From: Alexy, Karl (FRA)
To: Michael Hiller; David Casaceli
Subject: Response to questions regarding the contractor fatality at great Barrington, MA
Date: Monday, January 8, 2024 3:53:23 PM
Attachments: 010424 SPD Response to NTSB (FINAL).docx
Part 243 Inspection Information.pdf

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Good afternoon, Mike and Dave. Attached are responses posed to FRA. I apologize for the delay in responding.

Mike - Per our conversation FRA will not be participating in formal party interview. We will be happy to respond to subsequent questions. Please copy me and I will make sure we provide a timely response.

Karl

FRA's Response to NTSB's Question 11 Regarding NTSB Investigation RRD23FR015[1]

NTSB's Question Related to 49 CFR Part 243

"Regarding FRA's regulations on training, qualification, and oversight for safety-related railroad employees:

11. "How does FRA ensure compliance with Part 243? Specifically, how does FRA ensure employers, including short line railroads and railroad contractors, (a) have a compliant program; (b) adhere to that program; (c) monitor the effectiveness of their program; and (d) provide proper oversight tests and inspections of their program. After adopting an approved plan or program, how often does FRA audit or inspect Part 243 training, including on short line railroads and contractors? Please share any documentation, guidance, or other instructions to FRA employees regarding how and when to evaluate compliance with Part 243. (*Originally requested August 24, 2023, as item number 6. Additional clarity added)"*

Brief History of Part 243 Background

FRA's resources on this subject are available on the agency's public website by clicking here.[2]

FRA's Office of Railroad Safety's (RRS) Safety Partnerships Division (SPD) leads FRA on Part 243 compliance issues and works closely with other divisions within FRA's Office of Railroad Safety to ensure compliance with Part 243. SPD is staffed by four employees: a Staff Director and three Human Performance Specialists.

To maintain consistent enforcement, only designated FRA personnel with instructional design experience and Master Trainer accreditation or similar academic credentials are involved in reviewing and approving training plans; that generally describes SPD.

Audits directed by the RRS Audit Management Division (AMD) utilize other divisions within RRS to focus on areas within their domain of expertise. For example, SPD focuses on Part 243.

Including SPD and AMD, other FRA personnel, including FRA's inspectors, have the authority to request copies of training records to ascertain the qualification status of any safety-related railroad employee.

The Part 243 Compliance Guide provides guidance to the regulated community and FRA employees.

[1] https://www.ntsb.gov/investigations/Pages/RRD23FR015.aspx
[2] https://railroads.dot.gov/railroad-safety/divisions/safety-partnerships/training-standards-rule

Although this regulation was effective January 6, 2015, employers had training program submission requirements in 2020 and 2021, and refresher training completion requirements do not come due until the end of 2024 and 2025. Because there are a large number of small employers (railroads and contractors) who have expressed difficulty understanding the requirements, FRA has expended significant resources providing outreach to the industry at in-person conferences across the country to ensure employers properly understand how to adhere to the Part 243 requirements. This outreach also included several webinars directed at the contractor and short line communities.

FRA's Responses to NTSB Q11(a) through (d)

"How does FRA ensure compliance with Part 243? Specifically, how does FRA ensure employers, including short line railroads and railroad contractors,

(a) have a compliant program;"

Part 243 program reviews are under the purview and direction of SPD. See Program Review Checklist Manual.[3]

Training plans were required to be implemented and submitted within the timelines described in § 243.101(a) as described below,

"§ 243.101 Employer program required.

(a)

(1) Effective January 1, 2020, each Class I railroad, and each intercity or commuter passenger railroad conducting operations subject to this part with 400,000 total employee work hours annually or more, shall submit, adopt, and comply with a training program for its safety-related railroad employees.

(2) Effective May 1, 2021, each employer conducting operations subject to this part not covered by paragraph (a)(1) of this section shall submit, adopt, and comply with a training program for its safety-related railroad employees."

Each employer, as well as every training organization or learning institution, is required to submit their plans. To process those submissions, FRA created a website called the Railroad Safety Portal – also known as the Part 243 Portal. Each employer submits their training plans into this portal. FRA is notified whenever a new document or any changes are made in the portal.[4] FRA then reviews the documents and either approves them or informs the employer of

[3] https://franet.fra.dot.gov/eLib/details/L03770#p1_z25_gD_lSP_k105
[4] See e.g., 49 CFR subpart B (describing the required approval process).

the specific deficiencies. Once the submission is approved by FRA, the database automatically generates an approval notice that is sent via email to the point of contact listed in the program.

