

Perspective: The 30 Year Anniversary of FRA's Part 219

1985- 2017

2015 was the 30th anniversary of
the Publication of 49 CFR Part
219's Original final Rule

“Control of Alcohol and Drug Use
in Railroad Operations”

- ❑ Setting the Stage – Why FRA Felt Part 219 Was Needed
- ❑ The Rulemaking and Skinner v. RLEA
- ❑ The Post-Accident Testing Program

- The Father and the Heart of 49 CFR Part 219
 - Grady Cothen
then Special Assistant to the Chief Counsel, FRA
- First Head Drover in the Office of Safety
 - Walt Rockey
Special Assistant to the Associate Administrator of Safety, FRA

- FRA Drug and Alcohol Program Managers

- Walt Rockey 1985-1989ish
- Sam Holley 1989ish-1992
- Don Shatinsky 1992-1994
- Lamar Allen 1994-2013
- Jerry Powers 2013-Present

Setting the Stage



1973

- **Indio CA** June 25, 1973 12:45 am
- Southern Pacific
- Rear-end collision in the SP yard with standing train
- Engineer, brakeman in the striking train killed
- Excessive speed, just didn't stop
- 5 locomotives destroyed, 33 cars derailed
- \$1.4M damage
- Engineer **0.16 BAC**

1979

- The REAP Report published by FRA
- REAP = Railroad Employee Assistance Project
- “Prevalence, Costs, and Handling of Drinking Problems on Seven Railroads”
- Authors: Mannello and Seaman
- Often cited, frightening to non-railroaders

- 240 key labor and management personnel
- 6,300 railroad employees at 7 railroads
- Staff members at railroad EAPs
- Study year was 1978

- 19% of all employees were “problem drinkers”
- 23% of all operating personnel were “problem drinkers”
- 5% of workers reported to work “very drunk” or got “very drunk” on duty at least once in the study year (1978)
- 13% of workers reported to work at least “a little drunk” one or more times in 1978
- 13% of operating personnel drank while on duty at least once in 1978, averaging 3 times

- The REAP Report emphasized most railroad employees reported to work sober and did not drink while on duty
- Nonetheless, OTJ intoxication was clearly a significant safety problem

1982

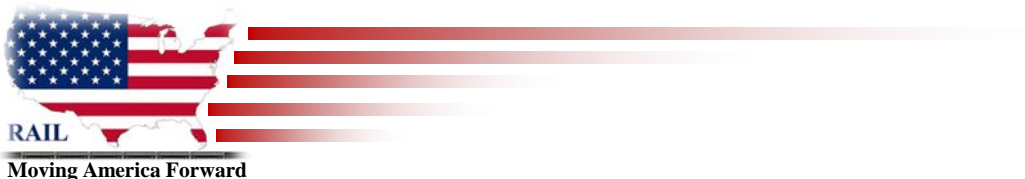
- **Livingston LA** September 28, 1982 5:13 am
- Illinois Central Gulf Railroad
- 43 cars derailed, 20 cars punctured, explosion, fireball, haz mat release, toxic fumes
- 2700-3000 people evacuated, 19 residences destroyed
- \$14M damage (mostly in cleanup of 200K gallons of toxic chemicals)

- Engineer estimated at **0.19 BAC**
- Brakeman estimated at **0.06 BAC**
- Engineer had turned over train operation to unqualified operator-clerk who was not authorized to be on board
- Excessive speed
- Engineer was called early but was drinking while on way to train and on train

- 10 years as an engineer for ICG
- Fired twice (once for alcohol)
- Suspended 6 times (speed, ignoring signals, failing to report for duty, allowing unauthorized personnel to operate the locomotive)

1983

- **Sullivan IN** September 14, 1983 5:32 am
- Seaboard Systems
- Rear–end collision
- Derail, 27 cars, 3 locomotives, 2 cabooses
- 2 fatalities (in caboose of struck train)
- 3 injuries
- \$800K damage



U.S. Department
of Transportation
**Federal Railroad
Administration**

- Engineer consumed at least 11 drinks in 6 hours pre-duty
- Likely continued drinking after he went on duty
- Estimated to be **0.33 BAC** at the time of the accident

- Brakeman estimated to be **0.11 BAC** at the time of the accident
- Was operating train (engineer was asleep)

