

## **Certification of Locomotive Engineers**

### **I. STATUTE**

In 1988 Congress required the Secretary to establish a program for licensing or certification of any operator of a locomotive.

The program shall provide the following:

1. Approval of each railroad's qualification standards.
2. Minimum training requirements.
3. The employee shall have a comprehensive knowledge of the railroad operating practices.
4. It shall require consideration of the employee's driving record, including:  
(a) whether his or her driver's license has been denied for cause within the previous 5 years, (b) whether within the previous 5 years the license has been canceled, revoked or suspended, and (c) whether within the previous 5 years the employee has been convicted of an offense described in the National Driver Register Act of 1982 (i.e. driving under the influence).
5. The individual seeking a license or certification (a) shall require the motor vehicle department of the state in which he or she lives to provide the driving record of the said employee to the employer or the Secretary for the previous 5 years; (b) shall request that the information in the National Driver Register Act be transmitted to the employer or the Secretary of Transportation. The information shall be made available to the employee who may comment in writing as to the mitigating circumstances surrounding the driving record.
6. The Secretary may disqualify the employee based solely on his or her driving record. However, the Secretary may waive the requirements if the Secretary determines that the employee is not unfit. The secretary cannot grant a waiver if there has been a conviction, cancellation, revocation or suspension, and the employee has not completed a rehabilitation program.
7. If the employee is denied a license or certification, he or she is entitled to an administrative hearing as permitted under the Federal Railroad Safety Act (i.e. the right to an oral hearing).
8. No employee shall be denied a license where he or she was convicted for alcohol or a controlled substance if such person completed a rehabilitation program established by the railroad or approved by the Secretary.
9. There can be no access to the National Driver Registry which was entered more than 3 years before the request, unless revocations or cancellations

are still in effect against the employee. There is no requirement that an employee must have or obtain a driver's license.

## **II. SUMMARY OF FRA'S RULE ON LOCOMOTIVE ENGINEER CERTIFICATION**

### **Classes Of Engineers**

For the purposes of this rule, operation of a locomotive would be divided into two distinct classifications or types of service. The types are: train service engineers who would have the knowledge and skill to operate any train under all conditions; and locomotive servicing engineers who would have the capacity to operate locomotives without cars attached.

### **Categories That Must Be Examined**

Under FRA's system, railroads themselves would issue the certificates and could not require or permit anyone to operate a locomotive unless that person held the proper certificate. Although railroads will be free to have more stringent criteria, FRA's rule will require railroads, as a minimum, to make four determinations concerning anyone being authorized to operate a locomotive. Prior to issuing a certificate, each railroad must determine that the prospective operator:

- (1) has the necessary visual and hearing acuity to perform such service;
- (2) has the necessary knowledge, as demonstrated by passage of a written examination;
- (3) has the necessary skills to operate a locomotive or train, as demonstrated by passage of a performance skills test; and
- (4) is eligible to become an operator, as demonstrated by a review of the person's prior record of conduct as a railroad employee and as a motor vehicle operator.

#### **1. Vision and Hearing**

In making a determination concerning a person's vision and hearing a railroad will have to review a competent medical evaluation of the individual's acuity levels. If warranted by the person's physical condition, the operator will be required to use appropriate corrective devices while on-duty.

#### **2. Knowledge**

In making a determination concerning the person's knowledge a railroad will have to administer a written examination covering the appropriate rules and safety practices of that railroad. Initially, railroads will have considerable discretion in developing these tests until time permits greater standardization of such test. To improve operator competency, FRA requires supplemental training triggered either by the passage of time or significant changes in operations.

### **3. Performance Skills**

#### **a. Monitoring**

In making a determination about the person's performance skills a railroad will have to administer a skills test either by monitoring the person's computer simulated operation of a train or by monitoring actual operation of a test train. In addition, railroads will have data concerning the person's operational monitoring program. That monitoring program will require annual evaluations of an operator's skills during routine operations.

#### **b. Training**

As alternative to such testing at initial certification, a railroad can rely on fact that person has successfully completed a training program appropriate for the type of operations he or she will perform. Standards for the training of future locomotive engineers also are included in this rule. Railroads that elect to conduct such training programs will obtain approval of their overall program. Students will be authorized to operate locomotives and trains when supervised by instructors.

### **4. Motor Vehicle History**

In making determinations about the person's eligibility to be an engineer railroads will have to consider, where pertinent history exists, the individual's recent (previous 3-5 years) conduct as a railroad employee and as a motor vehicle operator. Such considerations are limited to evaluating instances where the operator candidate voluntarily has created such a behavioral history. A system is provided for evaluating the significance, for the purposes of this rule, of instances in which the person had been involved with alcohol or drugs either while on duty as a railroad employee or while operating a motor vehicle.

### **5. Substance Abuse**

Any single incident of substance abuse would trigger an evaluation by a skilled professional (e.g., medical review officers and Employee Assistance Program (EAP) counselors) of the significance to be attached to such an event. Both railroad employment incidents and motor vehicle driving incidents involving substance abuse would generate this response. The professional would have to consider whether the person is currently dependent on alcohol or drugs or has a treatable disorder involving abuse of alcohol or drugs as a manifestation. If the professionals conclude that such a condition exists, railroads could permit the person to perform service subject to the aftercare and testing provisions contained in FRA's alcohol and drug rules after sufficient intervention has occurred.

Certification candidates would have the responsibility for furnishing the data concerning driving history. They would have to query the relevant state agencies and the National Driver's Register and make the results available to the railroad.

## **6. Revocation**

### **a. Substance Abuse**

Mandatory revocation of the certificate is prescribed for multiple instances of work related detection of substance abuse, regardless of how detected. The period of revocation varies based on the manner of detection. A mandatory nine month revocation would be imposed if the event giving rise to the evaluation was the result of on the job possession, use, or impairment involving alcohol or a controlled substance.

Refusal to submit to chemical testing would be rated as the same as if the test were positive. Whenever a certificate is revoked, completion of the requisite time period and an EAP evaluation showing no current controlled substance abuse disorder are predicates for re-certification.

### **b. Motor Vehicle History**

FRA's rule provides a system for evaluating a variety of instances in which the person operated a train unsafely, including the matter of or motor vehicle driving safety.

### **c. Instances of Poor Safety Performance**

Multiple types of incidents of poor safety performance while at the controls of a train will be considered under this evaluation system. For example, operating without proper authority, excessive speeding, and tampering with safety devices would be among the types of unsafe behavior that would result in revocation of certification. In each of the five specific types of events identified by FRA, the incident involves a very dangerous situation in which it is appropriate to hold a locomotive engineer directly responsible for his or her conduct.

Mandatory periods of revocation are provided for single incidents and for multiple incidents of poor train operation that may occur in any three to five year interval. The severity of the response contains gradations to deter repeat offenders. Candidates would be given an opportunity to review any comment on any adverse train operation data before a railroad considered it.

