**DEPARTMENT OF TRANSPORTATION**

**Federal Railroad Administration**

**49 CFR Part 240**

**[FRA Docket No. RSOR–9, Notice 12]**

**RIN 2130–AA74**

## Qualification and Certification of Locomotive Engineers

**AGENCY:** Federal Railroad Administration (FRA), DOT.

**ACTION:** Final rule.

**SUMMARY:** FRA is making miscellaneous amendments to its requirements for the qualification and certification of locomotive engineers. These amendments are largely based on recommendations made by an advisory committee comprising rail industry and labor representatives; in reaching these consensus recommendations, the advisory committee examined data, discussed the successes and failures of the rule since its inception, and debated how to improve the regulations. In particular, this final rule will: Clarify the decertification process; clarify when certified locomotive engineers are required to operate service vehicles; and address the concern that some designated supervisors of locomotive engineers are insufficiently qualified to properly supervise, train, or test locomotive engineers.

**DATES:** (1) *Effective Date:* This regulation is effective January 7, 2000.

(2) Any petition for reconsideration of any portion of the rule must be submitted no later than 60 days after publication in the **Federal Register**.

**ADDRESSES:** Petitions for reconsideration of this rule should be submitted to Ms. Renee Bridgers, Docket Clerk, Office of Chief Counsel, FRA, 400 Seventh Street SW, Mail Stop 10, Washington, DC 20590.

**FOR FURTHER INFORMATION CONTACT:** John Conklin, Operating Practices Specialist, Office of Safety Assurance and Compliance, FRA, 400 Seventh Street SW, Mail Stop 25, Washington, DC 20590 (telephone: 202–493–6318); Alan H. Nagler, Trial Attorney, Office of Chief Counsel, FRA, 400 Seventh Street, SW, RCC–11, Mail Stop 10, Washington, DC 20590 (telephone: 202–493–6049); or Mark H. McKeon, Regional Administrator, 55 Broadway, Cambridge, MA 02142 (telephone: 617–494–2243).

**SUPPLEMENTARY INFORMATION:**

### I. Statutory Background

Section 4 of the Rail Safety Improvement Act of 1988 (''RSIA''), Pub. L. 100–342, 102 Stat. 624 (June 22, 1988), later amended and recodified by Pub. L. 103–272, 108 Stat. 874 (July 5, 1994), requires that FRA issue regulations to establish a program for certifying or licensing locomotive operators. This statutory requirement was adopted in the wake of an Amtrak/Conrail accident at Chase, Maryland that resulted in 16 deaths and was caused by errors made by the Conrail locomotive engineer. Congress thus determined the existence of a safety need for regulations concerning the qualifications of engineers. In addition to the general need for regulations, Congress required that certain subject areas be addressed within those regulations. Now codified at 49 U.S.C. § 20135, the amended statute was reprinted in the preamble to the NPRM.

### II. Regulatory Background

One year and a half after the passage of the RSIA, FRA published an NPRM which proposed a certification program for locomotive operators. 54 FR 50890 (Dec. 11, 1989). FRA noted in the preamble to the final rule that some of the comments received in response to this NPRM suggested ''significant misunderstanding of the proposal.'' 56 FR 28228, 28229 (June 19, 1991). These misunderstandings and the appropriateness of the approach were addressed thoroughly in the final rule's preamble. 56 FR 28228, 28229–30 (June 19, 1991).

The final rule establishing minimum qualification standards for locomotive engineers is a certification program, not a licensing program. In summary, the rule requires railroads to have a formal process for evaluating prospective operators of locomotives and determining that they are competent before permitting them to operate a locomotive or train. The rule requires that railroads: (1) Make a series of four determinations about a person's competency; (2) devise and adhere to an FRA-approved training program for locomotive engineers; and (3) employ standard methods for identifying qualified locomotive engineers and monitoring their performance. At the time of publication, FRA noted that the agency ''is adopting this regulation to minimize the potentially grave risks posed when unqualified people operate trains.'' 56 FR 28228 (June 19, 1991).

In 1993, less than two years after the publication of the final rule, an interim final rule was promulgated ''in response to petitions for reconsideration and requests for clarification.'' 58 FR 18982 (Apr. 9, 1993). Some of the issues addressed in this rule included: (1) The application of the rule to service vehicles which could potentially function as a locomotive or train; (2) the application of the rule to certain minimal, incidental and joint operations; (3) the application of the rule to events involving operational misconduct by a locomotive engineer; (4) the application of the rule to current railroad practices for storing data electronically; (5) the application of the rule to events involving testing and evaluation of a locomotive engineer's knowledge or skills; (6) the application of the procedural provisions of the rule to events involving denial, suspension and revocation of certification; and (7) technical changes to correct minor errors in the rule text. FRA did not provide additional notice and request for public comment prior to making the amendments contained in this interim final rule. ''FRA concluded that such notice and comment were impractical, unnecessary and contrary to the public interest since FRA is, for the most part, only making minor technical changes in response to requests for reconsideration of issues that were previously the subject of detailed notice and extensive comment in the development of the initial final rule in this proceeding.'' 58 FR 18982, 19002 (Apr. 9, 1993). In addition, FRA stated that delay in the effective implementation of this interim rule could result in the diversion of significant resources by all persons and entities affected by this rule. Meanwhile, this interim final rule guaranteed a full opportunity to comment on the amendments.

In 1995, after approximately four years and four months had passed since the initial final rule, FRA issued a second interim final rule. This second interim final rule contained minor modifications that clarified existing procedural rules applicable to the administrative hearing process; a series of changes made to provide for omitted procedures; and changes to correct typographical errors and minor ambiguities that had been detected since the rule's issuance. 60 FR 53133 (Oct. 12, 1995). Since the Administrative Procedure Act, specifically 5 U.S.C. 553(b)(3), provides that no notice and comment period is required when an agency modifies rules of procedure and practice, FRA issued this regulation without provision of such a period of comment prior to its adoption. 60 FR 53133, 53135 (Oct. 12, 1995). However, FRA did provide for a 30 day comment period subsequent to the publication of this interim final rule and stated that any comments received would be considered to the extent practicable.

## III. The Railroad Safety Advisory Committee

In 1994, FRA established its first formal regulatory negotiation committee to address roadway worker safety. This committee successfully reached consensus conclusions and recommended an NPRM to the Administrator, persuading FRA that a more consensual approach to rulemaking would likely yield more effective, and more widely accepted, rules. Additionally, President Clinton's March 1995 Presidential Memorandum titled ''Regulatory Reinvention Initiative'' directed agencies to expand their efforts to promote consensual rulemaking. In 1996, therefore, FRA decided to move to a collaborative process by creating a Railroad Safety Advisory Committee (RSAC, or the Committee) pursuant to the Federal Advisory Committee Act (Public Law 92–463).

RSAC was established to provide recommendations and advice to the Administrator on development of FRA's railroad safety regulatory program, including issuance of new regulations, review and revision of existing regulations, and identification of non-regulatory alternatives for improvement of railroad safety. RSAC is comprised of 48 representatives from 27 member organizations, including railroads, labor groups, equipment manufacturers, state government groups, public associations, and two associate non-voting representatives from Canada and Mexico. The Administrator's representative (the Associate Administrator for Safety or that person's delegate) is the Chairperson of the Committee.

## IV. The Qualification and Certification of Locomotive Engineers Working Group

At a two day RSAC meeting that began on October 31, 1996, the Committee agreed to take on the task of proposing miscellaneous revisions to the regulations addressing Locomotive Engineer Certification (49 CFR Part 240). *See* 61 FR 54698 (Oct. 21, 1996). The Committee members delegated responsibility for creating a proposal to a working group consisting of the members' representatives. The Qualification and Certification of Locomotive Engineers Working Group (Working Group or Group) met for seven week-long meetings prior to submitting the Working Group's proposal to the Committee.

On May 14, 1998, the Committee recommended that the FRA Administrator publish the Working Group's consensually reached effort as a proposed rule. During RSAC's meeting, the Committee suggested that the proposal contained some suggested amendments that may be further improved by being subject to more debate. In order to permit an informed debate, FRA committed itself to providing RSAC with an opportunity to assist FRA in considering comments received in response to the NPRM which all parties anticipated that FRA would issue. Relying heavily on RSAC's recommendations for change, on September 22, 1998, FRA published the NPRM which forms the basis for this final rule. 63 FR 50626 (Sept. 22, 1998). As promised, FRA provided RSAC with an opportunity to assist FRA in examining the comments and convened a meeting of the existing Working Group for that purpose. During a meeting of the Working Group held on December 8–9, 1998, information and views were received on every issue raised in the comments. Detailed minutes for that meeting are contained in the docket. The Working Group provided consensus recommendations for agency response on some issues raised by the comments and those recommendations were sent to RSAC for further review. On January 28, 1999, RSAC adopted the Working Group's recommendations and requested that FRA adopt them.

The recommendations provided by RSAC and a summary of the Working Group discussions are provided below in conjunction with the discussion of the individual issues presented by this rulemaking. Virtually all of the changes proposed by FRA are being adopted in this final rule; thus, the preamble and section-by-section analysis for the 1998 NPRM contain useful background information concerning the changes being made which is not being repeated here. FRA's analysis in this final rule focuses on the comments received in response to the 1998 NPRM and explains why FRA made certain changes to the rule.

Considering the temporary nature of the two interim final rules and the thorough review of the regulation provided for in this rulemaking process, FRA readopts the two previously issued interim final rules, suitably modified, as this final rule. Thus, the amendments promulgated here would govern any conflicts with the previously published interim final rules upon the effective date of this final rule. FRA is grateful to the members of RSAC and the Working Group for their efforts, information and recommendations. The detailed information and recommendations made have proved useful in FRA's deliberations on the best ways to improve the rule and FRA has given great weight to RSAC's recommendations for this final rule.

The section-by-section analysis discusses all of the amendments to this part.

## V. Major Issues

*Background*

FRA received eight written comments in response to the NPRM. Although an opportunity to present oral comments was offered, the request that was made for a public hearing was subsequently withdrawn. Thus, FRA is only responding to written comments. Some comments requested clarification, some suggested alternative language to improve upon a concept raised by the proposal, and others requested reconsideration of previously suggested proposals. Of these issues, FRA considers eight to be major topics and a discussion of each of these major topics follows.

*A. Application of the Rule to Certain Service Vehicles*

One commenter (the United Transportation Union, or ''UTU'') maintains that the 1988 statute that required FRA to issue the engineer certification rule did not authorize FRA to permit operation of certain roadway maintenance vehicles by persons other than certified locomotive engineers. UTU's November 18, 1998 comments state: ''In short, certified engineers must be at the controls of any motorized equipment that operates as a locomotive.'' UTU concludes that ''the language relating to dual purpose vehicles must be removed.'' UTU notes that, although it was part of the working group that reached consensus on the proposed rule, the relevant statutory language ''was not reviewed in detail by the group.'' UTU goes on to say that all language in the proposed section 240.104 that allows exceptions to certification should be removed.

The statutory provision that required FRA to issue its engineer certification rule was section 4 of the Rail Safety Improvement Act of 1988 (''RSIA''), Pub. L. No. 100–342. As currently codified at 49 U.S.C. 20135(a), that provision states, in relevant part: ''The Secretary of Transportation shall prescribe regulations and issue orders to establish a program requiring the licensing or certification, after one year after the program is established, of any operator of a locomotive.'' FRA believes that Congress intended the agency to have some discretion in determining which employees are operators of locomotives as well as which vehicles

are being used as locomotives under which circumstances.

Since the rule's issuance in 1991, there has been extensive debate over whether certain service vehicles should be considered locomotives for the purposes of this rule, and in 1993 FRA promised to provide an opportunity to fully examine this issue in a future proceeding. 58 FR 18982, 18983 (Apr. 9, 1993). The nature of railroading requires that equipment used to construct, maintain, and repair track, signals, and roadway structures be able to move on rails, as there are many locations on railroads that are accessible only by rail. Moreover, the nature of the construction, maintenance, and repair work requires that this equipment be able to be moved independently from normal train movements, both to and from work sites and within extensive work sites. To serve this purpose, some of the maintenance equipment is capable of moving other maintenance equipment without the need for a traditional locomotive. FRA does not believe that Congress intended to require that operators of this maintenance equipment be certified as locomotive engineers, as this equipment is not generally considered to be a locomotive, and movement of this equipment was not in any way within the range of concerns that prompted the 1988 legislation on locomotive engineer certification.

However, some of the vehicles used in maintenance service have sufficient power and appropriate coupling mechanisms to enable them to move railroad rolling stock. Manufacturers of service vehicles indicate that the industry is requesting equipment that can perform a specific maintenance task and haul an increasing number of cars. As these vehicles improve, some railroads may decide to take advantage of the vehicles' ability to haul cars—even to the exclusion of their maintenance function. Without a regulatory mechanism to address these dual purpose vehicles, FRA is concerned that some railroads might seek to use the dual purpose vehicle as a functioning locomotive to avoid the expense of having a certified locomotive engineer at the controls, which would pose an unacceptable safety risk.

The amendments being adopted in this final rule will resolve the issue of when certain types of on-track equipment, which are not traditional locomotives but share some common characteristics with a traditional locomotive, are required to be operated by certified locomotive engineers. The final rule uses the term ''roadway maintenance equipment'' to refer generally to equipment used in maintenance of track, signals, and structures. The rule provides that one type of maintenance equipment (''specialized roadway maintenance equipment'') need not be operated by a certified locomotive engineer. The reason for excluding such vehicles is that they do not have the capability to move railroad rolling stock and thus cannot be used as a substitute for a traditional locomotive. Dual purpose vehicles describes service vehicles that may, at times, function as roadway maintenance vehicles and can be used as a substitute for a traditional locomotive as a result of their capability to move railroad rolling stock. The rule will require a certified locomotive engineer at the controls of a dual purpose vehicle unless certain specified criteria are met. See § 240.104(b). In essence, those criteria mean that a certified engineer must operate the equipment when it is being used as a locomotive in service unrelated to roadway maintenance work and also when, even in the context of maintenance work, there is no employee available who is trained to operate the vehicle. In general, railroads will be able to allow the operation of dual purpose vehicles by people who are not certified locomotive engineers when the vehicle is being used in roadway maintenance service, including traveling to and from the work site; the operator has been trained on how to operate the equipment safely in accordance with FRA's rules on the protection of roadway workers (49 CFR part 214); and the equipment is moved under railroad operating rules designed for the protection of such equipment from train movements. Given the definitions in the rule, if specialized roadway maintenance equipment is somehow used for moving railroad rolling stock, it will be treated as a dual purpose vehicle for purposes of determining whether a certified locomotive engineer is necessary for its operation.

When roadway maintenance equipment is used at a work site where roadway workers are present, FRA's rules on Roadway Worker Protection provide standards for protecting the workers from such equipment and trains and for protecting the equipment from train movements. *See , e.g.,* 49 CFR § 214.319 (explaining the requirements of working limits, generally). A review of relevant accident and injury history indicates that the greatest danger inherent in the movement of this equipment is that it may strike a roadway worker, and FRA's roadway worker protection rule is specifically designed to substantially reduce that risk. In RSAC's fact finding efforts, none of the RSAC's members or commenters provided information, nor did FRA have any information, showing that when dual purpose vehicles are being used for maintenance purposes they are involved in accidents or incidents that could be prevented by requiring that such vehicles be operated by certified locomotive engineers. Although operators of roadway maintenance equipment will generally not be required to be certified locomotive engineers, these operators must be trained and qualified on how to safely operate that equipment. *See* 49 CFR § 214.355. Moreover, when roadway maintenance equipment travels to and from a work site, there are existing operating rules that protect such movements from train movements. *See, e.g.,* Northeast Operating Rules Advisory Committee (NORAC) 800 series rules; General Code of Operating Rules (GCOR)—Maintenance of Way Operating Rules section, 6.0 series rules; CSX's On Track Worker Manual, Rule 704 (effective Jan. 1, 1999); Illinois Central Railroad System's On Track Safety Rules, 500 series rules (effective Mar. 10, 1998); and Norfolk Southern Corporation's Operations Division, Bulletin No. 8 regarding Rule 808 (July 22, 1996). Thus, in addition to the fact that this equipment is not traditionally considered to be a locomotive of the type that Congress had in mind when requiring FRA to issue its certification rule, there are existing FRA and railroad rules that ensure that those who operate such equipment in maintenance service will operate these machines safely.

One area of concern identified by the RSAC working group was the use and maintenance of air brakes on roadway maintenance equipment. Much of the concern arose from a fatal accident involving a burro crane hauling cars from a work site on November 5, 1996, which did not have brake pipe hoses connected between the locomotive crane and the three freight cars being hauled. The group drafted a recommendation intended to resolve that concern. Based on that recommendation, FRA proposed that one of the conditions for a non-certified locomotive engineer to operate a dual purpose vehicle that will be hauling cars would be that ''not less than 85% of the total cars designed for air brakes shall have operative air brakes.'' RSAC's purpose and FRA's intent was to make sure that when a dual purpose vehicle is hauling cars to or from a work site the air brakes on the consist can stop the

movement within the normal stopping distance for that equipment.

FRA specifically solicited comments to learn how others perceived the ''85% rule'' found in proposed § 240.104(b)(4). The comments indicated that this proposed provision was generating some confusion. One commenter wanted to know whether this paragraph excused the railroad from compliance with the power brake requirements of 49 CFR part 232, despite FRA's statement in the NPRM that it did not. The same commenter requested an explanation of the necessary inspection and testing of the consist's braking system to determine compliance with the 85% operable brake requirement; this question was echoed by other Working Group members who believed computing 85% or greater operative air brakes would likely cause some confusion for those trying to comply.

Upon further reflection, FRA is deleting this proposed brake requirement from the rule. The issue of whether the railroad must use, maintain, and inspect power brakes on dual purpose vehicles is not related to the qualifications of the vehicle's operator and should be resolved in the same way whether or not the operator is a certified locomotive engineer. The proposed provision implied that, if the railroad used a locomotive engineer to operate dual purpose equipment, the brake rules would not apply to the movement. FRA's position is that the movement of railroad equipment to and from a work site is governed by the power brake rules of 49 CFR part 232. Even though the dual purpose vehicle hauling the equipment may not be a traditional locomotive, to the extent the vehicle and the equipment it is hauling are equipped with power brakes, they must comply with the relevant standards. It would not be appropriate to include this policy on the applicability of an equipment rule in the text of a rule on locomotive operator qualifications. However, railroads should understand that FRA will enforce the power brake rules in accordance with the policy stated in this preamble.

One commenter also asked several interpretative questions. For instance, FRA was asked whether proposed § 240.104 allows MOW equipment to be used to move loads of slag, for the purpose of dragging slag, or to move empty hoppers, for the purpose of cleaning up debris with a track cleaner, from the yard to the work site without the use of a certified locomotive engineer. FRA notes that ''slag'' is a term interchangeably used for ballast, and that spreading ballast and picking up debris along the track are both MOW duties. FRA would categorize a vehicle performing such duties as a dual purpose vehicle because it is being used to move railroad rolling stock. It is possible that a certified locomotive engineer will not be required if all of the conditions in paragraph (a)(2) have been satisfied.

In conjunction with the last question discussed, the commenter also asks whether the rule lends itself to an inherent limit on the distance traveled, or the type of track traversed, before a railroad is required to utilize a certified engineer for this type of movement. FRA's answer to this question is that § 240.104 does not place any such limits with regard to the distance or type of track over which a person who is not a certified engineer may operate dual purpose equipment. The limitations in that section are based on the type of service being performed (maintenance of way, or something else), the person's qualifications to operate the equipment in that service, and application of the railroad's rules for protection of such equipment in such service.

One commenter recommended that Class III Switching and Terminal Carriers be excluded from the requirement that ''dual purpose vehicles'' must be operated by a certified locomotive engineer in those situations where the ''vehicle'' is being used to move disabled equipment for clearing and repair of track. FRA does not agree with the commenter that this exclusion is necessary or would promote safety. Wrecking operations to move damaged equipment are not maintenance movements, which are the only movements of dual purpose vehicles FRA intended to permit without the use of a certified engineer. Since the safety risks associated with these operations do not diminish with railroad size, it would not promote safety to exclude certification requirements on small railroads and yet require it on the bigger roads.

Finally, FRA notes that one commenter may have been confused as to the proposed application of the rule due to some confusing language in the section-by-section analysis to describe the new definitions ''dual purpose vehicle'' and ''specialized roadway maintenance equipment,'' and the previous definition of ''locomotive.'' Thanks to the Working Group, the confusing language was brought to FRA's attention and alternative proposals were discussed. Although not an RSAC recommendation, a new proposed definition of ''locomotive'' has been provided to make clear that specialized maintenance equipment and dual purpose vehicles operating in accordance with § 240.104(a)(2) are not locomotives. FRA has also added definitions of ''roadway maintenance equipment'' and ''railroad rolling stock'' in order to further clarify the revisions. Also, the section-by-section analysis of § 240.7, below, provides improved analysis of the terms ''dual purpose vehicle'' and ''specialized roadway maintenance'' equipment. FRA expects that these modifications will lead to a better understanding of the rule for all those persons who need to comply with it.

