



FRA's Proposed Rule on Risk Reduction Programs Puts the Outreach Obligations Squarely on Railroad Management

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On February 27, 2015, the Federal Railroad Administration ("FRA") published its proposed rule on Risk Reduction Programs in the Federal Register.¹ The proposed rule would require Class I railroads and railroads with an inadequate safety performance to develop and implement a Risk Reduction Program ("RRP"). The rule proposes general, performance-based requirements and would allow railroads substantial flexibility to tailor RRP requirements to their operations.²

There are many important details in the proposed rule and anyone involved in railroad safety needs to read it from cover to cover. After a brief overview for context, this e-Alert will focus on the consultation and outreach aspects of the proposed rule, because these requirements likely will require more railroad management attention than first meets the eye.

Overview of the Proposed Rule

Five Elements. The proposed rule will require each covered railroad³ to establish an RRP that systematically evaluates railroad safety hazards and manages the risks associated with those hazards in order to reduce the number and rates of railroad accidents and incidents.⁴

There are five key elements to the RRP:

- A risk-based hazard management program ("HMP");⁵
- A safety performance evaluation component;⁶
- A safety outreach component;⁷
- A technology analysis and technology implementation plan;⁸ and
- RRP implementation and support training.⁹

Risk Reduction Program Plan. The RRP will be documented and implemented in a written RRP plan, which must be submitted to and approved by FRA.¹⁰ An RRP plan must identify persons utilizing or performing significant safety-related services for the covered railroad, including contract operators and other railroads using the same track or corridor. A covered railroad must ensure that such contractors and track/corridor users support and participate in the RRP and describe the participation in the RRP plan.¹¹

Hazard Management Program. Although all of the foregoing RRP elements are important, the core of the RRP is the risk-based HMP. A Hazard Management Plan is an integrated, system-wide and ongoing risk-based program that proactively identifies hazards and mitigates the risks resulting from those hazards.¹² The HMP must address infrastructure; equipment; employee levels and work schedules; operating rules and practices; management structure; employee training, and other areas impacting railroad safety that are not covered by the railroad safety laws or regulations or other federal laws or regulations.¹³ The HMP process involves identifying hazards by analyzing the railroad's system (including operational and system changes), accidents/incidents, injuries, fatalities, and other known indicators of hazards.¹⁴ Once hazards are identified, the next step is to calculate the risk (likelihood or severity) of the hazards. Next, the railroad compares and prioritizes the identified risks for mitigation purposes. Finally, the railroad designs and implements mitigation strategies to reduce or eliminate the risks.¹⁵

Safety Outreach. As noted above, the proposed rule will require an RRP to include a safety outreach component that communicates RRP safety information to railroad personnel. This requirement also applies to contractors. The outreach component must:

- Convey safety-critical information;
- Explain why RRP-related safety actions are taken; and
- Explain why safety procedures are introduced or changed.

A covered railroad also must report the status of risk-based HMP activities to senior railroad management on an ongoing basis.¹⁶ The outreach requirements should not be confused with the employee consultation requirements, discussed in the next section.

Consultation Requirements in the Proposed Rule

Good Faith & Best Effort Employee Consultation. As noted above, a covered railroad must implement its RRP through a written plan.¹⁷ The RRP plan covers several of the consultation and safety outreach requirements of the proposed rule. First, a covered railroad has a general duty to consult in good faith with all of its directly affected employees (including unionized employees) on the content of the RRP plan.¹⁸ A railroad that consults with a union representing its employees is considered to have consulted with the employees.¹⁹ Second, and closely related, a covered railroad must use its best efforts to reach agreement with all of its directly affected employees on the content of the RRP plan.²⁰

The proposed rule sets out mandatory schedules for the employee consultation.²¹ FRA has specifically requested comments on the proposed schedules.

Appendix B to the proposed rule contains guidance on how a covered railroad could comply with the consultation requirement and is the most revealing part of the consultation discussion in the proposed rule.²² Appendix B defines the terms "good faith" and "best efforts." The "good faith" obligation requires a covered railroad to consult with employees in a manner that is "honest, fair and reasonable, and to genuinely pursue agreement on the contents of an RRP plan." If a railroad consults with employees in a

"perfunctory manner," it will not have met the "good faith" requirement. A railroad will fail to meet the "good faith" requirement if it merely attempts to use the RRP plan to "unilaterally modify a provision of a collective bargaining agreement." See Appendix B.

