

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

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Investigation of: *

BNSF RAILWAY ROADWAY WORKER *

FATALITIES IN EDMONT, SOUTH * Accident No.:

DCA17FR004 *

DAKOTA, ON JANUARY 17, 2017 *

* * * * *

Interview of: JOSEPH E. RILEY

Thursday,
April 6, 2017

APPEARANCES:

CY GURA, Rail Accident Investigator
National Transportation Safety Board

JOE GORDON, Investigator in Charge
National Transportation Safety Board

JOSEPH RILEY, Track Specialist
Federal Railroad Administration

RICK INCLIMA, Director of Safety and Education
Brotherhood of Maintenance of Way Employes Division
(BMWED)

RYAN RINGELMAN, Systems Safety
BNSF Railway

EDWARD KENDALL, Esq.
National Transportation Safety Board
(Posting)

BRIAN ROBERTS, Esquire
Federal Railroad Administration
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Federal Railroad Administration
(On behalf of Mr. Riley)

Via Telephone:

DANIEL KENNER, Safety Task Force
Brotherhood of Locomotive Engineers and Trainmen (BLET)

JOSEPH ST. PETER, Rail System Oversight Manager
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I N D E X

<u>ITEM</u>	<u>PAGE</u>
Interview of Joseph E. Riley:	
By Mr. Gura	6
By Mr. Inclima	22
By Mr. Adams	52
By Mr. Gura	54
By Mr. Gordon	56
By Mr. Ringelman	64
By Mr. Inclima	65

I N T E R V I E W

(2:16 p.m.)

MR. GURA: This interview is being conducted by Cy, C-y, Gura, G-u-r-a, investigator with the National Transportation and Safety Board, on April 6, 2017, at approximately 2:16 Eastern Time, with Mr. Joseph E. Riley.

This interview is being conducted in regard with the investigation of the accident that occurred on January 17, 2017, in Edgemont, South Dakota, where two trackmen, including the watchman/lookout were killed. The track group were working under Federal Regulations 214.329 - Train approach warning provided by watchmen/lookouts protection procedures. Mr. Joseph Riley will be interviewed based on his knowledge of train approach warning.

The purpose of the investigation is to increase safety, not to assign fault, blame or liability. NTSB cannot offer any guarantee or confidentiality or immunity from legal certificate actions. A transcript or a summary of the interview will go into the public docket.

And the interviewee can have one representative of the interviewee's choice.

Joseph, do you mind if I call you Joe?

MR. RILEY: Joe would be fine.

MR. GURA: Joe, do you have a representative with you, please?

MR. RILEY: I do, sir.

1 MR. GURA: And will you please identify yourself for the
2 record, Mr. --

3 MR. MOORE: Aaron, A-a-r-o-n, Moore, M-o-o-r-e.

4 MR. GURA: Okay. Everyone please identify yourself for the
5 record and spell your name.

6 And I'll start out with myself, and we'll go this direction.
7 My name is Cy, C-y, Gura, G-u-r-a, investigator with the National
8 Transportation Safety Board.

9 MR. MOORE: Aaron, A-a-r-o-n, Moore, M-o-o-r-e, trial
10 attorney, FRA.

11 MR. RILEY: Joseph, J-o-s-e-p-h, E, letter E, Riley,
12 R-i-l-e-y. I'm headquarters track specialist, RWP and RMM,
13 Federal Railroad Administration.

14 MR. ROBERTS: Brian Roberts, B-r-i-a-n, Roberts, attorney,
15 Federal Railroad Administration. And I am just observing,
16 posting.

17 MR. INCLIMA: Hi. Rick Inclima. That's R-i-c-k,
18 I-n-c-l-i-m-a. I'm the director of safety and education for the
19 Brotherhood of Maintenance of Way Employes Division.

20 MR. RINGELMAN: Ryan, R-y-a-n, Ringelman, R-i-n-g-e-l-m-a-n,
21 BNSF Railway, System Safety.

22 MR. KENDALL: Edward Kendall, E-d-w-a-r-d, K-e-n-d-a-l-l,
23 attorney, NTSB.

24 MR. GORDON: Joe Gordon, J-o-e, G-o-r-d-o-n, NTSB,
25 investigator in charge for this accident.

1 MR. GURA: People on the telephone, please, in the order that
2 we already discussed, identify yourself and the organization and
3 spell your name.

4 MR. KENNER: Daniel Kenner, K-e-n-n-e-r, Brotherhood of
5 Locomotive Engineers and Trainmen, Safety Task Force.

6 MR. ST. PETER: Joseph St. Peter, J-o-s-e-p-h, S-t,
7 P-e-t-e-r, FRA, rail system oversight manager.

8 MR. ADAMS: Douglas Adams, D-o-u-g-l-a-s, A-d-a-m-s, BNSF
9 Railway, director of rules, field support.

10 MS. BEAN: Anne Bean, A-n-n-e, B-e-a-n, BNSF, director,
11 engineering and planning.

12 INTERVIEW OF JOSEPH E. RILEY

13 BY MR. GURA:

14 Q. Okay, Joe. Pleases tell us your title at the FRA, and what
15 are your responsibilities?

16 A. My title is, I am the headquarters track specialist, RWP and
17 RMM. My primary responsibility is to provide guidance and
18 interpretation of -- to our inspectors with regards to the
19 enforcement of Part 214, Workplace Safety, subparts A, C and D.

20 Q. Okay. And the RWP and that other acronym that you used,
21 could you tell us what those mean?

22 A. Yes. RWP is roadway worker protection, which is subpart C of
23 Part 214. RMM is roadway maintenance machines, and that's subpart
24 D of Part 214.

25 Q. Joe, are you familiar with the circumstances of the accident

1 at Edgemont?

2 A. I am familiar from the extent of our work here at NTSB and,
3 obviously, my position capacity.

4 Q. Those parts that you described, does that include train
5 approach warning?

6 A. It does.

7 Q. Okay. Please describe what you understand has to occur for
8 this type of on-track protection in order for the track workers to
9 be in compliance.

10 A. Well, number one, there has to be a designated RWIC.

11 Q. And what does that acronym --

12 A. Roadway worker in charge.

13 Number two, there has to be a job briefing. And in the job
14 briefing, one of the components would be to establish the form of
15 on-track safety. One would have to designate an individual as a
16 watchman/lookout, whose job task would be to perform no other
17 function than to be that, if train approach warning, TAW, is the
18 method of on-track safety that's selected.

19 Next, one would have to be knowledgeable of the maximum
20 authorized speed, and one would have to determine the appropriate
21 sight distance that would be required based on the job that's
22 being performed. Per the regulation, individuals must be at the
23 predetermined place of safety 15 seconds before the arrival of
24 trains or on-track equipment at that location. Plus, one would
25 have to add in the additional sight distance required to (a)

1 receive the warning; (b) remove themselves and others from the
2 foul of the track; and (c) move to the predetermined place of
3 safety. And then one would be required to determine whether
4 adequate sight distance, based on the requisite time, was in fact
5 there.

6 Q. Okay. And is the designated place of safety a mandatory
7 place of safety or does -- just the fact that you could clear the
8 track within 15 seconds?

9 A. No. As part of the job briefing, that predetermined place of
10 safety should be designated.

11 Q. Okay. How is this regulation enforced?

12 A. Well, it's enforced under the Federal Railroad Administration
13 regulations and requirements. And our regional inspectors,
14 obviously, in the performance of their job functions would enforce
15 this regulation.

16 Q. Okay. Do they have -- basically do they have to be there
17 when this type of protection is in place in order for them to see
18 if their track group is in compliance?

19 A. I want to think about this question for a second. There are
20 various methods in which one might learn of a situation. And so
21 not in all cases would, I guess, one have to actually be there.
22 But there are procedures that would have to be -- you know, we'd
23 have to prove the fact.

24 Q. Okay. Are you kind of referring to like if someone
25 complained or something of that --

1 A. Exactly.

2 Q. -- nature that it's not being performed properly?

3 A. Exactly.

4 Q. Okay. Is that done through like a red -- hotline or
5 something of that nature?

6 A. Yeah. It's done through an investigation process, and there
7 are a variety of ways in which we could become aware of it.

8 Q. Okay. So, and then your field inspectors would check in for
9 that. Do you have any idea on the numbers of that? Is there some
10 kind of a database that says we have done X amount of inspections
11 or we have done so many of these complaint investigations? Is
12 there a database on that?

13 A. Cy, I don't know that I can definitively tell you that there
14 is one database there. Depending on the type of complaint that's
15 received, we have an aggregate. But the regions also have their
16 own. So I -- I'm going to have to get that information for you.

17 Q. Okay. Yeah, that would be appropriate.

18 A. Yes. I can't say that for certain.

19 Q. Okay. And is, in that same database, do you know if there's
20 failures and passes and stuff like that? Like we investigated in
21 this particular region 10 on-track safety compliance and all were
22 passes or there were failures?

23 A. The database, which is located on our secure site, is
24 comprised of the 96 forms that the inspectors fill out. So
25 obviously if there was a defect or a violation issued, we would

1 have a record of that. Inspectors frequently conduct audits, if
2 you will, or -- as part of their normal inspection process. But
3 that information -- you know, everybody was in compliance wouldn't
4 necessarily be there unless it was identified in the comment
5 field.

6 Q. Okay. Is that a retrievable thing where -- I mean, is there
7 a way to retrieve it?

8 A. Comment fields are not retrievable.

9 Q. Okay. So it would either be defects or violations?

10 A. Yes, those are retrievable.

11 Q. That would be retrievable. And is it retrievable enough
12 where it could be just cued in and say -- let's say BNSF at a
13 specific location for so many years?

14 A. No.

15 Q. No. How would it be retrievable?

16 MR. RILEY: I'd like to talk to the attorney for a second.

17 MR. GURA: Sure.

18 (Pause.)

19 UNIDENTIFIED SPEAKER: Joe, we've got a small conference room
20 right down the hall, if you guys need it.

21 MR. MOORE: Okay. That would be great.

22 (Pause.)

23 MR. RILEY: The secure site, you can query it on the basis of
24 a variety of situations: by railroad, by inspector, by region, by
25 type of defect or violation, and even the violation report. But

1 in terms of an aggregate, you can do it by year or years, but
2 you're limited in the ways in which it can actually be done.

3 BY MR. GURA:

4 Q. Okay. In that case, could I make a request for a search then
5 to be supplied at a later time?

6 A. Assuming that FRA is agreeable, certainly.

7 Q. Yeah. And one of the things that I'm looking for then would
8 be a search on a specific BNSF for a specific area for a year.

9 A. Okay, Cy. It goes down to BNSF subdivision, county, state.
10 In terms of anything further than that, I -- it wouldn't be able
11 to do it.

12 Q. Okay. And then we would just do -- we would request BNSF.
13 We'd go the South Dakota, okay, and I don't know what county
14 Edgemont is. You know, I'm going to go right in the specific area
15 for Edgemont, whatever that county is, and for a year. And if
16 there's any violations for -- we're going to call it -- was it
17 213.329, Watchman/Lookout?

18 A. Right.

19 Q. Right.

20 A. And then, of course, under that would be various sub --
21 B1, B2.

22 Q. Right.

23 A. You know, there are a variety of defects or violations that
24 are issued under 214.

25 Q. 214. Right.

1 A. Yes.

2 Q. Okay. In the FRA Compliance Manual, it says that each
3 railroad -- railroad's roadway worker protection program is
4 subject to critical review by the FRA. Has the BNSF's program
5 been reviewed?

6 A. It obviously in the beginning of the rule, per the
7 regulation, received a review. I don't know that -- and I don't
8 really know if it's been reviewed since that particular time.
9 Obviously pieces of it are, but I don't know that we --

10 Q. Okay. Well, if there was exceptions in the review -- would
11 you know if there was exceptions in the initial review?

12 A. I would not.

13 Q. Okay. And it also says that -- like a memo, if a memo was
14 written with any recommendations for approval or disapproval. Do
15 you know if any -- is there any record or is it -- would it be
16 able to be searched if there's a record for approval or
17 disapproval of their roadway worker program?

18 A. Well, the regulation was from '97. So I doubt seriously that
19 you could actually search for anything of that nature, but I don't
20 know. I guess that's what I should have said to start with.

