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Control of Alcohol and Drug Use: Expanded Application of FRA Alcohol and Drug Rules to Foreign Railroad Foreign-Based Employees Who Perform Train or Dispatching Service in the United States; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 219

[Docket No. FRA 2001–11068, Notice No. 5]

RIN 2130–AB39

Control of Alcohol and Drug Use: Expanded Application of FRA Alcohol and Drug Rules to Foreign Railroad Foreign-Based Employees Who Perform Train or Dispatching Service in the United States

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Final rule.

SUMMARY: In 2001, FRA proposed to make employees of a foreign railroad (a railroad incorporated outside the United States) whose primary reporting point is outside the United States who enter into the United States to perform train or dispatching service (foreign railroad foreign-based employees or ''FRFB employees''). After a public hearing, a review of the comments, and consultations with the Canadian and Mexican governments, FRA is issuing a final rule that differs from the proposal in four ways; the two most significant revisions are summarized below.

First, the final rule allows FRFB employees to enter into the United States for a distance of up to 10 route miles and remain excepted, as before, from FRA's requirements for employee assistance programs, pre-employment drug testing, and random alcohol and drug testing. Second, the final rule allows FRA's Associate Administrator for Safety to recognize a foreign railroad's substance abuse program promulgated under the laws of its home country as a compatible alternative to the return-to-service requirements if the program includes equivalents to these FRA provisions, and testing procedures, criteria, and assays reasonably comparable in effectiveness to all applicable provisions of DOT's procedures for workplace drug and alcohol testing programs.

DATES: This rule is effective on June 11, 2004.

Any petition for reconsideration of this final rule must be submitted not later than June 11, 2004.

ADDRESSES: Petitions for reconsideration must reference the FRA docket and notice numbers (FRA Docket No. FRA 2001–11068, Notice No. 5). You may submit your petition and related material by only one of the following methods:

- *Web site: http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001.
- *Hand Delivery:* Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. For detailed instructions on submitting comments, petitions for reconsideration, and additional information on the rulemaking process, see the Public Participation heading of the Supplementary Information section of this document. Note that all petitions received will be posted without change to *http://dms.dot.gov* including any personal information provided.

Docket: For access to the docket to read background documents, comments, or petitions received, go to *http://dms.dot.gov* at any time or to Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

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).

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I. Summary of the Final Rule

Currently, employees of a foreign railroad (a railroad incorporated outside the United States) whose primary reporting point is outside the United States who enter into the United States to perform train or dispatching service (foreign railroad foreign-based employees or ''FRFB employees'') are subject only to the general conditions, prohibitions, and post-accident testing and reasonable suspicion testing requirements in FRA's alcohol and drug regulations (part 219). The NPRM proposed to apply all of part 219 to FRFB employees (unless their employer qualified as a small railroad) and to persons applying for such service by making them subject to FRA's employee assistance program requirements, pre-employment drug testing, and random alcohol and drug testing (respectively, subparts E, F, and G of part 219). (FRFB employees who enter the United States to perform signal service would not have been included because of their current *de minimis* impact on rail operations in the United States.) The final rule mirrors the NPRM with the following four significant revisions:

(1) Under the final rule, FRFB employees will be allowed to enter into the United States for a distance of up to 10 route miles (up to 20 train-miles round-trip) without being subject to the employee assistance program requirements, pre-employment testing,

and random testing requirements of part 219. FRA believes that allowing a 10-mile ''limited haul exception'' will facilitate the interchange of trains in the United States between Canadian and United States railroads, and between Mexican railroads and United States railroads, since 28 of the current 34 Canadian railroad operations in the United States will be excepted from full application of part 219, as will all six of the current Mexican railroad operations in the United States. (The current cross-border railroad operations originating from Canada and Mexico are listed at the end of this rule.) For the most part, existing cross-border railroad operations occur on short segments of track in the United States and proceed to the closest convenient location for handover of the operation from the foreign-based railroad crew to the United States-based railroad crew. Since the implementation of FRA's post-accident testing program in 1986, there have been few accidents or incidents reported on cross-border railroad operations significant enough to require post-accident testing, and there have been no positive test results. FRA will therefore except cross-border railroad operations of 10 route miles or less from full application of part 219 since the safety risks on these short movements appear to be small.

Current or new cross-border railroad operations that proceed more than 10 route miles into the United States will be subject to the employee assistance program requirements, pre-employment testing, and random testing requirements of part 219 unless a waiver is granted. (See discussion of waiver requests below.) In addition to the longer distances traveled in the United States, several of the current longer segments involve other significant risk factors, such as high volumes of hazardous material traffic or passage through heavily populated areas. For example, each of the two longest segments, where crews respectively operate 54 and 74 miles into the United States, runs through at least 70 public highway-grade crossings before terminating in the Detroit, Michigan, metropolitan area.

(2) A foreign railroad will be allowed to petition FRA to waive application of subparts E, F, and G of part 219 for any cross-border railroad operation that becomes subject to these subparts by virtue of this rule. FRA will consider each such petition to determine if waiving application of these subparts on the subject operation is consistent with railroad safety and in the public interest. If a petition for waiver with respect to existing cross-border railroad operations is filed within 120 days of the publication of this rule, the existing cross-border crew assignments on the operation subject to the petition will continue to be excepted from subparts E, F, and G until FRA decides the petition. FRA's determination process will include appropriate investigation and opportunity for public comment.

A foreign railroad beginning a new cross-border operation that proceeds more than 10 route miles into the United States, or expanding an existing cross-border operation beyond the 10-mile limited haul exception, may file a petition in accordance with FRA's rules of practice (49 CFR part 211) to waive the application of subparts E, F, and G on that operation not later than 90 days before commencing the cross-border operation for it to be considered by FRA. FRA will attempt to decide such petitions within 90 days. If no action is taken on the petition within 90 days, the petition remains pending for decision, and the cross-border crew assignments covered by the petition will be subject to subparts E, F, and G until FRA grants the petition should the petitioner commence the proposed operation.

(3) A foreign railroad will be allowed, at its option, to choose to comply with this part by conducting FRA-required testing entirely on United States soil. A Canadian or Mexican railroad required to comply in full with part 219 requirements will be permitted to collect FRA-required specimens in its home country or in the United States, so long as the DOT workplace testing procedures (49 CFR part 40) are observed and records are maintained as required. For a railroad to do so, testing must be conducted at a laboratory currently certified as meeting the standards contained in subpart C of the Mandatory Guidelines for Federal Workplace Drug Testing Programs (59 FR 29916, 29925) issued by the United States Department of Health and Human Services (HHS).[1] A foreign railroad will be allowed to fulfill FRA's random testing requirements without having to collect specimens in its home country by arranging to have contract collectors collect the required specimens while its employees are working in the United States.

As always, a foreign railroad will continue to be allowed to retain an employee who tests positive or refuses a part 219 test; although the foreign railroad may not use the employee for train or dispatching service in the United States for a period of nine months. Canadian and Mexican railroads will continue to remain otherwise free to handle their employees under the applicable law and agreements in their home countries.

(4) The final rule will add a provision allowing FRA's Associate Administrator for Safety to recognize a foreign railroad's workplace testing program promulgated under the laws of its home country as a compatible alternative to the return-to-service requirements in subpart B, and subparts E, F, and G of this part, with respect to the foreign railroad's foreign-based employees who perform train or dispatching service in the United States. To be recognized as a compatible alternative, the foreign railroad's program must include equivalents to these FRA provisions, and use testing procedures, criteria and assays reasonably comparable in effectiveness to those in DOT's procedures for drug and alcohol workplace testing programs (49 CFR part 40, incorporated by reference in subpart H of this part) in its equivalent provisions to the return-to-service requirements in subpart B, and subparts E, F, and G of this part. In approving a program under this section, the FRA Associate Administrator for Safety may impose conditions deemed necessary. Upon FRA's recognition of a foreign railroad's workplace testing program as a compatible alternative, the foreign railroad may comply with the standards of the recognized program while operating in the United States as an alternative to complying with the enumerated subparts of this part.[2] If its

[1] The Standards Council of Canada voted to end its Laboratory Accreditation Program for Substance Abuse (LAPSA) effective May 12, 1998. Laboratories certified through that program were accredited to conduct forensic urine drug testing as required by DOT regulations. As of that date, the certification of those accredited Canadian laboratories has continued under DOT authority. The responsibility for conducting quarterly performance testing and periodic on-site inspections of those LAPSA-accredited laboratories was transferred to the HHS, with the HHS' National Laboratory Certification Program (NLCP) contractor continuing to have an active role in the performance testing and laboratory inspection processes.

Other Canadian and foreign laboratories wishing to be considered for the NLCP may apply directly to the NLCP contractor just as United States laboratories do. Upon finding a foreign laboratory to be qualified, HHS will recommend that DOT certify the laboratory (**Federal Register**, July 16, 1996) as meeting the minimum standards of the Mandatory Guidelines published on June 9, 1994 (59 FR 29908) and on September 30, 1997 (62 FR 51118). After receiving DOT certification, the laboratory will be included in the monthly list of HHS-certified laboratories and participate in the NLCP certification maintenance program.

[2] While operating in the United States the FRFB employees will continue to be subject to FRA's general prohibitions, post-accident testing, and reasonable suspicion testing requirements (subpart A, subpart B other than the return-to-service requirements in § 219.104(d), subpart C, mandatory reasonable suspicion testing in § 219.300 in subpart D, and subparts H, I, and J).

program has been recognized, the foreign railroad shall maintain a letter on file indicating that it has elected to extend specified elements of the recognized program to its operations in the United States. Once granted, program recognition remains valid so long as the program retains these elements and the foreign railroad complies with the program requirements.

II. Statutory Background: The Omnibus Transportation Employee Testing Act of 1991 and Its Implementation

In 1991, Congress passed the Omnibus Transportation Employee Testing Act of 1991, Pub. L. No. 102–143 (''Omnibus Act''or ''Act''). The Omnibus Act mandated FRA, the Federal Aviation Administration (FAA), the Federal Highway Administration (FHWA, whose Office of Motor Carrier Safety is now part of the Federal Motor Carrier Safety Administration (FMSCSA)), and the Federal Transit Administration, to add new alcohol and drug program requirements for their respective regulated industries. FRA subsequently fulfilled the Act's mandates by adding pre-employment testing and random alcohol testing to an already comprehensive drug and alcohol program that included random drug testing (59 FR 7613, February 15, 1994).

The Omnibus Act also mandated each agency to act consistent with the international obligations of the United States, and to take foreign countries' laws and regulations into account in fulfilling the Act's regulatory requirements. 49 U.S.C. 20140(e). In 1992, FRA published an advance notice of proposed rulemaking (ANPRM) asking for comment on international application of its alcohol and drug regulations to foreign railroad foreign-based railroad employees who cross into the United States to work. FRA received no comments and terminated its rulemaking in 1994.

