DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Parts 219, 240 and 242

[Docket No. FRA–2018–0053, Notice No. 2]

RIN 2130–AC40

Qualification and Certification of Locomotive Engineers; Miscellaneous Revisions

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final rule; technical amendment.

SUMMARY: FRA is revising its regulation governing the qualification and certification of locomotive engineers to make it consistent with its regulation for the qualification and certification of conductors. The changes include: Amending the program submission process; handling engineer and conductor petitions for review with a single FRA review board (Operating Crew Review Board or OCRB); and revising the filing requirements for petitions to the OCRB. To ensure consistency throughout its regulations, FRA is also making conforming amendments to its regulations governing the control of alcohol and drug use, and the qualification and certification of conductors. The changes would reduce regulatory burdens on the railroad industry while maintaining the existing level of safety.

DATES: This regulation is effective January 14, 2021.

ADDRESSES: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* at any time.

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I. Executive Summary

On May 9, 2019, FRA issued a notice of proposed rulemaking (NPRM) to amend title 49 Code of Federal Regulations (CFR) part 240, Qualification and Certification of Locomotive Engineers (part 240).[1] In response to that NPRM, FRA received three written comments.

This final rule responds to those comments and amends part 240 by: Making part 240 more consistent with the language in 49 CFR part 242, Qualification and Certification of Conductors (part 242); creating two provisions under which railroads may issue temporary locomotive engineer certifications; merging FRA's locomotive engineer and conductor review boards; adopting aspects of part 242 for locomotive engineer certification; providing labor representatives with the ability to provide input on a railroad's part 240 program; and allowing for and encouraging the use of electronic document submission of a railroad's part 240 program. This final rule also makes technical amendments to part 242 to: (1) Make the requirement for calibration of audiometers used during hearing tests for conductors the same as the requirement in part 240 for locomotive engineers; and (2) conform the definition of ''main track'' in part 242 to the definition of ''main track'' in part 240.

Additionally, this final rule makes conforming amendments to title 49 CFR part 219, Control of Alcohol and Drug Use (part 219) to update two cross-references to part 240. Updating these references is necessary to ensure consistency between part 219 and part 240, as amended.

The final rule will create new costs. First, each locomotive engineer certification manager will need to review the amendments made to part 240 to ensure compliance is maintained. Second, amendments to part 240 will require each railroad to provide a copy of its part 240 plan to the president of each labor organization whenever the railroad files a submission, resubmission, or makes a material modification to its plan. Third, a railroad will need to maintain service records for certified locomotive engineers who are not performing service that requires locomotive engineer certification. For the 20-year period of analysis, the cost of the final rule will be $233,779 (undiscounted), $171,764 (PV 7%), and $200,775 (PV 3%).

The final rule will also create cost savings. First, adding clarity in part 240 and conforming language in part 240 to part 242 will reduce stakeholder burden related to review and compliance with part 240. Second, it will reduce the burden on a railroad when providing another railroad with information about a former employee's prior service records. Third, it will update the program submission process to allow for electronic document submission, which will reduce stakeholder paperwork and submission costs related to part 240 program submissions and locomotive engineer certification petitions. Fourth, it will remove the requirement for railroads to obtain a waiver from the annual testing requirements for certified locomotive engineers who are not performing service that requires certification. For the 20-year period of analysis, the cost savings of the final rule will be $12.3 million (undiscounted), $6.9 million (PV 7%), and $9.4 million (PV 3%).

As shown in Table ES.1, the regulatory evaluation quantifies the economic impact of the final rule in terms of cost savings and new costs accruing to stakeholders. For the 20-year period of analysis, the final rule will result in a net cost savings of $12.0 million (undiscounted), $6.8 million (PV 7%), and $9.2 million (PV 3%). This final rule is an Executive Order (E.O.) 13771 deregulatory action. Details on the estimated costs of this final rule can be found in the rule's economic analysis.

[1] 84 FR 20472 (May 9, 2019).

TABLE ES.1—FINAL RULE: NEW COSTS, COST SAVINGS, AND NET COST SAVINGS; 20-YEAR PERIOD

Cost of proposed rule	Undiscounted	Present value 7%	Annualized 7%	Present value 3%	Annualized 3%
New Costs:.					
Review amendments	$118,383	$110,638	$10,443	$114,935	$7,725
Provide copy of part 240 plan to labor organization	2,263	1,199	113	1,683	5,657
Maintain service records	113,133	59,927	5,657	84,157	5,657
Total new costs	233,779	171,764	16,213	200,775	19,039
Cost Savings					
Conforming part 240 to part 242	11,838,340	6,709,732	633,351	9,070,417	609,675
Former employee paperwork	113,133	59,927	5,657	84,157	5,657
Petition submission process	109,620	58,066	5,481	81,543	5,481
Plan submission process	6,800	3,602	340	5,058	340
Government cost savings	92,448	48,970	4,622	60,933	4,096
Removing waiver requirement	113,133	59,927	5,657	84,157	5,657
Total cost savings	12,273,475	6,940,223	655,108	9,386,266	630,904
Net Cost Savings	12,039,696	6,768,459	638,895	9,185,491	611,866

The final rule will create benefits. First, the final rule will amend the part 240 program submission process to require railroads to solicit labor input, providing for fully informed decisions by railroads. Second, it affords railroads additional time and flexibility to comply with some regulatory requirements. Third, it creates certain provisions that allow for temporary locomotive engineer certificates. Fourth, electronic filing will make information more accessible to interested stakeholders and the public. Because FRA lacks sufficient information related to these four benefits, this analysis could not accurately quantify these benefits. Therefore, the rule's economic analysis qualitatively explains benefits.

The final rule will also reduce Governmental administrative costs, including mailing, filing, and storing costs related to amendments to part 240, by allowing the Government and stakeholders to transmit and store documents electronically.

II. Discussion of General Comments and Conclusions

FRA received three written comments in response to the NPRM. The Association of American Railroads and the American Short Line and Regional Railroad Association submitted one set of joint comments (collectively referred to as ''Railroad Commenters''). A second set of joint comments was submitted by a group of seven labor organizations (collectively referred to as ''Labor Commenters'').[2] The American Association of Nurse Practitioners submitted the third comment.

Some of the specific comments are discussed in the Section-by-Section Analysis or in the Regulatory Impact and Notices portion of this final rule directly with the provisions and statements to which they specifically relate. Other comments apply more generally to the final rule as a whole, and FRA is discussing them here. Please note that the order in which the comments are discussed in this document, whether by issue or by commenter, is not intended to reflect the significance of the comment raised or the standing of the commenter.

A. Remote Control Operators and Operations

In the NPRM, FRA proposed several changes to part 240 to clarify the locomotive engineer certification requirements for remote control operators, including defining ''remote control operator (RCO),'' ''operator control unit (OCU),'' and ''remote control locomotive (RCL).''

FRA received two comments that opposed FRA's changes related to certification of RCOs. Labor Commenters asserted that FRA should not address RCO issues in this rulemaking because the proposed changes would not be conforming changes to part 242 and would thus be beyond the scope of this rulemaking. Labor Commenters also recommended FRA address remote control safety and operational issues to a much greater degree than proposed. Railroad Commenters asserted that the RCO proposed changes are unnecessary, create confusion, and potentially create new administrative burdens.

FRA's Response

FRA was persuaded by the comments that the proposed changes regarding RCOs were not strictly conforming changes and that the proposed changes had the potential to create unforeseen problems. Considering that the regulated community understands how to certify RCOs under the current regulatory requirements, and the intent of the proposed changes was to ''catch up [with] industry practice'' in implementing the existing regulations,[3] FRA is not adopting the proposed clarifying requirements regarding remote control operations in this final rule.

B. Defining Main Track

In the NPRM, FRA proposed to revise part 240's definition of ''main track'' to be the same as the definition in part 242 by revising the existing definition to include a reference to positive train control (PTC) as a method of operation that would make a track a ''main track.'' Railroad Commenters noted that they opposed making this conforming change because PTC is not a method of operation.

FRA's Response

In considering these comments, FRA recognizes that it did not explain the inclusion of PTC as a method of operation in the part 242 rulemaking notices. Upon further review, FRA agrees with the comment that PTC is not a method of operation but rather is a technology that helps enforce compliance with a railroad's method(s)

[2] The labor organizations that submitted the Labor Comments are: The American Train Dispatchers Association; the Brotherhood of Locomotive Engineers and Trainmen; the Brotherhood of Maintenance of Way Employes Division; the Brotherhood of Railroad Signalmen; the Brotherhood Railway Carmen Division; the International Association of Sheet Metal, Air, Rail and Transportation Workers—Transportation Division; and the National Conference of Firemen & Oilers District, Local 32BJ/SEIU.

[3] 84 FR 20479.

governing train operations. For this reason, the final rule does not make any changes to the definition of main track in part 240.

C. Newly Hired Employee

In the NPRM, FRA proposed to delete the definition for the term ''newly hired employee'' because the term is not used in part 240. Labor Commenters noted that although the term ''newly hired employee'' is not used in part 240, the terms ''newly hired engineer'' and ''newly hired conductor'' are used in parts 240 and 242, respectively. Labor Commenters explain that these existing terms ''establish the benchmark by which a railroad may rely upon qualification determinations made by a prior railroad employer of a candidate for certification.'' Accordingly, Labor Commenters suggest that instead of deleting the existing definition of ''newly hired employee,'' FRA change the term to ''newly hired'' and integrate it into reporting and accident analysis requirements in a future rulemaking.

FRA's Response

FRA reviewed the regulatory history to determine the origins of the definition of ''newly hired employee'' and whether deleting the term as proposed would be the correct approach. FRA notes that the term is not used or defined in part 242. FRA found that its original 1989 proposal for part 240 contained a section titled ''Content and duration of student training programs.'' [4] As proposed in the 1989 NPRM, § 240.63 contained a requirement for training applicable only to ''newly hired employees.'' [5] However, in the final rule implementing the 1989 NPRM, FRA explained that a premise of FRA's original proposal was that every engineer would be trained, tested, and evaluated using the same criteria so that the regulatory requirements would resemble a motor vehicle licensing scheme employed by State governments for issuance of commercial truck driver licenses.[6] The final rule implementing this initial proposal, however, took a more individualized, railroad-centric approach that allowed each railroad to formulate a program for setting qualification standards and submitting that program to FRA for approval. As such, the final rule did not adopt proposed § 240.63 or any similar requirement. FRA, however, erroneously adopted the unnecessary definition of ''newly hired employee'' into the 1991 final rule implementing the original 1989 proposal. Thus, the definition is a legacy term left over from the original 1989 NPRM and is not applicable to part 240 as it currently exists.

FRA recognizes that, as Labor Commenters note, existing § 240.225(a) refers to a ''newly hired engineer'' and existing § 242.215 refers to a ''newly hired conductor.'' Those undefined terms, however, are not equivalent to the term ''newly hired employee'' (*e.g.,* a newly hired engineer must be a previously certified locomotive engineer, while a newly hired employee could be an individual who has no prior railroad experience or has less than one year of railroad transportation service). Accordingly, in this final rule, FRA is deleting the existing definition of ''newly hired employee'' from part 240 as proposed.

D. Preventing Public Disclosure of Confidential Information

In the NPRM, FRA proposed to have parties submit part 240 petitions for FRA review of railroads' certification decisions (§ 240.403) through DOT's public docket website at *www.regulations.gov.* Labor Commenters ask that FRA revise its proposal to include procedures for a party to request that certain information filed in these proceedings be protected from public disclosure (*e.g.,* personally identifiable information and medical records). Labor Commenters note that locomotive engineers typically file petitions under § 240.403 on their own behalf or petitions are filed by local union representatives, not an attorney. Labor Commenters cite to the Federal Rules of Civil Procedure as an example of how this information could be protected.

FRA's Response

Although FRA recognizes the Labor Commenters' concern about the importance of protecting personal information from public disclosure, FRA notes that the Agency's regulations already include procedures for any person submitting documents or information to FRA to request confidential treatment of that information.[7] Accordingly, FRA finds it is unnecessary to include any additional procedures in part 240. FRA notes that the existing filing procedures have been utilized in both parts 240 and 242 for years, and FRA is unaware of any concern raised that it failed to provide confidential treatment of information upon request in any such filing under part 240 or 242. The changes FRA proposed to § 240.403(b)(2) and that are being adopted in this final rule are limited to moving the Agency's docket management procedures from the old-fashioned, paper dockets kept at FRA's headquarters to modern, electronic dockets that are web-based.

FRA's changes to § 240.403 will not only align it with the corresponding procedures in part 242 (§ 242.505) but also with the administrative hearing filing procedures in both parts 240 and 242 (§§ 240.407 and 242.507). Those filing procedures have been in place for many years and FRA believes the procedures are sufficient to enable filers to request protection of personally identifiable information, including medical records, with minimal burden.

In proceedings under § 240.403, FRA uses the Federal Government's on-line docket system at *www.regulations.gov.* That docket system maintains a privacy and security notice on its website that warns users that the material and personally identifiable information filed in a document may be publicly disclosed in a docket or on the internet. Under the existing procedures of § 240.403 and with FRA's amendments to that section, a party must decide for itself if there is personally identifiable information or other types of information that should be kept confidential, and it is that party's duty to request confidentiality. FRA notes that social security numbers or employee identification numbers are not generally necessary in any filings under § 240.403. Accordingly, FRA encourages parties to redact those numbers from any documents submitted to a docket.

As noted, FRA's procedures for requesting confidential treatment of any document or portion of any document are in 49 CFR 209.11. Parties should follow the procedures specified in that regulation when requesting that FRA treat information or documents submitted as confidential information. In general, when requesting confidential treatment of information in a filing, a party should include in its filing a description of each item redacted or not disclosed and the rationale for each non-disclosure (*e.g.,* contains medical information). FRA will then contact the party to obtain any information indicated as redacted if FRA believes it is relevant to issuance of a decision. Questions regarding confidential treatment can be directed to FRA's Office of the Chief Counsel.

E. General Docketing and Service Concerns

Labor Commenters raised several general docketing and service concerns.

[4] 54 FR 50890 (Dec. 11, 1989) (*see* proposed 49 CFR 240.63).

[5] 54 FR at 50930.

[6] 56 FR 28228, 28230 (June 19, 1991).

[7] 49 CFR 209.11.

For instance, the commenters indicate that some labor representatives and members have experienced problems associated with uploading large files or multiple files to *Regulations.gov*. Similarly, the commenters state that some labor representatives have experienced difficulty emailing large files to parties (including FRA) as an alternative form of service from mailing copies of the documents. The labor organizations also seek FRA's answer to the question of how their members and labor representatives are to determine that service/delivery of emails is completed.

FRA's Response

Just like petitions submitted in conductor certification cases, petitions to the OCRB for the review of a railroad's decision to deny, recertify, or revoke a locomotive engineer's certification may be hand delivered or mailed, and may additionally be submitted by fax or electronically, consistent with the standards and requirements established by the Federal Docket Management System and posted on the *Regulations.gov* website.

The process for filing a petition to the OCRB requires filing in a docket that does not yet exist as the petition itself serves as a request to open a new non-rulemaking docket. To open a new non-rulemaking docket, a filer first electronically submits a document to a pre-existing docket called a ''shell docket.'' This is accomplished by going to *Regulations.gov* and entering FRA's shell docket number ''FRA–2007–0003'' in the search box. This will open a window for the shell docket and allow a filer to click on ''Comment Now.'' The filer will then enter the required information and upload one or more files. While entering something in the comment box is required, FRA recommends that filers only use the comments box to list the documents they are filing, as the documents they upload will contain their argument(s) and supporting documentation. After entering the information and uploading any documents, there is an opportunity to preview the information submitted and to receive a receipt. Whether submitting a petition by mail, electronically, or by other method, FRA recommends that the party retain a receipt or other proof of the petition's filing date. Further, once a docket is created for a petition, FRA recommends the filing party return to *Regulations.gov* and sign up for email alerts to keep updated on any changes or additions that occur in the docket folder. Typically, the filing party will know that FRA received the submission when FRA sends an acknowledgment letter notifying the party of the petition's assigned docket number. If the petition is deficient because it does not meet the minimum requirements or arrangements need to be made to handle confidential information, FRA will contact the filing party and provide further instructions before issuing an acknowledgment letter with the docket number.

Labor Commenters expressed concern that some labor representatives and members have experienced problems uploading large files or multiple files to *Regulations.gov*. FRA is aware that *Regulations.gov* has imposed a size limit on uploaded files. *Regulations.gov* has a ''help'' tab, and the user can choose ''FAQs'' in the drop-down menu. One of the FAQs asks ''how many files can I upload to the comment form'' and the answer provided is ''up to 20 files, but each file cannot exceed 10MB.'' The answer also clarifies that valid file types include: .bmp, .docx, .gif, .jpeg, .jpg, .pdf, .png, .pptx, .rtf, .sgml, .tif, .tiff, .txt, .wpd, .xlsx, and .xml. Parties have several options for overcoming this size limitation. For example, in some cases it is possible for a filer to split the files and then upload them onto *Regulations.gov*. Another option would be to file as many documents as possible through uploading at FRA's shell docket on *Regulations.gov*, and leave a comment in the comment box describing the large files that cannot be uploaded and how the filing party intends to submit those files. For example, a comment could be entered stating that a large video file will be provided to FRA on a memory storage device sent through the mail, such as a USB memory stick. Comments can also request FRA contact the commenter to discuss other arrangements, such as emailing the file or providing FRA with a way to download the document from a cloud-based file hosting service such as Dropbox. Although FRA can currently receive CD–ROM and DVD–ROM disks, the readers for these disks are becoming antiquated and therefore more difficult for FRA to access reliably. Documents that are not in an acceptable format, including files on proprietary software that FRA does not license to use, will need conversion to an acceptable format or other arrangements will be required that will allow FRA to review the files. If a file cannot be placed in a docket or viewed by FRA, the file cannot be made part of the administrative record, and therefore cannot be considered by FRA in reviewing the petition.

Similarly, Labor Commenters state that some labor representatives have experienced difficulty emailing large files to parties or FRA as an alternative form of service from mailing copies of the documents. Serving documents under FRA's administrative procedures should be no different than serving documents on parties in Federal court litigation. That is why the definition of the term ''serve or service'' in part 240 states that the term has the same meaning given in Rule 5 of the Federal Rules of Civil Procedure. Service of documents on another party is the responsibility of the party performing service. If files are too large to email, the party performing service must make arrangements to perform the service by mail or other mutually agreed upon method with the party to be served. A party performing service by email has a duty to choose an option for service where it receives a receipt automatically or it can ask the receiving party to reply that receipt was completed satisfactorily. Without proof of completeness, service cannot be proven, and is thus presumably incomplete. Any questions regarding files, filing, and service should be directed to FRA's Office of the Chief Counsel.

F. Issues Beyond the Scope of This Rulemaking

In the NPRM, FRA explained that issues that go beyond conforming FRA's locomotive engineer regulation with FRA's conductor certification regulation and updating and clarifying the existing requirements for locomotive engineer certification, are best saved for a separate, future rulemaking.[8] In response to the NPRM, FRA received several comments which FRA has determined go beyond the scope of this rulemaking and are best saved for such a separate, future rulemaking.

The American Association of Nurse Practitioners (AANP) commented that the definition of medical examiners should include nurse practitioners. AANP commented that nurse practitioners are authorized to become certified medical examiners under the Federal Motor Carrier Safety Administration's (FMCSA) regulations and the National Transportation Safety Board (NTSB) includes nurse practitioners in the category of medical professionals who should be eligible for training and certification as transportation medical examiners for medical fitness for duty tests. FRA finds that the issue of whether nurse practitioners should be included in the definition of medical examiners is best saved for a separate, future rulemaking, as the issue is complex, and FRA expects additional commenters would

[8] 84 FR at 20473.

have submitted comments if FRA had provided notice of this issue in the NPRM. In addition, FRA notes that if a nurse practitioner is a licensed or certified technician, the nurse practitioner is permitted to perform the vision and hearing acuity examinations required in parts 240 and 242. However, both parts 240 and 242 require a medical examiner, who is defined as a person licensed as a doctor of medicine or doctor of osteopathy, to conduct any medical evaluation to determine if the locomotive engineer or conductor candidate can operate safely in the event the candidate fails the vision or hearing acuity examination. Although AANP's comment indicates that nurse practitioners can be trained and certified to perform those type of medical evaluations, beyond the standard testing, AANP did not address the fact that FMCSA has medical examiner certification requirements in its regulations, while FRA does not.[9] Accordingly, this issue is not addressed in this final rule.

Railroad Commenters raised several issues that are beyond the scope of this rulemaking and, as such, FRA is not addressing them in this final rule. For instance, Railroad Commenters advocate that FRA should amend its approach regarding requirements for joint operations territory, even though FRA explained in the NPRM that it was not proposing any changes to the requirements in § 240.229 because doing so would not conform part 240 to part 242.

Labor Commenters also raised several issues that are best saved for a separate, future rulemaking and thus FRA is not addressing them in this final rule. For instance, Labor Commenters advocated for amending § 240.129, so that instead of requiring that a certified engineer be given an operational monitoring observation and unannounced compliance test within 30 days of return to service following a period of not performing a service that requires engineer certification, the certified engineer be provided 30 working trips or tours of duty in engineer service following a return before such testing. Labor Commenters also suggested that FRA amend its denial and revocation procedures, §§ 240.219(c) and 240.307(c)(11), to require each railroad to provide more specificity in its decision as to the citation allegedly violated, and notify the person in writing of the right to request FRA review and the applicable time limits. Since these proposals go beyond the scope of this rulemaking, which FRA intended merely to conform part 240 to part 242 and clarify part 240's existing requirements, FRA declines to address them in this final rule. Labor Commenters also included a history and analysis of international legal issues that go beyond the scope of this rulemaking.

G. Minor Revisions Identified

With this final rule, FRA is making many minor revisions that were proposed in the NPRM to fix grammatical errors, typographical errors, reference errors, and superfluous language and citations. These revisions include the following sections: 240.11(d); 240.207(b); 240.209(b) and (c); 240.211(b); 240.215(e); 240.217(a) and (d); 240.225(b); 240.305(b)(2); 240.307(g) and (i); 240.309(b)(4) and (e)(1), (2), (8), and (9); and appendix D. FRA identified these amendments as proposed in the NPRM and received no comments in response. Accordingly, FRA is adopting the proposed revisions without further discussion in this final rule.