21 Q. Okay. What are the responsibilities of the individual
22 roadway workers to be in compliance with the 214.239? What is
23 each individual guy's responsibilities?

24 A. Well, first off, he must not foul a track unless on-track
25 safety has been provided him. He must not foul the track unless

1 necessary for performance of his duties. He must not perform any
2 roadway worker related function unless he has received training on
3 those particular functions. And let's see. There's one more I'm
4 missing. Yeah, and he's responsible for following the on-track
5 safety rules of the railroad for which he's working.

6 Q. Okay. If a worker saw his watchman/lookout engaged in work,
7 what is his responsibilities?

8 A. Well, his responsibility would be to -- and I have to be
9 careful, but he has the right to exercise a challenge, and he
10 would be duty bound to advise that appropriate on-track safety is
11 not being provided. Quite frankly, Cy, in the regulation he is
12 not mandated to challenge, but he has the right to challenge. And
13 he would certainly want to immediately vacate the track himself
14 and advise any other roadway workers that are around that this is
15 not an appropriate form of on-track safety. And this comes from
16 the compliance manual.

Commented [RJ(1): Clarification required.

17 Q. Okay. What does it mean that a watchman/lookout is to
18 communicate a train approach warning and clearly signify to all
19 recipients of the warning that the train or other on-track
20 equipment is approaching?

21 A. What that does, what that requires is the watchman/lookout do
22 nothing exclusively other than be looking, and in any direction,
23 for an approaching train or piece of on-track equipment. And that
24 he immediately utilized the designated, the designated form of
25 providing the alert as is required in the railroad's on-track

1 safety policy.

2 Q. So if the railroad had a form, basically a watchman/lookout
3 form that they fill out, and in there they would say we are going
4 to use verbal communication, the watchman/lookout would have to
5 tell the folks to clear the track basically, if that's the box
6 that he checked?

7 A. Well, yes. The regulation does not require that a form be
8 filled out. But if the railroad's rules said that you will fill
9 out -- and in this case I assume you're referring to a statement
10 of on-track safety?

11 Q. That is correct.

12 A. That's a requirement of -- per the regulation, of the lone
13 worker using ITD. But perhaps a --

14 Q. What is that?

15 A. Individual train detection.

16 Q. Okay.

17 A. But perhaps the railroad may have a rule. Railroad rules can
18 be more restrictive than the regulation. Then the roadway worker
19 would be bound in order to fill that out.

20 Q. There's only other way to communicate then, if there's
21 whistles or something like that, would that be something that
22 would be required by the railroad instead of the FRA?

23 A. Well, again, the railroad under the regulation, the railroad
24 must designate the mechanism for providing the warning. It has to
25 be audible. The audible warning in itself, there must be no doubt

1 in a roadway worker's mind, so it has to be distinctive and
2 clearly discernible. There must be no doubt in a roadway worker's
3 mind that that is the warning for an approaching train or on-track
4 equipment and that he must immediately vacate to the predetermined
5 place of safety.

6 Q. And that's up to the railroad to determine how that warning
7 is to be placed?

8 A. That warning system, the method of warning, per the
9 regulation and the preamble to the 1996 rule, provides -- under
10 329 provides some guidance along that line. It says that the
11 railroad will determine what that means is. And that means is to
12 be in the on-track safety program.

13 Q. If there are a lot of noise from workmen, equipment and
14 trains, does it matter then how the notification is made? It's
15 just -- it's up to the watchman/lookout, knowing that this is the
16 type of work that's being conducted, in how he's going to warn the
17 employees that are working with him?

18 A. Well, per the regulations, Cy, the RWIC first must determine
19 whether or not the form of protection is appropriate. And the
20 regulation is very clear that there are occasions such as you
21 mentioned when a audible warning or train approach warning is not
22 appropriate. And then it would be expected that you would select
23 another form of on-track safety, obviously working limits.

24 So the watchman/lookout's primary duty is to ascertain
25 whether or not he has adequate sight distance. It's the roadway

1 worker in charge's duties to determine whether that form of on-
2 track safety is appropriate.

3 Now, per the regulation, if the watchman/lookout does not
4 have adequate sight distance, then he must immediately tell
5 everyone get in the clear. And then of course he would advise the
6 roadway worker in charge that he does not have adequate sight
7 distance. But the duties that you are referring to are, really
8 are more applicable to the roadway worker in charge.

9 Q. Okay. What does the 15-second clear time mean?

10 A. It means that you must be in the clear 15 seconds before the
11 arrival of the train or on-track equipment, wherever that
12 designated location is. And, again, the preamble language and the
13 compliance manual is very clear that that means in addition to the
14 15 seconds. The additional amount of time (a) **to** receive the
15 warning; (b) to get your tools and yourself out of the foul of the
16 track; (c) to move to your predetermined place of safety, and then
17 you must be there 15 seconds prior to the arrival of the train.
18 And under the new revision to RWP, that sight distance must be
19 based on the maximum authorized speed, okay, effective April 1 of
20 2017.

21 Q. I'm going to switch a little bit here and go into FAMES.

22 A. Okay.

23 Q. Okay. And --

24 A. Just a second.

25 Q. Sure.

Commented [RJ(2): Clarification

1 A. May I consult with my attorney for a second?

2 MR. GURA: Sure.

3 (Pause.)

4 MR. RILEY: Okay.

5 BY MR. GURA:

6 Q. In the Fatality Analysis of Maintenance-of-way Employees and
7 Signalmen, FAMES, analysis, there is a section under fatal
8 accidents under train approach warning watchman/lookout. Are you
9 familiar with this report?

10 A. I am familiar with the report, yes.

11 Q. The last published report I was able to find referenced
12 January 1, 2012, for the number of accidents and fatalities. Is
13 there any more data that can be added to the 2012 data? Is that
14 the last report?

15 A. Well, Cy, I would have to check to verify that that is in
16 fact the correct date. That's about right. Rick and I are both
17 members of the FAMES committee.

18 MR. RILEY: I think it would be acceptable, Rick, to indicate
19 that we are working on a updated report on this particular topic.
20 Okay. Here it is right here. And --

21 MR. MOORE: That's the last one, Joe.

22 MR. RILEY: And it is -- oh, no. It's January 6, 2014.

23 BY MR. GURA:

24 Q. Okay.

25 A. I think you indicated 2012.

1 Q. Yeah, I got -- yeah, that's what I have.

2 A. Yeah, yeah.

3 Q. The last was January 1st, 2012.

4 A. Yeah, yeah. This is the only report that we have generated
5 under --

6 Q. Okay. And could I get a copy of that, please?

7 A. Yes.

8 MR. RILEY: Are you making --

9 UNIDENTIFIED SPEAKER: You'll get a -- submit a list
10 afterwards.

11 MR. GURA: It will be on the transmittal of the thing, but --

12 UNIDENTIFIED SPEAKER: Yeah. Ed's going to keep the list
13 down there.

14 MR. GURA: He's keeping the list down there? Good deal.

15 MR. RILEY: All right, good.

16 BY MR. GURA:

17 Q. In the data available, 4 of the 10 fatal accidents
18 watchman/lookout were not using prescribed warning devices. Is
19 there any comment on that? I mean, looking at the FAMES report,
20 that's basically all it says, where they weren't using proper
21 warning devices.

22 A. And so your question, Cy, is?

23 Q. Is there any recommendation based on that saying that you
24 should have a whistle, you should have a horn, you should have
25 clappers or something of that nature to get people's attention to

1 clear?

2 A. I would have to review our recommendations from that report.
3 I don't remember specifically. But we build our recommendations
4 based on the findings, and the findings are backed up by a
5 database, an access database.

6 Q. Okay. If you get a minute, could you look at that FAMES
7 report that Rick passed to you to see if there's any
8 recommendations on that for the prescribed warning devices?

9 A. We have a bullet point here, but it's actually just a
10 regurgitation of the regulation requirements. And that bullet
11 point, if it's permissible to read it?

12 Q. Yes, it is.

13 A. It says, "During the on-track safety briefing, the RWIC must
14 clearly identify the method that the watchman/lookout will use to
15 indicate when it's safe for roadway workers to reenter the foul of
16 the track." Okay. So that's -- what's that?

17 Q. That's going back into the track?

18 A. Yeah.

19 Q. After the train --

20 A. Oh, oh, oh.

21 Q. To reenter.

22 A. You're right, it is. Okay. I don't see -- Cy, I don't see
23 under our recommendations a specific recommendation associated
24 with doing that. And I would need to -- we do not maintain notes.
25 And as part of the FAMES requirements, I don't recall -- and I was

1 very involved in this, in the drafting of this particular one.
2 This is one of significant interest to me. But I don't recall why
3 we didn't make a recommendation along that. Perhaps when it's
4 time to interview Rick or whatever, he may --
5 Q. Okay.
6 A. -- he may recall.
7 Q. Are railroads required to prescribe warning devices for
8 different situations?
9 A. Their on-track safety rules would need to specify the
10 appropriate form of providing the warning. And I don't think I
11 can say any more than that, Cy.
12 Q. And I'm going to give you an example. If the railroad
13 determined that their warning is going to be verbal, would that be
14 sufficient?
15 A. Cy -- okay.
16 MR. MOORE: That calls -- this is Aaron. I think it calls
17 for opinion.
18 MR. RILEY: Okay.
19 MR. GURA: Okay.
20 BY MR. GURA:
21 Q. In the definition, it basically talks about warning devices
22 in the C.F.R.
23 A. It does.
24 Q. And what does it say in the definition, if you have that
25 there?

1 A. I can read that to you. Okay. Under the definition of a
2 watchman/lookout -- this is under 214.7, which is under Subpart A
3 of Part 214. "Watchman/lookout means an employee who has been
4 annually trained and qualified to provide warning to roadway
5 workers of approaching trains or on-track equipment.
6 Watchmen/lookouts shall be properly equipped to provide visual and
7 auditory warning such as whistle, air horn, white disk, red flag,
8 lantern, fusee. A watchman/lookout's sole duty is to look out for
9 approaching trains/on-track equipment, and provide at least
10 15 seconds advanced warning to employees before arrival of trains
11 or on-track equipment."

12 Q. With that definition then, that becomes part of the
13 requirement then? As a definition, does that become part of the
14 requirement where a railroad has a watchman/lookout program, and
15 does that have to be incorporated in the program as a definition?

16 A. That program or that position, there are requirements for the
17 training of a watchman/lookout under 214.340- -- I'd better check.
18 I believe it's 47. But we better check on that.

19 Under 214.349, Training and qualification of
20 watchman/lookout. The definition establishes the responsibility
21 of the watchman/lookout to -- or for the -- to provide -- for his
22 duty to be exclusively looking out for approaching trains or on-
23 track equipment. And it talks about what some of the possible
24 proper equipment that a railroad might utilize. It's not
25 exclusive in nature.

1 MR. GURA: Okay. I have no further questions. I'm going to
2 pass it on to Joe Gordon.

3 MR. GORDON: I have no questions at this time.

4 MR. GURA: Mr. Ringelman.

5 MR. RINGELMAN: Are we going to have folks on the phone ask
6 questions?

7 MR. GURA: Yes.

8 MR. RINGELMAN: Yeah. Then I'll pass and defer to Doug and
9 Anne.

10 MR. GURA: Mr. Inclima.

11 MR. INCLIMA: Yes.

12 MR. GURA: Please identify yourself for the record and --

13 MR. INCLIMA: Thank you.

14 MR. GURA: -- ask your questions.

15 MR. INCLIMA: Yes. Rick Inclima, Brotherhood of Maintenance
16 of Way Employes Division.

17 BY MR. INCLIMA:

18 Q. Good afternoon, Joe. Thanks for being here. We're here to
19 discuss the Edgemont accident. I'll try not to repeat questions
20 that have been asked. But as I understand it, Edgemont was a
21 double fatality, which occurred with a three-person crew. They
22 were using watchman/lookout protection as their form of on-track
23 safety.