FAA, which had simultaneously published a similar ANPRM with respect to its alcohol and drug rule, terminated its international application rulemaking in 2000, after deciding that application of its regulations to foreign-based flight personnel would be better handled through safety standards negotiated within the International Civil Aviation Organization (ICAO) (a specialized United Nations agency responsible for setting global standards for international civil aviation), than through a rulemaking. FHWA (as stated above, now FMCSA), which had also published a similar ANPRM, took a different approach and in 1995 issued a final rule applying all of its alcohol and drug regulations (including pre-employment and random drug testing) to truck and bus drivers and their employers who operate in the United States, regardless of domicile.

III. Proceedings in the Present Rulemaking

On December 11, 2001, FRA proposed to amend its regulation on the control of alcohol and drug use to narrow the scope of its existing exceptions for FRFB employees. 66 FR 64000. FRA also invited comments on whether it should expand the scope of events that trigger post-accident testing (subpart C) and reasonable suspicion testing (subpart D) to include events that occur outside the United States, and FRA raised for comment several practical issues associated with the extraterritorial application of part 219.

Currently, an FRFB employee who enters the United States to perform train, dispatching, or signal service is subject only to the provisions on general conditions, prohibitions, post-accident testing, reasonable suspicion testing (accident/incident testing and rule violation testing are authorized, but not required, for both FRFB and domestic rail employees), testing procedures, annual report, and recordkeeping of FRA's alcohol and drug rules (respectively, all of subparts A, B, C, and § 219.300 (reasonable suspicion testing) in subpart D, and subparts H. I, and J of part 219) under paragraph (c) of § 219.3. In the NPRM, FRA proposed to apply subparts E (identification of troubled employees), F (pre-employment testing), and G (random testing) to FRFB train and dispatching service employees, who had previously been excepted from these requirements, unless their employer qualified as a small railroad under the proposed § 219.3(b). FRA's proposal to narrow the current exceptions for FRFB employees arose from its concerns about the projected steady increase in the number and extent of cross-border train operations due to the continuing consolidation of North American railroads. Under this proposal, only FRFB signal service employees, who are currently few in number, would continue to be excepted from the requirements of subparts E, F, and G.

The most controversial part of the NPRM was its proposal to include random alcohol and drug testing as part of a more comprehensive testing program for FRFB employees who perform train or dispatching service in the United States. As noted in the preamble to the NPRM, alcohol or drug use has resulted in serious accidents in the United States (*e.g.*, marijuana use was implicated in a 1987 collision between two trains at Chase, Maryland, which killed 16 people and injured 174). FRA believes that random alcohol and drug testing is an effective and necessary deterrent to substance abuse by road train crews and road switching crews, who normally work independent of supervisory monitoring, and to dispatching service employees, who are critical to rail safety because they determine the movements and speed of trains. Train employees, in general, including engineers, conductors, switchmen, trainmen, brakemen, and hostlers, pose a significant safety risk to themselves and others if their judgment and motor skills are impaired by the use of alcohol or drugs.

FRA's experience with administering part 219 has shown that random alcohol and drug testing helps to deter alcohol and drug usage and to identify individuals who have a substance abuse problem. Since mandatory FRA random drug testing began in 1989, the positive drug rate for the United States rail industry has declined from 1.04 percent in 1990 to 0.77 percent in 2001. A positive drug test result can indicate on-duty impairment if the test was conducted shortly after the employee's ingestion of an illegal substance (since random testing may be conducted only when an employee is on duty). However, even if a test were conducted some time after the employee's ingestion, a positive result still provides valuable safety information since it establishes that the employee has a history of drug use. Use of controlled substances is typically compulsive behavior that is likely to be repeated, and the chronic and withdrawal effects of drugs are frequently as serious as the acute effects.

Through its Management Information System (subpart I of part 219, discussed below), FRA obtains data annually from the larger domestic railroads on the training and testing results of their alcohol and drug misuse prevention programs. FRA examines the collective data from these reports to gauge substance abuse trends in the rail industry, such as the overall industry positive rate, which determines the following year's minimum annual percentage rate for random drug and random alcohol testing. Because Transport Canada does not have comparable reporting requirements for Canadian railroads, similar data on the extent of substance abuse in the Canadian rail industry are not available.

In the NPRM, FRA also proposed to amend paragraphs (b)(2) and (3) of § 219.3 to take into account a railroad's

operations outside the United States in determining its size for two exceptions. Currently, § 219.3(b)(2) provides relief from subparts D, E, F, and G for certain small railroads. A small railroad is defined as one that (1) does not operate on the track of another railroad or otherwise engage in joint operations with 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 exception, at § 219.3(b)(3), provides relief from subpart I (annual reports) for a railroad with fewer than 400,000 employee-hours. FRA proposed to reduce the scope of the two exceptions at §§ 219.3(b)(2) and 219.3(b)(3) to provide relief only to relatively small railroads, as originally intended, by taking into account a railroad's operations outside the United States in determining the size of the railroad for purposes of those exceptions.

Finally, the NPRM also contained an invitation to discuss part 219 implementation issues, and a request for comment on whether FRA should expand the basis for requiring post-accident testing and reasonable suspicion testing to include events that occur outside the United States.

In a separate notice, FRA announced a public hearing on the NPRM (67 FR 3183, January 23, 2002). At the February 14, 2002 hearing, FRA heard testimony from the Canadian National Railway Company (CN), the Canadian Pacific Railway Company (CP), and two Canadian counterparts of American railroad unions, the Brotherhood of Locomotive Engineers (BLE-Can.) and the United Transportation Union (UTU-Can.). A transcript of this hearing is available in the public docket of this rulemaking. At the hearing, FRA also extended the comment period 30 days to allow interested parties time to supplement the record.

On July 10, 2002, several months after the comment period had closed, the Canadian Human Rights Commission (CHRC or Commission) issued a Policy Statement on Alcohol and Drug Testing (CHRC Policy). To consider the implications of this major statement, FRA published a notice (December 10, 2002, 67 FR 75996) inviting comment on the CHRC Policy and extending the comment period on the NPRM until further notice to enable the agency to consult further with the Governments of Canada and Mexico.

As discussed in detail below, FRA has since consulted with both Canada and Mexico on this rulemaking and other issues. In a July 28, 2003 notice (68 FR 44276), FRA outlined the likely revisions to the NPRM, based on these consultations and consideration of other public comments. FRA also announced that the comment period on this rulemaking would close on August 27, 2003, and invited comments on the changes to the NPRM that the agency was considering. The public comments filed in response to the notice will be discussed later in this preamble.

IV. FRA's Consultations With the Governments of Canada and Mexico

A. The Canadian Human Rights Commission Policy Statement on Alcohol and Drug Testing

In the CHRC Policy, the Commission found four types of testing not to be bona fide occupational requirements and, therefore, unacceptable types of testing in Canada: Pre-employment drug testing, pre-employment alcohol testing, random drug testing, and random alcohol testing of employees in non-safety-sensitive positions. Two of these four types of testing, namely pre-employment alcohol testing, which is authorized but not required by part 219, and random alcohol testing of non-safety-sensitive employees, which is neither authorized nor required by part 219, are not at issue here. The CHRC Policy did, however, recognize that Canadian trucking and bus companies wishing to do business in the United States present a special case and may be required to develop drug and alcohol-testing programs that comply with United States (FMCSA) alcohol and drug regulations applicable to Canadian truck and bus drivers who operate in the United States. Nevertheless, the programs would have to respect Canadian human rights laws.

FRA has attempted to harmonize the final rule to the Commission's concerns about pre-employment drug testing and random drug testing to the extent practicable. FRA has accordingly limited the application of pre-employment drug testing to FRFB employees so that a pre-employment drug test is required only when both of the following conditions apply: (1) The FRFB employee performs train or dispatching service for a railroad for the first time after the effective date of this rule, *and* (2) the FRFB performs such service on a cross-border operation beyond the 10-mile limited haul exception adopted in this rule. Thus, an FRFB employee who is currently performing train or dispatching service on a cross-border operation will be excepted from pre-employment drug testing, regardless of whether that operation falls within the 10-mile limited haul exception; conversely, an FRFB employee performing train or dispatching service on a cross-border operation for the first time will only be required to undergo a pre-employment drug test if that operation proceeds beyond the 10-mile limited haul exception.

With respect to random drug testing, however, FRA disagrees with the Commission's finding that this type of testing is not reasonably necessary to the accomplishment of a legitimate, safety-related purpose. Unlike Canada, the United States has adopted a policy recognizing that misuse of controlled substances is inconsistent with the obligations of transportation employees because of the acute, chronic, or withdrawal effects of such misuse. Random testing is a legitimate means of detecting and deterring such misuse. Again, however, FRA is willing to limit the impact of its random drug testing requirements by limiting application only to FRFB employees who operate more than 10 route miles into the United States. FRA notes too, that the Commission found cross-border trucking and bus operations to be ''a special case'' under which Canadian trucking and bus companies that conduct extensive cross-border operations may be required to develop drug and alcohol testing programs that comply with United States regulations, and employees of such companies may be found to have a bona fide occupational requirement in not being banned from driving in the United States.

B. FRA's Consultations With the Government of Canada

In a diplomatic note dated May 16, 2002, the Embassy of Canada (Embassy) requested that FRA ''formally recognize the regulatory manner in which Canada deals internally with its substance use issues in the railway industry as providing a safety equivalent, if not identical, to that of the United States, and to withdraw the extra-territorial application portions of the current NPRM.'' As support for Canadian safety regulatory equivalence, the Embassy and CN and CP in their comments, cited the following safeguards: (1) The Canadian railroads' operating Rule G, which, like the longstanding United States rail industry rule, prohibits the use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty; (2) the Canadian railroads' implementation of comprehensive drug and alcohol programs that, except for random testing, are similar to those required by FRA; (3) the Railway Safety Management System Regulations, which

require Canadian railroads to implement and maintain safety programs; (4) the Canadian Railway Safety Act, which mandates regular medical examinations for all persons occupying safety-critical positions (including train crews), and which requires physicians and optometrists to notify the railroad's Chief Medical Officer if a person occupying a safety-critical position has a medical condition that could be a threat to safe railroad operations; and (5) Transport Canada's role in monitoring operating crew compliance with Rule G and auditing railroad safety programs.

The Embassy's note also stated that Canada does not believe that FRA has proven safety or security reasons to support the extraterritorial application of part 219 to the Canadian rail industry, or that FRA has jurisdiction to impose the rule in Canada. Furthermore, the Embassy stated, any requirement to conduct random drug testing of Canadian-based employees would likely be challenged under the privacy provisions of the Canadian Charter of Rights and Freedoms, and the Canadian Human Rights Act. For these reasons, the Embassy recommended that FRA withdraw the NPRM, and continue to work with Transport Canada to establish a Canada-United States rail safety working group that would explore areas of bilateral cooperation.

FRA has since consulted both formally and informally with Transport Canada on this rulemaking and other topics. FRA and Transport Canada meet annually to share information on regulatory initiatives, safety programs, and current issues; this year's joint session included a discussion of this rulemaking. FRA also discussed this rulemaking with Transport Canada and its Mexican counterpart, the Secretaria de Comunicaciones y Transportes, at another annual meeting, the Land Transportation Standards Subcommittee/Transportation Consultation Group (LTSS) meeting, an annual forum where representatives from DOT and the Canadian and Mexican governments discuss cross-border transportation issues. At the 2003 LTSS meeting, Transport Canada presented FRA with a list of four Part 219 rulemaking options for discussion. Transport Canada's options are listed in italics, with FRA's response below.

