

Chapter 8A

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## Part 40 – Procedures for Transportation Workplace

Drug (and Alcohol) Testing Programs.

### Subpart B – Drug Testing

#### 40.21 - The drugs

Application: An employer cannot use a DOT urine test to search for possible medical conditions (i.e., diabetes) or pathology. Testing to determine pH, specific gravity or creatinine levels is not authorized at the collection site.

#### 40.25 - Specimen collection procedures

Application: Collection Site: Any of the following could serve as a collection site provided they meet the minimum requirements of privacy and security: employee rest room, patient toilet at doctor's office/ hospital/clinic, portable toilet facility, hotel/motel rest room, rest room with open urinals, train lavatory, employee office/break room, public rest room and mobile collection site, e.g., van.

Application: Aural and visual privacy: *Must each collection "station" (multiple booths) be physically separated by a barrier or wall to ensure modesty and donor privacy? The closeness of another donor or other employee must not interfere with aural and visual privacy.*

What if two donors request to provide their specimens at the same time in a multi-use rest room? Only one donor at a time may be processed for a DOT specimen collection. One of the donors must wait until the other donor's specimen collection process is complete. For this purpose, a collection procedure is complete when the urine bottle has been sealed and initialed, the drug testing custody and control form has been executed, and the employee has departed the site (or, in the case of an employee who was unable to provide a complete specimen, has entered a waiting area).

Application: Collector Identification: The collector is required to provide his/her collection company identification if requested by the donor. There is no requirement for the collector to have a picture I.D. or to provide his/her driver's license with the address. Also, the collector is not required to provide any certification or other documentation to the donor proving the collector's training or skill in the DOT collection process.

Application: Controlling Water Supply: The following are acceptable ways to control the water supply: Tape faucets prohibiting flow of water, and tape shut-off valve to cut off water supply. Securing a urinal is difficult with tape. Generally speaking, a urinal can only be effectively secured by flushing, then shutting off the water supply with a shut-off valve and taping or removing the flush handle. Faucets and sinks located outside the toilet area, which are under control of the collector, do not have to be taped.

What if collector doesn't have any bluing agent or the toilet does not have a bowl or tank water supply? Instruct donor not to flush the toilet. Use other materials to color the water if possible (e.g., ink, food coloring, etc.). Cut off the water supply during each collection; turn on for flushing of the toilet after each collection. If materials other than a bluing agent are used, the resultant

color should not be yellow or orange and if other than blue, the collector should annotate in the remarks section the color that was actually substituted.

Application: Monitored Collection: If a rest room has multiple sinks, urinals and toilets, using only one stall and being able to monitor the donor's access to other toilets, sinks, urinals etc. is appropriate as long as all other requirements are followed.

What if the collection is taking place in a multi-use rest room with stalls and the collector is not the same sex as the donor? If the collector is not medically certified or licensed, he/she must remain outside the rest room door during the collection and the entire restroom has to be secured.

Application: Removing Unnecessary Outer Garments: What if the clinic or office policy requires "patients" to "strip" and wear a hospital gown? Except for collections conducted as part of a required DOT physical examination, which requires disrobing, DOT collections shall not require or allow disrobing (wearing a hospital or examination gown). Note: FRA does not require DOT physical exams. Removing shirts, blouses, pants, skirts, dresses, or underwear is not authorized. However, if a donor was made to disrobe and a urine adulterant was found, the collector would be required to act on the discovery.

Application: Use of Lock Box for Personal Items: A major railroad was requiring employees to empty their pockets into a "lock box." The collector retained the key and the employee maintained custody of the box until the collection was finished. FRA and DOT determined this was not permissible.

Application: Federal Drug Testing Custody and Control Form: The form may not be modified or revised, except that the form may include such additional information as may be required by billing or other legitimate purposes necessary to the collection, provided that personal identifying information on the donor (other than the social security or other employee ID number) may not be provided to the laboratory.

MRO's Name: A specific physician's name and address must appear on the form rather than the name of the clinic or medical facility. (A company name can appear as part of the address, provided it is followed by or includes an MRO's name.) The named physician can be the MRO who will actually perform the verification review or the name of a qualified MRO within the practice (company), in those cases where there is more than one MRO working in that company.

Social Security Number: What if donor refuses to provide his/her social security number? The collector should request that the donor provide an alternate donor ID number (e.g., employee number, payroll number, etc.) If the donor does not provide an ID number, the collector should record, "donor refuses to provide ID number" in the remarks section. This is neither a fatal flaw nor a refusal if the donor subsequently provides a specimen. The collector should proceed with the collection.

Collector's Name: The use of a "code" name, pseudonym, collector ID number, or other substitute for the collector's real name is not acceptable.

Application: Union/Legal Representation: What if the donor requests to have a union or legal representative present during the collection? If a railroad's policy permits such practice, it is permissible, as long as the union or other representative does not disrupt or interfere with the collection process or cause any delay in the collection process. Any representative must remain outside the stall or rest room when the donor is providing the specimen and should not "participate" in any way in the collection process itself. This applies to alcohol (breath or saliva) testing also.

Application: Temperature: A railroad may not use a more stringent temperature range.

What if the collector failed to do the temperature check or annotate the temperature was within range on the custody and control form (the specimen bottles were sealed and placed in the shipping container)? The collector should note the discrepancy in a logbook and/or annotate it in the remarks section of the collector's copy of the form and provide a signed statement upon request by the MRO. This is not in itself a fatal flaw.

Application: Adulteration of Specimen: DOT procedural rule does not specifically address adulteration of specimens in the context of laboratory reports, however, specific guidance is delineated to laboratories and MROs per letter dated Dec. 7, 1993, "Abnormal Test Results, Smith."

Application: Fatal Flaws: Specimens presented to laboratories should be rejected for testing by the lab when any of the following procedural errors occur: Note: The lab is directed to acquire corrections for items with \* (correctable) and then proceed with testing.

