

*Section 214.503 Good-Faith Challenges; Procedures for Notification and Resolution*

This section outlines the circumstances under which employees operating on-track roadway maintenance machines and hi-rail vehicles are guaranteed the right and have the responsibility to make challenges relative to the operation or condition of on-track roadway maintenance machines and hi-rail vehicles. In the final rule, FRA has expressly added hi-rail vehicles as roadway maintenance machines covered by the requirements of this section. Hi-rail vehicles were not intended to be treated differently and excluded from this section's requirements. It is consistent with safety to afford the operators of hi-rail vehicles the same protections- and impose on them the same obligations-under this section as the operators of on-track roadway maintenance machines.

Paragraph (a) addresses the employee's responsibility to inform the employer whenever the employee makes a good-faith determination that the on-track roadway maintenance machine or hi-rail vehicle does not comply with FRA regulations or has a condition that inhibits its safe operation. The employee should consider not only the minimum safety requirements specified in this subpart, but also the general requirements specified in § 214.341 of subpart C, which also address the safety of roadway workers who operate or work near roadway maintenance machines.

A challenge must be made in good faith in order to fall within the purview of this section.

Paragraph (b) guarantees the employee's right of refusal to operate any on-track roadway maintenance machine or hi-rail vehicle once the employee has made a good-faith determination that the machine or vehicle does not meet all the requirements of this subpart, or has a condition that inhibits its safe operation. As specified in § 214.531, this rule generally allows the employer up to seven days to repair a roadway maintenance machine or hi-rail vehicle found to be noncompliant. However, the employer cannot require an employee, who in good faith challenges the fitness of a machine or vehicle, to operate the machine or vehicle until the challenge has been resolved.

Under paragraph (c), each employer must have in place, and must adhere to, written procedures for attaining a prompt and equitable resolution of challenges resulting from good-faith

determinations made in accordance with this section. The procedures shall outline the steps the employer will take to investigate each good-faith challenge. They shall also include steps to be taken when the employer's investigation shows that the challenged machine or vehicle should not be used as it is, to ensure that the challenged machine or vehicle is not used until repaired or removed from service to comply with this subpart. Further, the written procedures shall include the title and location of the employer's designated official(s) for the purpose of reporting conditions found to be in non-compliance with this subpart, to ensure that machine and vehicle operators are informed as to whom they should address any good-faith challenges. FRA's purpose in requiring these procedures is to make certain that a machine or vehicle operator who makes a good-faith challenge of a machine's or vehicle's fitness to operate receives an explanation of the employer's decision to either keep the machine or vehicle in service, repair it, or replace it. FRA will not consider an employer to be in compliance with this section if it responds to any good-faith challenge with a mere "yes" or "no" answer.

FRA envisions that operators will challenge the fitness of an assigned machine or vehicle only in good faith, and the employer likewise will respond in good faith as well. FRA realizes that an employer's fleet of roadway maintenance machines and hi-rail vehicles may be very large and that machines and vehicles may sometimes become unfit for safe use without the employer's immediate knowledge. This provision seeks to establish a system under which a machine or vehicle operator, who on any day may be in the best position to assess the safety fitness of a particular machine or vehicle, can bring to the employer's attention safety deficiencies and other defects that should be immediately addressed.

However, FRA does realize that sometimes defects can appear to be more serious than they actually are. What may appear to be a defect jeopardizing operational safety may in reality be a minor flaw that can be addressed at a later, more convenient time or location. This section allows an employer to investigate a good-faith challenge to a roadway maintenance machine's and hi-rail vehicle's safety fitness and make its own good-faith determination that the machine or vehicle may be used without immediate repairs. However, this section requires good faith on the part of all parties involved. If FRA determines that an employer has not exercised good faith in

determining that a machine or vehicle need not be immediately repaired or replaced, FRA may seek enforcement action against the employer for being in violation of this section. On the other hand, FRA will not consider an employer's response to a challenge to be a violation of this section if FRA determines that the challenge was made for purposes of disrupting or delaying work or in a manner demonstrating motivations other than good faith and concern for safety.

In the final rule, FRA has modified paragraph (a) to make it more consistent with paragraphs (b) and (c) by expressly focusing the employee's good-faith challenge on the condition of the machine or vehicle, instead of on the employer's rules governing the machine or vehicle. As paragraph (a) read in the NPRM, the employee would have been required to inform the employer whenever the employer's rules governing the machine did not comply with FRA regulations. However, paragraphs (b) and (c) in the NPRM expressly focused on the safety of the machine itself. For example, paragraph (c) referred to the employer's "challenged machine"—not to the employer's "challenged rule." FRA's modification of paragraph (a) eliminates this inconsistency.

One of the commenters to the proposed rule, Loram, objected to the rule's guarantee of an employee's right to refuse to operate a roadway maintenance machine which the employee has determined in good faith to be non-compliant with the regulation. The commenter suggested that one employee could, in effect, shut down a rail operation if a single machine does not meet all of the many requirements of the rule. Loram stated that mechanisms are already in place on railroads for such disputes to be resolved. Furthermore, Loram added that the provision itself suggests that there is necessarily an adversarial relationship between employers and employees in the railroad industry. According to Loram, this regulation would add to the burden of regulations already imposed on the industry.

In considering this comment, it was noted that the language of the regulation is modeled after the good-faith challenge that is permitted of employees who are working under the roadway worker safety regulations in subpart C to this part. Since the early months of 1997 when the roadway worker safety regulations became effective, few roadway workers have exercised the good-faith challenge provision. As far as FRA is aware, in each case where the challenge has been exercised, the