

By the Commission.

Ronald D. Murphy,

Assistant Secretary.

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DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Parts 219 and 240

[Docket No. RSOR-6, Notice No. 45; Docket No. RSOR-9, Notice No. 9]

RIN 2130-AA63

Alcohol/Drug Regulations: Technical Amendments; Qualifications for Locomotive Engineers: Correction

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Final rule.

SUMMARY: FRA issues a final rule containing technical amendments to its regulations on control of alcohol and drug use (49 CFR part 219), and amends its regulations on locomotive engineer qualifications (49 CFR part 240) to delete an outdated cross-reference to part 219 in part 240.

EFFECTIVE DATE: This rule is effective December 31, 1997.

ADDRESSES: Any petition for reconsideration should be submitted in triplicate to the Docket Clerk, Docket No. RSOR-6, Office of the Chief Counsel, Federal Railroad Administration, 400 7th Street, S.W., Room 8201, Washington, DC, 20590.

FOR FURTHER INFORMATION CONTACT: Lamar Allen, Alcohol and Drug Program Manager (RRS-11), Office of Safety, FRA, Washington, DC 20590 (Telephone: (202) 632-3378) or Patricia V. Sun, Trial Attorney (RCC-11), Office of Chief Counsel, FRA, Washington, DC 20590 (Telephone: (202) 632-3183).

SUPPLEMENTARY INFORMATION:

In addition to the technical amendments discussed below, this rule makes several editorial changes to correct typographical errors.

Section by Section Analysis

Section 219.5 Definitions

FRA is deleting the definition of "Field Manual" for the reasons discussed below.

Section 219.19 Field Manual

FRA is removing and reserving this section and deleting all references to its alcohol and drug testing field manual (including, as mentioned above, the

definition in § 219.5 and a reference in § 219.205(c)(1)), since this 1985 publication is obsolete. At present, FRA has no plans to issue an updated manual.

Section 219.101 Alcohol and Drug Use Prohibited

Paragraph (a)(5)

FRA is adding a new paragraph to codify a 1995 interpretation which made clear that a railroad is prohibited from using an FRA alcohol test result that indicates an alcohol concentration below 0.02 as a basis for federal or company discipline.

Section 40.63(e) of the Department of Transportation's (DOT or the Department) alcohol testing procedures (contained in 49 CFR part 40 (part 40), which is incorporated by reference into part 219) states that in any case where the employee's breath alcohol concentration is less than 0.02, no further testing is authorized under Federal regulations. This is because levels below .02 are considered to be negative results (i.e., not persuasive evidence of alcohol use).

Testing conducted under federal authority is a search subject to the protections of the Constitution of the United States. For this reason, actions taken pursuant to federal rules must be supported by forensically sound evidence. After considering the limits of current technology, DOT determined that .02 was the lowest alcohol concentration measurement at which it could be confident in the result's accuracy. (This is analogous to the drug testing cutoff levels established by the Department of Health and Human Services (DHHS)).

FRA recognizes that railroads retain independent authority to test and discipline on their own. In § 219.1, FRA states that railroads may adopt more stringent standards under their own authority *that are not inconsistent with Part 219*, and in § 219.101(c), FRA accommodates longstanding industry zero tolerance policies by allowing railroads to impose an absolute prohibition on the presence of alcohol or drugs in the body fluids of their employees.

This does not mean, however, that railroads can use a federal test result below 0.02 as a basis for discipline, even under their own authority. For FRA purposes, if a federal test result indicates an alcohol concentration below .02, the test is negative and is not evidence of alcohol abuse. Therefore, a railroad cannot use the federal test result either as evidence in a company

proceeding or as a basis for subsequent testing under company authority.

A railroad can take further action only if it has an independent basis for doing so. For example, if a supervisor reasonably suspects alcohol use because the employee smells of alcohol, and the federal test result is below .02, the railroad may use the supervisor's observations as an independent basis for further company testing. Before starting a separate company testing process, the railroad must ensure that the employee understands that the completed federal test was negative, and that no federal violation occurred. The railroad may then conduct a company test (for which use of an FRA or DOT form is *not* authorized), after making the employee aware that any subsequent actions, such as future testing or discipline, are taken under railroad authority only.

Prohibiting use of federal test results below .02 does not interfere with railroad authority. A railroad remains free to test or take further action *if* it has an independent basis for doing so. Commingling federal authority with an employer testing program is impermissible, however, since the employee must always know in advance what his or her procedures, rights and consequences are.