## **7. Certificate**

Railroads will issue engineers deemed qualified a certificate documenting their status and engineers must have that certificate in their possession while on duty. Certificates would have to be renewed at 36-month intervals after again making the four determinations identified above.

## **8. Failure to Certify**

Review of a railroad's decision not to certify would be performed by FRA. Initial review would be simple and prompt. Those dissatisfied with the initial review

could request a formal, trial-type hearing procedure for further review. Hearing officer decisions could be appealed to the FRA Administrator before becoming administratively final.

## **9. Monitoring**

Periodic monitoring of locomotive engineer safety performance will be required. Both over and covert periodic monitoring is required as well as a formal annual evaluation of the effectiveness of the safety performance of a railroad's corps of locomotive engineers.

## **10. Penalties and Disqualification**

FRA also is making certain locomotive engineer actions, such as excessive speeding, that are not currently proscribed by specific regulation, unlawful under the provisions of this rule. This will enable FRA to independently respond, through the use of its civil penalty and disqualification procedures, to instances of unlawful behavior by certified locomotive engineers.

### **III. SECTION BY SECTION SUMMARY OF FRA REGULATIONS**

As the result of the statute the Secretary has issued the following regulations:<sup>1/</sup>

#### **Subpart A -- General**

##### **49 C.F.R. § 240.1--Purpose and Scope**

This part prescribes minimum Federal safety requirements for the eligibility, training, testing, certification, and monitoring of all locomotive engineers. It covers any person who operates a locomotive. It does not restrict a railroad from implementing additional or more stringent requirements that are not inconsistent with this part.

##### **§ 240.3 --Applicability**

- (a) This part applies to all railroads, including contractors, that operate locomotives on standard gage track that is part of the general railroad system of transportation, except:
  - i. rapid transit operations in an urban area that are not connected with the general system of transportation; and

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<sup>1/</sup> Because of the complexity of the regulations, the specific section number is identified. Some of the subsections are not summarized and therefore one should look at the actual regulations for specific details.

- ii. a railroad that operates only on track inside an installation which is not part of the general railroad system of transportation.

#### **§ 240.5–Construction**

These regulations preempt any State law, rule, regulation, order, or standard covering the same subject matter in accordance with the Federal Railroad Safety Act.

- (b) They do not preempt an additional or more stringent state law necessary to reduce local safety hazards that is not incompatible with Federal law and does not impose unreasonable burden on interstate commerce.
- (c) They do not preempt any State criminal law that imposes sanctions for reckless conduct that leads to actual loss of life, injury, or damage to property.
- (d) They do not preempt or otherwise alter collective bargaining agreements that employ other job classification titles to identify operators of locomotives.
- (e) They do not preempt or otherwise alter the authority of a railroad to initiate disciplinary sanctions against its employees, including managers and supervisors.
- (f) 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.

#### **§ 240.7–Definitions**

This contains definitions for the following words:

"Alcohol"  
"Controlled Substance"  
"Current Employee"  
"Designated Supervisor of Locomotive Engineers"  
"Dual Purpose Vehicle"  
"Drug"  
"EAP Counselor"  
"Exclusive Track Occupancy"  
"Filing"  
"FRA Representative"  
"Instructor Engineer"  
"Joint Operations"  
"Knowingly"  
"Locomotive"

"Locomotive Engineer" means any person who moves a locomotive or group of locomotives, regardless of whether they are coupled to other rolling equipment except:

(1) a person who moves a locomotive or group of locomotives within the confines of a locomotive repair servicing area as provided for in 49 C.F.R. 218.5 (f) and 218.29 (a)(1); or

(2) a person who moves a locomotive or group of locomotives for distances of less than 100 feet and this incidental movement of a locomotive or locomotives is for inspection or maintenance purposes.

"Maxi 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 block system.

"Medical Examiner"

"Newly Hired Employee"

"Person" means a railroad, a manager, supervisor, official, or other employee or agent of a railroad, any owner, manufacturer, lessor, or lessee of railroad equipment, track or facilities, any independent contractor providing goods or services to a railroad, and any employee of such owner, manufacturer, lessor, lessee, or independent contractor.

"Qualified"

"Railroad Office"

"Railroad" means all forms of non-highway ground transportation that runs on rail or electromagnetic guideways, including commuter service and high speed ground transportation systems, without regard to whether those systems use new technology not associated with traditional railroads. It does not include rapid transit operations. That are not connected to the general railroad system.

"Segment"

"Service"

"Specialized Roadway Maintenance Equipment"

"Substance abuse disorder"

"Type I Simulator" means a replica of the control compartment of a locomotive with all associated control equipment that:

(1) functions in response to a person's manipulation and causes the gauges associated with such controls to appropriately respond to the consequences of that manipulation;

(2) pictorially, audibly and graphically illustrates the route to be taken;

(3) graphically, audibly, and physically illustrates the consequences of control manipulations in terms of their effect on train speed, braking capacity, and in-train force levels throughout the train; and

(4) is computer enhanced so that it can be programmed for specific train consists and the known physical characteristics of the line illustrated.

"Type II Simulator" is similar to a Type I Simulator, except that it does not physically illustrate the consequences of control manipulations.

"Type III Simulator" is similar to Type I and Type II Simulators, except that it only graphically illustrates the route to be taken and graphically illustrates the consequences of control manipulations.

#### **§ 240.9–Waivers**

This provides for the same waiver procedures as under the FRA's general waiver requirements.

#### **§ 240.11--Penalties & Consequences for Noncompliance**

- (a) Any person who violates this part or causes the violation of any such requirement is subject to a civil penalty of at least \$500, but not more than \$11,000 per violation, except that: penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed \$22,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. Appendix A contains a schedule of civil penalty amounts used in connection with this rule.
- (b) Also, the employee may be subject to disqualification. (See Part 209).
- (c) Anyone who falsifies any record required by the rule may be subject to criminal penalties under 45 U.S.C. § 21311.
- (d) FRA may also issue an emergency order, compliance order, and/or injunction.

#### **§240.13–Information Collection Requirement**

This is a technical requirement concerning paperwork reduction.

#### **Subpart B — Component Elements of the Certification Process**

##### **49 C.F.R. § 240.101–Certification Program Required**

- (a) After the effective date, each railroad in operation on that date and subject to this part shall have a written program for certifying the qualifications of locomotive engineers.

