



Office of the Chairman

National Transportation Safety Board

Washington, DC 20594

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US Department of Transportation
Docket Management Facility
Room W12-140
1200 New Jersey Ave. SE
Washington, DC 20590-0001

Dear Sir or Madam:

The National Transportation Safety Board (NTSB) has reviewed the Federal Railroad Administration's (FRA) notice of proposed rulemaking (NPRM), "Control of Alcohol and Drug Use: Coverage of Maintenance of Way Employees, Retrospective Regulatory Review-Based Amendments (RRR)" published in the *Federal Register* July 28, 2014.¹ We appreciate this opportunity to comment on the proposed rulemaking in response to Congress' mandate in the Rail Safety Improvement Act of 2008 and are encouraged by the FRA addressing NTSB safety recommendations in these proposed fundamental revisions to this rule.

Summary of Comments to the Proposed Rulemaking

The FRA proposes to expand the scope of its alcohol and drug regulations to cover employees who perform maintenance-of-way (MOW) activities and to update and clarify portions of the regulation, some of which are in response to NTSB safety recommendations. This NPRM is the first fundamental revision to Title 49 *Code of Federal Regulations (CFR)* Part 219 since 1994.²

We are commenting on the following sections of the NPRM:

Section III. Expansion of Part 219 to Employees Who Perform MOW Activities

- B. FRA's Proposed Definition of "MOW Activities"
- C. "Regulate Employee" and "Regulated Service"
- D. Alternatives Considered for Part 219 Expansion
- E. MOW Employees and the Small Railroad Exception

Section IV. Other Proposed Substantive Amendments

Section VII. Section-by-Section Analysis

¹ *Federal Register*, vol. 79, no. 144 (July 28, 2014): 43830.

² In 2004, FRA expanded the scope of Part 219 to cover foreign railroad foreign-based employees who perform train or dispatching service in the United States. *Federal Register* 59, no. 71 (April 12, 2004): 19270. In 2013, FRA added routine tests for certain noncontrolled substances to its postaccident testing program. *Federal Register* 78, no. 43 (March 5, 2013): 14217.

Background

Over the years, the NTSB has made recommendations concerning alcohol and drug use by transportation workers in safety-sensitive positions.³ In 1987, we undertook a safety study to review the first full year of implementation of the FRA's alcohol and drug testing rules that established requirements for postaccident toxicological (PAT) testing and testing for cause (the FRA did not require random alcohol testing, and drug testing was not required until 1988).^{4,5} As a result of this safety study, we issued 11 safety recommendations to the FRA. One, R-88-23, was relevant to testing all employees in safety-sensitive positions:

Amend 49 *CFR* Part 219 to require postaccident toxicological testing of all employees in safety-sensitive positions.

As noted in NTSB records, the FRA responded on September 21, 1990, that it had reviewed this issue on several occasions and concluded that employees covered by the Hours of Service (HOS) Act occupy the most safety-sensitive positions on the railroads and are the proper focus of Federal requirements:⁶

Categorical expansion of those tested following accidents would either result in an excessive testing burden in relation to the benefits derived (e.g., testing of an entire track gang at the scene of a derailment) or in an overboard delegation of decisional authority to the railroad supervisor in the field.

In correspondence on March 3, 1994, the FRA again stated that it found no basis to expand PAT testing to other railroad crafts. On May 3, 1994, we replied:

Based on FRA's response, the Safety Board classifies Safety Recommendation R-88-23 'Closed—Reconsidered.' However, the Safety Board will continue to monitor this issue closely.

We made a similar safety recommendation, R-08-06, as a result of our investigation of the January 9, 2007, accident in which two Massachusetts Bay Transportation Authority (MBTA) MOW employees were killed near Woburn, Massachusetts, when a passenger train struck a roadway maintenance machine on the track.⁷ The FRA specifically references this recommendation in this NPRM.

PAT testing of one of the fatally injured MOW employees showed he had likely used marijuana within 3 hours of his death. This class of employee was not subject to other

³ Title 49 *CFR* Section 209.303 describes "safety-sensitive functions" performed by specified categories of rail workers.

