

standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

19. In this *FNPRM*, the Commission explores the underpinnings of two principles underlying the regulation of the radio broadcast industry, namely diversity and competition. The principles of diversity and competition are of particular import to small entities. Thus we seek comment on the general advantages and disadvantages of relying on numerical limits or other bright-line rules to guide our public interest determination versus conducting a case-by-case competitive analysis. The framework minimizes the impact on small entities by not subjecting to further competitive analysis transactions below a threshold level.

20. This *FNPRM* invites comment on a number of alternative interpretations of the relationship between the revision of local radio ownership rules, embodied in section 202(b) of the Telecommunications Act of 1996 and the Commission's public interest mandate. Specifically, we propose alternative views on that relationship in the *FNPRM*, seek comment on these proposals, and invite additional possible interpretations of the relevant statutory provisions. Further, the *FNPRM* seeks comment on how the Commission's rules and policies concerning local radio ownership affect our goal of promoting diversity. In light of the fact that a majority of the radio broadcasting stations likely to be affected are small, we seek comment on the impact of industry consolidation on both viewpoint and source diversity.

21. In addition to the principle of diversity, this *FNPRM* seeks comment on the principle of competition in the radio broadcast industry, with regard to the definitions of the marketplace and measurement of market share.

Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rules

22. None.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 01-30527 Filed 12-10-01; 8:45 am]

BILLING CODE 6712-01-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 219

[Docket No. FRA 2001-11068, Notice No. 1]

RIN 2130-AB39

Control of Alcohol and Drug Use: Proposed Application of Random Testing and Other Requirements to Employees of a Foreign Railroad Who Are Based Outside the United States and Perform Train or Dispatching Service in the United States; Request for Comment on Even Broader Application of Rules and on Implementation Issues

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Notice of proposed rulemaking (NPRM) and request for comments.

SUMMARY: In general, FRA's regulation on the control of alcohol and drug use (49 CFR part 219) currently applies to all railroads that operate on the general railroad system of transportation in the United States. However, part 219 presently exempts certain operations by foreign railroads and certain small railroads from certain subparts. In this NPRM, FRA proposes to narrow the scope of these exemptions.

This NPRM also seeks to reopen a discussion of part 219 implementation issues, many of which were first raised in FRA's 1992 advance notice of proposed rulemaking on this subject. Finally, FRA invites comment on whether it should expand the basis for requiring post-accident testing (subpart C) and testing for cause (subpart D) of part 219 to include events that occur outside the United States.

DATES: (1) *Written Comments:* Written comments must be received by February 11, 2002. Comments received after that date will be considered to the extent possible without incurring additional expense or delay.

(2) *Public Hearing:* FRA will conduct a public hearing to provide interested parties an opportunity to comment on this proposed rule. FRA will issue a separate document in the **Federal Register** informing interested parties of the date and location of the hearing.

ADDRESSES: Anyone wishing to file a comment should refer to the FRA docket and notice numbers (FRA Docket No. FRA 2001-11068, Notice No. 1). You may submit your comments and related material by only one of the following methods:

By mail to the Docket Management System, U.S. Department of Transportation, room PL-401, 400 7th Street, SW., Washington, DC 20590-0001; or

Electronically through the Web site for the Docket Management System at <http://dms.dot.gov>. For instructions on how to submit comments electronically, visit the Docket Management System web site and click on the "Help" menu.

The Docket Management Facility maintains the public docket for this rulemaking. Comments, and documents as indicated in this preamble, will become part of this docket and will be available for inspection or copying at room PL-401 on the plaza level of the Nassif Building at the same address during regular business hours. You may also obtain access to this docket on the Internet at <http://dms.dot.gov>.

FOR FURTHER INFORMATION CONTACT: For technical issues, Lamar Allen, Alcohol and Drug Program Manager, FRA Office of Safety, RRS-11, 1120 Vermont Avenue, NW., Mail Stop 25, Washington, DC 20590 (telephone 202-493-6313). For legal issues, Patricia V. Sun, Trial Attorney, Office of the Chief Counsel, RCC-11, 1120 Vermont Avenue, NW., Mail Stop 10, Washington, DC 20590 (telephone 202-493-6038).

SUPPLEMENTARY INFORMATION¹:**Table of Contents for Supplementary Information**

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¹ Elsewhere in today's **Federal Register**, FRA published an Interim Final Rule (new 49 CFR part 241). That rule requires all dispatching of railroad operations that occur in the United States to be performed in the United States, with three limited exceptions. First, a railroad is allowed to conduct extraterritorial dispatching (dispatching of railroad operations that occur in the United States by dispatchers who are located outside the United States) in emergency situations. Second, the grandfathering provision of the rule permits continued extraterritorial dispatching of the very limited track segments in the United States that were regularly being so dispatched in December 1999. Third, certain other fringe border operations are permitted. FRA does not propose at this time to apply part 219 to the limited number of extraterritorial dispatchers covered by the grandfathering provision in part 241, but invites public comment on this issue.

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I. Introduction**A. Summary**

Paragraph (c) of § 219.3 now exempts employees of a foreign railroad whose primary reporting point is outside the United States (a foreign railroad's foreign-based employees or "FRFB employees") who perform service in the United States covered by the hours of service laws ("covered service")—train service, dispatching service, or signal service—from subparts E (identification of troubled employees), F (pre-employment testing), and G (random testing). FRA proposes to limit the exemption to FRFB signal service employees, who are currently few in number. FRA would apply all of part 219 to FRFB train and dispatching service employees, including pre-employment testing under subpart F for all individuals seeking to serve in such capacity, unless their employer qualifies as a small railroad under proposed § 219.3(b). This change, together with the Interim Final Rule discussed at footnote 1 below, and will ensure that dispatchers controlling the bulk of rail operations in the United States are covered by part 219.

Paragraph (b)(2) of § 219.3 currently exempts railroads employing not more than 15 covered service employees from the requirements of subparts D (testing for cause), E, F, and G, and paragraph (b)(3) exempts railroads having fewer than 400,000 total manhours from the requirements of subpart I (annual reports). In this NPRM, FRA proposes to amend paragraphs (b)(2) and (3) to take into account a railroad's operations outside the United States in determining its size and eligibility for the "small railroad" exemptions.

As mentioned above, FRA also invites a discussion of part 219 implementation issues, and comment on whether it should expand the basis for requiring post-accident testing (subpart C) and

testing for cause to include events that occur outside the United States.

B. Abbreviations

The following abbreviations are used with some frequency in this preamble and are collected here for the convenience of the reader:

ANPRM Advance Notice of Proposed Rulemaking
 CFR Code of Federal Regulations
 ch. chapter
 DOT United States Department of Transportation
 FAA Federal Aviation Administration
 FHWA Federal Highway Administration
 FMCSA Federal Motor Carrier Safety Administration
 FR **Federal Register**
 FRA Federal Railroad Administration
 FRFB foreign railroad's foreign-based
 HHS United States Department of Health and Human Services
 MRO Medical Review Officer
 NPRM Notice of Proposed Rulemaking
 Pub. L. Public Law
 OST Office of the Secretary, United States Department of Transportation
 SAP Substance Abuse Professional
 U.S.C. United States Code

II. Alcohol Abuse and Illegal Drug Use by Train Employees and Dispatching Service Employees Pose Significant Dangers to the Safety of Railroad Operations

A. Safety-Sensitive Role of Train Employees

Train employees include engineers, conductors, switchmen, trainmen, brakemen, and hostlers. See statement of agency policy and interpretation of the hours of service laws (49 U.S.C. ch. 211 and related provisions in chs. 201 and 213), including 49 U.S.C. 21101(5) and 21103, at 49 CFR part 228, appendix A. These train employees are responsible for safely assembling, disassembling, and operating passenger and freight trains, including working on and around the equipment. Train crew members can become fatigued because of the long and varied hours they are expected to work. Because trains have long stopping distances, a small mistake in application of power or brakes by an engineer or the misreading or forgetting of a signal or a mandatory directive by any of the crew could have serious consequences. For example, such a small mistake could cause the train to run over a crew member, or to exceed its authorized speed and possibly derail or collide with another train, with resulting injuries or death to train crews, passengers, or both, and possible harm to surrounding communities by

the release of hazardous materials. These errors by the train crew could also cause their train to enter into a track segment without authority, endangering authorized occupants of the track such as another train or a roadway work group. The crew's failure to sound the locomotive horn at a grade crossing could endanger motorists. Again, the long stopping distances required by trains can make it very difficult for a crew to recover from such mistakes or omissions in time to avoid accidents and consequent property damage, injury, or death. Train crew members whose judgment and motor skills are impaired by the use of alcohol or drugs pose a significant safety risk to themselves and others.

Adding to the criticality of the train crew's need to be subject to an effective safety program that encourages them to be in the best possible physical and mental state is the environment in which they work. Road train crews and road switching crews in particular (as opposed to switch crews who work in yards) normally work independent of supervision, without the supervisory monitoring that could assist in identifying substance-abuse symptoms, such as poor work performance, and allowing subsequent timely remedies. Misuse of drugs and alcohol is often difficult to identify under the best of circumstances, and this is particularly true of drugs such as cocaine, for which the chronic or after-effects of the drug may be of greater concern than the acute effects. Even practiced, functional alcoholics can sometimes avoid detection over long periods of time.

