



U.S. Department  
of Transportation

**Federal Railroad  
Administration**

# Memorandum

Date: February 3, 2004

Reply to Attn of: OP-04-10

Subject: Authority of Local Police to Administer Alcohol and  
Drug Tests to Rail Employees After Train Accidents

Original Signed By:

From: Edward W. Pritchard  
Director, Office of Safety Assurance and Compliance

To: Regional Administrators

The attached letter to Senator David Pryor deals with the issue of whether or not FRA's post-accident drug testing regulations preempt local law enforcement agencies in the conduct of toxicological testing following railroad accidents and under what conditions local police may conduct such tests. It is provided as interpretive guidance to Operating Practices Specialists and Inspectors in the discharge of their drug and alcohol enforcement duties.

Attachment

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Attachment to OP-04-10

The Honorable David Pryor  
United States Senate  
Washington, D.C. 20510-0402

November 30, 1993

Dear Senator Pryor:

Thank you for your October 13 letter forwarding a letter from one of your constituents, Mr. Larry H. Gentry, who inquired about the effect of the Federal Railroad Administration's (FRA) alcohol and drug testing regulations on the authority of local police to administer blood alcohol tests to rail employees after train accidents. Mr. Gentry had attached a letter from the Little Rock and Western Railway Corporation (LRWN) to the Arkansas State Police, which cited 49 CFR, Section 219.201 of FRA's regulations on post-accident testing. The LRWN letter incorrectly implied that the FRA rule preempts local enforcement officials from conducting post-accident testing after rail/highway grade crossing accidents.

To clarify this issue, I will first explain FRA's post-accident testing regulations. Section 219.201 (a) lists several types of events that require post-accident testing of railroad employees. Section 219.201 (b) exempts train crews involved in rail/highway grade crossing accidents from post-accident testing conducted under FRA authority. FRA's reasons for this are two-fold. First, a significant number of train/vehicle collisions occur when a motor vehicle drives into the side of a train. Second, in the vast majority of the remaining accidents, the crew has little or no chance to avoid the impact because of the very long stopping distances involved and the fact that it is the motorist or pedestrian who has placed himself or herself in danger. (FRA's Operation Lifesaver Program is, in fact, designed to educate the public on the risks of trying to "outrun" a train). Thus, FRA believes there is very little chance that toxicological tests of train crews after grade crossing accidents will yield useful information as to cause.

Section 219.201 (c) provides that the railroad shall determine whether or not to conduct post-accident testing. Railroad officials, who are almost always the first to respond to the scene of an accident/incident, must be relied upon to determine the facts if timely testing is to be carried out. The railroad representative is required to make a reasonable inquiry into the circumstances and consequences of the accident/incident before determining whether testing is required.

In general terms, FRA's regulations preempt state and local toxicological testing of railroad employees after train accidents. However, FRA's rule makes a special allowance to permit enforcement of certain state and local criminal provisions. Section

219.13, which defines the preemptive effect of FRA's regulations, reads in its entirety as follows:

“(a) Under Section 205 of the Federal Railroad Safety Act of 1970 (45 U.S.C. 434), issuance of these regulations preempts any State law, rule, regulation, order or standard covering the same subject matter, except a provision directed at a local hazard that is consistent with this part and that does not impose an undue burden on interstate commerce.

(b) FRA does not intend by issuance of these regulations to preempt provisions of State criminal law that impose sanctions for reckless conduct that leads to actual loss of life, injury or damage to property, whether such provisions apply specifically to railroad employees or generally to the public at large.”

Therefore, while FRA's alcohol and drug testing regulations generally preempt states from issuing drug testing regulations of their own, they do not preempt provisions of state criminal law that may require drug testing after rail/highway grade crossing accidents (or other train accidents) if such provisions impose sanctions for reckless conduct that leads to actual loss of life, injury or damage to property.

*Mr. Gentry's letter did not cite any specific facts. If local police are acting pursuant to an appropriate state criminal law, their testing authority would not appear to be preempted by FRA's regulations. However, it should be noted that any testing conducted by a governmental entity outside of FRA's program must have an independent basis upon which to withstand constitutional scrutiny. Moreover, we strongly urge that in situations where FRA requires post-accident testing [i.e., after an event listed in section 219.201 (a)], any testing done by the state not be allowed to interfere with the testing required under FRA's rule.*

I hope that this letter addresses Mr. Gentry's concerns. A copy of this letter will also be forwarded to the LRWN. Thank you for your interest in rail safety and FRA's alcohol and drug testing program.

Signed by Jolene M. Molitoris, Administrator