- (b) A railroad commencing operations after the effective date shall have such a program prior to commencing operations.
- (c) Each railroad's certification program shall:
  - (1) have a procedure for designating any person it determines to be qualified as a supervisor of locomotive engineers that complies with the criteria established in § 240.105;
  - (2) contain a designation of the classes of service that it determines will be used in compliance with the criteria established in § 240.107;
  - (3) have a procedure for evaluating prior safety conduct that complies with the criteria established in § 240.109;
  - (4) have a procedure for evaluating visual and hearing acuity that complies with the criteria established in § 240.121;
  - (5) have a procedure for training that complies with the criteria established in § 240.123;
  - (6) have a procedure for knowledge testing that complies with the criteria established in § 240.125;
  - (7) have a procedure for skill performance evaluation that complies with the criteria established in § 240.127; and
  - (8) have a procedure for operational monitoring that complies with the criteria established in § 240.129.

**§ 240. 103–Approval of Design of Individual Railroad Programs by FRA**

- (a) Each railroad shall submit a written program and description of program conformity with Appendix B.
- (b) That submission shall contain an election either (1) to train student engineers and thereby obtain authority for that railroad to initially certify a person as an engineer in an appropriate class of service or (2) to recertify only engineers trained by other railroads. A railroad that elects to train student engineers may either conduct the training program or employ a training program conducted by some other entity.
- (c) A railroad's program is considered approved 30 days after the pertinent filing date unless the Administrator notifies the railroad in writing that the program does not conform.

- (d) The 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.
- (e) A railroad that intends to materially modify its program after receiving initial FRA approval shall submit a description of how it intends to modify the program at least 30 days prior to implementing such a change.

**§240.104–Criteria for Determining Whether a Railroad Operation Requires A Certified Locomotive Engineer**

Any person operating a locomotive or group of locomotives, regardless of being coupled to other rolling stock, must be a certified locomotive engineer, except:

- (1) specialized roadway maintenance equipment, including to and from work site, or
- (2) dual purpose vehicle which is: (i) specialized roadway maintenance equipment, including to and from work site;(ii) moving under authority of MOW rules(§ 214.353); (iii)operator trained and qualified accordance with roadway worker protection; and(iv) when hauling cars, with sufficient air brakes (i.e., not less than 85%).

**§ 240.105–Criteria for Selection of Designated Supervisors of Locomotive Engineers**

- (a) Any person a railroad is considering for qualification as a supervisor of locomotive engineers shall:
  - (1) know and understand the requirements of this part;
  - (2) appropriately test and evaluate the knowledge, skills, and ability of locomotive engineers;
  - (3) have the necessary supervisory experience to prescribe appropriate remedial action; and is a certified engineer.

For railroads without DSLE(s) the chief operating officer will determine if any designate possesses the necessary performance skills (§ 240.127), taking into consideration any special operating characteristics.

**§ 240.107–Criteria for Designation of Classes of Service**

- (a) Each railroad's program shall reflect which of the three classes of service, provided for in paragraph (b) of this section, that it will issue certifications for under its program.

- (b) A railroad may issue certificates to the following classes of service:
  - (1) Train service engineers,
  - (2) Locomotive servicing engineers, and
  - (3) Student engineers.
- (c) The following operational constraints apply to each class of service:
  - (1) Train service engineers may operate locomotives singly or in multiples and may move them with or without cars coupled to them;
  - (2) Locomotive servicing engineers may operate locomotives singly or in multiples but may not move them with cars coupled to them; and
  - (3) Student engineers may operate only under direct and immediate supervision of an instructor engineer.
- (d) Each railroad is authorized to impose additional conditions or operational restrictions on the service an engineer may perform beyond those identified in this section provided those conditions or restrictions are not inconsistent with this part.

**§ 240.109–General Criteria for Eligibility Based on Prior Safety Conduct**

- (a) . . . .
- (b) A railroad shall evaluate the prior safety conduct of any person it is considering for qualification as a locomotive engineer. A person is ineligible if he/she has an adverse record of prior safety conduct as provided for in § 240.115, § 240.117 and § 240.119.
- (c) The railroad shall evaluate data which reflects the person's prior safety conduct as a railroad employee and as an operator of a motor vehicle.
- (d) . . . .
- (e) When evaluating the motor vehicle driving record or railroad employment record, the railroad shall not consider information concerning the driving record or prior railroad safety conduct which occurred prior to the effective date.
- (f) The employee shall have an opportunity to comment on any record which contains the person's prior safety conduct, including records

concerning substance abuse (if the railroad would use such information to render the employee ineligible).

- (g) All comments under (f) shall be retained by the railroad.

The information to be evaluated shall include: (1) the railroad's own records; (2) data furnished by any other railroad formerly employing the person; and (3) data furnished by any governmental agency with pertinent motor vehicle driving records.

- (h) Nothing in this section shall be deemed as imposing a duty or requirement that a person have prior railroad employment experience or obtain a motor vehicle driver's license in order to become a certified locomotive engineer.

**§ 240.111-Individual's Duty to Furnish Data on Prior Safety Conduct as Motor Vehicle Operator**

- (a) Each person seeking certification or recertification shall, within 366 days before the railroad's decision or certification:

- (1) make his/her driving record available to the railroad; and
- (2) take any additional actions, including providing any necessary consent, required by State or Federal law to make information concerning his/her driving record available to that railroad;

- (b) Each person seeking certification or recertification shall:

- (1) request, in writing, that the chief of each driver licensing agency (that last issued the person's license and from any other state that issued his/her a license within 5 years), provide a copy of that agency's information concerning his/her driving record to the railroad; and
- (2) request that a check of the National Driver Register be performed and be provided to that railroad.

- (c) . . . .

- (d) . . . .

- (e) . . . .

- (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 not

previously contacted in accordance with this section, such person shall:

- (1) request that licensing agency to provide such information.
  - (2) ...
- (g) Any person who has never obtained a driving license is not required to comply with (b).

The request required for compliance shall be submitted within the 366 days preceding the date of the railroad's decision concerning initial certification and/or recertification.

- (h) Each certified engineer or person seeking initial certification shall report incidents pursuant to § 240.115(b)(1) & (2) within 48 hours of conviction or completed state action.

**§ 240.113–Individual's Duty to Furnish Data on Prior Safety Conduct as an Employee of a Different Railroad**

- (a) Each person seeking certification or recertification shall, within 366 days preceding the railroad's decision on certification or recertification take the actions required by paragraph (b) to make information concerning his/her prior railroad service record available to the railroad that is considering such certification or recertification.
- (b) Each person seeking certification or recertification under this part shall request, in writing, that the former employing railroad provide a copy of that railroad's available information concerning his/her service record to the railroad that is considering such certification or recertification.
- (c) ....

**§ 240.115–Criteria for Consideration of Prior Safety Conduct as Motor Vehicle Operator**

- (a) ....
- (b) 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.

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

- (1) conviction for operating a motor vehicle while under the influence of or impaired by, alcohol or a controlled substance;
  - (2) conviction for refusal to undergo such testing for above when suspected of operating a vehicle while under the influence of alcohol or a controlled substance.
- (c) If such an incident is identified, the railroad shall provide the information to the EAP counselor, together with the person's service record, and shall refer the person for evaluation.