Train crews do not experience the deterrence provided by the timely oversight of a supervisor because of their normal, independent working conditions. Random alcohol and drug testing of these train employees helps to provide the necessary deterrent effect.

B. Safety-Sensitive Role of Dispatching Service Employees

Proper dispatching is essential for safe railroad operations. Because trains have long stopping distances, train operations are generally not conducted by line of sight. Rather, the route ahead must be cleared for the train's movement. Switches must be aligned properly along the route. Potentially conflicting movements must be guarded against in order to prevent collisions. Dispatching service employees actually "steer" the train by remotely aligning switches; these dispatchers determine whether the train should stop or move, and if so, at what speed, by operating signals and issuing train orders and other forms of movement authority or speed

restriction. See 49 U.S.C. 21101(2), 21105 and 49 CFR part 228, appendix A. In addition, dispatchers protect track gangs and other roadway workers from passing trains by issuing authorities for working limits. Train crews on board locomotives carry out the dispatchers' instructions and are responsible for actually moving the train, but dispatchers make it possible to do so safely. A dispatcher's judgment must be sound if railroad operations are to be conducted safely.

C. The Dangers to Railroad Operations Posed by Alcohol Abuse and Illegal Drug Use by Train Employees and Dispatching Service Employees

Alcohol and drug use results in safety risks and consequences that are unacceptable in the railroad environment. The loss of life, injuries, and property damage in accidents caused by train employees or dispatchers impaired by alcohol or drugs or both has been well documented. See 49 FR 24254-24264 (June 12, 1984) and 53 FR 47105 (Nov. 21, 1988). One of the most serious of these accidents in the United States was the January 4, 1987 train accident at Chase, Maryland, in which 16 persons were killed and 174 injured when a Conrail train passed an absolute restrictive signal and went through a switch into the path of a high-speed Amtrak train. The engineer and conductor of the Conrail train admitted smoking marijuana immediately prior to the accident.

Drug and alcohol abuse in the railroad industry is not limited to the United States. It also occurs in other countries, as evidenced by a 1987 Canadian survey commissioned by a Canadian Task Force on the Control of Drug and Alcohol Abuse in the Railway Industry. In that survey, 1,000 randomly-selected Canadian railway workers, including train employees, were interviewed by telephone. The survey revealed, among other things, that 20 percent of those surveyed had come to work feeling the effects of alcohol and nine percent felt that their use of alcohol had at some time compromised job safety. In addition, 2.5 percent admitted to using illegal drugs during their shift. As the following passage from a recent Canadian arbitration award involving CN illustrates, drug and alcohol abuse problems continue to exist in Canada:

As related in the submission of the employer's counsel, CN has extensive experience in drug and alcohol testing over the past decade, including circumstances of hiring, promotion, reasonable cause and post accident testing. Its data confirm a relatively high incidence of positive test results across

Canada, exceeding ten per cent over all categories of testing in Western Canada. While positive drug tests obviously do not confirm that individuals in the railway industry have necessarily used illegal drugs while at work, a substantial number of awards of the Canadian Railway Office of Arbitration provide a well-documented record of cases which reveal the unfortunate willingness of some employees to have drugs or alcohol in their possession while at work, to use them while at work, or to report for work under their influence. * * *

In the Matter of an Arbitration Between Canadian National Railway Company and National Automobile, Aerospace, Transportation and General Workers Union of Canada (Union) and Canadian Council of Railway Operating Unions (Intervener), Re: the Company's Drug and Alcohol Policy at 123-24, Arbitrator Michel G. Picher (July 18, 2000). The drug and alcohol abuse problem in Canada is relevant to the current problem posed by FRFB employees who are performing train or dispatching service in the United States and helps demonstrate the need for more comprehensive drug and alcohol testing of such employees.

III. Congress Has Determined That Comprehensive Alcohol and Drug Testing (Including Random Testing) Is Needed in the Railroad Industry; FRA's Regulations on Control of Alcohol and Drug Use (49 CFR Part 219) Require Such Comprehensive Testing for Safety-Sensitive Employees of United States Railroads

In 1991, the many alcohol- and drug-related railroad accidents caused Congress to require FRA to expand its existing comprehensive drug and alcohol program (and to strengthen FRA's 1988 regulations requiring random drug testing) because Federal regulations and the industry's own rule on drug and alcohol usage had not proven to be totally effective.² Congress determined that alcohol abuse and illegal drug use posed significant dangers to the safety of railroad operations, and mandated DOT to establish regulations to eliminate the abuse of alcohol and use of illegal drugs (whether on or off duty), by individuals involved in railroad operations. In passing the Omnibus Transportation Employee Testing Act of 1991, Pub. L. No. 102-143 (Omnibus Act), Congress specifically found that—

(1) Alcohol abuse and illegal drug use pose significant dangers to the safety and welfare of the Nation;

² The railroad industry has long had in place a common rule (Rule G) prohibiting employees from using, possessing, or being under the influence of intoxicants or other drugs while on duty or subject to duty. Rule G can be tracked back to at least 1849.

(2) Millions of the Nation's citizens utilize transportation by aircraft, railroads, trucks, and buses and depend on the operators of aircraft, trains, trucks, and buses to perform in a safe and responsible manner;

(3) The greatest efforts must be expended to eliminate the abuse of alcohol and use of illegal drugs (whether on duty or off duty), by those individuals who are involved in the operation of aircraft, trains, trucks, and buses;

(4) The use of alcohol and illegal drugs has been demonstrated to affect significantly the performance of individuals, and has been proven to have been a critical factor in transportation accidents;

(5) The testing of uniformed personnel of the Armed Forces has shown that the most effective deterrent to abuse of alcohol and use of illegal drugs is increased testing, especially random testing;

(6) Adequate safeguards can be implemented to ensure that testing for abuse of alcohol or use of illegal drugs is performed in a manner which protects an individual's right to privacy, ensures that no individual is harassed by being treated differently from other individuals, and ensures that no individual's reputation or career development is unduly threatened or harmed; and

(7) Rehabilitation is a critical component of any testing program for abuse of alcohol or use of illegal drugs, and should be made available to individuals, as appropriate.

49 U.S.C. app. 1434 note.

The Omnibus Act, as subsequently recodified in 1994 and amended in 1995, requires the Secretary of Transportation to issue regulations relating to alcohol and drug use in railroad operations (49 U.S.C. 20140, "section 20140"), aviation (49 U.S.C. 45101–45106), motor carriers (49 U.S.C. 31306), and mass transportation (49 U.S.C. 5331). Pub. L. No. 103–272 (1994); Pub. L. No. 104–59 (1995). Section 20140(b) provides that—* * *

(b) General.—(1) In the interest of safety, the Secretary of Transportation shall prescribe regulations and issue orders, . . . related to alcohol and controlled substances use in railroad operations. The regulations shall establish a program requiring—

(A) A railroad carrier to conduct preemployment, reasonable suspicion, random, and post-accident testing of all railroad employees responsible for safety-sensitive functions (as decided by the Secretary) for the use of a controlled substance in violation of law or United States Government regulation, and to conduct reasonable suspicion, random, and post-accident testing of such employees for the use of alcohol in violation of law or a United States Government regulation; and

(B) When the Secretary considers it appropriate, disqualification for an established period of time or dismissal of any employee found—

(i) To have used or been impaired by alcohol while on duty; or

(ii) To have used a controlled substance, whether on or not on duty, except as allowed

for medical purposes by law or a regulation or order under this chapter.

(2) When the Secretary of Transportation considers it appropriate in the interest of safety, the Secretary may prescribe regulations and issue orders requiring railroad carriers to conduct periodic recurring testing of railroad employees responsible for safety-sensitive functions (as decided by the Secretary) for the use of alcohol or a controlled substance in violation of law or a Government regulation.

In establishing these requirements, the Secretary is to act consistent with the international obligations of the United States, and to take foreign countries' laws and regulations into account. 49 U.S.C. 20140(e). Part 219 implements the requirements of the Omnibus Act.

In general, FRA's regulation on the control of alcohol and drug use (49 CFR part 219) currently applies to all railroads except a railroad that operates only on track inside an installation which is not part of the general railroad system of transportation or a rapid transit operation in an urban area that is not connected to the general railroad system of transportation. However, part 219 currently exempts certain operations by foreign railroads and certain small railroads from certain subparts. As discussed later in this notice, FRA proposes to narrow the scope of most of these exemption provisions.

Under part 219, dispatcher and train employees of a domestic railroad that perform their duties in the United States are generally subject to random, reasonable suspicion, reasonable cause, return-to-duty, follow-up, and post-accident drug and alcohol testing, as well as pre-employment testing for drugs.³ See subparts B, C, D, F, and G of part 219. Post-accident testing is required for a dispatcher or train employee who is directly and contemporaneously involved in the circumstances of any train accident meeting FRA testing thresholds. See subpart C. A dispatcher or train employee found to have violated 219.101 or 219.102 of FRA's drug and alcohol rules is required to be immediately removed from covered service, and the railroad must follow specified procedures, including rehabilitation and return-to-duty and follow-up testing requirements, before returning the dispatcher or train employee to covered service. A dispatcher or train employee who refuses to cooperate with providing a required sample is required to be

removed from covered service for a nine-month period and to complete a rehabilitation program. See subpart B. Additionally, employers of such dispatchers and train crews operating in the United States generally must provide self-referral and co-worker reporting (self-policing) programs for their employees (subpart E), submit random alcohol and drug testing plans for approval by FRA (subpart G), conduct random testing under part 219 and DOT procedures found in 49 CFR part 40 (part 40) (subpart H), submit annual reports (subpart I), and maintain program records (subpart J).⁴ The reports and records required by part 219, especially subparts H through J are necessary for audit purposes in order to demonstrate the employer's compliance with part 219.

