



U.S. Department
of Transportation

**Federal Railroad
Administration**

1200 New Jersey Avenue, SE
Washington, DC 20590

Guidance on Railroad/Employee Consultation Requirements in 49 CFR Parts 270 and 271

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Guidance Disclaimer

This document does not revise or replace any previously issued guidance. FRA is issuing this guidance pursuant to its general authority to prescribe regulations and issue orders for every area of railroad safety under 49 U.S.C. 103(g), 20103(a). FRA issued the requirements in Parts 270 and 271 pursuant to a statutory mandate under 49 U.S.C. 20156(a). Except when referencing laws, regulations, policies, or orders, the contents of this guidance document do not have the force and effect of law and are not meant to bind the public in any way. Rather, this document is intended only to provide information regarding existing requirements in 49 CFR Parts 270 and 271.

Background

Section 103 of the Rail Safety Improvement Act of 2008 (RSIA 2008), codified at 49 U.S.C. 20156, required FRA to issue regulations requiring certain railroads to develop and implement railroad safety risk reduction programs and include fatigue management plans as part of those programs. FRA issued three rules in response to this mandate. First, FRA issued a rule requiring each Class I freight railroad and each freight railroad with inadequate safety performance (ISP) to develop and implement a Risk Reduction Program (RRP).¹ Second, FRA issued a rule requiring each commuter and intercity passenger rail operation to develop and implement a System Safety Program (SSP).² Third, FRA issued a rule requiring each freight railroad or passenger rail operation subject to either the RRP or SSP rule to develop and implement a Fatigue Risk Management Program (FRMP).³

The RSIA 2008 also mandated that railroads required to develop, submit for FRA approval, and implement safety risk reduction programs under Section 103 consult with directly affected employees on the contents of the plan. 49 U.S.C. 20156(g) (requiring railroads to employ good faith and use best efforts to reach agreement with all directly affected employees). FRA has incorporated this statutory requirement into its requirements for the RRP, SSP, and FRMP rules. 49 CFR §§ 270.107(a)(1), 270.409, 271.207(a)(1), and 271.609 (requiring freight railroads and passenger rail operations subject to section 103 of RSIA 2008 to adopt and implement the required RRP, SSP, and FRMP plans).

¹ 85 FR 9262 (Feb. 18, 2020) and 85 FR 12826 (Mar. 4, 2020) (codified at 49 CFR Part 271).

² 81 FR 53850 (Aug. 12, 2016) (Final Rule) and 85 FR 12826 (Mar. 4, 2020) (codified at 49 CFR Part 270).

³ 87 FR 35660 (June 13, 2022) (amended both Parts 270 and 271).

Consistent with the statutory consultation requirements, the regulatory requirements under Parts 270 and 271 require freight railroads and passenger rail operations to use “good faith” and “best efforts” to reach agreement with all directly affected employees, including any non-profit employee labor organization (“labor organization”) representing a class or craft of directly affected employees, on the contents of the relevant plan. 49 §§ 270.107(a)(1), 271.207(a)(1), and 271.609(a). These consultation requirements apply regardless of whether directly affected employees are represented by a labor organization. Consultation is required not just for the initial RRP, SSP, or FRMP plan, but also for substantive amendments to the plan(s). 49 §§ 270.107(d), 271.209, and 271.609(d)(4).

FRA has published guidance on the consultation process in Appendix B to Part 270 and Appendix A to Part 271. This guidance, applicable to the development and implementation of RRP, SSP, and FRMP plans, discusses the meaning of the terms “good faith” and “best efforts” in the context of the consultation requirements and provides an example roadmap that freight railroads and passenger rail operations could follow to meet the consultation requirements of Parts 270 and 271, with both employees represented by a labor organization and non-represented employees.

With the initial submissions of freight railroads’ RRP plans and passenger rail operations’ SSP plans complete, as noted in the FRMP rule, FRA is concerned that the consultations some railroads and passenger rail operations engaged in during development of their RRP and SSP plans did not meet the spirit of the statutory consultation requirements. The intent of consultation is to engage with directly affected employees at all stages of plan development and program implementation. Ideally, railroads will look to their directly affected employees as partners throughout the process rather than as reviewers of a finished product. FRA expects consultation on FRMP plans will genuinely involve good faith and best efforts. Accordingly, this document provides a set of Frequently Asked Questions intended to provide additional guidance on the consultation requirements of Parts 270 and 271 based on lessons learned from consultations that took place between freight railroads and passenger rail operations and their directly affected employees leading up to the initial submission of freight railroads’ RRP plans and passenger rail operations’ SSP plans. For ease of reference, this document also includes, in Appendix A, the relevant statutory language related to the employee consultation requirement; in Appendix B, the relevant regulatory language; and in Appendix C, the guidance previously published as Appendix B to Part 270 and Appendix A to Part 271 related to “good faith” and “best efforts” in the context of the consultation requirement.