- 1) Specimen I.D. number on specimen bottle and custody and control form do not match (not correctable).
- 2) Specimen I.D. number is omitted on specimen bottle (not correctable).
- 3) \*Collector's signature is omitted from certification (correctable).
- 4) \*Chain of custody block is incomplete (minimum of two signed entries by collector, both dated, and shipping/storage entry) (correctable).
- 5) \*Donor SSN or I.D. number is omitted on custody and control form unless "refusal of donor to provide" is stated in remarks section (correctable).
- 6) Specimen volume is less than 30 mL; if upon arrival at the laboratory, specimen volume is slightly below the 30 mL minimum (within 10%), the specimen may be accepted if the laboratory can ensure that sufficient volume will be available for storage and any necessary reanalyzes for quality control or reconfirmation of results. NOTE: This provision does not change the DOT requirement for the donor to provide 45 mL of urine. This provision is meant to apply to situations such as leakage (not correctable).
- 7) Specimen bottle seal is broken or shows evidence of tampering (not correctable).
- 8) Specimen shows obvious adulteration (i.e., color, foreign objects, unusual odor) and the collector did not collect a second specimen under direct observation (not correctable).

Additionally, specimen test results reviewed by the MRO should be canceled (by the MRO) when the following procedural errors occur (unless corrections are made - \*correctable).

- 1) \*Donor certification statement is not signed and there is no indication in the remarks section of the donor's refusal to sign.
- 2) \*The certifying scientist's signature is omitted on positive results from the laboratory.

Application: Shy Bladder: The rule does not preclude the MRO from performing the medical evaluation if he/she has the expertise and is willing.

Both the DOT and FRA rules are silent on whether the employee with a shy bladder is taken out of covered service while awaiting medical evaluation. This is an issue that needs to be addressed through collective bargaining.

Application: Use of a Second MRO: The DOT drug testing rule does not permit the use of a different MRO to whom the results of the split specimen can be sent from the second laboratory.

Resource: Urine Specimen Collection Procedures Guidelines, Dec. 1994.

### **40.33 - Reporting and review of results**

Application: MRO Receipt of Lab Test Reports: It is unacceptable for the MRO copy of the form to accompany the urine specimen either to the lab or en route to the MRO. The collector should send the MRO's copy directly to the MRO. Lab results may not be provided verbally by telephone.

Application: Unverified Drugs: Multiple drug positive results for the same specimen require the MRO to verify each drug to determine if there is a medical explanation. When the MRO verifies and reports only one drug, the other drugs should not be reported to the employer if they have not been verified. The MRO may document these unverified positive results in his/her records as unverified and unreported results.

Application: Passive Inhalation: The cut-off levels are designed to ensure that levels of drug metabolites likely to be produced by "passive inhalation" do not trigger a positive result. Consequently, the probability of a valid claim of passive inhalation is negligible. Moreover, even if a case of passive inhalation exceeding the cut-off levels could be established, it would be irrelevant to the MRO's verification process. The MRO's inquiry is simply whether there is a legitimate medical explanation for the lab finding. Having spent time at a party, concert, a closed vehicle, etc. with persons smoking drugs, whatever else it may be, cannot fairly be viewed as a legitimate medical explanation.

Application: Consortiums: MROs cannot appoint outside "agents" (consortiums or third party administrators) to perform administrative reviews and conversely, a consortium or third party administrator cannot contract for the MRO to only review positive drug test results, leaving the review of negatives to the consortium unless the TPA personnel are under the direct supervision of the MRO.

All drug test results must be transmitted by the lab directly to the MRO and not to a subsidiary or contractor; and notification of all positive results will be performed by the MRO and not through or by anyone else.

### **40.29 - Laboratory analysis procedures**

Application: Mislabeling of Specimen Bottles: In the situation where the collector has obviously mislabeled the specimen bottles (i.e., labeled the smaller-volume bottle as A and the larger-volume bottle as B), DOT allows the primary lab receiving the specimens to redesignate the bottles. The bottles must be redesignated prior to the opening of either bottle. On the appropriate bottle, the lab shall mark through the "A" and write "B," then initial and date the change. A corresponding change shall be made to the other bottle by marking through the "B" and writing "A," and initialing and dating the change. A notation shall be made on the original chain of custody (Copy 1) and on the split-specimen copy.

If the primary lab unintentionally opens the split specimen (Bottle B) first, it should not open the primary specimen (Bottle A), but rather redesignate the bottles. If there were not sufficient specimen quantity in the opened bottle (the original split) to conduct the screening and confirmation testing, then the test would be canceled. Under no circumstance would the primary lab open the second bottle.

Application: Quarterly Reports: DOT changed the requirement for a monthly report to a quarterly report, as a minimum, but not to limit those employers or labs who desired monthly reports...If a lab provides monthly reports, there is no requirement to additionally provide a quarterly report.

## **Subpart C – Alcohol Testing**

### **40.51 - The breath alcohol technician**

Inspector Guidance: In July 1994, DOT published its BAT Training Instructor Training Curriculum (model course). It is available from U.S. Government Book Stores or Governing Printing Office (202-512-1800) for \$25.00. Sample certificates are included in the lesson plans that can be copied and used to certify a student's proficiency. A copy of the student's certificate could serve as sufficient documentation for the employer's records. Rather than keeping copies of each certificate, instructors may elect to record the names, dates of certification, and other pertinent data for all certified BATs in a logbook.

### **40.63 - Procedures for screening tests**

Application: Signatures: All signatures must be pen and ink; electronic signatures are not currently authorized.

### **40.65 - Procedures for confirmation tests**

Application: Malfunctioning EBT: If the EBT is malfunctioning and there is no backup, the BAT should cancel the test, and make note in the remarks section that the test was canceled due to the device malfunctioning. The BAT then notifies his/her supervisor or the manufacturer's service provider.

### **40.81 - Availability and disclosure of alcohol testing information about individual employees**

Application: Consortium: When the employer uses a consortium or third party administrator (C/TPA) to act as the agent, then they could have access to the form or the authority to obtain a copy. Results may be maintained afterwards by a C/TPA...while there is no objection to the MRO or BAT transmitting results simultaneously both to the employer and to the C/TPA, it is not appropriate for the MRO or BAT to send the results only to the C/TPA, which subsequently transmits them to the employer. A lab functioning as a C/TPA may receive the employer's copy of the breath alcohol testing form as long as it is not received by the accession/receiving (testing) section of the lab.