FRA's broad-based, multi-component alcohol and drug program has reduced alcohol and drug abuse in the railroad industry (the original regulations were implemented in 1986, and random alcohol testing began in 1994).

- In 1987, testing for cause conducted under FRA and railroad programs resulted in a 4.0 percent positive rate for alcohol and a 6.9 percent positive rate for drugs. These rates have declined each year, with the 1998 testing for cause resulting in a 0.36 percent positive rate for alcohol and a 0.95 percent rate for drugs.

- Random drug testing began in 1989. The first full year's data for 1990 indicated a 1.04 percent rate, declining in 1995 to a 0.93 percent rate, and to a 0.77 percent rate in 1998.

- Random alcohol testing began in 1994, with the first full year's data for 1995 resulting in a 0.42 percent rate, which has declined each year to a 0.003 percent rate for 1998.

FRA post-accident testing data provide perhaps the most stark and compelling proof of the decline in alcohol and drug abuse in the railroad industry. In its post-accident testing program, in which testing is triggered only by significant accidents, FRA may use lower drug detection levels (cutoffs) and test for more substances than those tested for in other types of FRA testing. Post-accident testing data are the most scrutinized because FRA reviews each testing event, and tests each specimen in a designated contract laboratory, which FRA inspects quarterly. Furthermore, because the program has been in effect since 1986, post-accident testing data provide the longest trend line.

³ Pre-employment testing for alcohol, unlike pre-employment testing for drugs, is authorized but not required (see § 219.502)

⁴ For example, Subpart I requires larger railroads to summarize and submit the results of their alcohol and drug misuse programs annually to FRA for review.

An analysis of the post-accident testing data in the chart below demonstrates how positive test results have dramatically declined since FRA's program started. In 1987, the first year of the program, 42 employees produced a positive specimen, resulting in a post-accident positive rate of 0.4 percent for alcohol and 5.1 percent for drugs; by 1998 only four employees produced a positive specimen, resulting in positive rates of 0.0 percent for alcohol and 2.6 percent for drugs.

As shown in the post-accident testing chart, in each of the fields—"Qualifying Events," "Employees Tested," and "Employees Positive . . ."—FRA has achieved a desired reduction, despite a significant increase in rail traffic. The deterrent effect of random drug testing, which was implemented in 1988–1989,

most certainly influenced the dramatic reduction in post-accident positives from 41 in 1988 to only 17 in 1990. Additionally, in the eight years from 1987 through 1994, there were 20 post-accident alcohol positives, but only two post-accident alcohol positives in the succeeding four years after implementation of random alcohol testing in 1994. Although some refinement of regulatory requirements over the years has reduced the class of qualifying events (damages criteria for two of the qualifying events have been increased), the remaining events are those for which higher positive rates would be expected due to a higher component of likely human factor involvement.

FRA is aware that many factors have contributed to these results and

probably influenced movement in both directions. The number of employees tested has decreased due to fewer qualifying events and crew consist reductions. For Federal workplace detection programs such as FRA's (other than FRA post-accident testing under subpart C), Health and Human Services (HHS) has reduced the detection cut-off level for marijuana metabolites and has increased the detection levels for opiates. Another factor likely to have contributed to higher industry positive rates is the constant improvement in railroad random testing programs. Nonetheless, testing data remain the best indicator of the success that the comprehensive programs mandated by FRA have had in significantly reducing alcohol and drug abuse in the railroad industry.

FRA POST-ACCIDENT TOXICOLOGICAL TESTING RESULTS (1987–1998)

Year	Qualifying events	Employees tested	Employees positive one/more substances [number (A=alcohol; D=drug)]
1987	179	770	42 (3A–39D)
1988	178	682	41 (3A–38D)
1989	161	607	24 (6A–18D)
1990	149	524	17 (1A–16D)
1991	157	552	8 (2A–6D)
1992	109	332	7 (1A–6D)
1993	128	403	8 (2A–6D)
1994	115	294	7 (2A–5D)
1995	82	225	2 (0A–2D)
1996	73	197	1 (0A–1D)
1997	86	240	3 (2A–1D)
1998	68	153	4 (0A–4D)

Note on this chart, concerning 49 CFR 219, subpart C—Post-Accident Toxicological Testing:

The positives reflected in the chart indicate the presence of drugs or alcohol in a covered employee during the event. A positive result does not necessarily indicate a causal relationship with the accident. Causal determinations are made only after a thorough review of all factors that may have contributed to the accident.

With certain stated exceptions, post-accident toxicological tests are required to be conducted for the following events occurring in the United States:

1. Major Train Accident (involving damage exceeding the current FRA reporting threshold (\$6,600 in 1998)) involving:

- (a) a fatality;
- (b) a release of hazardous material lading from railroad equipment resulting in either an evacuation or a reportable injury; or
- (c) damage to railroad property of \$1,000,000 or more.

2. Impact Accident (as defined in § 219.5 involving damage exceeding the FRA reporting threshold) involving:

- (a) a reportable injury; or
- (b) damage to railroad property of \$150,000 or more.

3. Fatal Train Incident: fatality to any on-duty railroad employee involving movement of on-track equipment with damage not exceeding the reporting threshold.

4. Passenger Train Accident: passenger train involved in an accident that exceeds the reporting threshold and results in an injury reportable to FRA under 49 CFR part 225.

See 49 CFR 219.201(a). Rail/highway grade crossing accidents and accidents wholly resulting from natural causes (e.g., tornado), vandalism, or trespassing are exempt from FRA post-accident testing. See 49 CFR 219.201(b). For a major train accident, all train crewmembers must be tested, but any other covered employees (e.g., dispatchers, signalmen) determined not to have had a role in the cause or

severity of the accident are not to be tested. See 49 CFR 219.201(c)(2).

IV. Currently, a Foreign Railroad's Foreign-Based (FRFB) Employees Who Perform Service Covered by the Hours of Service Laws in the United States Are Exempt by § 219.3(c) from Subparts E (Identification of Troubled Employees), F (Pre-employment Testing), and G (Random Testing)

A. FRA's 1992 Advance Notice of Proposed Rulemaking and 1994 Issuance of Current Exemption at § 219.3(c)

Foreign railroads (railroads incorporated in a place outside the United States) have been subject to portions of FRA's regulations on the control of alcohol and drug use (part 219) since 1986. 51 FR 3973, Jan. 31, 1986. In 1992, FRA published an advance notice of proposed rulemaking (ANPRM) asking for comment on the international application of the additional areas of drug and alcohol testing discussed in the Omnibus Act.

The ANPRM discussed departmental issues because the Federal Aviation Administration (FAA) and the Federal Highway Administration (FHWA, whose Office of Motor Carrier Safety is now the Federal Motor Carrier Safety Administration (FMCSA)), concurrently published separate ANPRMs on international application of the Omnibus Act.

As noted in FRA's ANPRM, section 4 of the Omnibus Act amended then section 202(r)(1) of the Federal Railroad Safety Act of 1970, as well as sections of the Federal Aviation Act and the Commercial Motor Vehicle Safety Act of 1988. 49 U.S.C. 20140, superseding 45 U.S.C. 432(r). Addressing concerns of all three modal administrations, the ANPRM stated that:

Under these similar provisions, FAA, FRA and FHWA have the authority and obligation to require drug and alcohol tests for safety sensitive employees of foreign employers. The FAA provisions specifically extend coverage to foreign air carriers, and the FHWA and FRA provisions cover motor carriers and railroads, respectively, which definitions include employers based in this country or a foreign country. Moreover, the legal authority extends to all kinds of testing required by the Act: Reasonable suspicion, post-accident, preemployment, and random (subject to U.S. international obligations).

It is the Department's policy to carry out the Act's requirements using a territorial jurisdiction approach. That is, the Department interprets its statutory authority and obligation for drug and alcohol testing to apply to foreign employers who conduct operations in the United States, with respect to those operations. This does not mean that all operations of such a transportation employer would be subject to the rules. For example, a foreign employer's operations within its own country would not be subject to these rules. Following the same policy, only those employees of a foreign transportation employer who perform safety-sensitive functions in operations within the U.S. would be subject to testing.

For each of the three industries involved, the Act requires the Department to act consistent with the international obligations of the U.S. and, to take foreign countries' laws and regulations into account.

(57 FR 59606, Dec. 15, 1992).

To implement Congress' intent, FRA proposed several rules (which later became final rules) and asked in its ANPRM for comments on whether FRA should extend the reach of all its substance abuse rules to FRFB employees who perform, or are assigned to perform, train service or other service covered by the hours of service laws (signal service or dispatching service) in the United States. The ANPRM also asked for information on any treaty obligations or principles of international law that could affect FRA's

implementation of the Omnibus Act. Questions posed in the ANPRM are discussed in Section VIII of this preamble.