If the employee is evaluated as not currently affected by an active substance abuse disorder, the above data shall not be used in considering certification. However, if the EAP counselor recommends, the railroad shall condition the certification on participation in further treatment and/or follow-up testing.

If the person is evaluated as currently affected by substance abuse disorder, the person shall not be certified.

#### **§ 240.117–Criteria for Consideration of Operating Rules Compliance Data**

- (a) . . . .
- (b) A person who has demonstrated a failure to comply with railroad rules and practices for the safe operation of trains shall not be currently certified as a locomotive engineer, or
  - (1) shall have certification revoked.
  - (2) A DSLE who is monitoring and fails to take appropriate action to prevent violation of paragraph (he shall have his certification revoked. The duty may be met by warning the engineer of the potential or foreseeable violation. The DSLE will not be held culpable when conducting operational tests (§§ 217.9 and 240.303)
- (d) Limitations on consideration of prior operating rule compliance data. In reviewing whether a person may be or remain certified as a locomotive engineer, a railroad shall only consider conduct described in paragraph (e) that occurred within a period of 36 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) A railroad shall only consider violations of its operating rules and practices that involve:
- (1) Failure to control a locomotive or train in accordance with a signal indication that requires a complete stop before passing it;
  - (2) Failure to adhere to limitations concerning train speed when the speed of the train exceeds the maximum authorized limit by at least 10 miles per hour. If the train speed exceeds by more than one half the authorized speed and results in a reportable accident or incident, it shall be considered also;
  - (3) Failure to adhere to procedures for the safe use of train or engine brakes when the procedures are required for compliance with transfer, initial, or intermediate terminal test;
  - (4) Occupying main track or track segment without proper authority;
  - (5) Tampering with locomotive mounted safety devices or knowingly operating or permitting to be operated with unauthorized disabled safety device controlling the locomotive;
  - (6) Noncompliance with § 219.101 (i.e. alcohol/drug tests); however, such incidents shall be a violation only under (g)(2) and (g)(3) of this section.
- (f) If in any single incident the person's conducted contravened more than one operating rule or practice, that event shall be treated as a single violation for the purposes of this section. A violation of (e)(1) through (e)(5) that occurs during operational compliance test under this regulation shall be counted in determining period of ineligibility.
- (g) A period of ineligibility described in this paragraph begins on the date of the most recent violation for a person not then currently certified. If the person is currently certified it begins on date of notification of the denial. The following standards shall apply to such consideration:
- (1) In the case of single incident involving violation of one or more of these sections, the person shall have certificate revoked for a period of one month.
  - (2) In the case of two separate incidents involving violations of one or more of these sections that occurred within 24 months

of each other, the person shall be ineligible to hold a certificate for a period of six months.

- (3) In the case of more than three such violations in any consecutive 36 months interval, the person shall be ineligible to hold a certificate for a period of one year.
  - (4) Where incidents of noncompliance with different sections of this Chapter occur, the longest period of ineligibility shall be imposed.
- (h) Future eligibility to hold certificate.
- (1) Only a person whose certification has been denied or revoked for a period of one year or less under (g)(3) for reasons other than § 219.101, shall be eligible for grant or reinstatement of the certificate prior to the expiration of the initial period of ineligibility. In order to qualify for grant or reinstatement, the person must also meet paragraphs (h)(1) through (3).
  - (2) The person shall not be eligible for grant or reinstatement unless and until —
    - (i) The person has been evaluated by the railroad designated supervisor of locomotive engineers and determined to have received adequate remedial training;
    - (ii) The person has successfully completed any mandatory program of training or retraining if the railroad determined this was necessary prior to return to service; and
    - (iii) At least one-half the pertinent period of ineligibility specified in paragraph (g)(2) has elapsed.
- (i) The FRA has concluded that certain types of incidents are too minor to warrant decertification. Therefore, this new section provides in no event shall incidents that meet the criteria of paragraphs (i)(1) through (4) of this section be considered as prior incidents for the purposes of paragraph (g)(3) of this section even though such incidents could have been or were validly determined to be violations at the time they occurred. Incidents that shall not be considered under paragraph (g)(3) of this section are those that:
- (1) Occurred prior to effective date of this amendment;

- (2) Involved violations of one or more of the following operating rules or practices:
    - (i) Failure to control a locomotive or train in accordance with a signal indication;
    - (ii) Failure to adhere to limitations concerning train speed;
    - (iii) Failure to adhere to procedures for the safe use of train or engine brakes; or
    - (iv) Entering track segment without proper authority;
  - (3) Were or could have been found to be violations under this section as it read prior to May 10, 1993; and
  - (4) Would not be a violation of paragraph (e) of this section as amended.
- (j) The following shall not be considered a under (g) (3) if it involved violation of failure to control in accordance with signal indication that requires a complete stop, or exceeded the maximum authorized speed by at least 10 mph or one half the authorized speed; and would not be a violation of paragraph (e).

**§ 240.119–Criteria for Consideration of Substance Abuse Disorder and Alcohol/Drug Rules Compliance**

- (a) . . . .
- (b) Fitness requirement.
  - (1) A person who has an active substance abuse disorder shall not be currently certified as a locomotive engineer.
  - (2) and (3) Unless eligible for a voluntary referral program, a certified engineer who has an active substance abuse disorder shall be suspended from certification. Certification may be reinstated as provided in (d). If placed in a voluntary referral program, the evaluation shall be confidential.
- (c) Prior alcohol/drug conduct; Federal rule compliance.
  - (1) In reviewing whether a person may be or remain certified as a locomotive engineer, a railroad shall consider any violations of the alcohol and drug regulations that occurred within a period of 60 consecutive months prior to the

review. A review of certification shall be initiated promptly upon the occurrence of any alcohol or drug incident of conduct.

Violation of the following alcohol/drug regulations shall result in ineligibility to hold a certificate:<sup>1/</sup>

Violation of:

§219.102			§219.101		Both .101 and .102	
1 viol.	2 viol.	more than 2 viol.	2 or more viol.	1 viol.	2 or more viol. of either	1 viol of each
Until EAP evaluation & completion of any RR required rehab. <sup>2/</sup>	2 years	5 years	5 years	9 mos <sup>2/</sup>	5 years	3 years

<sup>1/</sup> In cases of refusal to provide a sample for testing, the drug testing regulations apply regarding the sanction to be imposed.

<sup>2/</sup> If the violation was discovered through "co-worker report" in § 219.405 and the engineer waives investigation, then the certificate shall be suspended only during evaluation and any required treatment.

Once returned to service the employee shall be subject to follow-up alcohol and drug testing for up to 60 months. Such tests shall not be fewer than 6 alcohol tests and 6 drug tests during the first 12 months.