*B. Qualifications for Designated Supervisors of Locomotive Engineers*

The role of the Designated Supervisor of Locomotive Engineers (DSLE) is critical to the safety success of this rule and was discussed as a major issue in the NPRM. This role is twofold. One, the DSLE makes the final determination that a locomotive engineer is qualified to safely operate a train. Two, after a person is certified, a DSLE is responsible for qualifying engineers on the physical characteristics of any additional territories over which the engineer will need to operate. Both of these issues were addressed in the public comments received and RSAC has made some additional recommendations for modifying the rule based on the comments FRA received.

FRA noted in the NPRM its concern over whether a specified amount of operational experience should be a prerequisite for qualifying DSLEs. The cause of this concern has been the finding that some railroads have been seeking to establish systems in their certification programs that do not assure that supervisors will be experienced individuals. Moreover, since implementation of the original rule, FRA has investigated several instances in which there is some evidence that railroads designated persons to be supervisors who have had only the most minimal amount of operational experience.

The proposed modifications to § 240.105(b)(4) reflect RSAC's recommendation and FRA's concern that not all supervisors have been found to be familiar with the physical characteristics of the territories in which they work. Given this universal concern, this final rule will require those persons who are DSLEs to be qualified on the physical characteristics of the portion of the railroad over which they are supervising. As specifically addressed in § 240.105(a), railroads will be required to address how they intend to implement the qualification of their DSLEs on physical characteristics and

include those procedures in their certification programs. Thus, a railroad will not be in compliance with the requirements of § 240.105 if it were to merely state in its program that it intends to comply with this section or restates the requirements of this section in its program. Instead, a railroad will be required to detail specific training requirements for DSLEs on physical characteristics.

A benefit of this rule will be that a DSLE who changes territories, including a situation where the new territory presents more demanding train handling challenges than the previous assignment, will receive training on the physical characteristics of the new territory. This new requirement goes further than the current requirement in § 240.127(b) that requires certified locomotive engineers to have ''the skills to safely operate locomotives and/or trains, including the proper application of the railroad's rules and practices for the safe operation of locomotives or trains, in the most demanding class or type of service that the person will be permitted to perform;'' presumably, it will occasionally be necessary for DSLEs to require additional training in train handling skills to satisfy the § 240.127(b) requirement. Since it is presumed that a DSLE in a territory would be permitted to perform train handling service in that territory, as well as be prepared to offer remedial advice for noted deficiencies in the skill level of other locomotive engineers, a DSLE must receive skills training that is commensurate with performing such duties in equally or more difficult terrain. As a result of the new requirement, DSLEs will now be required to have knowledge of the physical characteristics of the territory in which they supervise in addition to the continuing requirement of having the requisite skills commensurate with the difficulty of the terrain.

In the preamble and section-by-section analysis of the NPRM for this final rule, FRA noted that RSAC recommended a modification to § 240.127(c)(2) in order to permit a DSLE, whose skill level is commensurate with the difficulty of a territory, to be able to assess a person's performance skills over that territory even if the DSLE is not qualified on the physical characteristics of that territory. One RSAC member commented that FRA should revisit this issue, especially in the context of whether the proposed exception in § 240.127(c)(2) promotes safety. In reviewing the comments and upon further consideration, RSAC recommended the exception be retained and also recommended extending the exception to a related section of the rule.

The Working Group's discussion of their previously recommended exception for § 240.127(c)(2) reinforced RSAC's consensus that the exception would be a safe practice that is cost effective and practical; FRA agrees with this assessment. Consequently, some of the Working Group's members promoted the practicality of the concept for this exception of the triennial performance monitoring pursuant to § 240.127 and suggested transferring this benefit to the annual monitoring pursuant to § 240.129. FRA had been working under the mistaken impression that the Working Group's members had purposely recommended that FRA treat these two monitoring examinations differently. FRA had believed that the level of sophistication was different for the two tests and so proposed changing only one of the testing provisions. In response to RSAC's new understanding, they recommended adding the exemption to § 240.129 for the same reasons the exemption was created for § 240.127; likewise, FRA has agreed to promulgate this recommendation based on the agency's assessment that this is a safe practice that is cost effective.

FRA concurs with certain additional recommendations from RSAC that propose to clarify that the amendment to § 240.105(b)(4), requiring DSLEs to be qualified on the physical characteristics of the portion of the railroad on which they are performing their DSLE duties, will not be made in vain. One of these recommendations is that a DSLE should not be allowed to make the determination of whether a person is qualified to be a locomotive engineer, at the completion of a training program pursuant to § 240.213, unless that DSLE is qualified on the physical characteristics of the railroad or its pertinent segments over which the person will be permitted to perform; accordingly, FRA amended § 240.213(b)(3). In addition, RSAC recommended that a qualified DSLE should be required whenever a locomotive engineer is to be qualified on a new territory. Although RSAC's recommendation to address this concern was to add a paragraph (c) to § 240.213, FRA amended a different section which it believes will have the same effect. That is, an amendment to § 240.123(b) is being made to explicitly require that when a railroad provides for the continuing education of a certified locomotive engineer, that railroad must ensure that each engineer maintains the necessary knowledge, skill and ability concerning familiarity with physical characteristics ''as determined by a qualified designated supervisor of locomotive engineers.'' Thus, this modification is not that engineers must be qualified on physical characteristics (since that is already a requirement) but that the person making this determination for the railroad must be a qualified DSLE.

*C. Improving the Dispute Resolution Procedures*

As FRA stated in the NPRM, many procedural issues concerning the initial regulation were addressed by issuing a second Interim Final Rule. 60 FR 53133 (Oct. 12, 1995). FRA brought the procedural issues to RSAC's attention in order to determine whether additional procedures could be clarified or changed that would improve the dispute resolution process located in Subpart E of this part. In addressing this issue prior to the publication of the NPRM, the Working Group formed a Task Force consisting of some interested Group members who were asked to explore different options. After exploring the alternatives, the Working Group accepted the Task Force recommendations that the current system is the best choice, assuming that the petitions to the LERB and the requests for administrative proceedings are handled promptly.

One commenter expressed opinions regarding four issues that would amount to substantial modifications to the certificate revocation procedures if accepted. During the Working Group meeting to review the comments, it was noted that the opinions raised by this commenter relate to matters that were previously discussed by the Working Group and that no recommendations for changes responsive to these suggestions emerged after these previous lengthy discussions. These previous discussions were based on (1) an FRA issues paper that outlined the pros and cons of alternative procedures, (2) two comments received in response to the 1995 Interim Final Rule, and (3) proposals made by Working Group members. A summary of the previous RSAC deliberations is located in the NPRM. After further consideration, RSAC recommended that the final rule retain the same language with respect to the issues raised by this commenter. These issues were identified as I. B. through E. in FRA's outline of the comments.

This commenter contends that, if the standard of review for issues of fact at the FRA administrative hearing is preponderance of the evidence (§ 240.409(q)), then the railroad hearing (proposed § 240.307(i)) and the Locomotive Engineer Review Board

(LERB) review should also use this standard instead of the substantial evidence standard of review. FRA disagrees with this suggestion for several legal reasons. One, the commenter is mistaken that the railroad hearing must employ the substantial evidence standard of review. The current rule does not contain a standard of proof for the railroad hearing, the proposed rule did not contain such a standard, and FRA has not added such a standard to the new rule. Although silent on the standard of proof, FRA specifically requires that the railroad determine, on the record of the hearing, whether the person no longer meets the qualification requirements of this part and state explicitly the basis for the conclusion reached. § 240.307(b)(4). FRA wants to ensure that the railroad hearings are fair, and allow for consolidation with applicable collective bargaining agreements, without the rigidity of instituting a standard of proof. Two, it is necessary for the LERB to apply the substantial evidence standard of review because it is not a fact finding body that hears new evidence, but is instead relying on an existing record. Three, as the process moves along to the FRA Hearing Officer stage, the procedures are designed to permit a full evidentiary hearing. The preponderance standard is appropriate at that stage because the FRA Hearing Officer will be finding facts on a *de novo* basis. Thus, the commenter's suggestion is not acceptable because it seems to confuse the difference between a standard of proof with a standard for review.

A second opinion raised by this commenter is that it should be mandatory that the written decision prepared by a railroad's presiding officer, pursuant to § 240.307, include more detailed information than that the charge was proven. This opinion appears to be a commentary on the fact that some written decisions merely state that the locomotive engineer was found to have violated one of the operational misconduct events without summarizing the evidence upon which the decision was based. In deference to this commenter, FRA notes that judicial opinions usually contain such an analysis of the evidence and some revocation decisions are detailed in the manner preferred by this commenter. Meanwhile, FRA has decided not to require more detail in decisions because the record upon which the decision is based should speak for itself. Since railroad presiding officers are not required to be attorneys, additional costs could be associated with requiring more detailed decisions as drafting such decisions could be categorized as legal work. Those who do not believe that a railroad has met its burden of proof and desire an articulated summary of the evidence can petition FRA for a review of the record.

A third opinion raised by this commenter is that the current dispute resolution procedures that allow for a railroad hearing (§ 240.307) and a petition to the Locomotive Engineer Review Board for a decision are in noncompliance with the RSIA and thus in order to afford due process FRA must conduct all on-the-property railroad hearings. FRA believes it is in compliance with the statute, and in fact provides far more opportunity for a hearing than the statute requires. There is substantial case law interpreting what is proper administrative due process and FRA believes it has followed the law properly. Although not required by statute, FRA provides the opportunity for a full evidentiary hearing in front of a presiding officer pursuant to § 240.409 for any person who has been denied certification, denied recertification, or has had his or her certification revoked and has timely availed himself or herself of earlier administrative remedies. The section of the RSIA cited by the commenter as authority for his position requires an administrative hearing only if a person's certification is detrimentally effected because of information found in the person's motor vehicle driving record. See 49 U.S.C. 20135(d) (cross referencing subsection (b)(4) of the same section). The required hearing must comply with 49 U.S.C. 20103(e), which calls for just an informal hearing. FRA's rule goes far beyond the statutory minimum: under the rule, a person is entitled to a hearing regardless of the basis for the denial or revocation, and the hearing FRA provides to those not satisfied by the informal process of the LERB is a formal, trial-type hearing. Moreover, FRA does not intend to voluntarily act as the hearing officer in every on the property certification hearing since FRA does not have the resources to absorb the substantial costs involved with such a modification of the dispute resolution process.

A fourth opinion raised by this commenter was that a railroad's presiding officer is the only individual who can fairly issue a decision for the § 240.307 hearing and that the proposal to allow any railroad official to issue the opinion other than the investigating officer is unfair. FRA solicited comments on this issue in the NPRM. When the original final rule was promulgated in 1991, FRA's thought was that railroad presiding officers would make the decisions and that these presiding officers were the people best situated to do so. FRA has since learned from experience and from RSAC members that having the railroad presiding officers make the decisions poses problems raised by historical concerns in the existing disciplinary review chain; i.e., railroads objected to limiting decision-makers to presiding officers because in some cases it would require additional burdens and costs not associated with holding a combined collective bargaining agreement hearing with the Part 240 revocation proceeding currently allowed for pursuant to § 240.307(d). The main issue concerns whether it is fair for the decision-maker to be someone who has not had the opportunity to evaluate the credibility of witnesses in the case by receiving their testimony first hand. Although FRA recommends that railroads set up their hearing proceedings to allow for the presiding officer to make the revocation decision or for the decision-maker to consult with the presiding officer on issues of credibility, FRA believes a fair decision can be made on the record alone as long as the decision-maker is free of other conflicts of interest that could interfere with rendering a fair decision. FRA's overall concerns of fairness are satisfied because the rule's changes continue to clarify the importance of the separate duties between the investigating officer and the decision-maker. See § 240.307(b)(2), (c)(2), (c)(10), and (e).

Another commenter expressed an opinion that violations that have occurred prior to promulgation of the final rule should be treated under the new revocation periods. FRA has previously considered the fairness of this issue and both the proposed and final § 240.117(g)(4) conforms with this commenter's opinion. That is, the rule will apply the new, shorter periods of ineligibility retroactively to most incidents that have occurred prior to the effective date of this rule. The rule will not retroactively apply the new, shorter revocation periods if the event involves a violation of § 240.117(e)(6) or the most recent decertifiable event occurred within 60 months of a prior violation of § 240.117(e)(6).

Similarly, FRA has received inquiries regarding whether it is ever possible to run multiple revocation periods concurrently. This question can arise when multiple incidents of operational misconduct are found during a single tour of duty or within a short period of time prior to a railroad's receipt of reliable information forming the basis for a certificate suspension pursuant to

§ 240.307(b)(1). Although revocation periods were designed to run consecutively, not concurrently, two related issues deserve mention. First, this issue usually involves questions concerning the meaning of § 240.117(f), which reads: ''If in any single incident the person's conduct contravened more than one operating rule or practice, that event shall be treated as a single violation for the purposes of this section.'' The question of whether multiple contraventions of a railroad's rules or practices should be treated as a single incident is a factual one which requires consideration of whether the contraventions were sufficiently separated by time, distance or circumstance that to treat them as multiple violations would be logical. Generally, violations that occur simultaneously are part of a single incident. The prudent railroad will address time, distance and circumstance in making its revocation decision and will document the reasoning of that decision in the relevant records kept in accordance with the Part 240 program. Second, railroads have some discretion to reduce the concurrently running periods of ineligibility given that certain conditions are met pursuant to § 240.117(h). Understanding of these two additional issues can often soften the blow of facing concurrently running revocation periods if warranted.

The only other comment concerning certificate revocation procedures was a minor issue that was addressed in the section-by-section analysis concerning § 240.307(c)(10).

*D. Revisiting the Standards for Hearing and Vision*

Since FRA did not modify the standards for hearing and visual acuity since publishing the final rule in 1991, FRA suggested in the NPRM that sufficient time has passed to evaluate the effectiveness of this rule and determine whether any modifications are necessary. FRA received virtually no comments in response to its proposal despite the fact that substantial modifications were proposed. Only one commenter offered views on this important issue and since both of those views involve minor suggested changes to the proposed rule they have been addressed in the section-by-section analysis regarding § 240.121(e) and Appendix F.

*E. Reviewing the Requirements for Consideration of Unsafe Conduct as a Motor Vehicle Operator*

In the NPRM, FRA noted this topic as a major issue and discussed that since the Working Group reluctantly determined that elimination of the review of motor vehicle driving data was outside the Working Group's authority, the Working Group focused on identifying problems with the current system and whether the regulation could be modified to resolve any of those problems. For instance, some railroad Working Group members set goals of achieving (1) ''one stop shopping'' for both the National Driver Register (NDR) and State motor vehicle data, (2) simplified request procedures, and (3) accurate data. As noted in the NPRM's preamble, the RSAC members' recognized their limited authority and thus formal recommendations were not made. Instead, FRA has offered to assist interested parties in discussing and resolving these NDR matters with the National Highway Traffic Safety Administration.

As noted in the preamble to the NPRM, the RSAC's members identified a few modifications that FRA agreed will ease regulatory burdens without any detrimental effect on safety. Regulatory burdens are eased by substantially lengthening the period of time required for individuals to provide railroad employers with prior safety conduct as motor vehicle operators pursuant to § 240.111(a). Individual rights are strengthened by limiting when a railroad can require a person to submit motor vehicle operator data pursuant to § 240.111(h). Please note that proposed paragraph (h) was eliminated due to its redundancy with paragraph (a); accordingly, proposed paragraph (i) has been moved to new paragraph (h).

The only commenter on this topic raised an issue not directly addressed in the NPRM. The commenter's concern is being addressed in this final rule and it is discussed at length in the section-by-section analysis to § 240.5.

*F. Addressing Safety Assurance and Compliance*

One of the principles of the current rule is that locomotive engineers should comply with certain basic railroad rules and practices for the safe operation of trains or risk having their certification revoked. The rule provides for persons who hold certificates to be held accountable for their improper conduct. The reason for holding people accountable for operational misconduct serves one of the principal objectives of this regulation; that is, by revoking the certificates of locomotive engineers who fail to abide by safe rules and practices, the implementation of the rule is instrumental in reducing the potential for future train accidents.

In FRA's Issues Paper, FRA recommended that RSAC consider the following five general issues: (1) The degree of discretion accorded railroads in responding to individual incidents; (2) the criteria for the types of operational misconduct events that can trigger revocation of a certificate; (3) the severity of the consequences for engaging in operational misconduct; (4) the significance to be attached to decertification for violations that occur during operational tests required pursuant to § 240.303; and (5) the effectiveness of FRA's direct control over operational misconduct. Two commenters raised concerns with the proposed rule.

One commenter questioned whether the rule should address how a railroad should treat an individual's defenses of defective equipment, improper notification of tonnage or lading, lack of training, or failure by the employer to provide proper equipment in making suspension and revocation decisions. The commenter was concerned that railroads might suspend and revoke an individual's certificate on the mistaken belief that they cannot take into account these defenses if a violation of operational misconduct has occurred.

Although FRA articulated in the NPRM that the rule already provides railroads with the authority to consider these defenses, FRA noted that it supported RSAC's recommendation to clarify this concern. That is why the proposed § 240.307(i) stated that a railroad shall not revoke a person's certificate when there is an intervening cause or the violation was of a minimal nature with no direct or potential effect on rail safety. This issue was also addressed in the NPRM's proposed § 240.307(j) which creates safeguards for the application of paragraph (i).

For purposes of this final rule, FRA has decided to retain the defense of an intervening cause; however, rather than prohibit the railroad from taking revocation action for all events determined to be of a minimal nature with no direct or potential effect on rail safety, FRA has decided to permit all railroads to use their discretion to determine whether revocation is desirable in such instances. The reason for this modification is that determining an intervening cause is significantly more objective than determining what types of violations are both (1) of a minimal nature and (2) have no direct or potential effect on rail safety. Given that the intervening cause defense addresses this comment fully, FRA does not recognize a need to make further modifications in response to this comment.

One commenter suggested that there should be experimental ''amnesty

programs'' for self reporting of apparent violations by locomotive engineers who honorably come forward to admit an operational misconduct event. Although this comment was reviewed by the Working Group, the proponent of this comment withdrew it from RSAC's consideration before a recommendation could be made. FRA has considered this suggestion and notes that this concept is essentially experimental which would make the waiver route a better vehicle for addressing this matter than this rulemaking. Enforcement problems could be anticipated with such a program and thus FRA is wary about drafting regulations that allow all railroads to utilize amnesty programs. For those parties interested in applying for a waiver, it should be noted that waiver requests which have been jointly submitted by interested parties tend to get expedited resolution.

One commenter suggested that the rule should require different revocation periods based on the severity of the violation. For example, the commenter offered that a locomotive engineer who gets by a stop signal by a few feet in the yard should be subject to a shorter revocation period than the engineer who blasts by a stop signal on main track. FRA believes that it would be immensely difficult to establish a fair system that assesses different revocation periods based on the severity of the violation. Meanwhile, the rule will provide a railroad with the discretion to choose not to revoke a person's certificate when the violation is of a minimal nature with no direct or potential effect on rail safety. See § 240.307(i)(2). An explanation on the application of this new paragraph is provided in the section-by-section analysis.

One commenter was concerned with whether the proposed rule adequately addressed that training may sometimes be more useful than revocation. Because FRA believes that training may be useful in some circumstances, FRA proposed modifying § 240.117(h) to expand the use of training in exchange for a reduction in the revocation period. However, given the proposed rule's modifications to eliminate revocations for defensible and minimal violations, FRA believes that the remaining revocable offenses should be of such greater magnitude that training alone would be considered too light a consequence. FRA has retained § 240.117(h) as proposed and thus has concluded that the rule adequately addresses the usefulness of substituting training for a reduction in some revocation periods.

In reviewing the effectiveness of FRA's current control over operational misconduct, the rule prohibits certain operational conduct which is specified in § 240.305. That section makes it unlawful to (1) operate a train at excessive speed, (2) fail to halt a train at a signal requiring a stop before passing it, and (3) operate a train on main track without authority. The effect of this section is that it enables FRA to initiate civil penalty or disqualification actions when such events occur and are deemed appropriate. Since changes to § 240.117(e) have been made, some parallel modifications are necessary under § 240.305. The NPRM proposed these parallel modifications and they have been adopted in this rule with one exception. That exception is a parallel modification to §§ 240.117 and 240.305.