FRA received no comments in response to this ANPRM. Based on this lack of response and the perceived lack of interest in these issues that it implied, FRA decided not to proceed with a separate rulemaking on extraterritorial application. Accordingly, in 1994, FRA withdrew the ANPRM and instead, in its final rule implementing the Omnibus Act, codified at § 219.3(c) the scope of extraterritorial application already in effect. 59 FR 7448, 59 FR 7482; Feb. 15, 1994.

B. Scope of Existing Exemption at § 219.3(c)

Section 219.3(a) makes all of the requirements of part 219 applicable to railroads that operate on the general system and to commuter railroads unless these railroads are exempted by paragraphs (b) (dealing with small railroads) or (c). Paragraph (c) explicitly exempts foreign railroads from only subparts E through G, therefore leaving them subject to subparts A, B, C, D, H, I, and J. Section 219.3(c) reads as follows:

Subparts E [self-referral and co-worker report policy], F [pre-employment testing] and G [random testing] do not apply to operations of a foreign railroad conducted by covered service employees whose primary place of service ("home terminal") for rail transportation services is located outside the United States. Such operations and employees are subject to subparts A, B, C, and D when operating in United States territory.

The existing paragraph (c) exemption from subparts E through G applies to "covered service employees"—train crews, dispatchers, and signal maintainers subject to the hours of service laws at 49 U.S.C. ch. 21101—who are employed by a foreign railroad and whose primary reporting point is outside the United States. *See, e.g.,* 57 FR 59606 (Dec. 15, 1992); 59 FR 7449–7450 (Feb. 15, 1994); and Section X of the preamble, "Section-by-Section Analysis," *infra*. The following categories of employees do not fall within the exemption and are, therefore, subject to part 219 in its entirety, unless their employing railroad qualifies as a small railroad under § 219.3(b): (1) An employee of a United States railroad whose primary reporting point is outside the United States but who enters the United States to perform, or is assigned to perform, service subject to the hours of service laws; and (2) an employee of a foreign or domestic railroad whose primary reporting point

is in the United States and who performs, or is assigned to perform, service subject to the hours of service laws.

V. FRA Is Proposing To Narrow the Scope of § 219.3(c) and To Apply All of Part 219 to FRFB Employees Who Perform Train Service or Dispatching Service in the United States, and Pre-employment Testing to All Individuals Seeking To Perform Such Service for the First Time, Unless Their Employer Would Be Exempt Under Proposed § 219.3(b) (Dealing with Small Railroads)

Recent trends in the organization of North American railroads and the expansion of trade among the United States, Mexico, and Canada under such treaties as the North American Free Trade Agreement, together have resulted in a growth, and potential for further growth, in multinational railroad operations. *See* the preamble to FRA's Interim Final Rule (49 CFR part 241) published in today's edition of the **Federal Register** for a discussion of organizational trends, current and potential level of cross-border train dispatching operations, and other issues related to this NPRM. The Interim Final Rule points out the increasing prospect that, if unrestrained, foreign railroads will resort to the use of foreign-based dispatchers who are not subject to the same safety laws and regulations as United States-based dispatchers, to control rail operations in the United States.

Because of the existing level of cross-border train operations involving FRFB train crews, the potential for increase in such operations, and the increasing risk of foreign railroads using foreign-based dispatchers to control rail operation in the United States, and the resulting increased safety risk posed by such actions, FRA now proposes to narrow the scope of all three provisions of § 219.3 that create exemptions from portions of part 219.⁵ With regard to the most important of these exemptions, § 219.3(c), FRA would limit the exemption from subparts E, F, and G to FRFB signal service employees, who are currently few in number. FRA would apply all of part 219 to FRFB train and dispatching service employees, including pre-employment testing under subpart F for all individuals seeking to serve in such capacity, unless their

⁵ In the proposed rule, FRA repeats verbatim the existing exemption provided by § 219.3(b)(1) from all of part 219, which is for a railroad whose operations are confined to an installation that is not part of the general railroad system of transportation.

employer qualifies as a small railroad under proposed § 219.3(b).

Furthermore, FRA proposes to reduce the scope of the two exemptions at §§ 219.3(b)(2) and 219.3(b)(3) to make sure that they provide relief only to relatively small railroads, as originally intended, and that a railroad's operations outside the United States are taken into account in determining the size of the railroad for purposes of those exemptions. Currently, § 219.3(b)(2) provides relief from subparts D, E, F, and G for a railroad that both (1) does not operate on the track of another railroad except for purposes of interchange and (2) has 15 or fewer employees whose duties are covered by the hours of service laws. The other exemption, at § 219.3(b)(3), provides relief from subpart I (annual reports) for a railroad with fewer than 400,000 manhours. (See Section X of the preamble, "Section-by-Section Analysis," *infra*.)

In the context of § 219.3(c), and omitting the special case involving pre-employment testing, the term "FRFB train employee" or "FRFB dispatching service employee" basically refers to an individual who meets all of the following three criteria. First, the individual must be employed by a foreign railroad or by a contractor to a foreign railroad. If the individual is employed by a United States railroad (a railroad incorporated in the United States) or a contractor to a United States railroad, the exemption in § 219.3(c) from subparts E through G does not apply. Second, the individual's primary place of service for rail transportation services ("home terminal") must be located outside the United States. If the individual's home terminal is inside the United States, § 219.3(c) does not apply. Third, the individual must either—

(a) In the case of a train service employee, be engaged in or connected with the movement of a train, including a hostler (49 U.S.C. 21101(5)), or

(b) In the case of a dispatching service employee, report, transmit, receive, or deliver orders related to or affecting train movements (49 U.S.C. 21101(2))—in the United States during a duty tour or be assigned to perform such train service or dispatching service in the United States during a duty tour.

As previously noted, train and dispatching service in the United States conducted by FRFB employees who perform, or are assigned to perform, such service in the United States is already subject to subparts A (general requirements and definitions), B (prohibitions), C (post-accident toxicological testing), D (testing for cause), H (testing procedures), I (annual

report), and J (recordkeeping procedures), unless their employer falls within an exemption at § 219.3(b).

FRA proposes to amend the exemption at § 219.3(c) to limit it to FRFB signal maintainers. Train operations and dispatching service in the United States performed by FRFB train or dispatching service employees, who are currently subject to all of part 219 other than subparts E (self-referral and co-worker report programs), F (pre-employment drug tests), and G (random testing), would become subject to these subparts as well. It should be noted that even though, broadly speaking, subparts H, I, and J currently apply to operations in the United States by FRFB train crews and dispatching service employees, some specific requirements in subparts H, I, and J do not by their terms apply to these operations because the requirements are partly or wholly triggered only if the employing railroad is required to do pre-employment or random testing. See the annual reporting requirements in subpart I at, e.g., §§ 219.801(d)(3)–(5) and 219.803(e)(3)–(5), for information by type of testing; § 219.803(d)(6), for number of persons denied a position as a covered employee following a pre-employment drug test; and § 219.801(d)(12), for number of covered employees who refused to submit to a random alcohol test required by part 219. By making pre-employment and random testing requirements applicable to such operations, the proposed amendments would trigger these additional reporting requirements in subpart I, increase the scope of the foreign railroad's activities subject to subpart H and 49 CFR part 40 testing safeguards and procedures, and require the keeping of additional records under subpart J.

To comply with these proposed requirements, foreign railroads that use FRFB train or dispatching service employees to conduct train operations in the United States would have to conduct pre-employment drug tests (subpart F) and submit random alcohol and drug testing plans for approval by FRA (subpart G) for these employees. To meet the same requirements already applicable to railroads with United States-based train and dispatching service employees and to United States railroads with foreign-based train and dispatching service employees, FRA would also require foreign railroads employing or contracting for the services of FRFB train or dispatching service employees operating in the United States to comply with subpart E by providing self-referral and co-worker report programs for such operations and

employees. Finally, as indicated earlier, a foreign railroad's responsibilities to comply with subparts H, I, and J with respect to such operations and employees would become more complex because subpart H would also govern random and pre-employment testing, subpart I would require additional specific information on random or pre-employment tests if random or pre-employment testing is required, and subpart J would call for certain records for random and pre-employment tests. FRA's intent is to ensure that, unless exempted by proposed § 219.3(b), part 219 is fully applicable to all employees who perform, or are assigned to perform, train or dispatching service in the United States subject to the hours of service laws at 49 U.S.C. ch. 211, whether they are foreign- or domestically-based and whether employed by a foreign or a domestic railroad.

VI. Whether and to What Extent Extraterritorial Dispatchers or FRFB or Extraterritorial Signal Maintainers Should Be Covered by Part 219

FRA's Interim Final Rule, also published in this edition of the **Federal Register**, generally requires dispatchers controlling United States railroad operations to be located in the United States; by way of exception, the rule (1) conditionally permits extraterritorial dispatching in an emergency, (2) permits continued extraterritorial dispatching of very limited track segments in the United States that were normally being so dispatched in December 1999, and (3) conditionally permits extraterritorial dispatching of certain other fringe border operations. The Interim Final Rule invites comments on whether FRA should adopt an alternative regulatory scheme under which extraterritorial dispatching would be permitted; under this alternative scheme extraterritorial dispatchers may be subject to part 219. As discussed in the Interim Final Rule, an extraterritorial dispatcher of railroad operations in the United States, who is not a "covered employee" and therefore generally outside the scope of application of part 219, could compromise safety in the United States if impaired by drugs or alcohol. Because of the *de minimis* nature of the exceptions to the prohibition against extraterritorial dispatching, FRA does not propose to apply any or all of part 219 to the few employees permitted to conduct extraterritorial dispatching under the Interim Final Rule based on that service. FRA invites comment on this issue.

