



*A bold voice for transportation workers*

November 7, 2022

The Honorable Amitabha (Amit) Bose  
Administrator  
Federal Railroad Administration  
1200 New Jersey Avenue SE  
Washington, DC 20590

**RE: Risk Reduction Program  
Docket No. FRA-2021-0035**

Dear Administrator Bose:

On behalf of the Transportation Trades Department, AFL-CIO (TTD), I am pleased to respond to the Federal Railroad Administration's (FRA) proposed rule regarding Risk Reduction Programs (RRP). TTD consists of 37 affiliate unions representing the totality of rail labor and its 105,000 workers across the country. Our affiliated unions represent workers who perform every task on trains and railroad tracks and at rail yards and shops. These workers are vital to keeping our railroad system successfully operating every day.<sup>1</sup>

The NPRM, issued in response to a petition filed by the Association of American Railroads (AAR), seeks views on whether to retain, remove or modify the application of 49 CFR 271. 3(c) in the development of risk reduction programs, to contractors and their employees who perform a significant portion of a railroad's operations. Currently, pursuant to final FRA rules issued on February 18, 2020 (49 CFR 271) contractors and their employees, providing "ongoing services involving significant aspects of the railroads operations" (e.g. maintenance of locomotives and rail car, dispatching, switching, flagging etc.) are covered under the development and implementation of the mandated risk reduction plans. (see 49 CFR 271.221 and 3(c)). As justification, the AAR asserts that none of the seven Class 1 freight railroads utilize such contractors, and therefore requests that the existent requirements under 49 CFR 271 be removed, notwithstanding that even if true, such arrangements could arise in the future.

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<sup>1</sup> Attached is a list of TTD's 37 affiliated unions

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Greg Regan, President / Shari Semelsberger, Secretary-Treasurer



As discussed more fully below, FRA must follow an open and transparent process on this matter and should issue a Supplemental Notice of Proposed Rulemaking (SNPRM) with the full text of any intended changes to §271.3(c) regarding “operationally significant contractors” so that the public may review the specific changes proposed and offer comments.

Rail contractors need to retain the full protection proposed by the final Risk Reduction Programs rule. While a definition for “operationally significant contractors” may be warranted to provide additional clarity and enable robust enforcement, any definition must take into account many considerations to ensure that the role of contractors is not expanded and to simultaneously ensure that all relevant contractors can avail themselves of the risk reduction benefits they are entitled to under Rail Safety Improvement Act of 2008 (RSIA)

TTD endorses the comments of our affiliate, the Brotherhood of Railroad Signalmen, who say, “The scope of §271.3(c) is important and necessary to close the gap concerning safety when a railroad utilizes contractors.”

### **Background**

FRA’s proposed rule would define “operationally significant contractors,” as well as respond to a petition for reconsideration received from the Association of American Railroads (AAR) to reconsider the inclusion of § 271.3(c), which requires a railroad to consider a contractor and its employees who perform significant portions of the railroad's operations (i.e., operationally significant contractors) as directly affected employees for purposes of RRP plan consultation (§ 271.207) and employee involvement (§ 271.113(a)).

In its petition, AAR argued that because only a portion of their operations were contracted out, and that none of those contractors were “operationally significant,” that contractors should not be covered in the RRP rule. Upon receipt of AAR’s petition in 2020, FRA made clear that, through its enforcement discretion, FRA intended to neither take enforcement action based on § 271.3(c) nor disapprove a Class I freight railroad's RRP plan on grounds that it did not comply with § 271.3(c).<sup>2</sup>

Since issuing this response, FRA has received and approved RRP plans from all seven Class I freight railroads. None of the Class I railroad RRP plans stated that the railroads use operationally significant contractors, perhaps because the railroads were aware from FRA that the provision would not be enforced.

### **Proposed Rule Procedures**

In the proposed rule, FRA does not specifically propose removing § 271.3(c) because “FRA currently believes the provision should be retained. However, FRA may issue a final rule removing § 271.3(c) and making any necessary conforming changes (such as removing similar language from § 271.221) in response to public comment.”

