

testing violation rate has remained below .5 percent for the last two years, the Administrator has determined that the minimum random alcohol testing rate will remain at 10 percent of covered railroad employees for the period January 1, 2002 through December 31, 2002.

**DATES:** This notice is effective January 2, 2002.

**FOR FURTHER INFORMATION CONTACT:**

Lamar Allen, Alcohol and Drug Program Manager, Office of Safety Enforcement, Mail Stop 25, Federal Railroad Administration, 1120 Vermont Avenue, NW., Washington, DC 20005, (Telephone: (202) 493-6313).

**SUPPLEMENTARY INFORMATION:**

**Administrator's Determination of 2002 Random Drug and Alcohol Testing Rates**

In a final rule published on December 2, 1994 (59 FR 62218), FRA announced that it will set future minimum random drug and alcohol testing rates according to the rail industry's overall positive rate, which is determined using annual railroad drug and alcohol program data taken from FRA's Management Information System. Based on this data, the Administrator publishes a **Federal Register** notice each year, announcing the minimum random drug and alcohol testing rates for the following year (see 49 CFR 219.602, 219.608).

Under this performance-based system, FRA may lower the minimum random drug testing rate to 25 percent whenever the industry-wide random drug positive rate is less than 1.0 percent for two calendar years while testing at 50 percent. (For both drugs and alcohol, FRA reserves the right to consider other factors, such as the number of positives in its post-accident testing program, before deciding whether to lower annual minimum random testing rates). FRA will return the rate to 50 percent if the industry-wide random drug positive rate is 1.0 percent or higher in any subsequent calendar year.

In 1994, FRA set the 1995 minimum random drug testing rate at 25 percent because 1992 and 1993 industry drug testing data indicated a random drug testing positive rate below 1.0 percent; since then FRA has continued to set the minimum random drug testing rate at 25 percent as the industry positive rate has consistently remained below 1.0 percent. In this notice, FRA announces that the minimum random drug testing rate will remain at 25 percent of covered railroad employees for the period January 1, 2002 through December 31, 2002, since the industry random drug

testing positive rate for 2001 was .20 percent.

FRA implemented a parallel performance-based system for random alcohol testing. Under this system, if the industry-wide violation rate is less than 1.0 percent but greater than .5 percent, the rate will be 25 percent. FRA will raise the rate to 50 percent if the industry-wide violation rate is 1.0 percent or higher in any subsequent calendar year. FRA may lower the minimum random alcohol testing rate to 10 percent whenever the industry-wide violation rate is less than .5 percent for two calendar years while testing at a higher rate. Since the industry-wide violation rate for alcohol has remained below .5 percent for the last two years, FRA is maintaining the minimum random alcohol testing rate at 10 percent of covered railroad employees for the period January 1, 2002 through December 31, 2002.

This notice sets the minimum random testing rates required next year. Railroads remain free, as always, to conduct random testing at higher rates.

Issued in Washington, DC, on December 21, 2001.

**Allan Rutter,**

*Federal Railroad Administrator.*

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**DEPARTMENT OF TRANSPORTATION**

**Federal Railroad Administration**

**49 CFR Part 240**

[FRA Docket No. RSOR-9, Notice 13]

**RIN 2130-AA74**

**Qualification and Certification of Locomotive Engineers; and Other Proceedings**

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

**ACTION:** Interim final rule.

**SUMMARY:** This interim final rule amends the definition of *filing* as used in the Federal Railroad Administration's rule on engineer certification in order to address recent, unavoidable postal delays. Due to terrorism, the Department of Transportation has implemented additional security procedures regarding mail delivery. The purpose of this interim final rule is to temporarily amend the regulation so that parties in adjudicatory proceedings pursuant to subpart E, Dispute Resolution Procedures of part 240 will not be prejudiced by circumstances beyond their control.

**DATES:** (1) *Effective Date:* This regulation is effective January 2, 2002.

(2) Written comments concerning this rule must be filed no later than March 4, 2002. Comments received after that date will be considered to the extent practicable.

**ADDRESSES:** Comments should be submitted to the Docket Clerk, Department of Transportation Central Docket Management System (DMS), Nassif Building, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590 or, in accordance with the electronic standards and requirements, at <http://dms.dot.gov>.

**FOR FURTHER INFORMATION CONTACT:**

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).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

In response to acts of terrorism beginning on September 11, 2001, the timely delivery of mail by the United States Postal Service (USPS) and private mail services were negatively impacted by the temporary closing of airline shipping facilities. About one month later, additional delays were caused by more acts of terrorism. On Tuesday, October 16, USPS mail delivery to the Department of Transportation's (DOT) headquarters buildings was halted and did not resume until November 2. DOT's mail was halted in order to take appropriate safety measures concerning the threat of bio-terrorism through mail handling and delivery. The safety of DOT employees and the public clearly override the short-term concern of timely mail delivery. Although it was necessary to establish new security systems, the delay in processing mail may have had unintended consequences.

As envisioned in a notice posted on DMS's website, FRA will take these mail delays into account with respect to rulemaking documents that have comment periods that may have closed before regular mail delivery resumed. FRA will do everything it can to ensure that comments that would otherwise have been received before the close of the comment period are considered. For example, FRA generally has authority to consider late-filed comments and will do so to the extent that it can; FRA will also take note of the postmark date for late-filed comments.

In contrast, federal agencies do not have authority to consider late-filed petitions in adjudicatory proceedings where the filing date requirements have

been established by regulation. This is the situation FRA faces in trying to fairly consider documents filed by parties that (1) have been harmed or delayed by the recent mail disruptions or (2) could potentially be harmed or delayed by these disruptions.