FRA's safety analysis of extraterritorial dispatchers parallels its safety analysis of extraterritorial and FRFB signal maintainers. An impaired extraterritorial signal maintainer responsible for signals controlling rail operations in the United States could adversely impact safety in the United States without ever physically entering United States territory. An extraterritorial signal maintainer, who by definition is not a "covered employee" and therefore who is normally outside the scope of application of part 219, or an FRFB signal maintainer, who is exempt from subparts E, F, and G under § 219.3(c), could endanger railroad operations in the United States. For this reason, FRA considered proposing an expanded application of part 219 to cover such extraterritorial or FRFB signal maintainers. It appears that this activity is also *de minimis*. To FRA's knowledge, no FRFB signal maintainer comes into the United States to maintain a railroad signal system on a regular basis, and only a few FRFB signal maintainers do so on an occasional basis. This infrequent performance of signal service in the United States by FRFB signal maintainers occurs in the areas of Buffalo and Niagara Falls, New York; Detroit, Michigan; and Sarnia, Michigan. After examining the *de minimis* impact of such extraterritorial or FRFB signal maintainers on rail operations in the United States, FRA has decided that such a proposal is not necessary at this time. However, commenters are invited to address whether any or all of part 219 should be applied to extraterritorial signal maintainers and whether subparts E, F, and G should be applied to FRFB signal maintainers who perform signal service in the United States. (Again, it should be noted that signal maintainers based in the United States, whether employed by United States or foreign railroads, remain, as always, fully subject to part 219 with respect to their covered service (which by definition is in the United States) unless exempt under a provision of existing § 219.3(b). Likewise, signal maintainers employed by United States railroads but based outside the United States remain subject to part 219 in its entirety with respect to their covered service in the United States unless otherwise exempt.)

VII. Whether To Broaden the Application of Other Part 219 Requirements

The preceding portions of this preamble discuss the issue of whether and how to broaden the application of

principally random testing and pre-employment testing and of how to narrow three exemption provisions in § 219.3. In this portion of the preamble, FRA solicits comment on whether to broaden the application of other part 219 requirements to reach operations and employees outside the United States.

For example, FRA invites comment on whether it should expand the basis for requiring post-accident testing under subpart C and testing for cause under subpart D to events that occur outside the United States and, if so, what those events should include. Currently, under part 219, FRA limits qualifying events for post-accident and "for cause" testing to those within the borders of the United States. Should FRA expand post-accident testing to include FRFB train employees who are involved in an otherwise qualifying event while in transit to or from the United States?

If FRA decides against such an expansion, the agency will likely amend—

- § 219.201 to make explicit that events for which post-accident toxicological testing under subpart C is required are limited to those within the borders of the United States; and
- §§ 219.300 and 219.301 to clarify that events for which reasonable suspicion testing is mandatory and reasonable cause testing is authorized are limited to those that occur within the borders of the United States.

VIII. Implementation Issues Raised by Extraterritorial Application of Part 219

In its 1992 ANPRM, FRA raised for comment several practical issues associated with the extraterritorial application of part 219, including:

- How would foreign employers ensure that an employee who had tested positive did not engage in operations in the United States until after his or her reinstatement requirements had been met?
- How would FRA monitor or enforce compliance outside the United States?

As in its 1992 ANPRM, FRA seeks comment on potential implementation issues. FAA and FMCSA, the other DOT modes covered by the Omnibus Act, have taken divergent approaches to extraterritorial application of their regulations. (The Federal Transit Administration has not addressed this issue since to date there are no cross-border transit operations affecting United States transit safety.) Citing work in progress by the International Civil Aviation Organization, FAA withdrew a proposed rulemaking that would have required foreign air carriers to establish alcohol and drug testing programs for

their employees performing safety-sensitive aviation functions within the United States (65 FR 2079, Jan. 13, 2000).

FMCSA, which, like FRA, does not have an international treaty organization for its regulated industry, adopted an approach similar to what FRA is proposing. FMCSA has applied all of 49 CFR part 382 (FMCSA's equivalent to part 219) to persons and employers of such persons who operate a commercial motor vehicle in commerce in the United States, including foreign-domiciled employees. See 49 CFR 382.115. In the preamble to its final rule (60 FR 49321, 49323, Sept. 22, 1995), FMCSA's predecessor agency, the FHWA, stated that "[a]ll drivers operating in the United States are to be subject to controlled substances and alcohol testing, regardless of domicile. The safety concerns which led to the Omnibus Act pertain equally to United States and foreign-based drivers."

FRA is now reconsidering many of the issues first raised in its ANPRM about the implementation of part 219 testing in foreign countries, and invites comments on extraterritorial application issues. FRA post-accident toxicological testing, unlike other testing under part 219, does not parallel part 40 procedures. See part 219, subpart C. In its investigation of a qualifying accident, FRA may require testing for different substances (e.g., carbon monoxide in the remains of a deceased employee) or testing at lower levels of detection than those required under part 40. FRA therefore contracts out all post-accident testing to an HHS-certified special laboratory that meets its detailed testing specifications (currently NWT Inc. in Salt Lake City, Utah). For example, if based on comments received on this NPRM, FRA decides to apply part 219 to extraterritorial signal maintainers and an extraterritorial signal maintainer could have contributed to a qualifying accident on United States soil, is there a way to assure that the employing railroad will ship the maintainer's specimens to FRA's designated post-accident laboratory? Although several Canadian laboratories have been deemed equivalent by HHS, post-accident testing requires testing specifications beyond those of part 40.

Furthermore, clearance through customs and international mail may delay shipment of body fluid and tissue specimens, and may also cause problems with the timely transmission of specimens and their accompanying paperwork. FRA also seeks comment on whether employing railroads in foreign countries would have difficulty obtaining and using evidential breath

testing devices that are on the National Highway Traffic Safety Administration Conforming Products List, as required for part 40 alcohol testing.

IX. In Conclusion, FRA Believes That, Unless Exempted by Proposed § 219.3(b), All of Part 219 Should Apply to FRFB Employees Who Perform Train Service or Dispatching Service in the United States and Pre-Employment Testing Should Apply to Applicants To Perform Such Service

Train and dispatching service employees operating in the United States whose judgment and motor skills are impaired by the use of alcohol or drugs pose a significant safety risk to themselves and others. Significant portions of FRA's highly successful, broad-based, multi-component part 219 alcohol and drug program, including random drug and alcohol testing, do not currently apply to FRFB train and dispatching service employees operating in the United States. If such employees are impaired by alcohol or drugs, they can jeopardize the safety of United States railroad operations. Since train employees do not experience the deterrence provided by the timely oversight of a supervisor because of their normal, independent working conditions, random testing is especially necessary to provide the necessary deterrent effect. With the existing levels of cross-border train operations and the potential for increases in such operations, FRA believes that it is necessary to narrow the scope of three exemptions from part 219 and (absent exemption by proposed 219.3(b)) to apply all of its part 219 program to FRFB train and dispatching service employees operating in the United States, and to apply pre-employment testing to individuals seeking to perform such service. The proposed amendments to part 219 (together with the Interim Final Rule on extraterritorial dispatching published elsewhere in this issue), will help ensure the safety of railroad operations in the United States.

X. Section-by-Section Analysis

Introduction

This section-by-section analysis is intended to explain the provisions of the proposed rule. A number of these provisions and issues related to them have been addressed earlier in this preamble. Accordingly, the preceding discussions should be considered in conjunction with those below and will be referred to as appropriate.

General Provisions (Subpart A)

Section 219.3 Application

Paragraph (a) contains a general statement of the scope of applicability of part 219, and paragraphs (b) and (c) contain exceptions to the general statement of applicability. The three exemptions in paragraph (b) are available to both domestic and foreign railroads, which is noted in the new heading for the paragraph. The exemption in paragraph (c) is available only to foreign railroads, also noted in the new heading for paragraph (c).

Paragraph (a) is unchanged except to add the heading "General" and to make explicit that the commuter railroads to which part 219 applies must operate in the United States. Paragraph (a) means that part 219 applies to each railroad that operates on the general railroad system of transportation and each railroad providing commuter or other short-haul service as described in the statutory definition of "railroad," unless the railroad falls into an exception stated in paragraph (b) or (c). The terms "railroad" and "general railroad system of transportation" are defined in § 219.5. Intercity passenger operations and commuter operations in the United States are covered even if not physically connected to other portions of the general railroad system. See discussion below.

Paragraph (b)(1), which uses standardized regulatory language, means that railroads whose entire operations are conducted on track within an installation that is outside of the general railroad system of transportation in the United States (in this paragraph, "general system" or "general railroad system") are not covered by this part. Tourist, scenic or excursion operations that occur on tracks that are not part of the general railroad system would, therefore, not be subject to this part. The word "installation" is intended to convey the meaning of physical (and not just operational) separateness from the general system. A railroad that operates only within a distinct enclave that is connected to the general system only for the purposes of receiving or offering its own shipments is within an installation. Examples of such installations are chemical and manufacturing plants, most tourist railroads, mining railroads, and military bases. However, a rail operation conducted over the general system in a block of time during which the general system railroad is not operating is not within an installation and, accordingly, not outside of the general system merely because of the operational separation.