(a) *Continue the current exception for Canadian-based crews, in recognition of Canada's rail safety programs and as a reciprocal response to Transport Canada's limited exclusion of United States-based crews from Canadian medical examination requirements.* Transport Canada and FRA have reciprocally recognized each other's policies before (for example, each recognizes the other's engineer qualification requirements). Reciprocity is a significant objective of both the Canadian and United States Governments and benefits United States carriers conducting operations in Canada.

Transport Canada has allowed, on a case-by-case basis, United States-based crews to enter Canada for short distances without complying with Transport Canada's medical standards program, for which there is no FRA equivalent. Similarly, FRA will allow, through the 10-mile limited haul exception adopted in this rule, Canadian-based crews to enter the United States for short distances without complying with FRA's random testing program (or its employee assistance and pre-employment drug testing programs), for which there is no Transport Canada equivalent. Application of FRA's full alcohol and drug requirements will be limited to those cross-border operations that run more extensively into the United States, for which FRA believes the requirements are necessary to protect the safety of United States railroad operations. As will be discussed in the public comments section which follows, the Canadian regulatory program is not the functional equivalent to subparts E, F, and G of part 219.

The 10-mile limited haul exception recognizes the fact that most movements handled by Canadian-based crews are limited in distance and generally involve delivery in interchange to United States carriers. However, acquisition of Class I and Class II United States railroads by the two major Canadian railways makes it likely that this pattern will change over time, with longer ''interdivisional'' runs penetrating more deeply into the United States.

(b) *Automatically grandfather all Canadian cross-border operations existing as of January 1, 2004.* The 10-mile limited haul exception discussed above achieves the functional equivalent to grandfathering for all but the six longest Canadian cross-border routes, since 29 of the 35 current segments (listed at the end of this rule) extend into the United States 10 route miles or less. (The 10-mile limited haul exception also excepts all current Mexican cross-border railroad operations). The remaining six Canadian cross-border segments not only extend significantly farther into the United States (the longest three segments are 40, 54, and 78 miles long, respectively), but often pose other safety risks. Two of these segments carry large volumes of hazardous material, while the longest two segments run through Detroit, Michigan.

(c) *Grant waivers for Canadian-based crews in cross-border railroad operations in accordance with criteria similar to those adopted in FRA's rule on locational dispatching (49 CFR part 241).*[3]

As mentioned above, foreign-based railroads may petition for waivers of subparts E, F, and G of this part for the few cross-border operations that are fully subject to part 219 by virtue of extending more than 10 route miles into the United States. If FRA finds that a waiver of compliance is in the public interest and consistent with rail safety, FRA may grant the waiver subject to any conditions that FRA deems necessary. If a petition for a waiver with respect to existing cross-border operations is filed within 120 days of the publication date of this rule, the existing crew assignments covered by the petition will remain excepted from subparts E, F, and G while FRA until the waiver request is acted upon by FRA. If the waiver petition is filed beyond the 120-day period, the foreign railroad must comply with subparts E, F, and G while its petition for waiver is being considered by FRA.

A foreign railroad beginning a new cross-border operation that proceeds more than 10 route miles into the United States, or expanding an existing cross-border operation beyond the 10-mile limited haul exception, may file a petition in accordance with FRA's rules of practice (49 CFR part 211) to waive the application of subparts E, F, and G on that operation not later than 90 days before commencing the cross-border operation for it to be considered by FRA. FRA will attempt to decide such petitions within 90 days. If no action is taken on the petition within 90 days, the petition remains pending for decision and the cross-border crew assignments covered by the petition will be subject to subparts E, F, and G until FRA decides the petition should the petitioner commence the proposed operation.

(d) *Apply part 219 requirements to Canadian-based crews only while they are operating within the United States.*

Under this rule, only Canadian-based train and engine crews employed by foreign railroads who operate on

[3] The part 241 rulemaking (FRA Docket No. 2001–8728) dealt with the issue of whether FRA should permit extraterritorial dispatching (the act of dispatching of a railroad operation that occurs on trackage in the United States by a dispatcher located outside the United States). FRA issued part 241 as a final rule on December 10, 2002 (67 FR 75938).

extensive cross-border routes will be subject to FRA random testing. As discussed above, such testing will be allowed to be accomplished without requiring random testing specimens to be collected in Canada. Canadian railroads generally have United States subsidiaries that could easily manage such programs for collection and testing; FRA is committed to working with these railroads to develop and implement programs that meet FRA requirements.

C. FRA's Consultations With the Government of Mexico

At this year's LTSS meeting, the Secretaria de Comunicaciones y Transportes committed to making Mexico's drug and alcohol program for the railroad industry fully compatible with DOT requirements, including random alcohol and random drug testing, with the goal of complete mutual recognition between the two programs. The Mexican Constitution does not prohibit the Mexican Government from requiring random alcohol or drug testing of its citizens, and the Mexican Government routinely conducts its own alcohol testing during motor vehicle equipment checks (approximately two million tests annually, including a minimum of two random tests per year for each transportation employee). Mexico also conducts daily on-site fitness-for-duty checks. The Secretaria de Comunicaciones y Transportes anticipates expanding Mexico's program by requiring testing of FRFB employees as one condition to entry (visual and hearing acuity and other examinations would also be performed by physicians stationed at the border or in mobile medical units).

In general, Mexican-based train crews employed by Mexican railroads currently hand United States-bound trains off either at the border or within one mile of their entry into the United States. As Mexican railroads already have major United States participation in both capital and organization, this pattern will likely change over time, with Mexican-based crews operating longer runs into the United States. FRA anticipates that further integration of the North American rail networks may result in more extensive sharing of North American routes by affiliated or allied carriers. The final rule allows FRA's Associate Administrator for Safety to recognize a foreign railroad's alcohol and drug program as compatible to that of FRA if the foreign railroad's program contains the various elements covered by part 219.

IV. Public Comments and FRA's Response to Those Comments

A. Comments Filed in Response to the December 11, 2001 NPRM

Two domestic trade associations submitted written comments to the NPRM: The Association of American Railroads (AAR) and the Drug and Alcohol Testing Industry Association (DATIA). In addition to the Canadian Government, the Canadian commenters to the NPRM were the Railway Association of Canada (RAC), CN, CP, the BLE-Can., the UTU-Can., and Barbara Butler, a Canadian consultant. Of these comments, only those from DATIA fully supported FRA's proposal. There were no comments from the Government of Mexico or from Mexican railroads.

The Canadian comments all centered around random testing, which is controversial in Canada. CN supported FRA's proposal to require random testing of safety-sensitive employees, but only if such testing was also required by Transport Canada. Without Transport Canada's support, CN was concerned that its employees would likely challenge CN's implementation of FRA's proposed random testing requirements, and that such challenges under current Canadian human rights legislation could lead to significant costs and potential disruption to its rail operations. CN concluded that expansion of random testing to Canadian-based employees would best be done if Transport Canada promulgated regulations similar to those of FRA. CN therefore urged FRA to continue working with Transport Canada to achieve a similar regulatory scheme in Canada.

CP, the AAR, the BLE-Can., and the UTU-Can. opposed random testing. A detailed summary of their reasons for doing so, along with FRA's responses, is below. For the reasons stated above, FRA is not requiring FRFB employees performing cross-border train operations of 10 miles or less to be subject to random testing. FRA continues to believe in the proven deterrent effect of random testing, however, and FRFB employees who perform more extensive cross-border operations are subject to FRA's random testing requirements.

1. The Issue of Whether To Require Random Testing of FRFB Train and Dispatching Service Employees

The discussion below is a composite of the objections to random testing contained in the Canadian comments to the NPRM. For each item, the commenters' objection is in italics and followed by FRA's response.

a. *Canadian railroads operate with FRFB train crews for limited distances in the United States.* CP estimated that it operates an average of 27 trains a day into the United States using Canadian-based crews, while CN estimated that approximately 140 of its Canadian-based employees are currently in pools that operate into the United States, and that this total would increase to 400 FRFB employees if spareboard employees who occasionally work in the United States were included. The safety record of Canadian-based crews is good over current cross-border operations, most of which operate 10 miles or less into the United States (see current Canadian and Mexican cross-border operations are listed at the end of this rule) and therefore qualify for the limited haul exception contained in this rule.

FRA acknowledges the comments from CP attesting to the fact that its cross-border operations have been safely conducted for many years, but the nature of these operations can change in the future (for example, traffic levels in general and volumes of hazardous materials being handled) can greatly increase, thereby increasing the safety risk to the areas surrounding that track.[4]

FRA's decision to except cross-border operations of 10 miles or less means that only those employees who operate on the six longest current Canadian cross-border routes will be subject to random testing. FRA chose to set the limited haul exception at 10 miles because its main concern was and is the likely expansion of foreign railroad operations into United States territory, since FRA anticipates growth in both Canadian and Mexican cross-border operations due to trade expansion and recent trends in the organization of North American railroads as discussed in the preamble to the NPRM. Subsequent to the publication of the NPRM the Kansas City Railway Company (KCS) announced a series of agreements between separate parents whereby KCS would acquire the Texas-Mexican

[4] Between 1998 and 2002, the value of rail traffic moving between the United States and Canada has grown from $49.65 billion (United States dollars) to $60.94 billion, which is a 22.7 percent increase over the period or an annual rate of 5.3 percent. (Since the traffic mix has not changed significantly during this period, ''value'' can be considered a good proxy for physical units such as tons or carloads.) Traffic attributable to eastern gateways (Customs ports in United States border states of Michigan and eastward) has grown more slowly: $28.95 billion (United States dollars) to $33.00 billion, or 14.0 percent overall, or 3.3 percent per year. It is commonly expected that trade between the United States and Canada will continue to increase in the future. These data are based on USDOT, Bureau of Transportation Statistics, Transborder Surface Freight Data public files.

Railroad (Tex-Mex) and the Transportacion Ferroviaria Mexicana (TFM—a major rail carrier in Mexico), and bring all three under common control in a KCS holding company named NAFTA Rail. The acquisition of TFM is subject to approval by the Mexican Government and the Surface Transportation Board; KCS also needs to overcome TFM shareholder opposition to the KCS purchase offer. The approach in this rule seeks to minimize conflicts with foreign laws, by impacting only those employees who actually engage in extended rail operations in the United States.

b. *FRA should take the approach adopted by FAA rather than that adopted by FMCSA since the Canadian railroads' cross-border operations are very limited while cross-border trucking operations can be quite extensive.*

FRA does not agree that FAA's approach is more appropriate than that adopted by FMCSA. For example, data supplied by CP stated that in 1997 there were over 5.7 million trucks crossing from Canada into the United States. Despite such numbers (foreign-based truckers have access to over 3 million miles of highways in the United States through approximately 70 northern border locations), FMCSA has regulated and audited foreign Commercial Driver's License holders who operate in the United States with few problems since implementation of its program in 1995. Under FMCSA's program, a combination of Federal and state inspectors inspects vehicles engaged in cross-border operations.