Frequently Asked Questions

1) Under what circumstances must a freight railroad or passenger rail operation consult with its directly affected employees?

A freight railroad or passenger rail operation must consult with its directly affected employees on the contents of its initial, or a substantively amended, RRP, SSP, or FRMP plan, prior to submitting that plan to FRA for review and approval. In general, updates to names and addresses or corrections to typographic errors are considered non-substantive, but most other plan amendments would be considered substantive.

2) What does it mean to consult?

Each railroad must hold a preliminary meeting with directly affected employees to discuss the processes by which the overall consultation will be conducted. The subsequent consultation will then include coordinating, gathering, and discussing employee and railroad input and feedback on the development of the program plan in an attempt to reach agreement on the contents of the plan. How consultation is conducted varies depending upon each freight railroad or passenger rail operation and is further delineated in guidance published in Appendix B of Part 270 and Appendix A of Part 271.

3) How does a railroad identify directly affected employees?

In general, directly affected employees are those employees who either participate in the processes of the RRP, SSP, or FRMP, or who could be affected by some aspect of the execution of the programs. For example, if program activities impose certain requirements or limitations on employees, those employees are considered “directly affected employees.” Similarly, if program activities could reasonably be expected to lead to changes in the safety of employees’ work environment, the employees potentially impacted are considered “directly affected employees.” A freight railroad or passenger rail operation that consults with a labor organization is considered to have consulted with the directly affected employees represented by that organization, but railroads must also consult with employees who are not represented by a labor organization.

4) How should a freight railroad or passenger rail operation initiate the consultation process?

For directly affected employees represented by a labor organization, the primary point of contact is the general chairperson of the labor organization, unless another contact is mutually agreed upon at the beginning of the consultation process. Once the freight railroad or passenger rail operation notifies the primary point of contact for the labor organization, FRA expects that the labor organization will self-organize participation in the consultation process. For example, after the freight railroad or passenger rail operation contacts the general chairperson of a labor organization, it is now that chairperson’s responsibility to delegate: (1) participation in consultation meetings; (2) review of draft plans; (3) responding to comments, questions, or concerns of other individuals within the labor organization, as the chairperson deems appropriate.

For directly affected employees not represented by a labor organization, the freight railroad or passenger rail operation should notify those non-represented employees that they are able to participate in the development of the SSP, RRP, or FRMP plan. This initial notification could be done electronically, posting a notification easily visible to all employees, and/or providing a hard copy of the notification to the non-represented employees. Subsequent notifications may use the same methods of communication.

5) Is there a difference between consultation with directly affected employees under the RRP, SSP, and FRMP rules and collective bargaining negotiations under the Railway Labor Act, as amended?

Yes. The consultation process required under the RRP, SSP, and FRMP rules is not subject to the negotiation or collective bargaining requirements of the Railway Labor Act, even when a labor organization representing directly affected employees is participating in the consultation process. *See* 85 FR 9262, 9301 (Feb. 18, 2020). FRA consistently uses the terms “consultation” or “consulting” when describing the RRP, SSP, and FRMP process to distinguish it from negotiation or bargaining under the Railway Labor Act.

6) Is consultation with a labor organization considered sufficient to satisfy the consultation requirements of the rules?

It depends. For some freight railroads or passenger rail operations, all directly affected employees may be represented by one or more labor organization(s). In such a case, consultation with the labor organization(s) is considered to be equivalent to consulting with the directly affected employees represented by those labor organizations. 49 §§ 270.107(a)(2) and 271.207(a)(2). A freight railroad or passenger rail operation must ensure that it consults with all labor organizations representing its directly affected employees.

For freight railroads or passenger rail operations where only a portion of the directly affected employees are represented by a labor organization, those freight railroads and passenger rail operations are required to consult with the relevant labor organization(s) and additionally ensure that their non-represented employees are aware that they are able to participate in the development of the program plan. For guidance on how a freight railroad or passenger rail operation might consult with directly affected employees that are not represented by a labor organization, see Appendix C of this document, which includes the guidance FRA published in Appendix B to Part 270 and Appendix A to Part 271.