"Best efforts" describes the diligence that a covered railroad must pursue to reach agreement with its employees regarding the RRP plan.²³ It includes consideration of whether the covered railroad had sufficient meetings with its employees (presumably meaning meeting substance, frequency and duration) and whether the railroad made an effort to respond to employee feedback. A railroad will have failed to meet this "best efforts" obligation if it does not initiate the consultation process in a timely manner or only permits employees to express agreement or disagreement on the RRP plan.²⁴

Parenthetically, as if it were an afterthought, Appendix B indicates that FRA also expects a railroad's employees to utilize "good faith" and "best efforts" when negotiating on the content of an RRP plan.

Appendix B also sets out guidance (for unionized employees and for non-unionized employees, both incorporating the mandatory timetables) for consultation with employees. FRA notes that the guidance is not prescriptive, but "a railroad's consultation statement could indicate that the railroad followed the guidance in [Appendix B] as evidence that it utilized good faith and best efforts to reach agreement with its employees on the contents of the RRP plan." See Appendix B. Suffice it to say that it is a good idea to look at FRA's consultation "guidance."

The Consultation Statement. Along with the RRP plan, a covered railroad must prepare a "consultation statement" - a detailed description of the process the railroad used to consult with directly affected employees.²⁵ Curiously, one of the express purposes of the consultation statement requirement is to "ensure that ... employees with which the railroad has consulted were aware of the railroad's submission of its RRP plan to the FRA for review."²⁶ The consultation statement must include a detailed description of the process the railroad utilized to consult with employees. If the railroad is unable to reach agreement with its directly affected employees on the content of the RRP plan, the consultation statement must identify any known areas of "non-agreement" and provide an explanation why the railroad believes agreement was not reached.²⁷ If the RRP plan would affect a provision of a collective bargaining agreement, the consultation statement must identify the provision and explain how the RRP plan would affect it.

If a railroad and its employees cannot reach agreement on the RRP plan, the employees have 60 days within which to file a statement with the FRA explaining their views on the plan. The FRA will consider any such employee statements during the plan review and approval process.²⁹

Authors' Commentary. It takes two to tango and yet substantially all of the burden of the outreach requirements of the proposed rule falls on the railroads. The railroad has a duty to consult in good faith with all of its directly affected employees on the content of the RRP plan and employee good faith and best efforts are expressed in parentheses, as an afterthought. If the railroad is unable to reach agreement with its employees on the content of the RRP plan, the consultation statement must identify any known areas of "non-agreement" and provide an explanation why the railroad believes agreement was not reached. If the RRP plan would affect a provision of a collective bargaining agreement, the consultation statement must identify the provision and explain how the RRP plan would affect it. If there is no agreement, even the unionized employees have no obligation to report or communicate anything to the FRA. To be sure, it is the railroad's Risk Reduction Program, but accountability for any failure to agree on a program seems to fall disproportionately on railroad management.

Comments on the proposed rule are due on April 28, 2015, but FRA will consider late-filed comments to the extent it can do so with incurring expense or delay.

¹ 80 Fed. Reg.10950, (Feb. 27, 2015). FRA has published a separate system safety program ("SSP") proposed rule for Amtrak and commuter railroads. See 70 Fed. Reg. 55372, (September 7, 2012).

² The proposed rule is based on the requirements of Sections 103 and 109 of the Rail Safety Improvement Act of 2008 ("RSIA"), codified at 49 USC sections 20156 and 20118–20119. RSIA Section 103 directs the Secretary of Transportation (acting through FRA) to issue regulations requiring Class I railroads and railroads with inadequate safety performance to develop, submit for approval, and implement a railroad safety risk reduction program. Section 103 also requires FRA to issue regulations requiring Amtrak and commuter railroads to implement a risk reduction program. RSIA Section 109 specifies that certain risk reduction records obtained by the Secretary are exempt from public disclosure requirements of the Freedom of Information Act. Section 109 also authorizes the Secretary to protect from admissibility into evidence in litigation certain information generated for the purpose of developing, implementing or evaluating an RRP. The proposed rule implements this authority. Any information compiled or collected for the *sole* purpose of developing or implementing an RRP shall not be subject to discovery, admitted into evidence, or considered for other purposes in a federal or state court proceeding for damages involving personal injury or property damage. See Section 271.11. This very important provision will be the subject of a separate e-Alert.