Read together, proposed paragraphs (a) and (b)(1) mean that all of part 219 applies to all railroads that operate on the general railroad system of transportation or are commuter or intercity passenger railroads, except those exempted from one or more subparts of part 219 by proposed paragraphs (b)(2), (b)(3), or (c).

Paragraph (b)(2). Existing paragraph (b)(2) exempts from subparts D (testing for cause), E (self-referral and co-worker report programs), F (pre-employment testing), and G (random testing) a railroad that meets both of the following criteria: the railroad must (1) utilize 15 or fewer employees covered by the hours of service laws and (2) not operate on the tracks of another railroad or engage in other joint operations with another railroad except for purposes of interchange.

Under proposed paragraph (b)(2), the second criterion remains the same, but the first criterion changes. As proposed, a railroad (including, for example, a foreign railroad that utilizes FRFB employees to perform train operations in the United States) would qualify as a small entity exempt from subparts D, E, F, and G of part 219 upon satisfaction of the following two conditions. First, the *total* number of its employees covered by the hours of service laws (as train employees, dispatching service employees, or signal employees), and employees who would be covered by the hours of service laws if their services were performed in the United States, would have to be 15 or fewer. Second, as is the case currently, the railroad would also be obliged not to operate on the tracks of another railroad or otherwise engage in joint operations in the United States except in order to perform interchange.

The following example, the first of a series, illustrates the interpretation of proposed paragraph (b)(2):

- *Example 1:* Railroad XYZ employs 10 foreign-based individuals who perform service in the United States that is covered by the hours of service laws and 120 foreign-based individuals who would be covered by the hours of service laws if their services were performed in the United States. Railroad XYZ would not qualify under proposed paragraph (b)(2)(i) since it employs a total of 130 individuals who are, or would be, subject to the hours of service laws.

By exempting only railroads *which in their entirety, worldwide*, comprise 15 or fewer employees who are or would be subject to the hours of service laws, FRA would effectuate the original intent of this subsection, which was to lessen the economic impact of part 219 on those small entities that have both limited

resources and a minimal impact on safety.

Although under proposed paragraph (b)(2) FRA would partially determine the applicability of subparts D, E, F, and G to a railroad based on the total number of its employees who are, or would be, covered by the hours of service laws, a railroad that is exempted only under proposed paragraph (b)(2) from subparts D, E, F, and G would have to comply with all the other requirements of part 219 (subparts A, B, C, D, H, I, and J) generally only with respect to those of its employees who are "covered employees" within the meaning of the substantive provisions of part 219. In Example 1, Railroad XYZ with 10 foreign-based employees covered by the hours of service laws and 120 foreign-based employees who would be covered by the hours of service laws if their services were performed in the United States, would not be exempt under proposed paragraph (b)(2). The question remains whether Railroad XYZ is exempt from any subpart of part 219 under proposed paragraph (c) of § 219.3. The following examples illustrate the relationship between the exemption in proposed paragraph (b)(2) and the exemption in proposed paragraph (c).

- *Example 2:* If Railroad XYZ is a domestic railroad (incorporated in the United States) that just happens to have only foreign-based employees, then the proposed exemption at paragraph (c) would not apply because paragraph (c) exempts from subparts E, F, and G only operations by a foreign railroad, not a domestic railroad. As a result, this domestic railroad would be required to conduct random testing on its 10 foreign-based employees who perform covered service in the United States.⁶ Broadly speaking, these 10 employees would also be the only ones subject to part 219's prohibitions, general conditions, and other testing and reporting requirements. (However, for example, if § 219.11(g) requires training of a supervisor of a covered employee, then the railroad would have to train the supervisor even if the supervisor is not a covered employee.)

- *Example 3:* If Railroad XYZ is a foreign railroad (incorporated outside the United States) and all ten of its foreign-based employees who perform covered service in the United States perform train or dispatching service in the United States, then proposed paragraph (c) would not exempt them either. All ten FRFB train or dispatching service employees would be subject to random testing.

- *Example 4:* However, if some of foreign Railroad XYZ's ten foreign-based employees

instead perform only signal service in the United States, then those employees would be subject to the exemption at proposed paragraph (c) and, therefore, would not be subject to random testing.

Paragraph (b)(3). Existing paragraph (b)(3) reads as follows, "Subpart I does not apply to a railroad that has fewer than 400,000 total manhours." Proposed paragraph (b)(3) would make two basic changes to that provision. First, it would replace the term "manhours" with the term "employee hours" to make the provision gender-neutral. Second, the proposed paragraph would change and clarify the way in which employee hours are to be calculated, in part by defining the term "employee" as used in that subsection. Under the proposal FRA would look to a railroad's total number of employee hours worked worldwide in a calendar year, not just those worked in the United States, to determine whether the railroad would be required to file an annual Management Information System (MIS) report under subpart I. For a railroad to be exempt from MIS reporting, the number of hours worked by all of the railroad's employees regardless of their location or occupation, not just those employees performing train operations or other covered service in the United States, would have to total fewer than 400,000. For purposes of proposed paragraph (b)(3), an "employee of a railroad" is any individual who performs a service for the railroad; the term would include, for example, people directly compensated by the railroad and people employed by a contractor to the railroad who perform a service for the railroad. Non-work time, such as holidays, sick leave, or annual leave, would be excluded from the calculation of employee hours, even though it is paid.

It should be noted that the calculation of employee hours under proposed paragraph (b)(3) differs in some respects from the calculation of employee hours for purposes of FRA's accident reporting rules at 49 CFR part 225. See 49 CFR 225.21(d) (regarding the Form FRA 6180.56, "Annual Railroad Report of Manhours by State"). When reporting employee hours under the accident reporting rules, a railroad is to include only the hours of individuals who are directly compensated by a railroad, not the hours of employees of railroad contractors, and, as a general rule, to include only hours worked in the United States. See the FRA Guide for Preparing Accident/Incident Reports (1997 edition), Ch. 3, p. 3; Ch. 11, p. 1.) (By way of exception to the general rule for part 225 purposes, a railroad reporting under part 225 must include

hours worked outside the United States in the count of employee hours only if the employee works in both the United States and in a foreign country during the same tour of duty. *Id.*)

FRA proposes to base the application of subpart I on a railroad's total number of employee hours worldwide, rather than on the railroad's total number of employee hours worked in the United States, in order to ensure FRA's ability to monitor foreign-based railroads that impact rail safety in the United States. Requiring these railroads to submit MIS reports, which provide data on the required part 219 programs and tests on the subject employees, would allow FRA to capture basic compliance data even if budgetary and logistical concerns were to impact FRA's ability to conduct inspections in foreign countries.

Paragraph (c). This paragraph would revise existing paragraph (c). Proposed paragraph (c) would limit the existing exemption for operations of a foreign railroad conducted by a covered service employee whose primary reporting point is outside the United States and who is employed by a foreign railroad to FRFB signal maintainers. The change would make an FRFB train or dispatching service employee subject to part 219 to the same extent as a train or dispatching service employee whose primary reporting point is in the United States and as a train or dispatching service employee whose primary reporting point is outside the United States and who is employed by a United States railroad (a railroad incorporated in the United States). Proposed § 219.5 would define "foreign railroad" as a railroad that is incorporated outside the United States. The current term ("primary place of service ("home terminal") for rail transportation services") would be replaced by the more generic term ("primary place of reporting") to convey more clearly that the proposed narrower exemption applies to signal employees, whose principal reporting point is not typically called a "home terminal."

While the text of proposed paragraph (c) states that subparts E, F, and G do not apply to services of a foreign railroad performed by one of its employees whose principal reporting place is outside the United States and who performs signal maintenance in the United States, the note under that proposed paragraph states the positive inference that subparts A, B, C, D, H, I, and J of part 219 do apply to services in the United States performed by FRFB signal employees unless a provision of paragraph (b) provides an exemption from one or more of those subparts. (For

⁶ Consistent with FRA's treatment of domestic small railroads; part 219 would prohibit a railroad from conducting random testing under part 219 authority on its 120 employees who do not operate in the United States.

example, if the foreign railroad is small enough and operationally isolated enough to come within proposed paragraph (b)(2), then none of its covered service employees (neither its train crews, nor its signal maintainers, nor its dispatchers who perform covered service in the United States) would be subject to subparts D, E, F, or G.) For clarity, the proposed rule adds subparts H, I, and J to the existing list (“subparts A, B, C, and D”) in the second sentence of paragraph (c) of those subparts applicable to individuals meeting all of the following criteria: (1) Whose principal reporting point is outside the United States, (2) who are employed by foreign railroads, and (3) who are covered signal employees, unless exempted by § 219.3(b).

As discussed above, FRA is also asking for comment on whether signal maintainers who are the counterparts of FRFB train and dispatching service employees and whether extraterritorial signal maintainers, who remain outside the United States but may affect rail operations in the United States without entering United States territory, should be treated differently from FRFB train and dispatching service employees.