H. Rejecting the Addition of Implementation Dates

In the NPRM, FRA raised the issue of whether the final rule should include any implementation dates beyond the final rule's effective date. For example, FRA asked for comments considering whether the NPRM adequately addressed the time necessary for each railroad to incorporate into its part 240 program the changes required in this rulemaking. Labor Commenters suggested that FRA use a two-tiered implementation approach that would provide Class I, intercity passenger, and commuter railroads with six months from the date of publication to amend part 240 programs and provide all other railroads subject to part 240 one year. Railroad Commenters did not comment on this issue. After considering the comments and the revisions to part 240 being adopted in this final rule, FRA has concluded that the revisions will not, by themselves, require material modifications to a railroad's part 240 certification program. Thus, no railroad will be obligated to file its complete part 240 program with FRA after only making any necessary modifications resulting from this final rule. Further, as the Railroad Commenters did not request an implementation schedule, and the regulatory revisions will not result in material modifications to a railroad's program, it is unnecessary to create an implementation schedule.

Similarly, in the NPRM, FRA proposed amending § 240.403 to shorten the time limit for filing a denial of certification petition with the OCRB from 180 days to 120 days, and asked whether FRA should delay implementation of that shortened time limit. FRA did not receive any comments in response to this question. Accordingly, FRA has concluded that delaying implementation of that shortened time period is not necessary. Consequently, if a railroad's denial decision is on or after the effective date of this final rule, any petition in response to that denial decision must be filed with FRA within 120 days.

III. Section-by-Section Analysis

This section responds to public comments and identifies any changes made from the provisions as proposed in the NPRM. Provisions that received no comment, and are otherwise being finalized as proposed, are not discussed again here.[10]

Part 219

While drafting the final rule, FRA identified two cross-references in part 219 that required updating to reflect the part 240 amendments. As discussed below, the final rule revises these cross-references in §§ 219.25 and 219.1003 to ensure they conform with part 240, as amended. Although the NPRM did not specifically propose these revisions, they are both non-substantive in nature and within the scope of the rulemaking because they merely conform part 219 with part 240 as amended by the final rule.

Section 219.25 Previous Employer Drug and Alcohol Checks

Paragraph (b) of this section contains a cross-reference to former § 240.119(c), which this final rule is redesignating as § 240.119(e). FRA is therefore revising paragraph (b) to update the cross-reference from § 240.119(c) to § 240.119(e). This section and the revised cross-reference refer to the requirement for a railroad that is considering initially certifying or recertifying a locomotive engineer to review the person's records from the previous 60 consecutive months and consider any Federal alcohol and drug violations.

Section 219.1003 Referral Program Conditions

Paragraph (j) of this section contains a cross-reference to former § 240.119(e), which this final rule is redesignating as § 240.119(g). FRA is therefore revising paragraph (j) to update the cross-reference from § 240.119(e) to § 240.119(g). This section and the revised cross-reference refer to the

[9] 49 CFR 390.103 through 390.115.

[10] *See* 84 FR at 20473–95.

various referral programs allowed in part 219 and explains when confidentiality is waived.

Part 240

Section 240.7 Definitions

FRA is amending this section by: (1) Adding definitions for ''conductor,'' ''drug and alcohol counselor,'' ''ineligible or ineligibility,'' ''on-the-job training (OJT),'' ''physical characteristics,'' ''plant railroad,'' ''Substance Abuse Professional,'' ''territorial qualifications,'' and ''tourist, scenic, historic, or excursion operations that are not part of the general system of transportation''; (2) revising the definitions of ''file, filed and filing,'' ''FRA Representative,'' ''instructor engineer,'' ''medical examiner,'' ''qualified,'' ''railroad rolling stock,'' and ''substance abuse disorder''; (3) removing the definitions for ''EAP Counselor'' and ''newly hired employee''; and (4) replacing the defined term ''service'' with the term ''serve or service.'' These amendments will make the definitions in part 240 consistent with the definitions in part 242 and, rather than republish the analysis provided for those definitions, FRA references the analysis as proposed in the NPRM.[11]

Instructor Engineer

In the NPRM, FRA proposed to revise the definition of ''instructor engineer'' to make it as similar as possible to the definition of ''qualified instructor'' in part 242, by: (1) Establishing a role for employee representative participation; and (2) establishing methods for identifying instructors through railroad and employee representative coordination, as well as by the railroad unilaterally.

Although FRA received comments on the proposed changes to this definition, FRA is adopting the revised definition as proposed. Thus, the analysis provided in the NPRM is applicable. The following is a summary of the comments received and FRA's responses.

Railroad Commenters reiterated concerns raised by at least one Railroad Safety Advisory Committee (RSAC) Conductor Certification Working Group (RSAC Working Group or Working Group)[12] member that FRA addressed in the NPRM.[13] Railroad Commenters objected to the proposed requirement that, for each railroad that has designated employee representation, if the railroad seeks to designate a person as an instructor engineer when the designated employee representative declines to provide concurrence, the railroad would be required to select only a person who has a minimum of 12 months of service working in the class of service for which the person is designated to instruct. FRA disagrees with the Railroad Commenters that FRA did not provide a basis for justifying this proposed requirement. FRA's view is based on the understanding that an instructor is typically not a railroad officer or supervisor, but instead a person with current, relevant experience who can be counted on to impart knowledge and demonstrate safety-related tasks through OJT training.[14] FRA views instructor engineers as mentors that would not be directly testing or making certification decisions. When the conductor certification rule was first proposed in 2010, FRA explained that the purpose of the additional requirements was to allow employees, through their representatives, to have input in the selection of instructors who might be viewed as inexperienced. FRA's position was that if the railroad selected a person to instruct, but the person had less than 12 months of service working in the class of service, it is fair to presume the person might lack the experience necessary to instruct.[15] The conductor rule does not absolutely prohibit the railroad from selecting a person that lacks the 12-month experience requirement, but instead requires the railroad to work with the employees' representative(s) in the instructor selection process, unless the employees lack such representation. Considering the mentor relationship, if a location lacks experienced engineers and the railroad's employees are represented, the designated employee representative would have an interest in selecting those engineers who would be in the best position to help fellow colleagues get the proper instruction needed to obtain or retain certification.

Also in response to AAR's and ASLRRA's comment, FRA believes it is helpful to recall that, in the conductor rule, the minimum of 12-months' service working as a train service employee may be at any time during that person's career.[16] Likewise, in the engineer context, FRA reads the 12-month experience requirement in the class of service for which the person will instruct to pertain also to the collective number of months over the person's career, and not just the previous 12 months.

Medical Examiner

FRA is revising the definition of ''medical examiner'' to be the same as the definition of ''medical examiner'' in part 242 by removing the portion of the definition stating that the medical examiner owes ''a duty to the railroad.'' Instead, consistent with part 242, FRA is amending the definition to state ''the medical examiner owes a duty to make an honest and fully informed evaluation of the condition of an employee.''

Newly Hired Employee

As discussed in Section II.C, above, FRA is deleting the definition of ''newly hired employee'' because that term is not used (or necessary) in part 240.

Qualified

As proposed in the NPRM, FRA is revising the definition of ''qualified'' to be the same as the definition of ''qualified'' in part 242. Under the proposed definition, a qualified person is a person who has successfully completed all instruction, training, and examination programs required by the employer and the applicable parts of this chapter, and therefore may reasonably be expected to be proficient on all safety-related tasks the person is assigned to perform. The existing definition in part 240 focuses on an individual's knowledge, whereas the definition as proposed in the NPRM and adopted in this final rule focuses not only on the individual's knowledge through completion of training plan requirements but also on whether the individual could reasonably be expected to be proficient at performing all assigned tasks. The update to the definition of ''qualified'' is to ensure a railroad's instruction and training program not only provides knowledge of how to perform a task, but also adequately prepares an individual to perform the task proficiently. For example, a qualified locomotive engineer would need to be taught the railroad's rules and procedures for performing different types of brake tests. An individual who receives only classroom training would be expected to have the requisite knowledge to perform the brake tests, and an individual who is provided OJT or hands-on training would be expected to perform the tasks on the brake test proficiently. Without both instruction and hands-on practice,

[11] *See* 84 FR at 20474–78.

[12] The RSAC provides a forum for collaborative rulemaking and program development. RSAC includes representatives from all of the agency's major stakeholder groups, including railroads and labor organizations. For more information regarding the RSAC process and the conduct of the Working Group, *see* 76 FR 69802, 69802–69804 (Nov. 9, 2011).

[13] 84 FR 20472, 20476 (May 9, 2019).

[14] 84 FR at 20475.

[15] 75 FR at 69170 (Nov. 10, 2010).

[16] 76 FR at 69806 (Nov. 9, 2011).

the person could not be expected to be qualified to perform brake tests.

Labor Commenters questioned whether FRA's proposed definition of ''qualified'' would have a negative impact by lowering the standard for what it means to be qualified. Labor Commenters suggested that FRA's proposed definition is subject to multiple interpretations, including one that would mean the railroad is no longer required to provide instruction, training, and examination so that the candidate for qualification has a foundation from which qualification—actual knowledge and proficiency—can be demonstrated. Labor Commenters proposed an alternative definition for ''qualified,'' asking that FRA consider it to mean ''a person who has demonstrated actual knowledge and proficiency of the subject on which the person is qualified by successfully completing all instruction, training and examination programs required by the railroad and the applicable parts of this chapter.''

FRA concluded that Labor Commenters' alternative definition of ''qualified'' would stray from this rule's purpose of conforming part 240 with part 242, and FRA does not view the conforming definition as lowering the standard of the meaning of ''qualification.'' Although FRA's change to the definition focuses on proficiency in safety-related tasks over knowledge, the analysis in determining whether someone is qualified is the same. If the person passes all required training and examination, then the presumption is the person has the knowledge necessary to complete any necessary tasks proficiently. If a person is asked to perform a task that exceeds the training provided, the person could not be expected to have the required knowledge and the person would therefore not be qualified to perform that task safely. For these reasons, FRA is adopting the proposed definition without change from the NPRM.

Section 240.103 Approval of Design of Individual Railroad Programs by FRA

FRA is making three changes to this section, which will make the filing and FRA approval process for individual railroads' part 240 programs the same as for conductor certification programs under § 242.103. First, FRA is revising paragraph (a) to clarify that the primary method for a railroad to submit its certification program is by email to *FRAOPCERTPROG@dot.gov.* Previously, FRA would wait until a railroad contacted FRA and asked to submit its program electronically. It is more efficient to publish this FRA email address and encourage electronic filing. FRA expects that there are few railroads that do not have sufficient internet access to submit a certification program by email, but is leaving the mailing option open for those smaller entities whose internet service may still be unreliable. The revisions were not proposed in the NPRM, but they address an issue of agency policy or procedure previously addressed in appendix B to part 240. FRA expects that by moving this information from an appendix to this section, railroads will find the information more easily and will spend less time figuring out the submission process.

Second, FRA is revising paragraphs (b) and (c) of this section to require railroads to provide a copy of their program submissions, resubmissions, and material modifications to the president of each labor organization that represents the railroad's certified locomotive engineers. The revision will also allow any designated representative of certified locomotive engineers to submit comments to FRA on the railroad's submission within 45 days of the railroad's filing with FRA. Although FRA, not the commenters, will decide whether to approve a railroad's submission, FRA expects comments will be useful in determining whether the railroad's program conforms to the criteria in this final rule.

The final revisions to paragraphs (b) and (c) of this section are different from the proposed rule. For instance, in the NPRM, FRA used the term ''serve or service,'' which is defined in this part and refers to the legal issue of service of process during adjudication. Because the exchange of certification programs and comments to those certification programs are not adjudicatory matters, FRA is revising these requirements to reflect that each railroad and labor organization president must provide, not serve, its documents to each other, and affirm to FRA that it has done so, without the need to abide by strict legal rules for service of process. FRA is not specifying the methods that a railroad or president of a labor organization must use to provide documents to the other party, as FRA expects each party to use those methods it uses in the normal course of business with each other. Also, FRA is adding an email address to make it easier for parties to submit programs or comments to programs. Further, although the NPRM proposed that each railroad affirm that it provided a copy of its program to the president of each labor organization that represents the railroad's employees subject to this part, the labor organization presidents would have been required to certify that they sent their comments to the railroad; thus, for consistency, FRA is requiring that both parties must affirm that they provided the other party with a copy of the documents they submit to FRA under this requirement. Finally, FRA is making technical amendments to § 242.103 so that the locomotive engineer and conductor certification rules use the same language.

Third, in paragraph (h) (which revises former paragraph (e) and is the same as paragraph (i) of § 242.103), FRA is requiring a railroad intending to make material modifications to its FRA-approved program to submit to FRA a description of its intended material modification 60 days before implementing the modification (as opposed to the prior requirement to do so 30 days in advance). This revision will allow time for the labor organizations to comment on the proposed modification(s) under paragraph (c) of this section and for FRA to consider any comments from the relevant labor organizations.

In response to the proposed revisions to this section, Labor Commenters requested that FRA amend the final rule to clarify that a representative labor organization has the right to comment on the entirety of a railroad's program—even when a particular filing is a resubmission or a material modification—and that such comments will be considered by FRA. FRA is declining to amend the requirement to make this clarification as doing so would not conform the requirement to the parallel requirement in part 242. However, despite the lack of an explicit option to comment on the entirety of a railroad's program, FRA invites any person, including any labor organization, to inform FRA's Chief Safety Officer of any safety concern regarding a railroad's certification program at any time.

Section 240.107 Types of Service

The only change to this section is to the heading. The section heading is changed from ''Criteria for designation of classes of service,'' to the same section heading in its part 242 counterpart.

FRA is not making several other changes that were proposed to this section because, as explained in the discussion of specific comments and conclusions, above, FRA is not adding additional types of service that identify remote control operators. *See* Section II.A.

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

FRA is amending several requirements in § 240.111 to clarify that, for purposes of motor vehicle driving record checks and the reporting of certain motor vehicle incidents, the requirements apply equally to a person with a foreign-issued driver license as to a person with a U.S.-issued driver license. The final rule differs from the proposed version as the proposal contained an incorrect reference in § 240.111(h) to § 240.115(b)(1) and (2) when the reference should have read § 240.115(h)(1) and (2). No comments were received recommending specific changes to this section and the final rule is otherwise identical to the proposed rule; thus, the analysis provided in the NPRM is applicable.[17]

Section 240.115 Criteria for Consideration of Prior Safety Conduct as a Motor Vehicle Operator

This section provides the requirements and procedures a railroad must follow when evaluating an engineer's or engineer candidate's prior conduct as a motor vehicle operator. FRA is revising this section in its entirety to be consistent with paragraphs (a) through (f), and (n) and (o) of § 242.111. The final rule is identical to the proposed rule; thus, the analysis provided in the NPRM is applicable.[18]

Labor Commenters requested alternative language to proposed paragraphs (c) and (d) of this section. As proposed, paragraphs (c) and (d) would provide a 60-day grace period for obtaining motor vehicle operator records, if the records were timely requested. The labor organizations expressed concern that the proposed language could lead to an unintended consequence whereby a railroad could create a temporary locomotive engineer workforce, with each person temporarily certified for a 60-day period. Although theoretically possible, FRA does not share the labor organizations' concerns that the grace period provided for obtaining motor vehicle operator records will encourage any railroad to create a temporary engineer workforce. The proposed amendment, which FRA is adopting in this final rule, will apply to a person who has met all the other qualifications for certification but is solely missing the motor vehicle records check requirement. The proposed and final rule amendments to this section do not revise the determinations required as a prerequisite to certification or recertification in § 240.203, including the knowledge testing, performance skills testing, and vision and hearing acuity evaluation requirements. Thus, to take advantage of the flexibility FRA proposed and is making final in this rulemaking, each person that a railroad would want to certify temporarily must already have fulfilled all the qualification requirements, except that the railroad has not yet obtained the motor vehicle records to ensure the person did not incur any alcohol- or drug-related convictions that might indicate the person has an active substance abuse disorder. A railroad that invests the resources necessary to certify a person should want to complete the process by obtaining the motor vehicle operator records, which would allow the railroad to certify the person for up to three years, not temporarily certify the person for 60 days. Further, paragraph (e) prevents a railroad from perpetually certifying or recertifying the same person without obtaining the required motor vehicle driving records and conducting an evaluation of those records. Thus, to create a temporary certification workforce, a railroad would need to employ an available group of people who are qualified for certification except that they are each missing motor vehicle operator records. The theoretical situation is too remote to consider it a reason not to conform the two certification rules in this manner.

Section 240.117 Criteria for Consideration of Operating Rules Compliance Data

The requirements in this section provide the criteria and procedures a railroad must follow to evaluate an engineer's or engineer candidate's compliance with specific types of operating rules and practices. FRA is revising this section to improve clarity and conform the section to the corresponding provisions of the conductor certification rule in § 242.403. No comments were received recommending specific changes to this section and the final rule is identical to the proposed rule other than for an edit to paragraph (d) of this section to remove introductory text, including the phrase ''[e]xcept as provided for in paragraph (i) of this section.'' FRA is removing as unnecessary introductory text from corresponding § 242.403(d) in the conductor certification rule, and FRA removed paragraph (i) from this section through a rulemaking that was effective February 22, 2010.[19] For these reasons, the analysis provided in the NPRM is applicable.[20]

Section 240.121 Criteria for Vision and Hearing Acuity Data

This section contains the requirements for visual and hearing acuity railroads must incorporate into their locomotive engineer certification programs. FRA is amending paragraphs (a) and (d)[21] of this section to conform to § 242.117(a) and (i). These revisions will update part 240's testing procedures and standards for the hearing acuity requirements. No comments were received recommending specific changes to this section and the final rule is identical to the proposed rule except for the revision to paragraph (d)(3), explained below; thus, the analysis provided in the NPRM is applicable.[22]

FRA is changing proposed paragraph (d)(3) to eliminate the reference to the American National Standards Institute (ANSI) 2004 standard for calibration of audiometric devices. Existing paragraph (d) of this section references the ANSI 1969 calibration standard for audiometric devices (ANSI S3.6–1969, ''Specifications for Audiometers''). The companion provision in part 242, however, cites the 2004 version of ANSI's calibration standard.[23] Accordingly, in the NPRM, FRA proposed to update the ANSI standard referenced in paragraph (d) to the 2004 standard to conform to part 242.

However, ANSI revised the standard in 2018 and FRA expects ANSI will continue to revise the standard in the future. The audiometers covered by the ANSI standard are devices designed for use in determining the hearing threshold level of an individual in comparison with a selected hearing threshold level for reference. The ANSI standard provides specifications and tolerances for pure tone, speech, and masking signals and describes the minimum test capabilities of different types of audiometers.

To make clear that audiometers are not subject to a single industry standard, versions of which may change with time, FRA is amending this paragraph to remove the specific citation to the 1969 version of ANSI S3.6 and not adopt the

[17] *See* 84 FR at 20479–80.

[18] *See* 84 FR at 20480–81.

[19] 74 FR 68173 (Dec. 23, 2009).

[20] *See* 84 FR at 20481–82.

[21] In the NPRM, FRA erroneously cited to paragraph (c) instead of (d) in the Section-by-Section Analysis, although the regulatory text of the proposed rule contained the correct paragraph cite. 84 FR at 20482, 20509.

[22] *See* 84 FR at 20482.

[23] *See* the discussion of 49 CFR 242.117(i)(3) in the Section-by-Section Analysis, below.

proposed specific citation to the 2004 ANSI standard. Instead, this paragraph now expressly provides for use of a formal industry standard, such as ANSI S3.6. This change will allow a licensed or certified audiologist, or a technician responsible to that licensed or certified audiologist, the flexibility to use an audiometer calibrated to a formal industry standard, whether the standard is an older version of ANSI S3.6, a newer version of the standard, or a similar industry standard issued by an organization other than ANSI.

Separately, FRA is amending paragraph (b) to remove an unnecessary heading, ''[f]itness requirement.'' FRA discovered the technical error in preparing the final rule, and this correction makes the locomotive engineer rule consistent with an identical change to the conductor rule.

Section 240.123 Training

This section requires railroads to provide their certified locomotive engineers initial and continuing education to ensure each engineer maintains the necessary knowledge, skill, and ability to carry out the duties of a locomotive engineer. FRA is revising this section's heading to be the same as that for § 242.119 (Training). FRA also is amending this section's text to be similar to § 242.119's, and to relate the training and education requirements of part 240 to the requirements of 49 CFR part 243 (part 243) for the training, qualification, and oversight of safety-related railroad employees.

Railroad Commenters objected to the proposed language amending § 240.123(c), providing that initial training of an untrained person must comply with § 243.101 of this chapter. Railroad Commenters stated that such a revision would require a railroad to resubmit its part 243 program to FRA even though FRA did not identify any specific deficiencies with existing railroad training plans for locomotive engineers. FRA addressed this issue in the NPRM and the analysis in the proposed rule provides additional background not repeated in the discussion below.[24]

In summary, FRA is adding the cross-reference to part 243 to conform the rule to the parallel part 242 requirement and believes the cross-reference is helpful as a reminder of the requirement in part 243. Because there is an existing requirement, FRA is not creating a new burden. Locomotive engineer and conductor training programs have been, and continue to be, sufficiently robust to meet the part 243 standards. These certification training programs are already required to be submitted to FRA for review and approval under parts 240 and 242, and thus railroads are exempt from submitting them under part 243, unless a railroad's plan did not provide sufficient detail regarding the OJT components (§ 243.103(b)). When that is the case, the railroad is only required to supplement the certification training program with the updated OJT portion as a material modification, as required in §§ 240.103(e) and 242.103(i).

FRA expects each railroad to evaluate the OJT components in its part 240 training program and supplement its certification program only if necessary. The deadlines for implementing the modifications are governed by part 243. Please note that FRA amended the implementation deadlines for compliance with § 243.101; consequently, railroads and other employers that employ locomotive engineers were required to modify locomotive engineer OJT programs beginning January 1, 2020, depending on the size of the railroad operation.[25]

No additional comments were received recommending specific changes to this section and the final rule is identical to the proposed rule; thus, the analysis provided in the NPRM is applicable.[26]

Section 240.307 Revocation of Certification

This section provides the procedures a railroad must follow to revoke a certified locomotive engineer's certification. FRA is amending this section to clarify its intent and make it the same as § 242.407, which addresses the revocation of conductor certifications. As discussed in Section II.F, above, Labor Commenters recommended specific changes to paragraph (c)(11) of this section. As noted in Section II.F, FRA has determined that those suggestions are beyond the scope of this rulemaking. No other comments were received recommending specific changes to this section and the final rule is identical to the proposed rule; thus, the analysis provided in the NPRM is applicable.[27]

Section 240.308 Multiple Certifications

Proposed paragraph (d) contained an unnecessary heading, ''[p]assenger railroad operations,'' based on its corresponding provision in the conductor certification rule, § 242.213(e). FRA discovered the technical error in preparing the final rule and is correcting § 242.213(e). Accordingly, FRA is not adopting the heading proposed in paragraph (d) of this section for consistency with the conductor rule, and is instead making clear in the rule text that this paragraph applies to passenger train operations.