If an employee's test result is between .02 and .039, however, a railroad may take more stringent disciplinary action than the eight hour removal from covered service required under Part 219. In the preamble to its final rule on alcohol testing [February 15, 1994, at 59 FR 7452], FRA stated that "the bifurcated system [which imposes different consequences for results of .04 or above BAC than for results between .02 and .039] does not preempt a railroad's independent authority to test and discipline under Rule G. As stated in § 219.1, railroads retain the latitude to adopt more stringent standards under their own authority. For instance, railroads retain their authority to discipline an employee under company policy for a .02-.039 test result conducted under FRA authority or to discipline an employee found to have violated Rule G based solely on supervisory observations."

The crucial distinction is that while a .02-.039 test result does not necessarily indicate impairment, it *does* indicate the presence of alcohol in the employee's system. Thus, a railroad may use a federal test result of .02-.039 as the basis for more stringent discipline under its own independent authority. A separate company test is therefore not required to impose discipline in addition to the federally mandated minimum of eight hours removal from

covered service. Allowing a railroad to impose company discipline for a .02-.039 test result reinforces the rail industry's traditional Rule G prohibition against alcohol use since, as stated above, a .02 standard is the equivalent of zero tolerance because of the technological limitations of current alcohol testing technology.

*Section 219.104 Responsive Action
Paragraph (a)(3)*

FRA is amending § 219.104(a)(3)(ii) to remove references to pre-employment alcohol testing made obsolete by DOT's suspension of pre-employment alcohol testing on May 10, 1995 [60 FR 24765]. To implement DOT's decision, FRA suspended its pre-employment alcohol testing requirements by adding § 219.501(f) in 1995.

DOT explained the suspension's impact as follows: "[a]ny employer may [continue to] conduct pre-employment alcohol testing under its own authority. Because of this suspension, employers who wish to continue such testing may not claim a basis in Federal law or regulation for doing so, however."

Pre-employment drug testing was not affected by this suspension, however, and remains in effect.

Section 219.201 Events for Which Testing Is Required

Paragraph (b)

For clarification, FRA specifies that accidents that would otherwise qualify but are clearly attributable to the actions of a trespasser or trespassers are exempt from mandatory post-accident testing. This exemption spells out what had previously been implied in this subpart, since crewmembers would normally be excluded from testing upon determination that they played no role in the cause or severity of the accident, or that the accident was attributable to vandalism. Consistent with the other exceptions, the trespasser exception holds railroad supervisors to the reasonable inquiry/good faith judgment standard of § 219.201(c) when making determinations.

Section 219.203 Responsibilities of Railroads and Employees

Paragraph (d)(2)

To ensure prompt notification 24 hours a day, railroads shall immediately call the duty officer at the National Response Center (NRC) at (800) 424-8802. The NRC will in turn notify FRA, and work with FRA to ensure compliance with part 219 post-accident testing requirements. Railroads shall also notify FRA by calling FRA's Alcohol and Drug Program Manager, Mr.

Lamar Allen, at (202) 632-3378. If the accident occurs after business hours (8:00 a.m. to 4:30 p.m., E.S.T. or E.D.T.), the message will be recorded on voicemail.

This new policy ensures that notification will be made to a staffed phone number regardless of when an accident occurs.

Section 219.207 Fatality

Paragraph (b)

As discussed in § 219.203, FRA's notification policy has changed. This section is amended accordingly.

Section 219.209 Reports of Tests and Refusals

Paragraph (a)(2)

As discussed in § 219.203, FRA's notification policy has changed. This section is amended accordingly.

Section 219.303 Alcohol Test Procedures and Safeguards

Paragraphs (c)-(e)

The blood alcohol testing procedures in this section predate both the alcohol testing procedures in Part 40 and mandatory reasonable suspicion testing. In a final rule published on November 22, 1994 [59 FR 60562], FRA allowed Class II and Class III railroads to continue to use these procedures, but only until their deadlines (July 1, 1995 and January 1, 1996, respectively) for implementation of mandatory Federal reasonable suspicion testing under the Department's alcohol testing procedures. FRA is deleting its blood alcohol testing procedures, which have not been in effect since July 1, 1996. Currently, DOT does not authorize blood alcohol testing. FRA post-accident testing procedures and protocols remain unchanged.