Section 219.5 Definitions

The terms “covered service” and “covered employee” are closely interrelated and, therefore, their definitions are discussed together.

Covered service. FRA proposes to add this definition of a basic term used in part 219, which appeared in part 219 as originally issued in 1985 but which is no longer among the definitions. The proposed definition tracks the definition in the 1985 final rule, with the exception that FRA makes explicit that FRA continues to interpret “covered service” as occurring only in the United States. In this respect, no substantive change is intended. As stated in the section-by-section analysis of the 1985 final rule,

Covered service is service subject to the Hours of Service Act. This is a practical, rather than a craft-based, definition of the persons and functions subject to the regulations. However, the employees that will most often fall within the definition of covered employee are train and engine crews,

yard crews (including switchmen), hostlers, train order and block operators, dispatchers, and signalmen. These are the functions identified by the Congress as being connected with the movement of trains and requiring maximum limits on duty periods and required off-duty periods in order to ensure their fitness. 50 FR 31530 (Aug. 2, 1985).

Covered employee. The definition of this term is proposed to be revised to make clear that FRA interprets covered service as being performed only in the United States. It should be noted that the existing rule currently provides as follows:

(6) An employee must be subject to testing only while on duty. Only employees who perform covered service for the railroad are subject to testing under this part. In the case of employees who during some duty tours perform covered service and during others do not, the railroad program must specify the extent to which, and the circumstances under which they are to be subject to testing. To the extent practical within the limitations of this part and in the context of the railroad’s operations, the railroad program must provide that employees are subject to the possibility of random testing on any day they actually perform covered service.

49 CFR 219.601(b)(6) (regarding railroad random drug testing programs). The section on railroad random alcohol testing programs contains an almost identical provision. 49 CFR 219.607(b)(5). FRA will be glad to work with railroads to exercise the flexibility provided by the rule.

General railroad system of transportation. FRA proposes to add this definition to clarify that the term is limited to that part of the general railroad system of transportation that is located within the borders of the United States.

Annual Report (Subpart I)

§ 219.801 Reporting alcohol misuse prevention program results in a management information system.

§ 219.803 Reporting drug misuse prevention program results in a management information system.

First, FRA proposes to make conforming changes to §§ 219.801 and 219.803 in order to reflect the replacement of the term “manhours” in § 219.3(b)(3) with the gender-neutral term “employee hours” and to reflect

the new criteria for determining which hours should be included as employee hours (e.g., hours worked by a railroad’s employees and contractors worldwide). See text and analysis of proposed § 219.3(b)(3). Finally, FRA would conform § 219.803 to § 219.801 by, e.g., defining the calendar year.

XI. Regulatory Impact

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This proposed rule has been evaluated in accordance with existing policies and procedures, and determined to be significant under both Executive Order 12866 and DOT policies and procedures (44 FR 11034; Feb. 26, 1979). FRA has prepared and placed in the docket a regulatory evaluation addressing the economic impact of this proposed rule. Document inspection and copying facilities are available at 1120 Vermont Avenue, NW., 7th Floor, Washington, DC. Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk, Office of Chief Counsel, Mail Stop 10, Federal Railroad Administration, 1120 Vermont Avenue, NW., Washington, DC 20590. Access to the docket may also be obtained electronically through the web site for the Docket Management System at <http://dms.dot.gov>. FRA invites comments on this regulatory evaluation.

As part of the regulatory evaluation, FRA has assessed costs and benefits expected from the adoption of the proposed rule. Canadian and Mexican railroads employing FRFB employees to perform train or dispatching service in the United States would incur, by United States standards, a seemingly low level of costs associated with extending the application of all of the part 219 requirements addressing control of alcohol and drug use to FRFB employees performing train or dispatching service in the United States.

For a twenty-year period, the Net Present Value (NPV) of the estimated quantified costs are \$250,384 for Canadian railroads and \$115,860 for Mexican railroads. The following table presents estimated twenty-year monetary costs associated with the distinct proposed rule modifications.

ESTIMATED 20-YEAR COSTS

[Net Present Value]

Description	Canada	Mexico
Identification of Troubled Employees	\$7,883	\$2,032
Pre-employment Tests	20,857	15,370
Random Alcohol and Drug Testing	166,139	49,962

ESTIMATED 20-YEAR COSTS—Continued
[Net Present Value]

Description	Canada	Mexico
Annual Report	7,373	4,256
Recordkeeping Procedures	47,758	43,162
General: Written Instructions	374	1,078
Total (rounded)	250,384	115,860

Detailed calculations of these estimates can be found in Section 7.0 of the regulatory evaluation on file at FRA in the docket for this rulemaking.

The United States Department of Transportation estimates the “willingness to pay” to avert a fatality to be \$2.7 million. The estimated value of preventing a critical injury that is non-fatal over the next twenty years is between \$532,020 and \$2,058,750, depending on the year in which the injury occurs. Twenty-year costs of this NPRM would be justified if one critical injury or a combination of less severe injuries and property damages totaling \$366,244 was prevented over the twenty years. FRA believes that the costs associated with the transition from the current rule to the proposed rule would be justified by safety benefits in the form of fewer accidents and related injuries, fatalities, property damage, and hazardous materials releases. FRA also believes that the safety of certain domestic rail operations would be compromised if the proposed rule is not implemented. A more detailed

explanation of the benefits of this rule as well as a summary of the cost-benefit analysis can be found in Sections 9.0 and 10.0 of the regulatory evaluation on file at FRA in the docket for this rulemaking.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires a review of proposed and final rules to assess their impact on small entities. FRA has prepared and placed in the docket an Initial Regulatory Flexibility Assessment (IRA), which assesses the small entity impact. Document inspection and copying facilities are available at 1120 Vermont Avenue, NW., 7th Floor, Washington, DC 20590. Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk, Office of Chief Counsel, Mail Stop 10, Federal Railroad Administration, 1120 Vermont Avenue, NW., Washington, DC 20590.

Pursuant to section 312 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121),

FRA has published an interim policy that formally establishes “small entities” as being railroads that meet the line-haulage revenue requirements of a Class III railroad. For other entities, the same dollar limit in revenue governs whether a railroad, contractor, or other respondent is a small entity (62 FR 43024, Aug. 11, 1997).

The IRA concludes that this proposed rule would not have an economic impact on a sizable number of small entities. FRA further certifies that this proposed rule is not expected to have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The sections that contain the new information collection requirements and the estimated time to fulfill each requirement are as follows:

CFR Section—49 CFR	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual burden hours
219.401/403/405—Voluntary Referral & Co-worker Report Policies.	6 railroads	6 policies	33.33 hours	200	\$7,880
219.405(c)(1)—Report by a Co-worker	6 railroads	1 report	5 minutes08	3
219.403/405—SAP Counselor Evaluation ...	6 railroads	10 reports/referrals ...	2 hours	20	3,000
219.601(a)—Railroad Random Drug Testing Programs.	6 railroads	6 programs	1 hour	6	228
—Amendments to Programs	6 railroads	1 amendment	1 hour	1	38
219.601(b)(1)—Random Selection Proc.—Drug.	6 railroads	72 documents	4 hours	288	4,320
219.601(b)(4); 219.601(d)—Notice to Employees.	6 railroads	6 notices	10 hours	60	2,280
—Notice to Employees—Selection for Testing.	6 railroads	60 notices	1 minute	1	38
219.603(a)—Notice by Employee Asking to be Excused from Urine excuses.	200 employees	2 documented excuses.	15 minutes50	17
219.607(a)—Railroad Random Alcohol Testing Progs.	6 railroads	Incl. in 219.601(a) ...	Incl. in 219.601(a) ...	(1)	(1)
—Amendments	6 railroads	1 amendment	1 hour	1	38
219.608—Administrator’s Determination of Random Alcohol Testing Rate.	6 railroads	2 MIS reports	2 hours	4	152
219.609—Notice by Employee Asking to be Excused from Random Alcohol Testing.	200 employees	2 documented excuses.	15 minutes50	17
219.801—Alcohol Testing Management Information System Data Collection Form.	6 railroads	1 form	4 hours	4	152
—“EZ” Data Collection Form	6 railroads	1 form	2 hours	2	76
219.803—Drug Testing MIS Data Collection Form.	6 railroads	1 form	4 hours	4	152

CFR Section—49 CFR	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual burden hours
—Drug Testing MIS Zero Positives Data Coll. Form.	6 railroads	5 forms	2 hours	10	380
219.901/903—Retention of Breath Alcohol/Urine Drug Testing Records.	6 railroads	240 records	5 minutes	20	300

¹ Included in 219.601(a).

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. Pursuant to 44 U.S.C. 3506(c)(2)(B), the FRA solicits comments concerning: whether these information collection requirements are necessary for the proper performance of the functions of FRA, including whether the information has practical utility; the accuracy of FRA's estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan at 202-493-6292.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Mr. Robert Brogan, Federal Railroad Administration, 1120 Vermont Avenue, NW., Mail Stop 17, Washington, DC 20590.

OMB is required to make a decision concerning the collection of information requirements contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

FRA is not authorized to impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of a final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

D. Federalism Implications

Executive Order 13132, entitled "Federalism," requires that each agency in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provide[] to the Director of the Office of Management and Budget a federalism summary impact statement, which consists of a description of the extent of the agency's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of the State and local officials have been met * * *

See section 6(b)(2)(B).