⁴ National Transportation Safety Board, *Alcohol/Drug Use and Its Impact on Railroad Safety*, Safety Study NTSB/SS-88/04 (Washington, DC: National Transportation Safety Board, 1988).

⁵ *Federal Register* 53, no. 224 (November 21, 1988): 47102.

⁶ 49 *United States Code* (U.S.C) ch. 211.

⁷ National Transportation Safety Board, *Collision of Massachusetts Bay Transportation Authority Train 322 and Track Maintenance Equipment near Woburn, Massachusetts, January 9, 2007*, NTSB/RAR-08/01 (Washington, DC: National Transportation Safety Board, 2008).

toxicological testing protocols. As a result of the investigation, we issued safety recommendation R-08-07:

Revise the definition of covered employee under 49 *Code of Federal Regulations* Part 219 for purposes of Congressionally mandated alcohol and controlled substances testing programs to encompass all employees and agents performing safety-sensitive functions, as described in 49 *Code of Federal Regulations* 209.301 and 209.303.

This safety recommendation is currently classified “Open—Unacceptable Response.”

In the Woburn accident, the presence of the illicit drug was determined only because of PAT testing following a fatality. Of the seven MOW employees tested following this accident, four had positive results, and one submitted a diluted specimen that may have masked a positive result. This high rate of positive test results was symptomatic of a substance abuse problem among MBTA MOW employees.

Based on these accidents, we are concerned that waiting for a fatal accident to determine if an employee’s performance is impaired is too late. A proactive approach similar to that in Part 219 for covered employees, including random testing, will likely result in reduced accident rates, as indicated by the FRA PAT testing conducted over the 10 years ending January 9, 2007.⁸ We reviewed the data from this period and noted that in PAT testing of MOW employees, positive test results were about three times more likely when compared to the overall testing results of covered employees.⁹

The FRA uses these results to support its proposal to expand the number of employees tested, and we agree. However, FRA also proposes to limit testing to specific MOW employees, stating that “it is [not] necessary to expand part 219 beyond railroad employees (including contractors, subcontractors, volunteers, and probationary employees) who perform covered service and/or MOW activities for a railroad.” We disagree with this position, as discussed later in this response, as we believe that expanding the testing population to include contractors, defined in 49 *CFR* 209.303 as “agents” of the railroads will improve safety.

SECTION III. EXPANSION OF PART 219 TO EMPLOYEES WHO PERFORM MOW ACTIVITIES

B. FRA’s Proposed Definition of MOW Activities

The FRA’s proposed definition of MOW activities includes the (1) inspection, repair, or maintenance of track, roadbed, or electric traction systems; (2) operation of on-track or fouling equipment used for the inspection, repair, or maintenance of track, roadbed, or electric traction systems; (3) performance of flagmen or watchman/lookout duties; (4) obtaining of on-track authority and/or permission to perform activities described by the proposed definition; or

⁸ Covered employees are those subject to HOS laws found in 49 U.S.C. ch. 211.

⁹ FRA PAT testing of 26 MOW fatalities resulted in five positive test results, or 19.23%. In contrast, the overall PAT testing positive rate for covered employees was only 6.56%.

(5) granting on-track authority and/or permission for operation over a segment of track while workers are performing activities described by the proposed definition.

The FRA concludes that individuals performing such activities work along railroad tracks and roadbed and may suffer serious injury or death if struck by trains or other on-track or fouling equipment. As well, these individuals may directly affect the safety of railroad operations because they work on or near railroad tracks, operate on-track or fouling equipment, and/or authorize or direct trains through working limits. The FRA further concludes the performance of other FRA safety-sensitive functions listed in 49 *CFR* 209.303 do not typically lead to the same type of safety risks because they generally do not work on or around a railroad's track or roadbed.

We believe the FRA should expand the population of railroad employees to be tested. By limiting covered employees to only those who may be injured or killed by their own actions, the FRA has exempted a large railroad population that may affect the safe movement of trains. We do not believe that limiting the scope or function of safety-sensitive employees to be tested will ensure the safety of all railroad employees.