Furthermore, FMCSA and FRA, unlike FAA, share cross-border concerns only with Canada and Mexico. As mentioned above, ICAO, an agency with 187 contracting foreign governments, sets international civil aviation standards for the aviation industry. There is no counterpart to ICAO in the rail industry. Lastly, FRA anticipates substantial growth in both Canadian and Mexican cross-border operations due to trade expansion and recent trends in the organization of North American railroads.

c. *There are no data on accidents in the United States involving Canadian-based train crews that would justify random alcohol and drug testing.* Since FRA's accident reporting system does not break out data on existing cross-border operations, FRA cannot determine from its existing records whether drugs or alcohol have contributed to accidents in the United States during cross-border train operations. As mentioned earlier, however, and as discussed more fully below, the efficacy of random testing as a deterrent program has been demonstrated in the United States by the consistent decline in the United States rail industry's positive rate since the implementation of random drug testing.

d. *Random drug testing detects only past drug use and not current levels of impairment.* Random testing is conducted to determine whether employees are misusing controlled substances. Misuse can have detrimental effects on employee fitness whether or not the employee is under the acute effects of the drug on the job. FRA's post-accident testing program has also identified accidents that have been caused by recent usage resulting in the employee's impairment at the time of the accident. The rate of positive drug testing results decreased significantly when domestic railroad employees became subject to FRA's random drug testing requirements. FRA sees no merit in the suggestion that FRA encourage Transport Canada to implement random testing. FRA has been in conversation with Transport Canada since the late 1980's, and has no reason to believe that this approach would be successful.

e. *Regulatory equivalency in Canada justifies the current exceptions of FRFB employees from random drug testing.* The additional deterrence that random testing would provide is unnecessary. The commenters cite to the following as five elements of the Canadian rail safety program: (1) The Canadian railroads' operating Rule G (Canadian Rule G), which prohibits the use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty; (2) the Canadian railroads' voluntary implementation of comprehensive drug and alcohol programs that provide for pre-employment and pre-placement (or pre-assignment) drug testing to risk-sensitive positions, reasonable cause testing, and return-to-service testing; (3) the Railway Safety Management System Regulations, which require Canadian railroads to implement and maintain safety programs; (4) the Canadian Railway Safety Act, which mandates regular medical examination every three to five years, depending upon the age of the employee, for all persons occupying safety-critical positions (including train crews), and which requires physicians and optometrists to notify the employing railroad's Chief Medical Officer if the employee has a medical condition that could be a threat to safe railroad operations; (5) Transport Canada's role in monitoring compliance with Canadian Rule G and auditing railroad safety programs; and (6) criminal prosecutions—under the Canadian Criminal Code it is an offense to operate railway equipment while impaired by alcohol or a drug, or to have a blood alcohol concentration level greater than .08 percent.[5]

CN indicated that despite the drug and alcohol measures that have been adopted in Canada, it believed that random drug testing is also needed. CN urged FRA to continue to press Transport Canada to adopt a random drug testing requirement. However, both CN and CP expressed concern that, under current Canadian human rights legislation, employees could challenge the application of part 219's random drug testing requirement to Canadian railroad employees (such as Canadian train crews operating in the United States), and such challenges would lead to significant costs and potential disruption to their rail operations.

FRA commends the Canadian railroads and Canadian Government for their efforts to stem drug and alcohol abuse by Canadian railroad employees. However, FRA believes that the measures that have been implemented to date in Canada are neither comparable to the requirements of part 219, nor adequate to safeguard United States railroad operations were Canadian train crews to engage in extensive train operations in the United States. FRA also notes that since July 1, 1997, Canadian trucking companies with drivers assigned to operate commercial motor vehicles in the United States have had to comply with United States Department of Transportation substance-testing requirements similar to part 219, and that compliance with part 219 (in the case of Canadian train crews that operate in the United States) may not be as troublesome as CN and CP anticipate.

Transport Canada has approved Canadian Rule G, which was developed by the Canadian railroad industry, but Transport Canada has not reviewed and approved individual railroad plans implementing Canadian Rule G. [6] Like

[5] Under the Canadian criminal code police officers (including railway police officers) are entitled to test for presence of alcohol through approved breathalyser machines on reasonable cause. Penalties for violation of the criminal code include the possibility of fines and imprisonment. CN reported that over the past five years there have been four CN employees charged with this offense, one of which was a member of a train crew; the others were engineering or mechanical employees operating on or off-track equipment. CP reported that, between January 1998 and February 2002, five of its employees were charged with this offense; seven others were investigated but no charges were filed after an arrest, or the individuals were cleared of the charge.

[6] The Canadian Rule G provides the following:

(a) The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty, is prohibited.

other aspects of the Canadian regulatory scheme, Canadian Rule G relies very much on self-regulation and implementation with broad oversight by the Canadian government. Such an approach is in stark contrast to part 219, which mandates very specific requirements that the testing plans of domestic railroads must include.

Canadian Rule G has several significant differences from part 219. First, it fails to provide for alcohol and drug testing of railroad employees to detect and deter violations. Prior experience with a Rule G approach in the United States has revealed that such a rule alone, without the random and other tests required by part 219, is not effective in detecting and deterring drug and alcohol abuse among safety-sensitive railroad employees. Second, Canadian Rule G does not directly prohibit the off-duty use of drugs and abuse of alcohol by train crews, in contrast to FRA's regulations, which prohibit any off-duty use of drugs, and which prohibit use of alcohol within four hours of reporting for covered service or after receiving notice to report for covered service since such usage may ultimately affect an individual's performance on the job. See §§ 219.101(a)(3) and 219.102.

Prior to the adoption of part 219 in 1985, railroads in the United States had attempted to deter alcohol and drug use by their employees by their Rule G, which prohibited operating employees from possessing and using alcohol and drugs while on duty, and from consuming alcoholic beverages while subject to being called for duty. The customary sanction for violation of Rule G was dismissal. Unfortunately, accident reports revealed that the United States railroads' Rule G efforts were not effective in curbing alcohol and drug abuse by railroad employees. 48 FR 30726 (1983). Railroads were able to detect only a relatively small number of Rule G violations owing, primarily, to their practice of relying on observations by supervisors and co-workers to enforce the rule. FRA found that there was a ''conspiracy of silence'' among railroad employees concerning alcohol and drug use. 49 FR 24281 (1984).

(b) The use of mood altering agents by employees subject to duty, or their possession or use while on duty, is prohibited except as prescribed by a doctor.

(c) The use of drugs, medication or mood altering agents, including those prescribed by a doctor, which, in any way, will adversely affect their ability to work safely, by employees subject to duty, or on duty is prohibited.

(d) Employees must know and understand the possible effects of drugs, medication or mood altering agents, including those prescribed by a doctor, which, in any way, will adversely affect their ability to work safely.

Despite Rule G, industry participants confirmed that alcohol and drug use occurred on the United States railroads with unacceptable frequency. Available information from all sources ''suggest[ed] that the problem includ[ed] 'pockets' of drinking and drug use involving multiple crew members (before and during work), sporadic cases of individuals reporting to work impaired, and repeated drinking and drug use by individual employees who were chemically or psychologically dependent on those substances.'' Id. at 24253–24254. FRA identified multiple accidents, fatalities, injuries and property damage that resulted from the errors of alcohol- and drug-impaired railroad employees. Id. at 24254. Some of these accidents involved the release of hazardous material and, in one case, the release required the evacuation of an entire Louisiana community. Id. at 24254, 24259. These findings led FRA to promulgate the initial version of part 219 in 1985. The regulations do not restrict a railroad's authority to impose more stringent requirements. 50 FR 31538 (1985).

A review of the Canadian Rule G violations reported by CP indicates that the Canadian Rule G has resulted in the identification of an extremely low number of operating crew violators. CP reported that in the period 1995–2001, when there were between 3,900 to 4,700 operating crew employees per year, there was a total of only 26 Canadian Rule G operating crew violators for the period. It is likely that the true level of drug and alcohol abuse among Canadian operating crew employees was much higher. For example, a 1987 survey commissioned by a Canadian Task Force on the Control of Drug and Alcohol Abuse in the Railway Industry revealed that 20 percent of 1,000 randomly-selected Canadian railway workers admitted that they had come to work feeling the effects of alcohol, and 2.5 percent admitted that they had used illegal drugs during their shift. In addition, CN's drug screening of its employees has shown a significant level of drug abuse among its employees.[7]

[7] CN's submission to a Canadian Standing Committee on Transportation noted that CN had utilized pre-employment drug screening of job applicants since 1986, and these tests yielded a positive rate of 12 percent; similar testing of CN employees transferring to safety-sensitive positions (''pre-placement testing''), such as dispatcher positions, also yielded a positive rate of 12 percent. 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, decision of Arbitrator Michel G. Picher at 56 (July 18, 2000). CN drug screening results from of all sources (pre-placement, reasonable cause, medical examinations, promotions and transfer, reinstatement, and EAP follow-ups) in 1995, showed a 6.4 percent positive test rate in the Eastern Canada, and a 10 percent positive rate in Western Canada. Id. At 59–60.

Furthermore, alcohol and drug testing of safety-sensitive railroad employees in the United States found a significantly higher level of substance abuse prior to the introduction of random testing.

FRA's own data, compiled from domestic railroad reports, show a significantly higher level of substance abuse among safety-sensitive railroad employees in the United States prior to the introduction of random testing. For example, in 1988, the industry positive rates for reasonable cause testing were 4.7 percent for drugs and 4.5 percent for alcohol. After the introduction of random testing in 1989, these rates declined respectively to 2.02 percent and 1.32 percent. While the positive rates for reasonable suspicion testing have continued to fall, a comparison of the data for post-accident testing reveals an even stronger impact on positive testing rates. In 1988 the positive rate for drugs after qualifying accident events was 5.6 percent. After the commencement of random testing in 1990, this rate fell to 1.1 percent positive. There was a corresponding reduction in post-accident positives from 41 in 1988 to 17 in 1990. In 2002, two employees (1.06 per cent) testing for drugs other than alcohol in post-accident testing events.

The Canadian Government and CN and CP also rely heavily on the medical assessment that is required for dispatchers under the new Medical Rules for Safety Critical Employees as providing a functional equivalent to random testing. Under these rules, an assessment must be performed every three to five years, depending on the age of the employee, and include a medical examination. CP notes that the required intervals between assessments result in approximately 25 percent of Canadian employees being examined annually, and it argues that this is approximately the same number of United States rail employees that receive random drug testing per year under part 219.

