

railroad employees were required to be reported.

By contrast, under OSHA's Final Rule, the reporting entity is required to report work-related injuries and illnesses, including those events or exposures meeting the special recording criteria for employees of contractors, only if the employee of the contractor is under the day-to-day supervision of the reporting entity.

If an employee in my establishment is a contractor's employee, must I record an injury or illness occurring to that employee? If the contractor's employee is under the day-to-day supervision of the contractor, the contractor is responsible for recording the injury or illness. If you supervise the contractor employee's work on a day-to-day basis, you must record the injury or illness.

29 CFR 1904.31(b)(3).

In the Working Group meetings, APTA noted that it was difficult to comply with FRA's 1997 rule, read literally, with respect to an employee of a contractor to a railroad while he or she is off railroad property. Many commuter railroads often do not know whether an employee of a contractor to the railroad is injured or sickened if the event occurred on property other than property owned, leased, or maintained by the commuter railroad; it was difficult to follow up on an injury or illness suffered by such an employee. For example, ABC Railroad contracts with XYZ Contractor to repair ABC's railcars at XYZ's facilities. An employee of XYZ Contractor, while repairing ABC's railcar at XYZ's facility, receives an injury resulting in medical treatment. ABC Railroad notes that it may not know about the injury and, therefore, could not report it. Furthermore, no information is lost in the national database since the contractor must report the injury to OSHA even if ABC Railroad does not report the injury. The Working Group could not reach consensus on whether to require reporting of injuries to employees of railroad contractors while off railroad property.

A similar difficulty with reporting occurred in the context of fatalities to employees of contractors to a railroad. With respect to whether to require that railroads report fatalities of employees of contractors that arose out of the operation of the railroad but occurred off railroad property, the Working Group also could not reach consensus. AAR noted that for the reasons stated above related to injuries and illnesses, it was difficult for railroads to track fatalities of persons who were not employed by the railroad. Rail labor representatives noted on the other hand, that fatalities were the most serious

cases on the spectrum of reportable incidents and that it would be important that those cases be reported to FRA. In addition, rail labor representatives noted that railroads often contract for taxi services to deadhead railroad crews to their final release point and that if a driver died in a car accident transporting a railroad crew, FRA should know about those cases. FRA noted that as a practical matter, those types of cases occurred infrequently, and that FRA data showed only two possible fatal car accidents occurring off railroad property that involved employees of contractors to a railroad. As a compromise, rail labor representatives proposed that only fatalities that involved transporting or deadheading railroad crews be reportable, but that all other fatalities to employees of contractors to a railroad that occur off railroad property, not be reportable, even if the incident arose out of the operation of the railroad.

Since the Working Group could not reach consensus on the issue of reporting injuries, illnesses, or fatalities of contractors to a railroad that arose out of the operation of the railroad but occurred off railroad property, FRA drafted a proposal based upon its reasoned consideration of the issue. In this regard, FRA attempted to balance its need for comprehensive safety data concerning the railroad industry against the practical limitations of expecting railroads to be aware of all injuries suffered by contractors off of railroad property.

FRA recognized that certain types of accident/incidents occurring off of railroad property involved scenarios in which the fact that the contractor was performing work for a railroad was incidental to the accident or incident, and would offer no meaningful safety data to FRA, e.g., ordinary highway accidents involving an on-duty contractor to a railroad.

FRA proposed deleting the term "arising from the operation of a railroad" and its definition from § 225.5. The definition read as follows: "*Arising from the operation of a railroad* includes all activities of a railroad that are related to the performance of its rail transportation business." The new term "event or exposure arising from the operation of a railroad" would be added to § 225.5's list of defined terms and given a three-tier definition. First, "event or exposure arising from the operation of a railroad" would be defined broadly with respect to any person on property owned, leased, or maintained by the railroad, to include any activity of the railroad that relates to its rail transportation business and

any exposure related to that activity. Second, the term would be defined broadly in the same way with respect to an employee of the railroad, but without regard for whether the employee is on or off railroad property. Third, the term would be defined narrowly with respect to a person who is neither on the railroad's property nor an employee of the railroad, to include only certain enumerated events or exposures, i.e., a train accident, a train incident, or a highway-rail crossing accident/incident involving the railroad; or a release of hazardous material from a railcar in the railroad's possession or a release of another dangerous commodity if the release is related to the railroad's rail transportation business.

When read together with the rest of proposed § 225.19(d), the new definition of "event or exposure arising from the operation of a railroad" would mean that a railroad would not have to report to FRA the death or injury to an employee of a contractor to the railroad who is off railroad property (or deaths or injuries to any person who is not a railroad employee) unless the death or injury results from a train accident, train incident, or highway-rail grade crossing accident involving the railroad; or from a release of a hazardous material or some other dangerous commodity in the course of the railroad's rail transportation business. In addition, FRA would require railroads to report work-related illnesses only of railroad employees and under no circumstances the illness of employees of a railroad contractor. These proposed reporting requirements diverge from the OSHA standard, which would require the reporting of the work-related death, injury, or illness of an employee of a contractor to the reporting entity if the contractor employee is under the day-to-day supervision of the reporting entity. 29 CFR 1904.31(b)(3).

#### Comments

Although no specific comments were received on the proposal itself, AAR commented that the *Guide's* discussion of contractors did not reflect FRA's proposed approach and should be amended to do so.

#### Final Rule/Decision

For the reasons stated above, FRA has adopted the proposal as stated and has amended the *Guide* to reflect this new approach. FRA intends to address the divergence from OSHA on the employee of a contractor issue in the MOU.