24 Joe, in the spirit of full disclosure and for the record, I
25 want to note that we have known each other or at least have known

1 of each other for many years. And in your role at FRA and in my
2 role as Director of Safety for BMW, we've had opportunities to
3 work together on various committees and have interacted in our
4 respective roles as safety professionals. To assure a complete
5 record, I'm going to ask you questions about -- a little bit about
6 your background, your work experience, your responsibilities with
7 FRA. And I'm also going to ask you some questions about the
8 Edgemont accident specifically, as well as questions concerning
9 the history, regulatory text and intent of the roadway worker
10 regulations, Part 214, Subpart C.

11 Again, if you don't understand a question or want me to
12 reword a question to make it clearer, just ask. And, again, Joe,
13 I thank you for being here. So I'll go ahead and just begin with
14 some basic background questions.

15 How long have you been with FRA?

16 A. I've been with FRA a little over 6 years.

17 Q. And how long have you been in your current position?

18 A. Six years.

19 Q. With the same title basically?

20 A. Yes.

21 Q. Okay.

22 A. I was acting staff director for about 4 months, but I was
23 still in the position as the Track Specialist RWP and RMM.--

24 Q. Great. Okay, Joe. Can you give us just a brief summary of
25 your employment history prior to coming to FRA?

1 A. Yes. I had 37½ years in the railroad industry prior to
2 coming to FRA. I retired from Metra in Chicago, and I was with
3 Metra or its predecessor organizations for 33 years. I had -- I
4 started out on the Chicago and North Western in 1974, and I was
5 there for about 3. And I had a short little year and a half -- it
6 wasn't even a year and a half, segment where I set up a plant on
7 the south side of Chicago to reprocess rail anchors. So my entire
8 adult life I have been in this industry.

9 Q. Great, Joe. Thank you for that. Did you conduct roadway
10 worker protection training when you were with your railroad?

11 MR. MOORE: I think that's beyond the scope.

12 BY MR. INCLIMA:

13 Q. It would help to give us some past history of practical
14 application.

15 A. Yes, I did.

16 Q. Thank you, Joe. Did your railroad use train approach
17 warning; do you recall?

18 A. Yes, it does or did, does.

19 Q. And, Joe, do you recall, if after the 1997 promulgation of
20 Part 214, did your railroad equip your watchmen/lookouts with
21 auditory and visual warning devices?

22 MR. MOORE: I think that's beyond the scope.

23 MR. INCLIMA: Okay. That's fine.

24 BY MR. INCLIMA:

25 Q. Okay. Let's move to the scope, Edgemont. Was FRA a party to

1 the NTSB investigation at Edgemont?

2 MR. MOORE: And, again this is Aaron Moore. Mr. Riley is
3 here as the track specialist. He's not here as an investigator.

4 MR. INCLIMA: No.

5 MR. MOORE: He's not here to discuss an ongoing investigation
6 with FRA.

7 MR. INCLIMA: I'm just asking if FRA was a party, not Joe.

8 MR. MOORE: Just --

9 BY MR. INCLIMA:

10 Q. Is FRA a party? That's all I'm asking. Was FRA -- do you
11 know if FRA was a party to the NTSB investigation in Edgemont?

12 A. Yes, it is.

13 Q. Okay. Thank you. And were you a part of that investigation?

14 A. No, I am not.

15 Q. Okay, Joe. Thank you.

16 Do you know -- okay, we already established that there were
17 three employees at the switch in Edgemont. Is that your
18 understanding?

19 A. Well, based on the video that I reviewed along with yourself
20 and several other gentlemen, we saw three individuals in the
21 video.

22 Q. Has FRA -- is FRA doing their own investigation disjointed
23 from NTSB? In other words, is your regions or headquarters doing
24 an investigation of this accident?

25 MR. MOORE: FRA's investigation is ongoing.

1 MR. INCLIMA: It's ongoing. Okay.

2 BY MR. INCLIMA:

3 Q. Has FRA determined what form of on-track safety was being
4 used at the time of the accident?

5 A. I have not seen the completed -- the investigation is
6 ongoing, so --

7 Q. Has FRA determined the title or job position of the person
8 who was acting as watchman/lookout?

9 MR. MOORE: Again, it's beyond the scope of why Mr. Riley is
10 here, and our investigation is ongoing.

11 MR. INCLIMA: Well, again, that's your opinion, counselor,
12 and I'll accept it, but I don't think it's beyond the scope.

13 BY MR. INCLIMA:

14 Q. At this point is FRA aware of in the course of their
15 investigation that the watchman/lookout was equipped with audible
16 or visible warning devices?

17 MR. MOORE: Again, ongoing investigation. It's beyond the
18 scope why Mr. Riley is here.

19 BY MR. INCLIMA:

20 Q. Do you know if power equipment was in use?

21 MR. MOORE: Again, beyond the scope and investigation is
22 ongoing.

23 MR. INCLIMA: Well, counselor, I'm sorry. It's not beyond
24 the scope. I'm asking questions specific to Edgemont, and I'm
25 asking for simple yes or no questions about FRA from Mr. Riley's

1 knowledge of the accident as the chief of the rail -- you know, of
2 the roadway worker division at FRA.

3 MR. MOORE: Mr. Riley was called here as the track specialist
4 at FRA. He was not called here as the investigator. He's not
5 involved in the investigation. He's not an investigator on this
6 investigation, and our investigation is ongoing.

7 MR. GURA: Yeah, let me -- this is Cy, C-y, Gura, G-u-r-a.
8 Let me clarify. We're trying to limit the questions not to the
9 Edgemont accident itself. It's basically based on Mr. Riley's
10 knowledge of the regulations and what he expects his inspectors to
11 do when they're out in the thing. They're both ongoing
12 investigations, both with the NTSB and the FRA, and the ability to
13 speak about the ongoing investigation is limited. So if you'd
14 please --

15 MR. INCLIMA: Okay.

16 MR. GURA: -- keep your questions to the scope of the
17 regulations and what --

18 MR. INCLIMA: Fair enough.

19 MR. GURA: -- is expected?

20 MR. INCLIMA: Okay. Cy, and counselor, and Joe, I will try
21 to refocus my questions more or less in a more general way.

22 BY MR. INCLIMA:

23 Q. So let's go to the regulation. What year was the -- did the
24 FRA first promulgate the railway worker protection regulations,
25 214C?

1 A. December of 1996.

2 Q. And did you participate in that rulemaking?

3 A. I was not a direct participant, no.

4 Q. I have a copy of 214. I know you do as well, Joe, and I also
5 know you're very familiar with the regulation. Please refer to it
6 at any time during the course of this interview. I might also
7 refer to specific sections or definitions and ask questions for
8 the purpose of completing the record.

9 Under the roadway worker regulation, could you briefly
10 describe what the term "working limits" means as it relates to
11 controlled -- on-track safety on controlled main line track?

12 A. Yeah. And I'll actually -- I'd like to go right to the
13 definition rather than doing a synopsis, because the definition is
14 very, very clear.

15 "Working limits means a segment of track with definite
16 boundaries established in accordance with this part upon which
17 trains and engines may move only as authorized by the roadway
18 worker having control over that defined segment of track. Working
19 limits may be established through exclusive track occupancy,
20 inaccessible track, foul time or train coordination, as defined
21 herein."

22 Q. Okay, Joe. Thank you. So is it accurate to say that where
23 working limits are established for the purpose of on-track safety,
24 those limits are established through a -- on controlled track
25 through a train dispatcher where the train dispatcher actually

1 withholds movement of trains of on-track equipment into the work
2 zone? Is that --

3 A. That is correct. It could also be through the control
4 operator as well.

5 Q. Right. Dispatcher or control operator.

6 A. Right.

7 Q. Okay. Great. So -- and under working limits the trains are
8 withheld --

9 A. That's right.

10 Q. -- through an authority to withhold trains?

11 A. Under train coordination, obviously, the roadway worker is
12 utilizing the authority of the train to occupy the track segment.

13 Q. Right.

14 A. But it goes back to --

15 Q. Yes.

16 A. -- dispatcher or control operator.

17 Q. Okay. Great. Thank you, Joe. Is train approach warning
18 provided by watchman/lookout a form of working limits?

19 A. No, it is not.

20 Q. So under watchman/lookout protection, trains are not withheld
21 from the work area as they are when working limits are
22 established?

23 A. That is correct.

24 Q. And under watchman/lookout protection, is it accurate to say
25 that the train has the right-of-way to operate at the maximum

1 authorized speed through the work area?

2 A. Yes, he does.

3 Q. As you know, train approach warning by watchman/lookout is
4 governed by 214.329 of the RWP regs. What are the -- okay, we
5 already answered some of these so I'm going to try to get -- you
6 already clarified that the minimum amount of time is 15 seconds
7 plus the clearance point, right?

8 A. Um-hum.

9 Q. Can a watchman perform any other duties while assigned to
10 watchman/lookout?

11 A. No, he may not.

12 Q. Does the regulation at 214.329C require that a train approach
13 warning, quote, "shall be distinct," and quote, "shall clearly
14 signify to all recipients of the warning that a train or on track
15 equipment is approaching"?

16 A. Yes, it does. And it is further clarified, as I recall, in
17 the preamble language.

18 Q. In FRA's opinion, is a human voice distinct to the point that
19 it can clearly signify in all cases the approach of a train?

20 A. It has to be distinctive, Rick. And so that's going to vary
21 on a situation-by-situation basis there. Often that may not be
22 the case.

23 Q. And, Joe, in your experience as a former railroad employee, a
24 former manager, does a foreman -- foreman, EIC, we use those terms
25 interchangeably. Does a foreman give verbal orders to the men and

1 women under their charge during the workday?

2 A. Yes, obviously he does.

3 Q. And would a foreman be responsible to work with and direct
4 the men and women under his charge?

5 A. That's typically the way it's done, yes.

6 Q. Is a foreman/EIC responsible to intervene anytime a foreman
7 is -- observes a potentially unsafe act or condition?

8 A. Under railroad rules, that would be the case.

9 Q. Is a foreman responsible to answer questions from the
10 crewmembers about processes, procedures, safety of the work in
11 question, et cetera?

12 MR. MOORE: Not to interrupt you, but you said under railway
13 rules. That's really not your expertise. That could vary by
14 railroad.

15 MR. RILEY: That's right. That is correct.

16 MR. MOORE: So we're clear on the record.

17 MR. RILEY: Yes.

18 MR. INCLIMA: Thank you.

19 MR. RILEY: That is correct. And I might add, Rick, that the
20 RWIC doesn't necessarily always have to be the foreman either. I
21 mean you could have --

22 BY MR. INCLIMA:

23 Q. No, that's right. Sure.

24 A. -- situations -- the RWIC is responsible for the on-track
25 safety of the roadway work group. In many cases that will be the

1 foreman, but not exclusively.

2 Q. Thank you, Joe. And under the FRA regulation, is the EIC,
3 the employee in charge, RWIC, responsible to hear good-faith
4 challenges and to address any challenges --

5 A. Yes, he is.

6 Q. -- that may be brought up?

7 A. And he -- and the procedure that's outlined in the railroad's
8 on-track safety program will define how that challenge is handled.

9 Q. Okay. And going back to the specific language in the rule
10 that says the warning "shall be distinctive and shall clearly
11 signify," quote/unquote, what makes these day in and day out
12 verbal exchanges that occur between the crewmembers and between
13 the EIC, what makes those exchanges any different than a verbal
14 warning that they might hear?

15 I mean, these are all words being spoken and orders being
16 given at different tones and at different decibel levels by
17 various people. How can we say that a verbal warning is distinct
18 and shall clearly signify when you have people talking and
19 speaking and yelling at each other in a noisy environment
20 throughout the workday?

21 A. Well, Rick, we've got to go to the regulation itself. The
22 regulation says, and it's also backed up in the preamble, that it
23 must be distinct and there can be no doubt that that is the
24 warning, that that is in fact the warning to occupy the
25 predetermined place of safety. So it's really, it's on a

1 situation-by-situation basis.

2 Q. Okay.

3 A. Because clearly, as you pointed out, there are occasions
4 where a verbal signal would not be appropriate.

5 Q. Do roadway workers, they work in roadway work groups in some
6 cases?

7 A. Um-hum.

8 Q. That would be essentially a team of roadway workers, a group.
9 What would be the definition of a roadway work group, Joe?

10 A. A roadway work group are one or more roadway workers who are
11 engaged in a common task to perform work defined under the
12 regulations.