The source of FRA's timeliness issue with regard to engineer certification proceedings is found in the definition of *filing*. That definition is applicable to the adjudicatory proceedings provided for in Subpart E, Dispute Resolution Procedures of the Locomotive Engineer Certification Standards, 49 CFR Part 240. According to section 240.7, "[filing means that a document to be filed under this part shall be deemed filed only upon receipt by the Docket Clerk." As a result of this definition and the mail delivery delays beginning September 11, it is possible that a party could have attempted to file a document by mail, the document could have been received by DOT, and yet the document may not have been date stamped as received until days or weeks later. In order to prevent any unfair and unintended consequences, FRA is relaxing this filing requirement to permit the date mailing was completed (i.e., the postmark date unless the filer proves otherwise) to take the place of the receipt date during this unique state of alert.

This change in the filing requirements will ensure that documents mailed in a timely fashion will not be considered late if received after the due date by FRA's Docket Clerk pursuant to sections 240.403 and 240.405, or by DMS's Docket Clerk pursuant to sections 240.407 and 240.409, and by FRA's Administrator pursuant to section 240.411. The amended rule reflects this policy by adding the phrase "or if sent by mail on or after September 4, 2001, the date mailing was completed" to the definition. This change covers items postmarked on or after September 4, 2001 by the USPS or sent by other mail services on or after that date. By including all items sent by that date, FRA hopes to effectively include all documents that parties attempted to timely file under the original filing rule without being either under-inclusive or over-inclusive.

In addition, filers are encouraged to use the electronic submission system on the dockets Web page (<http://dms.dot.gov>) by clicking on "ES Submit" and following the online instructions. This option is available for filing hearing requests and documents pursuant to sections 240.407 and 240.409. A party filing electronically should note that the rule has not been amended to accept late electronic

filings. Electronic filings that are received after the specified dockets facility hours shall be deemed to be constructively received on the next dockets facility business day. See 14 CFR 302.3.

Furthermore, FRA rewrote the remaining part of the definition to more clearly state what is meant by *filing* without using the defined word itself in the definition. Thus, "[filing means that a document to be filed under this part shall be deemed filed upon receipt by the Docket Clerk" has been amended to read that "[file, filed and filing mean submission of a document under this part on the date when the Docket Clerk receives it \* \* \*". Both phrases have the same meaning. In addition, the rule was amended to reflect that all of the tenses of "file" are covered by the definition.

## II. Regulatory Evaluation

### A. Public Proceedings

The Administrative Procedure Act, specifically 5 U.S.C. 553(b)(3)(B), provides that a notice and comment period is not required when "the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." Accordingly, this amendment to part 240 is issued without notice and comment. FRA has chosen this course of action because notice and comment under these circumstances would be impracticable, unnecessary, and contrary to the public interest. The implementation of new security systems vis-a-vis mail handling in response to national security interests requires emergency action. If FRA did not amend this definition, it is foreseeable that parties relying on USPS or other mail services would be prejudiced. FRA is making this rule effective immediately for the same reasons it is dispensing with the need for prior comment.

Despite the need for prompt action, FRA is soliciting comments on this rule and will consider those comments in determining whether there is a need to take further action to improve these regulations. If comments persuade FRA that additional amendment to the definition is necessary, it will address them in a subsequent notice. Written comments must be submitted no later than 60 days after publication in the **Federal Register**, but late comments will be considered to the extent practicable.

### B. Regulatory Impact

E.O. 12866 and DOT Regulatory Policies and Procedures

This interim final rule has been evaluated in accordance with existing regulatory policies and is considered to be nonsignificant under Executive Order 12866 and is not significant under the DOT policies and procedures (44 FR 11034; February 26, 1979).

### C. Regulatory Flexibility Act

FRA certifies that this rule will not have a significant economic impact on a substantial number of small entities. Although a substantial number of small railroads are subject to this regulation, the economic impact of this amendment to the rule will not be significant since it only modifies a definition involved in dispute resolution proceedings conducted by FRA. The provisions do not make any changes to the way that a railroad would conduct its own proceedings pursuant to this part. This technical change should prevent injustice that would otherwise result from the actions of the DOT to ensure the safety of mail it receives.

This interim final rule will have no direct impact on small units of government, businesses, or other organizations. State rail agencies are not required to participate in the portion of part 240 that includes the definition.

### D. Paperwork Reduction Act

There are no new collection of information requirements contained in this rule and, in accordance with the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*, the record keeping and reporting requirements already contained in this rule have been approved by the Office of Management and Budget. The OMB approval number was published in a previous amendment to part 240 and can be found in section 240.13. The information collection requirements of this rule became effective on June 19, 1991, and were later amended on April 9, 1993.

### E. 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.

*F. Federalism Implications*

FRA believes that 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 compliance costs on State and local governments.

**List of Subjects in 49 CFR Part 240**

Administrative practice and procedure, 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 continues to read as follows:

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

\* \* \* \* \*

■ 2. Section 240.7 is amended by removing the definition of *filing* and adding the following definition in alphabetical order:

**§ 240.7 Definitions.**

As used in this part—

\* \* \* \* \*

*File, filed and filing* mean submission of a document under this part on the date when the Docket Clerk receives it, or if sent by mail on or after September 4, 2001, the date mailing was completed.

\* \* \* \* \*

Issued in Washington, DC, on December 21, 2001.

**Allan Rutter,**

*Administrator.*

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