³ The rule will apply to Class I railroads and railroads determined to have inadequate safety performance. Section 271.3. The process for determining which railroads fit into the latter category is set out in Section 271.13. Railroads may voluntarily comply with the requirements of the Rule. See Section 271.15.

⁴ Covered railroads that host Amtrak or commuter rail passenger service have an additional obligation to communicate with those passenger railroads to conform the RRP and the System Safety Program Plans of those passenger railroads. See Section 271.101(c). This communication requirement should not be confused with the outreach requirements in Section 271.107 or the employee consultation requirements, Section 271.207, discussed at length below.

⁵ See Section 271.101(a)(1). This requirement is briefly discussed below.

⁶ See Section 271.101(a)(2). To meet this requirement, the covered railroad will develop and maintain ongoing processes and systems for evaluating the safety performance of its system and measuring its safety culture. See Section 271.105.

⁷ See Section 271.101(a)(3). This requirement is discussed in detail below.

⁸ See Section 271.101(a)(4). The technology analysis and implementation plan will require a covered railroad to evaluate current, new or novel technologies that may mitigate or eliminate hazards and the resulting risks identified through the HMP. See Section 271.109.

⁹ See Sections 271.101(a)(5) and 271.111.

¹⁰ See Subpart C, beginning in Section 271.201; and Subpart D, beginning in Section 271.301.

¹¹ See Sections 271.107 and 271.205.

¹² See Sections 271.103 and 271.211.

¹³ This last requirement is significant because it clarifies that the HMP need not include a hazard analysis of areas of railroad safety already subject to the laws administered by FRA or other federal laws or regulations. See Section 271.103(b).

¹⁴ See Section 271.103(b)(1).

¹⁵ See Section 271.103(b)(2)-(3).

¹⁶ See Section 271.107.

¹⁷ These requirements would implement RSIA Section 103(g), 49 U.S.C. 20156(g), and are the same (for Class I railroads) as parallel provisions FRA has published in the System Safety Program proposed rule for Amtrak and commuter railroads. See 70 Fed. Reg. 55372, (September 7, 2012).

¹⁸ See Section 271.207(a)(1).

¹⁹ See Section 271.207(a)(2).

²⁰ See Section 271.207(a)(1).

²¹ See Section 271.207(a)(3)-(7).

²² Appendix B is printed at 80 Fed. Reg. 10997-10998.

²³ Appendix B is chock-full of curious language, evincing drafting by committee. "Good faith" and "best efforts" are "not interchangeable terms representing a vague standard" for consultation; the "good faith" obligation is concerned with the "railroad's state of mind during the consultation process;" the "best efforts" obligation "imposes a higher standard than that imposed by the good faith obligation." "Generally, best efforts are measured by the measures that a reasonable person in the same circumstances and of the same nature as the acting party would take... [and] ... may vary with different railroads, depending on the railroad's size, resources, and number of employees." See Appendix B.

²⁴ On the other hand, Appendix B suggests that a railroad "may wish to hold off substantive consultations regarding the content of its RRP plans until one year after of the rule in order to ensure that information generated as part of the process is protected from discovery admissibility of evidence under Section 271.11. The suggested timetable for consultation includes meetings "to discuss the administrative details of the consultation process as necessary" before the discovery protections become effective. See Appendix B.

²⁵ See Section 271.207(b).

²⁶ See 80 Fed. Reg. at 10975.

²⁷ See Section 271.207(b)(2).

²⁸ See Section 271.207(b)(3). The consultation statement also must include the names and contact information for organizations and individuals who significantly participated in the consultation process. The RRP plan and the consultation statement must be sent to each such person and organization when they are

sent to the FRA. See Section 271.207(b)(4).

²⁹ See Section 271.207(c). The RRP plan must include a description of the process the railroad will use to consult with its directly affected employees on any substantive amendments to the RRP. See Section 271.209.