13 Q. Great. So --

14 A. We actually have a definition --

15 Q. Yes, right.

16 A. -- for that. I should probably go and read the actual
17 definition, but --

18 Q. Yeah, and that's -- I was hoping you would.

19 A. Yeah.

20 Q. But I think you summarized it pretty well.

21 A. Let me do that, just so that we have it for the record here.

22 Roadway work group means two or more roadway workers
23 organized to work together in a common task. That is the actual
24 definition.

25 Q. So working as a common task basically would imply that

1 they're working as a team, right? They are working towards a
2 common goal?

3 A. Um-hum.

4 Q. You agree with that. Okay. And you -- do you agree that
5 roadway, members of a roadway work group would have to have
6 communications among themselves and with the EIC and other people
7 in the work area, verbal communication?

8 A. Absolutely.

9 Q. And are there verbal communication requirements under the RWP
10 regulations?

11 A. There are auditory requirements, audible requirements.

12 Q. I -- okay, let me rephrase, Joe.

13 A. Okay.

14 Q. The roadway worker regulation requires job safety -- job on-
15 track safety briefings.

16 A. That is correct.

17 Q. And those are given orally, right, verbally?

18 A. That's right.

19 Q. Okay. And when men and equipment are operating in the same
20 basic space on the track, is there a requirement for the operator
21 of the equipment and the men on the ground to communicate to each
22 other either through the operation of the equipment or for on-
23 track safety purposes?

24 A. Yes.

25 Q. So what I'm trying to establish, Joe, is there is a lot of

1 conversation and verbal discussion that goes on throughout a
2 workday in a roadway work group.

3 A. That is correct. But there are situations where clearly --
4 and one would be perhaps you have a watchman/lookout, you're out
5 there, you go out to look at a site, and so perhaps you need to
6 progress along the railroad. Certainly it would be appropriate --
7 the watchman/lookout is moving right along with you. Certainly it
8 would be appropriate to use a verbal signal for that.

9 Again, we go back to what the rule says, and the warning
10 that's being provided must be distinct. There must be no
11 misunderstanding upon any of the roadway workers that this is in
12 fact the signal to get in the clear. So whatever audible signal
13 you use, it must comply with that. And as you indicated, there
14 are occasions where perhaps a air horn or a whistle is not
15 adequate.

16 Q. Okay, Joe. Do maintenance-of-way roadway work groups
17 routinely use handheld motorized power hand tools or operate self-
18 propelled motorized equipment in the performance of their duties?

19 A. They do.

20 Q. These are power operated machines using internal combustion
21 engines?

22 A. Yes.

23 Q. In most cases, or hydraulic, hydraulically powered. Okay.

24 Joe, does the RWP regulation at 214.329(d) stipulate that the
25 communication of a train approach warning does not require a

1 warned worker to be looking in any particular direction at the
2 time of a warning?

3 A. That is correct. That's why it has to be an audible signal
4 first and foremost.

5 Q. Does the RWP regulation again at 214.329(d) require that the
6 train approach warning must be able to be detected by the warned
7 employees regardless of noise or distraction from the work?

8 A. It does.

9 Q. Does the FRA regulation require every watchman/lookout to be
10 trained, to be qualified, and designated in writing by their
11 employer?

12 A. It does.

13 Q. I'd like to read a section of train approach warning, Joe.
14 It's 214.329(g).

15 A. Okay.

16 Q. And ask you some follow-up questions on that section. Let me
17 quote 214.329(g). Quote: "Every watchman/lookout shall be
18 provided by the employer with the equipment necessary for
19 compliance with the on-track safety duties for which the
20 watchman/lookout will perform." Within the context of what I just
21 read, Joe, 214.329(g), what does the term "shall be provided by
22 the employer with the equipment" mean?

23 A. That's explained in the preamble language to 329, Rick. And
24 it is the equipment that's designated by the railroad in their on-
25 track safety program to provide the warning. Whatever that

1 equipment is, then the watchman/lookout has to have that
2 equipment.

3 Q. So in the context of the regulation where it says "shall be
4 provided by the employer with the equipment."

5 A. Um-hum. And then in the preamble, it defines, it says that
6 the railroad must identify what that equipment is.

7 Q. This regulatory text states clearly "shall be provided with
8 the equipment."

9 A. Um-hum.

10 Q. What does that mean, shall be provided with the equipment?
11 What does that mean?

12 A. That means that if in their policy they say that -- a
13 railroad says that the warning to be provided will be via with an
14 air horn or a whistle, that equipment has to be there. If it
15 indicates some other form of equipment, such as any one of the
16 items that were listed under 214.7 of the watchman/lookout, if
17 they include that equipment, then that equipment has to be there.

18 Q. Okay, Joe. And in that sense does, in FRA's view, does the
19 railroad's on-track safety program that they submit, their written
20 program, does that trump the mandatory directives in the rule
21 text?

22 A. It doesn't trump. The rule text basically establishes that
23 and the preamble explains the establishment. So it's not a matter
24 of trumping, Rick. It's a matter of the railroad must identify
25 the means of providing a warning, and whatever that warning is, it

1 must be distinct and there can be no doubt in a roadway worker's
2 mind that that is the warning that is to get in the clear. If the
3 roadway workers cannot receive that warning, then they need to
4 have another form of on-track safety such as the establishment of
5 ~~working limits~~ ~~units~~. That's per the regulation.

Commented [RJ3]: Corrected language.

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6 Q. Joe, and in your knowledge and experience with the regulatory
7 construct, and I know you have your attorney with you, does the
8 word "shall" when it is in the context of a regulatory text, does
9 shall mean mandatory?

10 A. Rick, I would have to defer to the attorneys on that because
11 I'm not -- I don't have expertise in that. Can we go off?

12 MR. RILEY: Huh? Okay. I guess I have to --

13 MR. MOORE: That's a good answer.

14 MR. RILEY: Okay.

15 BY MR. INCLIMA:

16 Q. Again I'll ask. In the context of regulatory construct does
17 shall mean mandatory?

18 A. Well, what I would say is I'll have to go back and get
19 that --

20 Q. Okay.

21 A. -- information for you.

22 Q. Okay, Joe, let me ask it, let me ask it in another way. In
23 the context of regulatory construct, when a regulation uses the
24 word "may" is that permissive?

25 A. This is outside of my area of expertise, Rick. I can't

1 really answer that.

2 Q. But, Joe, you are the regulatory guru, if you will, of
3 roadway worker, and I have called you many, many times, and we've
4 had many, many discussions over the years about what the words in
5 49 C.F.R. mean, whether it be part 213, part 214. And so, you
6 know, you're experienced with these things, and you are -- you
7 provide guidance, I assume, to your regional directors and to your
8 staff. So if -- when someone comes to you and say what does shall
9 mean; does it mean that we -- that it has to be done or does it
10 mean it's something you might do if you want to do?

11 MR. MOORE: I think we're going to -- he's provided the
12 interpretation --

13 MR. INCLIMA: Okay. I won't --

14 MR. MOORE: -- of what you asked.

15 MR. INCLIMA: -- I won't badger him. But I'm asking a clear-
16 cut question, is shall mandatory? And if you choose not to answer
17 that, so be it.

18 MR. GORDON: Well, and this is Joe Gordon. If, you know,
19 this may be something that we have to circle back if Joe can't --
20 you know, if it's an answer that needs to come from somewhere else
21 in FRA, we may have to schedule that for a later date, so --

22 MR. MOORE: This is Aaron Moore. And I think he answered the
23 question on the interpretation of the regulation.

24 MR. INCLIMA: Okay. Aaron, thank you. I know that -- thank
25 you, Joe. I know that we had talked about, and we read the

1 definition of watchman/lookout, and the second sentence of that:
2 Watchman/lookout shall be properly equipped to provide visual and
3 audible warnings such as whistle, air horn, white disk, red flag,
4 lantern, fusee.

5 In the context of the definition, what does shall mean?
6 Shall be properly equipped.

7 MR. GURA: Well, this is Cy Gura. We'll get an
8 interpretation from the legal staff of the FRA on the meaning
9 shall and will.

10 MR. RILEY: I think that would be best.

11 MR. GURA: That would best. And we can get that
12 interpretation to supplement the record.

13 MR. INCLIMA: Okay. That's fine. Just I think it's
14 important to get an answer to those questions. Okay, thanks.

15 BY MR. INCLIMA:

16 Q. Let's just move on, if we could, Joe. Do the FRA regulations
17 regarding train approach warning allow for the use of more than
18 one watchman?

19 A. Yes, it does. The advance watchman/lookout.

20 Q. Okay. Could you kind of give us a quick overview of how
21 advance watchman, who would be assumably separated by distance,
22 how would they convey the warning down to the watchman that's
23 stationed with the work group?

24 A. Right. And under the regulation and, quite frankly, there's
25 a section in the compliance manual that provides an explanation of

1 advance watchman/lookout. That signal may be provided via visual
2 rather than audible. Because, quite frankly, the advance
3 watchman/lookout and lookouts are doing nothing per the compliance
4 manual other than looking for a signal to do it. So, therefore,
5 they can be spread out further than what an audible signal to be
6 provided. But in the case where you're using advance
7 watchman/lookout, the watchman/lookout himself who communicates
8 the signals to the roadway worker, he must use an audible signal.
9 And, again, we go back to 214.329 and the requirements.

10 But that's why that's in there, Rick. And it's actually
11 explained in the compliance manual.

12 Q. Right. And so the reason for both audible and visible is
13 partly for advance watchmen, but also to provide -- let me
14 rephrase the question.

15 A. I never thought about it that way before, Rick, but you're
16 probably right.

17 Q. Joe, let me just maybe just try to tie this section up a
18 little bit.

19 A. All right.

20 Q. We established that there -- again, in general, roadway
21 workers use hand power tools and self-propelled equipment that
22 make noise.

23 A. Um-hum.

24 Q. And as you know, in 214, Subpart D, there are requirements
25 for backup alarms, change of direction alarms, and a lot of pieces

1 of self-propelled equipment, correct?

2 A. That is correct.

3 Q. So, and there's a requirement in 214, Subpart D, that
4 requires RMMs be equipped with a horn.

5 A. Um-hum.

6 Q. Okay. So is it -- would it be safe to say that in a
7 mechanized crew or where you have -- even a non-mechanized crew,
8 but where you have power equipment or mechanized equipment there
9 is a good deal of noise?

10 A. There is a good deal of noise, yes.

11 Q. Okay. And would you agree that that is why in 1997 the
12 provision in the definition that says shall be equipped with
13 audible and visual devices was intended to get around the noise?

14 A. That I don't know, Rick. As I say, I wasn't -- I was
15 obviously very active in the rule on the industry side, but I was
16 not part of the RSAC. So that I cannot answer.

17 Q. Okay. Thanks, Joe. Let's just move to the issue I know you
18 talked about a little bit, the predetermined place of safety.
19 214.329(a) states, and I'll quote, "Train approach warning shall
20 be given in sufficient time to enable each roadway worker to move
21 to and occupy a previously arranged place of safety not less than
22 15 seconds before a train moving at the maximum authorized speed
23 on that track can pass the location of a roadway worker." What is
24 a previously arranged place of safety within the meaning of
25 214.329(a)?

1 A. That previously predetermined place of safety is a location
2 that has been determined in the job briefing that roadway workers
3 must report to and obviously must not be foul of the track. And
4 under the new regulation effective April 1 of this year, 2017,
5 that place of safety may not be a track unless working limits are
6 established on that track. And actually there's a technical
7 bulletin G-05-10 that also provided some clarification to that as
8 well.

9 Q. But prior to April 1, 2017, that clarification was not in the
10 rule, about --

11 A. That was not in the rule text, no. That was --

12 Q. Okay.

13 A. There was a -- and even the technical bulletin G-05-10 was
14 not what I would call definitive. It talked in terms of -- and I
15 don't have that in front of me here, but it talked in terms of how
16 could you go to a track unless working limits were established on
17 it, because you'd have to be certain that the -- that no train or
18 on-track equipment could approach, but it never really came out
19 and said it. Now with our new rule, we say it.

20 Q. Right. Okay. So prior to April 1, 2017, there was no
21 specific FRA provision that said you cannot, you cannot clear up
22 in a live track?