## **Subpart D – Non-Evidential Alcohol Screening Devices.**

### **40.91 - Authorization for use of non-evidential alcohol screening devices (ASD)**

The CPL for ASDs is different from the CPL for EBTs.

ASDs are subdivided into two device classifications: 1) disposable ASD (designed for single use); required to be precalibrated, and need no additional calibration checks; 2) Reusable ASDs (designed to be reused); required to be capable of performing an external calibration check and of testing an air blank prior to the collection of breath.

None of the ASDs are required to be capable of printing or linking to a printer. However, if they have this capability, they must meet the print requirements.

As of the August 15, 1995, NHTSA's amended CPL of devices that conform to the Model Specifications for Screening Devices include the following 7 devices: Three are saliva alcohol testers: 1) ALCO-SCREEN 02, 2) On-Site Alcohol, 3) Q.E.D. A150 Saliva Alcohol Test. Four are breath alcohol testers that use semiconductor type sensors: 1) Alco Check 3000 D.O.T./Alco Screen 3000; 2) Alco Tector Mark X/Mark XAlcohol Checker; 3) Alco Tec III and 4) Digitox D.O.T./Alco Screen 1000.

### **40.93 - The screening test technician**

Inspector Guidance: The April 1995, DOT "Screening Test Technician (STT) Training Instructor Training Curriculum" (model course) is available from a Government Book Store or Government Printing Office (202-512-1800) for \$22.00. Sample certificates are included in the lesson plans that can be copied and used to certify a student's proficiency. A letter signed by the actual instructor will also provide adequate documentation of the student's proficiency.

Application: Form for Saliva Tests: STTs conducting tests using a non-evidential screening device shall use the alcohol testing form. The STT may cross out the word "breath" in the certification statements in Step 2 and 3 on the form, and write in the word "saliva." Crossing out the word "breath" is optional, but would be more explicit for the employee.

## **Part 225 – Railroad Accident Reporting**

Inspector Guidance:

Applications for this part are found in the current FRA Guide for Preparing Accident/Incident Reports. The forms used for reporting accident/incidents can be found in an FRA booklet entitled, "Forms for Accident /Incident Recordkeeping and Reporting." The Government Accounting Office (GAO) published a report in April 1989, "Railroad Safety - FRA Needs to Correct Deficiencies in Reporting Injuries and Accidents."

Accident Reports Act of 1910: The former Accident Reports Act is now in Public Law 103- 272, Chapter 209, Sections 209.01, 209.02 and 209.03. It reads as follows:

### **Chapter 209 – Accidents and Incidents**

Sec.

209.01 Reports.

209.02 Investigations.

209.03 Reports not evidence in civil actions for damages.

## § 209.01 Reports

(a) General Requirements. - Not later than 30 days after the end of each month, a railroad carrier shall file a report with the Secretary of Transportation on all accidents and incidents resulting in injury or death to an individual or damage to equipment or a roadbed arising from the carrier's operations during the month. The report shall be under oath and shall state the nature, cause, and circumstances of each reported accident or incident. If a railroad carrier assigns human error as a cause, the report shall include, at the option of each employee whose error is alleged, a statement by the employee explaining any factors the employee alleges contributed to the accident or incident.

(b) Monetary Threshold for Reporting. -

(1) In establishing or changing a monetary threshold for the reporting of a railroad accident or incident, the Secretary shall base damage cost calculations only on publicly available information obtained from -

(A) the Bureau of Labor Statistics; or

(B) another department, agency, or instrumentality of the United States Government if the information has been collected through objective, statistically sound survey methods or has been previously subject to a public notice and comment process in a proceeding of a Government department, agency, or instrumentality.

(2) If information is not available as provided in paragraph (1)(A) or (B) of this subsection, the Secretary may use any other source to obtain the information. However, use of the information shall be subject to public notice and an opportunity for written comment.

## § 209.02 Investigations

(a) General Authority. - The Secretary of Transportation, or an impartial investigator authorized by the Secretary, may investigate -

(1) an accident or incident resulting in serious injury to an individual or to railroad property, occurring on the railroad line of a railroad carrier; and

(2) an accident or incident reported under section 205.05 of this title.

(b) Other Duties and Powers. - In carrying out an investigation, the Secretary or authorized investigator may subpoena witnesses, require the production of records, exhibits, and other evidence, administer oaths, and take testimony. If the accident or incident is investigated by a commission of the State, in which it occurred, the Secretary, if convenient, should carry out the investigation at the same time as, and in coordination with, the commission's investigation. The railroad carrier on whose railroad line the accident or incident occurred shall provide reasonable facilities to the Secretary for the investigation.

(c) Reports. - When in the public interest, the Secretary shall make a report of the investigation, stating the cause of the accident or incident and making recommendations the Secretary considers appropriate. The Secretary shall publish the report in a way the Secretary considers appropriate.

## § 209.03 Reports not evidence in civil actions for damages

No part of an accident or incident report filed by a railroad carrier under 209.01 of this title or made by the Secretary of Transportation under section 209.02 of this title may be used in a civil action for damages resulting from a matter mentioned in the report.

Note: See Chapter 201, section 213.02 for the civil penalty provisions of accident and incident violations.

## Hours of Service Law

The former Hours of Service Act is now found in Public Law 103-272, Chapter 211, and Chapters 211.01-211.08. It reads as follows:

### Chapter 211- Hours of Service

Sec.

211.01 Definitions.

211.02 Nonapplication and exemption.

211.03 Limitations on duty hours of train employees.

211.04 Limitations on duty hours of signal employees.

211.05 Limitations on duty hours of dispatching service employees.

211.06 Limitations on employee sleeping quarters.

211.07 Maximum duty hours and subjects of collective bargaining.

211.08 Pilot projects.

### § 211.01 Definitions

In this chapter-

(1) "designated terminal" means the home or away-from-home terminal for the assignment of a particular crew.