For freight railroads or passenger rail operations where no directly affected employees are represented by a labor organization, as the Appendices note, those railroads or passenger rail operations must ensure that the unrepresented employees are made aware that they are able to participate in the development of the program and those employees must be provided instructions on how they are able to participate.

7) Are there specific requirements for how to conduct consultations with directly affected employees?

In general, railroads and passenger rail operations are required to consult in good faith with and use best efforts to reach agreement with directly affected employees on the contents of the program plan. *See* §§ 270.107(a)(1) and 271.207(a)(1). Discussion of what these terms mean is available in Appendix B to Part 270 and Appendix A to Part 271. For ease of access, this guidance is included as Appendix C in this document.

The regulations require a freight railroad or passenger rail operation to hold a preliminary meeting with directly affected employees, where they discuss the administrative processes they

will follow in order to accomplish the necessary consultation. *See* §§ 270.107(a)(3) and 271.207(b). The number and timing of meetings, the length of meetings, the format of meetings (face-to-face, virtual, conference call, etc.), and the processes for sharing and revising proposed drafts of the program plan are among the administrative details that may be discussed by the freight railroad or passenger rail operation and the directly affected employees during the preliminary meeting. As part of the overall consultation process, a railroad must use good faith and best efforts when discussing the administrative process with its directly affected employees. For example, a railroad that placed an arbitrary limit on the number or length of meetings, without input from directly affected employees, would not be consulting in good faith and with best efforts.

8) What is a consultation statement?

In addition to an RRP, SSP, or FRMP plan, a freight railroad or passenger rail operation must also submit a consultation statement for FRA to consider when reviewing the plan. 49 §§ 270.107(b) and 271.207(d). FRA expects the consultation statement to be separate from the plan; if the consultation statement is included as part of the plan, FRA approval of the plan would not constitute approval of the consultation statement or its contents. Under §§ 270.107(b) and 271.207(d), the consultation statement must:

- Include a detailed description of the process the railroad or passenger rail operation used to consult with its directly affected employees in developing the program plan;
- Identify any known areas of non-agreement and provide an explanation why the railroad or passenger rail operation believes agreement was not reached; and
- Include a service list containing the names and contact information for the international/national president and general chairperson of any labor organization representing a class or craft of the railroad's or passenger rail operation's directly affected employees and any directly affected employee not represented by a labor organization who significantly participated in the consultation process. If an international/national president or general chairperson did not participate in the consultation process, the service list shall also contain the name and contact information for a designated representative who participated on their behalf. When a railroad or passenger rail operation submits its program plan and consultation statement to FRA, it must also send a copy of these documents to all individuals identified in the service list.

9) Is there a minimum number of meetings required for consultation?

No, the number of meetings needed is determined by the complexity of the proposed program, the number of areas of non-agreement in the plan, the availability of relevant directly affected employee stakeholders, and other pertinent considerations. Railroads must, however, schedule their consultation efforts to allow reasonable periods of time for information exchanges and responses –so that consultation can be substantive and iterative. Among the freight railroads and passenger rail operations that have already completed consultations for their initial RRP or SSP plans, most conducted multiple meetings over the course of several months as they drafted the plans.

10) What methods or modes of communication are considered appropriate for consultation meetings with directly affected employees?

Many methods or modes of communication can be used to consult with directly affected employees and must enable a meaningful exchange of information and responses. In-person meetings, as well as electronic methods, such as Zoom, Microsoft Teams, or similar applications are all acceptable. For consultations on minor substantive plan amendments, email communications may also be appropriate.

11) What is a reasonable amount of time that a freight railroad or passenger rail operation should provide directly affected employees to review the written elements of the program plan?

A reasonable amount of time should be allowed for directly affected employees to receive, review, and comment on the proposed plan or any proposed amendments; what is a reasonable amount of time depends upon the specific circumstances of the railroad and employees involved, and the complexity of the plan or proposed amendments themselves. For example, providing a plan to directly affected employees on a Friday and expecting comments back on Monday morning would not meet the requirement to consult using good faith and best efforts. Similarly, providing an extensive and complex proposed substantive amendment to a plan to directly affected employees on a Friday and expecting comments back in one week may not be good faith and best efforts. Rather, in most instances, at least two weeks would be considered a reasonable amount of time to allow directly affected employees to thoroughly review and provide feedback on an RRP, SSP, or FRMP plan, but depending on the specific circumstances, a longer (or shorter) timeframe may be sufficient. Of course, other circumstances that could affect the reasonableness of any review period must be taken into consideration (e.g., holidays, the number of directly affected employees, the method in which directly affected employees were asked to deliver feedback). A best practice may be for a freight railroad or passenger rail operation to keep a working draft of any plan available to all stakeholders in an online sharing environment throughout the entire consultation process.