23 A. Yeah. In the adjacent controlled track rule that went into
24 effect on July 1 of 2014, for those situations where adjacent
25 controlled track on-track safety was required, we did have that

1 requirement.

2 Q. No, I'm aware of that. But outside of the adjacent
3 controlled track, the original 1997 provision on train approach
4 warning that's been in effect until April 1 of this year --

5 A. Yes.

6 Q. -- there was no specific prohibition?

7 A. That is correct.

8 Q. Okay. On clearing in a live track. Okay. Thank you, Joe.
9 I wanted to clarify that.

10 MR. ST. PETER: Joe, if I can interject just a second. G-05-
11 10 is that in normal circumstances it is expected that workers
12 will clear all tracks on the approach of train, if that helps
13 refresh your memory.

14 MR. RILEY: Okay. It does, Joe. And thank you very much for
15 that. I appreciate that.

16 MR. GURA: For the record will you repeat it then since I
17 know the tape recorder didn't make that.

18 MR. RILEY: Okay. Well, Joe St. Peter indicated that under
19 normal circumstances, under G-05-10, roadway workers would not
20 clear to a track as their predetermined place of safety unless
21 working limits were established on it. There's several paragraphs
22 to that.

23 BY MR. INCLIMA:

24 Q. And is that a technical bulletin?

25 A. That was a technical bulletin, yeah.

1 Q. Okay. Joe, are technical bulletins distributed to the 35,000
2 roadway workers represented by BMWWE nation-wide?

3 A. They are distributed to the railroads, and it would be up to
4 the railroad to then obviously --

5 Q. Okay. So roadway workers, the people doing the work, would
6 not necessarily receive an FRA technical bulletin or, in fact, a
7 safety advisory?

8 A. Yeah. I can't really state that, Rick, because I don't know
9 for certain.

10 Q. No, but can you state that FRA does not distribute it
11 directly to the workers; they send it to the railroad?

12 A. That is correct.

13 Q. Joe, I want to ask you are you -- do you recall, and I'm sure
14 you do, there was a fatal accident in Sunshine, Arizona, involving
15 roadway workers in 2009, January 2009. And that was very, very
16 similar to what happened here in Edgemont. And let me just
17 summarize the similarities between these two accidents. Both of
18 those accidents, Sunshine, Arizona, and Edgemont, both were three-
19 men crews. Both fatal accidents were on the BNSF. Both fatal
20 accidents occurred on the main line. Both fatal accidents
21 occurred in double track territory. In both accidents, a train
22 appeared on the adjacent track at the time the employees were
23 struck on the track where they were working.

24 A. Well, Rick, I -- and I'd better be --

25 Q. I'm just laying out the facts. I haven't asked you a

1 question yet.

2 A. Okay. All right.

3 Q. In both the fatal accidents, the foreman/EIC designated
4 himself or herself as the watchman/lookout. In both fatal
5 accidents --

6 A. I don't know -- okay.

7 Q. Okay. In both fatal accidents there were hand power tool --
8 handheld power tools in use at the time of the train strike. In
9 both fatal accidents the BNSF failed to equip the
10 watchmen/lookouts with the FRA required audible and visual warning
11 devices, and in both cases the crews continued to work on the
12 track while the train was passing -- while the train was passing
13 or located on the adjacent track. Very similar accidents.

14 In either one of these accidents, did FRA take enforcement
15 action for failure to equip a watchman/lookout with audible and
16 visible warning devices?

17 MR. MOORE: I'm going to --

18 MR. GURA: I'm going to have to interject here in a second,
19 Rick. This is Cy Gura. First of all, was there an FRA report on
20 the incident that Mr. Inclima is -- is there an FRA accident
21 report published?

22 MR. RILEY: I know there is because we studied this in the
23 FAMES report, as I recall.

24 MR. GURA: So instead of trying to make a comparison to the
25 Edgemont accident which are ongoing investigations, I would like

1 to request a copy of that FRA investigative report.

2 MR. RILEY: From Sunshine, Arizona?

3 MR. GURA: From Sunshine, Arizona.

4 MR. RILEY: Yes.

5 MR. GURA: And then we could have that when our
6 investigations, NTSB and FRA investigations, are complete. Or if
7 this accident makes it to FAMES, then a comparison can be made.
8 Okay. Thank you, Joe. Thank you, Rick.

9 MR. INCLIMA: Thank you, Cy.

10 BY MR. INCLIMA:

11 Q. I've just got a few more questions, Joe.

12 A. Okay.

13 Q. Thanks for bearing with me. Do you know or can you comment
14 on did FRA review the BNSF on-track safety program documents after
15 either the Sunshine, Arizona accident or the fatal accident in
16 South Dakota?

17 A. I do not know.

18 Q. Let's talk a little bit more about watchman/lookout and their
19 equipment, if we can. We've already established that a watchman's
20 sole duty is to watch for approaching trains and provide 15
21 seconds advanced warning, correct?

22 A. That is correct.

23 Q. A watchman is prohibited from performing any other work or
24 using other tools while performing watchman/lookout duties. Is
25 that correct?

1 A. That is correct.

2 Q. So besides the value of actual warning devices that make
3 noise and send an audible and visual signal, do you see a value in
4 equipping watchmen/lookouts so that their hands are occupied with
5 the visual and audible warning devices as a means to remind them
6 of their sole duties to watch and provide warnings?

7 MR. MOORE: This is Aaron. That's opinion. It's beyond the
8 scope.

9 MR. INCLIMA: Okay. Don't answer it. That's fine.

10 BY MR. INCLIMA:

11 Q. Okay. As you know, BMWE has been very active in the rule-
12 making process. It has been active in every single rule making on
13 roadway worker since 1997 and prior to 1997.

14 A. That is correct.

15 Q. And you know that we -- you know, this is near and dear to
16 our hearts because it's a matter of life and death for the people
17 I represent.

18 In 2006, FRA published a final rule on miscellaneous
19 revisions, and I just want to read something from the preamble in
20 that final rule, and it goes right to the heart of
21 watchman/lookout. And this is a quote, and it's on page 37, 850
22 of the *Federal Register*, Volume 81, Number 112, dated Friday,
23 June 10, 2016. Quote -- this is FRA's explanation in the preamble
24 of how they handle comments.

25 "BMWE later commented -- later comment expressed concern that

1 some railroads are not providing watchmen/lookouts with any
2 audible or visual warning devices to provide appropriate train
3 warning, train approach warning. The comment points out the
4 existing definition of the term watchman/lookout in 214.7 requires
5 in part that roadway workers acting as watchmen/lookouts be
6 properly equipped to provide visual and audible warnings such as
7 whistle, air horn, white disk, red flag, lantern and fusee. The
8 comment urges FRA to clarify in the final rule that the use of
9 such audible and/or visual warning devices are mandatory to
10 provide train approach warning under 214.329.

11 "FRA concurs with the BMWED. Both the definition of
12 watchman/lookout and the operative train approach warning
13 regulation at 214.329(c) and (g) provide that watchman/lookouts
14 must be properly equipped to provide train approach warning.
15 Thus, FRA emphasizes that under the existing RWP regulation a
16 railroad must properly equip a watchman/lookout with the equipment
17 specified by the railroad's on-track safety program for properly
18 communicating a warning. Except in limited circumstances (e.g., a
19 watchman/lookout assigned to provide train approach warning for a
20 single welder and who is located immediately next to a welder to
21 provide warning)," close quote, if -- close paren, excuse me --
22 "if a railroad does not provide equipment with the specified
23 audible -- auditory and visual warning capabilities to the roadway
24 workers a watchman/lookout is protecting, the railroad is in
25 violation of 214.329. If an on-track safety program fails to

1 specify the requisite equipment necessary for a watchman/lookout
2 to provide on-track safety for a roadway worker group, the program
3 is also not in compliance with part 214."

4 Do you have any comment no that?

5 A. FRA's interpretation goes back to the railroad designates the
6 form or the means of providing the warning, and whatever that is,
7 that's what has to be provided. And I think that's really what
8 that particular section is referencing, Rick, but that's all I can
9 really -- that's FRA's interpretation.

10 Q. Yes, it is. Thank you. And with that, Joe, just to read the
11 reference 214.329(g) -- this is in the regulation. It's not a
12 definition. It's part of the current regulation.

13 "Every watchman/lookout shall be provided by the employer
14 with the equipment necessary for compliance with the on-track
15 safety duties for which the watchman/lookout -- which a
16 watchman/lookout will perform."

17 Joe, I know that you and I serve on the FAMES Committee
18 together, and I'm proud of the committee's work and I think that
19 committee has done well to help educate and raise awareness for
20 roadway workers. But in the January 2014 -- January 6, 2014,
21 FAMES report, fatal accidents under train approach warning, we
22 identified that there four confirmed fatalities on the
23 watchman/lookout where the watchman/lookout were not equipped. I
24 know from my own research two of those fatalities -- two of those
25 four occurred on BNSF.

1 Now add Edgemont. Three of the five fatalities, which
2 occurred without watchman/lookout warning devices, occurred on
3 BNSF. Does that raise concerns for you as a regulator?

4 A. I don't think I can answer that, Rick.

5 Q. Does that -- has that been discussed at FRA?

6 MR. MOORE: Again, I don't know if he -- it's beyond the
7 scope. I'm not sure --

8 MR. RILEY: Yeah. I don't think I can.

9 MR. INCLIMA: Well, it seems like everything is beyond the
10 scope when we're asking direct questions and you don't want to
11 answer them. I'll accept that, and the record will show that. I
12 have no more questions at this time.

13 MR. GURA: Okay. Again this is Cy Gura. And we're going to
14 go to the telephone. And on the telephone, we'll go through the
15 prescribed group. The first gentleman would be Daniel Kenner.
16 Please identify yourself and spell your name, and if you have any
17 questions.

18 MR. KENNER: Hi. This is Dan Kenner, K-e-n-n-e-r, with the
19 BLET, and I have no questions at this time. Thank you.

20 MR. GURA: Okay. Next one would be from the FRA. Please
21 identify yourself and if you have any questions.

22 MR. ST. PETER: All right. Joseph St. Peter, J-o-s-e-p-h,
23 S-t, P-e-t-e-r. I have no questions.

24 MR. GURA: Next Douglas Adams from the BNSF. Please identify
25 yourself and if you have any questions.

1 MR. ADAMS: Douglas Adams, BNSF. D-o-u-g-l-a-s, A-d-a-m-s.
2 And, yes, I have a couple of questions for Joe.

3 MR. GURA: Okay.

4 BY MR. ADAMS:

5 Q. Joe, would you agree or do you agree that the railroad can
6 implement more restrictive rules than what is required by the
7 regulation?

8 A. That is correct, Doug. And the regulation even references
9 that.

10 Q. And did I understand you earlier that the purpose for the
11 reference for visual warning was to be used if you're using an
12 advance watchman so they could communicate between the watchmen?

13 A. No. That was Rick's point. It's the railroad's
14 responsibility to identify the means of providing a warning. And
15 FRA's interpretation is that that method, whatever they determine,
16 that's what has to be -- the mechanisms in order to provide that
17 have to be provided by the railroad.

18 Rick may be correct in the advance watchman/lookout piece.
19 Certainly on Amtrak where they use extensive use of advance
20 watchman/lookout, they do utilize these devices. But other
21 railroad use it too, Doug, so --

22 Q. So at 214.329, paragraph (c) -- paragraph (e), where it
23 states "the watchman/lookout shall communicate train approach
24 warnings by means that does not require a warned employee be
25 looking in any particular direction at the time of the warning,"

1 how would the visual method be used in conjunction with that
2 paragraph?

3 A. Well, clearly the audible warning has to be provided first.
4 If a railroad so chose to utilize a visual device on top of that,
5 the visual device acts as a redundant measure of that element.
6 But that's -- FRA has determined that it's the railroad that will
7 determine what that form of alert would be.

8 Q. Okay. Thank you. And one final question. There was mention
9 of the watchman/lookout being located immediately next to an
10 individual such as someone that was the welding or grinding. Is
11 that for a purpose of being able to provide a tactile warning to
12 that individual such as --

13 A. That is correct.

14 Q. -- touching them?

15 A. That is. That would be the one situation where a touch type
16 warning would be appropriate. You would have other situations
17 where perhaps an individual was accompanying a fellow or a person,
18 a roadway worker, who was in the foul of the track, but they were
19 progressing along the right-of-way, and other -- perhaps something
20 other than tactile would be appropriate there.