Throughout the preamble to the NPRM, FRA emphasized the importance of random drug and alcohol testing in detecting and deterring substance abuse by railroad employees. The deterrent effect of random testing, which was implemented by FRA in 1988–1989, most certainly influenced the dramatic reduction in post-accident positives between the 41 that were recorded in 1988 to the 17 that were recorded in 1990. FRA does not believe that the

periodic medical assessments Canadian railroad employees must undergo are the functional equivalent of random testing. The medical model relies primarily on medical examinations that are scheduled in advance. The employees know well beforehand that they will be undergoing an exam, giving them the opportunity to refrain from any activity that may reveal a substance abuse problem. Experience in similar programs in the United States (*e.g.*, in the aviation and motor carrier industries) indicates that routine medical examinations will seldom be successful in identifying alcohol or drug use problems except perhaps in the most advanced stages of chemical dependency when an employee's remaining work life is often limited and major damage has been done to vital organs. Even if an employee is forthcoming in offering that he or she is misusing drugs in his or her personal life, this would apparently not be a disqualifying condition absent medical diagnosis of a specific substance abuse disorder; however, one does not have to be chemically dependent to constitute a threat to public safety. Much of the alcohol and drug use that threatens transportation safety has a voluntary component, and random testing is therefore an appropriate deterrent. Further, Transport Canada is in the early stages of implementing this program and has not yet had the opportunity to determine program outcomes. For these reasons, it would not be appropriate for FRA to rely upon this program as a full substitute for key DOT program elements, including a prohibition on non-medical use of controlled substances and random testing.

Aside from the fact that FRA believes that random testing is the most important aspect of any testing program and that pre-employment testing is important, FRA is also concerned about two other significant differences between part 219 and the Canadian railroads' testing programs.

First, the criteria for post-accident testing are much more subjective under the Canadian programs than under part 219. In the United States, post-accident testing is required for a train crew employee who is directly and contemporaneously involved in the circumstances of any qualifying train accident. See section 219.203. Under the Canadian programs, however, a train crew employee is not automatically tested when he or she is involved in an accident. Instead, the railroad must have independent evidence of impairment before a train crew employee involved in a Canadian accident may be tested. Thus, a train crew employee under the influence of drugs or alcohol may contribute to an accident and yet must not be tested if he or she does not exhibit some physical manifestation of impairment. That train crew employee may continue to work without undergoing additional scrutiny that may reveal a dependency problem that could continue to negatively impact his or her job performance. CN did indicate in its written comments that it plans to revise its policy this year to add mandatory post-accident testing using criteria identical to that in part 219. The CHRC Commission Policy Statement endorses the right of Canadian companies to impose such testing for safety-sensitive employees.

Second, a Canadian rail employee may currently decline to be tested and not suffer adverse consequences unless the employer has an independent basis for concluding that the employee is impaired by drugs or alcohol. Under part 219, however, a train crew employee in the United States who refuses a test is immediately suspended for a period of nine months and must follow specified procedures, including return-to-duty and follow-up testing, before being allowed to return to safety-sensitive service. Obviously, the effectiveness of a testing program is severely compromised if an employee is permitted to simply decline to be tested.

In FRA's judgment, commenters who assert that Canada's stress on protection of individual rights is incompatible with random testing must consider public safety in any balancing test. Random testing, as implemented in part 219, effectively balances the rights of the individual against those of the public.

g. *FRFB employees may challenge the legality of a random drug testing program and may refuse to cooperate with the testing, including refusing to cross the border.* Litigation is costly and time consuming, and refusals by employees to submit to testing would result in them having to be taken out of United States service for a nine-month period and could lead to serious disruptions in train traffic across the border. In addition to the concerns listed above, commenters cited to four locations where interchange of railroad border traffic takes place in the United States, and asserted that comparable interchange facilities do not exist in Canada to permit the alternative of using United States-based crews to perform these operations. The AAR also pointed out that moving the interchange of traffic to Canada could have the counterproductive effect of undermining the deterrence effect of random drug testing on United States-based employees since, to accommodate Canadian law, railroads would be limited to conducting random testing only at the beginning of an employee's shift in the United States. Random testing achieves the most deterrence when the possibility of testing exists throughout an employee's shift, *i.e.*, before, during, or after a tour of duty.

FRA does not have sufficient information to make an informed judgment as to whether current facilities exist in Canada to permit the interchange of railroad traffic on the Canadian side of the border, or what the costs of constructing such facilities would be. While FRA cannot predict whether implementation of a random drug testing program would result in extensive Canadian railroad employee refusals to submit to such testing, litigation, or extensive disruptions to cross-border train service, FRA notes that employees of Canadian trucking companies who are subject to FMCSA's alcohol and drug testing regulations have not aggressively litigated the legitimacy of these regulations, and that the Canadian Human Rights Commission found cross-border trucking and bus operations to be ''a special case'' in that employees of Canadian cross-border trucking and bus companies may have a bona fide occupational requirement in not being banned from driving in the United States. As discussed above, FRA has modified its proposal as much as practicable to reconcile FRA's program requirements with Canadian public policy. Finally, random drug testing will detect and deter use whether the testing is conducted before, during, or after a tour of duty involving cross-border operations

h. *The proposed rule is not cost beneficial.* Commenters asserted that the NPRM's regulatory evaluation underestimated some of the costs associated with the proposal, including: (1) The likelihood of an increase in the pool of employees who would be subject to the proposed requirements; (2) the train delays associated with crews' refusals to submit to random drug testing; (3) the litigation expenses of defending challenges to random drug testing; (4) the need to make reasonable accommodations for persons with substance abuse problems, who are considered to be disabled under Canadian law; and (5) the back pay and other compensation paid to employees out of work due to positive drug test results or treatment for substance abuse. CP estimates that costs of the regulation, not including the significant costs associated with litigation or construction of track that would be

required to interchange all railroad traffic north of the Canada-United States border, are 37 times the benefits.

FRA believes that the costs may have been understated in the initial regulatory evaluation, but has not established the extent to which the additional factors cited by the commenters would raise the overall costs of the NPRM since FRA is proposing to except most existing cross-border operations from the application of subparts E, F, and G of part 219. FRA cannot verify or dispute CP's estimate, since CP failed to provide a complete justification of the costs and benefits used to develop it. The regulatory evaluation accompanying the NPRM estimated that its requirements would cost the rail industry approximately $366,244 Net Present Value (NPV) over the next 20 years. For a discussion of the costs and benefits associated with this final rule, see the analysis in the Regulatory Impact section below.

i. *Under NAFTA, trading partners are required to seek the least-trade-impact solution in furtherance of their national safety goals, and the NPRM does not meet this requirement.* Commenters indicated that FRA had not conducted a risk assessment to establish the need for the proposed rule, and that even if such an assessment existed, the proposed expansion of part 219 requirements for FRFB employees would be better handled through bilateral government negotiations than an FRA rulemaking.

FRA believes that the NPRM was consistent with NAFTA; nevertheless, as explained above, FRA has, after consultations with Canada and Mexico, and consideration of the public comments, modified the final rule to lessen its trade impact while continuing to further the safety of railroad operations in the United States. Under NAFTA, each Party retains the right to adopt and enforce any nondiscriminatory standards-related safety measure it considers appropriate to address legitimate safety objectives, including prohibiting the provision of service by a service provider of another Party that fails to comply with the safety measure. FRA has a legitimate interest in assuring the safety of rail transportation within the borders of the United States. A Canadian or Mexican dispatcher or train or engine crew employee operating in the United States who is impaired by alcohol or by use of a controlled substance has a substantial, direct, and foreseeable adverse effect on the safety of United States railroad operations, especially if he or she is involved in the movement of passengers or hazardous materials. Congress has determined, and FRA's experience has shown, that pre-employment drug testing and random drug and alcohol testing are critical parts of an effective drug and alcohol screening and deterrent program.

2. Other Issues Raised by Extraterritorial Application of Part 219

Because of the *de minimis* nature of the exceptions to the prohibition against extraterritorial dispatching, FRA proposed not to apply part 219 to the few railroad employees permitted to conduct extraterritorial dispatching under the interim final rule (49 CFR part 241) based on that service. Commenters agreed with this proposal, which is adopted in this final rule. FRA had also considered proposing an expanded application of part 219 to cover extraterritorial or FRFB signal maintainers, but decided not to do so after determining that this activity is also *de minimis.*[8]

FRA also solicited comment on whether it should 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, and whether to expand the basis for requiring reasonable suspicion testing to events that occur outside the United States.

CN supported post-accident testing in general, but commented that any expansion of FRA post-accident criteria would be subject to serious legal challenge and would also be rendered unnecessary by CN's plan to implement a company post-accident testing program. CP noted that in Canada each province has its own exclusive legal jurisdiction over post-mortem examinations, and that these differing requirements could interfere with administration of any expanded FRA post-accident testing requirements. CP also stated that it too is currently considering adoption of a post-accident testing program (unlike FRA's program, however, CN's post-accident testing program would likely test urine and breath specimens, but not blood). In light of the possibility of the two largest Canadian freight carriers implementing equivalent post-accident testing programs on their own, and out of respect for the prerogative of the Canadian Government to regulate events occurring within its territory, FRA has decided not to broaden the application of its post-accident testing program for now.

Finally, FRA also asked for comment on several implementation issues. Would clearance through customs and international mail significantly delay the shipment of testing specimens and their accompanying paperwork? Would employing railroads in foreign countries have difficulty obtaining and using evidential breath testing devices (EBTs) certified by the National Highway Traffic Safety Administration (NHTSA), as required in DOT's procedures for alcohol testing? In response to both questions, commenters indicated that while international customs and mail could occasionally cause delays, they did not anticipate a major problem with cross-border shipping and handling, or with obtaining and using NHTSA-certified EBTs.

FRA also asked whether, if it decided to apply post-accident testing to extraterritorial signal maintainers, foreign railroads would have difficulty shipping testing specimens to FRA's designated post-accident laboratory. This question is rendered moot by FRA's decision not to expand its post-accident testing program at this time.

B. Comments Filed in Response to the July 28, 2003 Notice

As mentioned above, after consulting with the Canadian and Mexican Governments, FRA published a notice outlining the likely revisions to the NPRM based on those consultations and FRA's consideration of the public comments to date. In response to this consultations notice, DATIA, CN, CP, and the UTU–Can. filed supplemental comments which, in addition to restating concerns expressed earlier in their comments in response to the NPRM, raised new issues or requested more information concerning the likely revisions outlined in the notice. Those comments that raised issues not discussed elsewhere in this rule (*e.g.,* under what circumstances an FRFB employee is required to undergo a pre-employment drug test), or not addressed in the above discussion of the comments to the NPRM, are discussed below.

CN noted that only half of its current cross-border operations would be excepted from subparts E, F, and G of this part, since each of its five remaining cross-border operations proceeds more than 10 route miles into United States territory. By definition, a limited haul is one that proceeds only a short distance into the United States; FRA excepts such short segment operations because it believes they present less of a safety

[8] As noted above, signal maintainers based in the United States, whether employed by United States or foreign railroads, remain fully subject to part 219 with respect to their covered service unless excepted 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 excepted.

risk and are necessary to facilitate interchange. The five CN cross-border operations that do not fall under this exception can in no way be considered limited hauls, since they respectively proceed 23, 25, 44, 54, and 74 route miles into the United States.

CN and the UTU–Can. stated that Canadian railroad employees who were subject to, but never actually called for cross-border operations, should not be subject to FRA's random testing requirements. A random testing pool can be designed to limit selections only to those employees who actually operate into the United States (*e.g.,* by selecting through job numbers or trains that operate in the United States beyond 10 route miles instead of through employee names).