Further, we question the FRA's failure to include the term "install" in the definition of MOW activities, believing the activity of installing new track should be considered regulated service. In addition, by not including the word "install" in its proposed MOW activities' definition, the FRA could improperly exclude other safety-sensitive installation work done by employees who are neither MOW nor covered employees but whose work requires them to work on or around a railroad's track or roadbed. Installing communication towers, erecting signal masts, maintaining switch heaters, or laying cable without affecting the safe functioning of a signal system might be done by railroad signalmen or signal contractors. Historically, however, the FRA has not determined this type of work to be covered under HOS regulations. Installing additional main tracks alongside existing main tracks in use may also exclude MOW personnel working on or around a railroad's roadbed, until the tracks are incorporated into the general railroad system of transportation.

Duties covered by the alcohol and drug testing requirements of the Federal Motor Carrier Safety Administration should also be included in the proposed rule to eliminate the possibility of confusion among regulations.

In addition, we disagree that MOW activities such as those on passenger station platforms should be excluded. In April 2000, we investigated a rail transit accident involving work on a passenger platform that resulted in the death of two contract employees; and on April 24, 2013, an employee fell from a walkway and was struck and killed by a New York City Transit train.^{10, 11} These accidents were not subject to FRA regulations, yet they illustrate the potential safety risk to employees and contractors working on passenger station platforms.

¹⁰ National Transportation Safety Board, *Metropolitan Atlanta Rapid Transit Authority (MARTA), Unscheduled train 166 striking bucket of self-propelled lift containing two contract workers at MARTA Lenox rail transit station, April 10, 2000*, NTSB/RAB-03/02 (Washington, DC: National Transportation Safety Board, 2003).

¹¹ New York City Transit Board of Inquiry Report: *Signal Maintainer, Pass #619015 Fatal Accident*, April 24, 2013.

Employees performing railroad bridge work, regardless of proximity to the track, should be included in regulated service. We investigated two accidents in 2013 where MOW employees were killed while working under railroad bridges and using aerial lift equipment. In Mathis, Texas, a welder was killed and a welder helper was seriously injured when the aerial lift they were in sprang upwards and tipped over.¹² In Harpursville, New York, an assistant bridge and building supervisor was electrocuted when the boom of the aerial lift contacted an energized electrical wire. In both accidents MOW employees were performing routine maintenance activities underneath railroad bridges and, in the proposed rule, would be excluded from PAT testing.

We also believe the proposed definition of MOW activities in the NPRM is more narrow than the definition found in current 49 *CFR* Part 214, and may cause confusion. We therefore urge you to use consistent language and retain the broader definition.

In response to the FRA request for comment on including additional MOW activities, we believe all six examples should be included: (1) boring a pipe under a track; (2) paving a highway-rail grade crossing; (3) placing detour or other signs in conjunction with grade crossing work; (4) operating cranes for the loading and unloading of MOW equipment, regardless of whether that equipment is being loaded onto or within the foul of a track; (5) clearing and repairing a railroad track following an accident or incident; and (6) operating a bridge if the employee is not covered under HOS laws.

Each of these identified activities may affect the safe movement of trains and each risks the safety of the employee performing the activity. For example, an equipment operator was struck and killed at a highway-railroad grade crossing by a privately operated vehicle in Bradner, Ohio, on October 28, 2013. At the time of the accident, MOW employees were replacing rail with the crossing closed to motor vehicular traffic.

C. “Regulated Employees” and “Regulated Service”

Rather than including all employees performing safety-sensitive functions under these rules, the FRA proposes creation of two new terms: “regulated employees” and “regulated service.” As discussed, we do not agree that individuals performing other safety-sensitive functions listed in 49 *CFR* 209.303 should be excluded from the definition of regulated service that is proposed in the NPRM and recommend including the following employees, consistent with 49 *CFR* Part 209:

- (a) Railroad employees who are assigned to perform service subject to the Hours of Service Act during a duty tour.
- (b) Railroad employees or agents who
 1. Inspect, install, repair, or maintain track and roadbed;
 2. Inspect, repair, or maintain locomotives, passenger cars, and freight cars;

¹² National Transportation Safety Board, *Union Pacific Railroad Employee Fatality, September 24, 2013*, NTSB/RAB-14/04 (Washington, DC: National Transportation Safety Board, 2013).

