

EXHIBIT 3-K

Docket No. DCA-08-MR009

**NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C. 20594**

49 CFR Part 217, Railroad Operating Rules

§216.27

Chief Counsel, Federal Railroad Administration, Washington, DC 20590. Upon receipt of a petition, FRA will immediately contact the petitioner and make the necessary arrangements for a conference to be held at the earliest date acceptable to the petitioner. At this conference, the petitioner will be afforded an opportunity to submit facts, arguments and proposals for modification or withdrawal of the Emergency order. If the controversy is not resolved at this conference and a hearing is desired, the petitioner must submit a written request for a hearing within fifteen (15) days after the conference. The hearing will commence within fourteen (14) calendar days of receipt of the request and will be conducted in accordance with sections 556 and 575, title 5, U.S.C.

(c) Unless stayed or modified by the Administrator, the requirements of each Emergency order issued under this subpart shall remain in effect and be observed pending decision on a petition for review.

§216.27 Reservation of authority and discretion.

The FRA may issue Emergency orders concerning track without regard to the procedures prescribed in this subpart whenever the Administrator determines that immediate action is required to assure the public safety.

PART 217—RAILROAD OPERATING RULES

Subpart A—General

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APPENDIX A TO PART 217—SCHEDULE OF CIVIL PENALTIES

AUTHORITY: 49 U.S.C. 20103, 20107; 28 U.S.C. 2461, note; and 49 CFR 1.49.

49 CFR Ch. II (10-1-08 Edition)

SOURCE: 39 FR 41176, Nov. 25, 1974, unless otherwise noted.

Subpart A—General

§ 217.1 Purpose.

Through the requirements of this part, the Federal Railroad Administration learns the condition of operating rules and practices with respect to trains and other rolling equipment in the railroad industry, and each railroad is required to instruct its employees in operating practices.

§ 217.2 Preemptive effect.

Normal State negligence standards apply where there is no Federal action covering the subject matter. Under 49 U.S.C. 20106 (section 20106), issuance of the regulations in this part preempts any State law, regulation, or order covering the same subject matter, except an additional or more stringent law, regulation, or order that is necessary to eliminate or reduce an essentially local railroad safety or railroad security hazard; that is not incompatible with a law, regulation, or order of the United States Government; and that does not unreasonably burden interstate commerce. Section 20106 permits State tort actions arising from events or activities occurring on or after January 18, 2002, for the following: violation of the Federal standard of care established by regulation or order issued by the Secretary of Transportation (with respect to railroad safety, such as these regulations) or the Secretary of Homeland Security (with respect to railroad security); a party's violation of, or failure to comply with, its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the two Secretaries; and a party's violation of a State standard that is necessary to eliminate or reduce an essentially local safety or security hazard, is not incompatible with a law, regulation, or order of the United States Government, and does not unreasonably burden interstate commerce. Nothing in section 20106 creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

[73 FR 8495, Feb. 13, 2008]

§217.3 Application.

(a) Except as provided in paragraph (b) of this section, this part applies to railroads that operate trains or other rolling equipment on standard gage track which is part of the general railroad system of transportation.

(b) This part does not apply to—

(1) A railroad that operates only on track inside an installation which is not part of the general railroad system of transportation; or

(2) Rapid transit operations in an urban area that are not connected with the general railroad system of transportation.

[40 FR 2690, Jan. 15, 1975, as amended at 54 FR 33229, Aug. 14, 1989]

§217.4 Definitions.

As used in this part—

Associate Administrator for Safety means the Associate Administrator for Safety of the Federal Railroad Administration or that person's delegate as designated in writing.

Class I, Class II, and Class III have the meaning assigned by regulations of the Interstate Commerce Commission (49 CFR part 1201; General Instructions 1-1), as those regulations may be revised and applied by order of the Commission (including modifications in class thresholds based revenue deflator adjustments).

Division headquarters means the location designated by the railroad where a high-level operating manager (e.g., a superintendent, division manager, or equivalent), who has jurisdiction over a portion of the railroad, has an office.

FRA means the Federal Railroad Administration.

Qualified means that a person has successfully completed all instruction, training, and examination programs required by the railroad and this part and that the person, therefore, has actual knowledge or may reasonably be expected to have knowledge of the subject on which the person is expected to be competent.

System headquarters means the location designated by the railroad as the general office for the railroad system.

[59 FR 43070, Aug. 22, 1994, as amended at 73 FR 8496, Feb. 13, 2008]

§217.5 Penalty.

Any person (an entity of any type covered under 1 U.S.C. 1, including but not limited to the following: a railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor) who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least \$550 and not more than \$16,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed \$27,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. See appendix A to this part for a statement of agency civil penalty policy.