1984

- **Wiggins CO** April 13, 1984
3:56am
- Burlington Northern
- Head-on collision
- 5 killed, 2 injured
- 7 locomotives destroyed, 40 cars derailed
- \$4M damage
- Engineer asleep, NTSB said alcohol and fatigue involved

1984

- **Newcastle WY** April 22, 1984
4:56am
- Burlington Northern
- Rear-end collision
- 2 killed, 2 injured
- 5 locomotives and a caboose destroyed, and 21 cars derailed
- \$1.4M damage
- Engineer asleep, NTSB said MJ and fatigue involved

1975-1984

- In the 1985 Final Rule preamble, FRA estimated **28** train accidents and **20** fatal train incidents involved drug and/or alcohol impairment.
 - **37** fatalities
 - **80** injuries
 - **\$20M** damage to railroad property (about \$45M today)
 - **\$14M** other damage (mostly the Livingston cleanup; about \$32M today)

The Rulemaking and Skinner v. RLEA



U.S. Department
of Transportation
**Federal Railroad
Administration**

- 1971 FRA started looking at the drug and alcohol issue seriously in 1971
- 1972-1974 Started working on a proposed rule
- 1975-1976 Regulations put on hold
 - Needed to develop more information
 - Working with labor and management to encourage employee support programs

Part 219

- July 5, 1983 ANPRM
- June 12, 1984 NPRM
- July-August 1984 Public meetings in Denver, Chicago, New Orleans, DC
- August 2, 1985 Final Rule
- August-September 1985 Public meetings in DC, Chicago, Ft. Worth, Salt Lake, Atlanta

- The 1985 Final Rule introduced:
 - The Field Manual (w/ standards for drug testing, breath testing, RS, and other program support)
 - Mandatory prohibitions (219.101 – the first version -- and 103 only)
 - Post-accident testing
 - Authorization for RS and RC testing

- Troubled employees programs
- Pre-employment testing, but under company authority
 - Need “competent” lab
 - Minimum 5 panel + barbiturates (more possible)
 - Alcohol testing authorized
 - Required confirmation of presumptive positives (second, specific method)
- Refusals

- The [Fourth Amendment](#) of the [U.S. Constitution](#) provides, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against [unreasonable searches and seizures](#), shall not be violated, and no [Warrants](#) shall issue, but upon [probable cause](#), supported by Oath or affirmation, and particularly describing the place to be [searched](#), and the persons or things to be [seized](#)."

Litigation

- [November 1, 1985 Part 219 to be in effect]
- October 31, 1985 RLEA files suit in CA based on 4th Amendment
Originally Dole v. RLEA, then Skinner v. RLEA
- October 31, 1985 CA Federal District Court issues TRO
- November 5, 1985 FRA suspends Final Rule (#1)
- November 26, 1985 District Court rules in FRA's favor

FRA sets new effective date of January 6, 1987

- December 16, 1985 RLEA appeals decision to 9th Circuit Court of Appeals
- January 3, 1986 9th Circuit grants injunction to Final Rule
- January 6, 1986 FRA suspends Final Rule again (#2)
- January 15, 1986 Govt appeals to Supreme Court (Judge Rehnquist)
- January 27, 1986 Supreme Court vacates 9th Circuit injunction

- February 10, 1986 Part 219 goes into effect
 - March 10, 1986 Subpart C goes into effect
 - March 21, 1986 Supreme Court rules in FRA's favor
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- Court holds that 4th amendment doesn't prohibit all search & seizures, just unreasonable ones
 - Circumstances decide
 - Balance intrusion on individual rights w/legitimate govt interest

- Probable cause not central, unreasonable is
- Deterrence, accident prevention, suitable employee protections

- RLEA later files a new lawsuit after random testing rule, but loses in the District Court (1989) and then at the 9th Circuit Court of Appeals (1991)

- November 21, 1988 FRA, along with other modes, issues a Final Rule on random, RTW, and FU testing. Federal RS, PE becomes mandatory. All FRA testing to be conducted under Part 40.
- December 21, 1988 DOT issues Final Part 40 Rule
- 1991 Congress passes Omnibus Transportation Employee Act of 1991
- February 15, 1989 DOT, FRA, and all other modes issue Final Rules on alcohol testing to comply
- December 19, 2000 DOT issues major rewrite of Part 40, to be effective August 1, 2001
- August 1, 2001 FRA issues conforming changes to sync with new Part 40