21 But as Rick clearly indicated, the mechanism that's provided,
22 it's got to be clearly discernible, and there can be no doubt that
23 this is the warning to get into the clear. Can't be anything
24 other than that.

25 MR. ADAMS: Okay. Thanks, Joe. I don't have any further

1 questions.

2 MR. GURA: Okay. The next person, Anne, do you have any
3 questions? And please identify yourself.

4 MS. BEAN: Anne Bean, A-n-n-e, B-e-a-n, with BNSF. No
5 questions.

6 MR. GURA: Okay. I just have a couple follow-up questions,
7 Joe.

8 MR. RILEY: Okay.

9 MR. GORDON: Before you get started, does anybody need a
10 break? We good to push on through?

11 MR. RILEY: You know, would you mind?

12 (Simultaneous comments.)

13 MR. GORDON: No. No, no, no, no.

14 On the phone, we're going to take a real quick break, and we
15 will be right back with you.

16 (Off the record.)

17 (On the record.)

18 BY MR. GURA:

19 Q. Okay. Joe, if the railroad's only form of warning is verbal
20 with a touch, is that in compliance with the regulations?

21 A. Cy, I can only go to what the regulation says, is that signal
22 must be clearly discernible to any roadway worker being provided
23 that signal that you have to get into the clear. And I think Rick
24 laid out a number of instances in locations where such would not
25 be the case. All right. But it is an audible signal, and on the

1 basis of our interpretation, in some situations it may be
2 appropriate.

3 Q. The technical bulletin that you referenced, that G-5-10.

4 A. G-05-10, yes.

5 Q. G-05-10. Is that also posted on your websites?

6 A. No. That technical bulletin has been superseded by the new
7 regulation. And in the preamble language it indicates that the
8 new rule supersedes that. I do not know -- at one time it was on
9 the public site. I do not know whether it's been removed or not.

10 Q. Okay. And the last question that I have, and it would go
11 back to one of my previous questions where I asked about the
12 review of the BNSF's roadway workers program. I'm going to
13 request that if it could be chased down, whether or not the BNSF
14 rule has been reviewed, and if it has been reviewed, if there's
15 any memo written with any recommendation for approval or
16 disapproval?

17 A. Well, I can tell you this. I have not reviewed it. Perhaps
18 in the course of the conducting of the investigation, perhaps the
19 region may have done so, but I do not know.

20 Q. Okay. But this would be something that would probably be
21 documented somewhere at headquarters, so this would probably go to
22 Aaron to research and provide us if there's any documentation,
23 either through the regions or through headquarters or through
24 wherever, if the rule has been reviewed with any memos of
25 recommendations.

1 A. Okay. Not the rule, their policy.

2 Q. No. Yeah, their policy. Yeah.

3 A. Okay, yeah. We'll have to check. I don't know.

4 Q. Yeah. If you would please check and then just get back to
5 us, you know, whether or not it has been reviewed somewhere with
6 the chain of the FRA.

7 A. Okay. And the gentleman at the end of the table here, you're
8 -- I know that this is buried, these requests are buried in the
9 thing. But if you could give us a synopsis -- or not a synopsis,
10 but a thing at the end that says these are the things we're
11 looking for, that would be appreciated.

12 UNIDENTIFIED SPEAKER: Yes, sir, I will.

13 MR. RILEY: Okay. Great.

14 MR. GURA: And that is all I have for right now.

15 Joe, do you have any follow-up questions?

16 MR. GORDON: Yes. Joe Gordon, NTSB.

17 BY MR. GORDON:

18 Q. Joe, appreciate you coming in and speaking with us today. A
19 few follow-up questions, and they may be kind of in the same vein
20 as some of what we've already heard. This one I've not heard.

21 Is there a medical fitness for duty requirement for a
22 railroad watchman/lookout under the FRA regulation?

23 A. I don't know the answer to that. Certainly not under 214,
24 Joe. But I don't know, you know -- specific to a
25 watchman/lookout, no. But I don't know what the federal fitness

1 for duty regulations, if there is such a thing as this, I don't
2 know what they require.

3 Q. Okay. Thank you. You mentioned the 15 seconds that a work
4 group is required to be in the predetermined place of safety prior
5 to the train's arrival. And then over and above that, there is a
6 clearing time that has to be calculated into that sight distance
7 requirement.

8 A. That is correct.

9 Q. Does FRA prescribe a minimum clearing time?

10 A. No, it does not. It's up to -- what FRA prescribes per the
11 regulation is the roadway worker must be at the predetermined
12 place of safety 15 seconds before the arrival of the train or on-
13 track equipment. And then in the compliance manual -- and I would
14 have to go back to check to see if it's in the preamble, I suspect
15 it probably is, but there's discussion in terms of that you have
16 to add in this additional time as well. But FRA does not have a
17 minimum predetermined time.

18 Q. So that would be something that would be covered in the on-
19 track safety job briefing prior to --

20 A. That's right.

21 Q. -- starting work?

22 A. That's right.

23 Q. Okay. You spoke of the site assessment that the work group
24 has to do in order to ensure adequate sight distance prior to
25 using train approach warning. Does FRA prescribe how those

1 distances are calculated? Is that --

2 A. No, it does not.

3 Q. There's no tool that's required, no stepping off the
4 distance? It's --

5 A. No.

6 Q. It's up to the work group?

7 A. It's up to the watchman/lookout to determine whether or not
8 he's got the adequate sight distance, and it's left to the --
9 obviously the railroad is the -- they're responsible for making
10 sure that they got that adequate sight distance. They have to
11 determine that.

12 Q. Okay. Thank you. Is there a restriction on the type of work
13 that can be done under train approach warning?

14 A. Not under FRA regulation. FRA, the regulation itself is
15 designed to protect the roadway worker. But I can tell you, Joe,
16 virtually every railroad has rules that cover that particular
17 situation. Typically their rules will say something to the effect
18 of work that interferes with the safe passage of trains requires
19 working limits. That is not FRA regulation because our regulation
20 is centered protecting the roadway worker not the track structure.

21 Q. You did mention before that you haven't reviewed -- I guess
22 done an official review of BNSF's roadway worker regulation or
23 roadway worker rules. Are you familiar with the BNSF rules?

24 A. Joe, I've looked at pieces here and there. I'm not certain
25 that I can say that I'm familiar with all aspects of it, but I've

1 looked at pieces of it.

2 Q. And in your role of providing guidance to the inspectors in
3 the field, have you ever had to provide any guidance on BNSF's
4 rules when it comes to train approach warning and properly
5 equipped flagmen that you recall?

6 MR. RILEY: I'm going to take it off speaker for a second.

7 (Pause.)

8 MR. RILEY: Okay. We're going to go back on.

9 I have.

10 BY MR. GORDON:

11 Q. Okay. And so can you tell us a little bit about that
12 guidance? I mean, has the question been posed -- I guess, BNSF's
13 rules do not require that a watchman's equipped with a flag and a
14 horn. Has the question been posed is this an exception under FRA
15 regulation?

16 A. It has been raised. Not recently, but it has been raised in
17 the past, yes.

18 Q. And the guidance that was given in response to that is in
19 line with what we've heard --

20 A. Is in line with what I --

21 Q. -- prior to -- with the preamble language?

22 A. Yes.

23 Q. Thank you. Do adjacent tracks limit the use -- I guess live
24 adjacent tracks, do they limit the use of train approach warning
25 under the regulation?

1 A. Well, in the case of the adjacent controlled track rule,
2 under paragraph F, if a component of a roadway maintenance machine
3 fouls ~~in~~ an adjacent controlled track, working limits must be
4 established. Under the adjacent controlled track rule, if we have
5 an adjacent controlled track with at least -- which means a
6 controlled track which track center is 19 feet or less from the
7 center line of the occupied track, and we have on-track self-
8 propelled equipment or coupled equipment on the occupied track,
9 and we have at least one roadway worker on the ground working
10 common with the on-track self-propelled equipment or ~~occupied~~
11 ~~coupled~~ equipment on the occupied track, then adjacent controlled
12 track on-track safety is required.

Commented [RJ(4): Clarification

13 If adequate sight distance is available and we don't have a
14 component of the roadway maintenance machine foul the adjacent
15 controlled track, then train approach warning could be utilized.
16 Obviously, if adequate sight distance isn't present, then it could
17 not.

Commented [RJ(5): Correction

18 Q. Okay. Thank you. I have just a few more. Does the FRA
19 require that railroads conduct rules checks regarding roadway
20 worker safety?

21 A. Under paragraph 303(b), a railroad must have a procedure for
22 monitoring the effectiveness of their on-track safety program.
23 And it wouldn't necessarily have to be a efficiency test, but
24 they've got to have some procedure for actually doing that. And
25 we believe that that procedure must be carried out. In fact,

1 under the new revised defect codes in the Appendix -- you'll find
2 it in the new C.F.R. here under 303(b). It now says under the
3 defect code, under 303(b) for the new defect code, failure of a
4 railroad to include and use internal monitoring procedures. So we
5 have that.

6 If I might add as an aside here, I didn't mean to be
7 impolite. The reason that I laughed is Doug and I were discussing
8 this very issue.

9 Was it this morning, Doug, or yesterday? I forget which.

10 A. No, I understand. So that rule, that 303(b) defect code that
11 you cited, that went into effect when?

12 A. Well, it's published with the new rule, so --

13 Q. April 1?

14 A. April 1.

15 Q. Of?

16 A. This year.

17 Q. Of this year. So --

18 UNIDENTIFIED SPEAKER: Five days -- 6 days old.

19 MR. GORDON: Oh, okay. Okay. So it's brand new.

20 UNIDENTIFIED SPEAKER: May I just take one minute?

21 UNIDENTIFIED SPEAKER: Yes.

22 (Pause.)

23 UNIDENTIFIED SPEAKER: We'd want to clarify probably, Joe,
24 that the rule text actually hasn't changed.

25 MR. RILEY: No. The rule text hasn't changed, no.

Commented [RJ(6): Clarification

1 BY MR. GORDON:

2 Q. So safe to say that that defect code probably hasn't been
3 cited to this point. That was going to be --

4 A. Well, in the last --

5 Q. -- my next question. Right.

6 A. -- 6 days it has.

7 Q. Okay. And so we mentioned before that it's up to the
8 railroad to provide the roadway work group with the means to
9 assess their sight distance, however they determine to do that.

10 A. That's correct.

11 Q. If an FRA inspector goes out to make an assessment of the
12 roadway work group and use of train approach warning, are they
13 provided any way to measure that sight distance? How would a --
14 so if an FRA safety inspector was going out to do a roadway worker
15 protection check on a work group, how would they assess whether or
16 not that work group had either the proper sight distance or the
17 proper amount of clearing time prior to the train's arrival?

18 A. Well, Joe, I would have to -- I can't answer that question.
19 I would have to defer. I assume you're talking about training?

20 Q. Yes.

21 A. I would have to defer to the appropriate folks for that
22 because I can't state as a fact.

23 Q. Okay. And I think I've got one last question. The rule
24 that we're talking about, the original, I guess, roadway worker --
25 roadway workplace safety, which encompasses roadway worker

1 protection and roadway maintenance machines --
2 A. And also bridge worker safety under --
3 Q. Bridge worker safety as well.
4 A. -- Subpart B.
5 Q. Went into effect in '97, correct?
6 A. The Subpart C went into effect in '97. D, I think was
7 actually either 2003 or '5. I forget which.
8 Q. Okay. And so if -- we'll focus on C, which is the roadway
9 worker protection, correct?
10 A. Um-hum.
11 Q. I assume there was a comment period when this rule first hit
12 the *Federal Register*?
13 A. Are we talking about the '96 rule?
14 Q. Yes. Would there have been a comment period where --
15 A. I don't --
16 Q. -- interested parties could have commented? Railroads and --
17 A. I would have to go back and check on that. It wasn't -- Rick
18 would be, would be able to better clarify that because I don't
19 really remember, to be honest.
20 Q. Okay.
21 A. I think there was, but --
22 Q. That will be another request is --
23 A. Yeah.
24 Q. -- just if there were any comments made to the original rule
25 from any of the interested parties.