It is also important to note, railroad and railroad contractor submissions (employers) are considered approved upon submission. Employers may implement training programs upon submission. However, if FRA finds non-compliance with the training plan, employers have 90 days to remediate the non-compliance. Training organizations and learning institutes require FRA approval prior to implementation.

FRA will review all portal submissions and use this same process with short lines railroads and contractors when submissions are received to ensure all entities have a compliant training program.

To date, FRA has reviewed and approved over 5,000 training plan submissions from railroads, railroad contractors, and training organizations/learning institutions. FRA continues to process training plan submissions on an ongoing basis.

"...(b) adhere to that program;"

In addition to reviewing the submissions, FRA has conducted on-site training program reviews for six Class I railroads (BNSF, CN, CSX, NS, UP and Amtrak) in which FRA observed delivery of the training. FRA observed various types of formal training, which mainly included classroom and on-the-job training (OJT), or other types of training that included job-related practice and practice-related feedback sessions.

SPD has been involved with several Class I audits performed by AMD and assisted other FRA disciplines in focused inspections on both Class I railroads and short line railroads.

"...(c) monitor the effectiveness of their program;"

FRA's ability to monitor the effectiveness of employer programs underpart 243 was impacted by the COVID-19 pandemic, especially in 2020 and 2021.

Beginning in 2022, SPD monitored the effectiveness of over a dozen Part 243 programs, primarily on Class I and Class II railroads—including two commuter railroads.

In 2022, SPD delivered training to all FRA's safety inspectors and specialists on their role in reviewing training and qualification records during their regular inspections. This training is expected to significantly increase the number of FRA field personnel that can ensure compliance and monitor the effectiveness of each railroad's program. The periodic oversight requirements were also covered in this internal-FRA training with specific discussions regarding how FRA's inspectors could monitor a railroad's or a railroad contractor's periodic oversight program. During the training, SPD requested that FRA's inspectors and specialists bring to SPD's attention certain issues that would indicate an employer is not appropriately monitoring the effectiveness

of its program. Some examples of issues that FRA's field personnel bring to SPD's attention include if (1) a safety-related railroad employee is found improperly performing tests or inspections, (2) an FRA accident/incident investigation identifies training or qualification deficiencies are contributing causes, or (3) FRA finds evidence of a system-wide problem, especially one that does not comply with Federal regulations or the employer's training program.

(d) provide proper oversight tests and inspections of their program

This answer is in addition to the previous response.

FRA created a job aid for all employers, but specifically with contractors in mind, to help them develop a compliant oversight program. FRA held several webinars and attended several conferences broadcasting this job aid. This job aid was sent to the National Railroad Construction and Maintenance Association (NRC), which represents most rail contractors covered by Part 243. This job aid can be found on the FRA Public Website found here.

"After adopting an approved plan or program, how often does FRA audit or inspect Part 243 training plans, including on short line railroads and contractors? Please share any documentation, plans, guidance, or other instructions to FRA employees regarding how and when to evaluate compliance with Part 243. (Originally requested August 24, 2023, as item number 6. Additional clarity added)"

In FRA's view, Part 243 is still a new regulation because initial compliance dates were in 2020 and 2021, and refresher training is not required to be completed until the end of 2024 and 2025. Further, FRA published an NPRM[5] and is still working to complete a final rule to address concerns raised by the shortline and contractor associations on various aspects of the rule. For these reasons, SPD has prioritized reviewing and approving the over 5,000 submissions and answering numerous questions, as well as spending a week or more at six of the largest railroads training facilities and providing significant on-the-spot feedback.

After completing a training facility visit with the remaining Class I railroad (CPKC, which FRA deferred largely because of the merger in April 2023), FRA plans to start initiating training facility visits at each of the major commuter railroads. FRA will start monitoring the major commuter railroads' training facilities beginning in 2024. The next step after that for SPD would be to focus on any other major stakeholder, such as short line railroads, contractors, or other entities of concern.

