

adjusted from time to time in accordance with Appendix B to Part 225 of this chapter.

*Supervisory employee* means an officer, special agent, or other employee of the railroad who is not a co-worker and who is responsible for supervising or monitoring the conduct or performance of one or more employees.

*Train*, except as context requires, means a locomotive, or more than one locomotive coupled, with or without cars. (A locomotive is a self-propelled unit of equipment which can be used in train service.)

*Train accident* means a passenger, freight, or work train accident described in §225.19(c) of this chapter (a "rail equipment accident" involving damage in excess of the current reporting threshold), including an accident involving a switching movement.

*Train incident* means an event involving the movement of railroad on-track equipment that results in a casualty but in which railroad property damage does not exceed the reporting threshold.

*Violation rate* means the number of covered employees (as reported under §219.801) found during random tests given under this part to have an alcohol concentration of .04 or greater, plus the number of employees who refuse a random test required by this part, divided by the total reported number of employees in the industry given random alcohol tests under this part plus the total reported number of employees in the industry who refuse a random test required by this part.

[66 FR 41973, Aug. 9, 2001, as amended at 68 FR 10135, Mar. 3, 2003]

#### §219.7 Waivers.

(a) A person subject to a requirement of this part may petition the FRA for a waiver of compliance with such requirement.

(b) Each petition for waiver under this section must be filed in a manner and contain the information required by Part 211 of this chapter. A petition for waiver of the Part 40 prohibition against stand down of an employee before the Medical Review Officer has completed the verification must also comply with §40.21 of this title.

(c) If the FRA Administrator finds that waiver of compliance is in the public interest and is consistent with railroad safety, the Administrator may grant the waiver subject to any necessary conditions.

#### §219.9 Responsibility for compliance.

(a) Any person (an entity of any type covered under 1 U.S.C. 1, including but not limited to the following: A railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor) who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least \$500 and not more than \$11,000 per violation, except that: Penalties may be assessed against individuals only for willful violations; where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury, or has caused death or injury, a penalty not to exceed \$22,000 per violation may be assessed; and the standard of liability for a railroad will vary depending upon the requirement involved. See, e.g., §219.105, which must be construed to qualify the responsibility of a railroad for the unauthorized conduct of an employee that violates §219.101 or §219.102 (while imposing a duty of due diligence to prevent such conduct). Each day a violation continues constitutes a separate offense. See Appendix A to this part for a statement of agency civil penalty policy.

(b)(1) In the case of joint operations, primary responsibility for compliance with this part with respect to determination of events qualifying for breath or body fluid testing under Subparts C and D of this part rests with the host railroad, and all affected employees must be responsive to direction from the host railroad consistent with this part. However, nothing in this paragraph (b)(1) restricts the ability of the railroads to provide for an appropriate assignment of responsibility for compliance with this part as among

## §219.11

## 49 CFR Ch. II (10–1–03 Edition)

those railroads through a joint operating agreement or other binding contract. FRA reserves the right to bring an enforcement action for noncompliance with applicable portions of this part against the host railroad, the employing railroad, or both.

(2) Where an employee of one railroad is required to participate in breath or body fluid testing under Subpart C or D of this part and is subsequently subject to adverse action alleged to have arisen out of the required test (or alleged refusal thereof), necessary witnesses and documents available to the other railroad must be made available to the employee on a reasonable basis.

(c) Any independent contractor or other entity that performs covered service for a railroad has the same responsibilities as a railroad under this part, with respect to its employees who perform covered service. The entity's responsibility for compliance with this part may be fulfilled either directly by that entity or by the railroad's treating the entity's employees who perform covered service as if they were its own employees for purposes of this part. The responsibility for compliance must be clearly spelled out in the contract between the railroad and the other entity or in another document. In the absence of such a clear delineation of responsibility, FRA will hold the railroad and the other entity jointly and severally liable for compliance.

### §219.11 General conditions for chemical tests.

(a) Any employee who performs covered service for a railroad is deemed to have consented to testing as required in subparts B, C, D, and G of this part; and consent is implied by performance of such service.

(b)(1) Each such employee must participate in such testing, as required under the conditions set forth in this part by a representative of the railroad.

(2) In any case where an employee has sustained a personal injury and is subject to alcohol or drug testing under this part, necessary medical treatment must be accorded priority over provision of the breath or body fluid specimen(s).

(3) Failure to remain available following an accident or casualty as required by company rules (i.e., being absent without leave) is considered a refusal to participate in testing, without regard to any subsequent provision of specimens.

(c) A covered employee who is required to be tested under subpart C or D of this part and who is taken to a medical facility for observation or treatment after an accident or incident is deemed to have consented to the release to FRA of the following:

(1) The remaining portion of any body fluid specimen taken by the treating facility within 12 hours of the accident or incident that is not required for medical purposes, together with any normal medical facility record(s) pertaining to the taking of such specimen;

(2) The results of any laboratory tests for alcohol or any drug conducted by or for the treating facility on such specimen;

(3) The identity, dosage, and time of administration of any drugs administered by the treating facility prior to the time specimens were taken by the treating facility or prior to the time specimens were taken in compliance with this part; and

(4) The results of any breath tests for alcohol conducted by or for the treating facility.

(d) An employee required to participate in body fluid testing under subpart C of this part (post-accident toxicological testing) or testing subject to subpart H of this part shall, if requested by the representative of the railroad or the medical facility (including, under subpart H of this part, a non-medical contract collector), evidence consent to taking of specimens, their release for toxicological analysis under pertinent provisions of this part, and release of the test results to the railroad's Medical Review Officer by promptly executing a consent form, if required by the medical facility. The employee is not required to execute any document or clause waiving rights that the employee would otherwise have against the employer, and any such waiver is void. The employee may not be required to waive liability with respect to negligence on the part of