[53 FR 28599, July 28, 1988, as amended at 53 FR 52927, Dec. 29, 1988; 63 FR 11620, Mar. 10, 1998; 69 FR 30593, May 28, 2004; 72 FR 51196, Sept. 6, 2007]

§217.7 Operating rules; filing and recordkeeping.

(a) On or before December 21, 1994, each Class I railroad, Class II railroad, the National Railroad Passenger Corporation, and each railroad providing commuter service in a metropolitan or suburban area that is in operation on November 21, 1994, shall file with the Federal Railroad Administrator, Washington, DC 20590, one copy of its code of operating rules, timetables, and timetable special instructions which were in effect on November 21, 1994. Each Class I railroad, each Class II railroad, and each railroad providing commuter service in a metropolitan or suburban area that commences operations after November 21, 1994, shall file with the Administrator one copy of its code of operating rules, timetables, and timetable special instructions before it commences operations.

(b) After November 21, 1994, each Class I railroad, each Class II railroad, the National Railroad Passenger Corporation, and each railroad providing commuter service in a metropolitan or suburban area shall file each new amendment to its code of operating rules, each new timetable, and each new timetable special instruction with the Federal Railroad Administrator within 30 days after it is issued.

(c) On or after November 21, 1994, each Class III railroad and any other railroad subject to this part but not subject to paragraphs (a) and (b) of this section shall keep one copy of its current code of operating rules, timetables, and timetable special instructions and one copy of each subsequent amendment to its code of operating rules, each new timetable, and each new timetable special instruction, at its system headquarters, and shall make such records available to representatives of the Federal Railroad Administration for inspection and copying during normal business hours.

[59 FR 43070, Aug. 22, 1994]

§217.9 Program of operational tests and inspections; recordkeeping.

(a) *Requirement to conduct operational tests and inspections.* Each railroad to which this part applies shall periodically conduct operational tests and inspections to determine the extent of compliance with its code of operating rules, timetables, and timetable special instructions, specifically including tests and inspections sufficient to verify compliance with the requirements of subpart F of part 218 of this chapter, in accordance with a written program as required by paragraph (c) of this section.

(b) *Railroad and railroad testing officer responsibilities.* The requirements of this paragraph (b) are applicable beginning January 1, 2009.

(1) Each railroad officer who conducts operational tests and inspections (railroad testing officer) shall:

(i) Be qualified on the railroad's operating rules in accordance with §217.11 of this part;

(ii) Be qualified on the operational testing and inspection program requirements and procedures relevant to

the testing and inspections the officer will conduct;

(iii) Receive appropriate field training, as necessary to achieve proficiency, on each operational test or inspection that the officer is authorized to conduct; and

(iv) Conduct operational tests and inspections in accordance with the railroad's program of operational tests and inspections.

(2) Written records documenting qualification of each railroad testing officer shall be retained at the railroad's system headquarters and at the division headquarters for each division where the officer is assigned and shall be made available to representatives of the FRA for inspection and copying during normal business hours.

(c) *Written program of operational tests and inspections.* Every railroad shall have a written program of operational tests and inspections in effect. New railroads shall have such a program within 30 days of commencing rail operations. The program shall—

(1) Provide for operational testing and inspection under the various operating conditions on the railroad. As of January 1, 2009, the program shall address with particular emphasis those operating rules that cause or are likely to cause the most accidents or incidents, such as those accidents or incidents identified in the quarterly reviews, six month reviews, and the annual summaries as required under paragraphs (e) and (f) of this section, as applicable;

(2) Require a minimum number of tests and inspections per year covering the requirements of part 218, subpart F of this chapter;

(3) Describe each type of operational test and inspection required, including the means and procedures used to carry it out;

(4) State the purpose of each type of operational test and inspection;

(5) State, according to operating divisions where applicable, the frequency with which each type of operational test and inspection is to be conducted;

(6) As of January 1, 2009, identify the officer(s) by name, job title, and, division or system, who shall be responsible for ensuring that the program of operational tests and inspections is

properly implemented. The responsibilities of such officer(s) shall include, but not be limited to, ensuring that the railroad's testing officers are directing their efforts in an appropriate manner to reduce accidents/incidents and that all required reviews and summaries are completed. A railroad with divisions shall identify at least one officer at the system headquarters who is responsible for overseeing the entire program and the implementation by each division.

(7) Include a schedule for making the program fully operative within 210 days after it begins.

(d) *Records.* (1) Each railroad to which this part applies shall keep a record of the date, time, place, and result of each operational test and inspection that was performed in accordance with its program. Each record shall specify the officer administering the test and inspection and each employee tested. These records shall be retained at the system headquarters and at each division headquarters where the tests and inspections are conducted for one calendar year after the end of the calendar year to which they relate. These records shall be made available to representatives of the FRA for inspection and copying during normal business hours.