In response to the proposal, one commenter questioned whether the decertification of supervisors would discourage supervisors from riding trains and evaluating locomotive engineers during actual operations. This commenter also requested guidance if the final rule were to define and document a need for decertification of supervisors. FRA and the other RSAC members believe this commenter's concerns are misplaced since the modified approach does not serve to single out DSLEs but instead makes them accountable for their actions in the same manner as non-supervisory locomotive engineers. This commenter was also concerned that a DSLE does not have the same due process rights as other certified locomotive engineers. Although the NPRM only addressed DSLEs, FRA has encountered several situations in which a designated supervisor of locomotive engineers, a certified locomotive engineer pilot or an instructor engineer has neglected his or her responsibilities and permitted an engineer at the controls to violate a specified prohibition. Usually, FRA finds out about those situations that cause accidents or result in the decertification of the engineer at the controls.

After further consideration of the comment, RSAC recommended that a change is necessary and that a designated supervisor of locomotive engineers, a certified locomotive engineer pilot or an instructor engineer's conduct does not have to be willful to be prohibited. In this way, all locomotive engineers, no matter what role they are performing that requires certification, will know that they will be held to the same high standard of care. This clarification will be found in §§ 240.117(c)(1), (c)(2), and 240.305(a)(6). While FRA maintains that the rule currently contains this authority without making revisions, the rule changes will put certified locomotive engineer supervisors, pilots, and instructors on more blunt notice that their inappropriate supervisory acts or omissions will trigger revocation and FRA enforcement authority. The revisions also will put railroads on better notice that they need to consider the actions of their DSLEs, locomotive engineer pilots and instructor engineers when alleged violations of Part 240 occur. This issue is further discussed in the section-by-section analysis. Some RSAC members and FRA also thought it would be helpful to point out that supervisory employees who are subject to revocation proceedings and who do not have a collective bargaining agreement are still entitled to the hearing procedures found in § 240.307(c) and Subpart E—Dispute Resolution Procedures.

After reviewing the comments, RSAC recommended a modification that would clarify that a certified engineer who is called to work in the capacity of a train crew member other than that of a locomotive engineer, and who does not perform engineer duties, should not have his or her certification revoked for a violation that occurs during that tour of duty. Since this recommendation coincides with FRA's current interpretation of the rule, FRA will add new paragraph § 240.117(c)(3). A more detailed discussion of this new paragraph can be found in the section-by-section analysis.

*G. Lengthening the Certification Period From 3 to 5 Years on Class III Railroads*

This issue was raised in the RSAC process prior to publication of the NPRM but no consensus was achieved for making a recommendation to FRA. In the NPRM, FRA did not propose a change although this issue was identified as one of the Working Group's topics. Only one RSAC member supported this modification prior to publication of the NPRM and that same RSAC organization is the only commenter to support its proposal post NPRM publication. This commenter requests that FRA reconsider whether a model program could be jointly developed by FRA and the industry to allay any safety concerns raised by lengthening the certification period for this subset of locomotive engineers.

The commenter urges that such a change would be either safety neutral or a safety positive change since the history of Class III program administration under the current rule is very positive. This commenter argues that Class III railroads have been

supportive when FRA has wanted modifications to the model Class III Part 240 program. In addition, the commenter argues that all Class III railroads would benefit even though only some would be involved with the development of a new Class III program. The basis for this assertion is the commenter's reminder that it developed the model Class III Part 240 program and it has shared that effort industry-wide.

This commenter stated that it is ready to adjust its model program to accommodate a longer certification cycle by increasing testing and training. In addition, the commenter and RSAC member noted at the last Working Group meeting that because of their members' commitment to safety, many of the Class III railroads are already exceeding the requirements of the rule and the model program they helped develop. Furthermore, this commenter believes that any concern over the longer interval for medical degradation is covered by the self-reporting aspects of the NPRM. The commenter noted that the NDR and medical checks were really all that would be changed by this approach and that there are significant costs that these railroads have difficulty passing on to the shippers while still remaining profitable.

Despite the appeal of this proposal to reduce the burdens imposed by the rule on Class III railroads, FRA remains concerned about the negative safety impact that would flow from such a broad modification to the rule. The proposal seems over-inclusive since the safety concerns on some Class III railroads are much greater than others; for example, some Class III railroads conduct operations on the same lines over which Amtrak conducts high speed operations. Similarly, the proposal could be considered under-inclusive since some Class I and Class II railroads could argue that their operations pose no greater safety threat than many Class III railroads. Thus, FRA believes that the proposal is flawed since it could arbitrarily allow railroads of a certain size to gain a benefit rather than considering safety issues that define the type of operation.

FRA fails to see that the costs associated with retaining the 3 year interval were very significant when compared to the risks. For example, the proposal devalues the benefit of maintaining a uniform interval throughout the industry. Also, the proposal increases the likelihood of a safety loss if the medical examinations are required less frequently. In addition to the dubious equity of the proposal and its possible safety degradation, FRA is concerned about how this 5 year approach would be handled by a major railroad that might need to certify a small railroad's engineers for operations on the major railroad. For all these reasons, RSAC failed to achieve consensus recommendations and FRA has decided not to change the rule to allow Class III railroads to certify their locomotive engineers every 5 years.

*H. Preemption*

One commenter requested that FRA clarify whether and to what extent Part 240 applies to the qualifications for train conductors. The State of Wisconsin's Office of the Commissioner of Railroads made this request because its comment states that Wisconsin appellate courts have held that Part 240 preempts state laws that govern the qualifications of conductors. Since FRA had committed to bringing all comments before the Working Group, RSAC reviewed the comment but was unable to achieve a consensus recommendation.

FRA believes that this request for legal guidance is based on the current rule and not the NPRM since the commenter cited a court case that occurred back in 1996. The question asked is narrow and pertains to a specific set of Wisconsin state regulations and the Wisconsin courts' decisions on particular facts. Thus, FRA is responding to this commenter directly rather than publishing a response here. A copy of FRA's response letter will be placed in the docket.

**Section-by-Section Analysis**

*Subpart A—General*

Section 240.1—Purpose and Scope

FRA will make minor changes to paragraph (b) so that the regulatory language used by FRA in all of its rules will become more standardized. A few words have been substituted for others in the second sentence, but FRA will not substantively change the purpose and scope of this part by virtue of these changes. FRA did not receive any comments on the proposed changes and the final rule text is identical to the proposed version.

Section 240.3—Application and Responsibility for Compliance

The amendments to this section are identical to the proposed version and employ what is essentially standardized regulatory language which FRA plans to use in all of its rules. FRA does not believe that these revisions substantively change the purpose and scope of this part. FRA explained the purpose of these amendments in the NPRM and FRA did not receive any comments in response to the NPRM version.

Paragraphs (a) and (b) contain the same approach as the current rule but with some slight rewording. As under the current provision, the new provision would mean that railroads whose entire operations are conducted on track that is outside of the general system of transportation are not covered by this part. Most tourist railroads, for example, involve no general system operations and, accordingly, would not be subject to this part. Therefore, FRA continues to intend that this rule shall not be applicable to ''tourist, scenic or excursion operations that occur on tracks that are not part of the general railroad system.'' 54 FR 50890, 50893, 50915 (Dec. 11, 1989); *see also* 56 FR 28228, 28240 (June 19, 1991). The word ''installation'' is intended to convey a meaning of physical (and not just operational) separateness from the general system. A railroad that operates only within a distinct enclave that is connected to the general system only for purposes of receiving or offering its own shipments is within an installation. Examples of such installations are chemical and manufacturing plants, most tourist railroads, mining railroads, and military bases. However, a rail operation conducted over the general system in a block of time during which the general system railroad is not operating is not within an installation and, accordingly, not outside of the general system merely because of the operational separation.

Paragraph (c) will be added so that the rule will more clearly identify that any person or contractor that performs a function covered by this part will be held responsible for compliance. This is not a substantive change since contractors and others are currently responsible for compliance with this part as specified in § 240.11.

Section 240.5— Preemptive Effect and Construction

FRA will amend paragraph (a) so that the regulatory language used by FRA in all of its rules will become more standardized. This change explains the rule's preemptive effect. This amendment will reflect FRA's effort to address recent case law developed on the subject of preemption. One comment was received regarding the issue of preemption and that issue has been addressed in the preamble.

FRA will amend paragraph (b) so that the regulatory language used by FRA in all of its rules will become more standardized. The only change is to

remove the word ''any.'' This minor edit would not be a substantive revision.

FRA will amend paragraph (e) of this section by adding the words ''or prohibit.'' The purpose of this modification is to clarify that the rule does not prevent ''flowback.'' The term flowback has been used in the industry to describe a situation where an employee who is no longer qualified or able to work in his or her current position, can return to a previously held position or craft. An example of flowback occurs when a person who holds the position of a conductor subsequently qualifies for the position of locomotive engineer, and at some later point in time the person finds it necessary or preferable to revert back to a conductor position. The reasons for reverting back to the previous craft may derive from personal choice or a less voluntary nature; e.g., downsizing, certificate ineligibility or revocation.

Many collective bargaining agreements address the issue of flowback. FRA does not intend to create or prohibit the right to flowback, nor does FRA intend to state a position on whether flowback is desirable. In fact, the exact opposite is true. In consideration of an RSAC recommendation, FRA has agreed to this clarification of the original intent of paragraph (e) so that it is understood by the industry that employees who are offered the opportunity to flowback or have contractual flowback rights may do so; likewise, employees who are not offered the opportunity to flowback or do not have such contractual rights are not eligible or entitled to such employment as a consequence flowing from this federal regulation.

FRA received a comment that the rule should be modified to prohibit railroads from taking any disciplinary actions during the period while awaiting state action. The comment as raised focused on discipline and not ineligibility to hold a certificate; FRA's authority to regulate a railroad's right to discipline its own employees has not been challenged by this rule. In fact, § 240.5(d) states that FRA does not intend to preempt or otherwise alter the authority of a railroad to initiate disciplinary sanctions against its employees by issuance of these regulations.

Based on discussions of this comment, RSAC recommended adding a new paragraph to this section. Although not proposed in the NPRM, FRA agrees upon reflection that by adding a new paragraph (f), the rule will clarify employee rights in a manner similar to the way in which it is clarifying railroad authority. The intent of the new language is to explicitly preserve any remedy already available to the person and not to create any new entitlements. FRA expects that employees will benefit from this new paragraph by referring to it should a railroad use this regulation as an inappropriate explanation for ignoring an employee's rights or remedies. A railroad must consider whether any procedural rights or remedies available to the employee would be inconsistent with this part.

Section 240.7—Definitions

The final rule adds definitions for eight terms and revises the definitions of another three terms. One of five modifications in the rule that differs from what FRA proposed in the NPRM is a revision to the term *locomotive.* That definition is amended by deleting the phrase ''other than hi-rail or specialized maintenance equipment'' and replacing it with ''other than specialized roadway maintenance equipment or a dual purpose vehicle operating in accordance with § 240.104(a)(2) of this part.'' In making this modification, FRA is excluding from the definition of ''locomotive'' those vehicles that the agency has determined, based on RSAC's recommendation, can be safely operated without a certified locomotive engineer. This means that a dual purpose vehicle will require a certified locomotive engineer whenever the exception as described in § 240.104(a)(2) cannot be met. FRA decided that the previously described modification would be better than one commenter's recommendation that the definition of locomotive be amended to include the phrase ''but including a dual purpose vehicle as defined above which is functioning as a locomotive;'' FRA believes this comment was intended to have the same effect in practice as FRA's modification, but is now redundant given the new definitions of ''locomotive,'' ''specialized roadway maintenance equipment,'' and ''dual purpose vehicle.''

Likewise, commenters expressed confusion as to the applicability of the rule to certain service vehicles and the confusion appeared to be tied to the section-by-section analysis for the definitions of *dual purpose vehicle* and *specialized roadway maintenance equipment.* In order to prevent additional confusion, FRA has modified the two definitions in question and offers the following descriptions to substitute for the apparently confusing analysis in the proposed rule. FRA wishes to alert interested parties that these service vehicle definitions are also addressed in the preamble and provide further clarification.

The definition for *dual purpose vehicle* describes a piece of on-track equipment that may function as roadway maintenance equipment and is capable of moving railroad rolling stock which enables it to substitute for a traditional locomotive. When a dual purpose vehicle is operated in conjunction with roadway maintenance, pursuant to limited circumstances identified in § 240.104(a)(2), a certified locomotive engineer is not required. Therefore, when using dual purpose vehicles, careful attention to whether the exception applies is necessary to determine whether a certified locomotive engineer is necessary.

A definition for *specialized roadway maintenance equipment* is added to define a type of machine that is used exclusively for maintenance, repair, construction or inspection of track, bridges, roadway, signal, communications, or electric traction systems and is not capable of moving railroad rolling stock. Meanwhile, if roadway maintenance equipment is used for moving railroad rolling stock, it will be treated as a dual purpose vehicle, not specialized roadway maintenance equipment. Specialized roadway maintenance equipment does not have the capability to move railroad rolling stock and, therefore, the alteration of such a vehicle that enables it to move railroad rolling stock will require that the vehicle be treated as a dual purpose vehicle.

The addition of a definition for *roadway maintenance equipment* is a fourth modification to the definitions section that differs from the proposed rule. It defines this on-track equipment as ''powered by any means of energy other than hand power which is used in conjunction with maintenance, repair, construction or inspection of track, bridges, roadway, signal, communications, or electric traction systems.'' The term roadway maintenance equipment has been incorporated into the definitions of dual purpose vehicle and specialized roadway maintenance equipment. FRA believes this definition is necessary to clarify that within the set of vehicles meeting the definition of roadway maintenance equipment there are two subsets: (1) Vehicles capable of moving railroad rolling stock, *i.e.,* dual purpose vehicles, and (2) vehicles that do not have such capability, *i.e.,* specialized roadway maintenance equipment.

The addition of a definition for *railroad rolling stock* is a fifth modification to the definitions section that differs from the proposed rule. This

definition was added so that the phrase ''which can function as either a locomotive'' would no longer be necessary. The functioning as a locomotive phrase could be construed as ambiguous and subject to multiple interpretations. By substituting that phrase with having ''the capability to move railroad rolling stock'' in the definitions of dual purpose vehicle and specialized roadway maintenance equipment, FRA intends to be unambiguous. The definition for railroad rolling stock refers to precise definitions found elsewhere in this chapter.

Of the remaining five added definitions and two revised definitions, all are added or modified as proposed. The term *Administrator* will be revised to standardize the FRA Administrator's authority in line with FRA's other regulations. The effect of this change will be to take away the Deputy Administrator's authority to act for the Administrator without being delegated such authority by the Administrator. The Deputy Administrator will also lose the authority to delegate, unless otherwise provided for by the Administrator. The current rule uses the word *qualified* without defining it and this rule expands the use of that term, so a definition is supplied.

The agency has previously neglected to define *FRA* as the Federal Railroad Administration, although that abbreviation has been used in the rule. FRA also will define *person* rather than rely on a definition that currently appears in parenthetic remarks within § 240.11.

Although FRA has previously defined the term *filing,* as in filing a petition, or any other document, with the FRA Docket Clerk, the rule has not defined what constitutes service on other parties. The added definition references the Rules 5 and 6 of the Federal Rules of Civil Procedure (FRCP) as amended. The intent is to apply the FRCP rules in effect at the time a proceeding under this rule occurs, rather than to perpetuate those FRCP rules that are in effect when this regulation becomes final. By defining the term *service,* the expectation is that the rule will clarify the obligations of the parties and improve procedural efficiency.

Section 240.9—Waivers

Minor amendments are being made to this section so that the regulatory language used by FRA in all of its rules will become more standardized. These amendments to paragraphs (a) and (c) are identical to what FRA proposed. The changes to paragraph (a) reflect FRA's current intent; that is, a person should not request a waiver of one of the rule's provisions unless the person is subject to a requirement of this rule and the waiver request is directed at the requirement which the person wishes he or she did not have to abide by. Paragraph (c) will standardize language with other FRA rules which clarify the Administrator's authority to grant waivers subject to any conditions the Administrator deems necessary.

Section 240.11—Consequences for Noncompliance

FRA is rewording this section slightly. No comments addressing this section were received and the final rule is identical to the proposed version. One change will respond to the Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101–410 Stat. 890, 28 U.S.C. 2461 note, as amended by the Debt Collection Improvement Act of 1996 Public Law 104–134, April 26, 1996 which requires agencies to adjust for inflation the maximum civil monetary penalties within the agencies jurisdiction. The resulting $11,000 and $22,000 maximum penalties are determined by applying the criteria set forth in sections 4 and 5 of the statute to the maximum penalties otherwise provided for in the Federal railroad safety laws.

Paragraphs (a), (b) and (c) will eliminate a parenthetic definition of person since FRA will define *person* in § 240.7. The citation to a statute in paragraph (c) is also a revision.

*Subpart B—Component Elements of the Certification Process*

Section 240.103—Approval of Design of Individual Railroad Programs by FRA

FRA will update this section to address railroads commencing operations in the future. There is a need to do so since the numbered paragraphs under paragraph (a) set forth a schedule of dates that have long since passed and any railroad that was conducting operations in 1991 and 1992 should have already filed a written program pursuant to this section. No comments were received and the final rule is identical to the proposed version.

Section 240.104—Criteria for Determining Whether Movement of Roadway Maintenance Equipment or a Dual Purpose Vehicle Requires a Certified Locomotive Engineer

FRA will add this new section to address the issue of what types of service vehicles should be operated by certified locomotive engineers. The title of the section has been revised from the NPRM to clarify that it applies only when roadway maintenance equipment or a dual purpose vehicle is to be operated and does not refer to operating traditional locomotives. Since this was an issue of great interest to many members of the industry represented in the RSAC process, FRA has addressed this issue in detail in the preamble and requests that those people interested in this topic reference the preamble text. The preamble and section-by-section analysis regarding the definitions of ''dual purpose vehicle,'' ''locomotive'' and ''specialized roadway maintenance equipment'' have been revised to clarify some language that commenters found confusing in the NPRM. In addition, the new section has been renumbered differently than the proposal.

Some minor changes to paragraph (a)(2)(ii), which was proposed paragraph (b)(2), were made for clarification. For example, the proposed rule did not state that the ''rules'' under which the railroad would be moving a dual purpose vehicle would be ''railroad operating rules.'' FRA eliminated the reference to ''exclusive track occupancy'' because, upon further examination, this reference to a term used in part 214 of this chapter applies to the protection of roadway workers within work limits and not to the protection of service vehicle movements. The paragraph was also reorganized for improved clarity.

In addition, proposed paragraph (b)(4), has been deleted. FRA concluded that this reference to power brake requirements was unnecessary, and has made clear in the preamble that it believes those rules apply to movements of maintenance equipment to and from the work site to the extent the equipment is equipped with power brakes.

Section 240.105—Criteria for Selection of Designated Supervisors of Locomotive Engineers

The amendments to this section contained in this final rule are identical to those in the proposed version. This section contains one of the more important modifications to the rule and related issues are addressed in the preamble. No comments were received with regard to the proposal for changes to this section.

The changes to paragraph (b)(4) will create two new requirements. One requirement is that those persons who are DSLEs must be qualified on the physical characteristics of the portion of the railroad on which they are supervising. A second requirement is that a railroad's program must address how it intends to implement the physical characteristics qualification of

its DSLEs. As it did in the NPRM, FRA recommends that DSLEs acquire some operational experience over the territories they supervise because it is arguably the best method for learning how to operate over a territory.

The addition of paragraph (c) is an effort to clarify how small railroads, particularly those just commencing operations who find themselves without a qualified and certified DSLE, can designate and train such individuals without reliance on outside sources. 56 FR 28228, 28241–42 (June 19, 1991)(stating that a DSLE could be a contractor rather than an employee of the railroad). The need to create a DSLE can occur under a variety of scenarios including when: (1) new railroads have never certified a locomotive engineer or a DSLE; (2) railroads may have had one or a few DSLEs at one time but no longer employ any qualified individuals; and (3) a railroad wishes to utilize contractor engineers. For those railroads that do not have DSLEs, the addition of paragraph (c) will enable them to consider an additional option for creation of their first DSLE. This section is designed to address the problems that arise from a railroad being unable to certify any person as a locomotive engineer, let alone a DSLE, since the railroad lacks even one DSLE who could conduct the required training and testing of § 240.203(a)(4)(for initial certification or recertification) or § 240.225(a)(5)(for certifying based on the reliance of the qualification determinations made by other railroads). Meanwhile, even if paragraph (c) is utilized, a railroad must comply with the other provisions of either §§ 240.203 or 240.225. Because this paragraph has not changed since the proposed rule and no comments were received with regard to this section, the lengthy explanation provided in the section-by-section analysis in the proposed rule has not been repeated here.