Subpart E—Dispute Resolution Procedures

Subpart E details the opportunities and procedures for an individual to appeal a decision by a railroad to deny certification or recertification or to revoke an individual's locomotive engineer certification. In the NPRM, FRA proposed some changes to the appeals process contained in §§ 240.401 through 240.411. The comments received recommending specific changes to this subpart are addressed in section II.A, above, or in the Section-By-Section analysis, below. However, the final rule is identical to the proposed rule; thus, the analysis provided in the NPRM is applicable.[28]

Section 240.401 Review Board Established

This section provides that an individual who is denied certification or recertification or has his or her engineer certification revoked, and believes that a railroad incorrectly determined that he or she failed to meet the ''qualification'' requirements of part 240, may petition FRA to review the railroad's decision. FRA is amending this section to delegate initial responsibility for adjudicating denial of locomotive engineer certification or recertification and revocation disputes to FRA's OCRB. Accordingly, the Locomotive Engineer Review Board (LERB), which previously had this responsibility, will merge into the OCRB, which also has the responsibility for adjudicating denial of conductor certification or recertification and revocation disputes.

Labor Commenters requested that FRA ''provide confirmation that (1) the Review Board will be comprised of an odd number of senior FRA staff members with pertinent experience, and (2) the number of Review Board members will be provided by FRA order.'' Labor Commenters made this request while acknowledging FRA's position, as stated in the NPRM, that the number of board members is an issue of internal agency organization, procedure, or practice that is normally left for an agency to decide. Such internal agency decisions are authorized even if made

[24] 84 FR at 20482–83.

[25] Contractors and Class II and III railroads that are not intercity or commuter passenger railroads with 400,000 total employee work hours annually or more are required to submit their Part 243 programs by May 1, 2021. 85 FR 10 (Jan. 2, 2020).

[26] *See* 84 FR at 20482–83.

[27] *See* 84 FR at 20487–89.

[28] *See* 84 FR at 20490–94.

without notice to the public. *See* 5 U.S.C. 553(b)(3)(A). Accordingly, FRA declines to adopt the Labor Commenters' specific suggestions in this final rule. The revisions to § 240.401 make the section the same as the corresponding section in part 242 (§ 242.501). The revisions do not, however, change FRA's right to use any number of FRA employees as OCRB members, in coordination with Agency resources and priorities.

Section 240.403 Petition Requirements

This section provides the requirements for obtaining FRA review of a railroad's decision to deny certification, deny recertification, or revoke an individual's locomotive engineer certification. FRA is revising this section to make it the same as the corresponding provision in part 242 (§ 242.503). The final rule will provide a single process for aggrieved parties to submit FRA locomotive engineer petitions under part 240 and conductor certification petitions under part 242.

FRA is revising paragraph (b) so that a person filing a petition under part 240 will need to file the same information and documentation that is required under part 242. The final rule is different than the NPRM in that FRA did not propose revisions to paragraph (b)(5) or (6). Existing paragraph (b)(5) requires that a petitioner provide a copy of all written documents in the petitioner's possession that document the railroad's decision that is being challenged. FRA is revising paragraph (b)(5) to add that a petitioner is required to provide a copy of all written documents that are reasonably available to the petitioner that document the railroad's decision. Without a complete record, the OCRB may not be able to determine whether a railroad's decision was improper. FRA wants petitioners to request a complete copy of the documents the railroad used in making its decision and, by revising this requirement, FRA is requiring petitioners to request a copy of any documents from the investigative hearing or railroad's denial decision that were not provided to them voluntarily. However, FRA recognizes that a petitioner cannot provide the OCRB with documents that the railroad refuses to provide. In that case, when a petitioner requests documents from a railroad and is denied those documents, the petitioner should explain that situation in the petition and provide the Board with any corroborating documents to substantiate that claim. Paragraph (b)(6) is the same, existing requirement, but an ''and'' was added to the end because it is no longer the last item in the list of paragraph (b)'s petition requirements.

FRA is revising paragraph (c) to require that a petition for review of a railroad's revocation or denial decision be filed with FRA within 120 days of the date the railroad serves the decision on the petitioner. This revision will make this provision of part 240 the same as the corresponding provision in part 242 (*see* § 242.503(c)). The labor organizations' comment requests that FRA not reduce the time limit for petitioning FRA on a railroad's denial of certification or recertification from 180 days to 120 days. The labor organizations' comment contends that the longer period is appropriate because it is often difficult to obtain a complete record. FRA does not agree with this comment for several reasons. FRA believes that 120 days is itself a significant period for an aggrieved locomotive engineer or locomotive engineer candidate to consider whether to request FRA review and submit necessary supporting materials. Part 242 has always imposed this 120-day time limit and FRA has not previously heard that the time limit is too short. To the extent a party finds it difficult to obtain the decision record from the railroad, FRA offers that the party may file its petition with any documents it has and add a description in the petition of the missing documents. FRA expects each railroad to submit any missing evidence it relied on in making its denial decision, even if the railroad chooses not to submit an argument in response to the petition. By making FRA aware of missing documents, the OCRB can follow up as appropriate. Further, although the regulatory text plainly describes the different deadlines for petitioning FRA to review a railroad's decision to deny certification or recertification and to review a railroad's decision to revoke certification, some locomotive engineers and their representatives have claimed the different deadlines have confused them into filing a late petition, believing the deadline to be within 180 days of a railroad's revocation decision instead of the required 120 days. The final rule amendment will eliminate any such confusion.

Section 240.405 Processing Certification Review Petitions

FRA is revising this section, which details how petitions for review will be handled by FRA, to make it the same as the corresponding provision in part 242 (§ 242.505). FRA received comments on this section, some of which are addressed in the discussion of specific comments and conclusions, above, in the section addressing issues beyond the scope of this rulemaking.[29] Two comments and one additional revision are addressed below.

FRA received a comment from AAR and ASLRRA objecting to proposed § 240.405(d)(2) requiring service of a copy of a railroad's response to an OCRB petition on petitioner's representative, if any. The AAR and ASLRRA suggest that this revision would establish a new burden because the change would require railroads to track down and provide service to the person's representative at the railroad's on-the-property hearing even if that is not the same person who assisted the individual in filing an OCRB petition. FRA believes the commenters misunderstood the proposal. FRA never intended the proposal to be construed as requiring service on a representative that no longer appears to be representing the person. FRA's reference to service on petitioner's representative, if any, is a reference to any representative identified in the petition. FRA is aware that some petitioners file a petition without identifying a representative in the petition. When that happens, this final rule will only require the railroad to serve the petitioner with a copy of the railroad's response.

FRA received a comment from labor organizations objecting to proposed § 240.405(l) because, unlike the rule for the LERB, the proposal did not include the requirement that every OCRB decision contain findings of fact on which the decision is based. In the NPRM, FRA explained that removal of the requirement is necessary because issuing findings of fact may not be appropriate for, or relevant to, some decisions. The revision also conforms to the OCRB's requirement in § 242.505(l). FRA notes that the labor organizations' comment recommends amending the regulation by providing flexibility to the OCRB to exclude findings of fact ''where such findings are not appropriate or relevant,'' which also seems to result in the same outcome. For these reasons, FRA is issuing the final rule as proposed.

FRA is revising proposed § 240.405(i) to clarify the OCRB's standard of review for procedural issues. The final rule will require that when considering procedural issues, the Board will determine whether the petitioner suffered substantial harm that was caused by the failure to adhere to the dictated procedures for making the railroad's decision. The restated standard uses active voice and removes the passive voice language that similarly

[29] *See* Section II.F.

explained that the Board will determine whether substantial harm was caused the petitioner by the railroad's failure to adhere to the dictated procedures. Although the Board will apply the revised standard in the same way as before, the final rule is expected to help the parties better understand the standard.

Section 240.411 Appeals

FRA is amending paragraphs (a) and (f) so that the instructions for appealing to the Administrator are the same in both parts 240 and 242 (§ 242.511). In the NPRM, FRA proposed to revise this section so that an aggrieved party requesting an appeal to the Administrator would file a copy of the appeal with the Administrator in addition to filing a copy in the docket.[30] Although no comments were received regarding this section, FRA is revising the filing requirements so that an aggrieved party will only need to file one copy of an appeal with FRA, instead of the proposed two copies. With the elimination of paper dockets, it is much easier for FRA to know when a document is added to an existing docket. Parties that are filing an appeal, whether under paragraph (a) or (f), would already have a docket number and would be expected to know how to file a document, as they would have already filed at least once, and probably several times, in that same docket kept electronically at *www.regulations.gov.* Rather than revising this section to require a party to file with FRA in two different places, FRA is amending both parts 240 and 242 so that an aggrieved party needs to file its appeal only in the electronic, public docket.

Appendix A

In the NPRM, FRA stated that it would likely need to make corresponding changes in the final rule to appendix A to part 240 (appendix A), which then contained the schedule of civil penalties for violations of part 240. Meanwhile, as published on May 23, 2019, FRA removed and reserved appendix A, as FRA moved all its schedules of civil penalties from the CFR to FRA's website.[31] Thus, there is no need to amend appendix A and it will remain reserved.

Nonetheless, FRA will modify the schedule of civil penalties on its website at *www.railroads.dot.gov* as necessary to reflect the requirements of the final rule. Because such penalty schedules are statements of agency policy, notice and comment are not required before their issuance.[32] In addition, FRA invited but did not receive any comments on the civil penalties for violations of part 240.

Appendix B

As explained in the NPRM, appendix B to part 240 (appendix B) provides both the organizational requirements and a narrative description of the submission required under §§ 240.101 and 240.103. FRA is updating job titles and clarifying requirements in appendix B. In the NPRM, FRA proposed revising appendix B to provide railroads with the option to file their part 240 program submissions electronically by adopting language from part 242's appendix B. As a matter of agency policy or procedure, FRA decided that the certification program submission process could be further streamlined. FRA accomplished this streamlining by adding an email address for direct electronic submission of a railroad's engineer certification program. There is no secure website for uploading a railroad submission, so FRA eliminated the proposed language in the appendix requesting information to set up a secure account for such a submission. Email is the primary method of railroad submission, and the publication of FRA's email address for such submission should make the submission process easier for each railroad that must submit. Although FRA is not making similar conforming changes to part 242's appendix B, FRA revised § 242.103 to provide the same email address and submission information for conductor certification programs as for locomotive engineer certification programs in revised § 240.103. Therefore, under both rules, railroad submission of certification programs should primarily be completed by email, without regard to the size of the paper or the need to mail FRA contact information to arrange for electronic submission.

Two comments recommending specific changes to appendix B are discussed below. FRA is revising appendix B based on one of the comments. Otherwise, the analysis provided in the NPRM is applicable.[33]

FRA received a comment from AAR and ASLRRA objecting to the proposed revision requiring a railroad to comply with requirements for training organizations or learning institutions in § 243.111 of this chapter if the railroad were to train another railroad's employees. The comment refers specifically to the proposed language for amending appendix B, ''Section 5 of the Submission: Training, Testing, and Evaluating Persons Not Previously Certified.'' [34] In appendix B, Section 5, FRA proposed that a railroad that plans to accept responsibility for the initial training of locomotive engineers may authorize another railroad or a non-railroad entity to perform the actual training effort if the other entity complies with the requirements for training organizations and learning institutions in § 243.111 of this chapter. The comment suggests that many small railroads work together when training their employees and may, for example, allow one railroad to conduct an operating rules class for the employees of multiple railroads. FRA is also aware that some railroads, especially Class I railroads, have robust training programs administered at specific training centers that could potentially accommodate appropriate training for employees of other railroads. The railroad associations indicate the revision would result in a new burden that could create inefficiencies and costs, and thereby adversely affect safety. After considering the comment, FRA has removed the reference equating a railroad that is not training its own employees with a training organization or learning institution. FRA believes that while these entities may share some common features, a railroad that has an approved training program is not a training organization or learning institution, and therefore does not have an obligation to comply with 49 CFR 243.111. FRA will nonetheless continue to monitor the practice of unaffiliated railroads providing training for any other railroad's employees, to help ensure the appropriateness of such training.

FRA received a comment from the labor organizations requesting that FRA revise appendix B to underscore that a railroad's certification program should explain, in detail, how its OJT program ensures training on the manual dexterity, cognitive ability, and human-machine interface skills necessary to be considered qualified. Appendix B, ''Section 3 of the Submission: Training Persons Previously Certified,'' mentions OJT in a list of the type of formal training necessary for effective evaluation of a railroad's training program. FRA expects the program to include the subject matter covered, the frequency and duration of the training sessions, and the type of formal training employed, as well as specify which aspects of the program are voluntary or mandatory. Testing each certified person or candidate is required to determine whether the person is qualified to do the work, and passing

[30] 84 FR at 20493–94.

[31] 84 FR 23730.

[32] 5 U.S.C. 553(b)(3)(A).

[33] *See* 84 FR at 20494.

[34] 84 FR at 20518.

such training is proof that the person's training is effective. FRA does not believe a person would be able to pass operational monitoring or skill performance testing without having all the skills the labor organizations mention in their comment as necessary. In addition, FRA believes that manual dexterity and cognitive ability may be difficult to measure, train, or test; thus, adding them as necessary requirements could be correspondingly difficult for railroads to implement. For these reasons, FRA is not revising appendix B in response to this comment.

Part 242

Section 242.7 Definitions

FRA is amending the definition of ''main track'' after discovering a technical error while addressing a comment on the text in an identical provision in part 240. FRA recognizes that it did not explain the inclusion of PTC as a method of operation in the part 242 rulemaking notices. Upon further review, FRA agrees with Railroad Commenters that PTC is not a method of operation but rather is a technology that helps enforce compliance with a railroad's method(s) governing train operations. For this reason, FRA is removing the reference to PTC, as defined in 49 CFR part 236, to correct the technical error.

FRA is amending the definition of ''Substance abuse disorder'' so that the locomotive engineer and conductor certification rules use the same language. In the NPRM, FRA proposed that part 240 conform to the definition in part 242. After the NPRM's publication, FRA decided that the definition in part 242 is improved by moving the word ''successfully'' in both places it is found in the definition without changing its meaning.

Section 242.103 Approval of Design of Individual Railroad Programs by FRA

FRA is making technical amendments to § 242.103 so that the locomotive engineer and conductor certification rules use the same language. For example, FRA is revising paragraph (b) so that, like § 240.103(a), both rules reference that the primary method for a railroad to submit its certification programs is by email to *FRAOPCERTPROG@dot.gov.* FRA is also clarifying that mailing will remain an option, although FRA expects that option will be exercised only by those smaller railroads that do not have internet access suitable for emailing the program.

The NPRM proposed certain requirements found in this section for adoption in § 240.103. However, as FRA described above in the analysis for § 240.103(b) and (c), some minor changes were made to improve the clarity of the proposed requirements to the locomotive engineer rule and FRA is making technical amendments to the conductor rule so the two certification rules contain the same requirements. For instance, FRA is revising paragraphs (c) and (d) of this section to require railroads to provide a copy of their program submissions, resubmissions, and material modifications to the president of each labor organization that represents the railroad's certified conductors, rather than serve a copy. FRA is finalizing this change to part 242 because the term ''serve or service,'' which is defined in this part, refers to the legal issue of service of process during adjudication and the exchange of certification programs and comments to those certification programs are not adjudicatory matters. Thus, FRA is revising these requirements to reflect that each railroad and labor organization president must provide, not serve, its documents to each other, and affirm to FRA that it has done so, without the need to abide by strict legal rules for service of process. FRA is not specifying the methods that a railroad or president of a labor organization must use to provide documents to the other party as FRA expects each party to use those methods it uses in the normal course of business with each other. Also, FRA is adding an email address to make it easier for parties to submit programs or comments to programs. Finally, although part 242 required that each railroad affirm that it provided a copy of its program to the president of each labor organization that represents the railroad's employees subject to this part, the labor organization presidents were required to certify that they sent their comment to the railroad; hence, for consistency, FRA is requiring that both parties affirm they provided the other party with a copy of the documents they submit to FRA under this requirement.

Section 242.117 Vision and Hearing Acuity

FRA is amending paragraph (g) to remove an unnecessary heading, ''[f]itness requirement.'' FRA discovered the technical error in preparing the final rule, and this correction makes the conductor rule consistent with an identical change to the locomotive engineer rule.

FRA is amending paragraph (h)(3) to correct the reference from appendix E to appendix D to this part. FRA discovered the technical error in preparing the final rule, and this correction makes the reference to appendix D consistent with the other references to appendix D in this section.

FRA is amending paragraph (i)(3) for consistency with corresponding changes to 49 CFR 240.121(d). Section 242.117(i)(3) referenced the 2004 version of the ANSI calibration standard for audiometric devices (ANSI S3.6–2004, ''Specifications for Audiometers'') whereas 49 CFR 240.121(d) cited the 1969 version of that standard. *See* the discussion of 49 CFR 240.121(d) in the Section-by-Section Analysis, above. Further, ANSI revised this standard in 2018 and FRA expects ANSI will continue to revise the standard in the future. The audiometers covered by the ANSI standard are devices designed for use in determining the hearing threshold level of an individual in comparison with a selected hearing threshold level for reference. The ANSI standard provides specifications and tolerances for pure tone, speech, and masking signals and describes the minimum test capabilities of different types of audiometers.

To make clear that audiometers are not subject to a single industry standard, versions of which may change with time, FRA is amending this paragraph to remove the specific citation to the 2004 version of ANSI S3.6 and instead provide for use of a formal industry standard, such as ANSI S3.6. This will allow a licensed or certified audiologist, or a technician responsible to that licensed or certified audiologist, the flexibility to use an audiometer calibrated to a formal industry standard, whether the standard is an older version of ANSI S3.6, a newer version of the standard, or a similar industry standard, whether or not issued by ANSI.

Section 242.213 Multiple Certifications

FRA is amending paragraph (e) to remove an unnecessary heading, ''[p]assenger railroad operations,'' and is instead making clear in the rule text that this paragraph applies to passenger train operations. FRA discovered the technical error in preparing the final rule, and this correction makes the conductor rule consistent with its corresponding provision in the locomotive engineer rule.

Section 242.403 Criteria for Revoking Certification

FRA is revising § 242.403(d) to remove unnecessary introductory text. FRA is making a corresponding technical revision to § 240.117(d) to remove the same text. No substantive change is intended.

Section 242.503 Petition Requirements

FRA is revising § 242.503(c)(2) so that the locomotive engineer and conductor certification rules use the same language. The change reverses the phrase ''timely file'' to ''file timely'' to match the language in § 240.403(c)(2) without changing its meaning.

Section 242.505 Processing Certification Review Petitions

FRA is revising § 242.505(i) to clarify the OCRB's standard of review for procedural issues and make the standard the same as in § 240.405(i). The final rule requires that, when considering procedural issues, the Board determines whether the petitioner suffered substantial harm that was caused by the failure to adhere to the dictated procedures for making the railroad's decision. The restated standard uses active voice and removes the passive voice language that similarly explained that the Board will determine whether substantial harm was caused the petitioner by the railroad's failure to adhere to the dictated procedures. Although the Board will apply the revised standard in the same way as before, the final rule is expected to help the parties better understand the standard.

FRA is also making certain technical revisions to this section. Specifically, FRA is revising paragraphs (h) through (k) to remove unnecessary introductory text and is revising paragraph (k) to replace the word ''regulation'' with ''part.'' These technical revisions do not affect the meaning of this section.

Section 242.511 Appeals

FRA is amending paragraphs (a) and (f) so that the instructions for appealing to the Administrator are the same in both parts 240 and 242. FRA is revising the filing requirements to eliminate the requirement for an aggrieved party to file two copies of an appeal rather than one. With the elimination of paper dockets, it is much easier for FRA to know when a document is added to an existing docket. Parties that are filing an appeal, whether under paragraph (a) or (f), would already have a docket number and would be expected to know how to file a document, as they would have already filed at least once, and probably several times, in that same docket kept electronically at *www.regulations.gov.* Filing in the docket will be sufficient to notify FRA, and the final rule will eliminate the requirement to file a separate copy with the Administrator.

Appendix E to Part 242—Application of Revocable Events

FRA is amending appendix E to part 242 so that both part 240 and part 242 will contain the same table that explains, in spreadsheet-style form, when an individual certified as both an engineer and conductor will be permitted to work following a certification revocation. In the NPRM, FRA proposed adding the same table to part 240 that is found in appendix E to part 242, and designating it as new appendix G to part 240. However, in adding the table to part 240, FRA made slight changes to include some citations to the different periods of revocation that may be applied in part 240 when a locomotive engineer has a drug or alcohol violation, as only the conductor citations were in the part 242 version of the table. The table in appendix E to part 242 is expected to continue to be a useful reference, and this non-substantive revision will conform part 240 with part 242. FRA considered not revising appendix E to part 242 but was concerned that any differences between the two appendices might lead to confusion. The appendices are intended to be identical, insofar as practical, to promote proper understanding and application of both regulations.

IV. Regulatory Impact and Notices

A. Executive Orders 12866 and 13771 and DOT Regulatory Policies and Procedures

This final rule is a non-significant regulatory action and has been evaluated in accordance with existing policies and procedures under E.O. 12866 and DOT's Administrative Rulemaking, Guidance, and Enforcement Procedures in 49 CFR part 5. The rule is non-significant under the policies and procedures of E.O. 12866 and under DOT's Rulemaking Procedures. This final rule is also an E.O. 13771 deregulatory action.

The primary purpose of the final rule is to reduce the differences between FRA's two operating crew certification regulations and to make engineer certification more efficient. Some of the amendments address the part 240 certification review and program submission processes. Other changes reduce the burden on the regulated community by addressing compliance difficulties noted through experience enforcing part 240. Further, some changes codify longstanding agency interpretations of whether a railroad or individual meets and maintains compliance with part 240 requirements.

FRA has prepared and placed in the docket (Docket No. FRA–2018–0053) a regulatory evaluation. The regulatory evaluation details estimated costs and costs savings that railroads subject to the final rule are likely to incur over a twenty-year period. The table below summarizes the costs, cost savings, and net cost savings estimated to come from issuing the final rule. For the 20-year period of analysis, the cost of the final rule will be $233,779 (undiscounted), $171,764 (PV 7%), and $200,775 (PV 3%). The total cost savings of the final rule over 20 years will be $12.3 million (undiscounted), $6.9 million (PV 7%), and $9.4 million (PV 3%). For the 20-year period of analysis, the final rule will result in a net cost savings of $12.0 million (undiscounted), $6.8 million (PV 7%), and $9.2 million (PV 3%).