12) Is a freight railroad or passenger rail operation required to implement all of the changes suggested by directly affected employees?

No, a freight railroad or passenger rail operation does not have to incorporate all of the directly affected employees' comments into the plan. They must, however, consider all comments received that fall within the scope of an RRP, SSP, or FRMP and use good faith and best efforts in trying to reach agreement. It is a best practice to notify directly affected employees when any of their comments are not incorporated into the plan; the freight railroad or passenger rail operation should also explain why those specific decisions were made. In general, a freight railroad or passenger rail operation is not required to consider comments that fall entirely outside the scope of an RRP, SSP, or FRMP, such as issues involving employee pay.

13) Who tracks the discussion during the consultation, and are disagreements noted?

The freight railroad or passenger rail operation is responsible for ensuring that the discussions held as part of the consultation process are appropriately documented in a consultation statement submitted to FRA along with the program plan. 49 §§ 270.107(b) and 271.207(d). FRA anticipates that areas of agreement will be included in revisions to the draft program plan. However, a freight railroad or passenger rail operation must also identify and explain areas of non-agreement in the separate consultation statement submitted to FRA along with the program plan. 49 §§ 270.107(b)(2) and 271.207(d)(2).

14) Are directly affected employees required to consult with a freight railroad or passenger rail operation using good faith and best efforts?

Although the statutory and regulatory requirement to consult using good faith and best efforts applies only to a freight railroad or a passenger rail operation, FRA expects all parties involved in the development of an RRP, SSP, or FRMP to use good faith and best efforts to ensure plans are adequately discussed among all stakeholders. FRA will likely give less weight to an employee statement if the directly affected employees were not consulting using good faith and best efforts. For example, FRA may give less consideration to statements from directly affected employees who were invited to participate in the consultation, but who chose not to attend consultation meetings or otherwise participate in the process.

15) Can a program plan be approved without consensus during the consultation process?

Yes, FRA can approve the plan if it is otherwise compliant with the requirements of the applicable rule. Areas of non-agreement must be identified and explained in the consultation statement submitted to FRA and shared with everyone on the service list. *See* §§ 270.107(b) and 271.207(d).

16) Who makes the determination of whether a plan amendment is considered substantive and requires consultation?

If the plan amendments involve updating names or addresses of railroad personnel, they are considered non-substantive and consultation is not required. *See* §§ 270.107(d) and 271.209. FRA would generally consider other types of plan amendments substantive. If there is any uncertainty whether a contemplated plan amendment would be substantive or non-substantive, the freight railroad or passenger rail operation may seek guidance from FRA.

17) Does a freight railroad or passenger operation need to submit a full consultation statement when submitting program plan amendments?

A freight railroad or passenger rail operation amendment must follow the process described in its program plan for consulting with directly affected employees on substantive plan amendments and for submitting a consultation statement. 49 §§ 270.107(d) and 271.209.

Generally, FRA expects that a consultation statement for any proposed substantive amendment would be less complex than an initial consultation statement, but this will depend on the extent of the amendment(s) proposed. Consultation statements that are less complex may be submitted

to FRA in the form of a cover letter for the submission. Any such letter would still be required to contain the same information required for a consultation statement, including a description of the process to allow for feedback from directly affected employees in the development of the amendment(s), a description of whether any comments/complaints were received, and identification and explanation of any known areas of disagreement. A consultation statement for a proposed substantive amendment should also note any changes to the service list to ensure FRA has current contact information for the directly affected employees included.

18) What can directly affected employees do if they do not reach consensus with the freight railroad or passenger rail operation on the contents of the plan, or if they believe the consultation was not conducted using good faith or best efforts?

Directly affected employees can file a statement with FRA expressing their views about the plan contents or the consultation process within 30 days of FRA's receipt of a plan submitted for approval. *See* §§ 270.107(c) and 271.207(e). FRA will consider employee statements while reviewing the plan and will determine on a case-by-case basis whether the employee statement(s) require the freight railroad or passenger rail operation to take action to remedy defects in the consultation process. In such cases, FRA will informally be in contact with directly affected employees (or representatives of those employees), and may either inform the freight railroad or passenger rail operation that the defects must be remediated before FRA will approve the submitted plan or provide written notice that the plan has not been approved. 49 §§ 270.201(b) and 271.301(d). Remedial actions may include, but are not limited to, revising a submitted plan or conducting further consultation with directly affected employees.