Section 219.601 Railroad Random Drug Testing Programs

Paragraph (b)(2)(ii) and (iii)

When FRA implemented random drug testing in 1989, all railroads were required to test at a minimum annualized rate of 50 percent. In 1994, FRA instituted a performance-based system which allowed the Administrator to determine the random drug and alcohol testing rate for each year based upon the preceding year's reported industry-wide positive rate. New railroads, however, were still required to begin random drug testing at a minimum annual percentage rate of 50 percent of their covered employees, regardless of the minimum rate in effect for the rest of the industry at that time. FRA will now allow new railroads to

implement random drug testing at the minimum rate set by the Administrator for the rail industry in the year in which they commence operations. (Since its inception, the minimum testing rate for random alcohol testing has been determined by the Administrator). Accordingly, paragraphs (b)(2)(ii) and (iii) are deleted.

In its random testing plan, a new railroad shall stipulate that its random alcohol and drug testing rates will be set in accordance with the annual minimum rates published by the Administrator yearly in the **Federal Register**.

Section 219.703 Drug Testing Procedures

Paragraph (d)

In its 1994 final rule mandating alcohol testing [59 FR 7358], DOT revised § 40.25(f)(10) to incorporate split sample collection procedures. As part of this revision, DOT deleted a provision in § 40.25(f)(10)(i)(B) on "shy bladder" situations, which had allowed the employer to discontinue the collection and conduct a subsequent collection at a later time. Now, in situations where an employee is unable to provide a complete specimen before his or her hours of service expire, Part 40 authorizes the employer only to discontinue the collection.

Previously, in random drug testing, when a covered service employee failed to provide a sufficient urine specimen within his or her hours of service, FRA allowed the employer the option of conducting a subsequent collection either immediately upon the expiration of the employee's required off-duty period, or on an unannounced basis within the next 30 days. FRA is deleting both of these options, to conform with Part 40.

Thus, if an employee's hours of service expire before completion of a random drug test, the railroad must discontinue the collection, and it is not counted as a completed random drug test. The employee has completed his or her obligations. This change does not affect post-accident and for cause testing, however, which are triggered by unanticipated events. As before, in these forms of testing a railroad may exceed hours of service if the railroad uses due diligence to complete testing and reports the excess hours of service.

Section 219.709 Retest

FRA removes and reserves § 219.709, which allowed an employee to make a written request for a retest within 60 days after his or her random drug test had been declared positive by the

railroad's Medical Review Officer (MRO). With the exception of post-accident testing, discussed below, all types of FRA testing (pre-employment, return to duty, follow-up, for cause, and random) now follow the split sample testing procedures contained in Part 40. Under § 40.25(f)(10)(ii)(E), the employee may request a test of his or her split sample in a second DHHS-certified laboratory within 72 hours of having been notified by the MRO of a verified positive drug test result.

For post-accident testing alone, FRA will continue to allow an employee the right to request a retest of his or her original sample(s) by making a written request within 60 days of the date on which the medical review officer declared the employee's test positive. FRA therefore retains § 219.211(i), which lists the procedures for requesting a retest of an employee's post-accident blood and urine samples.

Section 219.803 Reporting Drug Misuse Prevention Program Results in a Management Information System

Paragraph (a)

FRA's Management Information System (MIS) requires railroads with 400,000 or more total manhours to submit annual reports summarizing the results of their alcohol and drug misuse prevention programs. To conform the reporting cutoffs for the two systems, FRA amends this section so that the cutoff for the drug program MIS is now identical to that for the alcohol program MIS, namely 400,000 or more total manhours. Formerly this section differed slightly, by requiring railroads with "more than 400,000 total manhours" to submit their drug program data.

Appendix B to Part 219—Designation of Laboratory for Post-Accident Testing

On December 1, 1995, in a final rule and notice of determination, FRA announced that it had awarded a contract to Northwest Toxicology, Inc. to conduct post-accident toxicological analysis [60 FR 61664]. Earlier this year, Northwest Toxicology, Inc. changed its corporate name to NWT Inc. FRA is amending Appendix B to conform with the new corporate name of its designated post-accident laboratory and to change a previously published incorrect daytime telephone number. For convenience, the address and corrected telephone numbers for NWT Inc. are reprinted below.