TABLE 1—SUMMARY OF THE FINAL RULE'S TOTAL NEW COSTS, TOTAL COST SAVINGS, NET COST SAVINGS (TWENTY-YEAR PERIOD), PV 7 PERCENT AND PV 3 PERCENT

Cost of proposed rule	Undiscounted	Present value 7%	Annualized 7%	Present value 3%	Annualized 3%
New Costs:					
Review amendments	$118,383	$110,638	$10,443	$114,935	$7,725
Provide a copy of part 240 plan to labor organization	2,263	1,199	113	1,683	5,657
Maintain service records	113,133	59,927	5,657	84,157	5,657
Total new costs	233,779	171,764	16,213	200,775	19,039
Cost Savings:					
Conforming part 240 to part 242	11,838,340	6,709,732	633,351	9,070,417	609,675
Former employee paperwork	113,133	59,927	5,657	84,157	5,657
Petition submission process	109,620	58,066	5,481	81,543	5,481

TABLE 1—SUMMARY OF THE FINAL RULE'S TOTAL NEW COSTS, TOTAL COST SAVINGS, NET COST SAVINGS (TWENTY-YEAR PERIOD), PV 7 PERCENT AND PV 3 PERCENT—Continued

Cost of proposed rule	Undiscounted	Present value 7%	Annualized 7%	Present value 3%	Annualized 3%
Plan submission process	6,800	3,602	340	5,058	340
Government cost savings	92,448	48,970	4,622	60,933	4,096
Removing waiver requirement	113,133	59,927	5,657	84,157	5,657
Total cost savings	12,273,475	6,940,223	655,108	9,386,266	630,904
Net Cost Savings	12,039,696	6,768,459	638,895	9,185,491	611,866

The final rule will create benefits, though FRA did not monetize them. Some non-quantifiable benefits include: affording railroads additional time and flexibility to comply with some regulatory requirements, and creating certain provisions that allow for temporary locomotive engineer certificates. For example, the amendments to § 240.103 will afford railroads an additional 30 days, increasing from 30 days to 60 days, for a railroad to submit a description of its intended material modification to its part 240 plan. This additional time to respond to FRA amounts to an unquantified benefit to the railroad. In addition, the amendments to § 240.115 will allow for a temporary certification lasting 60 days for individuals who have properly requested motor vehicle operator information needed to certify or recertify as a locomotive engineer. Such temporary certifications amount to an unquantified benefit to workers and railroads. That is, under the amendments to § 240.115, workers may begin work as locomotive engineers sooner and railroads will have available a larger pool of workers who will be qualified to work as locomotive engineers.

The regulatory evaluation compares the final rule's costs and benefits, and estimates the final rule will be cost beneficial because the rule is expected to provide net cost savings and benefits.

B. Regulatory Flexibility Act and Executive Order 13272; Regulatory Flexibility Certification

The final rule will impact 741 railroads of which 93 percent (690) are small entities. Therefore, FRA has determined that this final rule will have an impact on a substantial number of small entities.

However, FRA has determined that the impact on entities affected by the final rule will not be significant as the final rule is deregulatory. Therefore, the impact on entities will be positive, taking the form of costs savings that are greater than any new costs imposed on the entities.

For the railroad industry over a 20-year period, FRA estimates that issuing the final rule will result in new costs of $171,764 (PV 7%) and $200,775 (PV 3%). Based on information currently available, FRA estimates that $97,905 (PV 7%) and $114,442 (PV 3%) of the total costs associated with implementing the final rule will be borne by small entities. Therefore, less than 60 percent of the final rule's total cost will be borne by small businesses. In addition, FRA estimates that the final rule will result in cost savings over 20 years of $6.9 million (PV 7%), and $9.4 million (PV 3%). For the 20-year period of analysis, the final rule will result in a net cost savings of $12.0 million (undiscounted), $6.8 million (PV 7%), and $9.2 million (PV 3%). FRA expects that small entities will accrue 94 percent of the cost savings associated with implementing the final rule.

Thus, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601(b), the FRA Administrator hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The information collection requirements in this final rule are being submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.[35] The sections that contain the new and current information collection requirements and the estimated time to fulfill each requirement are as follows:

CFR section [36]	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual dollar cost equivalent [37]
240.9—Waivers	741 railroads	2 waiver petitions	1 hour	2	$152
240.101/103—Certification program: Written program for certifying qualifications of locomotive engineers—amendments.	741 railroads	25 amendments	5 minutes	2	152
—Certification programs for new railroads	5 new railroads	5 programs	1 hour	5	380
—Final review and submission of certification programs for new railroads.	5 new railroads	5 reviews	1 hour	5	380
(b)(1)—RR provision of copy of certification program submission or resubmission to president of each labor union representing employees simultaneously with filing with FRA (See footnote 36).	62 railroads	62 copies	5 minutes	5	380
(b)(2)—RR affirmative statement that it has served certification program copy to each labor union president (See footnote 36).	62 railroads	62 copies	5 minutes	5	380
(c)—RR employee comment on submission, resubmission or material modification of RR certification program (See footnote 36).	62 railroads	62 comments	8 hours	496	37,696

[35] 44 U.S.C. 3501 *et seq.*

[36] The revisions to the estimates under OMB control number 2130–0533 are due to adding conforming language in Part 240 to Part 242. Also, burden requirements under § 240.308 are covered under OMB control number 2130–0544 (§ 242.213).

[37] Throughout the tables in this document, the dollar equivalent cost is derived from the Surface Transportation Board's Full Year Wage A&B data series using the appropriate employee group hourly wage rate that includes 75-percent overhead charges.

CFR section [36]	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual dollar cost equivalent [37]
(h)—RR material modifications to program after initial FRA approval (formerly under (e)).	741 railroads	10 modified programs	10 minutes	2	152
240.105(b)—(c) Written reports/determinations of DSLE performance skills.	741 railroads	10 reports	30 minutes	5	575
240.109/App. C—Prior safety conduct	17,667 candidates	25 responses	5 minutes	2	116
240.111/App C—Driver's license data requests from chief of driver licensing agency of any jurisdiction, including foreign countries.	17,667 candidates	17,667 requests	10 minutes	2,945	223,820
—NDR match—notifications and requests for data.	741 railroads	177 notices + 177 requests.	5 mins + 5 mins	30	2,010
—Written response from candidate on driver's license data.	741 railroads	20 cases/comments	10 minutes	3	174
240.111(g)—Notice to RR of absence of license	53,000 candidates	4 letters	5 minutes	0.3	19
240.111(h)—Duty to furnish data on prior safety conduct as motor vehicle operator.	741 railroads	100 communications	5 minutes	8	464
240.113—Duty to furnish data on prior safety conduct as an employee of a different RR.	17,667 candidates	353 requests + 353 responses.	5 mins + 5 mins	59	4,130
240.115(d)—RR temporary certification or recertification of locomotive engineer for 60 days after having requested the motor vehicle information specified in paragraph (h) of this section (See footnote 36).	741 railroads	25 recertifications	5 minutes	2	152
(i)(2)—RR drug and alcohol counselor request of employee's record of prior counseling or treatment (See footnote 36).	17,667 candidates	200 requests + 200 records.	5 minutes	33	1,914
(i)(3)—Conditional certification based on recommendation by DAC of employee aftercare and/or follow-up testing for alcohol/drugs (See footnote 36).	17,667 candidates	100 conditional certifications/DAC recommendations.	1 hour	100	5,800
(i)(4)—RR employee evaluation by DAC as having an active substance abuse disorder (See footnote 36).	17,667 candidates	100 DAC evaluations	1 hour	100	5,800
240.117(i)(4)—RR employee completion of training/retraining prior to return to service—records (See footnote 36).	53,000 locomotive engineers.	400 trained/retrained records.	5 minutes	33	1,914
240.119(c)—Written records indicating dates that the engineer stopped performing or returned to certification service + compliance/observation test (See footnote 36).	741 railroads	400 records	5 minutes	33	1,914
240.119(d)—Self-referral to EAP re: Active substance abuse disorder.	53,000 locomotive engineers.	150 self-referrals	5 minutes	13	754
240.119(e)(3)(ii)—RR notification to person that recertification has been denied or revoked (See footnote 36).	741 railroads	200 notifications	30 minutes	100	5,800
240.119(e)(4)(iii)—Locomotive engineer waiver of investigation in case of one violation of § 219.101 (See footnote 36).	53,000 locomotive engineers.	200 waivers	2 minutes	7	406
240.121—Criteria—vision/hearing acuity data—new railroads.	5 railroads	5 copies	5 minutes	0.4	32
—Conditioned certification	741 railroads	5 reports	5 minutes	0.4	48
—Not meeting standards—Notice by employee.	741 railroads	10 notifications	15 minutes	3	174
240.129(b)—RR documents on file regarding determination made regarding fitness, including DAC written document (See footnote 36).	53,000 locomotive engineers.	1,000 records	5 hours	83	6,308
240.201/221—List of qualified DSLEs	741 railroads	741 updates	5 minutes	62	4,712
—List of qualified loco. engineers	741 railroads	741 updated lists	5 minutes	62	4,712
240.201/223/301—Loco. engineer certificates	53,000 candidates	17,667 certificates	5 minutes	1,472	111,872
240.207—Medical certificate showing hearing/vision standards are met:.	53,000 candidates	17,667 certificates	30 minutes	8,834	1,015,910
—Written determinations waiving use of corrective device.	741 railroads	30 determinations	5 minutes	3	345
240.219(a)—RR notification letter to employee of certification denial + employee written rebuttal (See footnote 36).	17,667 candidates	45 letters + 45 responses.	30 minutes	45	3,420
—RR notice/written documents/records to candidate that support its pending denial decision (See footnote 36).	741 railroads	45 documents/records	2 minutes	2	152
240.229—Joint operations—notice—not qualified	321 railroads	184 employee calls	5 minutes	15	870
240.301(b)—Temporary replacement certificates valid for no more than 30 days (See footnote 36).	741 railroads	600 replacement certificates.	30 minutes	300	22,800
(c)—Engineer's notice of non-qualification to RR.	53,000 engineers or candidates.	100 notifications	5 minutes	8	464
(d)—Relaying certification denial or revocation status to other certifying railroad.	1,060 engineers	2 letters	15 minutes	1 hour	58
240.307(a–b)—Notice to engineer of disqualification.	741 railroads	1,100 letters	1 hour	1,100	73,700
240.307(b)(4)—RR provision to employee of copy of written information and list of witnesses that it will present at hearing (See footnote 36).	741 railroads	690 copies/list	5 minutes	58	4,408

CFR section [36]	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual dollar cost equivalent [37]
240.307(b)(5)—RR determination on hearing record whether person no longer meets certification requirements of part 240 (See footnote 36).	741 railroads	690 hearing determinations.	1 hour	690	52,440
240.307(c)(11)(i)(ii)—RR written decision after close of hearing containing findings of fact & whether a revocable event occurred (See footnote 36).	741 railroads	690 written decisions	30 minutes	345	26,220
240.307(c)(11)(iii)—RR service of written decision on employee and employee's representative (See footnote 36).	741 railroads	690 copies	5 minutes	58	4,408
240.307(f)—Person's waiver of right to hearing under this section (See footnote 36).	741 railroads	750 written waivers	5 minutes	63	3,654
240.307(j)—RR update of record with relevant information (See footnote 36).	741 railroads	50 updated records	10 minutes	8	608
240.309—RR oversight resp.: Detected poor safety conduct—annotation.	15 railroads	6 annotations	15 minutes	2	116
—Railroad annual review	51 railroads	51 reviews	3	153	11,628
Recordkeeping					
240.205—Data to EAP counselor	741 railroads	177 records	5 minutes	15	1,725
240.209/213—Written tests	53,000 candidates	17,667 testing record retention.	1 minute	294	22,344
240.211/213—Performance test	53,000 candidates	17,667 testing record retention.	1 minute	294	22,344
240.215—Retaining info. supporting determination	741 railroads	17,667 records	5 minutes	1,472	111,872
240.303—Annual operational monitoring observation.	53,000 candidates	53,000 testing record retention.	1 minute	883	67,108
240.303—Annual operating rules compliance test	53,000 candidates	53,000 testing record retention.	1 minute	883	67,108
240.307(b)(4)—RR hearings/hearing records (See footnote 36).	741 railroads	690 hearings/records	4 hours	2,760	209,760
Total	741 railroads	224,566 responses	N/A	23,964	2,146,751

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 Ms. Hodan Wells, Information Collection Clearance Officer, Office of Railroad Safety, Federal Railroad Administration, at 202–493–0440.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Ms. Hodan Wells via email at *Hodan.Wells@dot.gov.*

OMB must make a decision concerning the collection of information requirements contained in this rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

FRA is not authorized to impose a penalty on persons for violating information collection requirements that do not display a current OMB control number, if required. The current OMB control number for part 240 is 2130–0533.

D. Federalism Implications

Executive Order 13132, ''Federalism,'' [38] requires FRA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' are defined in the Executive Order to include regulations having ''substantial direct effects 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.'' Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal Government provides the funds necessary to pay the direct compliance costs incurred by State and local governments or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

FRA has analyzed this final rule under the principles and criteria contained in Executive Order 13132. FRA has determined this final rule will not have a substantial direct effect on the States or their political subdivisions; on the relationship between the Federal Government and the States or their political subdivisions, or on the distribution of power and responsibilities among the various levels of government. In addition, FRA has determined this final rule does not impose substantial direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

This final rule could have preemptive effect by the operation of law under a provision of the former Federal Railroad Safety Act of 1970, repealed and recodified at 49 U.S.C. 20106 (Section 20106). Section 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters),

[38] 64 FR 43255, Aug. 10, 1999.

except when the State law, regulation, or order qualifies under the ''essentially local safety or security hazard'' exception to section 20106.

In sum, FRA has analyzed this final rule in accordance with the principles and criteria contained in Executive Order 13132. As explained above, FRA has determined that this final rule has no federalism implications, other than the possible preemption of State laws under Federal railroad safety statutes, specifically 49 U.S.C. 20106. Accordingly, FRA has determined that preparation of a federalism summary impact statement for this final rule is not required.

E. International Trade Impact Assessment

The Trade Agreements Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards. This final rule is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

F. Environmental Impact

FRA has evaluated this final rule consistent with the National Environmental Policy Act [39] (NEPA), the Council of Environmental Quality's NEPA implementing regulations at 40 CFR parts 1500–1508, and FRA's NEPA implementing regulations at 23 CFR part 771 and determined that it is categorically excluded from environmental review and therefore does not require the preparation of an environmental assessment (EA) or environmental impact statement (EIS). Categorical exclusions (CEs) are actions identified in an agency's NEPA implementing regulations that do not normally have a significant impact on the environment and therefore do not require either an EA or EIS. 40 CFR 1508.4. Specifically, FRA has determined that this final rule is categorically excluded from detailed environmental review pursuant to 23 CFR 771.116(c)(15), ''[p]romulgation of rules, the issuance of policy statements, the waiver or modification of existing regulatory requirements, or discretionary approvals that do not result in significantly increased emissions of air or water pollutants or noise.''

The purpose of this rulemaking is to make FRA's regulation governing the qualification and certification of locomotive engineers consistent with its regulation for the qualification and certification of conductors. This rule does not directly or indirectly impact any environmental resources and will not result in significantly increased emissions of air or water pollutants or noise. In analyzing the applicability of a CE, FRA must also consider whether unusual circumstances are present that would warrant a more detailed environmental review.[40] FRA has concluded that no such unusual circumstances exist with respect to this regulation and the final rule meets the requirements for categorical exclusion under 23 CFR 771.116(c)(15).

Pursuant to Section 106 of the National Historic Preservation Act and its implementing regulations, FRA has determined this undertaking has no potential to affect historic properties.[41] FRA has also determined that this rulemaking does not approve a project resulting in a use of a resource protected by Section 4(f).[42]

G. Executive Order 12898 (Environmental Justice)

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, and DOT Order 5610.2(a) [43] require DOT agencies to achieve environmental justice as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income populations. The DOT Order instructs DOT agencies to address compliance with Executive Order 12898 and requirements within the DOT Order in rulemaking activities, as appropriate. FRA has evaluated this final rule under Executive Order 12898 and the DOT Order and has determined it will not cause disproportionately high and adverse human health and environmental effects on minority populations or low-income populations.

H. Unfunded Mandates Reform Act of 1995

Under section 201 of the Unfunded Mandates Reform Act of 1995,[44] each Federal agency ''shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' Section 202 of the Act (2 U.S.C. 1532) further requires that ''before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement'' detailing the effect on State, local, and tribal governments and the private sector. This final rule will not result in the expenditure, in the aggregate, of $100,000,000 or more (as adjusted annually for inflation) in in any one year, and thus preparation of such a statement is not required.

I. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any ''significant energy action.'' [45] FRA has evaluated this final rule under Executive Order 13211 and determined that this rule is not a ''significant energy action'' within the meaning of Executive Order 13211.

Executive Order 13783 requires Federal agencies to review regulations to determine whether they potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources.[46] FRA has evaluated this final rule under Executive Order 13783 and determined that this rule will not burden the development or use of domestically produced energy resources.

List of Subjects

49 CFR Part 219

Alcohol abuse, Drug abuse, Drug testing, Penalties, Railroad safety, Reporting and recordkeeping requirements, Safety, Transportation.

[39] 42 U.S.C. 4321 *et seq.*

[40] 23 CFR 771.116(b).

[41] *See* 16 U.S.C. 470.

[42] *See* Department of Transportation Act of 1966, as amended (Pub. L. 89–670, 80 Stat. 931); 49 U.S.C. 303.

[43] 91 FR 27534 (May 10, 2012).

[44] Public Law 104–4, 2 U.S.C. 1531.

[45] 66 FR 28355 (May 22, 2001).

[46] 82 FR 16093 (Mar. 31, 2017).

49 CFR Part 240

Administrative practice and procedure, Locomotive engineer, Penalties, Railroad employees, Railroad operating procedures, Railroad safety, Reporting and recordkeeping requirements.

49 CFR Part 242

Administrative practice and procedure, Conductor, Penalties, Railroad employees, Railroad operating procedures, Railroad safety, Reporting and recordkeeping requirements.

The Final Rule

For the reasons discussed in the preamble, FRA amends parts 219, 240, and 242 of chapter II, subtitle B of title 49 of the Code of Federal Regulations as follows:

PART 219—CONTROL OF ALCOHOL AND DRUG USE

■ 1. The authority citation for part 219 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20140, 21301, 21304, 21311; 28 U.S.C. 2461, note; Sec. 412, Div. A, Pub. L. 110–432, 122 Stat. 4889 (49 U.S.C. 20140, note) and 49 CFR 1.89.

■ 2. Section 219.25 is amended by revising paragraph (b) to read as follows:

§ 219.25 Previous employer drug and alcohol checks.

* * * * *

(b) When determining whether a person may become or remain certified as a locomotive engineer or a conductor, a railroad must comply with the requirements in § 240.119(e) (for engineers) or § 242.115(e) (for conductors) of this chapter regarding the consideration of Federal alcohol and drug violations that occurred within a period of 60 consecutive months before the review of the person's records.

■ 3. Section 219.1003 is amended by revising paragraph (j) to read as follows:

§ 219.1003 Referral program conditions.

* * * * *

(j) *Locomotive engineers and conductors.* Consistent with §§ 240.119(g) and 242.115(g) of this chapter, for a certified locomotive engineer, certified conductor, or a candidate for engineer or conductor certification, the referral program must state that confidentiality is waived (to the extent the railroad receives from a DAC official notice of the active drug abuse disorder and suspends or revokes the certification, as appropriate) if the employee at any time refuses to cooperate in a recommended course of counseling or treatment.

* * * * *

PART 240—QUALIFICATION AND CERTIFICATION OF LOCOMOTIVE ENGINEERS

■ 4. The authority citation for part 240 is revised to read as follows:

Authority: 44 U.S.C. 3501 *et seq.;* 49 U.S.C. 20103, 20107, 20135, 20138, 20162, 20163, 21301, 21304, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.89.

■ 5. Section 240.1 is amended by revising paragraph (c) to read as follows:

§ 240.1 Purpose and scope.

* * * * *

(c) The locomotive engineer certification requirements prescribed in this part apply to any person who meets the definition of locomotive engineer contained in § 240.7, regardless of the fact that the person may have a job classification title other than that of locomotive engineer.

■ 6. Section 240.3 is revised to read as follows:

§ 240.3 Application and responsibility for compliance.

(a) This part applies to all railroads, except:

(1) Railroads that operate only on track inside an installation that is not part of the general railroad system of transportation (*i.e.,* plant railroads, as defined in § 240.7);

(2) Tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation as defined in § 240.7; or

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

(b) 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.

■ 7. Section 240.5 is revised to read as follows:

§ 240.5 Effect and construction.

(a) FRA does not intend, by use of the term locomotive engineer in this part, to alter the terms, conditions, or interpretation of existing collective bargaining agreements that employ other job classification titles when identifying a person authorized by a railroad to operate a locomotive.

(b) FRA does not intend by issuance of these regulations to alter the authority of a railroad to initiate disciplinary sanctions against its employees, including managers and supervisors, in the normal and customary manner, including those contained in its collective bargaining agreements.

(c) Except as provided in § 240.308, 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.

(d) 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.

■ 8. Section 240.7 is amended by:

■ a. Adding in alphabetical order definitions for ''Conductor'' and ''Drug and alcohol counselor'';

■ b. Removing the definition of ''EAP counselor'';

■ c. Revising the definitions of ''File, filed and filing'' and ''FRA Representative'';

■ d. Adding in alphabetical order a definition for ''Ineligible or ineligibility'';

■ e. Revising the definitions of ''Instructor engineer'' and ''Medical examiner'';

■ f. Removing the definition of ''Newly hired employee'';

■ g. Adding in alphabetical order definitions for ''On-the-job training (OJT),'' ''Physical characteristics,'' and ''Plant railroad'';

■ h. Revising the definitions of ''Qualified'' and ''Railroad rolling stock'';

■ i. Adding in alphabetical order a definition for ''Serve or service'';

■ j. Removing the definition of ''Service'';

■ k. Revising the definition of ''Substance abuse disorder''; and

■ l. Adding in alphabetical order definitions for ''Substance Abuse Professional,'' ''Territorial qualifications,'' and ''Tourist, scenic, historic, or excursion operations that are not part of the general system of transportation.''