19) Will FRA consider employee statements that address issues that go beyond the scope of the SSP, RRP, or FRMP rules?

No. With respect to plan review and approval, FRA will not consider issues that fall outside the scope of an RRP, SSP, or FRMP, such as issues involving employee pay.

If an employee statement relates to a railroad safety topic outside the scope of SSP, RRP, or FRMP rules, but otherwise falls under FRA's railroad safety jurisdiction, FRA will investigate the issue in accordance with its standard complaint process, but will not otherwise consider the issue as part of its review of the submitted plan.

Appendix A: Statutory Requirement

Rail Safety Improvement Act of 2008

49 U.S.C. 20156

(g) CONSENSUS.—

(1) IN GENERAL.—Each railroad carrier required to submit a railroad safety risk reduction program under subsection (a) shall consult with, employ good faith and use its best efforts to reach agreement with, all of its directly affected employees, including any non-profit employee labor organization representing a class or craft of directly affected employees of the railroad carrier, on the contents of the safety risk reduction program.

(2) STATEMENT.—If the railroad carrier and its directly affected employees, including any nonprofit employee labor organization representing a class or craft of directly affected employees of the railroad carrier, cannot reach consensus on the proposed contents of the plan, then directly affected employees and such organization may file a statement with the Secretary explaining their views on the plan on which consensus was not reached. The Secretary shall consider such views during review and approval of the program.

Appendix B: Regulatory Requirements

49 CFR § 270.107 Consultation Requirements

(a) General duty

1. Each passenger rail operation required to establish a system safety program under this part shall in good faith consult with, and use its best efforts to reach agreement with, all of its directly affected employees, including any non-profit labor organization representing a class or craft of directly affected employees, on the contents of the SSP plan.
2. A passenger rail operation that consults with a non-profit employee labor organization as required by paragraph (a)(1) of this section is considered to have consulted with the directly affected employees represented by that organization. For directly affected employees represented by a non-profit employee labor organization, the primary point of contact shall be either the general chairperson of that non-profit employee labor organization or a non-profit employee labor organization primary point of contact the passenger rail operation and the non-profit employee labor organization agree on at the beginning of the consultation process. If a passenger rail operation contracts out significant portions of its operations, the contractor and the contractor's employees performing those operations shall be considered directly affected employees for the purposes of this part.
3. A passenger rail operation shall have a preliminary meeting with its directly affected employees to discuss how the consultation process will proceed. A passenger rail operation is not required to discuss the substance of an SSP plan during this preliminary meeting. A passenger rail operation must:
 - i. Hold the preliminary meeting no later than July 2, 2020;
 - ii. Notify the directly affected employees of the preliminary meeting no less than 60 days before it is held.
4. Appendix B to this part contains non-mandatory guidance on how a passenger rail operation may comply with the requirements of this section.

(b) Consultation statements. A passenger rail operation required to submit an SSP plan under §270.201 must also submit, together with the plan, a consultation statement that includes the following information:

1. A detailed description of the process utilized to consult with directly affected employees;
2. If the passenger rail operation could not reach agreement with its directly affected employees on the contents of its SSP plan, identification of any known areas of disagreement and an explanation of why it believes agreement was not reached; and

3. A service list containing the name and contact information for either each international/national president and general chairperson of any non-profit employee labor organization representing a class or craft of the passenger rail operation's directly affected employees, or each non-profit employee labor organization primary point of contact the passenger rail operation and the non-profit employee labor organization agree on at the beginning of the consultation process. The service list must also contain the name and contact information for any directly affected employee who significantly participated in the consultation process independently of a non-profit employee labor organization. When a passenger operation submits its SSP plan and consultation statement to FRA pursuant to §270.201, it must simultaneously send a copy of these documents to all individuals identified in the service list.

(c) Statements from directly affected employees.

1. If a passenger rail operation and its directly affected employees cannot reach agreement on the proposed contents of an SSP plan, the directly affected employees may file a statement with the FRA Associate Administrator for Railroad Safety and Chief Safety Officer explaining their views on the plan on which agreement was not reached with the FRA Associate Administrator for Railroad Safety and Chief Safety Officer at Mail Stop 25, 1200 New Jersey Avenue SE, Washington, DC 20590 [sic]. The FRA Associate Administrator for Railroad Safety and Chief Safety Officer shall consider any such views during the plan review and approval process.
2. A passenger rail operation's directly affected employees have 30 days following the date of the submission of a proposed SSP plan to submit the statement described in paragraph (c)(1) of this section.