Section 240.111—Individual's Duty To Furnish Data on Prior Safety Conduct as Motor Vehicle Operator

The amendments to this section contained in this final rule are identical to those in the proposed version except that proposed paragraph (h) was eliminated due to its redundancy with paragraph (a); accordingly, proposed paragraph (i) has been moved to new paragraph (h). No comments concerning the proposed modifications of this section were received and, thus, the NPRM should be consulted for a more detailed explanation of the impact of these amendments. The lengthening of the time limit interval in paragraphs (a) from 180 days to 366 days should prove helpful both to small railroads and large ones. RSAC's Working Group members could demonstrate clear examples of the administrative difficulties being encountered in attempting to meet the shorter period and thus FRA believes there is a sufficient basis for a regulatory change.

No comments were received concerning proposed paragraph (i) which is now new paragraph (h). This paragraph will require certified locomotive engineers to notify the employing railroad of motor vehicle incidents described in § 240.115(b)(1) and (2) within 48 hours of the conviction or completed state action to cancel, revoke, suspend, or deny a motor vehicle driver's license. In addition, this new paragraph will create an obligation for certified locomotive engineers to report to their employing railroad any type of temporary or permanent denial to hold a motor vehicle driver's license when the person has been found by a state to have either refused an alcohol or drug test, or to be under the influence or impaired when operating a motor vehicle. This paragraph will also require that, for purposes of locomotive engineer certification, a railroad cannot require a person to submit motor vehicle operator data earlier than specified in the paragraph. The reasoning behind this rule involves several intertwined objectives which are more fully explained in the NPRM.

Section 240.113—Individual's Duty To Furnish Data on Prior Safety Conduct as an Employee of a Different Railroad

The amendments to this section contained in this final rule are identical to those contained in the proposed version. As proposed, paragraph (a) is being modified by increasing the number of days an individual has to furnish data on prior safety conduct as an employee of a different railroad. The period is being changed from 180 days to 366 days so that the administrative difficulties of compliance would be lessened. FRA does not believe that railroad safety will be diminished by lengthening the period of time that a person has to request and furnish this data. No comments were received regarding this proposed section.

Section 240.117—Criteria for Consideration of Operating Rules Compliance Data

FRA proposed substantial amendments to this cornerstone of the regulation and provided a detailed analysis of the changes in the NPRM. Several comments were received in response to the proposed rule. In response to the comments, one proposed paragraph is being modified in this final rule and another paragraph has been added entirely. The issues upon which comments were received are addressed below and have also been addressed in the preamble under ''Addressing Safety Assurance and Compliance.''

First, paragraph (c)(2) is being added so that it makes clear the duties of both certified locomotive engineer pilots and instructor engineers, not just designated supervisors of locomotive engineers as was proposed. The explanation of paragraph (c)(2) concerning designated supervisors of locomotive engineers is still accurate and analogies can be made in the rule's application to when certified locomotive engineer pilots and instructor engineers are to be accountable to the extent that railroads must revoke certification. However, one commenter was concerned that FRA's NPRM appeared to be singling out DSLEs for special treatment. Although that comment is not accurate, RSAC recommended that FRA clarify the intent of the provision in the final rule. FRA agrees with RSAC's recommendation that clarification is warranted since some designated supervisors of locomotive engineers, as well as locomotive engineer pilots and instructor engineers may not understand that they are responsible for their conduct, and thus subject to decertification, when they are performing a function that requires them to be qualified and certified locomotive engineers.

Paragraph (c)(3) is being added to clarify the duty of a person who is a certified locomotive engineer but is called by a railroad to perform the duty of a train crew member other than that of locomotive engineer. For example, a person who is called to be the crew's conductor and who does not perform any of the duties of locomotive engineer during that tour of duty cannot have his or her certification revoked for a violation of § 240.117(e)(1) through (5). As the new paragraph will make clear, this exemption only applies when a person is performing non-locomotive engineer duty. Thus, the exemption will not apply if such a person is performing the duties of a locomotive engineer and causes the violation to occur. Meanwhile, note that the exemption does not apply for violations of § 240.117(e)(6) so that engineers working in other capacities who violate certain alcohol and drug rules will have certification revoked for the appropriate period pursuant to §§ 240.117 and 240.119. FRA believes this paragraph

explains the status quo and that it would be helpful to have rule text since that should help resolve such disputes for railroads over whether a revocation action is necessary. Consequently, FRA expects that a benefit of this new paragraph will be a reduction in the number of railroad hearings and petitions to FRA for review pursuant to § 240.307 and Subpart E—Dispute Resolution Procedures.

Paragraph (d) has been modified slightly from the proposal to clarify that the shortened time frame for considering operating rule compliance only applies to conduct described in ''paragraphs (e)(1) through (e)(5)'' of this section and not paragraph (e)(6). This modification is necessary to clarify that when alcohol and drug violations are at issue, the window in which prior operating rule misconduct will be evaluated will be dictated by § 240.119 and not limited to the 36 month period prescribed in this paragraph. The rule will continue to require that certification reviews consider alcohol and drug misconduct that occurred within a period of 60 consecutive months prior to the review pursuant to § 240.119(c).

FRA noted in the proposed rule that paragraph (e)(3) would likely need amending prior to becoming a final rule since two other regulatory proceedings might result in new rules which could supersede this reference. Although only one of these two regulatory proceedings has resulted in the issuance of a final rule, *i.e.*, Passenger Equipment Safety Standards published at 64 FR 25540 (May 12, 1999), FRA has modified this rule to account for the Passenger Equipment final rule and whatever changes, if any, are ever made to part 232. See 63 FR 48294 (Sept. 9, 1998) (proposing changes to part 232). These modifications will continue to hold certified locomotive engineers responsible for complying with procedures for the safe use of train or engine brakes, regardless of whether the train is a freight train or a passenger train, when these same engineers are responsible for inspecting or testing the brake system, or ensuring that the required tests and inspections have been performed.

The rest of the changes to this section did not receive any comments and, thus, the detailed explanation of their impact in the NPRM has not been repeated here.

Section 240.121—Criteria for Vision and Hearing Acuity Data

FRA will amend this section mainly to prevent potential accidents due to a locomotive engineer's medical condition that could compromise or adversely affect safe operations. The amendments to paragraphs (b) and (c)(3) are identical to the proposal. Meanwhile, amendments to paragraph (e) address one of the two comments received on the issue of acuity; the other issue is being addressed in Appendix F.

A comment requested clarification for when a railroad must provide additional testing pursuant to paragraph (e). RSAC's recommendation to address the commenter's concern has led to a revision. Paragraph (e) differs from the proposed version due to the addition of a sentence that states that ''[i]n accordance with the guidance prescribed in Appendix F, a person is entitled to one retest without making any showing and to another retest if the person provides evidence substantiating that circumstances have changed since the last test to the extent that the person could now arguably operate a locomotive or train safely.'' This recommended revision benefits both implementing railroads and candidates for certification or recertification without having any adverse effect on safety and thus has received FRA's endorsement.

For ease of reference, the following statement is reprinted from Appendix F and should provide sufficient guidance for implementing this new sentence. ''The intent of § 240.121(e) is not to provide an examinee with the right to make an infinite number of requests for further evaluation, but to provide an examinee with at least one opportunity to prove that a hearing or vision test failure does not mean the examinee cannot safely operate a locomotive or train. Appropriate further medical evaluation could include providing another approved scientific screening test or a field test. All railroads should retain the discretion to limit the number of retests that an examinee can request but any cap placed on the number of retests should not limit retesting when changed circumstances would make such retesting appropriate. Changed circumstances would most likely occur if the examinee's medical condition has improved in some way or if technology has advanced to the extent that it arguably could compensate for a hearing or vision deficiency.''

FRA has made two modifications to paragraph (f) that should improve the clarity and enforcement of the rule. One of these modifications substitutes the proposed phrase ''it is the obligation of each certified locomotive engineer to'' with the final language that ''each certified locomotive engineer shall;'' although the required notification is not altered by changing this language, the proposed language is less desirable since some engineers might consider an ''obligation'' to be optional or voluntary when it is intended to be mandatory. The final language clarifies that this notification is mandatory.

A second modification to paragraph (f) addresses the issue of how soon after learning of the deterioration of his or her best correctable vision or hearing must the certified locomotive engineer notify the railroad of the deterioration. The proposed rule failed to address this issue which could lead to delayed notification and enforcement difficulties. FRA is concerned with safe train operations, not whether a person can notify a railroad within a set time frame. Thus, FRA will require this notification ''prior to any subsequent operation of a locomotive or train which would require a certified locomotive engineer.'' Certified locomotive engineers should note that willful noncompliance with this new requirement may result in the assessment of a civil penalty or other appropriate enforcement action.

Section 240.123—Criteria for Initial and Continuing Education

The revision of paragraph (b) and the addition of paragraphs (d), (d)(1), and (d)(2) of this section are identical to the proposed revisions; these amendments will help resolve numerous inquiries FRA has received regarding how engineers can become familiar with the physical characteristics of a territory on new railroads being created, or on portions of a railroad being reopened after years of non-use. These paragraphs seek to clarify the status quo. The benefits of this approach include a better use of agency resources by not having to address this issue repeatedly on a case-by-case basis, a system that is fairer to all parties because it treats all railroads uniformly, and a process that is neither overly burdensome nor a compromise of safety. No comments were received in response to this issue.

Section 240.127—Criteria for Examining Skill Performance

This section contains one of the changes discussed in the preamble under the major issues section titled ''Qualifications for Designated Supervisors of Locomotive Engineers'' and is in response to a comment filed by an RSAC member. The sole modification to this section contained in this notice is identical to the modification contemplated in the proposed rule. This modification addresses a conflict between criteria that must be met to qualify as a DSLE and the concept endorsed by RSAC that

a DSLE can determine an engineer's train handling abilities without being familiar with the territory over which the engineer is operating. The commenter argued that DSLEs should be qualified on the physical characteristics of territory over which they are administering a skill performance test because that would increase safety. After further consideration, this RSAC member and commenter agreed with the previous consensus recommendation that this exception would not have a detrimental effect on safety. As suggested by RSAC, FRA believes this modification would conserve railroad resources by not creating an additional demand for training supervisors and without creating a detrimental effect on safety.

Section 240.129—Criteria for Monitoring Operational Performance of Certified Engineers

FRA did not propose a specific change to this section in the NPRM but is modifying the rule in order to resolve a conflict between the criteria that must be met to qualify a DSLE and the concept endorsed by RSAC that a DSLE can determine an engineer's train handling abilities without being familiar with the territory over which the engineer is operating. The same comment that was discussed in the section-by-section analysis regarding § 240.127 applies to this section and FRA's position is similarly situated. The commenter argued that DSLEs should be qualified on the physical characteristics of territory over which they are monitoring operational performance because that would increase safety. After further consideration, this RSAC member and commenter agreed with the previous consensus recommendation that this exception would not have a detrimental effect on safety. As suggested by RSAC, FRA believes this modification would conserve railroad resources by not creating an additional demand for training supervisors and without creating a detrimental effect on safety.

*Subpart C—Implementation of the Certification Process*

Section 240.213—Procedures for Making the Determination on Completion of Training Program

FRA did not propose a specific change to this section in the NPRM but is modifying the rule to ensure that a fully qualified DSLE, i.e., a person who meets all of the requirements of § 240.105, will be making the determination that a person completing a locomotive engineer training program has the requisite physical characteristics familiarity. As addressed in the preamble under the major issues section titled ''Qualifications for Designated Supervisors of Locomotive Engineers,'' FRA received one comment that advocated requiring that a supervisor of locomotive engineers be qualified on the physical characteristics of the territory over which the supervisor conducts the skill performance test. Although this is a different issue than the one raised in the comment, Working Group discussions on this issue led to RSAC's recommendation that FRA add a new paragraph (c) to § 240.213. RSAC's recommendation requested that FRA address that a DSLE be qualified on the physical characteristics of a territory over which a locomotive engineer is being qualified on at the completion of a training program pursuant to § 240.213. In addition, RSAC recommended that § 240.213 be amended to reflect that a qualified DSLE should be required whenever a locomotive engineer is to be qualified for the first time on a territory.

FRA believes that modification of paragraph (b)(3) makes greater sense than RSAC's recommendation of adding a new paragraph because paragraph (b) already requires written documentation that certain determinations will be met. The current language of § 240.213 also takes into account the first time a locomotive engineer is qualified on a territory and therefore addressing it again would be redundant. Paragraph (b)(3) was modified by requiring that when a railroad provides for the continuing education of a certified locomotive engineer, that railroad must ensure that each engineer maintains the necessary knowledge, skill and ability concerning familiarity with physical characteristics ''as determined by a qualified designated supervisor of locomotive engineers.'' Thus, the modification is not that engineers must be qualified on physical characteristics (since that is already a requirement) but that the person making this determination for the railroad must be a qualified DSLE. FRA believes that this change promotes safety.

Section 240.217—Time Limitations for Making Determinations

All of the modifications being made to this section involve changes to time limits and are identical to the proposed modifications. The RSAC members requested these changes, and FRA will make the modifications, because administrative difficulties will be eased by not having to meet the shorter and inconsistent periods. FRA does not believe that these time extensions will make the data so old that they will no longer be indicative of the person's ability to safely operate a locomotive or train. When the rule was originally published, time limits were established which seemed reasonable and prudent. The rule contained numerous time limits of varying length, which has led to confusion by those governed by the rule. Since publication of the rule, experience by the regulated community has shown the potential for simplification and consistency without sacrificing safety. No comments were received regarding this section and thus FRA believes there are benefits of extending these time limitations without any risk to safety.

Section 240.223—Criteria for the Certificate

The amendment that will be made by this final rule to paragraph (a)(1) is identical to the proposal and will require that each certificate identify either the railroad or ''parent company'' that is issuing it. No comments were received with regard to this section. This change will reduce the burden on small railroads. For these companies, complying with the current requirement of identifying each railroad has become a major logistical problem. It is arguable that a holding company managing multiple short line railroads is the equivalent of a major railroad operating over its many divisions; thus, it is fair to treat them similarly. However, the individuals must still qualify under the program of each short line railroad for which they are certified to operate and each of those railroads must maintain appropriate records as required by this part.

Section 240.225—Reliance on Qualification Determinations Made by Other Railroads

No comments were received with regard to this section and the modifications of this section are identical to the proposed version; thus, the analysis provided for in the NPRM is merely summarized here. New paragraph (a) addresses the perception that the larger railroads often administer a more rigorous training program than the smaller railroads due to the nature of their operations; that is, small railroads typically have more straightforward operations which are geographically compact and not as topographically diverse as the larger railroads. The modification requires a railroad's certification program to address how the railroad will administer the training of previously uncertified engineers with extensive operating experience or previously

certified engineers who have had their certification expire. In both these instances, FRA is providing a railroad with the opportunity to shorten the on-the-job training that might be required if a person is treated as having no operational experience. If a railroad's certification program fails to specify how to train a previously certified engineer hired from another railroad, then the railroad shall require the newly hired engineer to take the hiring railroad's entire training program. By articulating both the problem and mandating a safe solution, it is FRA's position that this modification will save resources.

Section 240.229—Requirements for Joint Operations Territory

No comments were received with regard to this section and the modifications of this section are identical to the proposed version; thus, the analysis provided for in the NPRM is merely summarized here. By amending paragraph (c), FRA has adopted RSAC's recommendation to realign the burden for determining which party is responsible for allowing an unqualified person to operate in joint operations. These changes are based on the experiences of the Working Group's members who expressed the universal opinion that an inordinate amount of the liability currently rests with the controlling railroad. The realignment would lead to a sharing of the burden among a controlling railroad, a guest railroad and a guest railroad's locomotive engineer. The parties' responsibilities are found respectively in paragraphs (c)(1) through (3). FRA's thought is that the changes will be fair to the parties involved since each party will be responsible for making determinations based on information that should be within that party's control.

Section 240.231—Requirements for Locomotive Engineers Unfamiliar With Physical Characteristics in Other Than Joint Operations

No comments were received with regard to this section and the addition of these final rule provisions are identical to those of the proposed version; thus, the lengthy analysis provided in the NPRM is merely summarized here. Railroads have a history of using conductors and other craft employees as pilots and this usage of non-certified locomotive engineers as pilots conflicts with FRA's position on what the current rule allows. FRA recognizes that there is a great need for clarification concerning which employees may serve as pilots since there has been great misunderstanding and misapplication of the rule in this regard.

FRA's changes to the rule reflect RSAC's recommendation that recognizes the complexity of the problem. The concept behind easing the engineer pilots only requirement relies on the Working Group members' experiences; that is, engineers who have been previously qualified on a territory would need less guidance and expertise to refamiliarize themselves with the physical characteristics of that territory as would those engineers who work under certain conditions that make a person's lack of familiarity a reduced safety concern. Simply requiring locomotive engineer pilots in all situations, or in no situations, is neither practical nor desirable. Hence, while supervisors of locomotive engineers may need to consult the rule more frequently in order to ensure compliance, the rule will ensure a higher degree of safety when an engineer operates in unfamiliar territory. Because the modification will ensure that physical characteristics are addressed in a more structured manner, this modification should promote safety better than the confusion caused by the original rule's lack of a statement.

*Subpart D—Administration of the Certification Program*

Section 240.305—Prohibited Conduct

FRA received one comment that led RSAC and FRA to reevaluate this section. The commenter was concerned that FRA's NPRM appeared to be singling out DSLEs for special treatment that would serve as a disincentive for people to want to be DSLEs. FRA believes that the opposite is true; by clarifying a DSLEs responsibilities, the regulation will more clearly notify the public that DSLEs will be subject to revocation of their certification in the same way as every other type of locomotive engineer. In fact, RSAC's post-NPRM recommendation was to expand the clarification so that locomotive engineer pilots and instructor engineers would understand that they too are subject to decertification based on their conduct when performing a locomotive engineer function. Thus, for the same reasons that FRA will change § 240.117(c)(2), paragraph (a)(6) will be modified from the proposal. This amendment certainly puts certified locomotive engineers who are also supervisors, pilots and instructors on notice that they cannot actively or passively acquiesce to misconduct events caused by certified engineers they are observing, piloting or instructing.

Besides the above mentioned change, several paragraphs to § 240.305(a) will be added and changed so that the prohibited conduct list is equivalent to the list of misconduct events in § 240.117(e), which require the railroad to initiate revocation action. This section is needed so that FRA may initiate enforcement action. For example, FRA may want to initiate enforcement action in the event that a railroad fails to initiate revocation action or a person is not a certified locomotive engineer under this part.

Furthermore, FRA has made conforming changes to paragraph (a)(3) as necessary considering the Passenger Equipment Safety Standards final rule that was published at 49 CFR Part 238. See 64 FR 25540 (May 12,1999). Paragraph (a)(3) was also modified to account for whatever changes, if any, are ever made to part 232. See 63 FR 48294 (Sept. 9, 1998) (proposing changes to part 232).

Section 240.307—Revocation of Certification

FRA is amending several paragraphs in this section. In response to the NPRM, two commenters offered opinions that suggested alternative changes to what FRA proposed. Those changes have been addressed fully in the preamble to this rule in the section ''Improving the Dispute Resolution Procedures'' and will not be addressed here unless the comment prompted FRA to make a rule change.

In adopting this final rule, FRA is making four modifications to this section which differ from the NPRM; otherwise, the analysis in the NPRM satisfactorily describes the basis for the amendments to this section. One of the four modifications from the NPRM involves the problem that throughout § 240.307 the regulation refers to an individual whose function is the ''charging official.'' In helping to formulate the NPRM recommendations, several of the Working Group's members noted that the railroad industry does not generally use this term and that a better description of the individual the regulation is referring to would be ''investigating officer.'' FRA agreed with what later became RSAC's recommendation and intended to change the term ''charging official'' to ''investigating officer'' throughout the document when referring to the railroad official who performs the prosecutorial role. Despite FRA's intent, the agency unintentionally failed to modify paragraph (c)(2) accordingly; that mistake is now being corrected.

In order to address two other modifications that differ from the proposal, it is helpful to reiterate the basis for one of the proposed modifications that remain in the final rule. Paragraph (c) requires that a railroad shall provide a hearing consistent with procedures specified in paragraph (c) unless a hearing is held pursuant to a collective bargaining agreement as specified in paragraph (d), a hearing is waived according to paragraph (f), or, prior to a hearing, the railroad makes certain determinations specified in paragraphs (i) and (j) which excuse the alleged misconduct. Paragraph (c)(10) requires that the presiding officer prepare a written decision, which on its face seems like a straightforward requirement. However, some petitioners have argued that procedural error has occurred when written decisions have been signed by a railroad official other than the presiding officer, e.g., a presiding officer's supervisor. The issue appears to be whether the presiding officer must also be the decision-maker or whether the presiding officer can merely take the passive role of presiding over the proceedings only. There is also a separate issue of whether a railroad official who is someone other than the presiding officer may have a conflict of interest that should disqualify that railroad official from signing the written decision; i.e., there may be the appearance of impropriety if the non-presiding railroad official has ex-parte communications with the charging official (or investigating officer). FRA urges railroad officials to avoid the appearance of impropriety and to conduct their on-the-property hearings in an objectively fair manner.