- (d) Future eligibility to hold certificate following alcohol/drug violation. If the employee has been denied certification, or it has been revoked or suspended because of an alcohol/drug violation, the person shall not be eligible for reinstatement until the person has (1) been evaluated by an EAP counselor; (2) completed any program of counseling or treatment; and (3) presented a urine sample that tests negative.
- (e) Confidentiality protected. The railroad under § 219.403 ("Voluntary Referral Policy") shall treat voluntary referrals for substance abuse counseling and treatment as confidential; and the certification status of an engineer who is successfully assisted under the procedures of that section shall not be adversely affected. The only exception is if the person at any time refuses to cooperate in a recommended course of counseling or treatment.

## **§ 240.121–Criteria for Consideration of Vision and Hearing Acuity Data**

- (a) . . .
- (b) In general, no person shall be certified who does not have visual acuity and/or hearing acuity that meets or exceeds the levels prescribed in this section and Appendix X. (An exception is where the railroad's medical examiner determines that the person still has the ability to operate a locomotive safely).
- (c) Each person shall have the following visual acuity:
  - (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 by successfully completing one of the tests in Appendix X.
- (d) Unless the railroad medical examiner determines that a person still has the ability to safely operate a locomotive, each person shall have hearing acuity that meets or exceeds the following thresholds when tested by use of an audiometric device, (calibrated to American National Standard Specification for Audiometers, S 3.6-1969): the person does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, 2,000 Hz with or without use of a hearing aid.
- (e) Even though not meeting the above requirements, the railroad's medical examiner may determine that the person has the ability to operate the locomotive safely, and the person may be certified conditioned on any restrictions the medical examiner imposes in writing.
- (f) As a condition of maintaining certification, the engineer is obligated to notify the railroad's medical department or official if vision or hearing has deteriorated and that he no longer meets the standards or requirements of this section.

## **§ 240.123–Criteria for Initial and Continuing Education**

- (a) . . .

- (b) A railroad shall provide for the continuing education of certified locomotive engineers.
- (c) Initial training shall at a minimum:
  - (1) be composed of classroom, skill performance, and familiarization with physical characteristic components;
  - (2) include both knowledge and performance skill testing;
  - (3) be conducted under the supervision of a qualified class instructor;
  - (4) be subdivided into segments or periods of appropriate duration to effectively cover the following subject matter areas: (i) personal safety, (ii) operating rules, (iii) mechanics, (iv) train handling procedures (including train brake tests), (v) familiarization with physical characteristics, and (vi) compliance with Federal regulations;
  - (5) be conducted so that the performance skill component shall (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.
- (d) A person may acquire familiarity with physical characteristics of a territory by methods described in the railroad's plan as described in Appendix B( which applies to new railroads or newly acquired railroads). Otherwise the person must acquire familiarization with hyrail trips or lite locomotive trips in compliance with the plan submission.

#### **§ 240.125–Criteria for Testing Knowledge**

- (a) ...
- (b) A railroad shall have procedures for testing to determine that the person has sufficient knowledge of the railroad's rules and practices.
- (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 safety rules;
  - (5) sufficient to accurately measure the person's knowledge of the subjects covered; and
  - (6) conducted without open reference books or other materials.
- (d) The test shall be documented in writing.

**§ 240.127–Criteria for Examining Skill Performance**

- (a) ...
- (b) A railroad shall have procedures for examining the performance skills to determine whether the person has the skills to safely operate locomotives and/or trains in the most demanding class of service.
- (c) The testing procedures selected by the railroad shall be:
  - (1) designed to examine a person's skills in safely operating locomotives or trains when performing the most demanding class or type of service;
  - (2) conducted by a designated supervisor of locomotive engineers; who does not need to be qualified on physical characteristics of the territory which test will be conducted;
  - (3) cover the following subjects during the test period (i) operating practices; (ii) equipment inspection practices; (iii) train handling practices; and (iv) compliance with Federal safety rules;
  - (4) be of sufficient length to effectively evaluate the person's ability to operate trains; and
  - (5) conducted when the person is at the controls of the type of train, or Type I or Type II simulator to be normally operated on that railroad or segment of railroad.
- (d) The conduct of the test shall be documented in writing and shall contain:

- (1) the relevant facts concerning the train being operated;
- (2) the constraints applicable to its operation; and
- (3) the factors observed and relied on for evaluation purposes by the designated supervisor.

**§ 240.129–Criteria for Monitoring Operational Performance of Certified Engineers**

- (a) ...
- (b) A railroad shall have procedures for monitoring operational performance of a locomotive engineer.
- (c) The procedures shall be designed:
  - (1) to determine that the person possesses and routinely employs the skills to safely operate locomotives and/or trains;
  - (2) so that each engineer shall be annually monitored;
  - (3) so that the locomotive engineer is either accompanied by the designated supervisor for a reasonable length of time or has his/her train handling activities electronically recorded by a train operations event recorder;
- (d) The procedures may be designed so that the locomotives engineer being monitored is at the controls of the type of train normally operated, or at the controls of a Type I and Type II simulator.
- (e) The testing and examination procedures shall be designed:
  - (1) so that each locomotive engineer shall be given at least one unannounced test each calendar year.
  - (2) to test engineer compliance with signals that display less than a "clear" aspect.
  - (3) to test engineer compliance with provisions that require affirmative response by the locomotive engineer to less favorable conditions than that which existed prior to initiation of the test;
  - (4) to test engineer compliance with provisions most often cited by the railroad as the cause of train accidents or train incidents;

- (5) so that the administration of these test is effectively distributed throughout whatever portion of a 24-hour day that the railroad conducts its operations; and
- (6) so that individual tests are administered without prior notice to the engineer being tested.

### **Subpart C — Implementation of the Certification Process**

#### **49 C.F.R. § 240.201–Schedule for Implementation**

- (a) Each railroad in operation on that date shall designate in writing any person(s) it deems qualified as a designated supervisor of locomotive engineers.
- (b) Each railroad shall designate in writing all persons that it deems to be qualified as locomotive engineers for the purpose of compliance with this part.

Each railroad shall issue a certificate that complies with § 240.223 to each person that it designates as qualified.

- (c) No railroad shall permit an employee to perform service for more than 36 months, unless the person has been certified in compliance with this subpart C.
- (d) No railroad shall permit or require any person to operate a locomotive in any class of locomotive or train service unless that person has been certified as a qualified locomotive engineer and issued a certificate that complies with § 40.223.
- (e) No Class I railroad (including Amtrak) or railroad providing commuter service shall initially certify or recertify a person as a locomotive engineer in either locomotive or train service unless that person has been tested, evaluated, and determined to be qualified in accordance with procedures that comply with subpart C.
- (f) ...
- (g) ...
- (h) A railroad may continue to designate any person it deems qualified prior to the effective date for compliance.
- (i) A new railroad commencing operations prior to the pertinent date for compliance by a railroad of its class may designate persons as

certified locomotive engineers on the basis of paragraph (b) until the pertinent date for compliance.