The additions and revisions read as follows:

§ 240.7 Definitions.

* * * * *

Conductor means the crewmember in charge of a ''train or yard crew'' as defined in part 218 of this chapter.

* * * * *

Drug and alcohol counselor (DAC) means a person who meets the credentialing and qualification requirements of a ''Substance Abuse Professional'' (SAP), as provided in 49 CFR part 40.

* * * * *

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

* * * * *

FRA Representative means the FRA Associate Administrator for Railroad Safety/Chief Safety Officer and the Associate Administrator's delegate, including any safety inspector employed by the Federal Railroad Administration and any qualified State railroad safety inspector acting under part 212 of this chapter.

Ineligible or ineligibility means that a person is legally disqualified from serving as a certified locomotive engineer. The term covers a number of circumstances in which a person may not serve as a certified locomotive engineer. Revocation of certification pursuant to § 240.307 and denial of certification pursuant to § 240.219 are two examples in which a person would be ineligible to serve as a certified locomotive engineer. A period of ineligibility may end when a condition or conditions are met. For example, a period of ineligibility may end when a person meets the conditions to serve as a certified locomotive engineer following an alcohol or drug violation pursuant to § 240.119.

Instructor engineer, as used in this part:

(1) Means a person who has demonstrated, pursuant to the railroad's written program, an adequate knowledge of the subjects under instruction and, where applicable, has the necessary operating experience to instruct effectively in the field, and has the following qualifications:

(i) Is a certified locomotive engineer under this part; and

(ii) Has been selected as such by a designated railroad officer, in concurrence with the designated employee representative, where present, to teach others proper train handling procedures; or

(iii) In absence of concurrence provided in paragraph (1)(ii) of this definition, has a minimum of 12 months service working in the class of service for which the person is designated to instruct.

(2) If a railroad does not have designated employee representation, then a person employed by the railroad need not comply with paragraph (1)(ii) or (iii) of this definition to be an instructor engineer.

* * * * *

Medical examiner means a person licensed as a doctor of medicine or doctor of osteopathy. A medical examiner can be a qualified, full-time salaried employee of a railroad, a qualified practitioner who contracts with the railroad on a fee-for-service or other basis, or a qualified practitioner designated by the railroad to perform functions in connection with medical evaluations of employees. As used in this rule, the medical examiner owes a duty to make an honest and fully informed evaluation of the condition of an employee.

On-the-job training (OJT) means job training that occurs in the workplace, *i.e.,* the employee learns the job while doing the job.

* * * * *

Physical characteristics means the actual track profile of and physical location for points within a specific yard or route that affect the movement of a locomotive or train. *Physical characteristics* includes both main track physical characteristics (*see* definition of ''main track'' in this section) and other than main track physical characteristics.

Plant railroad means a plant or installation that owns or leases a locomotive, uses that locomotive to switch cars throughout the plant or installation, and is moving goods solely for use in the facility's own industrial processes. The plant or installation could include track immediately adjacent to the plant or installation if the plant railroad leases the track from the general system railroad and the lease provides for (and actual practice entails) the exclusive use of that trackage by the plant railroad and the general system railroad for purposes of moving only cars shipped to or from the plant. A plant or installation that operates a locomotive to switch or move cars for other entities, even if solely within the confines of the plant or installation, rather than for its own purposes or industrial processes, will not be considered a plant railroad because the performance of such activity makes the operation part of the general railroad system of transportation.

Qualified means a person who has successfully completed all instruction, training and examination programs required by the employer and the applicable parts of this chapter, and that the person therefore may reasonably be expected to be proficient on all safety-related tasks the person is assigned to perform.

* * * * *

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

* * * * *

Serve or service, in the context of serving documents, 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.

* * * * *

Substance abuse disorder refers to a psychological or physical dependence on alcohol or a drug, or another identifiable and treatable mental or physical disorder involving the abuse of alcohol or drugs as a primary manifestation. A substance abuse disorder is ''active'' within the meaning of this part if the person is currently using alcohol or other drugs, except under medical supervision consistent with the restrictions described in § 219.103 of this chapter or has failed to complete primary treatment successfully or participate in aftercare successfully as directed by a DAC or SAP.

Substance Abuse Professional (SAP) means a person who meets the qualifications of a Substance Abuse Professional, as provided in part 40 of this title.

Territorial qualifications means possessing the necessary knowledge concerning a railroad's operating rules and timetable special instructions, including familiarity with applicable main track and other than main track physical characteristics of the territory over which the locomotive or train movement will occur.

Tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation means a tourist, scenic, historic, or excursion operation conducted only on track used exclusively for that purpose (*i.e.,* there is no freight, intercity passenger, or commuter passenger railroad operation on the track).

* * * * *

■ 9. Section 240.11 is amended by revising paragraph (d) to read as follows:

§ 240.11 Penalties and consequences for noncompliance.

* * * * *

(d) In addition to the enforcement methods referred to in paragraphs (a), (b), and (c) of this section, FRA may also address violations of this part by use of the emergency order, compliance order, and/or injunctive provisions of the Federal rail safety laws.

■ 10. Section 240.103 is revised 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. The primary method for a railroad's submission is by email to *FRAOPCERTPROG@dot.gov.* For those railroads that are unable to send the program by email, the program may be sent to the Associate Administrator for Railroad Safety/Chief Safety Officer, Federal Railroad Administration, 1200 New Jersey Avenue SE, Washington, DC 20590.

(b) Each railroad shall:

(1) Simultaneous with its filing with FRA, provide a copy of the submission filed pursuant to paragraph (a) of this section, a resubmission filed pursuant to paragraph (f) of this section, or a material modification filed pursuant to paragraph (g) of this section to the president of each labor organization that represents the railroad's employees subject to this part; and

(2) Include in its submission filed pursuant to paragraph (a) of this section, a resubmission filed pursuant to paragraph (f) of this section, or a material modification filed pursuant to paragraph (g) of this section a statement affirming that the railroad has provided a copy to the president of each labor organization that represents the railroad's employees subject to this part, together with a list of the names and addresses of persons provided a copy.

(c) Not later than 45 days from the date of filing a submission pursuant to paragraph (a) of this section, a resubmission pursuant to paragraph (f) of this section, or a material modification pursuant to paragraph (g) of this section, any designated representative of railroad employees subject to this part may comment on the submission, resubmission, or material modification.

(1) Each comment shall set forth specifically the basis upon which it is made, and contain a concise statement of the interest of the commenter in the proceeding;

(2) Each comment shall be submitted by email to *FRAOPCERTPROG@dot.gov* or by mail to the Associate Administrator for Railroad Safety/Chief Safety Officer, FRA, 1200 New Jersey Avenue SE, Washington, DC 20590; and

(3) The commenter shall affirm that a copy of the comment was provided to the railroad.

(d) The submission required by paragraph (a) of this section shall state the railroad's election either:

(1) To accept responsibility for the training of student engineers and thereby obtain authority for that railroad to certify initially a person as an engineer in an appropriate class of service, or

(2) To recertify only engineers previously certified by other railroads.

(e) A railroad that elects to accept responsibility for the training of student engineers shall state in its submission whether it will conduct the training program or employ a training program conducted by some other entity on its behalf but adopted and ratified by that railroad.

(f) A railroad's program is considered approved and may be implemented 30 days after the required filing date (or the actual filing date) unless the Administrator notifies the railroad in writing that the program does not conform to the criteria set forth in this part.

(1) If the Administrator determines that the program does not conform, the Administrator will inform the railroad of the specific deficiencies.

(2) If the Administrator informs the railroad of deficiencies more than 30 days after the initial filing date, the original program may remain in effect until 30 days after approval of the revised program is received so long as the railroad has complied with the requirements of paragraph (g) of this section.

(g) A railroad shall resubmit its program within 30 days after the date of such notice of deficiencies. A failure to resubmit the program with the necessary revisions will be considered a failure to implement a program under this part.

(1) The Administrator will inform the railroad in writing whether its revised program conforms to this part.

(2) If the program does not conform, the railroad shall resubmit its program.

(h) A railroad that intends to modify materially its program after receiving initial FRA approval shall submit a description of how it intends to modify the program in conformity with the specific requirements of this part at least 60 days prior to implementing such a change.

(1) A modification is material if it would affect the program's conformance with this part.

(2) The modification submission shall contain a description that conforms to the pertinent portion of the procedures contained in appendix B of this part.

(3) The modification submission will be handled in accordance with the procedures of paragraphs (b) and (c) of this section as though it were a new program.

■ 11. Section 240.105 is amended by adding paragraph (d) to read as follows:

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

* * * * *

(d) Each railroad is authorized to designate a person as a designated supervisor of locomotive engineers with additional conditions or operational restrictions on the service the person may perform.

■ 12. Section 240.107 is amended by revising the section heading to read as follows:

§ 240.107 Types of service.

* * * * *

■ 13. Section 240.111 is amended by revising paragraph (a)(2), revising and republishing paragraph (c), and revising paragraphs (d), (e), (f), and (h) to read as follows:

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

(a) * * *

(2) Take any additional actions, including providing any necessary consent required by State, Federal, or foreign law to make information concerning his or her driving record available to that railroad.

* * * * *

(c) Each person shall request the information required under paragraph (b)(1) of this section from:

(1) The chief of the driver licensing agency of any jurisdiction, including a State or foreign country, which last issued that person a driver's license; and

(2) The chief of the driver licensing agency of any other jurisdiction, including states or foreign countries, that issued or reissued him or her a driver's license within the preceding five years.

(d) Each person shall request the information required under paragraph (b)(2) of this section from the Chief, National Driver Register, National Highway Traffic Safety Administration,

1200 New Jersey Avenue SE, Washington, DC 20590 in accordance with the procedures contained in appendix C of this part unless the person's motor vehicle driving license was issued by a State or the District of Columbia.

(e) If the person's motor vehicle driving license was issued by one of the driver licensing agencies of a State or the District of Columbia, the person shall request the chief of that driver licensing agency to perform a check of the National Driver Register for the possible existence of additional information concerning his or her driving record and to provide the resulting information to the railroad.

(f) If advised by the railroad that a driver licensing agency or the National Highway Traffic Safety Administration has informed the railroad that additional information concerning that person's driving history may exist in the files of a State agency or foreign country not previously contacted in accordance with this section, such person shall:

(1) Request in writing that the chief of the driver licensing agency which compiled the information provide a copy of the available information to the prospective certifying railroad; and

(2) Take any additional action required by State, Federal, or foreign law to obtain that additional information.

* * * * *

(h) Each certified locomotive engineer or person seeking initial certification shall report motor vehicle incidents described in § 240.115(h)(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 driver's license for, such violations. For purposes of this paragraph (h) and § 240.115(h), ''State action'' means action of the jurisdiction that has issued the motor vehicle driver's license, including a foreign country. 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 driver's license.

■ 14. Section 240.113 is revised 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 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) Request, in writing, that the chief operating officer or other appropriate person of the former employing railroad provide a copy of that railroad's available information concerning his or her service record pertaining to compliance or non-compliance with §§ 240.111, 240.117, and 240.119 to the railroad that is considering such certification or recertification; and

(2) Take any additional actions, including providing any necessary consent required by State or Federal law to make information concerning his or her service record available to that railroad.

(b) [Reserved]

■ 15. Section 240.115 is revised to read as follows:

§ 240.115 Criteria for consideration of prior safety conduct as a motor vehicle operator.

(a) Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program that complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) Except as provided in paragraphs (c) through (f) of this section, each railroad, prior to initially certifying or recertifying any person as a locomotive engineer for any type of service, shall determine that the person meets the eligibility requirements of this section involving prior conduct as a motor vehicle operator.

(c) A railroad shall initially certify a person as a locomotive engineer for 60 days if the person:

(1) Requested the information required by paragraph (h) of this section at least 60 days prior to the date of the decision to certify that person; and

(2) Otherwise meets the eligibility requirements provided in § 240.109.

(d) A railroad shall recertify a person as a locomotive engineer for 60 days from the expiration date of that person's certification if the person:

(1) Requested the information required by paragraph (h) of this section at least 60 days prior to the date of the decision to recertify that person; and

(2) Otherwise meets the eligibility requirements provided in § 240.109.

(e) Except as provided in paragraph (f) of this section, if a railroad which certified or recertified a person pursuant to paragraph (c) or (d) of this section does not obtain and evaluate the information required pursuant to paragraph (h) of this section within 60 days of the pertinent dates identified in paragraph (c) or (d) of this section, that person will be ineligible to perform as a locomotive engineer until the information can be evaluated.

(f) If a person requests the information required pursuant to paragraph (h) of this section but is unable to obtain it, that person or the railroad certifying or recertifying that person may petition for a waiver of the requirements of paragraph (b) of this section in accordance with the provisions of part 211 of this chapter. A railroad shall certify or recertify a person during the pendency of the waiver request if the person otherwise meets the eligibility requirements provided in § 240.109.

(g) When evaluating a person's motor vehicle driving record, a railroad shall not consider information concerning motor vehicle driving incidents that occurred more than 36 months before the month in which the railroad is making its certification decision or at a time other than that specifically provided for in § 240.111, § 240.117, § 240.119, or § 240.205.

(h) A railroad shall only consider information concerning the following types of motor vehicle incidents:

(1) A conviction for, or completed State action to cancel, revoke, suspend, or deny a motor vehicle driver's license for, operating a motor vehicle while under the influence of or impaired by alcohol or a controlled substance; or

(2) A conviction for, or completed State action to cancel, revoke, suspend, or deny a motor vehicle driver's license for, refusal to undergo such testing as is required by State or foreign law when a law enforcement official seeks to determine whether a person is operating a vehicle while under the influence of alcohol or a controlled substance.

(i) If such an incident is identified:

(1) The railroad shall provide the data to the railroad's DAC, together with any information concerning the person's railroad service record, and shall refer the person for evaluation to determine if the person has an active substance abuse disorder;

(2) The person shall cooperate in the evaluation and shall provide any requested records of prior counseling or treatment for review exclusively by the DAC in the context of such evaluation; and

(3) If the person is evaluated as not currently affected by an active substance abuse disorder, the subject data shall not be considered further with respect to certification. However, the railroad shall, on recommendation of the DAC, condition certification upon participation in any needed aftercare and/or follow-up testing for alcohol or

drugs deemed necessary by the DAC consistent with the technical standards specified in § 240.119(d)(3).

(4) If the person is evaluated as currently affected by an active substance abuse disorder, the provisions of § 240.119(b) will apply.

(5) If the person fails to comply with the requirements of paragraph (i)(2) of this section, the person shall be ineligible to perform as a locomotive engineer until such time as the person complies with the requirements.

■ 16. Section 240.117 is amended by:
■ a. Revising paragraphs (a), (c)(1) and (3), (d), and (e)(5) and (6);
■ b. Adding paragraph (f)(4);
■ c. Revising paragraphs (g)(3)(i) and (ii);
■ d. Redesignating paragraph (h) as paragraph (i); and
■ e. Adding new paragraph (h).

The revisions and additions read as follows:

§ 240.117 Criteria for consideration of operating rules compliance data.

(a) Each railroad shall adopt and comply with a program which meets the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of a program that complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

* * * * *

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

* * * * *

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

(d) 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 (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) * * *

(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); or

(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) * * *

(4) A railroad shall not be permitted to deny or revoke an employee's certification based upon additional conditions or operational restrictions imposed pursuant to § 240.107(d).

(g) * * *

(3) * * *

(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 (5) of this section, the person shall have his or her certificate revoked for a period of 30 calendar days.

(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 (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 180 calendar days.

* * * * *

(h) Any or all periods of revocation provided in this section may consist of training.

* * * * *

■ 17. Section 240.119 is revised to read as follows:

§ 240.119 Criteria for consideration of data on substance abuse disorders and alcohol/drug rules compliance.

(a) *Program requirement.* Each railroad shall adopt and comply with a program which complies with the requirements of this section. When any person, including, but not limited to, each railroad, railroad officer, supervisor, and employee, violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) *Determination requirement.* Each railroad, prior to initially certifying or recertifying any person as a locomotive engineer for any type of service, shall determine that the person meets the eligibility requirements of this section.

(c) *Recordkeeping requirement.* In order to make the determination required under paragraph (d) of this section, a railroad shall have on file documents pertinent to that determination, including a written document from its DAC which states his or her professional opinion that the person has been evaluated as not currently affected by a substance abuse disorder or that the person has been evaluated as affected by an active substance abuse disorder.

(d) *Fitness requirement.* (1) A person who has an active substance abuse disorder shall be denied certification or recertification as a locomotive engineer.

(2) Except as provided in paragraph (g) of this section, a certified locomotive engineer who is determined to have an active substance abuse disorder shall be ineligible to hold certification. Consistent with other provisions of this part, certification may be reinstated as provided in paragraph (f) of this section.

(3) In the case of a current employee of the railroad evaluated as having an active substance abuse disorder (including a person identified under the procedures of § 240.115), the employee may, if otherwise eligible, voluntarily self-refer for substance abuse counseling or treatment under the policy required by § 219.1001(b)(1) of this chapter; and the railroad shall then treat the substance abuse evaluation as confidential except with respect to ineligibility for certification.

(e) *Prior alcohol/drug conduct; Federal rule compliance.* (1) In determining whether a person may be or remain certified as a locomotive engineer, a railroad shall consider conduct described in paragraph (e)(2) of this section that occurred within a period of 60 consecutive months prior to the review. A review of certification shall be initiated promptly upon the occurrence and documentation of any incident of conduct described in this paragraph (e)(1).

(2) A railroad shall consider any violation of § 219.101 or § 219.102 of this chapter and any refusal to provide a breath or body fluid sample for testing under the requirements of part 219 of this chapter when instructed to do so by a railroad representative.

(3) A period of ineligibility described in this paragraph (e) shall begin:

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

(ii) 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.

(4) The period of ineligibility described in this section shall be determined in accordance with the following standards:

(i) In the case of a single violation of § 219.102 of this chapter, the person shall be ineligible to hold a certificate during evaluation and any required primary treatment as described in paragraph (f) of this section. In the case of two violations of § 219.102 of this chapter, the person shall be ineligible to hold a certificate for a period of two years. In the case of more than two such violations, the person shall be ineligible to hold a certificate for a period of five years.

(ii) In the case of one violation of § 219.102 of this chapter and one violation of § 219.101 of this chapter, the person shall be ineligible to hold a certificate for a period of three years.

(iii) In the case of one violation of § 219.101 of this chapter, the person shall be ineligible to hold a certificate for a period of 9 months (unless identification of the violation was through a qualifying referral program described in § 219.1001 of this chapter and the locomotive engineer waives investigation, in which case the certificate shall be deemed suspended during evaluation and any required primary treatment as described in paragraph (f) of this section). In the case of two or more violations of § 219.101 of this chapter, the person shall be ineligible to hold a certificate for a period of five years.

(iv) A refusal to provide a breath or body fluid sample for testing under the requirements of part 219 of this chapter when instructed to do so by a railroad representative shall be treated, for purposes of ineligibility under this paragraph (e), in the same manner as a violation of:

(A) Section 219.102 of this chapter, in the case of a refusal to provide a urine specimen for testing; or

(B) Section 219.101 of this chapter, in the case of a refusal to provide a breath sample for alcohol testing or a blood specimen for mandatory post-accident toxicological testing.

(f) *Future eligibility to hold certificate following alcohol/drug violation.* The following requirements apply to a person who has been denied certification or who has had certification suspended or revoked as a result of conduct described in paragraph (e) of this section:

(1) The person shall not be eligible for grant or reinstatement of the certificate unless and until the person has:

(i) Been evaluated by a SAP to determine if the person currently has an active substance abuse disorder;

(ii) Successfully completed any program of counseling or treatment determined to be necessary by the SAP prior to return to service; and

(iii) In accordance with the testing procedures of subpart H of part 219 of this chapter, has had an alcohol test with an alcohol concentration of less than .02 and presented a urine sample that tested negative for controlled substances assayed.

(2) A locomotive engineer placed in service or returned to service under the above-stated conditions shall continue in any program of counseling or treatment deemed necessary by the SAP and shall be subject to a reasonable program of follow-up alcohol and drug testing without prior notice for a period of not more than 60 months following return to service. Follow-up tests shall include not fewer than 6 alcohol tests and 6 drug tests during the first 12 months following return to service.

(3) Return-to-service and follow-up alcohol and drug tests shall be performed consistent with the requirements of subpart H of part 219 of this chapter.

(4) This paragraph (f) does not create an entitlement to utilize the services of a railroad SAP, to be afforded leave from employment for counseling or treatment, or to employment as a locomotive engineer. Nor does it restrict any discretion available to the railroad to take disciplinary action based on conduct described herein.

(g) *Confidentiality protected.* Nothing in this part shall affect the responsibility of the railroad under § 219.1003(f) of this chapter to treat qualified referrals for substance abuse counseling and treatment as confidential; and the certification status of a locomotive engineer who is successfully assisted under the procedures of that section shall not be adversely affected. However, the railroad shall include in its referral policy, as required pursuant to § 219.1003(j) of this chapter, a provision that, at least with respect to a certified locomotive engineer or a candidate for certification, the policy of confidentiality is waived (to the extent that the railroad shall receive from the SAP or DAC official notice of the substance abuse disorder and shall suspend or revoke the certification, as appropriate) if the person at any time refuses to cooperate in a recommended course of counseling or treatment.

■ 18. Section 240.121 is amended by revising paragraphs (a), (b), and (d) to read as follows:

§ 240.121 Criteria for vision and hearing acuity data.

(a) Each railroad shall adopt and comply with a program which complies with the requirements of this section. When any person, including, but not limited to, each railroad, railroad officer, supervisor, and employee, violates any requirement of a program that complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) 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.

* * * * *

(d) Except as provided in paragraph (e) of this section, each person shall have a hearing test or audiogram that shows the person's hearing acuity meets or exceeds the following thresholds: The person does not have an average hearing loss in the better ear greater than 40 decibels with or without use of a hearing aid, at 500 Hz, 1,000 Hz, and 2,000 Hz. The hearing test or audiogram shall meet the requirements of one of the following:

(1) As required in 29 CFR 1910.95(h) (Occupational Safety and Health Administration);

(2) As required in § 227.111 of this chapter; or

(3) Conducted using an audiometer that meets the specifications of and is maintained and used in accordance with a formal industry standard, such as ANSI S3.6, ''Specifications for Audiometers.''