The agency's intentions were articulated in the preamble to the 1993 interim final rule. FRA stated that ''FRA's design for Subpart D was structured to ensure that such decisions would come only after the certified locomotive engineer had been afforded an opportunity for an investigatory hearing at which the hearing officer would determine whether there was sufficient evidence to establish that the engineer's conduct warranted revocation of his or her certification.'' 58 FR 18982, 18999 (Apr. 9, 1993). FRA also discussed in this 1993 preamble how the revocation process pursuant to this part should be integrated with the collective bargaining process. FRA stated that if the collective bargaining process is used ''the hearing officer will be limited to reaching findings based on the record of the hearing'' and not other factors as may be allowed by a bargaining agreement; the rule was written to ''guard against hearing officers who might be tempted to make decisions based on data not fully examined at the hearing.'' 58 FR 18982, 19000 (Apr. 9, 1993). Hence, it appears that the agency did not even contemplate that someone other than the presiding officer might make the revocation decision.

In contrast to the agency's initial position, several of the Working Group's members said that their organizations have set up this process to allow someone other than the presiding officer to make the revocation decision. This other person is always a railroad official who reviews the record made at the railroad hearing. Although this is not what the agency expected when it drafted the original final rule in 1991, FRA and the LERB have found this practice acceptable as long as the relevant railroad official has not been the charging official (or investigating officer). The reasoning behind this acceptance is that fairness of the hearing and the decision is maintained by separating the person who plays the prosecutorial role from the person who acts as the decision-maker. Thus, RSAC recommends, and FRA agrees, to codify this position in paragraph (c)(10).

Meanwhile, a second modification that differs from the NPRM is FRA's failure to amend the reference in paragraph (e) to the ''presiding officer'' when it published the NPRM. FRA's intent was to amend paragraph (e) so that the rule will uniformly state that a railroad official, other than the investigating officer, shall make findings as to whether revocation is required. Thus, pursuant to the new rule, the railroad official, who is someone other than the investigating officer and who determines whether revocation is necessary, could be the presiding officer or another qualified railroad official.

A third modification that FRA is making to this section that differs from the NPRM is found in paragraph (c)(10). FRA's original proposal stated that ''[a]t the close of the record, a railroad official, other than the investigating officer, shall prepare and sign a written decision in the proceeding.'' FRA received one comment that suggested that this paragraph should be revised to clarify that the written decision could be prepared at or after the close of the record; the commenter argued that unless amended, the paragraph ambiguously gave the impression that a written decision had to be provided upon the immediate closing of the hearing. In consideration of the comment, RSAC discussed that a formal deadline for written decisions in revocation proceedings not held pursuant to collective bargaining agreements was desirable so that these decisions could be expected to be completed within a reasonable period of time. RSAC recommends, and FRA agrees, that it would be fair to all parties if such a decision would be required ''no later than 10 days after the close of the record.'' The ''no later than 10 days after the close of the record'' requirement should not place a great burden on any railroad nor should it be confusing to apply. The ''no later than'' language allows issuance of the decision on the tenth day after the close of the record or any time prior to the expiration of that tenth day.

FRA did not receive comments with regard to the other proposed changes to this section, which are explained below. Paragraph (b)(2) is modified in two significant ways. First, based on RSAC's recommendation and FRA's understanding of fair process, initial notice of a revocation suspension may be either oral or written but confirmation of the suspension must be made in writing at a later date; this clarifies a railroad's obligations since FRA was silent in the rule as to whether notice could be made orally or must be in writing yet FRA's preamble stated that the notice must be in writing. Second, the amount of time the railroad will have to confirm the notice in writing will depend on a time limit imposed by an applicable collective bargaining agreement or, in the absence of such an agreement, a time limit of 96 hours will be imposed.

Modifications to paragraphs (i) and (i)(1) from the proposal are merely cosmetic. Paragraph (i)(1) will make it explicitly known that a person's certificate shall not be revoked when there is sufficient evidence of an intervening cause that prevented or materially impaired the person's ability to comply. FRA has always maintained this position and the RSAC members agreed that it would be useful to incorporate it into the rule. FRA expects that railroads which have previously believed they were under a mandate to decertify a person for a violation regardless of the particular factual defenses the person may have had, will more carefully consider similar defenses in future cases. In 1993, FRA stated that ''[f]actual disputes could also involve whether certain equitable considerations warrant reversal of the railroad's decision on the grounds that, due to certain peculiar underlying facts, the railroad's decision would produce an unjust result not intended by FRA's rules.'' 58 FR 18982, 19001 (Apr. 9, 1993). The example FRA used in 1993

applies to this proposal as well. That is, the LERB ''will consider assertions that a person failed to operate the train within the prescribed speed limits because of defective equipment.'' Similar to the defense of defective equipment, the actions of other people may sometimes be an intervening cause. For instance, a conductor or dispatcher may relay incorrect information to the engineer which is reasonably relied on in making a prohibited train movement.

Meanwhile, locomotive engineers and railroad managers will need to note that not all equipment failures or errors caused by others should serve to absolve the person from certification action. The factual issues of each circumstance must be analyzed on a case-by-case basis. For example, a broken speedometer would certainly not be an intervening factor in a violation of § 240.117(e)(3) (failure to do certain required brake tests).

Paragraph (i)(2) has been modified from the proposal although no comments were received requesting the type of change made. The proposed rule prohibited all railroads from taking revocation action for events that are of a minimal nature and that do not have either a direct or potential effect on rail safety while the final rule merely permits railroads to make such a determination. Thus, the final rule will provide a railroad with the discretion necessary to decide not to revoke an engineer's certification for an operational misconduct event that violates § 240.117(e)(1) through (e)(5) under certain limited circumstances. Without such a modification, the proposal would have created a defense in every case where many close judgment calls by railroads could be second guessed by the LERB. Rather than finalize the proposal, which FRA helped RSAC develop into a recommendation, FRA has decided to moderate it so that it is not a defense in every case and thus carry the potential to greatly increase the number of petitions to the LERB. In comparison, FRA does not believe that the modification of adding the defense of an intervening cause will greatly increase or decrease the number of petitions to the LERB since making such a determination is significantly more objective than determining what types of violations are both (1) of a minimal nature and (2) have no direct or potential effect on rail safety. The potential downside to proposed paragraph (i)(2) was not recognized until after the comment period closed and RSAC's final recommendations were made.

Paragraph (i)(2) will not permit a railroad to use their discretion to dismiss violations indiscriminately. That is, FRA will only permit railroads to excuse operational misconduct when two criteria are met. First, the violation must be of a minimal nature; for example, on high speed track at the bottom of a steep grade, the front of the lead unit in a four unit consist hauling 100 cars enters a speed restriction at 10 miles per hour over speed, but the third unit and the balance of the train enters the speed restriction at the proper speed, and maintains that speed for the remainder of the train. If more of the locomotive or train consist enters the speed restriction in violation, a railroad that is willing to consider mitigating circumstances will need to consider whether the violation was truly of a minimal nature. Other examples where violations may be of a minimal nature may include slowing down for speed restrictions that are located within difficult train-handling territory, flat switching-kicking cars, snow plow operations, and certain industrial switching operations requiring short bursts of speed to spot cars on steep inclines.

In contrast, a violation could not be considered of a minimal nature if an engineer fundamentally violated the operating rules. For example, using the same consist and location in the previous example, if the entire train were operated through the speed restriction at 10 miles per hour over the prescribed speed, then the event could not be considered of a minimal nature. In situations where the rule has been fundamentally violated, a railroad does not have the discretion to excuse this violation.

Second, for paragraph (i)(2) to apply, it will also be required that sufficient evidence be presented to prove that the violation did not have either a direct or potential effect on rail safety. This defense will certainly not apply to a violation that actually caused a collision or injury because that would be a direct effect on rail safety. It will also not apply to a violation that, given the factual circumstances surrounding the violation, could have resulted in a collision or injury because that would be a potential effect on rail safety. For instance, an example used to illustrate the term ''minimal nature'' described a situation involving a train that had the first two locomotives enter a speed restriction too fast, yet the balance of the train was in compliance with the speed restriction; since the train in this example would not be endangering other trains because it had the authority to travel on that track at a particular speed, there would be no direct or potential effect on rail safety caused by this violation.

In contrast, if a train fails to stop short of a banner, which is acting as a signal requiring a complete stop before passing it, during an efficiency test, that striking of a banner may have no direct effect on rail safety but it has a potential effect since a banner would be simulating a railroad car or another train. Meanwhile, there is a difference between passing a banner versus making an incidental touching of a banner. If a locomotive or train barely touches a banner so that the locomotive or train does not run over the banner, break the banner, or cause the banner to fall down, this incidental touching could be considered a minimal nature violation that does not have any direct or potential effect on rail safety. This is because such an incidental touching is not likely to cause damage to equipment or injuries to crew members even if the banner was another train. Although it is arguable that if the banner were a person the touching could be fatal, FRA is willing to allow railroads the discretion to consider this type of scenario in the context of excusing a violation pursuant to paragraph (i)(2); of course, if the banner was in fact a person in the manner described in the example, the railroad would not have the discretion to apply paragraph (i)(2).

Similarly, if a train has received oral and written authority to occupy a segment of main track, the oral authority refers to the correct train number, and the oral authority refers to the wrong locomotive because someone transposed the numbers, the engineer's violation in not catching this error before entering the track without proper authority could be considered of a minimal nature with no direct or potential effect on rail safety. Since the railroad would be aware of the whereabouts of this train, the additional risk to safety of this paperwork mistake may practically be zero. Under the same scenario, where there are no other trains or equipment operating within the designated limits, there may be no potential effect on rail safety as well as no direct effect.

FRA also notes that in paragraphs (i)(1) and (i)(2) of the new rule, a defense must be supported by sufficient evidence, not substantial evidence as was mistakenly proposed. As FRA discussed in the preamble topic ''Improving the Dispute Resolution Procedures,'' the rule does not contain a standard of proof for the railroad hearing and FRA did not intend to create any such standard. Although silent on the standard of proof, FRA specifically requires that the railroad determine, on the record of the hearing,

whether the person no longer meets the qualification requirements of this part and state explicitly the basis for the conclusion reached. § 240.307(b)(4). FRA wants to ensure that the railroad hearings are fair, and allow for consolidation with applicable collective bargaining agreements, without the rigidity of instituting a standard of proof. Furthermore, substantial evidence is a standard of review that would not be appropriate given the fact finding role of such a hearing, as opposed to a reviewing role.

Paragraph (j) will require that railroads keep records of those violations in which they must not or elect not to revoke the person's certificate pursuant to paragraph (i). The keeping of these records is substantially less burdensome than the current rule since the current rule requires this type of recordkeeping plus the opportunity for a hearing under § 240.307. Paragraph (j)(1) will require that railroads keep records even when they decide not to suspend a person's certificate due to a determination pursuant to paragraph (i). Paragraph (j)(2) will require that railroads keep records even when they make their determination prior to the convening of the hearing held pursuant to § 240.307.

Paragraph (k) will address concerns that problems could arise if FRA disagrees with a railroad's decision not to suspend a locomotive engineer's certificate for an alleged misconduct event pursuant to § 240.117(e). The idea behind new paragraph (i) is that as long as the railroads make good faith determinations after reasonable inquiries, they should have a defense to civil enforcement for making what the agency believes to be an incorrect determination. Since paragraph (i) will both require and permit railroads to make some difficult decisions based on factual circumstances on a case-by-case basis, FRA accepts RSAC's recommendation that it is fair not to penalize railroads for making what the agency in hindsight may decide to be the wrong decision. However, railroads are put on notice that if they do not conduct a reasonable inquiry or act in good faith, they are subject to civil penalty enforcement. In addition, even if a railroad does not take what FRA considers appropriate revocation action, FRA can still take enforcement action against a person responsible for the non-compliance by assessing a civil penalty pursuant to § 240.305 or issuing an order prohibiting an individual from performing safety-sensitive functions in the rail industry for a specified period pursuant to 49 CFR part 209, subpart D.

Section 240.309—Railroad Oversight Responsibilities

This recordkeeping section will be modified to better reflect the types of poor safety conduct identified in § 240.117(e). It is identical to the proposal except for paragraph (e)(3). FRA has made conforming changes to paragraph (e)(3) as necessary considering the Passenger Equipment Safety Standards final rule that was published at 49 CFR Part 238. See 64 FR 25540 (May 12,1999). Paragraph (e)(3) was also modified to account for whatever changes, if any, are ever made to part 232. See 63 FR 48294 (Sept. 9, 1998)(proposing changes to part 232).

Paragraphs (e)(6), (7) and (8) currently concern train handling issues (i.e., improper use of dynamic brakes, automatic brakes and a locomotive's independent brake) that are no longer considered operational misconduct events and therefore FRA should not need to ask railroads to report this information for study and evaluation. The new paragraphs (e)(6), (7) and (8) mirror those operational misconduct events that were mistakenly left off this list of conduct that needs to be reported for study and evaluation purposes.

New paragraph (h) would correct a clerical error which had mistakenly created two paragraphs labeled as (e). No comments were received in response to this section in the NPRM.

*Subpart E—Dispute Resolution Procedures*

Section 240.403—Petition Requirements

The change to paragraph (d) which shortens the amount of time an aggrieved person can take to file a petition with the LERB from 180 days to 120 days is identical to the proposal. No comments were received in response to the proposed section. The main reason for this change is the broad concept that the entire certification review process should be as short as possible because timely decisions are more meaningful. Another reason for shortening this filing period is that the RSAC members, many of whom have had significant exposure to the LERB petition process, found this time period unnecessarily long in order to complete a petition. These industry leaders recognize that the evidence typically needed for the LERB's review is readily available at the time the railroad makes its revocation decision. Petitioners need to send the LERB this evidence and add an explanation as to why they believe the railroad's decision was improper. Since this period of time was so great, some RSAC members reported that it only encouraged aggrieved persons to procrastinate before deciding whether to file a petition.

While FRA is acting to shorten the time available to file a petition, in consideration of recent circumstances experienced in administering the dispute resolution process, FRA is no longer comfortable with the Locomotive Engineer Review Board's lack of authority to accept late petitions for cause shown. Thus, FRA has modified paragraph (d) and added paragraphs (d)(1) and (2) to accept late filings under certain limited circumstances that are modeled after, to the extent possible, rule 6(b) of the Federal Rules of Civil Procedure regarding enlargement of time. Through the promulgation of paragraph (d)(1), FRA intends to give the Board wide discretion to grant a request for additional time that is made prior to the expiration of the period originally prescribed. As the Board may exercise its discretion under this rule only for ''cause shown,'' a party must demonstrate some justification for the Board to accept the late petition. Similarly, if the deadline in (d) is completely missed, the movant, under paragraph (d)(2), must allege the facts constituting ''excusable neglect'' and the mere assertion of excusable neglect unsupported by facts is insufficient. Excusable neglect requires a demonstration of good faith on the part of the party seeking an extension of time and some reasonable basis for noncompliance within the time specified in the rules. Absent a showing along these lines, relief will be denied. In addition, paragraph (e) was added to explain that a decision of untimeliness may be appealed directly to the Administrator. Ordinarily, an appeal to the Administrator may occur only after a case has been heard by FRA's hearing officer.

Section 240.405—Processing Qualification Review Petitions

The changes to this section are identical to the proposal with one exception and no comments were received in response to this proposed section. Paragraph (a) is modified to include a public pronouncement of FRA's goal to issue decisions within 180 days from the date FRA has received all the information from the parties. FRA's ability to achieve this goal is dependent on the number of petitions filed and agency resources available to handle those petitions in any given period. The modification to paragraph (c) lengthens the amount of time the railroad will be given to respond to a petition from 30 days to 60 days because FRA accepts RSAC's recommendation that a 30-day time period is unfairly short; FRA

expects that when possible, railroads will continue to file responses as soon as possible rather than wait until the sixtieth day to file. A further modification was made to paragraph (c) based on FRA's recent experiences administering the dispute resolution process; thus, FRA has decided to allow the Board to consider late filings to the extent it is practicable to do so. Also, paragraph (d)(3) is added so that railroads which submit information in response to a petition will be required to file such submission in triplicate; without this requirement, the burden placed on the Docket Clerk could cause undesirable delay in this process.

It is important to note that FRA is not amending paragraph (f). The LERB is still only determining whether the railroad's decision was based on an incorrect determination. If a railroad conducted hearing is so unfair that it causes a petitioner substantial harm, the LERB may grant the petition; however, the LERB's review is not intended to correct all procedural wrongs committed by the railroad.

Section 240.411—Appeals

Paragraph (e) is amended as proposed to give the Administrator the power to remand or vacate. No comments were received in response to this proposed section. The phrase ''except where the terms of the Administrator's decision (for example, remanding a case to the presiding officer) show that the parties' administrative remedies have not been exhausted'' is included as part of the regulation so that parties would understand that a remand, or other intermediate decision, would not constitute final agency action. The inclusion of this phrase is made in deference to those parties that are not represented by an attorney or who might otherwise be confused as to whether any action taken by the Administrator should be considered final agency action.

Likewise, recent administration of the dispute resolution proceedings has convinced FRA to allow the Locomotive Engineer Review Board to accept late filings for cause shown under certain limited circumstances. See § 240.403(d). Given the limited authority of the FRA hearing officer, it appears appropriate for an aggrieved party to a Board decision, which denies a petition as untimely, to have the right to appeal that Board decision directly to the Administrator. See § 240.403(e). Paragraph (f) was added to adjust for that additional type of Administrator review.

Appendix A to Part 240—Schedule of Civil Penalties

No comments were received in response to this appendix. FRA is changing footnote number 1 to this schedule of civil penalties so that it will reflect recent changes in the law. The Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101–410 Stat. 890, 28 U.S.C. 2461 note, as amended by the Debt Collection Improvement Act of 1996 Public Law 104–134, April 26, 1996 required agencies to adjust for inflation the maximum civil monetary penalties within the agencies jurisdiction. The resulting $11,000 and $22,000 maximum penalties were determined by applying the criteria set forth in sections 4 and 5 of the statute to the maximum penalties otherwise provided for in the Federal railroad safety laws.

As promised in the proposal's analysis, FRA has considered the modifications to the rule in deciding where revisions of the penalty schedule are necessary. Although penalty schedules are statements of policy and FRA was not obligated to provide an opportunity for public comment, FRA invited comments on this issue and received none.

Appendix F to Part 240—Medical Standards Guidelines

The purpose of this appendix is to provide greater guidance on the procedures that should be employed in administering the vision and hearing requirements of §§ 240.121 and 240.207 of this part. The main issue addressed in this appendix is the addition of acceptable test methods for determining whether a person has the ability to recognize and distinguish among the colors used as signals in the railroad industry. Two issues were raised by one commenter to the NPRM regarding the appropriateness of some of the guidance proposed.

For consistency and clarification, the commenter asked whether Appendix F and § 240.121(e) should be revised to reflect that further testing may be conducted upon request if the railroad has not provided for such further testing without such a request. Since this issue was discussed in great detail in the section-by-section analysis for § 240.121(e), FRA requests that interested persons consult that earlier analysis.

The second of these two issues involves the appropriateness of using chromatic lenses when testing a person's color vision. The commenter recommended the deletion of the sentence ''[c]hromatic lenses may be worn in accordance with any subsequent testing pursuant to § 240.121(c) if permitted by the medical examiner and the railroad.'' RSAC and the commenter support banning the wearing of chromatic lenses during an initial test on the grounds that FRA has acquired a general body of knowledge that chromatic lenses are a safety issue. Meanwhile, the commenter requested that the rule be silent on the issue of whether chromatic lenses are acceptable for subsequent testing since such a statement from FRA might be considered an endorsement of chromatic lenses in other legal contexts. RSAC recommended that this sentence be deleted and that FRA remain silent on the acceptability of chromatic lenses in subsequent testing because it is likely that the judicial system will end up deciding such issues on a case-by-case basis regardless of FRA's pronouncements. After further consideration, FRA agrees with RSAC's recommendations.

## Regulatory Impact

### E.O. 12866 and DOT Regulatory Policies and Procedures

This final rule has been evaluated in accordance with existing policies and procedures and is considered to be non-significant under both Executive Order 12866 and DOT policies and procedures (44 FR 11034; Feb. 26, 1979). Nevertheless, FRA has prepared and placed in the docket a regulatory evaluation of the final rule. This evaluation estimates the costs and other consequences of the rule as well as its anticipated economic and safety benefits. It may be inspected and photocopied during normal business hours by visiting the FRA Docket Clerk at the Office of Chief Counsel, FRA, Seventh Floor, 1120 Vermont Avenue, NW, in Washington, DC. Photocopies may also be obtained by submitting a written request by mail to the FRA Docket Clerk at the Office of Chief Counsel, Federal Railroad Administration, 1120 Vermont Avenue, NW, Mail Stop 10, Washington, DC 20590.