Finally, CN asked whether, in order to aid compliance with the rule's requirements, FRA would consider certifying Canadian testing laboratories for DOT workplace testing and recognizing Canadian railroad Chief Medical Officers (CMOs) as Substance Abuse Professionals (SAPs) for return-to-service and follow-up testing evaluations. As stated above, FRA has no authority to certify laboratories for forensic urine testing; Canadian and foreign laboratories wishing to be considered for certification must apply to the HHS National Laboratory Certification Program (NLCP) just as United States laboratories do. (As noted earlier, several accredited Canadian laboratories are currently certified to conduct DOT workplace testing.) FRA also has no authority to recognize CMOs as a body as Substance Abuse Professionals; under § 40.283, an organization that seeks recognition for its members as SAPs must petition DOT for such recognition.

VI. Alternative Options that FRA Considered But Did Not Adopt

After reviewing the comments on the NPRM, FRA considered several alternatives to the one adopted today. FRA's reasons for excepting cross-border operations of 10 route miles or less from full application of part 219 are fully discussed throughout this preamble. The pluses and minus of the alternatives that were considered but not adopted are discussed below.

A. Adopt the NPRM as Proposed

First, FRA considered adopting the NPRM's proposal to apply part 219 in its entirety to FRFB train and dispatching service employees. FRA continues to believe that random testing is an essential component of effective programs to deter alcohol and drug abuse since, as stated above, industry positive rates have decreased significantly since domestic railroad employees became subject to FRA's random drug testing requirements. Moreover, a substantial number of the existing Canadian cross-border operations involve the movement of significant quantities of hazardous materials. Failure to subject the employees conducting these operations to random drug and alcohol testing increases the possibility that these operations will be conducted with drug or alcohol-impaired train crews. Conversely, barring FRFB employees who test positive or who refuse to submit to drug and alcohol testing from working in the United States would likely improve the safety of United States rail operations. Finally, as stated earlier, FMCSA has regulated and audited foreign-based Commercial Drivers License holders who operate in the United States with few problems since 1995.

Nevertheless, FRA decided not to adopt the NPRM entirely as proposed. Canadian commenters objected strongly to the NPRM's proposal to require FRFB employees to submit to random testing, with only CN favoring implementation of a random testing requirement, and then only if random testing were also required by Transport Canada. Furthermore, random testing would be of lesser deterrent value to a Canadian employee than to a United States counterpart, since a Canadian FRFB employee with a positive result or a refusal could continue to perform train or dispatching service in Canada so long as he or she is removed from United States service. Also, as commenters pointed out, an individual FRFB employee's refusal to be tested could disrupt the flow of United States-bound freight over the Canadian border since a train delay due to a train crew member's refusal to take a random drug test is potentially more disruptive than the refusal of a single trucker to comply with the FMCSA testing program. Finally, as commenters noted, to date FRA has no specific accident data to show that cross-border railroad operations, which are only partially subject to part 219, are less safe than domestic operations, which are fully subject to part 219. Given all these factors, FRA opted instead to adopt a limited haul exception.

B. Grandfather Canadian and Mexican Cross-Border Train and Dispatching Service Operations in Existence as of the Date of Publication of the Final Rule

FRA also considered modifying its original proposal by grandfathering existing Canadian and Mexican cross-border train operations and dispatching service in the United States performed by FRFB employees. (FRA has not identified any FRFB employees who enter the United States to dispatch a United States rail operation.) Because FRA does not segregate cross-border operations from overall accident reporting data, the prevalence of drug and alcohol abuse on existing cross-border operations is unknown, as is the extent to which substance abuse has contributed to cross-border accidents. The extent and volume of existing Canadian and Mexican cross-border railroad operations are limited, however, since, half of the current Canadian cross-border railroad operations travel one mile or less into the United States, and all of the current Mexican cross-border railroad operations travel one mile or less within the United States.

For the reasons stated above, however, FRA has decided to adopt a 10-mile limited haul exception instead of grandfathering all existing cross-border railroad operations from full application of part 219. Setting the fringe border's limits at 10 route miles or less allows FRA to except most of the current Canadian cross-border railroad operations and all of the current Mexican ones, while still capturing the six longest cross-border operations, all of which operate a significant distance into the United States from Canada (the two cross-border segments that end in Detroit operate respectively 54 and 74 miles into United States territory). Other than new cross-border railroad operations within the 10-mile limited haul exception, any expansion of current cross-border train or dispatching service operations will be required to comply with all part 219 requirements (absent the grant of waivers or future rule changes by FRA), including random alcohol and drug testing, which may, at the option of the foreign railroad, be conducted in the United States or in the railroad's home country. The limited haul approach is also consistent with NAFTA, since this option has the least trade impact consistent with achieving safe railroad operations in the United States, and is less costly than adopting the full application approach of the NPRM.

VI. Section-by-Section Analysis

Introduction

This section-by-section analysis explains the provisions of the final rule and any changes made from the NPRM. This analysis should be considered as a whole with the discussion in the previous sections of this preamble. For

completeness, this analysis reprints portions of the section-by-section analysis from the proposed rule where sections have been adopted without change from the NPRM.

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 that general statement of applicability. The exceptions in paragraph (b) are available to both domestic and foreign railroads, while the exceptions in paragraph (c) are available only to foreign railroads. These changes are noted in the new paragraph headings.

Paragraph (a) is unchanged except to add the heading ''General'' and to make explicit in paragraph (a)(2) that part 219 applies to commuter and short-haul railroad operations in the United States, but not to such operations outside 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 in the United States as described in the statutory definition of ''railroad,'' unless the railroad falls into one of the exceptions contained in paragraphs (b) or (c). 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) is amended to state that this part does not cover a railroad whose entire operation is 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''). Tourist, scenic or excursion operations that occur on tracks that are not part of the general railroad system are, therefore, not subject to this part. FRA uses the term ''installation'' 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 solely to receive or offer 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, *paragraphs (a) and (b)(1)* mean that part 219 applies in its entirety to all railroads that operate on the general railroad system of transportation or are commuter or intercity passenger railroads, except those excepted from certain subparts of part 219 by paragraphs (b)(2) or (b)(3), or any provision of paragraph (c).

Paragraph (b)(2). Existing paragraph (b)(2) excepts from subparts D (mandatory reasonable suspicion testing; the other types of for cause testing, namely accident/incident and rule violation testing, are authorized but not required), E (self-referral and co-worker report programs), F (pre-employment testing), and G (random testing) a railroad that meets the following two criteria for the small railroad exception: the railroad must (1) utilize 15 or fewer employees who are subject to 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.

As proposed, a railroad (including a foreign railroad that utilizes FRFB employees to perform train operations in the United States) qualifies as a small entity excepted from the reasonable suspicion testing requirement in subpart D, and from subparts 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, must be 15 or fewer. (In calculating the total number of its employees covered by the hours of service laws, a railroad must include *all* employees covered by virtue of operating on United States soil, including those employees who operate on cross-border operations that are excepted under the 10-mile limited haul exception. The latter, will, however, continue to be excepted from subparts E, F, and G.) Second, as is the case currently, the railroad may not operate on the tracks of another railroad or otherwise engage in joint operations in the United States except in order to perform interchange. By excepting only railroads which in their entirety, comprise 15 or fewer employees who are or would be subject to the hours of service laws, FRA is effectuating 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.

Also as proposed, FRA in part determines the applicability of subparts 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 excepted under paragraph (b)(2) only from subparts E, F, and G must comply with all other requirements of part 219 (subparts A, B, C, reasonable suspicion testing in subpart D, and subparts H, I, and J) only with respect to those of its employees who are ''covered employees'' within the meaning of the substantive provisions of part 219.

Paragraph (b)(3). The exception from reporting requirements for subpart I is revised in three ways. First, the term ''employee hours'' replaces the term ''manhours'' to make the provision gender-neutral. Second, the way in which employee hours are to be calculated is clarified. Third, the term (''primary place of service (''home terminal'') for rail transportation services'') is replaced with the more generic term (''primary place of reporting'') to convey more clearly that this exception applies to signal employees, whose principal reporting point is not typically called a ''home terminal.''

Paragraph (c). As proposed, to be considered an ''FRFB train employee'' or ''FRFB dispatching service employee,'' an individual must meet all three of the following criteria. First, the individual must be employed by a foreign railroad or by a contractor to a foreign railroad. 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)(2) 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. A foreign railroad must remove any employee who refuses to submit to FRA-required testing from performing rail operations in the United States for a nine-month period (the employee must also comply with the return-to-service requirements in § 219.104 before returning to safety-sensitive service in

the United States), although this regulation does not preclude such an employee from continuing to perform rail service outside the United States.

Paragraph (c)(1). As stated above, FRFB train or dispatching service employees who operate on cross-border segments of 10 route miles or less will continue to be excepted from subparts E (self-referral and co-worker report programs), F (pre-employment drug tests), and G (random testing); those who perform train operations or dispatching service in the United States on cross-border segments that extend more than 10 route miles into the United States are no longer excepted from full application of part 219 (unless they work for railroads that qualify for the small railroad exception in § 219.3(b)).

While FRA has chosen not to address the relatively low safety risk of smaller cross-border segments, FRA continues to have safety concerns about the potential for future expansion of foreign railroad operations into United States territory. In new or expanded cross-border operations, FRFB employees may operate a significant distance inside the United States. There is no reason to treat these FRFB employees differently from domestic employees. Adopting a 10-mile limited haul exception ensures that only FRFB train or dispatching service employees who perform extended cross-border operations in the United States will be subject to random testing.

Paragraph (c)(2). This paragraph excepts an FRFB signal maintainer, defined as an individual (1) whose principal reporting point is outside the United States, (2) who is employed by a foreign railroad, and (3) who is a covered signal employee (unless the railroad for whom the individual works falls under the small railroad exception in § 219.3(b)) from subparts E, F, and G of this part. As before, subparts A, B, C, reasonable suspicion in subpart D, and subparts H, I, and J of this part continue to apply to an FRFB signal maintainer when he or she is performing signal maintenance in the United States.

Paragraph (c)(3). As stated earlier, current FRFB employees are not subject to pre-employment drug testing. Only employees not covered by the 10-mile limited haul exception who perform train or dispatching service for the first time in the United States after June 11, 2004 will be subject to pre-employment testing under this part.

Section 219.4 Recognition of Foreign Railroad Workplace Testing Programs

This new section specifies the procedures and requirements for a foreign railroad to obtain FRA recognition of a program promulgated under its home country government's workplace testing standards as compatible with the return-to-service requirements in subpart B, and subparts E, F, and G of this part. To be so recognized, the foreign railroad's program must include equivalents to the specified portions of part 219, and, in these equivalent provisions, use testing procedures, criteria and assays reasonably comparable in effectiveness to those in DOT procedures for workplace drug and alcohol testing programs (49 CFR part 40, incorporated by reference in subpart H of this part). In approving a program under this section, the FRA Associate Administrator for Safety may impose conditions deemed necessary. Upon FRA's recognition of a foreign workplace testing program as compatible with these subparts, train and dispatching employees whose primary reporting point is in the foreign country may comply with the standards of the recognized program while operating in the United States as an alternative of the requirements of these subparts; FRFB employees, would, however, continue to be subject to certain part 219 requirements: subpart A, subpart B other than the return-to-service requirements in section 219.104(d), subpart C, reasonable suspicion in subpart D, and subparts I and J of this part; all of these requirements remain subject to part 40 procedures.