* * * * *

■ 19. Section 240.123 is amended by revising the section heading and paragraph (a), revising and republishing paragraph (c), and adding paragraphs (e) and (f) to read as follows:

§ 240.123 Training.

(a) Each railroad shall adopt and comply with a program that meets the requirements of this section. When any person, including, but not limited to, each railroad, railroad officer, supervisor, and employee, violates any requirement of a program that complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

* * * * *

(c) A railroad that elects to train a previously untrained person to be a locomotive engineer shall provide initial training that, at a minimum, complies with the program

requirements of § 243.101 of this chapter and:

(1) Is composed of classroom, skill performance, and familiarization with physical characteristics components;

(2) Includes both knowledge and performance skill testing;

(3) Is conducted under the supervision of a qualified class instructor;

(4) Is subdivided into segments or periods of appropriate duration to effectively cover the following subject matter areas:

(i) Personal safety;

(ii) Railroad operating rules and procedures;

(iii) Mechanical condition of equipment;

(iv) Train handling procedures (including use of locomotive and train brake systems);

(v) Familiarization with physical characteristics including train handling; and

(vi) Compliance with Federal railroad safety laws, regulations, and orders; and

(5) Is conducted so that the performance skill component shall meet the following conditions:

(i) Be under the supervision of a qualified instructor engineer located in the same control compartment whenever possible;

(ii) Place the student engineer at the controls of a locomotive for a significant portion of the time; and

(iii) Permit the student to experience whatever variety of types of trains are normally operated by the railroad.

* * * * *

(e) A railroad shall designate in its program required by this section the time period in which a locomotive engineer must be absent from a territory or yard, before requalification on physical characteristics is required.

(f) A railroad's program shall include the procedures used to qualify or requalify a person on the physical characteristics.

■ 20. Section 240.125 is amended by revising the section heading and paragraph (a), revising and republishing paragraph (c), and adding paragraphs (e), (f), and (g) to read as follows:

§ 240.125 Knowledge testing.

(a) Each railroad shall adopt and comply with a program that meets the requirements of this section. When any person, including, but not limited to, each railroad, railroad officer, supervisor, and employee, violates any requirement of a program that complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

* * * * *

(c) The testing methods selected by the railroad shall be:

(1) Designed to examine a person's knowledge of the railroad's rules and practices for the safe operation of trains;

(2) Objective in nature;

(3) Administered in written form;

(4) Cover the following subjects:

(i) Personal safety practices;

(ii) Operating practices;

(iii) Equipment inspection practices;

(iv) Train handling practices including familiarity with the physical characteristics of the territory; and

(v) Compliance with Federal railroad safety laws, regulations, and orders;

(5) Sufficient to accurately measure the person's knowledge of the covered subjects; and

(6) Conducted without open reference books or other materials except to the degree the person is being tested on his or her ability to use such reference books or materials.

* * * * *

(e) For purposes of paragraph (c) of this section, the railroad must provide the person(s) being tested with an opportunity to consult with a supervisory employee, who possesses territorial qualifications for the territory, to explain a question.

(f) The documentation shall indicate whether the person passed or failed the test.

(g) If a person fails to pass the test, no railroad shall permit or require that person to function as a locomotive engineer prior to that person's achieving a passing score during a reexamination of the person's knowledge.

■ 21. Section 240.127 is amended by revising paragraph (a) to read as follows:

§ 240.127 Criteria for examining skill performance.

(a) Each railroad shall adopt and comply with a program which complies with the requirements of this section. When any person, including, but not limited to, each railroad, railroad officer, supervisor, and employee, violates any requirement of a program that complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

* * * * *

■ 22. Section 240.129 is amended by revising paragraphs (a), (b), (c) introductory text, (c)(2), (d) introductory text, (e) introductory text, and (e)(1) and adding paragraph (h) to read as follows:

§ 240.129 Criteria for monitoring operational performance of certified engineers.

(a) Each railroad shall adopt and comply with a program which complies with the requirements of this section. When any person, including, but not limited to, each railroad, railroad officer, supervisor, and employee, violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) Each railroad shall have a program to monitor the operational performance of those it has determined as qualified as a locomotive engineer in any class of service. The program shall include procedures to address the testing of certified engineers who are not given both an operational monitoring observation and an unannounced compliance test in a calendar year pursuant to paragraph (h) of this section. At a minimum, such procedures shall include the following:

(1) A requirement that an operational monitoring observation and an unannounced compliance test must be conducted within 30 days of a return to service as a locomotive engineer; and

(2) The railroad must retain a written record indicating the date that the engineer stopped performing service that requires certification pursuant to this part, the date that the engineer returned to performing service that requires certification pursuant to this part, and the dates that the operational monitoring observation and the unannounced compliance test were performed.

(c) The procedures for the operational monitoring observation shall:

* * * * *

(2) Be designed so that each engineer shall be monitored each calendar year 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 monitoring observation will be conducted;

* * * * *

(d) The operational monitoring observation procedures may be designed so that the locomotive engineer being monitored either:

* * * * *

(e) The unannounced compliance test program shall:

(1) Be designed so that, except for as provided in paragraph (h) of this section, each locomotive engineer shall be given at least one unannounced compliance test each calendar year;

* * * * *

(h) A certified engineer who is not performing a service that requires certification pursuant to this part need not be given an unannounced compliance test or operational monitoring observation. However, when the certified engineer returns to a service that requires certification pursuant to this part, that certified engineer must be tested pursuant to this section and § 240.303 within 30 days of his or her return.

■ 23. Section 240.205 is revised to read as follows:

§ 240.205 Procedures for determining eligibility based on prior safety conduct.

(a) Each railroad, prior to initially certifying or recertifying any person as an engineer for any class of service other than student, shall determine that the person meets the eligibility requirements of § 240.115 involving prior conduct as a motor vehicle operator, § 240.117 involving prior conduct as a railroad worker, and § 240.119 involving substance abuse disorders and alcohol/drug rules compliance.

(b) In order to make the determination required under paragraph (a) of this section, a railroad shall have on file documents pertinent to the determinations referred to in paragraph (a) of this section, including a written document from its DAC either reflecting his or her professional opinion that the person has been evaluated as not currently affected by a substance abuse disorder or that the person has been evaluated as affected by an active substance abuse disorder and is ineligible for certification.

■ 24. Section 240.207 is amended by revising paragraphs (b)(2) introductory text and (b)(2)(i) to read as follows:

§ 240.207 Procedures for making the determination on vision and hearing acuity.

* * * * *

(b) * * *

(2) A written document from its medical examiner documenting his or her professional opinion that the person does not meet one or both acuity standards and stating the basis for his or her determination that:

(i) The person can nevertheless be certified under certain conditions; or

* * * * *

■ 25. Section 240.209 is amended by revising paragraphs (b) and (c) to read as follows:

§ 240.209 Procedures for making the determination on knowledge.

* * * * *

(b) In order to make the determination required by paragraph (a) of this section, a railroad shall have written documentation showing that the person either:

(1) Exhibited his or her knowledge by achieving a passing grade in testing that complies with this part; or

(2) Did not achieve a passing grade in such testing.

(c) If a person fails to achieve a passing score under the testing procedures required by this part, no railroad shall permit or require that person to operate a locomotive as a locomotive or train service engineer prior to that person's achieving a passing score during a reexamination of his or her knowledge.

■ 26. Section 240.211 is amended by revising paragraph (b) to read as follows:

§ 240.211 Procedures for making the determination on performance skills.

* * * * *

(b) In order to make this determination, a railroad shall have written documentation showing the person either:

(1) Exhibited his or her knowledge by achieving a passing grade in testing that complies with this part; or

(2) Did not achieve a passing grade in such testing.

* * * * *

■ 27. Section 240.215 is amended by revising and republishing paragraph (e) and revising paragraph (j) to read as follows:

§ 240.215 Retaining information supporting determinations.

* * * * *

(e) The information concerning demonstrated performance skills that the railroad shall retain includes:

(1) The relevant data from the railroad's records concerning the person's success or failure on the performance skills test(s) that documents the relevant operating facts on which the evaluation is based including the observations and evaluation of the designated supervisor of locomotive engineers;

(2) If a railroad relies on the use of a locomotive operations simulator to conduct the performance skills testing required under this part, the relevant data from the railroad's records concerning the person's success or failure on the performance skills test(s) that documents the relevant operating facts on which the determination was based including the observations and evaluation of the designated supervisor of locomotive engineers; and

(3) The relevant data from the railroad's records concerning the person's success or failure on tests the railroad performed to monitor the engineer's operating performance in accordance with § 240.129.

* * * * *

(j) Nothing in this section precludes a railroad from maintaining the information required to be retained under this section in an electronic format provided that:

(1) The railroad maintains an information technology security program adequate to ensure the integrity of the electronic data storage system, including the prevention of unauthorized access to the program logic or individual records;

(2) The program and data storage system must be protected by a security system that utilizes an employee identification number and password, or a comparable method, to establish appropriate levels of program access meeting all of the following standards:

(i) No two individuals have the same electronic identity; and

(ii) A record cannot be deleted or altered by any individual after the record is certified by the employee who created the record;

(3) Any amendment to a record is either:

(i) Electronically stored apart from the record that it amends; or

(ii) Electronically attached to the record as information without changing the original record;

(4) Each amendment to a record uniquely identifies the person making the amendment;

(5) The system employed by the railroad for data storage permits reasonable access and retrieval of the information in usable format when requested to furnish data by FRA representatives; and

(6) Information retrieved from the system can be easily produced in a printed format which can be readily provided to FRA representatives in a timely manner and authenticated by a designated representative of the railroad as a true and accurate copy of the railroad's records if requested to do so by FRA representatives.

■ 28. Section 240.217 is amended by revising paragraphs (a) and (d) to read as follows:

§ 240.217 Time limitations for making determinations.

(a) A railroad shall not certify or recertify a person as a qualified locomotive engineer in any class of train or engine service, if the railroad is making a determination concerning:

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

(2) Visual and hearing acuity and the medical examination being relied on was conducted more than 450 days before the date of the railroad's recertification decision;

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

(4) Demonstrated knowledge and the knowledge examination being relied on was conducted more than 24 months before the date of the railroad's certification decision if the railroad administers a knowledge testing program pursuant to § 240.125 at intervals that do not exceed 24 months; or

(5) 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.

* * * * *

(d) A railroad shall issue each person designated as a certified locomotive engineer a certificate that complies with § 240.223 no later than 30 days from the date of its decision to certify or recertify that person.

■ 29. Section 240.219 is amended by revising paragraphs (a) and (c) and adding paragraph (d) to read as follows:

§ 240.219 Denial of certification.

(a) A railroad shall notify a candidate for certification or recertification of information known to the railroad that forms the basis for denying the person certification and provide the person a reasonable opportunity to explain or rebut that adverse information in writing prior to denying certification. A railroad shall provide the locomotive engineer candidate with any written documents or records, including written statements, related to failure to meet a requirement of this part that support its pending denial decision.

* * * * *

(c) If a railroad denies a person certification or recertification, it shall notify the person of the adverse decision and explain, in writing, the basis for its denial decision. The basis for a railroad's denial decision shall address any explanation or rebuttal information that the locomotive engineer candidate may have provided in writing pursuant to paragraph (a) of this section. The document explaining the basis for the denial shall be served on the person within 10 days after the railroad's decision and shall give the date of the decision.

(d) A railroad shall not deny the person's certification for failing to comply with a railroad operating rule or practice that constitutes a violation under § 240.117(e)(1) through (5) if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the engineer's ability to comply with that railroad operating rule or practice.

■ 30. Section 240.221 is amended by revising paragraphs (d), (e), and (f) to read as follows:

§ 240.221 Identification of qualified persons.

* * * * *

(d) The listing required by paragraphs (a), (b), and (c) of this section shall:

(1) Be updated at least annually;

(2) Be available at the divisional or regional headquarters of the railroad; and

(3) Be available for inspection or copying by FRA during regular business hours.

(e) It shall be unlawful for any railroad to knowingly or any individual to willfully:

(1) Make, cause to be made, or participate in the making of a false entry on the list required by this section; or

(2) Otherwise falsify such list through material misstatement, omission, or mutilation.

(f) Nothing in this section precludes a railroad from maintaining the list required under this section in an electronic format provided that:

(1) The railroad maintains an information technology security program adequate to ensure the integrity of the electronic data storage system, including the prevention of unauthorized access to the program logic or the list;

(2) The program and data storage system must be protected by a security system that utilizes an employee identification number and password, or a comparable method, to establish appropriate levels of program access meeting all of the following standards:

(i) No two individuals have the same electronic identity; and

(ii) An entry on the list cannot be deleted or altered by any individual after the entry is certified by the employee who created the entry;

(3) Any amendment to the list is either:

(i) Electronically stored apart from the entry on the list that it amends; or

(ii) Electronically attached to the entry on the list as information without changing the original entry;

(4) Each amendment to the list uniquely identifies the person making the amendment;

(5) The system employed by the railroad for data storage permits reasonable access and retrieval of the information in usable format when requested to furnish data by FRA representatives; and

(6) Information retrieved from the system can be easily produced in a printed format which can be readily provided to FRA representatives in a timely manner and authenticated by a designated representative of the railroad as a true and accurate copy of the railroad's records if requested to do so by FRA representatives.

■ 31. Section 240.223 is amended by revising and republishing paragraph (a) to read as follows:

§ 240.223 Criteria for the certificate.

(a) As a minimum, each certificate issued in compliance with this part shall:

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

(2) Indicate that the railroad, acting in conformity with this part, has determined that the person to whom it is being issued has been determined to be qualified to operate a locomotive;

(3) Identify the person to whom it is being issued (including the person's name, employee identification number, the year of birth, and either a physical description or photograph of the person);

(4) Identify any conditions or limitations, including the class of service or conditions to ameliorate vision or hearing acuity deficiencies, that restrict the person's operational authority;

(5) Show the effective date of each certification held;

(6) Be signed by a supervisor of locomotive engineers or other individual designated in accordance with paragraph (b) of this section;

(7) Show the date of the person's last operational monitoring event as required by §§ 240.129(c) and 240.303(b), unless that information is reflected on supplementary documents which the locomotive engineer has in his or her possession when operating a locomotive; and

(8) Be of sufficiently small size to permit being carried in an ordinary pocket wallet.

* * * * *

■ 32. Section 240.225 is revised to read as follows:

§ 240.225 Reliance on qualification determinations made by other railroads.

(a) 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 it will 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.

(b) 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; and

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

■ 33. Revise the heading of subpart D to read as follows:

Subpart D—Administration of the Certification Program

■ 34. Section 240.301 is revised to read as follows:

§ 240.301 Replacement of certificates.

(a) A railroad shall have a system for the prompt replacement of lost, stolen or mutilated certificates at no cost to engineers. That system shall be reasonably accessible to certified locomotive engineers in need of a replacement certificate or temporary replacement certificate.

(b) At a minimum, a temporary replacement certificate must identify the person to whom it is being issued (including the person's name, identification number and year of birth); indicate the date of issuance; and be authorized by a supervisor of locomotive engineers or other individual designated in accordance with § 240.223(b). Temporary replacement certificates may be delivered electronically and are valid for a period no greater than 30 days.

■ 35. Section 240.303 is amended by revising paragraphs (b) and (c) to read as follows:

§ 240.303 Operational monitoring requirements.

* * * * *

(b) The program shall be conducted so that each locomotive engineer, except as provided in § 240.129(h), shall be given at least one operational monitoring observation by a qualified supervisor of locomotive engineers in each calendar year.

(c) The program shall be conducted so that each locomotive engineer, except as provided in § 240.129(h), shall be given at least one unannounced, compliance test each calendar year.

* * * * *

■ 36. Section 240.305 is amended by revising and republishing paragraph (b) to read as follows:

§ 240.305 Prohibited conduct.

* * * * *

(b) Each locomotive engineer who has received a certificate required under this part shall:

(1) Have that certificate in his or her possession while on duty as an engineer; and

(2) Display that certificate upon the receipt of a request to do so from:

(i) A representative of the Federal Railroad Administration;

(ii) A State inspector authorized under part 212 of this chapter;

(iii) An officer of the issuing railroad; or

(iv) An officer of another railroad when operating a locomotive or train in joint operations territory.

* * * * *

■ 37. Section 240.307 is amended by:

■ a. Revising paragraph (a);

■ b. Republishing the introductory text to paragraph (b);

■ c. Revising paragraphs (b)(1) and (4);

■ d. Redesignating paragraphs (b)(5) and (6) as paragraphs (b)(6) and (7);

■ e. Adding a new paragraph (b)(5); and

■ f. Revising paragraphs (c)(2), (9), and (11), (g), (i), and (j)(2).

The revisions and additions read as follows:

§ 240.307 Revocation of certification.

(a) Except as provided for in § 240.119(e), a railroad that certifies or recertifies a person as a qualified locomotive engineer and, during the period that certification is valid, acquires reliable information regarding violation(s) of § 240.117(e) or § 240.119(c) shall revoke the person's engineer certificate.

(b) Pending a revocation determination under this section, the railroad shall:

(1) Upon receipt of reliable information regarding violation(s) of § 240.117(e) or § 240.119(c), immediately suspend the person's certificate;

* * * * *

(4) No later than the convening of the hearing and notwithstanding the terms of an applicable collective bargaining agreement, the railroad convening the hearing shall provide the person with a copy of the written information and list of witnesses the railroad will present at the hearing. If requested, a recess to the start of the hearing will be granted if that information is not provided until just prior to the convening of the hearing. If the information was provided through statements of an employee of the convening railroad, the railroad will make that employee available for examination during the hearing required by paragraph (b)(3) of this section. Examination may be telephonic where it is impractical to provide the witness at the hearing;

(5) Determine, on the record of the hearing, whether the person no longer meets the certification requirements of this part stating explicitly the basis for the conclusion reached;

* * * * *

(c) * * *

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

* * * * *

(9) The record in the proceeding shall be closed at the conclusion of the hearing unless the presiding officer allows additional time for the submission of information. In such instances, the record shall be left open for such time as the presiding officer grants for that purpose.

* * * * *

(11) The decision shall:

(i) Contain the findings of fact as well as the basis therefor, concerning all material issues of fact presented on the record and citations to all applicable railroad rules and practices;

(ii) State whether the railroad official found that a revocable event occurred and the applicable period of revocation with a citation to § 240.117 or § 240.119; and

(iii) Be served on the employee and the employee's representative, if any, with the railroad to retain proof of that service.

* * * * *

(g) A railroad that has relied on the certification by another railroad under the provisions of § 240.227 or § 240.229, shall revoke its certification if, during the period that certification is valid, the railroad acquires information that

convinces it that another railroad has revoked its certification in accordance with the provisions of this section. The requirement to provide a hearing under this section is satisfied when any single railroad holds a hearing and no additional hearing is required prior to a revocation by more than one railroad arising from the same facts.

* * * * *

(i) A railroad:

(1) 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 that constitutes a violation under § 240.117(e)(1) through (5); or

(2) May 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 (5) was of a minimal nature and had no direct or potential effect on rail safety.

(j) * * *

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

* * * * *

■ 38. Section 240.308 is added to read as follows:

§ 240.308 Multiple certifications.

(a) A person may hold both conductor and locomotive engineer certification.

(b) A railroad that issues multiple certificates to a person, shall, to the extent possible, coordinate the expiration date of those certificates.

(c) Except as provided in paragraph (d) of this section, a locomotive engineer, including a remote control operator, who is operating a locomotive without an assigned certified conductor must either be:

(1) Certified as both a locomotive engineer under this part and as a conductor under part 242 of this chapter; or

(2) Accompanied by a person certified as a conductor under part 242 of this chapter but who will be attached to the crew in a manner similar to that of an independent assignment.

(d) If the conductor is removed from a passenger train for a medical, police or other such emergency after the train departs from an initial terminal, the train may proceed to the first location where the conductor can be replaced without incurring undue delay without the locomotive engineer being a certified conductor. However, an assistant conductor or brakeman must be on the train and the locomotive engineer must be informed that there is no certified conductor on the train prior to any movement.

(e) During the duration of any certification interval, a person who holds a current conductor and/or locomotive engineer certificate from more than one railroad shall immediately notify the other certifying railroad(s) if he or she is denied conductor or locomotive engineer recertification under § 240.219 or § 242.401 of this chapter or has his or her conductor or locomotive engineer certification revoked under § 240.307 or § 242.407 of this chapter by another railroad.

(f) A person who holds a current conductor and locomotive engineer certificate and who has had his or her conductor certification revoked under § 242.407 of this chapter for a violation of § 242.403(e)(1) through (5) or (12) of this chapter may not work as a locomotive engineer during the period of revocation. However, a person who holds a current conductor and locomotive engineer certificate and who has had his or her conductor certification revoked under § 242.407 of this chapter for a violation of § 242.403(e)(6) through (11) may work as a locomotive engineer during the period of revocation.

(1) For purposes of determining the period for which a person may not work as a certified locomotive engineer due to a revocation of his or her conductor certification, only violations of § 242.403(e)(1) through (5) or (12) of this chapter will be counted. Thus, a person who holds a current conductor and locomotive engineer certificate and who has had his or her conductor certification revoked three times in less than 36 months for two violations of § 242.403(e)(6) and one violation of § 242.403(e)(1) would have his or her conductor certificate revoked for 1 year, but would not be permitted to work as a locomotive engineer for one month (*i.e.,* the period of revocation for one violation of § 242.403(e)(1)).

(g) A person who holds a current conductor and locomotive engineer certificate and who has had his or her locomotive engineer certification revoked under § 240.307 may not work as a conductor during the period of revocation.

(h) A person who has had his or her locomotive engineer certification revoked under § 240.307 may not obtain a conductor certificate pursuant to part 242 of this chapter during the period of revocation.

(i) A person who had his or her conductor certification revoked under § 242.407 of this chapter for violations of § 242.403(e)(1) through (5) or (12) of this chapter may not obtain a locomotive engineer certificate pursuant to this part 240 during the period of revocation.

(j) A railroad that denies a person conductor certification or recertification under § 242.401 of this chapter shall not, solely on the basis of that denial, deny or revoke that person's locomotive engineer certification or recertification.

(k) A railroad that denies a person locomotive engineer certification or recertification under § 240.219 shall not, solely on the basis of that denial, deny or revoke that person's conductor certification or recertification.

(l) In lieu of issuing multiple certificates, a railroad may issue one certificate to a person who is certified as a conductor and a locomotive engineer. The certificate must comply with § 240.223 and § 242.207 of this chapter.