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<sup>2</sup> <https://www.regulations.gov/document/FRA-2009-0038-0124>

This proposed approach is not appropriately transparent. If FRA, after reviewing public comments on this notice, intends to make changes to the already finalized RRP rule, FRA should issue a Supplemental Notice of Proposed Rulemaking (SNPRM) with full text of intended changes so that stakeholders and the public may review the specific changes proposed and offer comments.

### **Enforcement and Operationally Significant Contractor Definition**

Contractors performing work in rail facilities and around rail equipment should be covered by programs that reduce risk. In the same way that an office building's fire safety and evacuation plan has no regard for which workers are contractors and which workers are employees, contractors must be afforded equal protection of occupational risk and hazards. The argument that AAR offers that its contractors should not be covered simply because the entire workforce is not contracted out is nonsensical and is simply not consistent with safety.

### **Operationally Significant Contractors and Employees are Currently Utilized**

In this proposed rule, FRA has stated that it has not heard from any employees who would be directly affected by this proposed rule. In contrast, TTD has heard from many of our affiliates who represent employees of Class I railroads who would be significantly impacted by this proposed rule. This disparity and potential lack of communication with FRA is likely because the development of this rule has only recently been posted publicly. Regardless, TTD believes there would be many rail employees impacted. In fact, there are contractors who perform operationally significant work for the Class I railroads. Below are a few specific examples.

1. The Transport Workers Union of America (TWU) knows of a contractor performing modifications on locomotives and warranty work on rail cars at CSX's Rose Lake yard in East St. Louis.
2. Hulcher contractors have also worked at CSX's Avon Yard in Indiana replacing wheels in rail cars. Similar work has been done by CraneMaster contractors at Norfolk Southern's Baltimore Yard.
3. Most intermodal yards have contractors loading and unloading trailers on intermodal flat cars, including the Baltimore Yard that uses Parsec contractors. All of these contractors would fall under FRA Blue Flag Protection regulations, meaning that they perform operational duties that expose them to occupational risk that the RRP rule is intended to mitigate.
4. The International Brotherhood of Electrical Workers (IBEW) also represents and works with rail electricians who are contractors that perform work on locomotives both while stationary in yards and on active lines. Beyond electricians, many workers to access the locomotive are contractors, including Wabtec contractors who maintain Positive Train Control systems in rail yards and aboard moving locomotives riding with crew.
5. Track and vegetation maintenance operations on active rail lines are performed by contractors such as Asplundh, who spray weeds and cut brush along tracks using heavy and complex equipment on tracks.

6. Flagging workers who designate work zones along tracks, often as required under existing safety regulations, are often contractors.
7. Further, even contractors deemed not “operationally significant” by definition, could quickly become so if they are located in fouled track or perform temporary duties such as roll-by inspections or emergent needs.

All of these examples show contractors actively performing work that exposes them to the risks associated with being around rail operations. If the worker’s proximity to rail operations poses a significant risk to a contracted worker, that worker should be considered “operationally significant” and covered for the purposes of risk reduction programs.

These examples lead to a broader point that the Class I railroads often use contractors to perform work that should be performed only by railroad employees. Inspections should always be performed by qualified employees directly employed by their respective railroads as required by existing safety regulations. The definition of “contractors who perform a significant portion of a railroad's operations” should not be used to expand the role of contractors in railroad operations.

TTD agrees, however, that a clear definition of operationally significant contractors is necessary for robust enforcement of the RRP rule. However, this definition must take into account many considerations to ensure that the role of contractors is not expanded and to simultaneously ensure that all relevant contractors can avail themselves of the risk reduction benefits they are entitled to under Rail Safety Improvement Act of 2008 (RSIA), which directed railroad carriers to “consult with, employ good faith, and use its best efforts to reach agreement with, all of its directly affected employees, including any nonprofit employee labor organization representing a class or craft of directly affected employees of the railroad carrier, on the contents of the safety risk reduction program.”

Any such changes or modifications, if contemplated, should be the subject of an FRA SNPRM with the full text of the proposed changes, prior to finalizing any proposed rule.

We appreciate the opportunity to comment on this proposed rule and look forward to working with FRA on this and other issues in the future.

Sincerely,



Greg Regan  
President