3. Conduct training and testing of employees when the training or testing is required by the FRA's safety regulations; or
 4. Perform service subject to the Transportation of Hazardous Materials laws.
- (c) Railroad managers, supervisors, or agents when they
1. Perform the safety-sensitive functions listed in paragraphs (a) and (b) of this section;
 2. Supervise and otherwise direct the performance of the safety-sensitive functions listed in paragraphs (a) and (b) of this section; or
 3. Are in a position to direct the commission of violations of any of the requirements of parts 213 through 241 of this title, or any of the requirements of 49 U.S.C. ch. 51, or any regulation or order prescribed thereunder.

Workers performing safety-sensitive functions other than MOW activities may have a reduced risk overall for being struck by trains or other on-track or fouling equipment; however, they are at risk when on or near tracks performing their duties. These duties are directly related to safe railroad operations and include, for example, air brake inspection, repair and maintenance of freight cars or locomotives, intermodal equipment loading/unloading, and managers conducting efficiency testing within facilities. Further, workers performing other safety-sensitive functions may pose safety risks if impaired.

Including all employees and agents performing safety-sensitive functions, as defined in 49 CFR 209.303, would likely result in reductions in positive alcohol and drug testing results similar to those cited in the background and in accidents related to alcohol and/or drug impairment.

D. Alternatives Considered for Part 219 Expansion

We believe the actions of an impaired employee performing safety-sensitive functions can heighten the risk for other employees and the public. Therefore, we continue to advocate for application of mandated alcohol and drug testing programs to all employees and agents performing safety-sensitive functions as described in 49 CFR 209.301 and 209.303.

We are concerned that workers performing noncovered or non-MOW safety-sensitive functions will not be subject to PAT testing under the proposed rule. For example, if a mechanical employee failed to properly repair a critical device on railroad equipment and that failure resulted in an accident, such an employee would not be subject to drug and alcohol testing. Since PAT testing would then only occur if such an employee was fatally injured, the magnitude of alcohol and drug use among railroad employees performing safety-sensitive functions such as equipment maintenance would not be uncovered. The FRA points out these other employees are "not subject to the same risks as individuals working on or around railroad track[s]." However, we believe the issue is not injury risk for the employee, but risk to the public.

For example, we investigated an accident at the Miami Airport people-mover.¹³ On November 28, 2008, the automated people-mover train collided with the passenger terminal wall. We determined that the probable cause, in part, was:

...the installation by Johnson Controls, Inc. maintenance technicians of a jumper wire that prevented the overspeed/overshoot system from activating to stop the train.

The technician who applied the jumper wire was not tested for drugs or alcohol after the accident or as part of a random testing program. It was never determined if his job performance or decision-making process was impaired when he applied the jumper wire that ultimately led to the accident that injured several people.

This accident did not occur on an FRA-regulated railroad; however, the sequence of events could easily apply to a railroad system. As mentioned, railroad employees other than those who maintain the track also repair and maintain components that are critical for the safe operation of trains.