1 A. Yeah.

2 MR. GORDON: And I believe that is all the questions that I
3 have at this time.

4 MR. GURA: Okay. Mr. Ringelman.

5 MR. RINGELMAN: Yeah. Ryan Ringelman, BNSF.

6 BY MR. RINGELMAN:

7 Q. We've talked about a number of different scenarios and
8 permutations here, right. So you're talking about roadway workers
9 on a track doing some task. They might be doing a task by hand.
10 They might be doing a task with equipment. They might be doing a
11 task with power tools. There might be single track, multiple
12 track, main line, siding track. I'm trying not to belabor this
13 point too much. There might be track curvature. There might be
14 topography involved. There might be locomotives or equipment on
15 adjacent track. Given all those potential permutations, how does
16 FRA -- how do your inspectors or how do you from the headquarter
17 perspective give guidance to field folks that when you go out to
18 do an observation or to do an inspection of a roadway work group,
19 what are you looking for?

20 A. Well, Ryan, our folks are looking for compliance with the
21 regulation. The regulation is very clear about what those
22 requirements actually are. And then, as you've indicated, if
23 there's questions, they'll either contact their track specialist
24 for that particular region, and he may answer it or it may come
25 back to me. And in some cases, I have to go to the chief counsel

1 as well.

2 Q. So there isn't guidance that they have to look for one thing?

3 A. No.

4 Q. Or two things?

5 A. No.

6 Q. Do they inquire as to the quality of a job safety briefing?

7 A. That's actually outside of my purview there. I'm not sure I
8 should answer that.

9 Q. Have you ever seen a violation, a railroad get a violation
10 for a crew's failure to have a thorough job safety briefing and to
11 discuss the risks associated with use of lookout protection?

12 A. I can't point to a specific one, Ryan. I have seen that,
13 yes.

14 Q. Okay. I think the question is really how do you account for
15 all these different variables? Does your rule account
16 specifically for the 20 permutations we've discussed here and the
17 other 1,000 that might be out there?

18 A. Well, there certainly are permutations. But I think the
19 rule, and again from the perspective of interpretation, I think we
20 can pretty well cover those permutations. Our guys know what to
21 look for. They do ask.

22 MR. RINGELMAN: Thank you. That's all.

23 MR. GURA: Mr. Inclima, do you have any follow-up questions?

24 MR. INCLIMA: I have a few, Cy, please.

25 BY MR. INCLIMA:

1 Q. Thanks for being with us, Joe. I know it's kind of a long
2 afternoon to be sitting. I'll try to make it quick. I got four
3 or five questions.

4 Does FRA audit roadway worker training programs and their --
5 both their curriculum and the actual training delivery after a
6 fatal accident?

7 A. Often they do, Rick, that I've seen in the past. Again, I am
8 not directly involved in that, but often that happens. Does it
9 happen in every case, I can't actually say.

10 Q. And, Joe, you may or may not be able to answer this
11 firsthand. But does FRA -- you know, under your direction, do you
12 have your inspectors audit, if you will, or post in a training
13 program, roadway worker training program, to see -- you know, to
14 observe the delivery, the subject matter, how it's being conveyed
15 and if all the, you know, if the high points are being hit? In
16 other words, do we monitor the actual training to ascertain
17 whether the trainer and the program is meeting the requirements,
18 the knowledge requirements of the rule?

19 A. Well, again, I can only do this in the context of my own
20 responsibilities. And there have been occasions where I have been
21 involved where I have asked regions to look in on a particular
22 training program or whatever. The regions often will have special
23 audits, special programs where they will go out and do this on
24 their own as well.

25 Q. Okay. A subset to that question is, does FRA audit or review

1 the requirement under 214.303 where you pointed out it states a
2 railroad essentially -- you know, procedures to be used by each
3 railroad for monitoring effectiveness and compliance with the
4 program? So after a fatality or a tragedy, do we know or does FRA
5 know or track whether the railroad at that time does monitor and
6 review their program to make sure it's in compliance and see if
7 there are amendments that need to be made?

8 MR. MOORE: This is Aaron Moore. I would just point out Joe
9 Riley is not here as an investigator.

10 MR. INCLIMA: No, but --

11 MR. MOORE: In the scope of the regulations, if you could
12 answer, but --

13 MR. RILEY: Yeah. That's typically not done at my direction.
14 But do they do that? Yeah, they do.

15 BY MR. INCLIMA:

16 Q. Okay, Joe. Thank you. We established in the previous line
17 of communications, Joe, that it's a noisy environment and in some
18 cases they've got power equipment or self-propelled equipment,
19 have horns or they have backup alarms. We probably have gang
20 truck and crew buses out along the right-of-way. They have horns.
21 They have backup alarms. And in many cases, the railroad
22 parallels major highways or cities, city roads, et cetera. So
23 it's safe to say -- if you don't agree, say so -- that there are a
24 lot of horns and things going on, right?

25 A. Um-hum.

1 Q. Could conceivably be. So when a roadway worker who is
2 engaged in work, he's protected by a watchman/lookout, and he
3 hears a horn that he believes may be a watchman/lookout warning,
4 what does he do?

5 A. Per the regulation, that warning has to be clearly
6 discernible that that is in fact the warning to get into the
7 clear. And so, for example, if you were working on top of the
8 Kennedy Expressway in Chicago, an air horn may not actually be a
9 good means of delivering the warning because what you can't have
10 is roadway workers saying "Was that the warning to get in the
11 clear or was that truck air horn?" So you have to look at it in
12 the context which the regulation does. The signal has to be
13 clearly discernible and there can be no doubt that that's the
14 signal to get in the clear. And so everything centers around
15 that.

16 Q. Right. Thank you, Joe. And we read the definition of
17 watchman/lookout, and it says shall be equipped to provide visual
18 and auditory. It's not "or." It's "and auditory." And so I want
19 to just pose this question to you. You may or may not know I was
20 a track guy for --

21 A. I know.

22 Q. -- 16 years in the Northeast Corridor, high speed trains.
23 And we used watchman/lookout well before 1997, and, you know,
24 before this became a rule. And so my question to you is, when I
25 have a horn -- a track person in the foul of a track hears a horn

1 or a beep, he looks up, should he know where his watchman is?

2 Should he -- right, he should know?

3 A. Well, but again the regulation says that the roadway worker
4 must not be -- or the warning provided must not require the
5 roadway worker to look in the direction of the -- or to be looking
6 at the watchman/lookout. So that's why it has to be an audible
7 signal first and foremost. And if that audible signal is not
8 sufficient, they need working limits. That's what the regulation
9 says. That's what the preamble says.

10 Q. And, Joe, just to -- thank you, Joe. And to paraphrase
11 214.329(d), which is kind of parallel to the previous provision
12 you cited. It says every roadway worker who depends on train
13 approach warning for the on-track safety shall maintain a position
14 that will enable him or her to receive a train approach warning by
15 a watchman/lookout any time. Right?

16 And so my question to you, and I'm trying to get to the why
17 is it visual and audible. If I'm in the foul of the track and I
18 hear a beep, as a track guy, I'm trained to look up, and I'm
19 looking to where that beep was. And if I see a watchman just
20 standing there with his hands down, not making any move, I'm not
21 sure what that -- I'm assuming there's nothing going on. But when
22 I see the watchman with the visual device in an elevated position,
23 that is my affirmation that the beep I heard, the horn I heard, is
24 the warning, and it wasn't one of these other noises.

25 So, yes, the warning, audible warning has to be distinct, but

1 the visual requirement is an affirmation that, yes, that was a
2 warning and not just a horn on the highway. Would you agree with
3 that?

4 A. Rick, again, I have to go back to what the preamble says, the
5 way it's constructed, and it clearly gives the railroad the right
6 to basically -- this is what FRA has determined, to determine what
7 that warning is. Certainly, the items that you've listed there
8 are strong arguments for this. But the regulation isn't -- and
9 the preamble isn't instructive.

10 Q. Okay. So when the writers of the regulation used the term
11 "shall be equipped," that didn't really mean they shall be
12 equipped? Is that FRA's position?

13 A. Well, you know, again, I can't -- that's something I think
14 that should be addressed by the legal folks.

15 Q. Okay. Thank you. Okay, Joe, just a couple more. Just to
16 clarify. There were some questions about what's permitted, what's
17 not permitted under watchman/lookout. So I just want to ask a
18 couple of fundamental questions.

19 Can a railroad permit a piece of equipment to foul a track on
20 the watchman/lookout?

21 A. Certainly not on controlled track by railroad rule.

22 Q. I'm talking about --

23 A. Must have authority.

24 Q. -- on controlled track.

25 A. Yeah, yeah.

1 Q. Okay.

2 A. On non-controlled track, in yard limits --

3 Q. Let's not confuse the record with --

4 A. All right. Okay.

5 Q. -- non-controlled. I'm just talking about main line track.

6 Can I get a backhoe up there and say protect me with a watchman;

7 I'll get out of the way?

8 A. Not on controlled track.

9 Q. Okay. Can I --

10 A. But that's by railroad rule. Because, again, remember the

11 FRA -- the on-track safety regulation is there to protect the

12 roadway worker, not the track structure --

13 Q. Exactly.

14 A. -- or the equipment that they're utilizing.

15 Q. Okay. So in the same vein, is a railroad permitted to remove

16 a rail on the watchman/lookout?

17 A. On controlled track?

18 Q. On main line track.

19 A. Without authority?

20 Q. Yes.

21 A. I --

22 Q. I'm just trying to find the limits of what watchman/lookout

23 is.

24 A. Yeah.

25 Q. That's all.

1 A. Okay. Just per the -- I can only -- the regulation doesn't
2 cover that piece, okay?

3 Q. Okay.

4 A. Now we do have other regulations that I'm not an expert on
5 that I think cover that.

6 Q. Well, let me ask you this as the chief of the Track Division
7 there in your capacity. If one of your inspectors called and
8 said, I've got a roadway work group out here who has removed the
9 rail on the watchman/lookout, would you take exception to it?

10 MR. MOORE: Again, that's opinion.

11 MR. RILEY: Okay. I guess I can't answer that.

12 BY MR. INCLIMA:

13 Q. Okay. Thank you. Just a couple more, Joe. And I know you
14 talked about the -- we talked a little bit about the original
15 amendments or the original rule, 1997, and were there comments
16 submitted through the NPRM. And of course, it was a rulemaking
17 procedure so there was an NPRM, and this is way --

18 A. Was it an RSAC process then?

19 Q. It was --

20 A. I couldn't remember that.

21 Q. It was a -- it was the first negotiated rulemaking.

22 A. Yeah.

23 Q. It was pre-RSAC. It was actually the model for RSAC at the
24 end of the day. But my -- but there was an NPRM because that's
25 the rulemaking process.

1 A. Okay. All right.

2 Q. Have there been amendments to 214 Subpart C since 1997?

3 A. Sure. The adjacent controlled track rule, and also the
4 revision to RWP.

5 Q. Right. And those would -- those as well would have been
6 notices of proposed rulemaking and comment period?

7 A. Yes, they were.

8 Q. Okay. And that's part of the public, that's part of the
9 public domain?

10 A. Um-hum.

11 Q. Okay. Great. The last issue I would like to raise, Joe, and
12 it's really just to fill in the blanks with regard to the FAMES
13 committee. You and I sit on that FAMES committee, and as we
14 stated earlier. Within the FAMES committee, if any party -- first
15 of all let's explain FAMES committee is made up of rail labor, the
16 two engineering -- Brotherhood of Maintenance of Way Employees,
17 Brotherhood of Railroad Signalmen. The dispatchers sit on that
18 committee as well as all the Class 1 railroads.

19 A. No. Just four.

20 Q. Four? Okay. And the Association of American Railroads,
21 Short Line Association, Regional Railroad Association.

22 A. APTA.

23 Q. APTA as well. And so, just getting to process so we
24 understand the limitations of the FAMES report. Is it accurate to
25 say that FAMES, the FAMES committee works on the principle of full

1 consensus?