Section 240.119 Criteria for Consideration of Data on Substance Abuse Disorders and Alcohol Drug Rules Compliance

Paragraph (d)(4)

Section 240.119(d)(4)(ii) in FRA's regulations on the qualification and certification of locomotive engineers allows railroads to use the blood alcohol testing procedures found in § 219.303 for return-to-service and follow-up alcohol testing. As explained above, this rule removes § 219.303(c)–(e), since FRA ceased to authorize use of these blood testing procedures as of January 1, 1996. Accordingly, the cross-reference in this section of Part 240 is deleted.

Regulatory Process Matters

This final rule is considered to be a nonsignificant rulemaking under DOT Regulatory Policies and Procedures, 44 FR 11034, and Executive Order 12886.

The Regulatory Flexibility Act of 1980 was enacted by Congress to ensure that small entities are not unnecessarily and disproportionately burdened by Government regulations. FRA certifies that this rule will not have a significant economic impact on a substantial number of small entities.

In accordance with the Paperwork Reduction Act of 1995, FRA has examined this rule and determined that it does not significantly change any previously approved information collection requirements. The rule has also been analyzed in accordance with the principles and criteria contained in Executive Order 12612. There are insufficient federalism implications to warrant the preparation of a Federalism Assessment.

The Small Business Regulatory Enforcement and Fairness Act of 1996 requires Federal agencies to consider the impact of regulatory actions on small entities, and to the extent possible, minimize the economic burdens of the Federal action on small entities. FRA has determined that the technical amendments set forth in this final rule will not impose burdens on small entities subject to the requirements of the rule.

FRA finds that prior notice and public comment on the rule would be impracticable, unnecessary, and contrary to the public interest, since the rule contains only technical and editorial changes.

List of Subjects in 49 CFR Parts 219 and 240

Alcohol and drug abuse, Railroad operating procedures, Railroad safety.

Accordingly, for the reasons stated above, FRA amends 49 CFR parts 219 and 240 as follows:

PART 219—CONTROL OF ALCOHOL AND DRUG USE

1. The authority for Part 219 continues to read as follows:

Authority: 45 U.S.C. 431, 437, and 438, as amended; Pub. L. 100–342; and 49 CFR 1.49(m).

§ 219.5 [Amended]

2. Section 219.5 is amended by removing the definition for "Field Manual."

§ 219.9 [Removed]

3. Section 219.19 is removed and reserved.

4. In section 219.101, in paragraph (c), the phrase "form imposing" is corrected to read "from imposing," and a new paragraph (a)(5) is added as follows:

§ 219.101 Alcohol and drug use prohibited.

(a) * * *

(5) If an employee tested under the provisions of this part has a test result indicating an alcohol concentration below 0.02, the test shall be considered negative and is not evidence of alcohol misuse. A railroad shall not use a federal test result below 0.02 either as evidence in a company proceeding or as a basis for subsequent testing under company authority. A railroad may take further action to compel cooperation in other breath or body fluid testing only if it has an independent basis for doing so.

* * * * *

§ 219.104 [Amended]

5. In section 219.104, paragraph (a)(3)(ii) is amended by inserting the word "drug" each time after the word "pre-employment" appears and by removing the phrase "either an alcohol concentration equal to or greater than .04, or".

6. In section 219.201, paragraph (b) is amended by revising the second sentence to read as follows:

§ 219.201 Events for which testing is required.

* * * * *

(b) * * * No test shall be required in the case of an accident/incident the cause and severity of which are wholly attributable to a natural cause (e.g., flood, tornado or other natural disaster) or to vandalism or trespasser(s), as determined on the basis of objective and

documented facts by the railroad representative responding to the scene.

* * * * *

7. In section 219.203, paragraph (d)(2) is amended by revising the first sentence to read as follows:

§ 219.203 Responsibilities of railroads and employees.

* * * * *

(d) * * *

(2) If an injured employee is unconscious or otherwise unable to evidence consent to the procedure and the treating medical facility declines to obtain blood samples after having been acquainted with the requirements of this subpart, the railroad shall immediately notify the duty officer at the National Response Center (NRC) at (800) 424-8802, and FRA at (202) 632-3378, stating the employee's name, the medical facility, its location, the name of the appropriate decisional authority at the medical facility, and the telephone number at which that person can be reached. * * *

* * * * *

§ 219.205 [Amended]

8. In section 219.205, paragraph (c)(1) is amended by removing the last sentence.

9. In section 219.207, paragraph (b) is revised as follows:

§ 219.207 Fatality.