(2) "dispatching service employee," means an operator, train dispatcher, or other train employee who by the use of an electrical or mechanical device dispatches, reports, transmits, receives, or delivers orders related to or affecting train movements.

(3) "employee" means a dispatching service employee, a signal employee, or a train employee.

(4) "signal employee" means an individual employed by a railroad carrier who is engaged in installing, repairing, or maintaining signal systems.

(5) "train employee" means an individual engaged in or connected with the movement of a train, including a hostler.

## § 211.02 Nonapplication and exemption

(a) General. - This chapter does not apply to a situation involving any of the following:

- (1) a casualty.
- (2) an unavoidable accident.
- (3) an act of God.
- (4) a delay resulting from a cause unknown and unforeseeable to a railroad carrier or its officer or agent in charge of the employee when the employee left a terminal.

(b) Exemption. - The Secretary of Transportation may exempt a railroad carrier having not more than 15 employees covered by this chapter from the limitations imposed by this chapter. The Secretary may allow the exemption after a full hearing, for good cause shown, and on deciding that the exemption is in the public interest and will not affect safety adversely. The exemption shall be for a specific period of time and is subject to review at least annually. The exemption may not authorize a carrier to require or allow its employees to be on duty more than a total of 16 hours in a 24-hour period.

## § 211.03 Limitations on duty hours of train employees

(a) General. - Except as provided in subsection (c) of this section, a railroad carrier and its officers and agents may not require or allow a train employee to remain or go on duty-

- (1) unless that employee has had at least 8 consecutive hours off duty during the prior 24 hours; or
- (2) after that employee has been on duty for 12 consecutive hours, until that employee has had at least 10 consecutive hours off duty.

(b) Determining Time on Duty. - In determining under sub-section (a) of this section the time a train employee is on or off duty, the following rules apply:

- (1) Time on duty begins when the employee reports for duty and ends when the employee is finally released from duty.
- (2) Time the employee is engaged in or connected with the movement of a train is time on duty.
- (3) Time spent performing any other service for the railroad carrier during a 24-hour period in which the employee is engaged in or connected with the movement of a train is time on duty.
- (4) Time spent in deadhead transportation to a duty assignment is time on duty, but time spent in deadhead transportation from a duty assignment to the place of final release is neither time on duty nor time off duty.

(5) An interim period available for rest at a place other than a designated terminal is time on duty.

(6) An interim period available for less than 4 hours rest at a designated terminal is time on duty.

(7) An interim period available for at least 4 hours rest at a place with suitable facilities for food and lodging is not time on duty when the employee is prevented from getting to the employee's designated terminal by any of the following:

(A) a casualty.

(B) a track obstruction.

(C) an act of God.

(D) a derailment or major equipment failure resulting from a cause that was unknown and unforeseeable to the railroad carrier or its officer or agent in charge of that employee when that employee left the designated terminal.

(c) Emergencies. - A train employee on the crew of a wreck or relief train may be allowed to remain or go on duty for not more than 4 additional hours in any period of 24 consecutive hours when an emergency exists and the work of the crew is related to the emergency. In this sub-section, an emergency ends when the track is cleared and the railroad line is open for traffic.

## § 211.04 Limitations on duty hours of signal employees

(a) General. -

(1) In paragraph (2)(C) of this subsection, "24-hour period" means the period beginning when a signal employee reports for duty immediately after 8 consecutive hours off duty or, when required under paragraph (2)(B) of this subsection, after 10 consecutive hours off duty.

(2) Except as provided in subsection (c) of this section, a railroad carrier and its officers and agents may not require or allow a signal employee to remain or go on duty-

(A) unless that employee has had at least 8 consecutive hours off duty during the prior 24 hours;

(B) after that employee has been on duty for 12 consecutive hours, until that employee has had at least 10 consecutive hours off duty; or

(C) after that employee has been on duty a total of 12 hours during a 24-hour period, or after the end of that 24-hour period, whichever occurs first, until that employee has had at least 8 consecutive hours off duty.

(b) Determining Time on Duty. - In determining under subsection (a) of this section the time a signal employee is on duty or off duty, the following rules apply:

(1) Time on duty begins when the employee reports for duty and ends when the employee is finally released from duty.

(2) Time spent performing any other service for the railroad carrier during a 24-hour period in which the employee is engaged in installing, repairing, or maintaining signal systems is time on duty.

(3) Time spent returning from a trouble call, whether the employee goes directly to the employee's residence or by way of the employee's headquarters, is neither time on duty nor time off duty, except that up to one hour of that time spent returning from the final trouble call of a period of continuous or broken service is time off duty.

(4) If, at the end of scheduled duty hours, an employee has not completed the trip from the final outlying worksite of the duty period to the employee's headquarters or directly to the employee's residence, the time after the scheduled duty hours necessarily spent in completing the trip to the residence or headquarters is neither time on duty nor time off duty.

(5) If an employee is released from duty at an outlying worksite before the end of the employee's scheduled duty hours to comply with this section, the time necessary for the trip from the worksite to the employee's headquarters or directly to the employee's residence is neither time on duty nor time off duty.

(6) Time spent in transportation on an on track vehicle, including time referred to in paragraphs (3)-(5) of this subsection, is time on duty.

(7) A regularly scheduled meal period or another release period of at least 30 minutes but not more than one hour is time off duty and does not break the continuity of service of the employee under this section, but a release period of more than one hour is time off duty and does break the continuity of service.

(c) Emergencies. - A signal employee may be allowed to remain or go on duty for not more than 4 additional hours in any period of 24 consecutive hours when an emergency exists and the work of that employee is related to the emergency. In this subsection, an emergency ends when the signal system is restored to service.

## **§ 211.05 Limitations on duty hours of dispatching service employees**

(a) Application. - This section applies, rather than section 211.03 or 211.04 of this title, to a train employee or signal employee during any period of time the employee is performing duties of a dispatching service employee.