(m) A person who holds a current conductor and locomotive engineer certification and who is involved in a revocable event under § 240.307 or § 242.407 of this chapter may only have one certificate revoked for that event. The determination by the railroad as to which certificate to revoke for the revocable event must be based on the work the person was performing at the time the event occurred.

■ 39. Section 240.309 is amended by:

■ a. Revising paragraphs (b)(4), (e)(1), (2), (8), and (9), and (f) through (h); and

■ b. Adding paragraph (i).

The revisions and addition read as follows:

§ 240.309 Railroad oversight responsibilities.

* * * * *

(b) * * *

(4) If the railroad conducts joint operations with another railroad, the number of locomotive engineers employed by the other railroad(s) that: Were involved in events described in this paragraph (b) and were determined to be certified and to have possessed the necessary territorial qualifications for joint operations purposes by the controlling railroad.

* * * * *

(e) * * *

(1) Incidents involving noncompliance with part 218 of this chapter;

(2) Incidents involving noncompliance with part 219 of this chapter;

* * * * *

(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; and

(9) Incidents involving noncompliance with the railroad's operating practices (including train handling procedures) resulting in excessive in-train force levels.

(f) For reporting purposes, an instance of poor safety conduct involving a person who holds both conductor certification pursuant to part 242 of this chapter and locomotive engineer certification pursuant to this part need only be reported once (either under § 242.215 of this chapter or this section). The determination as to where to report the instance of poor safety conduct should be based on the work the person was performing at the time the conduct occurred.

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

(1) The nature of the remedial action taken and the number of events subdivided so as to reflect which of the following actions was selected:

(i) Imposition of informal discipline;

(ii) Imposition of formal discipline;

(iii) Provision of informal training; or

(iv) Provision of formal training; and

(2) If the nature of the remedial action taken was formal discipline, the number of events further subdivided so as to reflect which of the following punishments was imposed by the railroad:

(i) The person was withheld from service;

(ii) The person was dismissed from employment; or

(iii) The person was issued demerits. If more than one form of punishment was imposed only that punishment deemed the most severe shall be shown.

(h) For reporting purposes, each category of detected poor safety conduct identified in paragraph (b) of this section which resulted in the imposition of formal or informal discipline shall be annotated to reflect the following:

(1) The number of instances in which the railroad's internal appeals process reduced the punishment initially imposed at the conclusion of its hearing; and

(2) The number of instances in which the punishment imposed by the railroad was reduced by any of the following entities: The National Railroad Adjustment Board, a Public Law Board, a Special Board of Adjustment or other body for the resolution of disputes duly constituted under the provisions of the Railway Labor Act.

(i) For reporting purposes, each category of detected poor safety conduct identified in paragraph (b) 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 under part 225 of this chapter; and

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

■ 40. Section 240.401 is revised to read as follows:

§ 240.401 Review board established.

(a) Any person who has been denied certification, denied recertification, or has had his or her certification revoked and believes that a railroad incorrectly determined that he or she failed to meet the certification requirements of this part when making the decision to deny or revoke certification, may petition the Federal Railroad Administrator to review the railroad's decision.

(b) The Administrator has delegated initial responsibility for adjudicating such disputes to the Operating Crew Review Board.

(c) The Operating Crew Review Board shall be composed of employees of the Federal Railroad Administration selected by the Administrator.

■ 41. Section 240.403 is amended by:

■ a. Revising and republishing paragraph (b);

■ b. Revising paragraphs (c) and (d); and

■ c. Removing paragraph (e).

The revisions and addition read as follows:

§ 240.403 Petition requirements.

* * * * *

(b) Each petition shall:

(1) Be in writing;

(2) Be filed with the Docket Clerk, U.S. Department of Transportation, Docket Operations (M–30), West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The form of such request may be in written or electronic form consistent with the standards and requirements established by the Federal Docket Management System and posted on its website at *http://www.regulations.gov;*

(3) Contain all available information that the person thinks supports the person's belief that the railroad acted improperly, including:

(i) The petitioner's full name;

(ii) The petitioner's current mailing address;

(iii) The petitioner's daytime telephone number;

(iv) The petitioner's email address (if available);

(v) The name and address of the railroad; and

(vi) The facts that the petitioner believes constitute the improper action by the railroad, specifying the locations, dates, and identities of all persons who were present or involved in the railroad's actions (to the degree known by the petitioner);

(4) Explain the nature of the remedial action sought;

(5) Be supplemented by a copy of all written documents in the petitioner's possession or reasonably available to the petitioner that document that railroad's decision;

(6) Be filed in a timely manner; and

(7) Be supplemented, if requested by the Operating Crew Review Board, with a copy of the information under 49 CFR 40.329 that laboratories, medical review officers, and other service agents are required to release to employees. The petitioner must provide written explanation in response to an Operating Crew Review Board request if written documents that should be reasonably available to the petitioner are not supplied.

(c) A petition seeking review of a railroad's decision to deny certification or recertification or revoke certification in accordance with the procedures required by § 240.307 filed with FRA more than 120 days after the date the railroad's denial or revocation decision was served on the petitioner will be denied as untimely except that the Operating Crew Review Board for cause shown may extend the petition filing period at any time in its discretion:

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

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

(d) A party aggrieved by a Board decision to deny a petition as untimely or not in compliance with the requirements of this section may file an appeal with the Administrator in accordance with § 240.411.

■ 42. Section 240.405 is revised to read as follows:

§ 240.405 Processing certification 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 attempt to 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.

(b) Upon receipt of the petition, FRA will notify the railroad that it has received the petition and where the petition may be accessed.

(c) Within 60 days from the date of the notification provided in paragraph (b) of this section, the railroad may submit to FRA any information that the railroad considers pertinent to the petition. Late filings will only be considered to the extent practicable.

(d) A railroad that submits such information shall:

(1) Identify the petitioner by name and the docket number of the review proceeding and provide the railroad's email address (if available);

(2) Serve a copy of the information being submitted to FRA to the petitioner and petitioner's representative, if any; and

(3) File the information with the Docket Clerk, U.S. Department of Transportation, Docket Operations (M–30), West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The form of such information may be in written or electronic form consistent with the standards and requirements established by the Federal Docket Management System and posted on its website at *http://www.regulations.gov.*

(e) Each petition will then be referred to the Operating Crew Review Board for a decision.

(f) Based on the record, the Board shall have the authority to grant, deny, dismiss, or remand the petition.

(g) If the Board finds that there is insufficient basis for granting or denying the petition, the Board shall issue an order affording the parties an opportunity to provide additional information or argument consistent with its findings.

(h) When considering factual issues, the Board will determine whether there is substantial evidence to support the railroad's decision, and a negative finding is grounds for granting the petition.

(i) When considering procedural issues, the Board will determine whether the petitioner suffered substantial harm that was caused by the failure to adhere to the dictated procedures for making the railroad's decision. A finding of substantial harm is grounds for reversing the railroad's decision. To establish grounds upon which the Board may grant relief, Petitioner must show:

(1) That procedural error occurred; and

(2) The procedural error caused substantial harm.

(j) Pursuant to its reviewing role, the Board will consider whether the railroad's legal interpretations are correct based on a *de novo* review.

(k) The Board will determine whether the denial or revocation of certification or recertification was improper under this part (*i.e.,* based on an incorrect determination that the person failed to meet the certification requirements of this part) and grant or deny the petition accordingly. The Board will not otherwise consider the propriety of a railroad's decision, *i.e.,* it will not consider whether the railroad properly applied its own more stringent requirements.

(l) The Board's written decision shall be served on the petitioner, including the petitioner's representative, if any, and the railroad.

■ 43. Section 240.407 is amended by revising paragraphs (a) and (c) and revising and republishing paragraph (d) to read as follows:

§ 240.407 Request for a hearing.

(a) If adversely affected by the Operating Crew Review Board's decision, either the petitioner before the Board or the railroad involved shall have a right to an administrative proceeding as prescribed by § 240.409.

* * * * *

(c) If a party fails to request a hearing within the period provided in paragraph (b) of this section, the Operating Crew Review Board's decision will constitute final agency action.

(d) If a party elects to request a hearing, that person shall submit a written request to the Docket Clerk containing the following:

(1) The name, address, telephone number, and email address (if available) of the respondent and the requesting party's designated representative, if any;

(2) The specific factual issues, industry rules, regulations, or laws that the requesting party alleges need to be examined in connection with the certification decision in question; and

(3) The signature of the requesting party or the requesting party's representative, if any.

* * * * *

■ 44. Section 240.409 is amended by revising paragraphs (a), (p), and (q) to read as follows:

§ 240.409 Hearings.

(a) An administrative hearing for a locomotive engineer certification petition shall be conducted by a presiding officer, who can be any person authorized by the Administrator, including an administrative law judge.

* * * * *

(p) The petitioner before the Operating Crew Review Board, the railroad involved in taking the certification action, and FRA shall be parties at the hearing. All parties may participate in the hearing and may appear and be heard on their own behalf or through designated representatives. All parties may offer relevant evidence, including testimony, and may conduct such cross-examination of witnesses as may be required to make a record of the relevant facts.

(q) The party requesting the administrative hearing shall be the ''hearing petitioner.'' The hearing petitioner shall have the burden of proving its case by a preponderance of the evidence. Hence, if the hearing petitioner is the railroad involved in taking the certification action, that railroad will have the burden of proving that its decision to deny certification, deny recertification, or revoke certification was correct. Conversely, if the petitioner before the Operating Crew Review Board is the hearing petitioner, that person will have the burden of proving that the railroad's decision to deny certification, deny recertification, or revoke certification was incorrect. Between the petitioner before the Operating Crew Review Board and the railroad involved in taking the certification action, the party who is not the hearing petitioner will be a respondent.

* * * * *

■ 45. Section 240.411 is amended by revising paragraphs (a) and (f) to read as follows:

§ 240.411 Appeals.

(a) Any party aggrieved by the presiding officer's decision may file an appeal in the presiding officer's docket. The appeal must be filed within 35 days of issuance of the decision. A copy of the appeal shall be served on each party. The appeal shall set forth objections to the presiding officer's decision, supported by reference to applicable laws and regulations and with specific reference to the record. If no appeal is timely filed, the presiding officer's decision constitutes final agency action.

* * * * *

(f) An appeal from an Operating Crew Review Board decision pursuant to § 240.403(d) must be filed in the Board's docket within 35 days of issuance of the decision. A copy of the appeal shall be served on each party. 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.

■ 46. Revise appendix B to part 240 to read as follows:

Appendix B to Part 240—Procedures for Submission and Approval of Locomotive Engineer Qualification Programs

This appendix establishes procedures for the submission and approval of a railroad's program concerning the training, testing, and evaluating of persons seeking certification or recertification as a locomotive engineer in accordance with the requirements of this part (*see* §§ 240.101, 240.103, 240.105, 240.107, 240.123, 240.125, 240.127, and 240.129). It also contains guidance on how FRA will exercise its review and approval responsibilities.

Submission by a Railroad

As provided for in § 240.101, each railroad must have a program for determining the certification of each person it permits or requires to operate a locomotive. In designing its program, a railroad must take into account the trackage and terrain over which it operates, the system(s) for train control that are employed, and the operational design characteristics of the track and equipment being operated including train length, train makeup, and train speeds. Each railroad must submit its individual program to FRA for approval as provided for in § 240.103. Each program must be accompanied by a request for approval organized in accordance with this appendix. Requests for approval must contain appropriate references to the relevant portion of the program being discussed. Requests can be in letter or narrative format. The primary method for a railroad's submission is by email to *FRAOPCERTPROG@dot.gov.* For a railroad that is unable to send the program by email, the program shall be sent to the Associate Administrator for Railroad Safety/Chief Safety Officer, Federal Railroad Administration, 1200 New Jersey Avenue SE, Washington, DC 20590. Simultaneous with its filing with FRA, each railroad must provide a copy of its submission to the president of each labor organization that represents the railroad's employees subject to this part.

A railroad that electronically submits an initial program or new portions or revisions to an approved program required by this part shall be considered to have provided its consent to receive approval or disapproval notices from FRA by email. FRA may electronically store any materials required by this part regardless of whether the railroad that submits the materials does so by delivering the written materials to the Associate Administrator and opts not to submit the materials electronically. A railroad that opts not to submit the materials required by this part electronically, but provides one or more email addresses in its submission, shall be considered to have provided its consent to receive approval or disapproval notices from FRA by email or mail.

Organization of the Submission

Each request should be organized to present the required information in the following standardized manner. Each section must begin by giving the name, title, telephone number, and email and mailing addresses of the person to be contacted concerning the matters addressed by that section. If a person is identified in a prior section, it is sufficient merely to repeat the person's name in a subsequent section.

Section 1 of the Submission: General Information and Elections

The first section of the request must contain the name of the railroad, the person to be contacted concerning the request (including the person's name, title, telephone number, and email and mailing addresses) and a statement electing either to accept responsibility for educating previously untrained persons to be qualified locomotive engineers or recertify only engineers previously certified by other railroads. § 240.103(b).

If a railroad elects not to provide initial locomotive engineer training, the railroad is obligated to state so in its submission. A railroad that makes this election will be limited to recertifying persons initially certified by another railroad. A railroad that makes this election can rescind it by obtaining FRA approval of a modification of its program. § 240.103(e).

If a railroad elects to accept responsibility for training persons not previously trained to be locomotive engineers, the railroad is obligated to submit information on how such persons will be trained but has no duty to conduct such training. A railroad that elects to accept the responsibility for the training of such persons may authorize another railroad or a non-railroad entity to perform the actual training effort. The electing railroad remains responsible for assuring that such other training providers adhere to the training program the railroad submits.

This section must also state which class or classes of service the railroad will employ. § 240.107.

Section 2 of the Submission: Selection of Supervisors of Locomotive Engineers

The second section of the request must contain information concerning the railroad's procedure for selecting the person or persons it will rely on to evaluate the knowledge, skill, and ability of persons seeking certification or recertification. As provided for in § 240.105, each railroad must have a procedure for selecting supervisors of locomotive engineers which assures that persons so designated can appropriately test and evaluate the knowledge, skill, and ability of individuals seeking certification or recertification.

Section 240.105 provides a railroad latitude to select the criteria and evaluation methodology it will rely on to determine which person or persons have the required capacity to perform as a supervisor of locomotive engineers. The railroad must describe in this section how it will use that latitude and evaluate those it designates as supervisors of locomotive engineers so as to comply with the performance standard set forth in § 240.105(b). The railroad must identify, in sufficient detail to permit effective review by FRA, the criteria for evaluation it has selected. For example, if a railroad intends to rely on one or more of the following, a minimum level of prior experience as an engineer, successful completion of a course of study, or successful passage of a standardized testing program, the submission must state which criteria it will employ.

Section 3 of the Submission: Training Persons Previously Certified

The third section of the request must contain information concerning the railroad's program for training previously certified locomotive engineers. As provided for in § 240.123(b) each railroad must have a program for the ongoing education of its locomotive engineers to assure that they maintain the necessary knowledge concerning personal safety, operating rules and practices, mechanical condition of equipment, methods of safe train handling (including familiarity with physical characteristics), and relevant Federal safety rules.

Section 240.123(b) provides a railroad latitude to select the specific subject matter to be covered, duration of the training, method of presenting the information, and the frequency with which the training will be provided. The railroad must describe in this section how it will use that latitude to assure that its engineers remain knowledgeable concerning the safe discharge of their train operation responsibilities so as to comply with the performance standard set forth in § 240.123(b). This section must contain sufficient detail to permit effective evaluation of the railroad's training program in terms of the subject matter covered, the frequency and duration of the training sessions, the type of formal training employed (including, but not limited to, classroom, computer-based, correspondence, OJT, simulator, or laboratory training) and which aspects of the program are voluntary or mandatory.

Without assistance from automation, safe train handling involves both abstract knowledge about the appropriate use of engine controls and the application of that knowledge to trains of differing composition traversing varying terrain. Time and circumstances have the capacity to diminish both abstract knowledge and the proper application of that knowledge to discrete events. Time and circumstances also have the capacity to alter the value of previously obtained knowledge and the application of that knowledge. In formulating how it will use the discretion being afforded, each railroad must design its program to address both loss of retention of knowledge and changed circumstances, and this section of the submission to FRA must address these matters.

For example, locomotive engineers need to have their fundamental knowledge of train operations refreshed periodically. Each railroad needs to advise FRA how that need is satisfied in terms of the interval between attendance at such training, the nature of the training being provided, and methods for

conducting the training. A matter of particular concern to FRA is how each railroad acts to ensure that engineers remain knowledgeable about safe train handling procedures if the territory over which a locomotive engineer is authorized to operate is territory from which the engineer has been absent. The railroad must have a plan for the familiarization training that addresses the question of how long a person can be absent before needing more education and, once that threshold is reached, how the person will acquire the needed education. Similarly, the program must address how the railroad responds to changes such as the introduction of new technology, new operating rule books, or significant changes in operations including alteration in the territory engineers are authorized to operate over.

Section 4 of the Submission: Testing and Evaluating Persons Previously Certified

The fourth section of the request must contain information concerning the railroad's program for testing and evaluating previously certified locomotive engineers. As provided for in §§ 240.125 and 240.127, each railroad must have a program for the ongoing testing and evaluating of its locomotive engineers to ensure that they have the necessary knowledge and skills concerning personal safety, operating rules and practices, mechanical condition of equipment, methods of safe train handling (including familiarity with physical characteristics), and relevant Federal safety rules. Similarly, each railroad must have a program for ongoing testing and evaluating to ensure that its locomotive engineers have the necessary vision and hearing acuity as provided for in § 240.121.

Sections 240.125 and 240.127 require that a railroad rely on written procedures for determining that each person can demonstrate his or her knowledge of the railroad's rules and practices and skill at applying those rules and practices for the safe operation of a locomotive or train. Section 240.125 directs that, when seeking a demonstration of the person's knowledge, a railroad must employ a written test that contains objective questions and answers and covers the following subject matters: (i) Personal safety practices; (ii) operating practices; (iii) equipment inspection practices; (iv) train handling practices (including familiarity with the physical characteristics of the territory); and (v) compliance with relevant Federal safety rules. The test must accurately measure the person's knowledge of all of these areas.

Section 240.125 provides a railroad latitude in selecting the design of its own testing policies (including the number of questions each test will contain, how each required subject matter will be covered, weighting (if any) to be given to particular subject matter responses, selection of passing scores, and the manner of presenting the test information). The railroad must describe in this section how it will use that latitude to ensure that its engineers will demonstrate their knowledge concerning the safe discharge of their train operation responsibilities so as to comply with the performance standard set forth in § 240.125.

Section 240.127 directs that, when seeking a demonstration of the person's skill, a railroad must employ a test and evaluation procedure conducted by a designated supervisor of locomotive engineers that contains an objective evaluation of the person's skills at applying the railroad's rules and practices for the safe operation of trains. The test and evaluation procedure must examine the person's skills in terms of all of the following subject matters: (i) Operating practices; (ii) equipment inspection practices; (iii) train handling practices (including familiarity with the physical characteristics of the territory); and (iv) compliance with relevant Federal safety rules. The test must be sufficient to examine effectively the person's skills while operating a train in the most demanding type of service which the person is likely to encounter in the normal course of events once he or she is deemed qualified.

Section 240.127 provides a railroad latitude in selecting the design of its own testing and evaluation procedures (including the duration of the evaluation process, how each required subject matter will be covered, weighing (if any) to be given to particular subject matter response, selection of passing scores, and the manner of presenting the test information). However, the railroad must describe the scoring system used by the railroad during a skills test administered in accordance with the procedures required under § 240.211. The description shall include the skills to be tested and the weight or possible score that each skill will be given. The section should also provide information concerning the procedures which the railroad will follow that achieve the objectives described in FRA's recommended practices (*see* appendix E to this part) for conducting skill performance testing. The section also gives a railroad the latitude to employ either a Type 1 or a Type 2 simulator (properly programmed) to conduct the test and evaluation procedure. A railroad must describe in this section how it will use that latitude to assure that its engineers will demonstrate their skills concerning the safe discharge of their train operation responsibilities so as to comply with the performance standard set forth in § 240.127.

Section 240.121 provides a railroad latitude to rely on the professional medical opinion of the railroad's medical examiner concerning the ability of a person with substandard acuity to operate a locomotive safely. The railroad must describe in this section how it will ensure that its medical examiner has sufficient information concerning the railroad's operations to make appropriate conclusions about the ability of a particular individual to operate a train safely.

Section 5 of the Submission: Training, Testing, and Evaluating Persons Not Previously Certified

Unless a railroad has made an election not to accept responsibility for conducting the initial training of persons to be locomotive engineers, the fifth section of the request must contain information concerning the railroad's program for educating, testing, and evaluating persons not previously trained as locomotive engineers. As provided for in § 240.123(c), a railroad that is issuing an initial certification to a person to be a locomotive engineer must have a program for the training, testing, and evaluating of its locomotive engineers to ensure that they acquire the necessary knowledge and skills concerning personal safety, operating rules and practices, mechanical condition of equipment, methods of safe train handling (including familiarity with physical characteristics), and relevant Federal safety rules.

Section 240.123 establishes a performance standard and gives a railroad latitude in selecting how it will meet that standard. A railroad must describe in this section how it will use that latitude to ensure that its engineers will acquire sufficient knowledge and skill and demonstrate their knowledge and skills concerning the safe discharge of their train operation responsibilities. This section must contain the same level of detail concerning initial training programs as that described for each of the components of the overall program contained in sections 2 through 4 of this appendix. A railroad that plans to accept responsibility for the initial training of locomotive engineers may authorize a non-railroad entity to perform the actual training effort as long as the other entity complies with the requirements for training organizations and learning institutions in § 243.111 of this chapter. The authorizing railroad may submit a training program developed by that authorized trainer but the authorizing railroad remains responsible for ensuring that such other training providers adhere to the training program submitted. Railroads that elect to rely on other entities, to conduct training away from the railroad's own territory, must indicate how the student will be provided with the required familiarization with the physical characteristics for its territory.

Section 6 of the Submission: Monitoring Operational Performance by Certified Engineers

The final section of the request must contain information concerning the railroad's program for monitoring the operation of its certified locomotive engineers. As provided for in § 240.129, each railroad must have a program for the ongoing monitoring of its locomotive engineers to ensure that they operate their locomotives in conformity with the railroad's operating rules and practices including methods of safe train handling and relevant Federal safety rules.