### **§ 240.203–Determinations Required As a Prerequisite to Certification**

- (a) This requires the railroads before certifying an engineer determine that the person:
  - (1) meets the requirements of § 240.115 (motor vehicle safety, § 240.117 (operating rules), and § 240.119 (alcohol/drug);
  - (2) meets the vision and hearing acuity standards of § 240.121;
  - (3) has the necessary knowledge, by passing a test, that meets the requirements of § 240.125 (the railroad's rules and practices);
  - (4) passes an operational performance test under § 240.127; and
  - (5) if not previously certified, has completed a training program that meets § 240.123.
  
- (b) A railroad may certify a person as a student engineer after determining that the person meets the visual and hearing acuity standards of § 240.121. A railroad may subsequently certify a student engineer as either a locomotive servicing engineer or a train service engineer without further review of their acuity status as required under paragraph (b) of this section provided it determines that:
  - (1) the person successfully completed a training program that complies with § 240.127;
  - (2) the person meets the eligibility requirements of §§ 240.109 (prior safety conduct) and 240.119 (alcohol/drug); and
  - (2) a period of not more than 24 months has elapsed since the student engineer certification was issued.
  - (3)

### **§ 240.205–Procedures for Determining Eligibility Based on Prior Safety Conduct**

- (a) Each railroad, prior to certifying or re-certifying an engineer for any class of service shall determine that he meets the eligibility requirements involving prior conduct as a motor vehicle operator, involving prior conduct as a railroad worker, and involving substance abuse disorders and alcohol/drug rules compliance.

- (b) The railroad shall have documentation of the determinations made in (a), including any EAP evaluations whether the person is affected by an active substance abuse disorder.

**§ 240.207–Procedures for Making the Determination on Vision and Hearing Acuity**

- (a) Each railroad, prior to initially certifying or recertifying any person as an engineer for any class of service, shall determine that the person has visual acuity and hearing acuity prescribed in § 240.121.
- (b) The railroad shall have or file the medical examiner's certificate that the acuity standards have been met, or that the standards were not met and whether the person can still be certified under certain conditions.
- (c) The examinations must be by a licensed optometrist and audiologist or a technician responsible to that person.
- (d) If the examination discloses that the person needs either corrective lenses or a hearing aid, or both, either to meet the threshold acuity levels or to meet a lower threshold (determined by the railroad's medical examiner to be sufficient to safely operate a locomotive or train on that railroad), that fact shall be noted on the certificate issued.
- (e) Any person with such a certificate notation shall use the relevant device while operating a locomotive in locomotive or train service unless the railroad's medical examiner determines that the person can safely operate without using the device.

**§ 240.209–Procedures for Making the Determination on Knowledge**

A railroad shall certify or re-certify an engineer that exhibited his/her knowledge for safe operation of trains by achieving a passing grade after participating in testing procedures. If the person fails the test, he/she cannot operate a train prior to being reexamined.

**§ 240.211–Procedures for Making the Determination on Performance Skills**

This section requires the engineer to demonstrate his/her skills to safely operate in the most demanding class of service by achieving a passing grade during testing. The person may be reexamined upon failing the test.

**§ 240.213–Procedures for Making the Determination on Completion of Training Program**

- (a) The engineer is required to have the knowledge and skills to safely operate a locomotive or train in the most demanding class or type of service that the person will be permitted to perform.
- (b) In making this determination, the employee shall:
  - (1) complete a training program (§ 240.123);
  - (2) has knowledge and skills by achieving a passing grade under the testing and evaluation procedures; and
  - (3) the person is familiar with the physical characteristics of the railroad or its pertinent segments.

**§ 240.215–Retaining Information Supporting Determinations**

- (a) The railroad shall maintain a record for each certified engineer that contains the information the railroad relied on in making the determinations.
- (b) The information shall include records:
  - (1) of the person's prior safety conduct;
  - (2) of data from another railroad;
  - (3) of the motor vehicle driving record; and
  - (4) furnished by the person concerning eligibility.

The information also shall include that obtained by § 240.207 regarding vision and hearing acuity.

- (c) § 240.207 regarding vision and hearing acuity.
- (d) § 240.209 regarding knowledge; and
- (e) § 240.211 regarding skills.
- (f) If the railroad is relying on the training program of another entity, the railroad shall maintain the data furnished by such entity.
- (g) If a railroad is relying on a certification made by another railroad, the railroad shall maintain the data furnished.

- (h) All records required under this section shall be retained for a period of four years.
- (i) 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 record(s); or
  - (2) otherwise falsify that record through material misstatement, omission, or mutilation.
- (j) A railroad may maintain the information required to be retained in an electronic format.

**§ 240.217–Time Limitations for Making Determinations**

- (a) A railroad shall not certify a person unless it is:
  - (1) eligibility based on visual and hearing acuity medical data less than 366 days old;
  - (2) data concerning demonstrated knowledge and the knowledge examination being relied on shall be less than 366 days old;
  - (3) data concerning demonstrated performance skills and the performance skills testing shall be less than 366 days old; or.
  - (4) data concerning demonstrated performance skills and skill testing conducted 366 days before the railroad’s decision.
- (b) The time limitations do not apply to a railroad that is making a certification decision based on determinations made by another railroad in accordance with paragraph (c)(2), § 240.227 or 240.229.
- (c) No railroad shall:
  - (1) certify a person as a qualified locomotive engineer for an interval of more than 36 months; or
  - (2) rely on a certification issued by another railroad that is more than 36 months old.
- (d) The certificate shall be issued no later than 30 days from the date of its decision to certify or recertify the person.

### **§ 240.219–Denial of Certification**

- (a) A railroad shall notify a candidate for certification of information that forms the basis for denying the person certification and provide the person an opportunity to explain or rebut that adverse information in writing prior to denying certification.
- (b) This section does not require further opportunity to comment if the railroad's denial is based on § 240.115 (motor vehicle safety), § 240.117 (operating rules), and § 240.119 (alcohol/drugs).
- (c) If it denies a person certification or recertification, a railroad shall notify the person of the adverse decision and explain, in writing, the basis for its denial decision. The document explaining the basis for the denial shall be mailed or delivered to the person within 10 days after the railroad's decision and shall identify the date of the decision.

### **§ 240.221–Identification of Qualified Persons**

- (a) A railroad shall maintain a written record identifying each person designated by it as a supervisor of locomotive engineers.
- (b) A railroad shall maintain a written record identifying each person designated as a certified locomotive engineer. That listing of certified engineers shall indicate the class of service the railroad determines each person is qualified to perform and date of the railroad's certification decision.
- (c) If joint operations are involved, the controlling railroad shall maintain the listing of persons.
- (d) The listing required by paragraphs (a), (b) and (c) shall be updated at least annually.
- (e) . . . .