The Omnibus Transportation Employee Testing Act of 1991 directed individual DOT agencies to define those safety-sensitive employees who would best improve safety if tested for drugs and alcohol.¹⁴ The Act includes specific findings by Congress:

SEC. 2. The Congress finds that

- (1) alcohol abuse and illegal drug use pose significant dangers to the safety and welfare of the Nation;
- (2) millions of the Nation's citizens utilize transportation by aircraft, railroads, trucks, and buses, and depend on the operators of aircraft, trains, trucks, and buses to perform in a safe and responsible manner;
- (3) the greatest efforts must be expended to eliminate the abuse of alcohol and use of illegal drugs, whether on duty or off duty, by those individuals who are involved in the operation of aircraft, trains, trucks, and buses;
- (4) the use of alcohol and illegal drugs has been demonstrated to affect significantly the performance of individuals, and has been proven to have been a critical factor in transportation accidents;
- (5) the testing of uniformed personnel of the Armed Forces has shown that the most effective deterrent to abuse of alcohol and use of illegal drugs is increased testing including random testing;

¹³ National Transportation Safety Board, *Miami International Airport, Automated People Mover Train Collision with Passenger Terminal Wall*, NTSB/RAR-11/01 (Washington, DC: National Transportation Safety Board, 2011).

¹⁴ Public Law 102-143-Oct. 28, 1991, 105 STAT. 953.

(6) adequate safeguards can be implemented to ensure that testing for abuse of alcohol or use of illegal drugs is performed in a manner which protects an individual's right of privacy, ensures that no individual is harassed by being treated differently from other individuals, and ensures that no individual's reputation or career development is unduly threatened or harmed; and

(7) rehabilitation is a critical component of any testing program for abuse of alcohol or use of illegal drugs, and should be made available to individuals, as appropriate.

The Federal Aviation Administration (FAA), with the same mandate from the Omnibus Transportation Employee Testing Act of 1991 as the FRA, defines the aviation safety-sensitive employees subject to drug and alcohol testing in Title 14 CFR 120.105 as:

Each employee, including any assistant, helper, or individual in a training status, who performs a safety-sensitive function listed in this section directly or by contract (including by subcontract at any tier) for an employer as defined in this subpart must be subject to drug testing under a drug testing program implemented in accordance with this subpart. This includes full-time, part-time, temporary, and intermittent employees regardless of the degree of supervision. The safety-sensitive functions are (a) flight crewmember duties, (b) flight attendant duties, (c) flight instruction duties, (d) aircraft dispatcher duties, (e) aircraft maintenance and preventative maintenance duties, (f) ground security coordinator duties, (g) aviation screening duties, (h) air traffic control duties.¹⁵

We believe the FAA's definition covering a broader population of employees provides better assurance that all employees who can affect transportation safety are not impaired while performing their duties.

E. MOW Employees and the Small Railroad Exception

We oppose continuing the exclusion from certain FRA regulations of MOW employees working for small railroads.

The FRA continues to "exclude tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation from certain portions of its regulations." We note that these operations often include services to the general public; thus, the passengers who ride these trains are exposed to many of the potential hazards of railroad operations. Instituting a drug and alcohol regulation would be an important step to ensure that the performance of these railroad employees is not impaired, which would better protect passengers on these trains.

We realize imposing all of the Part 219 protocols may burden small tourist or scenic railroads; however, alternative regulations could be developed to address the possible use of

¹⁵ Title 14 *CFR* 120.105.

drugs and alcohol on these unique operations. Many of the tourist, scenic, historic, or excursion operations occur in small and sometimes remote communities throughout the country where, as the FRA notes in this NPRM, “drug use is now a significant issue in many small communities.” Therefore, we believe the FRA would be remiss if it failed to use this opportunity to include tourist, scenic, historic, or excursions operations as part of the drug and alcohol regulations, because these are passenger-carrying operations.

SECTION V. OTHER PROPOSED SUBSTANTIVE AGREEMENTS

SECTION VI SECTION-BY-SECTION ANALYSIS

Section 219.101 - Alcohol and Drug Use Prohibited, Paragraph (a) (1)

The FRA is soliciting comments on whether Part 219 should continue to prohibit the on-duty possession of all controlled substances and alcohol, while noting no other DOT agency prohibits the on-duty possession of either controlled substances or alcohol.¹⁶ As applied, this prohibition bans the on-duty possession of many commonly sold over-the-counter (OTC) cough and cold remedies containing alcohol.