FRA expects that overall the rule will save the rail industry approximately $920,000 Net Present Value (NPV) over the next twenty-years. The NPV of the total estimated twenty-year costs associated with the rule is $1,049,964. The NPV of the total twenty-year monetary savings (non-safety benefits) expected to accrue to the industry from the rule is $1,970,999. For some rail operators, the total costs incurred may exceed the total costs saved. For others,

the cost savings will outweigh the costs incurred.

Costs/savings, and benefits/safety impacts associated with particular requirements of the final rule were analyzed separately. FRA believes it is reasonable to expect that several injuries and fatalities will be avoided as a result of implementing some of the rule modifications. FRA also believes that the safety of rail operations will not be compromised as a result of implementing the cost savings modifications.

The following table presents estimated twenty-year monetary impacts associated with the rule modifications.

| Description | Costs incurred | Costs saved |
|---|---|---|
| Supervisors of Loco. Engineers: | | |
| Qualifications | $1,012,211 | |
| First Designated Supervisor | | $ 8,422 |
| Extending Culpability | 17,798 | |
| Revocable Event Criteria (Speed) | | 232,486 |
| Ineligibility Schedule | | 574,746 |
| Vision and Hearing Acuity: | | |
| Right to Further Medical Examination | 14,185 | |
| Distribution of Rule to Medical Examiners | 4,000 | |
| New Railroads/New Territories | | 16,844 |
| Pilots for Locomotive Engineers | | 1,047,282 |
| Written Notice of Revocation | 1,769 | |
| Added Railroad Discretion | | 88,481 |
| Single Certificate | | 2,737 |
| Total (rounded) | 1,049,964 | 1,970,999 |
| Net Savings (rounded) | | 921,035 |

Note that the NPV of the total cost savings to individual locomotive engineers that commit second and third offenses within a three-year period is expected to total approximately $2.5 million over the next twenty years. However, because one engineer's lost employment opportunity would become another locomotive engineer's opportunity, this information is not included as a savings and is presented for information purposes only.

**Regulatory Flexibility Act**

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires an assessment of the impacts of rules on small entities. FRA has conducted a regulatory flexibility assessment of this final rule's impact on small entities, and the assessment has been placed in the public docket for this rulemaking. The regulatory flexibility assessment concludes that the final rule will have economic impact on small entities. However, FRA certifies that the final rule will not have a ''significant'' impact on a substantial number of small entities.

''Small entity,'' is defined in 5 U.S.C. 601 as a small business concern that is independently owned and operated, and is not dominant in its field of operation. The United States Small Business Administration (SBA) stipulates in its ''Size Standards'' that the largest a ''for-profit'' railroad may be, and still be classified as a ''small entity,'' is 1,500 employees for ''Line-Haul Operating'' Railroads, and 500 employees for ''Switching and Terminal Establishments'' (Table of Size Standards, U.S. Small Business Administration, January 31, 1996, 13 CFR Part 121). This final rule will affect small railroads as defined by the SBA. The statutory definition of ''small government jurisdictions'' is a governmental entity that serves a population center of 50,000 or less. The transit authorities subject to the requirements of this rule do not serve communities with population levels of 50,000 or less.

Because FRA does not have information regarding the number of people employed by railroads, it cannot determine exactly how many small railroads, by SBA definition, are in operation in the United States. However, FRA maintains information regarding annual employee hours for railroads and has used the delineation of less than 400,000 annual employee hours to represent small entities in other regulatory flexibility assessments. This grouping captures most small entities that would be defined by the SBA as small businesses. FRA has also used this grouping in the past to alleviate Federal reporting requirements.

About 645 of the approximately 700 railroads in the United States are considered small businesses by FRA. The final rule applies to railroads that operate locomotives on standard gage track that is part of the general railroad system of transportation. Approximately 25 tourist and museum railroads that are small businesses do not operate on the general railroad system. Therefore, this rule will affect approximately 620 small entities. Small railroads that will be affected by the final rule provide less than 10 percent of the industry's employment, own about 10 percent of the track, and operate less than 10 percent of the ton-miles.

The standards contained in the final rule were generally developed in consensus with the representatives from the American Shortline and Regional Railroad Association (ASLRRA). Two representatives from the ASLRRA are members of the Working Group established by the Federal Railroad Administrator's Rail Safety Advisory Committee (RSAC) to work on this rulemaking. These members represented the interests of small freight railroads and some excursion railroads operating in the United States during this rulemaking process. A representative of the Tourist Railway Association, Incorporated is a member of the RSAC which is responsible for approving the standards developed by the Working Group. Small rail operators had an opportunity to comment on the NPRM.

The impacts of the final rule on small entities are not expected to be substantial. FRA has identified four specific requirements that will result in additional regulatory burden for small railroads. The extension of culpability to DSLEs, locomotive engineers' right to receive further medical evaluation following a vision and hearing acuity test, distribution of the final rule to medical officers, and written notification of suspension of certification will all affect small railroads. The level of costs associated with these standards should vary in proportion to the size of each railroad. Railroads with fewer locomotive

engineers should experience lower costs. These standards do not offer opportunities for larger railroads to experience economies of scale.

Also note that railroads will be relieved of some of the regulatory burdens associated with current Federal regulations. Small railroads should benefit proportionally from the modifications to the ineligibility schedule and the speed violation criteria. These modifications will allow locomotive engineers committing acts that would result in revocation of certification under the current rule to remain or more quickly return to their chosen form of employment. Small railroads will also benefit from the flexibilities allowed for the selection of the first DSLE and the increased railroad discretion with regard to revocation of certification.

Small railroads are actually expected to benefit relatively more than their larger counterparts from three particular requirements. The criteria for requiring pilots for locomotive engineers not qualified on the physical characteristics of a territory grant exemptions based on factors favorable to small railroads such as operating speed and type of terrain. The allowance for a single certificate for certified locomotive engineers qualified to operate on more than one railroad will have particular applicability to small railroads owned by holding companies. Finally, the joint operations requirement for the shared responsibility of determining which locomotive engineers are qualified to operate over the host railroad's territory will provide small railroads that give other railroads trackage rights over all or part of their territory with opportunities for cost savings.

FRA expects that overall the economic benefits that will accrue to small railroads if the requirements of this rule are implemented will exceed the regulatory costs. FRA is also confident that the costs associated with particular requirements will be justified by the safety benefits achieved.

The Working Group considered proposals made by the ASLRRA to provide small railroads with economic relief from some of the burdens imposed by the existing and new federal regulations addressing locomotive engineer qualifications and certification. Of particular interest to the ASLRRA was the certification interval. The ASLRRA sought to extend certification, National Driver Register (NDR) check, and hearing and vision acuity test intervals from 3 to 5 years.

Initially, the ASLRRA proposed that recertification of locomotive engineers occur every 5 years, versus the current 3 year interval. The Working Group considered this proposal. However, the proposal would decrease the level of confidence that railroads have regarding the level of safety with which trains are operated. The recertification process provides railroads with the opportunity to ascertain that locomotive engineers can continue to operate trains in a safe manner. Unsafe locomotive engineer train operating practices are detected during the tests administered as part of the recertification process and can be corrected through appropriate training. Because the timing of training of locomotive engineers coincides with their recertification, lengthening the recertification interval could translate into delaying needed refresher training sessions. This would decrease the level of safety with which trains are operated. This extension would advance the economic interests of small entities but, would not advance the interests of rail safety.

Taking into account the safety concerns of the Group, the ASLRRA proposed that recertification remain at a 3 year interval, but that the NDR check and the hearing and vision tests be performed at 5 year intervals (instead of the current 3 year interval) for Class III railroads that do not operate passenger trains, do not operate in territory where passengers trains are operated, do not operate in territory with a grade of two percent or greater over a distance of two continuous miles or, do not operate in signal territory, and, within the past year, have not transported any hazardous materials in hazard classes 1 (explosives), 2.3 (poisonous gases) or 7 (radioactive materials). The rationale for allowing longer intervals between hearing and vision acuity tests for locomotive engineers in smaller operations is that on-site management would be more likely to notice changes in a person's medical condition. By excluding territories with passenger rail traffic, steep grades, signals, and railroads that haul hazardous materials from the extension, the rule limits its impacts to situations with the lowest level of exposure to accidents and the lowest severity of accident.

Extending the interval between NDR checks, however, raises safety concerns. This rule requires implementation of an honor system through which locomotive engineers self report to the railroads driving incidents involving reckless behavior on their part. The NDR check for motor vehicle drivers will confirm whether there were any incidents of reckless behavior while driving a highway vehicle. This information provides employers insight into whether a person can be trusted with the operation of a locomotive. The potential, and in certain cases even the incentive, exists for a locomotive engineer who operates a car under the influence of alcohol or drugs to not self-report and protect their certification and job. Increasing the interval between NDR checks would actually increase the amount of time an engineer could continue to operate trains without the railroad being aware of reckless motor vehicle driving incidents. This, in turn, would increase the risk of an accident occurring due to reckless behavior while operating a locomotive or train.

In an attempt to expedite the regulatory process associated with this rulemaking the ASLRRA withdrew their proposal for extending intervals from this particular rulemaking activity prior to publication of the NPRM. Following publication of the NPRM, the ASLRRA urged FRA to reconsider a model program jointly developed by FRA and the industry. This model would accommodate a longer certification cycle for Class III railroads by increasing testing and training. The characteristics that determine the level of train operating difficulty and other safety concerns of the Class III railroads in the country vary greatly. This proposal seems over-inclusive since the safety concerns of some Class III railroads are much greater than others. The proposal also seems under-inclusive since some Class I and Class II railroads could argue that their operations pose no greater safety risk than many Class III railroads. The proposal could arbitrarily allow railroads with a certain level of operating revenues to gain a benefit without considering the safety implications determined by the type of operation.

According to the ASLRRA, Class III railroads would save approximately $10 million over twenty years if the certification period was extended by 2 years. FRA believes that the safety risks associated with such an extension would be significant. The ASLRRA proposal increases the likelihood of a safety loss if the medical examinations are required less frequently. In addition to the dubious equity of the proposal and its possible safety degradation, FRA is concerned about how this 5-year approach would be handled by a major railroad that might need to certify a small railroad's engineers for operations on the major railroad. For all these reasons, the RSAC failed to achieve consensus recommendations and FRA has decided not to change the rule to allow Class III railroads to certify their locomotive engineers every 5 years.

The ASLRRA also commented that the administrative burden that was

imposed by the original rule and was perpetuated in the proposed revisions must be considered within the scope of the Small Business Regulatory Enforcement Fairness Act and the paperwork reduction act. FRA did consider this burden with resulting safety benefits and determined that the administrative burden is justified by the safer railroad operating environment.

In response to the NPRM, a Class III railroad recommended that Class III Switching and Terminal Carriers be excluded from the requirement that ''dual purpose vehicles'' must be operated by a certified locomotive engineer in those situations where the ''vehicle'' is being used to move disabled equipment for clearing and repair of track. Since factors such as traffic density and closeness to switches and signals will affect the safety risk of an operation, FRA believes that a general exclusion would not promote safety.

**Paperwork Reduction Act**

The information collection requirements in this final rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The sections that contain the new information collection requirements and the estimated time to fulfill each requirement are as follows:

| CFR section/subject | Respondent universe | Total annual responses | Average time per response | Total annual burden hours | Total annual burden cost |
|---|---|---|---|---|---|
| **NEW REQUIREMENTS** | | | | | |
| 240.105—Selection Criteria For Design. Supervisors of Locomotive Engineers. | 10 railroads | 10 reports | 1 hour | 10 hours | $380 |
| —Qualification—DSLEs—phys. characteristics | 675 railroads | 675 plans | 6 hours | 4,050 hours | 159,300 |
| —DSLE phys. characteristics—plan rev | 8 railroads | 4 rev. plans | 3 hours | 12 hours | 472 |
| 240.111—Indiv. Duty to Furnish Data on Prior Safety Conduct as M.V. Operator. | 675 railroads | 400 calls | 10 min | 67 hours | 2,412 |
| 240.117—Criteria For Consideration of Operating Rules Compliance Data. | 675 railroads | 3 viol./appeal | 12 hours | 36 hours | 1,368 |
| 240.121—Criteria—Hearing/Vision Acuity—First Year | 675 railroads | 675 copies | 15 min | 169 hours | 5,239 |
| —Criteria—Hearing/Vision—Subseq. Yrs | 10 new railroads | 10 copies | 15 min | 3 hours | 93 |
| —Medical Examiner Consultation w DSLE | 675 railroads | 17 reports | 1 hour | 17 hours | 527 |
| —Notification—Hearing/Vision Change | 675 railroads | 10 notifications | 15 minutes | 3 hours | 108 |
| 240.229—Reqmnts—Joint Oper. Terr | 321 railroads | 184 calls | 5 min | 15 hours | 540 |
| 240.309—Railroad Oversight Resp | 43 railroads | 10 annotation | 15 min. | 3 hours | 114 |
| **CURRENT REQUIREMENTS** | | | | | |
| 240.9—Waivers | 675 railroads | 5 waivers | 1 hour | 5 hours | 165 |
| —Certification Program | 10 new railroads | 10 programs | 200 hrs/40 hrs | 1,840 hours | 57,040 |
| 240.11—Penalties For Non-Compliance | 675 railroads | 2 falsification | 10 min | 20 min | 12 |
| 240.111—Request—State Driving Lic. Data | 13,333 candidates. | 13,333 requests | 15 min | 3,333 hours | 119,988 |
| —Railroad notification—NDR match | 675 railroads | 267 requests | 30 min | 134 hours | 4,489 |
| —Written Response from Candidate | 675 railroads | 267 comment | 15 min | 67 hours | 2,412 |
| —Notice to Railroad—No License | 40,000 candidates. | 4 letters | 15 min | 1 hour | 36 |
| 240.113—Notice to Railroad Furnishing Data on Prior Safety Conduct. | 13,333 candidates. | 267 requests/ 267 responses. | 15 min/30 min | 200 hours | 6,535 |
| 240.115—Candidate's Review + Written Comments—Prior Safety Conduct Data. | 13,333 candidates. | 133 responses | 30 min | 67 hours | 2,412 |
| 240.123—Criteria For Init./Cont. Educ | 30 railroads | 30 amend | 1 hour | 30 hours | 1,680 |
| 240.201/221/223/301—List of DSLEs | 675 railroads | 675 updates | 15 minutes | 169 hours | 5,239 |
| —List of Design. Qual. Loc. Engineers | 675 railroads | 675 updates | 15 minutes | 169 hours | 5,239 |
| —Locomotive Engineers Certificate | 40,000 candidates. | 13,333 cert. | 5 minutes | 1,111 hours | $34,441 |
| —List—Des. Persons to sign L.E. Cert. | 675 railroads | 20 lists | 15 minutes | 5 hours | 165 |
| 240.205—Data to EAP Counselor | 675 railroads | 267 records | 5 minutes | 22 hours | 792 |
| 240.207—Medical Certificate | 40,000 candidates. | 13,333 cert. | 70 minutes | 15,555 hours | 482,205 |
| 240.209/213—Written Test | 40,000 candidates. | 13,333 tests | 2 hours | 26,666 hours | 826,646 |
| 240.211/213—Performance Test | 40,000 candidates. | 13,333 tests | 2 hours | 26,666 hours | 1,013,308 |
| 240.215—Recordkeeping—Cert. Loc. Eng. | 675 railroads | 13,333 record | 10 minutes | 2,222 hours | 68,882 |
| 240.219—Denial of Certification | 13,333 candidates. | 133 letters/133 responses. | 1 hr./1hr. | 266 hours | 8,911 |
| —Written Basis For Denial | 675 railroads | 133 notific. | 1 hour | 133 hours | 4,123 |
| 240.227—Canadian Cert. Data | Canadian RRs | 200 certific. | 15 minutes | 50 hours | 1,550 |
| 240.303—Annual Op. Monit. Obs. | 40,000 candidates. | 40,000 tests | 2 hours | 80,000 hours | 3,040,000 |
| —Annual Operational Observation | 40,000 candidates. | 40,000 tests | 1 hour | 40,000 hours | 1,520,000 |
| 240.305—Engineer's Non-Qual. Notific | 40,000 candidates. | 400 notific. | 5 minutes | 33 hours | 1,188 |

| CFR section/subject | Respondent universe | Total annual responses | Average time per response | Total annual burden hours | Total annual burden cost |
|---|---|---|---|---|---|
| —Engineer's Notice—Loss of Qualification | 40,000 candidates. | 40 letters | 30 minutes | 20 hours | 720 |
| 240.307—Notice to Engineer—Disqual. | 675 railroads | 650 notific. letters. | 1 hour | 650 hours | 20,150 |
| 240.309—Railroad Oversight Resp. | 43 railroads | 43 reviews | 80 hours | 3,440 hours | 192,640 |
| 240.401—Engineer's Appeal to FRA | 40,000 Loco. Eng. | 100 petitions | 12 hours | 1,200 hours | 43,200 |
| 240.405—Railroad's Response to Appeal | 675 railroads | 100 responses | 6 hours | 600 hours | 22,800 |
| 240.407—Request For a Hearing | 675 railroads/ 40,000 Loco. Eng.. | 15 hearing requests. | 30 minutes | 8 hours | 288 |
| 240.411—Appeals | 675 | 2 appeal | 2 hours | 4 hours | 144 |

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. For information or a copy of the paperwork package submitted to OMB contact Robert Brogan at 202–493–6292.

OMB is required to make a decision concerning the collection of information requirements contained in this final rule between 30 and 60 days after receipt of this document.

FRA cannot impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of this rule. The valid OMB control number for this information collection is 2130–0533.

## Environmental Impact

FRA has evaluated this regulation in accordance with its ''Procedures for Considering Environmental Impacts'' (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this regulation is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this regulation is not a major Federal action significantly effecting the quality of the human environment.

## Federalism Implications

FRA believes it is in compliance with Executive Order 13132. This rule will not have a substantial effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This regulation will not have federalism implications that impose substantial direct compliance costs on State and local governments. Meanwhile, State officials were consulted to a practicable extent through their participation in the RSAC, a federal advisory committee discussed earlier in the preamble.

The State of Wisconsin's Office of the Commissioner of Railroads was the only State or local office to comment on the NPRM. The State of Wisconsin requested that FRA clarify whether and to what extent Part 240 applies to the qualifications for train conductors. FRA addressed this comment in the preamble under the headline ''preemption.'' FRA brought the comment to the attention of the Working Group, but RSAC was unable to achieve a consensus recommendation. FRA is responding to the State of Wisconsin directly, rather than publishing a response here, because the request for legal guidance is not based on any modification suggested in the NPRM. A copy of FRA's response letter will be placed in the docket.

## List of Subjects in 49 CFR Part 240

Penalties, Railroad employees, Railroad safety, Reporting and recordkeeping requirements.

Therefore, in consideration of the foregoing, FRA amends part 240, Title 49, Code of Federal Regulations as follows::

## PART 240—[AMENDED]

1. The authority citation for Part 240 is revised to read as follows:

**Authority:** 49 U.S.C. 20103, 20107, 20135; 49 CFR 1.49.

2. Section 240.1 is amended by revising paragraph (b) to read as follows:

### § 240.1 Purpose and scope.

* * * * *

(b) This part prescribes minimum Federal safety standards for the eligibility, training, testing, certification and monitoring of all locomotive engineers to whom it applies. This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

* * * * *

3. Section 240.3 is revised to read as follows:

### § 240.3 Application and responsibility for compliance.

(a) Except as provided in paragraph (b) of this section, this part applies to all railroads.

(b) This part does not apply to—

(1) A railroad that operates only on track inside an installation that is not part of the general railroad system of transportation; or

(2) Rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

(c) Although the duties imposed by this part are generally stated in terms of the duty of a railroad, each person, including a contractor for a railroad, who performs any function covered by this part must perform that function in accordance with this part.

4. Section 240.5 is amended by revising the title and paragraphs (a), (b) and (e) and adding paragraph (f) to read as follows:

### § 240.5 Preemptive effect and construction.

(a) Under 49 U.S.C. 20106, issuance of the regulations in this part preempts any State law, regulation, or order covering the same subject matter, except an additional or more stringent law, regulation, or order that is necessary to eliminate or reduce an essentially local

safety hazard; is not incompatible with a law, regulation, or order of the United States Government; and does not impose an unreasonable 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.

* * * * *

(e) Nothing in this part shall be construed to create or prohibit an eligibility or entitlement to employment in other service for the railroad as a result of denial, suspension, or revocation of certification under this part.