2 A. That is correct.

3 Q. Okay. And is it accurate to say that if any single party to
4 the -- you know, participating in the FAMES committee representing
5 their organization, if they disagree with any word or any
6 punctuation or any statement in a FAMES committee report, then
7 that report does not get issued?

8 A. That is correct.

9 Q. So is it safe to say that the FAMES committee in the process
10 of reaching consensus of various parties, whether it be labor or
11 railroad or FRA, have to remove certain things that they'd like in
12 the rule in order to get the report out?

13 A. That is correct.

14 MR. INCLIMA: Okay. Thank you. That's all the questions I
15 have at this time.

16 MR. GURA: Okay. We're going to go to the phone. Back -- we
17 have BLET, anyone? Any questions there? And please identify
18 yourself.

19 MR. KENNER: Dan Kenner, K-e-n-n-e-r, with the BLET, and no
20 questions. Thank you.

21 MR. GURA: Next, FRA, identify yourself, please.

22 MR. ST. PETER: Joseph St. Peter, FRA, no questions.

23 MR. GURA: BNSF, Douglas, any questions?

24 MR. ADAMS: Douglas Adams, BNSF, no further questions.

25 MR. GURA: Again BNSF, Anne, any questions?

1 MS. BEAN: Anne Bean, BNSF, no questions.

2 MR. GURA: Okay. Thank you.

3 Back over here. We're going to wrap this up with just
4 consolidation of requested reports. You want to review what we
5 requested. So BNSF, if you -- or FRA, if you'd please jot down
6 what is requested so we know, just for the record.

7 MR. MOORE: Maybe it's easier if you just provide me with a
8 list afterwards?

9 MR. KENDALL: I will.

10 MR. GURA: Okay. What will be provided on the list?

11 MR. KENDALL: Do you want me to read it into the record?

12 MR. GURA: Yes, please.

13 MR. KENDALL: Okay. There are six requests. This is Edward
14 Kendall for the NTSB.

15 The first one relates to database violations, which will be
16 specified by Cy, broken down to BNSF in South Dakota and the
17 county for Edgemont.

18 MR. RILEY: Now was that just for train approach warning or?

19 MR. KENDALL: That was all defects similar in the region,
20 so --

21 MR. RILEY: Say that again.

22 MR. KENDALL: It was all defects similar in the region. You
23 want all defects --

24 MR. GURA: Those were train approach warnings.

25 MR. RILEY: Train approach warnings. Okay. And that was for

1 year 2016?

2 MR. GURA: Yes.

3 MR. KENDALL: A copy of the latest FAMES report dated first
4 of January -- January 6, 2014. NTSB will interact with legal
5 staff to determine the definition of shall and will.

6 The fourth document requested is the Sunshine, Arizona,
7 accident report in January of 2009.

8 The next category of documents is any review of BNSF's
9 roadway worker program, whether it is at headquarters or field
10 region, and if there's any associated documents. I believe that
11 is going to be from 2009 to present.

12 And then the sixth category of documents is FRA, the comments
13 they received to the original rule from the 1996-1997 time period.
14 And then I think along with that the amendments to the RWP, we
15 would seek any comments on those amendments as well.

16 MR. RILEY: Oh, for the revision to the RWP rule?

17 MR. KENDALL: Yes.

18 MR. RILEY: So that would be the comments to the NPRM?

19 MR. KENDALL: Right.

20 UNIDENTIFIED SPEAKER: I think both the -- probably the
21 adjacent track rule --

22 MR. RILEY: You want the adjacent track rule --

23 UNIDENTIFIED SPEAKER: -- and the miscellaneous revisions.

24 MR. RILEY: Okay. All right. There's two NPRM's to the
25 adjacent controlled track rules.

1 UNIDENTIFIED SPEAKER: Is FAMES a regulatory document?

2 UNIDENTIFIED SPEAKER: No.

3 MR. RILEY: No. Anne, who's on the line here, she's on the
4 committee and --

5 UNIDENTIFIED SPEAKER: Oh, no, no, no. I know what FAMES is.
6 I'm just trying to get around, that's --

7 MR. RILEY: These are recommendations.

8 UNIDENTIFIED SPEAKER: By a group that isn't FRA?

9 MR. RILEY: That's right. We're comprised --

10 UNIDENTIFIED SPEAKER: We have on the record what it is
11 and --

12 MR. GURA: And there is one other document that I'm going to
13 request, and that is based on Mr. Inclima's question on audits.
14 It was based -- mentioned that the FRA audits post-accident on
15 BNSF. And if the region conducted an audit on the BNSF for track
16 safety program since, I'm going to say January 2017 to April 6th.
17 So if there was any audits on BNSF railroad post-accident for
18 Edgemont.

19 MR. RILEY: Okay. And I don't know that there were, Cy.

20 MR. GURA: I know. If there -- and that would be basically
21 contacting the region to see if there was an audit conducted --

22 MR. RILEY: Right.

23 MR. GURA: -- on the BNSF for that specific region on South
24 Dakota, you know, post-accident for the Edgemont accident.

25 MR. RILEY: Right. Okay. Great.

1 MR. GURA: And that would be the last document that I
2 requested.

3 MR. RILEY: And he'll provide Aaron with all these --

4 MR. GURA: Right.

5 MR. RILEY: Okay, great.

6 UNIDENTIFIED SPEAKER: So an audit of if the region audited
7 our roadway worker protection program?

8 MR. GURA: Yes.

9 UNIDENTIFIED SPEAKER: To clarify. So that's in addition to
10 the other one where you requested all of the reviews of the
11 roadway worker protection program?

12 MR. GURA: Right. The review of the roadway worker
13 protection is there -- BNSF's program for roadway worker
14 protection, if you actually were doing --

15 UNIDENTIFIED SPEAKER: Yeah, internal monitoring process.

16 MR. GURA: -- internal monitoring. You know, there's a
17 process that you're supposed to look at it, write a memo if you
18 agree with it or disagree with it or anything like that, if that
19 had been done. Okay. This is specific to a accident that
20 occurred. And if any post-accident audits was conducted. If it
21 was, fine. If it wasn't, fine. You just -- if there was one
22 conducted.

23 UNIDENTIFIED SPEAKER: Right.

24 UNIDENTIFIED SPEAKER: For sufficiency of the program not
25 compliance with the program?

1 MR. GURA: The regulation -- read it again, Rick.

2 MR. INCLIMA: Yeah. Let's go to 303. I think that's what
3 we're talking about.

4 MR. GURA: Right.

5 MR. INCLIMA: You can read 303(b), Cy, if you'd like to put
6 that in.

7 MR. GURA: 303(b). "Each on-track safety program adopted to
8 comply with this part shall include procedures to be used by each
9 railroad for monitoring effectiveness of the compliance with the
10 program." That's basically it.

11 MR. RILEY: I think I could probably say this. Doug and I
12 are actually currently working on this particular situation. Not
13 relative to Edgemont, South Dakota, but relative to making sure
14 that BNSF has an established program to do that. And that
15 incorporates not just 217 type efficiency tests, but RWP in
16 general. We're doing this across the board.

17 MR. GURA: Okay. I think that's it.

18 MR. GORDON: I have nothing further.

19 MR. GURA: Nothing further. Anyone?

20 MR. INCLIMA: Can I ask a question, Cy?

21 MR. GURA: Wait.

22 MR. INCLIMA: Oh, I'm sorry. People on the phone. I'm
23 sorry.

24 MR. KENNER: Yeah, this is Dan Kenner with the BLET. I just
25 wanted to make sure that when Cy gets all those documents they'll

1 be uploaded to the secure website so we can all have viewing of
2 them.

3 MR. GURA: Oh, yeah. The parties will have access to the
4 interview transcript and the documents.

5 MR. MOORE: And FRA reserves the right to negotiate with NTSB
6 if there are certain documents that we do not want to be public at
7 this time. That would be the only limitation.

8 MR. RILEY: The data that you're asking for comes from the
9 secure site. I don't know that we can share that outside of --

10 MR. GORDON: Yeah, We'll follow up on that, Mr. Kenner, but
11 anything that we receive as part of the investigation, you know,
12 aside from what FRA may work with our general counsel on keeping
13 off of the public docket will be available.

14 MR. KENNER: Okay. Thank you.

15 MR. GORDON: Okay. Anybody else on the phone?

16 MR. INCLIMA: I have a question but I want to let the folks
17 on the phone --

18 MR. GORDON: I think we've got one more question in the room,
19 but anybody else on the phone have anything? And you don't have
20 to go through the whole thing. Just a yea or nay.

21 No questions?

22 MR. INCLIMA: I just have a process question, Joe and Cy.
23 Simply like we'll get a transcript, and will the parties that are
24 here participating have an opportunity to -- will there be an
25 errata sheet process? Will you want us to review the transcript

1 and --

2 MR. GURA: Well, the errata sheet will go to Joe, and he will

3 -- you know, anything that needs to be --

4 MR. INCLIMA: Okay.

5 MR. GURA: -- clarified will go there. And the parties will

6 get --

7 MR. INCLIMA: And then we'll get that?

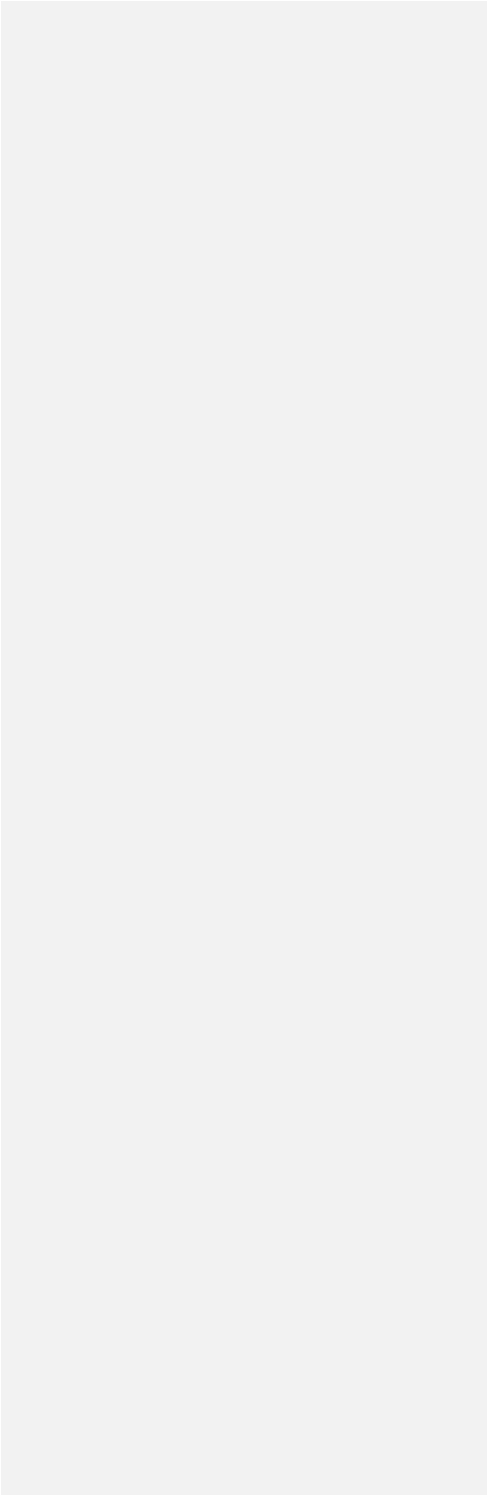
8 MR. GURA: Then you'll get -- the parties will get a copy.

9 MR. INCLIMA: Okay. Right. Just to make sure that
10 everything is captured. Okay. Very good.

11 I want to thank Joe and counsel for participating.

12 MR. GURA: The interview is over. Thank you.

13 (Whereupon, the interview was concluded.)
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CERTIFICATE

This is to certify that the attached proceeding before the

NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF: BNSF RAILWAY ROADWAY WORKER
 FATALITIES IN EDMONT, SOUTH
 DAKOTA ON JANUARY 17, 2017
 Interview of Joseph E. Riley

ACCIDENT NUMBER: DCA17FR004

PLACE:

DATE: April 6, 2017

was held according to the record, and that this is the original,
complete, true and accurate transcript which has been transcribed
to the best of my skill and ability.

Katherine Motley
Transcriber