We believe the FRA should not remove the prohibition for on-duty drug and alcohol possession. However, this section needs more clarification regarding on-duty employee possession of prescribed drugs and some OTC medications. We also believe this section should conform to the requirements found in 49 CFR 219.103 “Use of Prescription and Over-the-Counter Drugs” and specifically our comments below concerning medical certification.

Section 219.103 Use of Prescription and Over-the-Counter Drugs

The FRA asks specific questions regarding 49 CFR §219.103 in terms of prescribed and OTC drugs and notes this section “currently covers only a small portion of prescription drugs and no over-the-counter (OTC) drugs, since most prescription and OTC drugs are not Schedule II–V controlled substances.”

We agree the title of the section is misleading and the remainder of the section focuses only on a subset of prescription medications—those labeled as controlled substances.

However, we note many OTC medications may cause significant sedation and impair performance. In fact, a commonly used OTC antihistamine, diphenhydramine, is so sedating it is used as the active ingredient in OTC sleep aids. In a driving simulator study, a single dose of diphenhydramine impaired driving ability more than a blood alcohol concentration of 0.100 gm%.¹⁷ At this time, neither DOT nor the FRA has issued any guidance regarding safety-sensitive employees’ use of diphenhydramine or any other OTC medication and this NPRM provides no direction.

In addition, we note FRA regulations do not address the risk for impairment due to underlying medical conditions that may require treatment with prescription or OTC medications.

¹⁶ Title 21 *CFR* Part 1308.

¹⁷ J.M. Weiler and others. “Effects of fexofenadine, diphenhydramine, and alcohol on driving performance. A randomized, placebo-controlled trial in the Iowa Driving Simulator.” *Ann Intern Med* 2000. 132(5): p. 354-63.

As they stand, FRA regulations place the onus on the employee to ensure the treating health care providers know and understand the employee's specific work activities and responsibilities. This work often includes unpredictable shift work with circadian rhythm disturbances and increased responsibility for the employee's own safety and that of others while at work. Currently, the FRA does not require oversight of safety-sensitive employees' medical conditions or medications and relies solely on the individual employee to ensure railroad safety.

This reliance on employees to manage medical conditions and medications without oversight has led to a number of fatal accidents including Secaucus, New Jersey, in 1996; head-on collisions in Sugar Valley, Georgia, in 1990; Clarkston, Michigan, in 2001; and Goodwell, Oklahoma, in 2012; and a rear-end collision with a MOW equipment train in Red Oak, Iowa, in 2011. As a result, we issued a series of recommendations to the FRA, culminating most recently in R-13-021:

Develop medical certification regulations for employees in safety-sensitive positions that include, at a minimum, (1) a complete medical history that includes specific screening for sleep disorders, a review of current medications, and a thorough physical examination, (2) standardization of testing protocols across the industry, and (3) centralized oversight of certification decisions for employees who fail initial testing; and consider requiring that medical examinations be performed by those with specific training and certification in evaluating medication use and health issues related to occupational safety on railroads.

This safety recommendation is currently classified "Open–Unacceptable."

The FRA does not propose any changes to this section; yet, we believe this section does not effectively address the safety concerns raised by individuals' use of prescription and OTC drugs subject to Part 219. In addition, we believe the FRA, in its failure to address needed changes in this section, has missed a valuable opportunity to more fully speak to safety issues related to general health and medication effects in safety-sensitive railroad, including MOW, employees.

Section 219.201 Events for Which Testing is Required

Current FRA regulatory language defines a "major train accident" as one that meets damage criteria and causes "a fatality," however it does not specifically define the word "fatality." A train incident is defined in the NPRM as "[a]ny train incident that involves a fatality to any on-duty railroad employee." The NPRM proposes "to clarify that to qualify as a fatal train incident the fatality must have occurred within 12 hours of the train incident although the deceased employee need not have been performing regulated service at the time of the train incident." This definition is incongruent with how other modes of transportation define fatality and we believe a death within 30 days of an incident should be considered a "fatality."

For example, NTSB regulations at Title 49 CFR Section 830.2 specifically define fatal injuries in aviation as: "... any injury which results in death within 30 days of the accident."

