

employee's denial of prohibited alcohol or drug use as a waiver of any privilege the employee would otherwise enjoy to have such prohibited alcohol or drug use treated as a non-disciplinary matter or to have discipline held in abeyance.

(d) The railroad must comply with the return-to-service and follow-up testing requirements, and the Substance Abuse Professional conflict-of-interest prohibitions, contained in §§ 40.305, 40.307, and 40.299 of this title, respectively.

**§ 219.105 Railroad's duty to prevent violations.**

(a) A railroad may not, with actual knowledge, permit an employee to go or remain on duty in covered service in violation of the prohibitions of § 219.101 or § 219.102. As used in this section, the knowledge imputed to the railroad management employee (such as a supervisor deemed an "officer," whether or not such person is a corporate officer) or a supervisory employee in the offending employee's chain of command.

(b) A railroad must exercise due diligence to assure compliance with §§ 219.101 and 219.102 by each covered employee.

**§ 219.107 Consequences of unlawful refusal.**

(a) An employee who refuses to provide breath or a body fluid specimen or specimens when required to by the railroad under a mandatory provision of this part must be deemed disqualified for a period of nine (9) months.

(b) Prior to or upon withdrawing the employee from covered service under this section, the railroad must provide notice of the reason for this action, and the procedures described in § 219.104(c) apply.

(c) The disqualification required by this section applies with respect to employment in covered service by any railroad with notice of such disqualification.

(d) The requirement of disqualification for nine (9) months does not limit any discretion on the part of the railroad to impose additional sanctions for the same or related conduct.

(e) Upon the expiration of the 9-month period described in this section, a railroad may permit the employee to return to covered service only under the same conditions specified in § 219.104(d), and the employee must be subject to follow-up tests, as provided by that section.

**Subpart C—Post-Accident Toxicological Testing**

**§ 219.201 Events for which testing is required.**

(a) *List of events.* Except as provided in paragraph (b) of this section, post-accident toxicological tests must be conducted after any event that involves one or more of the circumstances described in paragraphs (a)(1) through (4) of this section:

(1) *Major train accident.* Any train accident (i.e., a rail equipment accident involving damage in excess of the current reporting threshold) that involves one or more of the following:

(i) A fatality;

(ii) A release of hazardous material lading from railroad equipment accompanied by—

(A) An evacuation; or

(B) A reportable injury resulting from the hazardous material release (e.g., from fire, explosion, inhalation, or skin contact with the material); or

(iii) Damage to railroad property of \$1,000,000 or more.

(2) *Impact accident.* An impact accident (i.e., a rail equipment accident defined as an "impact accident" in § 219.5) that involves damage in excess of the current reporting threshold, resulting in—

(i) A reportable injury; or

(ii) Damage to railroad property of \$150,000 or more.

(3) *Fatal train incident.* Any train incident that involves a fatality to any on-duty railroad employee.

(4) *Passenger train accident.* Reportable injury to any person in a train accident (i.e., a rail equipment accident involving damage in excess of the current reporting threshold) involving a passenger train.

(b) *Exceptions.* No test may be required in the case of a collision between railroad rolling stock and a

motor vehicle or other highway conveyance at a rail/highway grade crossing. No test may be required in the case of an accident/incident the cause and severity of which are wholly attributable to a natural cause (e.g., flood, tornado, or other natural disaster) or to vandalism or trespasser(s), as determined on the basis of objective and documented facts by the railroad representative responding to the scene.

(c) *Good faith determinations.* (1)(i) The railroad representative responding to the scene of the accident/incident must determine whether the accident/incident falls within the requirements of paragraph (a) of this section or is within the exception described in paragraph (b) of this section. It is the duty of the railroad representative to make reasonable inquiry into the facts as necessary to make such determinations. In making such inquiry, the railroad representative must consider the need to obtain specimens as soon as practical in order to determine the presence or absence of impairing substances reasonably contemporaneous with the accident/incident. The railroad representative satisfies the requirement of this section if, after making reasonable inquiry, the representative exercises good faith judgment in making the required determinations.

(ii) The railroad representative making the determinations required by this section may not be a person directly involved in the accident/incident. This section does not prohibit consultation between the responding railroad representative and higher level railroad officials; however, the responding railroad representative must make the factual determinations required by this section.

(iii) Upon specific request made to the railroad by the Associate Administrator for Safety, FRA (or the Associate Administrator's delegate), the railroad must provide a report describing any decision by a person other than the responding railroad representative with respect to whether an accident/incident qualifies for testing. This report must be affirmed by the decision maker and must be provided to FRA within 72 hours of the request. The report must include the facts reported by the responding railroad representative,

the basis upon which the testing decision was made, and the person making the decision.