### **§ 240.223–Criteria for the Certificate**

- (a) This section outlines what information is required to be contained in each certificate.
- (b) . . . .
- (c) . . . .
- (d) 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 that certificate; or
- (2) otherwise falsify that certificate through material misstatement, omission, or mutilation.

#### **§ 240.225–Reliance on Qualification Determinations Made by Other Railroads**

Any 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, so long as they meet the requirements of this regulation for certifying its own employees. If a program does not specify training for previously certified engineer, the engineer must take a retraining program.

#### **§ 240.227–Reliance on Qualification Requirements of Other Countries.**

- (a) A railroad that conducts joint operations with a Canadian railroad may certify that a person is qualified provided the employee of a Canadian railroad meets or exceeds the qualifications standards issued by Transport Canada for such service.
- (b) Any Canadian railroad that is required to comply with this regulation may certify that a person is qualified:
  - (1) the person is employed by the Canadian railroad; and
  - (2) the employee of a Canadian railroad meets or exceeds the qualifications standards issued by Transport Canada for such service.

#### **§ 240.229–Requirements for Joint Operations Territory**

- (a), (b) A railroad that is responsible for controlling the conduct of joint operations with another railroad shall not permit or require any person to operate a locomotive in any class unless the person has been certified, and shall certify the said person as a qualified engineer for purposes of joint operations.
- (c) This sets out the requirements if the controlling railroad relies on certification issued by another railroad. In addition, the employing railroad shall determine that the person operating on controlling railroad is certified and qualified on that track segment.
- (d) . . . .
- (e) A railroad responsible for controlling the conduct of joint operations with another railroad shall be deemed to be in compliance when it provides a qualified person to accompany a

locomotive engineer who lacks joint operations certification during that engineer's operations in joint operation territory.

- (f) A railroad that is responsible for controlling the conduct of joint operations with another railroad may permit a certified locomotive engineer to operate a locomotive in any class of train or engine service without determining that the person has been certified as a qualified locomotive engineer for the purposes of joint operations when a minimal joint operation is involved. For the purposes of this section a minimal joint operation exists when a locomotive or train belonging to one railroad is being operated on the same track on which operations are conducted by the railroad controlling operations, under the following conditions;
- (1) The maximum authorized speed for operations on the track does not exceed 20 miles per hour;
  - (2) The track is other than a main track;
  - (3) Operations are conducted under operating rules that require every locomotive and train to proceed at a speed that permits stopping within one half the range of vision of the locomotive engineer; and
  - (4) The maximum distance for joint operations on the track does not exceed one mile.

**§240.231–Requirements for Locomotive Engineers Unfamiliar With Characteristics in Other Than Joint Operations**

- (a) No engineer shall operate over territory unless qualified on physical characteristics pursuant to the railroad's program, except as provided in (b).
- (b) Except as provided in (c) , if the engineer lacks qualifications as required in (a), any person, other than assigned crew member, qualified over the territory pursuant to the railroad's program shall serve as pilot.
  - (1) If the engineer has never been qualified over the territory, the pilot shall be a qualified or certified engineer and be other than an assigned crew member.
  - (2) If the engineer's qualifications over the territory has expired, the pilot may be any person, other than a crew member, qualified on the territory;

- (d) Pilots are not required if movement is on track with average grade of less than 1% over 3 continuous miles, and
  - (1) Track is other than main; or
  - (2) Maximum distance does not exceed one mile; or
  - (3) Maximum speed for any operation does not exceed 20 mph; or
  - (4) Operations require all trains or locomotives to proceed at speed that requires stopping within one half the range of vision.

### **Subpart D — Administration of the Certification Programs**

#### **49 C.F.R. § 240.301—Replacement of Certificates**

This section requires prompt replacement of lost, stolen or mutilated certificates.

#### **§ 240.303—Operational Monitoring Requirements**

- (a) The railroad is required to monitor the engineer by operational monitoring observations and by conducting unannounced operating rules compliance tests.
- (b) Each locomotive engineer shall be given at least one operational monitoring observation by a qualified supervisor of locomotive engineers in each calendar year, and
- (c) Each locomotive engineer shall be given at least one unannounced compliance test each calendar year.
- (d) The unannounced tests shall include the engineer responding to:
  - (1) signals that display less than a "clear" aspect;
  - (2) less favorable operating conditions than that which existed prior to the test;
  - (3) rules which resulted in accidents/incidents on the railroad.(4), (5) and (6) the tests shall be distributed throughout the day without prior notice to the engineer. The results shall be recorded.

#### **§ 240.305—Prohibited Conduct by Certified Engineers**

- (a) It shall be unlawful to:

- (1) Operate past a signal indication, excluding hand or radio signal or switch that requires complete stop before passing.
- (2) Exceeding maximum authorized speed by at least 10 mph. Only conditional clause of restricted speed, or operational equivalent thereof, which ; or
- (3) Failure to adhere to brake procedures under §§232.12 & .13 and Part 238;
- (4) Failure to comply with any mandatory directive by occupying a main track or segment of track without authority.
- (5) Tampering with locomotive mounted safety devices or knowingly operating or permitting to be operated with unauthorized disabled safety device in control locomotive.
- (6) Be a DSLE who is monitoring and fails to take appropriate action to prohibit a violation of this section. A DSLE will not be held liable for conducting operational tests under §§ 217.9 and 240.303.

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

- (1) have that certificate in his/her possession while on duty as an engineer; and
  - (2) display that certificate upon request.
- (c) Any locomotive engineer who is notified or called to operate a locomotive or train that would cause him/her to exceed the limits set forth in subpart B shall immediately notify the railroad that he/she is not qualified to perform that anticipated service.
- (d) locomotive engineer who has a current certificate from more than one railroad shall immediately notify the unaffected railroad(s) if he/she is denied re-certification by a railroad or has his/her certification revoked by a railroad.
- (e) . . . .

**§ 240.307–Revocation of Certification**

- (a) Except as provided in 240.119(f), if a person no longer meets the qualification requirements, the railroad shall revoke the person's certificate.

- (b) Pending a revocation determination under this section, the railroad shall:
- (1) Upon receipt of reliable information indicating the person's lack of qualification under this part, immediately suspend the person's certificate;
  - (2) Provide written notice of the reason for the suspension, the pending revocation, and an opportunity for hearing before a presiding officer other than the investigating official; In the absences of an applicable collective bargaining agreement, written confirmation must be made within 96 hours;
  - (3) convene the hearing within the deadline prescribed by either (c)(1) or applicable collective bargaining agreement;
  - (4) determine, based on the record of the hearing, whether the person meets the qualification requirements;
  - (5) when appropriate impose the revocation period set out in § 240.117 or 240.119. . . .; and
  - (6) retain the record of the hearing for 3 years after the date of the decision.
- (c) Except as provided for in paragraphs (d), (f) (i), and (j) of this section, a hearing required by this section shall be conducted in accordance with the following procedures:
- (1) The hearing shall be convened within 10 days of the date the certificate is suspended unless the locomotive engineer requests or consents to delay in the start of the hearing.
  - (2) The hearing shall be conducted by a presiding officer, who can be any qualified person authorized by the railroad other than the charging officer.
  - (3) The presiding officer will exercise the powers necessary to regulate the conduct of the hearing for the purpose of achieving a prompt and fair determination of all material issues in controversy.
  - (4) The presiding officer shall convene and preside over the hearing.
  - (5) Testimony by witnesses at the hearing shall be recorded verbatim.