(2) Each railroad shall retain one copy of its current program for periodic performance of the operational tests and inspections required by paragraph (a) of this section and one copy of each subsequent amendment to such program. These records shall be retained at the system headquarters and at each division headquarters where the tests and inspections are conducted for three calendar years after the end of the calendar year to which they relate. These records shall be made available to representatives of the FRA for inspection and copying during normal business hours.

(e) *Reviews of tests and inspections and adjustments to the program of operational tests.* This paragraph (e) shall apply to each Class I railroad and the National Railroad Passenger Corporation beginning April 1, 2009 and to all other railroads subject to this paragraph beginning July 1, 2009.

(1) *Reviews by railroads other than passenger railroads.* Each railroad to which

this part applies shall conduct periodic reviews and analyses as provided in this paragraph and shall retain, at each division headquarters, where applicable, and at its system headquarters, one copy of the following written reviews, provided however that this requirement does not apply to either a railroad with less than 400,000 total employee work hours annually or a passenger railroad subject to paragraph (e)(2) of this section.

(i) *Quarterly review.* The designated officer of each division headquarters, or system headquarters, if no division headquarters exists, shall conduct a written quarterly review of the accident/incident data, the results of prior operational tests and inspections, and other pertinent safety data for that division or system to identify the relevant operating rules related to those accidents/incidents that occurred during the quarter. The review shall also include the name of each railroad testing officer, the number of tests and inspections conducted by each officer, and whether the officer conducted the minimum number of each type of test or inspection required by the railroad's program. Based upon the results of that review, the designated officer shall make any necessary adjustments to the tests and inspections required of railroad officers for the subsequent period(s). Quarterly reviews and adjustments shall be completed no later than 30 days after the quarter has ended.

(ii) *Six month review.* The designated officer of each system headquarters office responsible for development and administration of the program of operational tests and inspections shall conduct a review of the program of operational tests and inspections on a six month basis to ensure that it is being utilized as intended, that the quarterly reviews provided for in this paragraph have been properly completed, that appropriate adjustments have been made to the distribution of tests and inspections required, and that the railroad testing officers are appropriately directing their efforts. Six month reviews shall be completed no later than 60 days after the review period has ended.

(2) *Reviews by passenger railroads.* Not less than once every six months, the

designated officer(s) of the National Railroad Passenger Corporation and of each railroad providing commuter service in a metropolitan or suburban area shall conduct periodic reviews and analyses as provided in this paragraph and shall retain, at each division headquarters, where applicable, and at its system headquarters, one copy of the reviews. Each such review shall be completed within 30 days of the close of the period. The designated officer(s) shall conduct a written review of:

(i) The operational testing and inspection data for each division, if any, or the system to determine compliance by the railroad testing officers with its program of operational tests and inspections required by paragraph (c) of this section. At a minimum, this review shall include the name of each railroad testing officer, the number of tests and inspections conducted by each officer, and whether the officer conducted the minimum number of each type of test or inspection required by the railroad's program;

(ii) Accident/incident data, the results of prior operational tests and inspections, and other pertinent safety data for each division, if any, or the system to identify the relevant operating rules related to those accidents/incidents that occurred during the period. Based upon the results of that review, the designated officer(s) shall make any necessary adjustments to the tests and inspections required of railroad officers for the subsequent period(s); and

(iii) Implementation of the program of operational tests and inspections from a system perspective, to ensure that it is being utilized as intended, that the other reviews provided for in this paragraph have been properly completed, that appropriate adjustments have been made to the distribution of tests and inspections required, and that the railroad testing officers are appropriately directing their efforts.

(3) *Records retention.* The records of periodic reviews required in paragraphs (e)(1) and (e)(2) of this section shall be retained for a period of one year after the end of the calendar year to which they relate and shall be made available to representatives of FRA for inspec-

tion and copying during normal business hours.

(f) *Annual summary of operational tests and inspections.* Before March 1 of each calendar year, each railroad to which this part applies, except for a railroad with less than 400,000 total employee work hours annually, shall retain, at each of its division headquarters and at the system headquarters of the railroad, one copy of a written summary of the following with respect to its previous calendar year activities: The number, type, and result of each operational test and inspection, stated according to operating divisions where applicable, that was conducted as required by paragraphs (a) and (c) of this section. These records shall be retained for three calendar years after the end of the calendar year to which they relate and shall be made available to representatives of the FRA for inspection and copying during normal business hours.