(d) Consultation requirements for system safety program plan amendments. A passenger rail operation's SSP plan must include a description of the process the passenger rail operation will use to consult with its directly affected employees on any subsequent substantive amendments to the system safety program. The requirements of this paragraph do not apply to any non-substantive amendments (e.g., amendments that update names and addresses of railroad personnel).

§ 271.207 Consultation requirements.

(a) General duty.

(1) Each railroad required to establish an RRP under this part shall in good faith consult with, and use its best efforts to reach agreement with, all of its directly affected employees, including any non-profit labor organization representing a class or craft of directly affected employees, on the contents of the RRP plan.

(2) A railroad that consults with a non-profit employee labor organization is considered to have consulted with the directly affected employees represented by that organization.

(b) Preliminary Meeting. A railroad shall have a preliminary meeting with its directly affected employees to discuss how the consultation process will proceed. A railroad is not required to discuss the substance of an RRP plan during this preliminary meeting.

(1) A Class I railroad shall meet no later than October 15, 2020 with its directly affected employees to discuss the consultation process. The Class I railroad shall notify the directly affected employees of this meeting no less than 60 days before it is scheduled.

(2) A railroad determined to have inadequate safety performance shall meet no later than 30 days following FRA's notification with its directly affected employees to discuss the consultation process. The inadequate safety performance railroad shall notify the directly affected employees of this meeting no less than 15 days before it is scheduled.

(3) A railroad that the STB reclassifies or newly classifies as a Class I railroad shall meet with its directly affected employees to discuss the consultation process no later than 30 days following the effective date of the classification or reclassification. The reclassified or newly classified Class I railroad shall notify the directly affected employees of this meeting no less than 15 days before it is scheduled.

(4) A voluntarily-compliant railroad that files a notification with FRA of its intent to file an RRP plan under § 271.301(b)(4)(i) shall meet with its directly affected employees to discuss the consultation process no later than 30 days following the date that the railroad filed the notification. The voluntarily-compliant railroad shall notify the directly affected employees of this meeting no less than 15 days before it is scheduled.

(5) Compliance with the mandatory preliminary meeting requirements of this paragraph does not constitute full compliance with the consultation requirements of this section.

(c) Guidance. Appendix B to this part contains guidance on how a railroad could comply with the requirements of this section.

(d) Railroad consultation statements. A railroad required to submit an RRP plan under § 271.301 shall also submit, together with that plan, a consultation statement that includes the following information:

(1) A detailed description of the process the railroad utilized to consult with its directly affected employees;

(2) If the railroad could not reach agreement with its directly affected employees on the contents of its RRP plan, identification of any known areas of non-agreement and an explanation why it believes agreement was not reached; and

(3) A service list containing the names and contact information for each international/national president of any non-profit employee labor organization representing a class or craft of the railroad's directly affected employees. The service list must also contain the name and contact information for any directly affected employee who significantly participated in the consultation process independently of a non-profit employee labor organization. If an international/national president did not participate in the consultation process, the service list shall also contain the name and contact information for a designated representative who

participated on his or her behalf. When a railroad submits its RRP plan and consultation statement to FRA under § 271.301, it shall also simultaneously send a copy of these documents to all individuals identified in the service list. A railroad may send the documents to the identified individuals via electronic means or other service means reasonably calculated to succeed.

(e) Statements from directly affected employees.

(1) If a railroad and its directly affected employees cannot reach agreement on the proposed contents of an RRP plan, the directly affected employees may file a statement explaining their views on the plan on which agreement was not reached with the FRA Associate Administrator for Railroad Safety and Chief Safety Officer, 1200 New Jersey Ave, SE, Washington, DC, 20590. The FRA Associate Administrator shall consider any such views during the plan review and approval process.

(2) A railroad's directly affected employees have 30 days following the railroad's submission of a proposed RRP plan to submit the statement described in paragraph (e)(1) of this section.

§ 271.209 Consultation on amendments.

A railroad's RRP plan shall include a description of the process the railroad will use to consult with its directly affected employees on any subsequent substantive amendments to the railroad's RRP plan. The requirements of this section do not apply to non-substantive amendments (e.g., amendments that update names and addresses of railroad personnel).

Appendix C

The following guidance on consultation with directly affected employees was published as Appendix A to Part 271. The same guidance, with minor edits to correctly reference System Safety Program Plans and their deadlines, rather than those of Risk Reduction Programs, was published as Appendix B to Part 270.