(f) Nothing in this part shall be deemed to abridge any additional procedural rights or remedies not inconsistent with this part that are available to the employee under a collective bargaining agreement, the Railway Labor Act, or (with respect to employment at will) at common law with respect to removal from service or other adverse action taken as a consequence of this part.

5. Section 240.7 is amended by revising the definition of *Administrator*, *Locomotive* and *Railroad* and by adding definitions of *Dual purpose vehicle*, *FRA*, *Person*, *Qualified*, *Railroad rolling stock*, *Roadway maintenance equipment*, *Service*, and *Specialized roadway maintenance equipment* in alphabetical order as follows:

* * * * *

*Administrator* means the Administrator of the Federal Railroad Administration or the Administrator's delegate.

* * * * *

*Dual purpose vehicle* means a piece of on-track equipment that is capable of moving railroad rolling stock and may also function as roadway maintenance equipment.

* * * * *

*FRA* means the Federal Railroad Administration.

* * * * *

*Locomotive* means a piece of on-track equipment (other than specialized roadway maintenance equipment or a dual purpose vehicle operating in accordance with § 240.104(a)(2):

(1) With one or more propelling motors designed for moving other equipment;

(2) With one or more propelling motors designed to carry freight or passenger traffic or both; or

(3) Without propelling motors but with one or more control stands.

* * * * *

*Person* means an entity of any type covered under 1 U.S.C. 1, including but not limited to the following: a railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor.

*Qualified* means a person who has passed all appropriate training and testing programs required by the railroad and this part and who, therefore, has actual knowledge or may reasonably be expected to have knowledge of the subject on which the person is qualified.

*Railroad* means any form of nonhighway ground transportation that runs on rails or electromagnetic guideways and any entity providing such transportation, including

(1) Commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and

(2) High speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

* * * * *

*Railroad rolling stock* is on-track equipment that is either a freight car (as defined in § 215.5 of this chapter) or a passenger car (as defined in § 238.5 of this chapter).

* * * * *

*Roadway maintenance equipment* is on-track equipment powered by any means of energy other than hand power which is used in conjunction with maintenance, repair, construction or inspection of track, bridges, roadway, signal, communications, or electric traction systems.

* * * * *

*Service* has the meaning given in Rule 5 of the Federal Rules of Civil Procedure as amended. Similarly, the computation of time provisions in Rule 6 of the Federal Rules of Civil Procedure as amended are also applicable in this part. See also the definition of ''filing in this section.''

* * * * *

*Specialized roadway maintenance equipment* is roadway maintenance equipment that does not have the capability to move railroad rolling stock. Any alteration of such equipment that enables it to move railroad rolling stock will require that the equipment be treated as a dual purpose vehicle.

* * * * *

6. Section 240.9 is amended by revising paragraphs (a) and (c) to read as follows:

**§ 240.9 Waivers.**

(a) A person subject to a requirement of this part may petition the Administrator for a waiver of compliance with such requirement. The filing of such a petition does not affect that person's responsibility for compliance with that requirement while the petition is being considered.

* * * * *

(c) If the Administrator finds that a waiver of compliance is in the public interest and is consistent with railroad safety, the Administrator may grant the waiver subject to any conditions the Administrator deems necessary.

7. Section 240.11 is amended by revising the title and paragraphs (a), (b) and (c) to read as follows:

**§ 240.11 Penalties and consequences for noncompliance.**

(a) A person who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least $500 and not more than $11,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed $22,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. See Appendix A to this part for a statement of agency civil penalty policy.

(b) A person who violates any requirement of this part or causes the violation of any such requirement may be subject to disqualification from all safety-sensitive service in accordance with part 209 of this chapter.

(c) A person who knowingly and willfully falsifies a record or report required by this part may be subject to criminal penalties under 49 U.S.C. 21311.

* * * * *

8. Section 240.103 is amended by revising paragraph (a) to read as follows:

**§ 240.103 Approval of design of individual railroad programs by FRA.**

(a) Each railroad shall submit its written certification program and a description of how its program conforms to the specific requirements of this part in accordance with the procedures contained in appendix B to this part and shall submit this written certification program for approval at least 60 days before commencing operations.

* * * * *

9. Section 240.104 is added to read as follows:

**§ 240.104 Criteria for determining whether movement of roadway maintenance equipment or a dual purpose vehicle requires a certified locomotive engineer.**

(a) A railroad is not required to use a certified locomotive engineer to perform the following functions:

(1) Operate specialized roadway maintenance equipment; or

(2) Operate a dual purpose vehicle that is:

(i) Being operated in conjunction with roadway maintenance and related maintenance of way functions, including traveling to and from the work site;

(ii) Moving under authority of railroad operating rules designated for the movement of roadway maintenance equipment that ensure the protection of such equipment from train movements; and

(iii) Being operated by an individual trained and qualified in accordance with §§ 214.341, 214.343, and 214.355 of this chapter.

(b) A railroad is required to use a certified locomotive engineer when operating a dual purpose vehicle other than in accordance with paragraph (a)(2) of this section.

10. Section 240.105 is amended by revising paragraph (b)(4) and by adding paragraph (c) to read as follows:

**§ 240.105 Criteria for selection of designated supervisors of locomotive engineers.**

* * * * *

(b) * * *

(4) Is a certified engineer who is qualified on the physical characteristics of the portion of the railroad on which that person will perform the duties of a Designated Supervisor of Locomotive Engineers.

(c) If a railroad does not have any Designated Supervisors of Locomotive Engineers, and wishes to hire one, the chief operating officer of the railroad shall make a determination in writing that the Designated Supervisor of Locomotive Engineers designate possesses the necessary performance skills in accordance with § 240.127. This determination shall take into account any special operating characteristics which are unique to that railroad.

11. Section 240.111 is amended by revising paragraphs (a) introductory text, (a)(1), and (h) to read as follows:

**§ 240.111 Individual's duty to furnish data on prior safety conduct as motor vehicle operator.**

(a) Except for initial certifications under paragraph (b), (h), or (i) of § 240.201 or for persons covered by § 240.109(h), each person seeking certification or recertification under this part shall, within 366 days preceding the date of the railroad's decision on certification or recertification:

(1) Take the actions required by paragraphs (b) through (f) or paragraph (g) of this section to make information concerning his or her driving record available to the railroad that is considering such certification or recertification; and

* * * * *

(h) Each certified locomotive engineer or person seeking initial certification shall report motor vehicle incidents described in § 240.115 (b)(1) and (2) to the employing railroad within 48 hours of being convicted for, or completed state action to cancel, revoke, suspend, or deny a motor vehicle drivers license for, such violations. For the purposes of engineer certification, no railroad shall require reporting earlier than 48 hours after the conviction, or completed state action to cancel, revoke, or deny a motor vehicle drivers license.

12. Section 240.113 is amended by revising paragraph (a) introductory text to read as follows:

**§ 240.113 Individual's duty to furnish data on prior safety conduct as an employee of a different railroad.**

(a) Except for initial certifications under paragraphs (b), (h), or (i) of § 240.201 or for persons covered by § 240.109(h), each person seeking certification under this part shall, within 366 days preceding the date of the railroad's decision on certification or recertification:

* * * * *

13. Section 240.117 is revised to read as follows:

**§ 240.117 Criteria for consideration of operating rules compliance data.**

(a) Each railroad's program shall include criteria and procedures for implementing this section.

(b) A person who has demonstrated a failure to comply, as described in paragraph (e) of this section, with railroad rules and practices for the safe operation of trains shall not be currently certified as a locomotive engineer.

(c)(1) A certified engineer who has demonstrated a failure to comply, as described in paragraph (e) of this section, with railroad rules and practices for the safe operation of trains shall have his or her certification revoked.

(2) A Designated Supervisor of Locomotive Engineers, a certified locomotive engineer pilot or an instructor engineer who is monitoring, piloting or instructing a locomotive engineer and fails to take appropriate action to prevent a violation of paragraph (e) of this section, shall have his or her certification revoked. Appropriate action does not mean that a supervisor, pilot or instructor must prevent a violation from occurring at all costs; the duty may be met by warning an engineer of a potential or foreseeable violation. A Designated Supervisor of Locomotive Engineers will not be held culpable under this section when this monitoring event is conducted as part of the railroad's operational compliance tests as defined in §§ 217.9 and 240.303 of this chapter.

(3) A person who is a certified locomotive engineer but is called by a railroad to perform the duty of a train crew member other than that of locomotive engineer, and is performing such other duty, shall not have his or her certification revoked based on actions taken or not taken while performing that duty.

(d) Limitations on consideration of prior operating rule compliance data. Except as provided for in paragraph (i) of this section, in determining whether a person may be or remain certified as a locomotive engineer, a railroad shall consider as operating rule compliance data only conduct described in paragraphs (e)(1) through (e)(5) of this section that occurred within a period of 36 consecutive months prior to the determination. A review of an existing certification shall be initiated promptly upon the occurrence and documentation of any conduct described in this section.

(e) A railroad shall only consider violations of its operating rules and practices that involve:

(1) Failure to control a locomotive or train in accordance with a signal indication, excluding a hand or a radio signal indication or a switch, that requires a complete stop before passing it;

(2) Failure to adhere to limitations concerning train speed when the speed at which the train was operated exceeds the maximum authorized limit by at

least 10 miles per hour. Where restricted speed is in effect, railroads shall consider only those violations of the conditional clause of restricted speed rules (i.e., the clause that requires stopping within one half of the locomotive engineer's range of vision), or the operational equivalent thereof, which cause reportable accidents or incidents under part 225 of this chapter, as instances of failure to adhere to this section;

(3) Failure to adhere to procedures for the safe use of train or engine brakes when the procedures are required for compliance with the initial terminal, intermediate terminal, or transfer train and yard test provisions of 49 CFR part 232 or when the procedures are required for compliance with the class 1, class 1A, class II, or running brake test provisions of 49 CFR part 238;

(4) Occupying main track or a segment of main track without proper authority or permission;

(5) Failure to comply with prohibitions against tampering with locomotive mounted safety devices, or knowingly operating or permitting to be operated a train with an unauthorized disabled safety device in the controlling locomotive. (See 49 CFR part 218, subpart D and Appendix C to part 218);

(6) Incidents of noncompliance with § 219.101 of this chapter; however such incidents shall be considered as a violation only for the purposes of paragraphs (g)(2) and (3) of this section;

(f)(1) If in any single incident the person's conduct contravened more than one operating rule or practice, that event shall be treated as a single violation for the purposes of this section.

(2) A violation of one or more operating rules or practices described in paragraph (e)(1) through (e)(5) of this section that occurs during a properly conducted operational compliance test subject to the provisions of this chapter shall be counted in determining the periods of ineligibility described in paragraph (g) of this section.

(3) An operational test that is not conducted in compliance with this part, a railroad's operating rules, or a railroad's program under § 217.9 of this chapter, will not be considered a legitimate test of operational skill or knowledge, and will not be considered for certification, recertification or revocation purposes.

(g) A period of ineligibility described in this paragraph shall:

(1) Begin, for a person not currently certified, on the date of the railroad's written determination that the most recent incident has occurred; or

(2) Begin, for a person currently certified, on the date of the railroad's notification to the person that recertification has been denied or certification has been revoked; and

(3) Be determined according to the following standards:

(i) In the case of a single incident involving violation of one or more of the operating rules or practices described in paragraphs (e)(1) through (e)(5) of this section, the person shall have his or her certificate revoked for a period of one month.

(ii) In the case of two separate incidents involving a violation of one or more of the operating rules or practices described in paragraphs (e)(1) through (e)(5) of this section, that occurred within 24 months of each other, the person shall have his or her certificate revoked for a period of six months.

(iii) In the case of three separate incidents involving violations of one or more of the operating rules or practices, described in paragraphs (e)(1) through (e)(6) of this section, that occurred within 36 months of each other, the person shall have his or her certificate revoked for a period of one year.

(iv) In the case of four separate incidents involving violations of one or more of the operating rules or practices, described in paragraphs (e)(1) through (e)(6) of this section, that occurred within 36 months of each other, the person shall have his or her certificate revoked for a period of three years.

(v) Where, based on the occurrence of violations described in paragraph (e)(6) of this section, different periods of ineligibility may result under the provisions of this section and § 240.119, the longest period of revocation shall control.

(4) Be reduced to the shorter periods of ineligibility imposed by paragraphs (g)(1) through (3) of this section as amended, and effective January 7, 2000 if the incident:

(i) Occurred prior to January 7, 2000; and

(ii) Involved violations described in paragraphs (e)(1) through (e)(5) of this section; and

(iii) Did not occur within 60 months of a prior violation as described in paragraph (e)(6) of this section.

(h) Future eligibility to hold certificate. A person whose certification has been denied or revoked shall be eligible for grant or reinstatement of the certificate prior to the expiration of the initial period of revocation only if:

(1) The denial or revocation of certification in accordance with the provisions of paragraph (g)(3) of this section is for a period of one year or less;

(2) Certification was denied or revoked for reasons other than noncompliance with § 219.101 of this chapter;

(3) The person has been evaluated by a Designated Supervisor of Locomotive Engineers and determined to have received adequate remedial training;

(4) The person has successfully completed any mandatory program of training or retraining, if that was determined to be necessary by the railroad prior to return to service; and

(5) At least one half the pertinent period of ineligibility specified in paragraph (g)(3) of this section has elapsed.

(i) In no event shall incidents that meet the criteria of paragraphs (i)(1) through (4) of this section be considered as prior incidents for the purposes of paragraph (g)(3) of this section even though such incidents could have been or were validly determined to be violations at the time they occurred. Incidents that shall not be considered under paragraph (g)(3) of this section are those that:

(1) Occurred prior to May 10, 1993;

(2) Involved violations of one or more of the following operating rules or practices:

(i) Failure to control a locomotive or train in accordance with a signal indication;

(ii) Failure to adhere to limitations concerning train speed;

(iii) Failure to adhere to procedures for the safe use of train or engine brakes; or

(iv) Entering track segment without proper authority;

(3) Were or could have been found to be violations under this section contained in the 49 CFR, parts 200 to 399, edition revised as of October 1, 1992; and

(4) Would not be a violation of paragraph (e) of this section.

(j) In no event shall incidents that meet the criteria of paragraphs (j)(1) through (2) of this section be considered as prior incidents for the purposes of paragraph (g)(3) of this section even though such incidents could have been or were validly determined to be violations at the time they occurred. Incidents that shall not be considered under paragraph (g)(3) of this section are those that:

(1) Occurred prior to January 7, 2000;

(2) Involved violations of one or more of the following operating rules or practices:

(i) Failure to control a locomotive or train in accordance with a signal indication that requires a complete stop before passing it;

(ii) Failure to adhere to limitations concerning train speed when the speed

at which the train was operated exceeds the maximum authorized limit by at least 10 miles per hour or by more than one half of the authorized speed, whichever is less;

(3) Were or could have been found to be violations under this section contained in the 49 CFR, parts 200 to 399, edition revised as of October 1, 1999; and

(4) Would not be a violation of paragraph (e) of this section.

14. Section 240.121 is amended by revising paragraphs (b), (c)(3) and (e), and adding paragraph (f) to read as follows:

**§ 240.121 Criteria for vision and hearing acuity data.**

* * * * *

(b) Fitness requirement. In order to be currently certified as a locomotive engineer, except as permitted by paragraph (e) of this section, a person's vision and hearing shall meet or exceed the standards prescribed in this section and appendix F to this part. It is recommended that each test conducted pursuant to this section should be performed according to any directions supplied by the manufacturer of such test and any American National Standards Institute (ANSI) standards that are applicable.

(c) * * *

(3) The ability to recognize and distinguish between the colors of railroad signals as demonstrated by successfully completing one of the tests in appendix F to this part.

* * * * *

(e) A person not meeting the thresholds in paragraphs (c) and (d) of this section shall, upon request, be subject to further medical evaluation by a railroad's medical examiner to determine that person's ability to safely operate a locomotive. In accordance with the guidance prescribed in appendix F to this part, a person is entitled to one retest without making any showing and to another retest if the person provides evidence substantiating that circumstances have changed since the last test to the extent that the person could now arguably operate a locomotive or train safely. The railroad shall provide its medical examiner with a copy of this part, including all appendices. If, after consultation with one of the railroad's designated supervisors of locomotive engineers, the medical examiner concludes that, despite not meeting the threshold(s) in paragraphs (c) and (d) of this section, the person has the ability to safely operate a locomotive, the person may be certified as a locomotive engineer and such certification conditioned on any special restrictions the medical examiner determines in writing to be necessary.

(f) As a condition of maintaining certification, each certified locomotive engineer shall notify his or her employing railroad's medical department or, if no such department exists, an appropriate railroad official if the person's best correctable vision or hearing has deteriorated to the extent that the person no longer meets one or more of the prescribed vision or hearing standards or requirements of this section. This notification is required prior to any subsequent operation of a locomotive or train which would require a certified locomotive engineer.

15. Section 240.123 is amended by revising paragraph (b) and adding paragraph (d) to read as follows:

**§ 240.123 Criteria for initial and continuing education.**

* * * * *

(b) A railroad shall provide for the continuing education of certified locomotive engineers to ensure that each engineer maintains the necessary knowledge, skill and ability concerning personal safety, operating rules and practices, mechanical condition of equipment, methods of safe train handling (including familiarity with physical characteristics as determined by a qualified Designated Supervisor of Locomotive Engineers), and relevant Federal safety rules.

* * * * *

(d) Pursuant to paragraphs (b) and (c) of this section, a person may acquire familiarity with the physical characteristics of a territory through the following methods if the specific conditions included in the description of each method are met. The methods used by a railroad for familiarizing its engineers with new territory while starting up a new railroad, starting operations over newly acquired rail lines, or reopening of a long unused route, shall be described in the railroad's locomotive engineer qualification program required under this part and submitted according to the procedures described in Appendix B to this part.

(1) If ownership of a railroad is being transferred from one company to another, the engineer(s) of the acquiring company may receive familiarization training from the selling company prior to the acquiring railroad commencing operation; or

(2) Failing to obtain familiarization training from the previous owner, opening a new rail line, or reopening an unused route would require that the engineer(s) obtain familiarization through other methods. Acceptable methods of obtaining familiarization include using hyrail trips or initial lite locomotive trips in compliance with what is specified in the railroad's locomotive engineer qualification program required under this part and submitted according to the procedures described in Appendix B to this part.

16. Section 240.127 is amended by revising paragraph (c)(2) to read as follows:

**§ 240.127 Criteria for examining skill performance.**

* * * * *

(c) * * *

(2) Conducted by a Designated Supervisor of Locomotive Engineers, who does not need to be qualified on the physical characteristics of the territory over which the test will be conducted;

* * * * *

17. Section 240.129 is amended by revising paragraph (c)(2) to read as follows:

**§ 240.129 Criteria for monitoring operational performance of certified engineers.**

* * * * *

(c) * * *

(2) Be designed so that each engineer shall be annually monitored by a Designated Supervisor of Locomotive Engineers, who does not need to be qualified on the physical characteristics of the territory over which the operational performance monitoring will be conducted;

* * * * *

18. Section 240.213 is amended by revising paragraph (b)(3) to read as follows:

**§ 240.213 Procedures for making the determination on completion of training program.**

* * * * *

(b) * * *

(3) A qualified Designated Supervisor of Locomotive Engineers has determined that the person is familiar with the physical characteristics of the railroad or its pertinent segments.

19. Section 240.217 is amended by revising paragraphs (a)(1), (a)(2), (a)(3), (a)(4), and (c)(2) to read as follows:

**§ 240.217 Time limitations for making determinations.**

(a) * * *

(1) A determination concerning eligibility and the eligibility data being relied on were furnished more than 366 days before the date of the railroad's certification decision;

(2) A determination concerning visual and hearing acuity and the medical

examination being relied on was conducted more than 366 days before the date of the railroad's recertification decision;

(3) A determination concerning demonstrated knowledge and the knowledge examination being relied on was conducted more than 366 days before the date of the railroad's certification decision; or

(4) A determination concerning demonstrated performance skills and the performance skill testing being relied on was conducted more than 366 days before the date of the railroad's certification decision;

* * * * *

(c) * * *

(2) Rely on a certification issued by another railroad that is more than 36 months old.