While SPD continues with those Part 243-centered visits/audits, other divisions of RRS will be inspecting and auditing in ways that will support enforcement and oversight of Part 243 compliance. For instance, system audits are managed by AMD and Part 243 compliance is included in system audits. SPD expects these system audits will generally focus on certain

[5] 87 Fed. Reg. 59749 (Dec. 2, 2022).

requirements such as compliance with § 243.101(d)(3), § 243.201, § 243.109 (d)(i) (if applicable), § 243.205, § 243.207, and § 243.209 (if applicable). As mentioned above, FRA's inspectors and specialists are expected to play a significant role in identifying safety-related railroad employees with performance gaps in applying Federal regulations in connection with assigned duties, as well as other factors such as identifying any training weaknesses through accident/incident investigations, review of operational test failures, or through the investigation of concerns raised by railroad employees. SPD expects to maintain close coordination with the engagement by these other FRA divisions, which, for example, might lead SPD to reexamine previously approved training plans.

Attached for additional reference is a summary of FRA's inspection data related to Part 243 for calendar years 2020 through 2023.

NTSB's Questions related to 49 CFR Part 225 and Railroad Contractors:

1. Does FRA have data regarding the number of railroad contracting companies and the number of employees or employee work-hours of these railroad contractors? **FRA does not maintain a comprehensive set of data relating to railroad contracting companies. However, if there are questions about a specific contractor, FRA can search its records for what responsive information may be available**.

2. Is the FRA able to compute incident, injury, accident, or fatality rates amongst railroad contractor employees similar to how it is calculated for direct railroad employees? **No.**

3. Can the FRA determine such incident rates for railroad contractors specifically performing roadway worker activities? **No, not in a meaningful way that separates such rates for contractors from the employing railroads, based on current data collection and reporting.**
   a. If so, how do the accident/incident rates of railroad contractors and contract employees compare to those of railroads and railroad employees? **Some commuter railroad operations are primarily operated by contractors, which allows for such analysis. In those cases, FRA can use the railroad accident/incident rates and compare them to other groups. For example, MBTA is about 99% contractor operated, which would allow a comparison. But not all railroads, even among commuter railroads, have the same rate of contractors, so comparisons are difficult.**
   b. If the FRA cannot calculate incident rates for contract employees, how does FRA determine if a railroad contractor has a safety performance that would lead to the FRA performing additional oversight or recommending civil penalties? **In general, FRA relies on the knowledge and discretion of its field personnel to oversee the safety of railroad operations that employ contractors. FRA field personnel may recommend issuance of defects or civil penalties against railroads or their contractors, or both.**

Note that although FRA does not maintain a comprehensive set of data related to railroad contractors and contractor employees, FRA's safety oversight focuses on regulated entities' compliance with all applicable Federal rail safety requirements. Contractors, when performing functions subject to those requirements, are required to comply with those requirements to the same extent as railroads.

Part 243 Railroad Inspection Summary

	2023				2022				2021				2020				Grand Total			
Railroad	Units	Sub Units	Defects	Recom Violation	Units	Sub Units	Defects	Recom Violation	Units	Sub Units	Defects	Recom Violation	Units	Sub Units	Defects	Recom Violation	Units	Sub Units	Defects	Recom Violation
1					1.00	1.00	10	0									1.00	1.00	10	0
2					2.00	1,502.00	3	0									2.00	1,502.00	3	0
3	3.00	3.00	2	0					1.00	1.00	2	0					4.00	4.00	4	0
4									1.00	1.00	1	0					1.00	1.00	1	0
5	2.00	7.00	5	0													2.00	7.00	5	0
6					2.00	501.00	2	0	1.00	1.00	5	0					3.00	502.00	7	0
7	1.00	4.00	1	0													1.00	4.00	1	0
8	1.00	1.00	2	0													1.00	1.00	2	0
9					1.00	2.00	1	0									1.00	2.00	1	0
10													1.00	1.00	1	0	1.00	1.00	1	0
11					4.00	16.00	7	0									4.00	16.00	7	0
12	2.00	51.00	2	0													2.00	51.00	2	0
13									2.00	3.00	2	0					2.00	3.00	2	0
14													1.00	1.00	1	0	1.00	1.00	1	0
15					1.00	20.00	2	0									1.00	20.00	2	0
Grand Total	9.00	66.00	12	0	11.00	2,042.00	25	0	5.00	6.00	10	0	2.00	2.00	2	0	27.00	2,116.00	49	0

Note: Subunits are a subset of a particular inspection activity. For example, for a training records inspection, FRA records one unit for each day or partial day of inspection, and one subunit for each record reviewed.