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(ii) Mailing it by registered or certified mail to any representative listed in paragraph (d)(2)(i) of this section at his or her last known address; or

(iii) Any method whereby actual notice is given to such representative (and the fees are made available) prior to the return date.

(e) The original subpoena bearing a certificate of service shall be filed in accordance with § 209.9.

(f) A witness subpoenaed by the FRA shall be entitled to the same fees and mileage as would be paid to a witness in a proceeding in the district courts of the United States. See 28 U.S.C. 1821. The witness fees and mileage shall be paid by the person requesting that the subpoena be issued. In an appropriate case, the Chief Counsel or the hearing officer may direct the person requesting issuance of a subpoena for the production of documentary or other tangible evidence to reimburse the responding person for actual costs of producing and/or transporting such evidence.

(g) Notwithstanding the provisions of paragraph (f) of this section, and upon request, witness fees and mileage or the costs of producing other evidence may be paid by the FRA if the official who issued the subpoena determines on the basis of good cause shown that:

(1) The presence of the subpoenaed witness or evidence will materially advance the proceedings; and

(2) The party at whose instance the subpoena was issued would suffer a serious financial hardship if required to pay the witness fees and mileage.

(h) Any person to whom a subpoena is directed may, prior to the time specified therein for compliance, but in no event more than ten (10) days after the date of service of such subpoena, apply in writing to the official who issued the subpoena, or if that person is unavailable, to the Chief Counsel, to quash or modify the subpoena. The application shall contain a brief statement of the reasons relied upon in support of the action sought therein. The issuing official or the Chief Counsel, as the case may be, may:

(1) Deny the application;

(2) Quash or modify the subpoena; or

(3) In the case of subpoena to produce documentary or other tangible evi-

dence, condition denial of the application upon the advancement by the party in whose behalf the subpoena is issued of the reasonable cost of producing the evidence.

(i) If there is a refusal to obey a subpoena served upon any person under the provisions of this section, the FRA may request the Attorney General to seek the aid of the United States District Court for any district in which the person is found to compel that person, after notice, to appear and give testimony, or to appear and produce the subpoenaed documents before the FRA, or both.

(j) Attendance of any FRA employee engaged in an investigation which gave rise to a proceeding under subpart B or C of this part for the purpose of eliciting factual testimony may be assured by filing a request with the Chief Counsel at least fifteen (15) days before the date of the hearing. The request must indicate the present intent of the requesting person to call the employee as a witness and state generally why the witness will be required.

[42 FR 56742, Oct. 28, 1977, as amended at 54 FR 42906, Oct. 18, 1989]

§ 209.8 Depositions in formal proceedings.

(a) Any party to a proceeding under subpart B, C, or D of this part may take the testimony of any person, including a party, by deposition upon oral examination on order of the presiding officer following the granting of a motion under paragraph (b) of this section. Depositions may be taken before any disinterested person who is authorized by law to administer oaths. The attendance of witnesses may be compelled by subpoena as provided in § 209.7 and, for proceedings under subpart D of this part, § 209.315.

(b) Any party desiring to take the deposition of a witness shall file and serve a written motion setting forth the name of the witness; the date, time, and place of the deposition; the subject matter of the witness' expected testimony; whether any party objects to the taking of the deposition; and the reasons for taking such deposition. Such motion shall be granted only upon a showing of good cause. Good

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cause exists to take a person's deposition when the information sought is relevant to the subject matter involved in the proceeding and:

(1) The information is not obtainable from some other source that is more convenient, less burdensome, and less expensive; or

(2) The request is not unreasonably cumulative, unduly burdensome, or unduly expensive, taking into account the needs of the case, limitations on the parties' resources, and the importance of the issues in the case.

(c) Such notice as the presiding officer shall order will be given for the taking of a deposition, but this shall not be less than 10 days' written notice unless the parties agree to a shorter period.

(d) Each witness testifying upon deposition shall be sworn and the adverse party shall have the right to cross-examine. The questions propounded and the answers thereto, together with all objections made, shall be reduced to writing, subscribed by the witness, and certified by the reporter.

(e) Depositions taken under this section may be used for discovery, to contradict or impeach the testimony of the deponent as a witness, or as evidence in the proceeding as permitted by paragraph (f) of this section and in accordance with the limitations of Fed. R. Civ. Pro. 32 as though it were applicable to these proceedings.

(f) Subject to such objections to the questions and answers as were noted at the time of taking the deposition and as would be valid were the witness personally present and testifying, such deposition may be offered in evidence by any party to the proceeding.

[54 FR 42906, Oct. 18, 1989]

§ 209.9 Filing.

All materials filed with FRA or any FRA officer in connection with a proceeding under subpart B, C, or D of this part shall be submitted in duplicate to the Assistant Chief Counsel for Safety, (RCC-30), Office of Chief Counsel, Federal Railroad Administration, 400 Seventh Street, SW., Washington, DC 20590, except that documents produced in accordance with a subpoena shall be

presented at the place and time specified by the subpoena.

[54 FR 42906, Oct. 18, 1989]

§ 209.11 Request for confidential treatment.

(a) This section governs the procedures for requesting confidential treatment of any document filed with or otherwise provided to FRA in connection with its enforcement of statutes related to railroad safety. For purposes of this section, "enforcement" shall include all investigative and compliance activities, in addition to the development of violation reports and recommendations for prosecution.

(b) A request for confidential treatment with respect to a document or portion thereof may be made on the basis that the information is—

(1) Exempt from the mandatory disclosure requirements of the Freedom of Information Act (5 U.S.C. 552);

(2) Required to be held in confidence by 18 U.S.C. 1905; or

(3) Otherwise exempt by law from public disclosure.

(c) Any document containing information for which confidential treatment is requested shall be accompanied at the time of filing by a statement justifying nondisclosure and referring to the specific legal authority claimed.

(d) Any document containing any information for which confidential treatment is requested shall be marked "CONFIDENTIAL" or "CONTAINS CONFIDENTIAL INFORMATION" in bold letters. If confidentiality is requested as to the entire document, or if it is claimed that nonconfidential information in the document is not reasonably segregable from confidential information, the accompanying statement of justification shall so indicate. If confidentiality is requested as to a portion of the document, then the person filing the document shall file together with the document a second copy of the document from which the information for which confidential treatment is requested has been deleted. If the person filing a document of which only a portion is requested to be held in confidence does not submit a second copy of the document with the confidential information deleted, FRA may assume that there is no objection