Title 49 CFR Section 390.5, Definitions, of the Federal Motor Carrier Safety Regulations defines an accident as an event that causes a fatality; and specifies that "Fatality means any

injury which results in the death of a person at the time of the motor vehicle accident or within 30 days of the accident.”

The National Highway Traffic Safety Administration’s Fatality Analysis Reporting System is a census of accidents on public roadways in which at least one person died within 30 days as a result of the crash.¹⁸

In addition, the World Health Organization (WHO) recommends countries harmonize their definition of road traffic fatality to the 30-day standard.¹⁹ The WHO’s choice of 30 days is based on research that shows most people who die as a result of a crash succumb to their injuries within 30 days of sustaining them.²⁰

We believe restricting the definition of a fatal train incident only to events that lead to death within 12 hours will erroneously limit the reporting and accounting of such incidents; we suggest FRA instead use the United States’ and global transportation standard of death within 30 days.

Section 219.201, Paragraph (a) - Human-Factor Highway-Rail Grade Crossing Accident/Incident

In this section of the NPRM, the FRA references NTSB Safety Recommendation R-01-17, which we issued as a result of our investigation into the September 26, 1999, accident in McLean, Illinois, in which an Amtrak train collided with an automobile, killing both vehicle occupants.^{21, 22} In the NPRM, FRA notes:

Currently § 219.201(b) excepts PAT testing from any event involving a “collision between railroad rolling stock and motor vehicle or other highway conveyance at a rail/highway grade crossing.” FRA is proposing to narrow this exception to require PAT testing after any highway-rail grade crossing accident/incident in which human factor errors may have played a role. (Section V.E, p. 43840)

We support the FRA’s proposal to narrow this exception. While we are acutely aware that determining the probable cause of an accident is typically labor-intensive and time-consuming, quickly establishing whether any employees might have violated critical safety rules is often not

¹⁸ Information obtained from website of National Highway Traffic Safety Administration. Fatality Analysis Reporting System Encyclopedia. <http://www-fars.nhtsa.dot.gov/Help/Terms.aspx> accessed August 7, 2014.

¹⁹ World Health Organization. *Global status report on road safety 2013: Supporting a decade of action*. (Geneva, Switzerland: World Health Organization 2013).

²⁰ M.G. Karlaftis and A.P. Tarko. “Heterogeneity considerations in accident modeling.” *Accident Analysis and Prevention*, 1998, 30:425–433.

²¹ “Modify 49 *Code of Federal Regulations* 219.201(b) as necessary to ensure that the exemption from mandatory postaccident drug and alcohol testing for those involved in highway-rail grade crossing accidents does not apply to any railroad signal, maintenance, and other employees whose actions at or near a grade crossing involved in an accident may have contributed to the occurrence or severity of the accident” (R-01-17; Open-Unacceptable Response).

²² National Transportation Safety Board, *Collision of Amtrak Train 304-26 with a Highway Vehicle at a Highway-Rail Grade Crossing in McLean, Illinois, September 26, 1999*, NTSB/RAR-01/03 (Washington, DC: National Transportation Safety Board, 2001).

difficult. In some instances, the evidence or circumstances of the accident will be apparent enough to suspect a human factor error. Such was the case in the September 26, 1999, highway-rail grade crossing accident in McLean, Illinois, where the crossing warning system did not activate after the signal maintainer had worked on the equipment earlier that day.

We also note in all accident investigations, investigators typically evaluate the performance of the train's operating crewmembers to determine compliance with federal regulations and operating rules. In these cases, determining the cause of human error involves evaluating numerous factors, including the presence of drugs or alcohol. Therefore, if it is reasonable to suspect a train crew did not comply with a federal regulation or railroad operating rule in the case of a highway-rail grade crossing accident, it is also reasonable to conduct PAT testing to ensure illegal drugs or alcohol are not playing a role in such accidents.

We appreciate the opportunity to comment on this proposed rule and would be pleased to address any follow up questions concerning this submission.

Sincerely,