Appendix A to Part 271 - Federal Railroad Administration Guidance on the Risk Reduction Program Consultation Process

A railroad required to develop a risk reduction program (RRP) under this part shall in good faith consult with and use its best efforts to reach agreement with its directly affected employees on the contents of the RRP plan. *See* § 271.207(a)(1). This appendix discusses the meaning of the terms “good faith” and “best efforts,” and provides non-mandatory guidance on how a railroad may comply with the requirement to consult with directly affected employees on the contents of its RRP plan. Guidance is provided for employees who are represented by a non-profit employee labor organization and employees who are not represented by any such organization.

I. THE MEANING OF “GOOD FAITH” AND “BEST EFFORTS”

“Good faith” and “best efforts” are not interchangeable terms representing a vague standard for the § 271.207 consultation process. Rather, each term has a specific and distinct meaning. When consulting with directly affected employees, therefore, a railroad shall independently meet the standards for both the good faith and best efforts obligations. A railroad that does not meet the standard for one or the other will not be in compliance with the consultation requirements of § 271.207.

The good faith obligation requires a railroad to consult with employees in a manner that is honest, fair, and reasonable, and to genuinely pursue agreement on the contents of an RRP plan. If a railroad consults with its employees merely in a perfunctory manner, without genuinely pursuing agreement, it will not have met the good faith requirement. For example, a lack of good faith may be found if a railroad's directly affected employees express concerns with certain parts of the railroad's RRP plan, and the railroad neither addresses those concerns in further consultation nor attempts to address those concerns by making changes to the RRP plan.

On the other hand, “best efforts” establishes a higher standard than that imposed by the good faith obligation, and describes the diligent attempts that a railroad shall pursue to reach agreement with its employees on the contents of its RRP plan. While the good faith obligation is concerned with the railroad's state of mind during the consultation process, the best efforts obligation is concerned with the specific efforts made by the railroad in an attempt to reach agreement. This would include considerations such as whether a railroad had held sufficient meetings with its employees to address or make an attempt to address any concerns raised by the employees, or whether the railroad had made an effort to respond to feedback provided by employees during the consultation process. For example, a railroad would not meet the best efforts obligation if it did not initiate the consultation process in a timely manner, and thereby failed to provide employees sufficient time to engage in the consultation process. A railroad would also likely not meet the best efforts obligation if it presented employees with an RRP

plan and only permitted the employees to express agreement or disagreement on the plan (assuming that the employees had not previously indicated that such a consultation would be acceptable). A railroad may, however, wish to hold off substantive consultations regarding the contents of its RRP plan until one year after publication of the rule to ensure that information generated as part of the process is protected from discovery and admissibility into evidence under § 271.11. Generally, best efforts are measured by the measures that a reasonable person in the same circumstances and of the same nature as the acting party would take. Therefore, the standard imposed by the best efforts obligation may vary with different railroads, depending on a railroad's size, resources, and number of employees.

When reviewing RRP plans, FRA will determine on a case-by-case basis whether a railroad has met its § 271.207 good faith and best efforts obligations. This determination will be based upon the consultation statement submitted by the railroad pursuant to § 271.207(b) and any statements submitted by employees pursuant to § 271.207(c). If FRA finds that these statements do not provide sufficient information to determine whether a railroad used good faith and best efforts to reach agreement, FRA may investigate further and contact the railroad or its employees to request additional information. (FRA also expects a railroad's directly affected employees to utilize good faith and best efforts when negotiating on the contents of an RRP plan. If FRA's review and investigation of the statements submitted by the railroad under § 271.207(b) and the directly affected employees under § 271.207(c) reveal that the directly affected employees did not utilize good faith and best efforts, FRA could consider this as part of its approval process.)

If FRA determines that a railroad did not use good faith and best efforts, FRA may disapprove the RRP plan submitted by the railroad and direct the railroad to comply with the consultation requirements of § 271.207. Pursuant to § 271.301(b)(3), if FRA does not approve the RRP plan, the railroad will have 90 days, following receipt of FRA's written notice that the plan was not approved, to correct any deficiency identified. In such cases, the identified deficiency would be that the railroad did not use good faith and best efforts to consult and reach agreement with its directly affected employees. If a railroad then does not submit to FRA within 90 days an RRP plan meeting the consultation requirements of § 271.207, the railroad could be subject to penalties for failure to comply with § 271.301(b)(3).

II. GUIDANCE ON HOW A RAILROAD MAY CONSULT WITH DIRECTLY AFFECTED EMPLOYEES

Because the standard imposed by the best efforts obligation will vary depending upon the railroad, there may be countless ways for various railroads to comply with the consultation requirements of § 271.207. Therefore, it is important to maintain a flexible approach to the § 271.207 consultation requirements, to give a railroad and its directly affected employees the freedom to consult in a manner best suited to their specific circumstances.

