

with a safety device that has been tampered with prior to the crew's assuming responsibility for the locomotive. FRA has structured this provision and its attendant enforcement policy to reflect the fact that instances in which one individual encounters a locomotive that someone else has tampered with are relatively infrequent occurrences.

FRA's regulatory prohibition for subsequent operator conduct reflects the legal standard for individual culpability set forth in the RSIA. Under the relevant statutory standard ("knowingly operates or permits to be operated a train on which such devices have been tampered with or disabled by another person")—now incorporated into §218.57—individuals could be held to a simple negligence standard of conduct, i.e., a standard of reasonable care under the circumstances. FRA's conclusion about the proper interpretation of the word "knowingly" stems from both normal canons of statutory construction and analysis of decisional law concerning the use of similar statutory constructs in the civil penalty context. It is also consistent with other Departmental interpretations of the word as used in similar contexts. (See 49 CFR 107.299, defining "knowingly" under the Hazardous Materials Transportation Act, 49 App. U.S.C. 1801 *et seq.*)

Under that statutory language, the responsible members of the crew could be culpable if either (1) due to their failure to exercise reasonable care, they failed to determine that the safety device was not functioning, or (2) having ascertained that the device was not functioning, still elected to operate the train. Similarly, railroad supervisors who permit or direct that a train with a disabled device be operated after having learned that the safety device is not functioning or after having failed to use reasonable care in the performance of their duties could also be subject to sanction.

However, as a matter of enforcement policy, application of a negligence standard in this particular context presently appears unwarranted. We have seen no evidence of an employee's negligent failure to detect another employee's tampering having caused a safety problem. FRA can effectively attack the known dimensions of the tampering problem by employing an enforcement policy that limits its enforcement actions to situations where individuals clearly had actual knowledge of the disabled device and intentionally operated the train notwithstanding that knowledge.

Therefore, FRA will not take enforcement action against an individual under §218.57 absent a showing of such actual knowledge of the facts. Actual, subjective knowledge need not be demonstrated. It will suffice to show objectively that the alleged violator must have known the facts based on reasonable inferences drawn from the circumstances. For

example, it is reasonable to infer that a person knows about something plainly in sight on the locomotive he is operating. Also, unlike the case where willfulness must be shown (see FRA's statement of policy at 49 CFR part 209, appendix A), knowledge of or reckless disregard for the law need not be shown to make out a violation of §218.57. The knowledge relevant here is knowledge of the facts constituting the violation, not knowledge of the law.

Should FRA receive evidence indicating that a stricter enforcement policy is necessary to address the tampering problem, it will revise its enforcement policy to permit enforcement actions based only on a showing of the subsequent operator's negligent failure to detect the tampering, as the relevant provision of the RSIA permits it to do now. Any such change in enforcement policy will become effective only after publication of a revised version of this appendix.

[54 FR 5492, Feb. 3, 1989. Redesignated and amended at 58 FR 43293, Aug. 16, 1993]

PART 219—CONTROL OF ALCOHOL AND DRUG USE

Subpart A—General

Sec.

- 219.1 Purpose and scope.
- 219.3 Application.
- 219.4 Recognition of a foreign railroad's workplace testing program.
- 219.5 Definitions.
- 219.7 Waivers.
- 219.9 Responsibility for compliance.
- 219.11 General conditions for chemical tests.
- 219.13 Preemptive effect.
- 219.15 [Reserved]
- 219.17 Construction.
- 219.19 [Reserved]
- 219.21 Information collection.
- 219.23 Railroad policies.

Subpart B—Prohibitions

- 219.101 Alcohol and drug use prohibited.
- 219.102 Prohibition on abuse of controlled substances.
- 219.103 Prescribed and over-the-counter drugs.
- 219.104 Responsive action.
- 219.105 Railroad's duty to prevent violations.
- 219.107 Consequences of unlawful refusal.

Subpart C—Post-Accident Toxicological Testing

- 219.201 Events for which testing is required.
- 219.203 Responsibilities of railroads and employees.
- 219.205 Specimen collection and handling.
- 219.206 FRA access to breath test results.

Federal Railroad Administration, DOT

§219.3

- 219.207 Fatality.
- 219.209 Reports of tests and refusals.
- 219.211 Analysis and follow-up.
- 219.213 Unlawful refusals; consequences.

Subpart D—Testing for Cause

- 219.300 Mandatory reasonable suspicion testing.
- 219.301 Testing for reasonable cause.
- 219.302 Prompt specimen collection; time limitation.

Subpart E—Identification of Troubled Employees

- 219.401 Requirement for policies.
- 219.403 Voluntary referral policy.
- 219.405 Co-worker report policy.
- 219.407 Alternate policies.

Subpart F—Pre-Employment Tests

- 219.501 Pre-employment drug testing.
- 219.502 Pre-employment alcohol testing.
- 219.503 Notification; records.
- 219.505 Refusals.

Subpart G—Random Alcohol and Drug Testing Programs

- 219.601 Railroad random drug testing programs.
- 219.602 FRA Administrator's determination of random drug testing rate.
- 219.603 Participation in drug testing.
- 219.605 Positive drug test results; procedures.
- 219.607 Railroad random alcohol testing programs.
- 219.608 FRA Administrator's determination of random alcohol testing rate.
- 219.609 Participation in alcohol testing.
- 219.611 Test result indicating prohibited alcohol concentration; procedures.

Subpart H—Drug and Alcohol Testing Procedures

- 219.701 Standards for drug and alcohol testing.

Subpart I—Annual Report

- 219.800 Annual reports.
- 219.801-219.803 [Reserved]

Subpart J—Recordkeeping Requirements

- 219.901 Retention of alcohol testing records.
- 219.903 Retention of drug testing records.
- 219.905 Access to facilities and records.

APPENDIX A TO PART 219—SCHEDULE OF CIVIL PENALTIES

APPENDIX B TO PART 219—DESIGNATION OF LABORATORY FOR POST-ACCIDENT TOXICOLOGICAL TESTING

APPENDIX C TO PART 219—POST-ACCIDENT TESTING SPECIMEN COLLECTION

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

SOURCE: 66 FR 41973, Aug. 9, 2001, unless otherwise noted.

Subpart A—General

§219.1 Purpose and scope.

(a) The purpose of this part is to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.

(b) This part prescribes minimum Federal safety standards for control of alcohol and drug use. This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

§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 available to both domestic 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.