Once granted, program recognition allows a foreign railroad to comply with the standards of its home country with regard to the FRA tests and criteria that are a condition precedent to entry into the United States (*i.e.,* return-to-service criteria, employee assistance, and pre-employment and random testing procedures). For program recognition, these standards need be compatible, but not necessarily identical, to their corresponding sections in this part. In contrast, part 219 elements that address transactions occurring on United States soil (Rule G violations, post-accident testing events, and reasonable suspicion) will remain under United States law for all purposes, and all protections of this part, including the DOT workplace testing procedures incorporated by subpart H of this part, will continue to apply.

Once granted, program recognition would remain valid so long as the program retained these elements and foreign-based railroads continued to comply with program requirements. For FRA's auditing purposes, the foreign railroad should maintain a letter on file indicating that it has elected to extend specified elements of the recognized program to its operations in the United States. FRA will work with the Canadian and Mexican Governments to arrange cooperative audits that build confidence in the effectiveness of each government's program.

Section 219.5 Definitions

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

Covered service. As proposed, the definition is added to make clear that ''covered service'' is service subject to the hours of service laws (49 U.S.C. ch. 211) that occurs in the United States. This is a practical, rather than a craft-based, definition of the persons and functions subject to the regulations. 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 functions have been 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.

Covered employee. As proposed, the definition of this term is revised to make clear that FRA interprets covered service as service performed in the United States.

Cross-border operation. This definition was not proposed in the NPRM, but is consistent with the NPRM's usage of this term, and is added for clarity.

Domestic railroad. As proposed, FRA adds this definition for clarity to distinguish a railroad that is incorporated in the United States from a foreign railroad.

Foreign railroad. As proposed, FRA this new term refers to a railroad that is incorporated outside the United States.

General railroad system of transportation. As proposed, this new definition clarifies that the term applies only to that part of the general railroad system of transportation that is located within the borders of the United States.

State. As proposed, FRA this new term refers to a State of the United States of America or the District of Columbia.

Section 219.7 Waivers

Paragraph (d). Special dispensation for employees performing train or dispatching service on existing cross-border operations. This section allows a foreign railroad to petition FRA, within 120 days of the publication of this rule,

for a waiver of subparts E, F, and G of this part for any existing cross-border operation that becomes fully subject to these subparts by virtue of this rule. As with other requests for waivers of safety rules, FRA's Railroad Safety Board will consider each such petition to determine if waiving full application of these subparts on the subject operation is consistent with railroad safety and in the public interest. Existing cross-border crew assignments on the operation subject to a petition filed within the 120–day period will continue to be excepted from subparts E, F, and G until the waiver request is acted upon by FRA.

Paragraph (e). Waiver requests for employees performing train or dispatching service on new or expanded cross-border operations. As stated above, a new cross-border railroad operation that proceeds more than 10 route miles into the United States, or a formerly excepted cross-border operation that expands beyond the10 mile limited haul exception, is subject to these rules unless the foreign railroad involved petitions FRA for a waiver of subparts E, F, and G not later than 90 days before commencing the cross-border operation, and FRA determines that granting the required relief is consistent with rail safety and in the public interest. See 49 CFR part 211. FRA will attempt to decide such petitions within 90 days. However, if no action is taken on the petition within 90 days, the petition remains pending for decision and the petitioner must comply with subparts E, F, and G should it commence the subject operations.

Section 219.11 General Conditions for Chemical Tests

As stated above, a foreign railroad now has the option of complying with the requirements of this part by conducting required collecting and testing entirely on United States soil. The railroad may collect FRA-required specimens in its home country or in the United States, so long as the DOT's workplace testing procedures (49 CFR part 40) are observed and records are maintained as required.

Annual Report (Subpart I)

Section 219.800 Annual Report

Paragraph (a)

As proposed, § 219.800 is amended to reflect the replacement of the term ''manhours'' in § 219.3(b)(3) with the gender-neutral term ''employee hours.''

VIII. Regulatory Impact

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This 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 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*.

The provision to except FRFB employees who enter the U.S. for 10 route miles or less from subparts E, F, and G of part 219 narrows the number of FRFB employees who will be affected by this rule. All current Mexican FRFB employees fall under the exception, because all current Mexican-based train operations into the U.S. are less than 1 mile. Almost all Canadian railroad operations into the U.S. are also excepted, however, a small number of Canadian railroad operations extend into the U.S. for more than 10 miles. From information submitted to FRA, FRA estimates that 100 Canadian-based employees serving on these operations will be affected. The affected FRFB employees are employed by two railroads, the Canadian National Railway Company (CN) and the St. Lawrence & Atlantic Railroad Inc. (SLR).

The regulatory evaluation estimates the costs and benefits from extending subparts E, F, and G of part 219 to these 100 FRFB employees and two railroads. The costs resulting from applying subpart E are the costs of developing a referral and co-worker reporting policy, and evaluating employees who are experiencing substance abuse problems. The costs of subpart F are for costs associated with testing employee specimens for pre-employment drug testing. The main contributors to costs of extending subpart G are for developing the program and random selection procedures, and for costs associated with performing the subsequent alcohol and drug tests. A new provision in the Final Rule provides an option for foreign railroads to file a letter of intent to follow their home country's testing program for U.S. and foreign railroad operations, following approval of the alternate, compatible program by the FRA's Associate Administrator for Safety. It is anticipated this option will be used by Mexican railroads, who will be required to file compliance programs with their government (Mexico has indicated its intent to establish a regulatory program similar to part 219). This option will reduce the burden for Mexican railroads to comply with two sets of programs. The costs for FRA's review is estimated. To better account for all costs, a miscellaneous cost category is assigned to represent reporting, testing, administrative, logistical, other burdens that may not have been specifically estimated. The table below presents the costs of this rule calculated as Net Present Value (NPV) over a twenty-year period using a 7 percent discount rate.

TOTAL COSTS

Description	Estimated 20 year NPV costs @7%
Subpart E (Voluntary referral and co-worker identification, employee assistance programs)	$2,726
Subpart F (Pre-employment testing)	$10,646
Subpart G (Random alcohol and drug testing)	$69,741
Filing intent to follow alternative, compatible program and review	$359
Miscellaneous	$3,000
Total	$86,472

Total twenty-year NPV costs associated with the Final Rule are estimated to be about $90,000.

The benefits of this rule will result from improved safety of railroad operations in the U.S. FRA believes that eased trade restrictions between the U.S. and its foreign neighbors as a result of the North American Free Trade Agreement NAFTA, and consolidations in North American railroad operations, have led to more cross-border railroad operations. This trend will likely continue. Extending application of subparts E, F, and G of part 219 will help protect against accidents that may be caused by impaired employees. With the 10-mile limited haul exception, the Final Rule targets the longer-distance railroad operations that pose a greater safety risk, yet reduces regulatory burden on most foreign railroads that have cross-border operations. Although the deterrent effect of random alcohol and drug testing will likely reduce

accidents, the direct benefits from avoiding fatalities and injuries in the future are not monetized because FRA's database has not historically separately identified cross-border accidents. FRA also notes that extending subparts E, F, and G to some FRFB employees will improve fairness in the applicability of part 219, by placing the same mandates on those FRFB employees as are already placed on U.S. railroad employees.

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 a Regulatory Flexibility Assessment, 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. Access to the docket may also be obtained electronically through the Web site for the Docket Management System at *http://dms.dot.gov*.

Pursuant to Section 312 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), FRA has published a final 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 (68 FR 24891, May 9, 2003).

In the Regulatory Flexibility Assessment, FRA certifies that this rule is not expected to have a significant economic impact on a substantial number of small entities. Current cross-border railroad operations (listed at the end of this rule) are conducted only by large Canadian and Mexican railroad companies.

C. Paperwork Reduction Act

Paperwork Statement—Alcohol and Drug Regulations: FRFB Train Crews and Dispatchers

The information collection requirements in this final 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 cost
219.4–Recognition of a Foreign Railroad's Workplace Testing Program.	2 railroads	1 petition	10 hours	10 hours	$370.
–Comment	2 railroads/public	2 comments + 2 comment copies.	2 hours	4 hours	$148.
219.401/403/405–Voluntary Referral & Co-worker Report Policies.	2 railroads	2 policies	30 hours	60 hours	$2,364.
219.03/405–Evaluation by Substance Abuse Professional.	2 railroads	3 reports/referrals	2 hours	6 hours	$900.
219.405(c)(1)–Report by a Co-worker.	2 railroads	1 report	5 minutes	.08 hour	$3.
219.601(a)–Railroad Random Drug Testing Programs.	2 railroads	2 programs	16 hours	32 hours	$1,184.
–Amendments to Programs	2 railroads	1 amendment	1 hour	1 hour	$37.
219.601(b)(1)–Random Selection Proc.–Drug.	2 railroads	24 documents	4 hours	96 hours	$1,440.
219.601(b)(4); 219.601(d)–Notice to Employees.	2 railroads	2 notices	10 hours	20 hours	$740.
–Notice to Employees–Selection for Testing.	2 railroads	20 notices	1 minute	.333 hour	$12.
219.602; 219.608–Administrator's Determination of Random/Drug/Alcohol Testing Rate.	Covered under OMB No. 2105–0529.	Covered under OMB No. 2105–0529.	Covered under OMB No. 2105–0529.	Covered under OMB No. 2105–0529.	Covered under OMB No. 2105–0529.
219.603(a)–Notice by Employee Asking to be Excused From Urine Testing.	200 employees	2 documented excuses.	15 minutes	.50 hour	$22.
219.607(a)–Railroad Random Alcohol Testing Progs.	2 railroads	1 amendment	1 hour	1 hour	$37.
–Amendments					
219.609–Notice by Employee Asking to be Excused from Random Alcohol Testing.	200 employees	2 documented excuses.	15 minutes	.50 hour	$22.
219.800—Annual Reports	Covered under OMB No. 2105–0529.	Covered under OMB No. 2105–0529.	Covered under OMB No. 2105–0529.	Covered under OMB No. 2105–0529.	Covered under OMB No. 2105–0529.
219.901/903–Retention of Breath Alcohol/Urine Drug Testing Records.	2 railroads	80 records	5 minutes	7 hours	$105.

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), FRA solicited comments concerning: whether these information collection requirements are necessary for the proper performance of the function 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. FRA received no replies in response to this request for comments. For information or a copy of the paperwork package submitted to OMB, contact Robert Brogan, FRA Information Clearance Officer, at 202–493–6292.

OMB is required to make a decision concerning the collection of information requirements contained in this 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.

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).

In most circumstances 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. However, upon RSAC's inception FRA committed not to task the RSAC with rulemakings concerning alcohol and drug testing issues since these issues require extensive coordination and consultation with both DOT and HHS.

FRA instead solicited comment on the Federalism implications of the proposed rule from nine groups designated as representatives for various State and local officials. In March 2000, FRA sent a letter seeking comment on the Federalism implications of the NPRM 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 United States Conference of Mayors. FRA received no indication of concerns about the Federalism implications of this rulemaking from these representatives. FRA has adhered to Executive Order 13132 in issuing this final rule.