FRA is nevertheless providing guidance in this appendix as to how a railroad may proceed when consulting (utilizing good faith and best efforts) with employees in an attempt to reach agreement on the contents of an RRP plan. This guidance may be useful as a starting point for railroads that are uncertain about how to comply with the § 271.207 consultation requirements. This guidance distinguishes between employees who are represented by a non-profit employee

labor organization and employees who are not, as the processes a railroad may use to consult with represented and non-represented employees could differ significantly.

This guidance does not establish prescriptive requirements with which a railroad shall comply, but merely outlines a consultation process a railroad may choose to follow. A railroad's consultation statement could indicate that the railroad followed the guidance in this appendix as evidence that it utilized good faith and best efforts to reach agreement with its employees on the contents of an RRP plan.

(a) Employees Represented by a Non-Profit Employee Labor Organization

As provided in § 271.207(b)(1), a railroad consulting with the representatives of a non-profit employee labor organization on the contents of an RRP plan will be considered to have consulted with the directly affected employees represented by that organization.

A railroad may utilize the following process as a roadmap for using good faith and best efforts when consulting with represented employees in an attempt to reach agreement on the contents of an RRP plan.

(1) Pursuant to § 271.207(b)(1), a railroad must meet with representatives from a non-profit employee labor organization (representing a class or craft of the railroad's directly affected employees) within 240 days from February 18, 2020 to begin the process of consulting on the contents of the railroad's RRP plan. A railroad must provide notice at least 60 days before the scheduled meeting.

(2) During the time between the initial meeting and the applicability date of § 271.11, the parties may meet to discuss administrative details of the consultation process as necessary.

(3) Within 60 days after February 17, 2021, a railroad should have a meeting with the representatives of the directly affected employees to discuss substantive issues with the RRP plan.

(4) Within 180 days after February 17, 2021 or as otherwise provided by § 271.301(b), a railroad would file its RRP plan with FRA.

(5) As provided by § 271.207(e), if agreement on the contents of an RRP plan could not be reached, a labor organization (representing a class or craft of the railroad's directly affected employees) may file a statement with the FRA Associate Administrator for Railroad Safety and Chief Safety Officer explaining its views on the plan on which agreement was not reached.

(b) Employees Who Are Not Represented by a Non-Profit Employee Labor Organization

FRA recognizes that some (or all) of a railroad's directly affected employees may not be represented by a non-profit employee labor organization. For such non-represented employees, the consultation process described for represented employees may not be appropriate or sufficient. For example, a railroad with non-represented employees should make a concerted effort to ensure that its non-represented employees are aware that they are able to participate in the development of the railroad's RRP plan. FRA therefore is providing the following guidance

regarding how a railroad may utilize good faith and best efforts when consulting with non-represented employees on the contents of its RRP plan.

(1) Within 120 days from February 18, 2020, a railroad may notify non-represented employees that –

(A) The railroad is required to consult in good faith with, and use its best efforts to reach agreement with, all directly affected employees on the proposed contents of its RRP plan;

(B) Non-represented employees are invited to participate in the consultation process (and include instructions on how to engage in this process); and

(C) If a railroad is unable to reach agreement with its directly affected employees on the contents of the proposed RRP plan, an employee may file a statement with the FRA Associate Administrator for Railroad Safety and Chief Safety Officer explaining his or her views on the plan on which agreement was not reached.

(2) This initial notification (and all subsequent communications, as necessary or appropriate) could be provided to non-represented employees in the following ways:

(A) Electronically, such as by email or an announcement on the railroad's website;

(B) By posting the notification in a location easily accessible and visible to non-represented employees; or

(C) By providing all non-represented employees a hard copy of the notification.

A railroad could use any or all of these methods of communication, so long as the notification complies with the railroad's obligation to utilize best efforts in the consultation process.

(3) Following the initial notification (and before submitting its RRP plan to FRA), a railroad should provide non-represented employees a draft proposal of its RRP plan. This draft proposal should solicit additional input from non-represented employees, and the railroad should provide non-represented employees 60 days to submit comments to the railroad on the draft.

(4) Following this 60-day comment period and any changes to the draft RRP plan made as a result, the railroad should submit the proposed RRP plan to FRA, as required by this part.

(5) As provided by § 271.207(e), if agreement on the contents of an RRP plan cannot be reached, then a non-represented employee may file a statement with the FRA Associate Administrator for Railroad Safety and Chief Safety Officer explaining his or her views on the plan on which agreement was not reached.