(b) General. - Except as provided in subsection (d) of this section, a dispatching service employee may not be required or allowed to remain or go on duty for more than-

(1) a total of 9 hours during a 24-hour period in a tower, office, station, or place at which at least 2 shifts are employed; or

(2) a total of 12 hours during a 24-hour period in a tower, office, station, or place at which only one shift is employed.

(c) Determining Time on Duty. - Under subsection (b) of this section, time spent performing any other service for the railroad carrier during a 24-hour period in which the

employee is on duty in a tower, office, station, or other place is time on duty in that tower, office, station, or place.

(d) Emergencies. - When an emergency exists, a dispatching service employee may be allowed to remain or go on duty for not more than 4 additional hours during a period of 24 consecutive hours for not more than 3 days during a period of 7 consecutive days.

Limitations on employee sleeping quarters.

A railroad carrier and its officers and agents -

(1) may provide sleeping quarters (including crew quarters, camp or bunk cars, and trailers) for employees, and any individuals employed to maintain the right of way of a railroad carrier, only if the sleeping quarters are clean, safe, and sanitary and give those employees and individuals an opportunity for rest free from the interruptions caused by noise under the control of the carrier; and

(2) may not begin, after July 7, 1976, construction or reconstruction of sleeping quarters referred to in clause (1) of this section in an area or in the immediate vicinity of an area, as determined under regulations prescribed by the Secretary of Transportation, in which railroad switching or humping operations are performed.

## **§ 211.07 Maximum duty hours and subjects of collective bargaining**

The number of hours established by this chapter that an employee may be required or allowed to be on duty is the maximum number of hours consistent with safety. Shorter hours of service and time on duty of an employee are proper subjects for collective bargaining between a railroad carrier and its employees.

## **§ 211.08 Pilot projects**

(a) Waiver. - A railroad carrier or railroad carriers and all labor organizations representing any class or craft of directly affected covered service employees of the railroad carrier or railroad carriers, may jointly petition the Secretary of Transportation for approval of a waiver, in whole or in part, of compliance with this chapter, to enable the establishment of one or more pilot projects to demonstrate the possible benefits of implementing alternatives to the strict application of the requirements of this chapter to such class or craft of employees, including requirements concerning maximum on-duty and minimum off-duty periods. Based on such a joint petition, the Secretary may, after notice and opportunity for comment, waive in whole or in part compliance with this chapter for a period of no more than two years, if the Secretary determines that such waiver of compliance is in the public interest and is consistent with railroad safety. Any such waiver may, based on a new petition, be extended for additional periods of up to two years, after notice and opportunity for comment. An explanation of any waiver granted under this section shall be published in the Federal Register.

(b) Report. - The Secretary of Transportation shall submit to Congress, no later than January 1, 1997, a report that-

(1) explains and analyzes the effectiveness of all pilot projects established pursuant to a waiver granted under subsection (a);

(2) describes the status of all other waivers granted under subsection (a) and their related pilot projects, if any; and

(3) recommends appropriate legislative changes to this chapter.

(c) Definition. - For purposes of this section, the term 'directly affected covered service employees' means covered service employees to whose hours of service the terms of the waiver petitioned for specifically apply.

Note: See Chapter 211, section 213.04 for the civil penalty provisions of hours of service law violations.

## Hours of Service

The following is the hours of service section, which is prefaced, with a glossary of terms (with explanations), followed by hours of service applications. The application portion is subdivided into Train Service Employees and Train Dispatching Service Employees. It is essential that inspectors understand the glossary of terms and should refer back to those terms when applying the hours of service laws.

## Glossary of Terms with Explanations

### Alphabetical Order

1. Actual Time
2. Aggregate (Broken) Service
3. Call and Release
4. Commingled Service
5. Commuting
6. Continuous Service
7. Covered Service
8. Deadheading
9. Designated Terminal
10. Duty Tour (T&E)
11. Duty Tour (Dispatching)
12. Final Release
13. Hostler
14. Interim Release (T&E)
15. On-Duty Time
16. Other-Than-Regular Reporting Points

17. Prior Time Off
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1. **Actual Time:** Actual time is the specific time of day or the precise period of time being calculated.

Explanation: Part 228 requires the use of actual time for all hours of duty records. The start and ending times for on duty are actual occurrence times for these events. The precise period being calculated is the period between the start and ending times. Generally, hours of duty records will show a high degree of efficiency (compliance) for entries regarding on and off duty. However, estimates of time are erroneously used in several other areas.

Two significant areas in hours of duty records where estimates are frequently used are deadheading and prior time off. Frequently, deadhead entries reflect labor agreement established times for pay purposes. Since the time consumed in deadheading may vary significantly with the time of day, weather conditions and starting points, actual times must be used. Entries for prior time off often becomes redundant and reflect arbitrary amounts in excess of the minimum required time off, regardless of the actual time.

Since both may impact the calculation of on-duty time, precise time entries and calculations are required. The actual beginning and ending time for deadheading is utilized by the electronic system to accurately keep track of the duty tour. Actual prior time off bridges the gap between duty tours. A routine or minimum estimate indicates the presence of a phantom record, i.e., one that is not present in the electronic system.

2. **Aggregate (Broken) Service:** Broken or aggregate service is a sequence of on-duty periods broken by one or more qualifying releases within a duty tour.

Explanation: Broken service is, as the name implies, a duty tour whose service is interrupted by qualifying periods of release. The duty tour may represent only covered service or may include periods of covered and commingled service. The duty tour may also include multiple periods of covered service, commingled service or combinations of both. The key to identification of broken service is the presence of one or more qualifying periods of release at any time during the duty tour.

Broke or aggregate service employs a maximum on-duty limit and a mandatory 24-hour time frame, in which all sequenced events for the duty tour must occur. That is to say, the cumulative on-duty time for a covered and/or commingled broken service duty tour cannot exceed a maximum time on duty. Also, all on-duty events plus all qualifying periods of release must occur with a 24-hour time frame beginning with the start of the first on-duty event.