Section 240.129 requires that a railroad annually observe each locomotive engineer demonstrating his or her knowledge of the railroad's rules and practices and skill at applying those rules and practices for the safe operation of a locomotive or train. Section 240.129 directs that the observation be conducted by a designated supervisor of locomotive engineers but provides a railroad latitude in selecting the design of its own observation procedures (including the duration of the observation process, reliance on event recorder downloads that record the specifics of train operation, and the specific aspects of the engineer's performance to be covered). The section also gives a railroad the latitude to employ either a Type 1 or a Type 2 simulator (properly programmed) to conduct monitoring observations. A railroad must describe in this section how it will use

that latitude to assure that the railroad is monitoring that its engineers demonstrate their skills concerning the safe discharge of their train operation responsibilities. A railroad must also describe the scoring system used by the railroad during an operational monitoring observation or unannounced compliance test administered in accordance with the procedures required under § 240.303. A railroad that intends to employ train operation event recorder tapes to comply with this monitoring requirement shall indicate in this section how it anticipates determining what person was at the controls and what signal indications or other operational constraints, if any, were applicable to the train's movement.

Section 7 of the Submission: Procedures for Routine Administration of the Engineer Certification Program

The final section of the request must contain a summary of how the railroad's program and procedures will implement the various specific aspects of the regulatory provisions that relate to routine administration of its certification program for locomotive engineers. At a minimum, this section needs to address the procedural aspects of the rule's provisions identified in the following paragraph.

Section 240.109 provides that each railroad must have procedures for review and comment on adverse prior safety conduct, but allows the railroad to devise its own system within generalized parameters. Sections 240.115, 240.117 and 240.119 require a railroad to have procedures for evaluating data concerning prior safety conduct as a motor vehicle operator and as railroad workers, yet leave selection of many details to the railroad. Sections 240.203, 240.217, and 240.219 place a duty on the railroad to make a series of determinations but allow the railroad to select what procedures it will employ to assure that all of the necessary determinations have been made in a timely fashion; who will be authorized to conclude that person is or is not qualified; and how it will communicate adverse decisions. Documentation of the factual basis the railroad relied on in making determinations under §§ 240.205, 240.207, 240.209, 240.211, and 240.213 is required, but these sections permit the railroad to select the procedures it will employ to accomplish compliance with these provisions. Sections 240.225 and 240.227 permit reliance on qualification determinations made by other entities and permit a railroad latitude in selecting the procedures it will employ to ensure compliance with these provisions. Similarly, § 240.229 permits use of railroad selected procedures to meet the requirements for certification of engineers performing service in joint operations territory. Sections 240.301 and 240.307 allow a railroad a certain degree of discretion in complying with the requirements for replacing lost certificates or the conduct of certification revocation proceedings.

This section of the request should outline in summary fashion the manner in which the railroad will implement its program so as to comply with the specific aspects of each of the rule's provisions described in the preceding paragraph.

FRA Review

The submissions made in conformity with this appendix will be deemed approved within 30 days after the required filing date or the actual filing date whichever is later. No formal approval document will be issued by FRA. The brief interval for review reflects FRA's judgment that railroads generally already have existing programs that will meet the requirements of this part. FRA has taken the responsibility for notifying a railroad when it detects problems with the railroad's program. FRA retains the right to disapprove a program that has obtained approval due to the passage of time as provided for in section § 240.103.

Rather than establish rigid requirements for each element of the program, FRA has given railroads discretion to select the design of their individual programs within a specified context for each element. The rule, however, provides a good guide to the considerations that should be addressed in designing a program that will meet the performance standards of this rule. In reviewing program submissions, FRA will focus on the degree to which a particular program deviates from the norms set out in its rule. To the degree that a particular program submission materially deviates from the norms set out in its rule, FRA's review and approval process will be focused on determining the validity of the reasoning relied on by a railroad for selecting its alternative approach and the degree to which the alternative approach is likely to be effective in producing locomotive engineers who have the knowledge, skill, and ability to operate trains safely.

■ 47. Revise appendix C to part 240 to read as follows:

Appendix C to Part 240—Procedures for Obtaining and Evaluating Motor Vehicle Driving Record Data

The purpose of this appendix is to outline the procedures available to individuals and railroads for complying with the requirements of section 4(a) of the Railroad Safety Improvement Act of 1988 and §§ 240.109, 240.111, and 240.205. Those provisions require that railroads consider the motor vehicle driving record of each person prior to issuing him or her certification or recertification as a locomotive engineer.

To fulfill that obligation, a railroad must review a certification candidate's recent motor vehicle driving record. Generally, that will be a single record on file with the State agency that issued the candidate's current license. However, it can include multiple records if the candidate has been issued a motor vehicle driving license by more than one State agency or foreign country. In addition, the railroad must determine whether the certification candidate is listed in the National Driver Register and, if so listed, to review the data that caused the candidate to be so listed.

Access to State Motor Vehicle Driving Record Data

The right of railroad workers, their employers, or prospective employers to have access to a State motor vehicle licensing agency's data concerning an individual's driving record is controlled by State law. Although many States have mechanisms through which employers and prospective employers such as railroads can obtain such data, there are some States in which privacy concerns make such access very difficult or impossible. Since individuals generally are entitled to obtain access to driving record data that will be relied on by a State motor vehicle licensing agency when that agency is taking action concerning their driving privileges, FRA places responsibility on individuals who want to serve as locomotive engineers to request that their current State driver licensing agency or agencies furnish such data directly to the railroad considering certifying them as a locomotive operator. Depending on the procedures adopted by a particular State agency, this will involve the candidate's either sending the State agency a brief letter requesting such action or executing a State agency form that accomplishes the same effect. It will normally involve payment of a nominal fee established by the State agency for such a records check. In rare instances, when a certification candidate has been issued multiple licenses, it may require more than a single request.

The National Driver Register

In addition to seeking an individual State's data, each engineer candidate is required to request that a search and retrieval be performed of any relevant information concerning his or her driving record contained in the National Driver Register (NDR). The NDR is a system of information created by Congress in 1960. In essence, it is a nationwide repository of information on problem drivers that was created in an effort to protect motorists. It is a voluntary State/Federal cooperative program that assists motor vehicle driver licensing agencies in gaining access to data about actions taken by other State agencies concerning an individual's motor vehicle driving record. The NDR is designed to address the problem that occurs when chronic traffic law violators, after losing their license in one State travel to and receive licenses in another State. Today, each State and the District of Columbia are required to send information on all revocations, suspensions, and license denials within 31 days of receipt of the convictions from the courts to the NDR and each of these driver licensing agencies has the capability to provide NDR's data. 49 U.S.C. 30304. The NDR data can also be obtained by contacting the National Highway Traffic Safety Administration (NHTSA) of the Department of Transportation directly.

The information submitted to NHTSA contains, at a minimum, three specific pieces of data: The identification of the State authority providing the information, the name of the person whose license is being affected, and the date of birth of that person. It may be supplemented by data concerning the person's height, weight, color of eyes, and social security account number, if a State collects such data.

Access to NDR Data

Essentially only individuals and State licensing agencies, including the District of Columbia, can obtain access to the NDR data. Since railroads have no direct access to the NDR data, FRA requires that individuals seeking certification as a locomotive engineer request that an NDR search be performed and direct that the results be furnished to the railroad. FRA requires that each person request the NDR information directly from NHTSA unless the prospective operator has a motor vehicle driver license issued by a State motor vehicle licensing agency or the District of Columbia. Participating States and the District of Columbia can directly access the NDR data on behalf of the prospective engineer.

Requesting NHTSA To Perform the NDR Check

The procedures for requesting NHTSA performance of an NDR check are as follows:

1. Each person shall submit a written request to the National Highway Traffic Safety Administration at the following address: Chief, National Driver Register, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590.

2. The request must contain:

(a) The full legal name;

(b) Any other names used by the person (*e.g.,* nickname or professional name);

(c) The date of birth;

(d) Sex;

(e) Height;

(f) Weight;

(g) Color of eyes; and

(h) Driver's license number (unless that is not available).

3. The request must authorize NHTSA to perform the NDR check and to furnish the results of the search directly to the railroad.

4. The request must identify the railroad to which the results are to be furnished, including the proper name of the railroad, and the proper mailing address of the railroad.

5. The person seeking to become a certified locomotive engineer shall sign the request, and that signature must be notarized.

FRA requires that the request be in writing and contain as much detail as is available to improve the reliability of the data search. Any person may supply additional information to that being mandated by FRA. Furnishing additional information, such as the person's social security account number, will help to identify more positively any records that may exist concerning the requester. Although no fee is charged for such NDR checks, a minimal cost may be incurred in having the request notarized. The requirement for notarization is designed to ensure that each person's right to privacy is being respected and that records are only being disclosed to legally authorized parties.

Requesting a State Agency To Perform the NDR Check

As discussed earlier in connection with obtaining data compiled by the State agency itself, a person can either write a letter to that agency asking for the NDR check or can use the agency's forms for making such a request. If a request is made by letter the individual must follow the same procedures required when directly seeking the data from NHTSA. Since it would be more efficient for a prospective locomotive engineer to make a single request for both aspects of the information required under this rule, FRA anticipates that a State agency inquiry should be the predominant method for making these NDR checks. Requests to State agencies may involve payment of a nominal fee established by the State agency for such a records check.

State agencies normally will respond in approximately 30 days or less and advise whether there is or is not a listing for a person with that name and date of birth. If there is a potential match and the inquiry State was not responsible for causing that entry, the agency normally will indicate in writing the existence of a probable match and will identify the State licensing agency that suspended, revoked or canceled the relevant license or convicted the person of one of the violations referenced earlier in this appendix.

Actions When a Probable NDR Match Occurs

The response provided after performance of an NDR check is limited to either a notification that no potential record match was identified or a notification that a potential record match was identified. If the latter event occurs, the notification will include the identification of the State motor vehicle licensing authority which possesses the relevant record. If the NDR check results indicate a potential match and that the State with the relevant data is the same State which furnished detailed data (because it had issued the person a driving license), no further action is required to obtain additional data. If the NDR check results indicate a potential match and the State with the relevant data is different from the State which furnished detailed data, it then is necessary to contact the individual State motor vehicle licensing authority that furnished the NDR information to obtain the relevant record. FRA places responsibility on the railroad to notify the engineer candidate and on the candidate to contact the State with the relevant information. FRA requires the certification candidate to write to the State licensing agency and request that the agency inform the railroad concerning the person's driving record. If required by the State agency, the person may have to pay a nominal fee for providing such data and may have to furnish written evidence that the prospective operator consents to the release of the data to the railroad. FRA does not require that a railroad or a certification candidate go beyond these efforts to obtain the information in the control of such a State agency, and a railroad may act upon the pending certification without the data if an individual State agency fails or refuses to supply the records.

If the non-issuing State licensing agency does provide the railroad with the available records, the railroad must verify that the record pertains to the person being considered for certification. It is necessary to perform this verification because in some instances only limited identification information is furnished for use in the NDR and this might result in data about a different person being supplied to the railroad. Among the available means for verifying that the additional State record pertains to the certification candidate are physical description, photographs, and handwriting comparisons.

Once the railroad has obtained the motor vehicle driving record(s) which, depending on the circumstance, may consist of more than two documents, the railroad must afford the prospective engineer an opportunity to review that record and respond in writing to its contents in accordance with the provisions of § 240.219. The review opportunity must occur before the railroad evaluates that record. The railroad's required evaluation and subsequent decision making must be done in compliance with the provisions of this part.

■ 48. Revise appendix D to part 240 to read as follows:

Appendix D to Part 240—Identification of State Agencies That Perform National Driver Register Checks

Under the provisions of § 240.111, each person seeking certification or recertification as a locomotive operator must request that a check of the National Driver Register (NDR) be conducted and that the resulting information be furnished to his or her employer or prospective employer. Under the provisions of paragraphs (d) and (e) of § 240.111, each person seeking certification or recertification as a locomotive engineer must request that the National Highway Traffic Safety Administration (NHTSA) conduct the NDR check, unless he or she was issued a motor vehicle driver license by one of the State agencies that perform such checks, which today includes all State agencies and the District of Columbia. If the certification candidate received a license from one of the State agencies or the District of Columbia, he or she must request the State agency to perform the NDR check. Since these State agencies can more efficiently supply the desired data and, in some instances, can provide a higher quality of information, FRA requires that certification candidates make use of this method in preference to contacting NHTSA directly.

■ 49. Add appendix G to part 240 to read as follows:

Appendix G to Part 240—Application of Revocable Events

Part 240 and Part 242 Revocable Events		Application of Part 240 and Part 242 Revocable Events						
		Periods of Revocation					Employees with Multiple Certifications	
		Main Track				Other than Main Track Where Restricted Speed or the Operational Equivalent Is in Effect	Main Track or Other than Main Track	
		1st Offense	2nd Offense Within 24 Months	3rd Offense Within 36 Months	4th Offense Within 36 Months	No Offense Within Previous 12 Months	Offense (as a Conductor)	Offense (as an Engineer)
1	Signal Requiring Complete Stop before Passing	30 Days	6 Months	1 Year	3 Years	Not Applicable	Employee May Not Work as an Engineer During the Period of Revocation	Employee May Not Work as a Conductor During the Period of Revocation
2	Restricted Speed & Speed; 10 mph over							
3	Required Air Brake Test							
4	Occupying Main Track without Authority							
5	Disabling a Safety Device							
6	Shoving Movements					Half Revocation Period	Employee May Work as an Engineer During the Period of Revocation	Not applicable
7	Equipment Fouling Adjacent Tracks							
8	Hand Operated Switches (Crossovers)							
9	Hand Operated Switches Connected to Main Track					Not Applicable		
10	Hand Operated Crossover Switches (before & after movement)					Half Revocation Period		
11	Hand Operated Derails							
12	Drug & Alcohol	Different periods of revocation may be applied (see §§ 240.117, 240.119, 242.403, & 242.115)				Not Applicable	Employee May Not Work as an Engineer During the Period of Revocation	Employee May Not Work as a Conductor During the Period of Revocation

PART 242—QUALIFICATION AND CERTIFICATION OF CONDUCTORS

■ 50. The authority citation for part 242 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20135, 20138, 20162, 20163, 21301, 21304, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.89.

■ 51. Section 242.7 is amended by revising the definitions of ''Main track'' and ''Substance abuse disorder'' to read as follows:

§ 242.7 Definitions.

* * * * *

Main track means a track upon which the operation of trains is governed by one or more of the following methods of operation: Timetable; mandatory directive; signal indication; or any form of absolute or manual block system.

* * * * *

Substance abuse disorder refers to a psychological or physical dependence on alcohol or a drug, or another identifiable and treatable mental or physical disorder involving the abuse of alcohol or drugs as a primary manifestation. A substance abuse disorder is ''active'' within the meaning of this part if the person is currently using alcohol or other drugs, except under medical supervision consistent with the restrictions described in § 219.103 of this chapter or has failed to complete primary treatment successfully or participate in aftercare successfully as directed by a DAC or SAP.

* * * * *

■ 52. Section 242.103 is amended by revising paragraphs (b), (c)(1) and (2), and (d)(2) and (3) to read as follows:

§ 242.103 Approval of design of individual railroad programs by FRA.

* * * * *

(b) A railroad commencing operations after the pertinent date specified in paragraph (a) of this section shall submit its written certification program and request for approval in accordance with the procedures contained in appendix B to this part at least 60 days prior to commencing operations. The primary method for a railroad's submission is by email to *FRAOPCERTPROG@dot.gov.* For those railroads that are unable to send the program by email, the program may be sent to the Associate Administrator for Railroad Safety/Chief Safety Officer, Federal Railroad Administration, 1200 New Jersey Avenue SE, Washington, DC 20590.

(c) * * *

(1) Simultaneous with its filing with FRA, provide a copy of the submission filed pursuant to paragraph (a) or (b) of this section, a resubmission filed pursuant to paragraph (h) of this section, or a material modification filed pursuant to paragraph (i) of this section to the president of each labor organization that represents the railroad's employees subject to this part; and

(2) Include in its submission filed pursuant to paragraph (a) or (b) of this section, a resubmission filed pursuant to paragraph (h) of this section, or a material modification filed pursuant to paragraph (i) of this section a statement affirming that the railroad has provided a copy to the president of each labor organization that represents the railroad's employees subject to this part, together with a list of the names and addresses of persons provided a copy.

(d) * * *

(2) Each comment shall be submitted by email to *FRAOPCERTPROG@dot.gov* or by mail to the Associate Administrator for Railroad Safety/Chief Safety Officer, FRA, 1200 New Jersey Avenue SE, Washington, DC 20590; and

(3) The commenter shall affirm that a copy of the comment was provided to the railroad.

* * * * *

■ 53. Section 242.117 is amended by revising and republishing paragraphs (g), (h), and (i) to read as follows:

§ 242.117 Vision and hearing acuity.

* * * * *

(g) In order to be currently certified as a conductor, except as permitted by paragraph (j) of this section, a person's vision and hearing shall meet or exceed the standards prescribed in this section and appendix D 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.

(h) Except as provided in paragraph (j) of this section, each person shall have visual acuity that meets or exceeds the following thresholds:

(1) For distant viewing, either:

(i) Distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses; or

(ii) Distant visual acuity separately corrected to at least 20/40 (Snellen) with corrective lenses and distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses;

(2) A field of vision of at least 70 degrees in the horizontal meridian in each eye; and

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

(i) Except as provided in paragraph (j) of this section, each person shall have a hearing test or audiogram that shows the person's hearing acuity meets or exceeds the following thresholds: The person does not have an average hearing loss in the better ear greater than 40 decibels with or without use of a hearing aid, at 500 Hz, 1,000 Hz, and 2,000 Hz. The hearing test or audiogram shall meet the requirements of one of the following:

(1) As required in 29 CFR 1910.95(h) (Occupational Safety and Health Administration);

(2) As required in § 227.111 of this chapter; or

(3) Conducted using an audiometer that meets the specifications of and is maintained and used in accordance with a formal industry standard, such as ANSI S3.6, ''Specifications for Audiometers.''

* * * * *

■ 54. Section 242.213 is amended by revising and republishing paragraph (e) to read as follows:

§ 242.213 Multiple certifications.

* * * * *

(e) If the conductor is removed from a passenger train for a medical, police or other such emergency after the train departs from an initial terminal, the train may proceed to the first location where the conductor can be replaced without incurring undue delay without the locomotive engineer being a certified conductor. However, an assistant conductor or brakeman must be on the train and the locomotive engineer must be informed that there is no certified conductor on the train prior to any movement.

* * * * *

■ 55. Section 242.403 is amended by revising and republishing paragraph (d) to read as follows:

§ 242.403 Criteria for revoking certification.

* * * * *

(d) In determining whether a person may be or remain certified as a conductor, a railroad shall consider as operating rule compliance data only conduct described in paragraphs (e)(1) through (11) 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.

* * * * *

■ 56. Section 242.503 is amended by revising and republishing paragraph (c) to read as follows:

§ 242.503 Petition requirements.

* * * * *

(c) A petition seeking review of a railroad's decision to deny certification or recertification or revoke certification in accordance with the procedures required by § 242.407 filed with FRA more than 120 days after the date the railroad's denial or revocation decision was served on the petitioner will be denied as untimely except that the Operating Crew Review Board for cause shown may extend the petition filing period at any time in its discretion:

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

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

* * * * *

■ 57. Section 242.505 is amended by revising paragraphs (h), (i) introductory text, (j), and (k) to read as follows:

§ 242.505 Processing certification review petitions.

* * * * *

(h) When considering factual issues, the Board will determine whether there is substantial evidence to support the railroad's decision, and a negative finding is grounds for granting the petition.

(i) When considering procedural issues, the Board will determine whether the petitioner suffered substantial harm that was caused by the failure to adhere to the dictated procedures for making the railroad's decision. A finding of substantial harm is grounds for reversing the railroad's decision. To establish grounds upon which the Board may grant relief, Petitioner must show:

* * * * *

(j) Pursuant to its reviewing role, the Board will consider whether the railroad's legal interpretations are correct based on a *de novo* review.

(k) The Board will determine whether the denial or revocation of certification or recertification was improper under this part (*i.e.,* based on an incorrect determination that the person failed to meet the certification requirements of this part) and grant or deny the petition accordingly. The Board will not otherwise consider the propriety of a railroad's decision, *i.e.,* it will not consider whether the railroad properly applied its own more stringent requirements.

* * * * *

■ 58. Section 242.511 is amended by revising paragraphs (a) and (f) to read as follows:

§ 242.511 Appeals.

(a) Any party aggrieved by the presiding officer's decision may file an appeal in the presiding officer's docket. The appeal must be filed within 35 days of issuance of the decision. A copy of the appeal shall be served on each party. The appeal shall set forth objections to the presiding officer's decision, supported by reference to applicable laws and regulations and with specific reference to the record. If no appeal is timely filed, the presiding officer's decision constitutes final agency action.

* * * * *

(f) An appeal from an Operating Crew Review Board decision pursuant to § 242.503(d) must be filed in the Board's docket within 35 days of issuance of the decision. A copy of the appeal shall be served on each party. 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.

■ 59. Revise appendix E to part 242 to read as follows:

Appendix E to Part 242—Application of Revocable Events

	Part 240 and Part 242 Revocable Events	Application of Part 240 and Part 242 Revocable Events						
		Periods of Revocation					Employees with Multiple Certifications	
		Main Track				Other than Main Track Where Restricted Speed or the Operational Equivalent Is in Effect	Main Track or Other than Main Track	
		1st Offense	2nd Offense Within 24 Months	3rd Offense Within 36 Months	4th Offense Within 36 Months	No Offense Within Previous 12 Months	Offense (as a Conductor)	Offense (as an Engineer)
1	Signal Requiring Complete Stop before Passing	30 Days	6 Months	1 Year	3 Years	Not Applicable	Employee May Not Work as an Engineer During the Period of Revocation	Employee May Not Work as a Conductor During the Period of Revocation
2	Restricted Speed & Speed; 10 mph over							
3	Required Air Brake Test							
4	Occupying Main Track without Authority							
5	Disabling a Safety Device							
6	Shoving Movements					Half Revocation Period	Employee May Work as an Engineer During the Period of Revocation	Not applicable
7	Equipment Fouling Adjacent Tracks							
8	Hand Operated Switches (Crossovers)							
9	Hand Operated Switches Connected to Main Track					Not Applicable		
10	Hand Operated Crossover Switches (before & after movement)					Half Revocation Period		
11	Hand Operated Derails							
12	Drug & Alcohol	Different periods of revocation may be applied (see §§ 240.117, 240.119, 242.403, & 242.115)				Not Applicable	Employee May Not Work as an Engineer During the Period of Revocation	Employee May Not Work as a Conductor During the Period of Revocation

Issued in Washington, DC.

Quintin C. Kendall,

Deputy Administrator.

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