* * * * *

(b) If the local authority or custodian of the remains declines to cooperate in obtaining the necessary samples, the railroad shall immediately notify the duty officer at the National Response Center (NRC) at (800) 424-8802 and FRA at (202) 632-3378 by providing the following information:

- (1) Date and location of the accident or incident;
- (2) Railroad;
- (3) Name of the deceased;
- (4) Name and telephone number of custodian of the remains; and
- (5) Name and telephone number of local authority contacted.

* * * * *

10. Section 219.207(d) is amended by removing the phrase "and/or" and adding in its place the word "and."

11. In § 219.209, paragraph (a)(1) is amended by revising the second sentence as follows:

§ 219.209 Reports of tests and refusals.

(a)(1) * * * Notification shall immediately be provided to the duty officer at the National Response Center (NRC) at (800) 424-8802 and to the Office of Safety, FRA, at (202) 632-3378.

* * * * *

§ 219.303 [Amended]

12. Section 219.303 is amended by removing and reserving paragraphs (c) through (e).

§ 219.601 [Amended]

13. In § 219.601, paragraph (b)(2)(i) is amended by replacing the semi-colon with a period, paragraph (b)(2)(ii) is removed and reserved; and paragraph (b)(2)(iii) is removed.

§ 219.603 [Corrected]

14. In § 219.603, "§ 210.102" is corrected to read "§ 219.102".

§ 219.703 [Amended]

15. Section 219.703 is amended by removing paragraph (d).

§ 219.709 [Removed]

16. Section 219.709 is removed and reserved.

§ 219.803 [Amended]

17. Section 219.803(a) is amended by removing the phrase "with more than 400,000" and adding the phrase "that has 400,000 or more" in its place.

Appendix—B to Part 219 [Amended]

18. In Appendix B—Designation of Laboratory for Post-Accident Toxicological Testing, the corporate name, address, and telephone number of the designated laboratory is revised to read as follows:

Appendix—B to Part 219—Designation of Laboratory for Post-Accident Toxicological Testing

* * * * *

NWT Inc., 1141 E. 3900 South, Suite A-110, Salt Lake City, UT 84124, Telephone: (801) 268-2431 (Day), (801) 483-3383 (Night/Weekend).

PART 240—QUALIFICATIONS FOR LOCOMOTIVE ENGINEERS

PART 240—[AMENDED]

1. The authority citation for Part 240 continues to read as follows:

Authority: 49 U.S.C. Chs. 201-213; 49 CFR 1.49.

§ 240.119 [Amended]

2. In Section 240.119 amend paragraph (d)(3) by adding the words "alcohol and" before the words "drug tests" and remove paragraphs (d)(4) and (d)(5), and redesignate paragraph (d)(6) as paragraph (d)(4).

Issued in Washington, D.C. on November 20, 1997.

Jolene M. Molitoris,

Administrator, Federal Railroad Administration.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 222

Docket No. 97102 1250-7275-02; I.D. 092297E

RIN 0648-AK46

Endangered Fish or Wildlife; Special Prohibitions; North Atlantic Right Whale Protection

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule; temporary closure of fishery.

SUMMARY: NMFS issues this final rule to close the Mid-Atlantic and Northeast Coastal segments of the Atlantic pelagic drift gillnet fishery for swordfish, tuna, and shark through July 31, 1998. The swordfish portion of the Atlantic pelagic drift gillnet fishery has been closed since December 5, 1996, under an emergency Magnuson-Stevens Fishery Conservation and Management Act closure that expires on November 26, 1997. This action is necessary to avoid the likelihood that this fishery will jeopardize the continued existence of the northern right whale (*Eubalaena glacialis*), a species listed as endangered under the Endangered Species Act (ESA), until more long-term regulatory measures are issued.

DATES: This closure is effective from 0000 hours, local time, November 27, 1997 through 2400 hours, local time, July 31, 1998. The amendment to 50 CFR 222.34 is effective November 27, 1997 through July 31, 1998.

ADDRESSES: Copies of the May 29, 1997, Biological Opinion (BO), the August 29, 1997, amended BO, and an environmental assessment of this action may be obtained from Gregory Silber, Ph.D., Marine Mammal Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Gregory Silber, Ph.D. or Michael Payne,