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 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. This final rule does 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.

G. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any ''significant energy action.'' See 66 FR 28355; May 22, 2001. Under the Executive Order a ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has

evaluated this final rule in accordance with Executive Order 13211. FRA has determined that this final rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a ''significant energy action'' within the meaning of the Executive Order.

H. Privacy Act

Anyone is able to search the electronic form of all public submissions to any of our dockets by the name of the individual making the submission (or signing the submission, if made on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or by visiting *http://dms.dot.gov.*

List of Subjects in 49 CFR Part 219

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

The Final Rule

In consideration of the foregoing, the FRA amends 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 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.

(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, 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) *Exceptions available to foreign railroads only.* (1) Subparts E, F and G of this part do not apply to train or dispatching service in the United States performed by an employee of a foreign railroad whose primary reporting point is outside the United States, on that portion of a rail line in the United States extending up to10 route miles from the point that the line crosses into the United States from Canada or Mexico.

(2) Unless otherwise provided by paragraph (b) of this section, subparts A, B, C, D, H, I, and J of this part apply to signal service in the United States of a foreign railroad performed by an employee of the foreign railroad if the employee's primary place of reporting is located outside the United States. Subparts E, F, and G of this part do not apply to signal service in the United States of a foreign railroad performed by an employee of the foreign railroad if the employee's primary place of reporting is located outside the United States.

(3) Unless otherwise excepted under paragraph (c)(1) of this section, on and after June 11, 2004, a foreign railroad shall conduct a pre-employment drug test on each of its final applicants for, and each of its employees seeking to transfer for the first time to, duties involving train or dispatching service in the United States while having his or her primary reporting point outside of the United States. The test shall be conducted in accordance with this part prior to the applicant or employee's performance of train or dispatching service in the United States.

■ 3. Section 219.4 is added to read as follows:

§ 219.4 Recognition of a foreign railroad's workplace testing program.

(a) *General.* A foreign railroad may petition the FRA Associate Administrator for Safety for recognition of a workplace testing program promulgated under the laws of its home country as a compatible alternative to the return-to-service requirements in subpart B of this part and the requirements of subparts E, F, and G of this part with respect to its employees whose primary reporting point is outside the United States but who enter the United States to perform train or dispatching service and with respect to its final applicants for, or its employees seeking to transfer for the first time to, duties involving such service.

(1) To be so considered, the petition must document that the foreign railroad's workplace testing program contains equivalents to subparts B, E, F, and G of this part:

(i) Pre-employment drug testing;

(ii) A policy dealing with co-worker and self-reporting of alcohol and drug abuse problems;

(iii) Random drug and alcohol testing;

(iv) Return-to-duty testing; and

(v) Testing procedures and safeguards reasonably comparable in effectiveness to all applicable provisions of the United States Department of Transportation Procedures for Workplace Drug and Alcohol Testing Programs (part 40 of this title).

(2) In approving a program under this section, the FRA Associate Administrator for Safety may impose conditions deemed necessary.

(b) *Alternative programs.* (1) Upon FRA's recognition of a foreign railroad's workplace testing program as compatible with the return-to-service requirements in subpart B and the requirements of subparts E, F, and G of this part, the foreign railroad must comply with either the enumerated provisions of part 219 or with the standards of the recognized program, and any imposed conditions, with respect to its employees whose primary reporting point is outside the United States and who perform train or dispatching service in the United States. The foreign railroad must also, with respect to its final applicants for, or its employees seeking to transfer for the first time to, duties involving such train or dispatching service in the United States, comply with either subpart E of

this part or the standards of the recognized program.

(2) The foreign railroad must comply with subparts A, B (other than the return-to-service provisions in § 219.104(d)), C, reasonable suspicion testing in subpart D, and subparts I and J. Drug or alcohol testing required by these subparts must be conducted in compliance with all applicable provisions of the United States Department of Transportation Procedures for Workplace Drug and Alcohol Testing Programs (part 40 of this title).

(c) *Petitions for recognition of a foreign railroad's workplace testing programs.* Each petition for recognition of a foreign workplace testing program shall contain:

(1) The name, title, address, and telephone number of the primary person to be contacted with regard to review of the petition;

(2) The requirements of the foreign railroad workplace testing program to be considered for recognition;

(3) Appropriate data or records, or both, for FRA to consider in determining whether the foreign railroad workplace testing program is equivalent to the minimum standards contained in this part and provides at least an equivalent level of safety.

(d) ***Federal Register*** *notice.* FRA will publish a notice in the **Federal Register** concerning each petition under paragraph (c) of this section that it receives.

(e) *Comment.* Not later than 30 days from the date of publication of the notice in the **Federal Register** concerning a petition under paragraph (c) of this section, any person may comment on the petition.

(1) A comment shall set forth specifically the basis upon which it is made, and contain a concise statement of the interest of the commenter in the proceeding.

(2) Any comment on a petition should reference the FRA docket and notice numbers. A commenter may submit a comment and related material by only one of the following methods:

(i) *Web site: http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.

(ii) *Fax:* 1–202–493–2251.

(iii) *Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.

(iv) *Hand Delivery:* Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

(v) *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

(3) The commenter shall certify that a copy of the comment was served on the petitioner. Note that all petitions received will be posted without change to *http://dms.dot.gov* including any personal information provided.

(f) *Disposition of petitions.* (1) If FRA finds that the petition complies with the requirements of this section and that the foreign railroad's workplace testing program is compatible with the minimum standards of this part, the petition will be granted, normally within 90 days of its receipt. If the petition is neither granted nor denied within 90 days, the petition remains pending for decision. FRA may attach special conditions to the approval of any petition. Following the approval of a petition, FRA may reopen consideration of the petition for cause.

(2) If FRA finds that the petition does not comply with the requirements of this section or that the foreign railroad's workplace testing program is not compatible with the minimum standards of this part, the petition will be denied, normally within 90 days of its receipt.

(3) When FRA grants or denies a petition, or reopens consideration of the petition, written notice is sent to the petitioner and other interested parties.

(g) *Program recognition.* If its program has been recognized, the foreign railroad shall maintain a letter on file indicating that it has elected to extend specified elements of the recognized program to its operations in the United States. Once granted, program recognition remains valid so long as the program retains these elements and the foreign railroad complies with the program requirements.

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

§ 219.5 Definitions.

* * * * *

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. 211) 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.

Cross-border operation means a rail operation that crosses into the United States from Canada or Mexico.

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.

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■ 5. Section 219.7 is amended by adding new paragraphs (d) and (e) to read as follows:

§ 219.7 Waivers.

* * * * *

(d) *Special dispensation for employees performing train or dispatching service on existing cross-border operations.* If a foreign railroad requests a waiver not later than August 10, 2004, for an existing cross-border operation, subparts E, F, and G of this part shall not apply to train or dispatching service on that operation in the United States performed by an employee of a foreign railroad whose primary reporting point is outside the United States, until the railroad's waiver request is acted upon by FRA.

(e) *Waiver requests for employees performing train or dispatching service on new or expanded cross-border operations.* A foreign railroad seeking a waiver from subparts E, F, and G of this part for its employees performing train or dispatching service on a new cross-border operation that proceeds more than 10 route miles into the United States, or a formerly excepted cross-border operation that expands beyond the 10 mile limited haul exception in paragraph (d) of this section, must file

a petition not later than 90 days before commencing the subject operation. FRA will attempt to decide on such petitions within 90 days. If no action is taken on the petition within 90 days, the petition remains pending for decision and the cross-border crew assignments on the operation covered by the petition will be subject to subparts E, F, and G until FRA grants the petition should the petitioner commence the proposed operation.

■ 6. Section 219.11 is amended by adding a new paragraph (i) to read as follows:

§ 219.11 General conditions for chemical tests.

* * * * *

(i) A railroad required or authorized to conduct testing under this part may conduct all such testing in the United States. A foreign railroad required to conduct testing under this part may conduct such tests in its home country, provided that it otherwise complies with the requirements of this part.

■ 7. Section 219.800(a) is revised to read as follows:

§ 219.800 Annual reports.

(a) Each railroad that has a total of 400,000 or more 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.

* * * * *

Issued in Washington, DC, on March 26, 2004.

Allan Rutter,

Federal Railroad Administrator.

[**Note:** The following two tables will not appear in the Code of Federal Regulations.]

TRAIN OPERATIONS IN THE UNITED STATES BY CANADIAN-BASED EMPLOYEES OF FOREIGN RAILROADS

Destination in U.S.	Distance traveled in the U.S. per train	Operating railroad
10 miles or less		
Eastport, ID	1.7 miles	Canadian Pacific Railway Company (CP).
Detroit, MI	1 mile to CSX Transportation, Inc. (CSX) Expressway Yard	CP.
Detroit, MI	9 miles to the tunnel to CSX Rougemere Yard	CP.
Detroit, MI	9 miles to the tunnel to CSX Rougemere Yard	Canadian National Railway Company (CN).
Detroit, MI	6 miles to the Norfolk Southern Railway Company (NS) Oakwood Yard.	CP.
Sault Ste. Marie, MI	2 miles	CN.
Noyes, MN	1 mile	CN.
Noyes, MN	3.2 miles	CP.
Ranier, MN	Less than 1 mile	CP.
Coutts, MT	unknown	CP.
Sweet Grass, MT	2 miles	CN.
Sweet Grass, MT	2 miles	CP.
Buffalo, NY	5 miles	CN.
Buffalo, NY	7 miles	CN.
Buffalo, NY	9 miles	CN.
Buffalo, NY	7.5 miles	CP.
East Alburg, NY	2 miles	CN.
Niagara Falls, NY	1 mile	CN.
Rouses Point, NY	1 mile	CN.
Rouses Point, NY	1.2 mile	CP.
Portal, ND	2.8 miles	CP.
Sumas, WA	¼ mile	CP.
More than 10 miles		
Island Pond, VT	15 miles	St. Lawrence & Atlantic Railroad (Quebec), Inc.
Massena, NY	23 miles	CN.
St. Albans, VT	25 miles	CN.
Baudette, MN	44 miles	CN
Detroit, MI	54 miles to the GTW tunnel and East Yard in Detroit	CN.
Trenton, MI	74 miles via Detroit to tunnel and GTW Edison Yard (Trenton, MI)	CN.

TRAIN OPERATIONS IN THE UNITED STATES BY MEXICAN-BASED EMPLOYEES OF FOREIGN RAILROADS

Point of entry into U.S. and destination in U.S.	Distance traveled in the U.S. per train	Operating railroad
Nogales, AZ	Less than ¼ mile	Ferrocaril Mexicano (FXE).
Brownsville, TX	Less than 1 mile	Transportacion Ferroviaria Mexicana (TFM).
Eagle Pass, TX	Less than 1 mile	FXE.
El Paso, TX	Less than ¼ mile	FXE.

TRAIN OPERATIONS IN THE UNITED STATES BY MEXICAN-BASED EMPLOYEES OF FOREIGN RAILROADS—Continued

Point of entry into U.S. and destination in U.S.	Distance traveled in the U.S. per train	Operating railroad
Laredo, TX	Less than 1 mile	TFM.
Presidio, TX	Less than 1 mile	FXE.

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