Normally, FRA performs these required Federalism consultations in the early stages of a rulemaking at meetings of the full Railroad Safety Advisory Committee ("RSAC"), which includes representatives of groups representing State and local officials. Shortly after RSAC's inception FRA agreed not to task the RSAC with rulemaking concerning alcohol and drug testing issues, since, as discussed above, these issues require extensive coordination and consultation with both DOT and HHS.

FRA has instead solicited comment on the Federalism implications of this proposed rule from nine groups designated as representatives for various State and local officials. On March 17, 2000, FRA sent a letter seeking comment on the Federalism implications of this NPRM and on the Interim Final Rule to the following organizations: the American Association of State Highway and Transportation Officials, the Association of State Rail Safety Managers, the Council of State Governments, The National Association of Counties, the National Association of Towns and Townships, the National Conference of State Legislatures, the National Governors' Association, the National League of Cities, and the U.S. Conference of Mayors. To date, FRA has received no indication of concerns about the Federalism implications of this rulemaking from these representatives. FRA will adhere to Executive Order 13132 when issuing a final rule in this proceeding.

E. Environmental Impact

FRA has evaluated this regulation in accordance with its "Procedures for Considering Environmental Impacts" (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this regulation is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. 64 FR 28545, 28547, May 26, 1999. Section 4(c)(20) reads as follows:

(c) Actions Categorically Excluded. Certain classes of FRA actions have been determined to be categorically excluded from the requirements of these Procedures as they do not individually or cumulatively have a significant effect on the human environment. * * * The following classes of FRA actions are categorically excluded: * * *

(20) Promulgation of railroad safety rules and policy statements that do not result in significantly increased emissions of air or water pollutants or noise or increased traffic congestion in any mode of transportation.

In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this regulation is not a major Federal action significantly affecting the quality of the human environment.

F. Unfunded Mandates Reform Act of 1995

Pursuant to section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 2 U.S.C. 1531), each federal agency "shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law)." Section 202 of the Act (2 U.S.C. 1532) further requires that

before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement * * *

detailing the effect on State, local, and tribal governments and the private sector. The proposed rule would not result in the expenditure, in the aggregate, of \$100,000,000 or more in any one year, and thus preparation of a statement is not required.

XII. Request for Public Comment

In accordance with Executive Order 12866, FRA is allowing 60 days for comments. FRA believes that a 60-day comment period is appropriate to allow parties with interests to comment on this proposed rule. FRA solicits written comments on all aspects of this proposed rule, and FRA may make changes to the final rule based on comments received in response to this NPRM.

List of Subjects in 49 CFR Part 219

Alcohol abuse, Drug abuse, Drug testing, Penalties, Railroad safety, Reporting and recordkeeping requirements, Safety, Transportation.

The Proposal

In consideration of the foregoing, the FRA proposes to amend chapter II, subtitle B of title 49, Code of Federal Regulations as follows:

PART 219—[AMENDED]

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

Authority: 49 U.S.C. 20103, 20107, 20140, 21301, 21304, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.49(m).

2. Section 219.3 is revised to read as follows:

§ 219.3 Application.

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, this part applies to—

(1) Railroads that operate rolling equipment on standard gage track which is part of the general railroad system of transportation; and

(2) Railroads that provide commuter or other short haul rail passenger service in a metropolitan or suburban area (as described by 49 U.S.C. 20102) in the United States.

(b) *Exceptions for domestic railroads and foreign railroads.* (1) This part does

not apply to a railroad that operates only on track inside an installation which is not part of the general railroad system of transportation.

(2) Subparts D, E, F and G of this part do not apply to a railroad that—

(i) Has a total of 15 or fewer employees who are covered by the hours of service laws at 49 U.S.C. 21103, 21104, or 21105, or who would be subject to the hours of service laws at 49 U.S.C. 21103, 21104, or 21105 if their services were performed in the United States; and

(ii) Does not operate on the tracks in the United States of another railroad (or otherwise engage in joint operations in the United States with another railroad) except as necessary for purposes of interchange.

(3) Subpart I of this part does not apply to a railroad that has fewer than 400,000 total employee hours, including hours worked by all employees of the railroad, regardless of occupation, not only while in the United States but also while outside the United States. For purposes of this paragraph (b)(3), the term “employees of the railroad” includes individuals who perform service for the railroad, including not only individuals who receive direct monetary compensation from the railroad for performing a service for the railroad, but also such individuals as employees of a contractor to the railroad who perform a service for the railroad.

(c) *Exception for foreign railroads.* Subparts E, F, and G of this part do not apply to service in the United States or outside the United States of a foreign railroad performed by a covered signal employee of the foreign railroad if the employee’s primary place of reporting is located outside the United States.

Note to paragraph (c) of this section: Unless otherwise provided by paragraph (b) of this section, subparts A, B, C, D, H, I, and J of this part apply to service in the United States of a foreign railroad performed by a covered signal employee of the foreign railroad if the employee’s primary place of reporting is located outside the United States. Unless otherwise provided by paragraph (b) of this section, this part applies to the following: (1) Operations in the United States of a foreign railroad conducted by a covered train employee of the foreign railroad if the employee’s primary place of service (“home terminal”) for rail transportation services is located outside the United States or inside the United States; (2) service in the United States performed by a covered dispatching service employee of the foreign railroad if the employee’s primary place of reporting is located outside the United States or inside the United States; and (3) service in the United States performed by a covered signal employee of the foreign railroad if the employee’s primary place of reporting is located in the United States.

3. Section 219.5 is amended by revising the definition of *covered employee* and adding new definitions in alphabetical order, to read as follows:

§ 219.5 Definitions.

* * * * *

Covered dispatching service employee means a person who has been assigned to perform service in the United States subject to the limitations on duty hours of dispatching service employees under the hours of service laws at 49 U.S.C. 21105 during a duty tour, whether or not the person has performed or is currently performing such service, and a person who performs such service. For the purposes of pre-employment testing only, the term “covered dispatching service employee” includes a person applying to perform service in the United States subject to 49 U.S.C. 21105.

Covered employee means a person who has been assigned to perform service in the United States subject to the hours of service laws (49 U.S.C. ch. (21) during a duty tour, whether or not the person has performed or is currently performing such service, and any person who performs such service. (An employee is not “covered” within the meaning of this part exclusively by reason of being an employee for purposes of 49 U.S.C. 21106.) For the purposes of pre-employment testing only, the term “covered employee” includes a person applying to perform covered service in the United States.

Covered service means service in the United States that is subject to the hours of service laws at 49 U.S.C. 21103, 21104, or 21105, but does not include any period the employee is relieved of all responsibilities and is free to come and go without restriction.

Covered signal employee means a person who has been assigned to perform service in the United States subject to the limitations on duty hours of signal employees under the hours of service laws at 49 U.S.C. 21104 during a duty tour, whether or not the person has performed or is currently performing such service, and a person who performs such service. For the purposes of pre-employment testing only, the term “covered signal employee” includes a person applying to perform service in the United States subject to 49 U.S.C. 21104.

Covered train employee means a person who has been assigned to perform service in the United States subject to the limitations on duty hours of train employees under the hours of service laws at 49 U.S.C. 21103 during a duty tour, whether or not the person has performed or is currently

performing such service, and a person who performs such service. For the purposes of pre-employment testing only, the term "covered train employee" includes a person applying to perform service subject to 49 U.S.C. 21103.

* * * * *

Domestic railroad means a railroad that is incorporated in the United States.

* * * * *

Foreign railroad means a railroad that is incorporated outside the United States.

* * * * *

General railroad system of transportation means the general railroad system of transportation in the United States.

* * * * *

State means a State of the United States of America or the District of Columbia.

* * * * *

United States means all of the States.

* * * * *

4. Section 219.801(a) is revised to read as follows:

§ 219.801 Reporting alcohol misuse prevention programs results in a management information system.

(a) Each railroad that has 400,000 or more total employee hours (including hours worked by all employees of the railroad, regardless of occupation, not only while in the United States but also while outside the United States) must submit to FRA by March 15 of each year a report covering the previous calendar year (January 1–December 31), summarizing the results of its alcohol misuse prevention program. As used in this paragraph, the term "employees of the railroad" includes individuals who perform service for the railroad, including not only individuals who receive direct monetary compensation from the railroad for performing a service for the railroad, but also such individuals as employees of a contractor to the railroad who perform a service for the railroad.

* * * * *

5. Section 219.803(a) is revised to read as follows:

§ 219.803 Reporting drug misuse prevention program results in a management information system.

(a) Each railroad that has 400,000 or more total employee hours (including hours worked by all employees of the railroad, regardless of occupation, not only while in the United States but also while outside the United States) must submit to FRA by March 15 of each year an annual report covering the previous calendar year (January 1 through December 31), summarizing the results of its drug misuse prevention program. As used in this paragraph, the term "employees of the railroad" includes individuals who perform service for the railroad, including not only individuals who receive direct monetary compensation from the railroad for performing a service for the railroad, but also such individuals as employees of a contractor to the railroad who perform a service for the railroad.

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Issued in Washington, DC, on November 30, 2001.

Allan Rutter,

Federal Railroad Administrator.

[FR Doc. 01–30184 Filed 12–10–01; 8:45 am]

BILLING CODE 4910–06–P