For train employees, the statutory off-duty requirements for broken service are as follows:

1. A duty tour involving 12 cumulative hours or less on-duty time in a 24-hour period requires 8 consecutive hours off duty.
2. A duty tour in excess of 12 cumulative hours on-duty time in a 24-hour period requires 8 consecutive hours off duty.
3. A duty tour involving any amount of cumulative on-duty time for a period exceeding 24 hours requires 8 consecutive hours off duty.

3. Call and Release: Call and release is the railroad act of issuing an employee a Report-for-Duty Time, then releasing the employee from the requirement to report PRIOR to the Report-for-Duty Time.

Explanation: Call and release is known by other names, such as "Busted Call" and "Set Back." In all cases, both the call and the release occur prior to the Report-for-Duty Time. A release, busted call, or set back occurring on or after the Report-for-Duty Time is an EARLY release from duty.

4. Commingled Service: Commingled service is any railroad mandated "other" (noncovered) service performed for the railroad.

Explanation: Commingled service includes all noncovered mandatory activities that can commingle with covered service. For an "other" activity to commingle, i.e., count as on-duty time, it must be (1) mandatory and (2) part of a duty tour that includes covered service. When these two requirements are present, the "other" activity is said to commingle with covered service and thereby becomes part of the total on-duty time for the duty tour.

Activities that may commingle in some instances also may not commingle in others. If an activity cannot commingle with covered service it is a non-issue and is treated as off-duty for hours of service purposes.

5. Commuting: Commuting is the time spent by an employee in travel between his or her residence and the employee's regular reporting point. In certain instances it is also the time spent by the employee in railroad provided or authorized transportation between his or her release point and the lodging facilities at the away-from-home terminal.

Explanation: Commuting is employee travel time that is not included in the calculation of total time on duty. Since an employee is free to live wherever he or she chooses, the railroad is not penalized by the distance and travel time to the employee's regular reporting point. However, the same employee's travel to any other regular reporting point will require a portion or all of the travel time to be considered under the deadheading provisions of the HSL.

6. Continuous Service: Continuous service is a period of unbroken on-duty time during a duty tour and applies to train employees.

Explanation: The duty tour may represent only covered service or may include both covered service and commingled service. The duty tour may also include multiple periods of covered service or combinations of covered service and commingled service. The key to identification of

continuous service within a duty tour is the absence of a qualifying period of release, i.e., interim release for train employees.

7. Covered Service: This term refers to only the activities described in the definition for train employee, dispatching service employee, or signal employee.

Explanation: Covered service is the performance of specific activities defined by the law for three railroad operating functions. FRA maintains a functional approach in determining the presence of covered service regardless of craft or title. An activity must be functionally covered by the law before it can be treated as covered service.

8. Deadheading: Deadheading is an employee relocation (or repositioning) activity primarily related to train employees. It identifies the physical nonworking relocation of the employee from one point to another as a result of railroad-issued verbal or written directives.

Explanation: Deadheading includes all nonworking travel, excluding commuting, to or from a duty point. The travel may be accomplished by any of the several modes of transportation available to the railroad, such as rail, bus, air, taxi, company vehicle and privately owned vehicles of employees.

Deadheading is a separate function related to covered service, i.e., the movement of a train. In effect, it "commingles" with the train movement to (1) determine total on-duty and (2) helps to define the length of the duty tour. Most deadheading "commingles" with the train movement and is treated either as on-duty or limbo time (neither on nor off-duty). However, deadheading that occurs independent of covered service activity and is bracketed by statutory off-duty periods is treated as off-duty for hours of services purposes.

Usually employees involved in deadhead travel perform no function for the railroad other than relocation. In these cases, the deadheading provisions of the hours of service apply. However, if any other activity is involved, such as driving the deadhead transportation vehicle, the commingled service provisions take precedence over the deadheading provisions.

The actual time consumed is the appropriate entry for all deadheading events that are part of the duty tour. The hours of service requirements specify when deadheading is counted as time on duty. Conversely, deadheading that commingled with covered service can never be included in the off-duty time. Deadheading that does not commingled with covered service is off-duty for hours of service purposes.

Special consideration is given to the calculation of actual deadhead time when a train employee, at his/her residence, is ordered to a duty point other than his/her regular reporting point. Generally, actual time begins when the employee leaves his/her residence and ends on arrival at the "other-then-regular" reporting point. However, the time "charged" for the deadhead cannot exceed a reasonable deadhead time, under existing circumstances, between the employee's regular reporting point and the "other-than-regular" reporting point. This consideration maintains that regardless of where the employee lives, the railroad could order the employee to report for deadhead transportation from his/her regular reporting point.

9. Designated Terminal: A designated terminal is a geographical location for a railroad's operation. It must be identified in or under authority of a collective bargaining agreement as the "home," "away-from-home," or "additional" terminal for a specific run (train assignment). Also, it must have suitable facilities for food and lodging available for the crew of that run.

First, a designated terminal should not be confused with a reporting point. A designated terminal is run or train-related. It may be a yard, terminal, city or defined geographical area. It may include one or more on-duty locations or reporting points.

Designated terminals determine final or interim release points for qualifying off-duty purposes. An employee may be relieved at a non-designated terminal, but not released. The employee may be transported to a designated terminal for release. In this case, deadheading provisions must be considered in the travel.

10. Duty Tour - Train Employees: A duty tour is the period (s) of covered and/or commingled service occurring between two qualifying statutory off-duty periods (i.e., 8 or 10 hours statutory period each).

Explanation: The first step in developing a program to accurately identify and calculate total hours on duty is to understand FRA's concept of a duty tour. It is very important for the program to "think" in terms of a duty tour as opposed to a run, job, or shift. A duty tour is easily defined by identifying two distinct off-duty periods, each containing a statutory off-duty period. The time span between the two off-duty periods, regardless of time or number of runs, jobs and shifts, is one duty tour. All activity, covered and commingled, contributes to the calculation of total hours on duty. The beginning and ending of a duty tour is further defined as follows:

The start of a new duty tour begins at the end of an off-duty period that, at a minimum, includes the statutory 8 or 10 hours off duty. Since many off-duty periods exceed the minimum statutory requirements, a new duty tour begins with the start of the next covered or commingled service performed. The beginning of a duty tour is also the beginning of the 24-hour period limiting service broken by qualifying periods of release.