(g) *Electronic recordkeeping.* Each railroad to which this part applies is authorized to retain by electronic recordkeeping the information prescribed in this section, provided that all of the following conditions are met:

(1) The railroad adequately limits and controls accessibility to such information retained in its electronic database system and identifies those individuals who have such access;

(2) The railroad has a terminal at the system headquarters and at each division headquarters;

(3) Each such terminal has a computer (i.e., monitor, central processing unit, and keyboard) and either a facsimile machine or a printer connected to the computer to retrieve and produce information in a usable format for immediate review by FRA representatives;

(4) The railroad has a designated representative who is authorized to authenticate retrieved information from the electronic system as true and accurate copies of the electronically kept records; and

(5) The railroad provides representatives of the FRA with immediate access to these records for inspection and copying during normal business hours and provides printouts of such records upon request.

(h) Upon review of the program of operational tests and inspections required by this section, the Associate Administrator for Safety may, for cause stated, disapprove the program. Notification of such disapproval shall be made in writing and specify the basis for the disapproval decision. If the Associate Administrator for Safety disapproves the program,

(1) The railroad has 35 days from the date of the written notification of such disapproval to:

(i) Amend its program and submit it to the Associate Administrator for Safety for approval; or

(ii) Provide a written response in support of the program to the Associate Administrator for Safety, who informs the railroad of FRA's final decision in writing; and

(2) A failure to submit the program with the necessary revisions to the Associate Administrator for Safety in accordance with this paragraph will be considered a failure to implement a program under this part.

[73 FR 8496, Feb. 13, 2008, as amended at 73 FR 33902, June 16, 2008]

§217.11 Program of instruction on operating rules; recordkeeping; electronic recordkeeping.

(a) To ensure that each railroad employee whose activities are governed by the railroad's operating rules understands those rules, each railroad to which this part applies shall periodically instruct each such employee on the meaning and application of the railroad's operating rules in accordance with a written program retained at its system headquarters and at the division headquarters for each division where the employee is instructed.

(b) On or after November 21, 1994, or 30 days before commencing operations, whichever is later, each railroad to which this part applies shall retain one copy of its current program for the periodic instruction of its employees as required by paragraph (a) of this section and one copy of each subsequent amendment to that program. The system headquarters of the railroad shall

retain one copy of all these records; the division headquarters for each division where the employees are instructed shall retain one copy of all portions of these records that the division applies and enforces. These records shall be made available to representatives of the Federal Railroad Administration for inspection and copying during normal business hours. This program shall—

(1) Describe the means and procedures used for instruction of the various classes of affected employees;

(2) State the frequency of instruction and the basis for determining that frequency;

(3) Include a schedule for completing the initial instruction of employees who are already employed when the program begins;

(4) Begin within 30 days after November 21, 1994, or the date of commencing operations, whichever is later; and

(5) Provide for initial instruction of each employee hired after the program begins.

(c) Each railroad to which this part applies is authorized to retain by electronic recordkeeping its program for periodic instruction of its employees on operating rules provided that the requirements stated in §217.9(g)(1) through (5) of this part are satisfied.

[39 FR 41176, Nov. 25, 1974, as amended at 59 FR 43071, Aug. 22, 1994; 73 FR 8497, Feb. 13, 2008]

§217.13 Information collection.

(a) The information collection requirements in this part have been reviewed by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Public Law 96-511, and have been assigned OMB control number 2130-0035.

(b) The information collection requirements are found in the following sections:

(1) Section 217.7.

(2) Section 217.9.

(3) Section 217.11.

[50 FR 7919, Feb. 27, 1985. Redesignated and amended at 59 FR 43071, Aug. 22, 1994]

APPENDIX A TO PART 217—SCHEDULE OF CIVIL PENALTIES¹

Section	Violation	Willful violation
217.7 Operating rules:		
(a)	\$2,500	\$5,000
(b)	\$2,000	\$5,000
(c)	\$2,500	\$5,000
217.9 Operational tests and inspections:		
(a) Failure to implement a program	\$9,500– 12,500	\$13,000– 16,000
(b) Railroad and railroad testing officer responsibilities:		
(1) Failure to provide instruction, examination, or field training, or failure to conduct tests in accordance with program	9,500	13,000
(2) Records	7,500	11,000
(c) Record of program; program incomplete	7,500– 12,500	11,000– 16,000
(d) Records of individual tests and inspections	7,500	
(e) Failure to retain copy of or conduct:		
(1)(i) Quarterly review	9,500	13,000
(1)(ii) and (2) Six month review	9,500	13,000
(3) Records	7,500	11,000
(f) Annual summary	7,500	11,000
(h) Failure to timely or appropriately amend program after disapproval	9,500– 12,500	13,000– 16,000
217.11 Program of instruction on operating rules:		
(a)	\$5,000	\$7,500
(b)	\$2,500	\$5,000

¹A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$27,000 for any violation where circumstances warrant. See 49 CFR part 209, appendix A.

[59 FR 43071, Aug. 22, 1994, as amended at 63 FR 11620, Mar. 10, 1998; 69 FR 30593, May 28, 2004; 73 FR 8497, Feb. 13, 2008]

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