* * * * *

20. Section 240.223 is amended by revising paragraph (a)(1) to read as follows:

**§ 240.223 Criteria for the certificate.**

(a) * * *

(1) Identify the railroad or parent company that is issuing it;

* * * * *

21. Section 240.225 is revised to read as follows:

**§ 240.225 Reliance on qualification determinations made by other railroads.**

(a) After December 31, 1991, a railroad that is considering certification of a person as a qualified engineer may rely on determinations made by another railroad concerning that person's qualifications. The railroad's certification program shall address how the railroad will administer the training of previously uncertified engineers with extensive operating experience or previously certified engineers who have had their certification expire. If a railroad's certification program fails to specify how to train a previously certified engineer hired from another railroad, then the railroad shall require the newly hired engineer to take the hiring railroad's entire training program. A railroad relying on another's certification shall determine that:

(1) The prior certification is still valid in accordance with the provisions of §§ 240.201, 240.217, and 240.307;

(2) The prior certification was for the same classification of locomotive or train service as the certification being issued under this section;

(3) The person has received training on and visually observed the physical characteristics of the new territory in accordance with § 240.123;

(4) The person has demonstrated the necessary knowledge concerning the railroad's operating rules in accordance with § 240.125;

(5) The person has demonstrated the necessary performance skills concerning the railroad's operating rules in accordance with § 240.127.

(b) [Reserved].

22. Section 240.229 is amended by revising paragraph (c) to read as follows:

**§ 240.229 Requirements for joint operations territory.**

* * * * *

(c) A railroad that controls joint operations may rely on the certification issued by another railroad under the following conditions:

(1) The controlling railroad shall determine:

(i) That the person has been certified as a qualified engineer under the provisions of this part by the railroad which employs that individual;

(ii) That the person certified as a locomotive engineer by the other railroad has demonstrated the necessary knowledge concerning the controlling railroad's operating rules, if the rules are different;

(iii) That the person certified as a locomotive engineer by the other railroad has the necessary operating skills concerning the joint operations territory; and

(iv) That the person certified as a locomotive engineer by the other railroad has the necessary familiarity with the physical characteristics for the joint operations territory; and,

(2) The railroad which employs the individual shall determine that the person called to operate on the controlling railroad is a certified engineer who is qualified to operate on that track segment; and

(3) Each locomotive engineer who is called to operate on another railroad shall:

(i) Be qualified on the segment of track upon which he or she will operate in accordance with the requirements set forth by the controlling railroad; and,

(ii) Immediately notify the railroad upon which he or she is employed if he or she is not qualified to perform that service.

* * * * *

23. Section 240.231 is added to subpart C to read as follows:

**§ 240.231 Requirements for locomotive engineers unfamiliar with physical characteristics in other than joint operations.**

(a) Except as provided in paragraph (b) of this section, no locomotive engineer shall operate a locomotive over a territory unless he or she is qualified on the physical characteristics of the territory pursuant to the railroad's certification program.

(b) Except as provided in paragraph (c) of this section, if a locomotive engineer lacks qualification on the physical characteristics required by paragraph (a) of this section, he or she shall be assisted by a pilot qualified over the territory pursuant to the railroad's certification program.

(1) For a locomotive engineer who has never been qualified on the physical characteristics of the territory over which he or she is to operate a locomotive or train, the pilot shall be a person qualified and certified as a locomotive engineer who is not an assigned crew member.

(2) For a locomotive engineer who was previously qualified on the physical characteristics of the territory over which he or she is to operate a locomotive or train, but whose qualification has expired, the pilot may be any person, who is not an assigned crew member, qualified on the physical characteristics of the territory.

(c) Pilots are not required if the movement is on a section of track with an average grade of less than 1% over 3 continuous miles, and

(1) The track is other than a main track; or

(2) The maximum distance the locomotive or train will be operated does not exceed one mile; or

(3) The maximum authorized speed for any operation on the track does not exceed 20 miles per hour; or

(4) Operations are conducted under operating rules that require every locomotive and train to proceed at a speed that permits stopping within one half the range of vision of the locomotive engineer.

24. Section 240.305 is amended by revising paragraph (a) to read as follows:

**§ 240.305 Prohibited conduct.**

(a) It shall be unlawful to:

(1) Operate a locomotive or train past a signal indication, excluding a hand or a radio signal indication or a switch, that requires a complete stop before passing it; or

(2) Operate a locomotive or train at a speed which exceeds the maximum authorized limit by at least 10 miles per hour. Where restricted speed is in effect, only those violations of the conditional clause of restricted speed rules (i.e., the clause that requires stopping within one half of the locomotive engineer's range of vision), or the operational equivalent thereof, which cause reportable accidents or incidents under part 225 of this chapter, shall be considered instances of failure to adhere to this section; or

(3) Operate a locomotive or train without adhering to procedures for the safe use of train or engine brakes when the procedures are required for compliance with the initial terminal, intermediate terminal, or transfer train and yard test provisions of 49 CFR part 232 or when the procedures are required for compliance with the class 1, class 1A, class II, or running brake test provisions of 49 CFR part 238;

(4) Fail to comply with any mandatory directive concerning the movement of a locomotive or train by occupying main track or a segment of main track without proper authority or permission;

(5) Fail to comply with prohibitions against tampering with locomotive mounted safety devices, or knowingly operate or permit to be operated a train with an unauthorized disabled safety device in the controlling locomotive. (See 49 CFR part 218, subpart D, and appendix C to part 218);

(6) Be a Designated Supervisor of Locomotive Engineers, a certified locomotive engineer pilot or an instructor engineer who is monitoring, piloting or instructing a locomotive engineer and fails to take appropriate action to prevent a violation of paragraphs (a)(1) through (a)(5) of this section. Appropriate action does not mean that a supervisor, pilot or instructor must prevent a violation from occurring at all costs; the duty may be met by warning an engineer of a potential or foreseeable violation. A Designated Supervisor of Locomotive Engineers will not be held culpable under this section when this monitoring event is conducted as part of the railroad's operational compliance tests as defined in §§ 217.9 and 240.303 of this chapter.

* * * * *

25. Section 240.307 is amended by revising paragraphs (b)(2), (c) introductory text, (c)(2), (c)(10), (e) and adding paragraphs (i), (j), and (k) to read as follows:

**§ 240.307 Revocation of certification.**

* * * * *

(b) * * *

(2) Prior to or upon suspending the person's certificate, provide notice of the reason for the suspension, the pending revocation, and an opportunity for a hearing before a presiding officer other than the investigating officer. The notice may initially be given either orally or in writing. If given orally, it must be confirmed in writing and the written confirmation must be made promptly. Written confirmation which conforms to the notification provisions of an applicable collective bargaining agreement shall be deemed to satisfy the written confirmation requirements of this section. In the absence of an applicable collective bargaining agreement provision, the written confirmation must be made within 96 hours.

* * * * *

(c) Except as provided for in paragraphs (d), (f), (i) and (j) of this section, a hearing required by this section shall be conducted in accordance with the following procedures:

* * * * *

(2) The hearing shall be conducted by a presiding officer, who can be any qualified person authorized by the railroad other than the investigating officer.

* * * * *

(10) No later than 10 days after the close of the record, a railroad official, other than the investigating officer, shall prepare and sign a written decision in the proceeding.

* * * * *

(e) A hearing required under this section may be consolidated with any disciplinary or other hearing arising from the same facts, but in all instances a railroad official, other than the investigating officer, shall make separate findings as to the revocation required under this section.

* * * * *

(i) A railroad:

(1) Shall not determine that the person failed to meet the qualification requirements of this part and shall not revoke the person's certification as provided for in paragraph (a) of this section if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the locomotive engineer's ability to comply with the railroad operating rule or practice which constitutes a violation under § 240.117(e)(1) through (e)(5) of this part; or

(2) May determine that the person meets the qualification requirements of this part and decide not to revoke the person's certification as provided for in paragraph (a) of this section if sufficient evidence exists to establish that the violation of § 240.117(e)(1) through (e)(5) of this part was of a minimal nature and had no direct or potential effect on rail safety.

(j) The railroad shall place the relevant information in the records maintained in compliance with § 240.309 for Class I (including the National Railroad Passenger Corporation) and Class II railroads, and § 240.15 for Class III railroads if sufficient evidence meeting the criteria provided in paragraph (i) of this section, becomes available either:

(1) Prior to a railroad's action to suspend the certificate as provided for in paragraph (b)(1) of this section; or

(2) Prior to the convening of the hearing provided for in this section;

(k) Provided that the railroad makes a good faith determination after a reasonable inquiry that the course of conduct provided for in paragraph (i) of this section is appropriate, the railroad which does not suspend a locomotive engineer's certification, as provided for in paragraph (a) of this section, is not in violation of paragraph (a) of this section.

26. Section 240.309 is amended by revising paragraphs (e) introductory text, (e)(3), (e)(5), (e)(7), and (e)(8), removing paragraph (e)(10) and redesignating the second set of paragraphs (e) introductory text, (e)(1), (e)(2) and (e)(3) as paragraph (h) introductory text, (h)(1), (h)(2) and (h)(3), and revising them to read as follows:

**§ 240.309 Railroad oversight responsibilities.**

* * * * *

(e) For reporting purposes, information about the nature of detected poor safety conduct shall be capable of segregation for study and evaluation purposes into the following categories:

* * * * *

(3) Incidents involving noncompliance with the procedures for the safe use of train or engine brakes when the procedures are required for compliance with the initial terminal, intermediate terminal, or transfer train and yard test provisions of 49 CFR part 232 or when the procedures are required for compliance with the class 1, class 1A, class II, or running brake test provisions of 49 CFR part 238;

* * * * *

(5) Incidents involving noncompliance with the railroad's operating rules resulting in operation of a locomotive or train past any signal, excluding a hand or a radio signal indication or a switch, that requires a complete stop before passing it;

(6) Incidents involving noncompliance with the provisions of restricted speed, and the operational equivalent thereof, that must be reported under the provisions of part 225 of this chapter;

(7) Incidents involving occupying main track or a segment of main track without proper authority or permission;

(8) Incidents involving the failure to comply with prohibitions against tampering with locomotive mounted safety devices, or knowingly operating or permitting to be operated a train with

an unauthorized or disabled safety device in the controlling locomotive;

* * * * *

(h) For reporting purposes each category of detected poor safety conduct identified in paragraph (d) of this section shall be capable of being annotated to reflect the following:

(1) The total number of incidents in that category;

(2) The number of incidents within that total which reflect incidents requiring an FRA accident/incident report; and

(3) The number of incidents within that total which were detected as a result of a scheduled operational monitoring effort.

27. Section 240.403 is amended by revising paragraph (d) and adding paragraph (e) to read as follows:

**§ 240.403 Petition requirements.**

* * * * *

(d) A petition seeking review of a railroad's decision to revoke certification in accordance with the procedures required by § 240.307 filed with FRA more than 120 days after the date of the railroad's revocation decision will be denied as untimely except that the Locomotive Engineer Review Board for cause shown may extend the petition filing period at any time in its discretion:

(1) Provided the request for extension is filed before the expiration of the period provided in this paragraph (d); or

(2) Provided that the failure to timely file was the result of excusable neglect.

(e) A party aggrieved by a Board decision to deny a petition as untimely may file an appeal with the Administrator in accordance with § 240.411.

28. Section 240.405 is amended by revising paragraphs (a) and (c), and adding paragraph (d)(3) to read as follows:

**§ 240.405 Processing qualification review petitions.**

(a) Each petition shall be acknowledged in writing by FRA. The acknowledgment shall contain the docket number assigned to the petition and a statement of FRA's intention that the Board will render a decision on this petition within 180 days from the date that the railroad's response is received or from the date upon which the railroad's response period has lapsed pursuant to paragraph (c) of this section.

* * * * *

(c) The railroad will be given a period of not to exceed 60 days to submit to FRA any information that the railroad considers pertinent to the petition. Late filings will only be considered to the extent practicable.

(d) * * *

(3) Submit the information in triplicate to the Docket Clerk, Federal Railroad Administration, 400 Seventh Street SW., Washington, DC 20590;

* * * * *

29. Section 240.411 is amended by revising paragraph (e) and adding paragraph (f) to read as follows:

**§ 240.411 Appeals.**

* * * * *

(e) The Administrator may remand, vacate, affirm, reverse, alter or modify the decision of the presiding officer and the Administrator's decision constitutes final agency action except where the terms of the Administrator's decision (for example, remanding a case to the presiding officer) show that the parties' administrative remedies have not been exhausted.

(f) Where a party files an appeal from a Locomotive Engineer Review Board decision pursuant to § 240.403(e), the Administrator may affirm or vacate the Board's decision, and may remand the petition to the Board for further proceedings. An Administrator's decision to affirm the Board's decision constitutes final agency action.

30. Appendix A to part 240 is amended by adding penalty entries for §§ 240.104 and 240.231 and by revising the penalty entries for §§ 240.105, 240.111, 240.117, 240.121, 240.225, 240.229, 240.305, 240.307, 240.309 and footnote number 1 to read as follows:

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**Appendix A to Part 240—Schedule of Civil Penalties [1]**

| Section | Violation | Willful violation |
|---|---|---|
| * * * * * * | | * |
| 240.104—Allowing uncertified person to operate non-traditional locomotives | 5,000 | 10,000 |
| 240.105—Failure to have or execute adequate procedure for selection of supervisors | 2,500 | 5,000 |
| * * * * * * | | * |
| 240.111—Furnishing Motor Vehicle Records: | | |
| (a) Failure to action required to make information available | 1,000 | 2,000 |
| (b) Failure to request: | | |
| (1) local record | 1,000 | 2,000 |
| (2) NDR record | 1,000 | 2,000 |
| (f) Failure to request additional record | 1,000 | 2,000 |
| (g) Failure to notify of absence of license | 750 | 1,500 |
| (h) Failure to submit request in timely manner | 750 | 1,500 |
| (i) Failure to report within 48 hours or railroad taking certification action for not reporting earlier than 48 hours | 1,000 | 2,000 |
| * * * * * * | | * |
| 240.117—Consideration of Operational Rules Compliance Records: | | |
| (a) Failure to have program and procedures | 5,000 | 10,000 |
| (b–j) Failure to have adequate program or procedure | 2,500 | 5,000 |
| * * * * * * | | * |
| 240.121—Failure to have adequate procedure for determining acuity | 2,500 | 5,000 |
| (f) Failure of engineer to notify | 2,500 | 5,000 |
| 240.123—Failure to have: | | |
| (b) Adequate procedures for continuing education | 2,500 | 5,000 |
| (c) adequate procedures for training new engineers | 2,500 | 5,000 |

| Section | Violation | Willful violation |
|---|---|---|
| * * * * * * | | * |
| 240.225—Railroad Relying on Determination of Another: | | |
| (a) Failure to address in program or failure to require newly hired engineer to take entire training program | 5,000 | 7,500 |
| (1) Reliance on expired certification | 2,500 | 5,000 |
| (2) Reliance on wrong class of service | 2,500 | 5,000 |
| (3) Failure to familiarize person with new operational territory | 2,000 | 4,000 |
| (4) Failure to determine knowledge | 2,000 | 4,000 |
| (5) Failure to determine performance skills | 2,000 | 4,000 |
| * * * * * * | | * |
| 240.229—Requirements for Joint Operations Territory: | | |
| (a) Allowing uncertified person to operate | 2,000 | 4,000 |
| (b) Certifying without making determinations or relying on another railroad | 2,500 | 5,000 |
| (c) Failure of. | | |
| (1) controlling railroad certifying without determining certification status, knowledge, skills, or familiarity with physical characteristics | 4,000 | 8,000 |
| (2) employing railroad to determine person's certified and qualified status for controlling railroad | 4,000 | 8,000 |
| (3) person to notify employing railroad of lack of qualifications | 4,000 | 8,000 |
| (d) Failure to provide qualified person | 2,000 | 4,000 |
| 240.231—Persons Qualified on Physical Characteristics in Other Than Joint Operations: | | |
| (a) Person unqualified, no exception applies or railroad does not adequately address in program | 5,000 | 10,000 |
| (b) Failure to have a pilot. | | |
| (1) for engineer who has never been qualified | 4,000 | 8,000 |
| (2) for engineer previously qualified | 2,500 | 5,000 |
| * * * * * * | | * |
| 240.305—Prohibited Conduct: | | |
| (a) Unlawful: | | |
| (1) passing of stop signal | 2,500 | 5,000 |
| (2) control of speed | 2,500 | 5,000 |
| (3) brake tests | 2,500 | 5,000 |
| (4) occupancy of main track | 2,500 | 5,000 |
| (5) tampering on operation with disabled safety device | 2,500 | 5,000 |
| (6) supervisor, pilot, or instructor fails to take appropriate action | 2,500 | 5,000 |
| (b) Failure of engineer to: | | |
| (1) carry certificate | 1,000 | 2,000 |
| (2) display certificate when requested | 1,000 | 2,000 |
| (c) Failure of engineer to notify railroad of limitations or railroad requiring engineer to exceed limitations | 4,000 | 8,000 |
| (d) Failure of engineer to notify railroad of denial or revocation | 4,000 | 8,000 |
| 240.307—Revocation of Certification: | | |
| (a) Failure to withdraw person from service | 2,500 | 5,000 |
| (b) Failure to notify, provide hearing opportunity, or untimely procedures | 2,500 | 5,000 |
| (c–h) Failure of railroad to comply with hearing or waiver procedures | 1,000 | 2,000 |
| (j) Failure of railroad to make record | 2,500 | 5,000 |
| (k) Failure of railroad to conduct reasonable inquiry or make good faith determination | 5,000 | 10,000 |
| 240.309—Oversight Responsibility Report: | | |
| (a) Failure to report or to report on time | 1,000 | 2,000 |
| (b–h) Incomplete or inaccurate report | 2,000 | 4,000 |
| * * * * * * | | * |

[1] A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to $22,000 for any violation where circumstances warrant. See 49 CFR part 209, Appendix A.

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31. Appendix F is added to read as follows:

## Appendix F to Part 240—Medical Standards Guidelines

(1) The purpose of this appendix is to provide greater guidance on the procedures that should be employed in administering the vision and hearing requirements of §§ 240.121 and 240,207.

(2) In determining whether a person has the visual acuity that meets or exceeds the requirements of this part, the following testing protocols are deemed acceptable testing methods for determining whether a person has the ability to recognize and distinguish among the colors used as signals in the railroad industry. The acceptable test methods are shown in the left hand column and the criteria that should be employed to determine whether a person has failed the particular testing protocol are shown in the right hand column.

| Accepted tests | Failure criteria |
|---|---|
| **PSEUDOISOCHROMATIC PLATE TESTS** | |
| American Optical Company 1965 | 5 or more errors on plates 1–15. |
| AOC—Hardy-Rand-Ritter plates—second edition | Any error on plates 1–6 (plates 1–4 are for demonstration—test plate 1 is actually plate 5 in book) |

| Accepted tests | Failure criteria |
|---|---|
| Dvorine—Second edition | 3 or more errors on plates 1–15 |
| Ishihara (14 plate) | 2 or more errors on plates 1–11. |
| Ishihara (16 plate) | 2 or more errors on plates 1–8. |
| Ishihara (24 plate) | 3 or more errors on plates 1–15. |
| Ishihara (38 plate) | 4 or more errors on plates 1–21. |
| Richmond Plates 1983 | 5 or more errors on plates 1–15. |
| **MULTIFUNCTION VISION TESTER** | |
| Keystone Orthoscope | Any error. |
| OPTEC 2000 | Any error. |
| Titmus Vision Tester | Any error. |
| Titmus II Vision Tester | Any error. |

(3) In administering any of these protocols, the person conducting the examination should be aware that railroad signals do not always occur in the same sequence and that ''yellow signals'' do not always appear to be the same. It is not acceptable to use ''yarn'' or other materials to conduct a simple test to determine whether the certification candidate has the requisite vision. No person shall be allowed to wear chromatic lenses during an initial test of the person's color vision; the initial test is one conducted in accordance with one of the accepted tests in the chart and § 240.121(c)(3).

(4) An examinee who fails to meet the criteria in the chart, may be further evaluated as determined by the railroad's medical examiner. Ophthalmologic referral, field testing, or other practical color testing may be utilized depending on the experience of the examinee. The railroad's medical examiner will review all pertinent information and, under some circumstances, may restrict an examinee who does not meet the criteria from operating the train at night, during adverse weather conditions or under other circumstances. The intent of § 240.121(e) is not to provide an examinee with the right to make an infinite number of requests for further evaluation, but to provide an examinee with at least one opportunity to prove that a hearing or vision test failure does not mean the examinee cannot safely operate a locomotive or train. Appropriate further medical evaluation could include providing another approved scientific screening test or a field test. All railroads should retain the discretion to limit the number of retests that an examinee can request but any cap placed on the number of retests should not limit retesting when changed circumstances would make such retesting appropriate. Changed circumstances would most likely occur if the examinee's medical condition has improved in some way or if technology has advanced to the extent that it arguably could compensate for a hearing or vision deficiency.

(5) Engineers who wear contact lenses should have good tolerance to the lenses and should be instructed to have a pair of corrective glasses available when on duty.

Issued in Washington, DC, on September 30, 1999.

**Jolene M. Molitoris,**

*Administrator.*

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