The end of a duty tour occurs at the beginning of an off-duty period that, at a minimum, includes a statutory off-duty period. A duty tour that contains one or more qualifying periods of release may not exceed 24 hours. Qualifying periods of release do not break the continuity of a duty tour, but do break the continuity (consecutiveness) of the total time on duty.

11. Duty Tour- Dispatching Service Employees: A duty tour is the total of all periods of covered and/or commingled service occurring within any 24-hour period.

Explanation: The HSL does not mandate a minimum statutory off-duty period for dispatching service employees as it does for train employees and signal employees. Rather, maximum covered service limitations are imposed for the total time of all activities, covered and commingled service, within any 24-hour period.

The 24-hour period is a "sliding window" that moves with actual time covering the previous 24 hours. At any given time a dispatching service employee may accumulate up to the maximum allowable statutory on-duty time in this "window." The window may include multiple on-duty periods of covered and commingled service, the sum of which must not exceed the statutory limit. Release periods within the "window" of less than one hour are to be considered on duty in calculating total time on duty for the 24-hour period.

12. Final Release: Final release is the time the employee is released from all mandatory railroad-related activities and begins a statutory off-duty period.

Explanation: The key in determining the final release time is identifying the time the employee is released from all mandatory railroad related activities. In most cases involving duty tour of less than 12 hours, the relieved and the final release times will be the same. The need to distinguish between the two is paramount when deadheading at the end of the duty tour is involved. A point to remember about these times is:

Final release will always start the statutory off-duty period, relieved does not.

After initially releasing the employee, the railroad may elect to terminate the employee's statutory off-duty period for the purpose of deadheading the employee to another release point, i.e.,

another designated terminal. After arrival at the new release point, the employee must be given a complete 8 or 10 consecutive hours off-duty period. FRA considers the terminated period and the deadhead as limbo, deadheading to the point of final release provided no other mandatory activities are performed.

Also, if the employee is required to perform any mandatory activity, the deadhead converts to deadheading to duty and is considered on-duty and an extension of the duty tour.

13. Hostler: A hostler is any railroad employee who operates a locomotive consists without cars in covered service functions.

Explanation: Hostler activities are usually identified as either inside or outside. Inside hostlers move locomotives in covered service functions with the blue signal limits of a repair or servicing facility. Inside hostlers, as a rule, do not leave the repair or servicing facility. Usually, inside hostlers are mechanical employees performing covered service functions, but may also include engine service employees. Outside hostler activities involve shuttling locomotive consists between two locations within a yard or geographical area for railroad train operation convenience. Outside hostlers move locomotive consist within a yard and on the main track. Outside hostlers are engine service employees.

Employees who perform duties related to assisting a hostler are known as hostler helpers. Generally, these activities, such as lining switches and giving signals for locomotive movements, and making or breaking couplings, bring the hostler helper into covered service.

14. Interim Release- Train Employees Only: Only off-duty periods of at least 4 but less than 8 hours at a designated terminal are considered qualifying interim releases that temporarily suspend the accumulation of on-duty time, but do not start a new duty tour.

Explanation: Regarding train employees only, a qualifying interim release is considered as off-duty for purposes of computing the total on-duty time within a duty tour. However, qualifying interim release periods are included in the accumulation of time under the 24-hour time frame for broken or aggregated service. Qualifying releases are never considered as contributing to either the statutory or total off-duty periods.

Releases of less than 4 hours at a designated terminal do not suspend the accumulation of on-duty time for train employees. Also, releases of any length at a non-designated terminal do not suspend the on-duty time.

15. On-Duty Time-Train Employees: On-duty time commences when the employee reports at the time and place specified by the railroad and terminates when the employee is released of all responsibilities.

Explanation: Time on duty is the point in time an employee moves from off-duty status to either covered or service that will commingle. For train employees, time on duty begins when an employee:

1. reports at his/her regular reporting point to start a new duty tour, including deadhead, or
2. reports for duty at the end of an interim release to restart an existing duty tour, or
3. begins actual deadhead transportation from his/her residence to a non-regular reporting point.

On-Duty Time-Train Dispatching Employees: Time on duty is the point in time an employee moves from off-duty status to either covered or service that will commingle.

Explanation: For a dispatching service employee, time on duty begins when:

1. the employee starts his or her mandatory "turnover" process, or
2. starts performing any other non-covered service in a 24-hour period that includes covered service.

16. Other-Than-Regular Reporting Point(s) are all other on-duty reporting points within a railroad-defined geographical area, usually established under the collective bargaining process.

Explanation: Unlike regular reporting points, a covered service employee may have multiple other-than-regular reporting points. Usually, in this scenario, the employee is an extraboard or pool crewmember. These reporting points are all of the on-duty locations other than the employee's regular reporting point that are covered by the employee's collective bargaining agreement.

17. Prior Time Off: Prior time off is the actual time off-duty between identifiable periods of service for the railroad.

Explanation: Generally, prior time off reflects the actual time off between duty tours. However, in duty tours involving deadhead transportation, aggregate and commingled service, prior time off may be involved within a duty tour.

Prior time off entries will always refer to the activity that follows. The prior time off entry for the beginning of a duty tour is equal to the total off-duty period. When deadheading or commingled service occur prior to covered service, the time lapse, if any, between the activities must be shown as prior time off for the activity that follows. Each activity, i.e., deadheading, commingled service, and covered service, is treated as a separate component of the total record for a specific duty tour. Each of these activities may require a separate prior time off record.

18. Regular Reporting Point: A regular reporting point is the permanent on-duty location of the employee's regular assignment that is established through a job bulletin assignment (job award or forced assignment) or seniority placement. The assigned regular reporting point for extraboard and pool crew employees will always be a single fixed location identified by the railroad.

Explanation: Reporting points are employee specific. Each covered service employee may have only one regular reporting point. A covered service employee assigned to a specific job has the location of the job as his or her regular reporting point. For extraboard covered service employees, the railroad assigned location of the extraboard is that employee's regular reporting point. The assigned location of the extraboard must be precise; it cannot be a geographical area.