(iv) Any estimates of railroad property damage made by persons not at the scene must be based on descriptions of specific physical damage provided by the on-scene railroad representative.

(v) In the case of an accident involving passenger equipment, a host railroad may rely upon the damage estimates provided by the passenger railroad (whether present on scene or not) in making the decision whether testing is required, subject to the same requirement that visible physical damage be specifically described.

(2) A railroad must not require an employee to provide blood or urine specimens under the authority or procedures of this subject unless the railroad has made the determinations required by this section, based upon reasonable inquiry and good faith judgment. A railroad does not act in excess of its authority under this subpart if its representative has made such reasonable inquiry and exercised such good faith judgment, but it is later determined, after investigation, that one or more of the conditions thought to have required testing were not, in fact, present. However, this section does not excuse the railroad for any error arising from a mistake of law (e.g., application of testing criteria other than those contained in this part).

(3) A railroad is not in violation of this subpart if its representative has made such reasonable inquiry and exercised such good faith judgment but nevertheless errs in determining that post-accident testing is not required.

(4) An accident/incident with respect to which the railroad has made reasonable inquiry and exercised good faith judgment in determining the facts necessary to apply the criteria contained in paragraph (a) of this section is deemed a qualifying event for purposes of specimen analysis, reporting, and other purposes.

(5) In the event specimens are collected following an event determined by FRA not to be a qualifying event within the meaning of this section, FRA directs its designated laboratory

to destroy any specimen material submitted and to refrain from disclosing to any person the results of any analysis conducted.

**§ 219.203 Responsibilities of railroads and employees.**

(a) *Employees tested.* (1)(i) Following each accident and incident described in § 219.201, the railroad (or railroads) must take all practicable steps to assure that all covered employees of the railroad directly involved in the accident or incident provide blood and urine specimens for toxicological testing by FRA. Such employees must cooperate in the provision of specimens as described in this part and Appendix C to this part.

(ii) If the conditions for mandatory toxicological testing exist, the railroad may also require employees to provide breath for testing in accordance with the procedures set forth in part 40 of this title and in this part, if such testing does not interfere with timely collection of required specimens.

(2) Such employees must specifically include each and every operating employee assigned as a crew member of any train involved in the accident or incident. In any case where an operator, dispatcher, signal maintainer or other covered employee is directly and contemporaneously involved in the circumstances of the accident/incident, those employees must also be required to provide specimens.

(3) An employee must be excluded from testing under the following circumstances: In any case of an accident/incident for which testing is mandated only under § 219.201(a)(2) (an "impact accident"), § 219.201(a)(3) ("fatal train incident"), or § 219.201(a)(4) (a "passenger train accident with injury") if the railroad representative can immediately determine, on the basis of specific information, that the employee had no role in the cause(s) or severity of the accident/incident. The railroad representative must consider any such information immediately available at the time the qualifying event determination is made under § 219.201.

(4) The following provisions govern accidents/incidents involving non-covered employees:

(i) Surviving non-covered employees are not subject to testing under this subpart.

(ii) Testing of the remains of non-covered employees who are fatally injured in train accidents and incidents is required.

(b) *Timely specimen collection.* (1) The railroad must make every reasonable effort to assure that specimens are provided as soon as possible after the accident or incident.

(2) This paragraph (b) must not be construed to inhibit the employees required to be tested from performing, in the immediate aftermath of the accident or incident, any duties that may be necessary for the preservation of life or property. However, where practical, the railroad must utilize other employees to perform such duties.

(3) In the case of a passenger train which is in proper condition to continue to the next station or its destination after an accident or incident, the railroad must consider the safety and convenience of passengers in determining whether the crew is immediately available for testing. A relief crew must be called to relieve the train crew as soon as possible.

(4) Covered employees who may be subject to testing under this subpart must be retained in duty status for the period necessary to make the determinations required by § 219.201 and this section and (as appropriate) to complete the specimen collection procedure. An employee may not be recalled for testing under this subpart if that employee has been released from duty under the normal procedures of the railroad, except that an employee may be immediately recalled for testing if—

(i) The employee could not be retained in duty status because the employee went off duty under normal carrier procedures prior to being contacted by a railroad supervisor and instructed to remain on duty pending completion of the required determinations (e.g., in the case of a dispatcher or signal maintainer remote from the scene of an accident who was unaware of the occurrence at the time the employee went off duty);