FRA Post-Accident Testing



The FRA Post-Accident Laboratories

- 1986-1987 **FAA's Civil Aerospace Medical Institute (CAMI)**
Oklahoma City OK (Dr. Delbert Lacefield)
- 1987-1989 **The Center for Human Toxicology**
University of Utah, Salt Lake City UT
(Dr. Rodger Foltz)
- 1989-1990 **ChemWest**
Sacramento CA
(Dr. Michael Peat)

- 1990-1995 **CompuChem**
Research Triangle Park NC
(Became Roche CompuChem, Roche, and
then LabCorp)
(Dr. Michael Peat)
- 1995-2006 **NorthWest Toxicology (NWT)**
Salt Lake City UT
(Dr. Rodger Foltz)
- 2006-Present **Quest Diagnostics Atlanta**
Atlanta GA now Tucker GA

Credibility of FRA's P-A Program (and Part 219)
Almost Destroyed Due to Problems With FRA's First
Contract Lab, FAA's CAMI

1987's Chase MD Conrail/Amtrak Accident

- January 4, 1987 1:30 pm
- Conrail Engineer Ricky Gates and Brakeman Edward "Butch" Cromwell
- 3 Conrail locomotives running light foul the main line after running through signals at Gunpow Interlocking

- Conrail foul overtaken by Amtrak #94 traveling Washington DC to Boston
- Amtrak engineer, lounge attendant, 14 passengers killed, 170 injured
- Conrail engineer Gates unhurt.
Brakeman Cromwell had broken leg



Chase MD Conrail/Amtrak Jan 4

1987



- Conrail signal alerter whistle disabled with duct tape
- Cab signal display bulb missing
- Gates and Cromwell later testified they smoked MJ just before accident
- Gates spent 4 years in prison for manslaughter; Cromwell given immunity

- At beginning of P-A program, FRA contracted with FAA's CAMI as the lab
- CAMI responsible for the toxicological analysis of all aircraft accidents investigated by the FAA
- Sister DOT agency

- Initial CAMI Report:
Gates positive in urine for MJ, negative in blood
Cromwell positive in urine for MJ and PCP,
negative in blood
- Didn't make sense to FRA based on reported
urine concentrations
- FRA investigates, discovers no documentation of
blood tests and some testing equipment still in
boxes

- CAMI couldn't do GC/MS blood analysis, reported all blood tests as negative
- Result: Govt closed CAMI

- FRA immediately moved testing to the Center for Human Toxicology (CHT) at the University of Utah
- CHT arguably the best forensic toxicology lab in the country at that time (1987)
- Every FRA P-A specimen to that date retested, including Chase MD blood samples
- All results (negative and positive) were re-reported with accurate urine and blood concentrations
- No false positives uncovered

- FRA brought in independent forensic toxicology experts as consultants to evaluate CHT and all FRA testing results that had already been reported
- Since 1989, FRA has had in place a formal technical oversight contract to ensure all P-A test results reported are scientifically sound and legally defensible
- Quarterly, now tri-annual, onsite inspections by forensic toxicologists who evaluate every aspect of the P-A lab's performance, and review every test (negative and positive)

- Each inspection includes:
 - lab personnel, training, and qualifications
 - analytical and laboratory protocols
 - specimen receiving, aliquoting, and sample preservation
 - sample screening, including equipment performance
 - sample confirmation, including extraction procedures and equipment performance
 - quality control and quality assurance
 - data and record review, including chain-of-custody
 - laboratory and sample security

The FRA P-A Testing Program – The Early Years

<u>Year</u>	<u>Events</u>	<u>Tested</u>	<u>Posi- tives</u>	<u>Drugs</u>	<u>Alc- cohol</u>	
• 1987	179	770	42	39	3	5.5%
• 1988	178	682	41	38	3	6.0%
• 1989	161	607	24	18	6	4.0%
• 1990	149	534	17	16	1	3.2%
• 1991	157	552	8	6	2	1.4%



FRA P-A Tox Box 1986



FRA P-A Kit Contents 1986

Current FRA Post-Accident Tox Boxes