For train service employees, reporting points should not be confused with designated terminals. Designated terminals apply only to train service employees, are job or run oriented, and refer to the terminal (city or area) where employees may be released for statutory off-duty purposes. A designated terminal may contain multiple numbers of reporting points.

19. Release Periods - Dispatching Service Employees: A minimum release of one hour is considered as a qualifying release that temporarily suspends the accumulation of on-duty time for the preceding 24-hour period.

Explanation: Appendix A to Part 228, Communication of Train Orders states, "A release period is considered off-duty time if it provides a meaningful period of relaxation and if the employee is free

of all responsibilities to the carrier. One hour is the minimum acceptable release period for this type of covered service."

20. Released Time: Released time is the point in time that an employee is released from all mandatory railroad-related activities.

Explanation: It is important to distinguish between released time and final release. Released time may occur one or more times within a single duty tour. For train employees with duty tours containing more than one covered service activity (multiple trains or jobs), released time is the time that the employee is released from responsibility of one covered service activity to begin a second covered service activity prior to obtaining a statutory off-duty period. The period between the release time of the first covered activity and the beginning of the second covered service activity may or may not be an interim release for train employees. Obviously, if the release period qualifies as an interim release, then the duty tour is comprised of aggregate service. However, if the release period is less than 4 hours or the release point does not qualify as a designated terminal, the accumulation of on-duty time continues during the release.

In electronic recordkeeping, released time is used to segment the duty tour and associate the segments to the appropriate train or job IDs irrespective of the length of the release or its location. When the electronic program detects the presence of two or more covered or commingled service activities within one duty tour, the program logic should analyze the releases to determine whether or not the times should be included in the programs calculation of total time on duty. If the release time is at the beginning of a period that qualifies as a statutory off-duty period, the release becomes a final release. In this instance, the program logic should end accumulation of total time on duty for duty tours ending at the start of the release (final release).

21. Relieved Time: Relieved time is the time the employee stops performing covered or commingled service.

Explanation: Covered service is usually followed by either administrative duties associated with a tie-up or deadheading to a point of final release, or both. Administrative duties following covered service will commingle with covered service; therefore, time relieved occurs at the completion of the administrative duties.

Deadhead travel following covered service is treated as "limbo time," provided no other activities occur in the duty tour. When this occurs, time relieved is the time the employee(s) entered deadhead status. However, deadhead travel followed by administrative duties, now becomes "deadheading to duty" and is treated as on-duty in the calculation of total on-duty time.

22. Relieved But Not Released: Relieved but not released is a combination of relieved and released that identifies "limbo time."

Explanation: This is a term coined to identify "limbo time" when a crew or crewmember has reached his or her statutory limits on-line of road and covers the entire period from relieved to released. This period includes waiting for transportation and the deadhead travel time to the employee's point of final release.

23. Report for Duty Time: Report for duty time is generally the time the employee is required to be ready and available to start a mandatory activity.

Explanation: The report for duty time is commonly referred to as the "call time." The employee may arrive earlier to dress or prepare personal effects for duty. In this case, the arrival time is not considered as on duty, because the employee was not required to arrive early; therefore, the employee has not yet reported. Should the employee be required to perform service for the railroad between arrival and reporting, the employee's on-duty time must reflect the earlier start time.

24. **Reporting Point:** A reporting point is a precise physical location where an employee reports for duty to begin or restart a duty tour.

Explanation: First, a reporting point should not be confused with a designated terminal. A reporting point is employee related. It is the physical location designated by the railroad where an employee reports for duty. Reporting points are further defined as regular and other-than-regular.

FRA maintains that a train and engine employee may have only one regular reporting point. A regular reporting point is determined by the employee's regular assignment. The regular reporting point for an extraboard employee is the railroad defined location of the extraboard.

For purposes of deadheading, FRA requires the railroad to establish a regular reporting point for each train and engine service employee. Travel between an employee's residence and his/her regular reporting point is considered as commuting and is treated as part of the off-duty period. Travel to any other reporting point will involve the accumulation of deadhead time. In the event a regular reporting point is not established, travel between the employee's residence and all reporting points will involve deadheading and must be governed by the deadheading provisions.

25. **Statutory Off-Duty Period-Train Employees:** The statutory off-duty period, either 8 or 10 consecutive hours, is the minimum time required to start a new duty tour for train employees.

Explanation: The statutory off-duty period is determined by the length of previous duty, i.e., the total covered and commingled service for the ending duty tour. The statutory period will always begin at the time the employee is finally released and will consume the first 8 or 10 consecutive hours of the total off-duty period.

26. **Total Off-Duty Period-Train Employees:** The total off-duty period is the amount of off-duty time between duty tours.

Explanation: This is a period equal to or greater than the required statutory off-duty period. This period will always start at the time of the employee's final release and terminate when the employee begins covered or commingled service and will include the statutory off-duty period.

27. **Total Off-Duty Time-Dispatching Service Employees:** The total off-duty time is the time remaining after the total on duty time has been deducted from the 24-hour period.

Explanation: Dispatching service employees do not have a specific off-duty requirement in the HSL. Rather, these employees are limited to either 9 or 12 hours on-duty time in a 24-hour period. As a result, the required off-duty period becomes the difference between the 24-hour period and the statutory 9 or 12 hours on-duty limit.

The 24-hour period is a "sliding window" that moves with actual time covering the previous 24-hours. At any given time, a dispatching service employee may accumulate up to the maximum allowable statutory on-duty time in this "window." As explained in the dispatching service employee's duty tour, the "window" may include multiple periods of on-duty time. Therefore, the window may also include multiple off-duty periods, the sum of which must not be less than the difference between the statutory on-duty limits and 24 hours.

28. **Total Time On Duty (TTOD):** Total time on duty is the sum of all time spent in on-duty activities (covered and commingled) in a duty tour.

Explanation: TTOD includes all covered and commingled service within a duty tour. It does not include "limbo time" or arbitraries claimed and may be different, usually less than the employee's total time under pay.