- (6) All relevant and probative evidence shall be received unless the presiding officer determines the evidence to be unduly repetitive or so extensive and lacking in relevancy that its admission would impair the prompt, orderly, and fair resolution of the proceeding.
- (7) The presiding officer may:
  - (i) Adopt any needed procedures for the submission of evidence in written form;
  - (ii) Examine witnesses at the hearing;
  - (iii) Convene, recess, adjourn or otherwise regulate the course of the hearing; and
  - (iv) Take any other action authorized by or consistent with the provisions of this part and permitted by law that may expedite the hearing or aid in the disposition of the proceeding.
- (8) Parties may appear and be heard on their own behalf or through designated representatives. Parties may offer relevant evidence including testimony and may conduct such examination of witnesses as may be required for a full disclosure of the relevant facts.
- (9) The record in the proceeding shall be closed at 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.
- (10) At the close of the record, the railroad official, other than investigating officer shall sign a written decision in the proceeding.
- (11) The decision shall:
  - (i) Contain the findings of fact as well as the basis therefore, concerning all material issues of fact presented on the record; and
  - (ii) Be served on the employee.
- (12) The railroad shall have the burden of proving that the locomotive engineer's conduct was not in compliance with the applicable railroad operating rule or practice or Part 219 of this chapter.

- (d) A hearing required by this section which is conducted in a manner that conforms procedurally to the applicable collective bargaining agreement shall be deemed to satisfy the procedural requirements of this section.
- (e) A hearing required under this section may be consolidated with any disciplinary or other hearing arising from the same facts, but in all instances the presiding officer for the hearing shall make separate findings as to the revocation required under this section.
- (f) A person may waive the right to the hearing provided under this section. That waiver shall:
  - (1) Be made in writing;
  - (2) Reflect the fact that the person has knowledge and understanding of these rights and voluntarily surrenders them; and
  - (3) Be signed by the person making the waiver.
- (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 which convinces it that another railroad has revoked its certification after determining, in accordance with the provisions of this section, that the person no longer meets the qualification requirements of this part. 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.
- (h) The period of certificate suspension prior to the commencement of a hearing required under this section shall be credited towards satisfying any applicable revocation period imposed in accordance with the provisions of § 240.117.
- (i) A railroad shall not determine that a person failed to meet qualification requirements and shall not revoke certification if substantial evidence exists that:
  - (1) Intervening cause prevented or materially impaired engineer's ability to comply with railroad's operating rules which would violate § 240.117(e)(1) through (5); or
- (j) violation was of a minimal nature and had no direct or potential effect on rail safety.

- (k) A railroad shall place relevant information in the records (§240.309 Class I and II and § 240.215 Class III) if evidence becomes available, that meets criteria of (i).

### **§ 240.309–Railroad Oversight Responsibilities**

- (a) Beginning in calendar year 1993, each Class I railroad (including Amtrak and a railroad providing commuter service) and Class II railroad shall conduct a formal annual review and analysis, no later than March 31 of each year concerning the administration of its program for responding to detected instances of poor safety conduct by certified locomotive engineers during the prior calendar year.
- (b) . . . .
- (c) Based on that review and analysis each railroad shall determine what action(s) it will take to improve the safety of train operations to reduce or eliminate future incidents of that nature.
- (d) The FRA may require a report of the findings reached during annual review.
- (e) This subsection sets out 10 areas of poor safety conduct for the reporting purposes.
- (f) This subsection requires each category of poor safety conduct shall also identify the incidents reported by the railroad from each category.
- (g) This subsection requires that the railroad identify the remedial action taken in each of the areas of poor safety conduct.
- (h) This requires that the railroad identify the discipline in which punishment initially imposed was reduced.

### **Subpart E — Dispute Resolution Procedures**

#### **49 C.F.R. § 240.401–Review Board Established**

- (a) Any employee adversely affected by a railroad's decision under this regulation who believes that a railroad incorrectly determined that he/she failed to meet the qualification requirements may petition the Federal Railroad Administrator to review it.
- (b) The Federal Railroad Administrator has delegated initial responsibility for adjudicating such disputes to the Locomotive Engineer Review Board, which

- (c) Shall be composed of at least three employees of the Federal Railroad Administration.

#### **§ 240.403–Petition Requirements**

- (a) . . . .
- (b) This sets forth the specific procedures to follow when filing a petition and the contents required in the petition.
- (c), (d) A petition seeking review of a railroad's decision to deny or revoke certification shall be filed within 120 days after the date of the railroad's denial decision.

#### **§ 240.405–Processing Qualification Review Petitions**

This section sets out the procedures to be followed by the Review Board.

- (a) The petition shall be acknowledged in writing by FRA, and a statement that the FRA will render a decision within 180 days from date railroad's response is received or response period lapsed.
- (b) ...
- (c) The railroad will be given a period of not exceed 60 days to submit to FRA any information that the railroad considers pertinent to the petition.
- (d) Triplicate copies to be served upon FRA.
- (e) ...
- (f) The Board will only determine whether the railroad's denial was improper under the regulation.
- (g) ...

#### **§ 240.407–Request for a Hearing**

- (a) If adversely affected by the decision, either the original petitioner or the railroad involved shall have a right to an administrative hearing concerning that decision.
- (b) To exercise that right, the adversely affected party shall file a written request to the Docket Clerk within 20 days of service of the Board's decision on them.

- (c) Failure to request the hearing in time will automatically waive any further review.
- (d) This sets out what is required in the request for the hearing. The petitioner must specify in some detail what issues need to be reviewed.
- (e) The presiding officer sets the hearings schedule and agenda, not the FRA.

### **§ 240.409–Hearings**

This sets out the procedures to be followed in the FRA hearing.

- (a), (b), (c) The hearing shall be conducted by any presiding officer authorized by FRA, including an administrative law judge. Such person may be a FRA employee. The hearing is a de novo proceeding, not a review of the initial decision. The presiding officer has the power to grant any appropriate relief based on the facts.
- (d) The presiding officer may authorize discovery, and is given authority to sanction for willful noncompliance.
- (e) Pleadings must be signed, which certifies that the contents are true.
- (f) This sets out the procedures for service of the papers and the requirement for a proof of service.
- (g) If documents are improperly filed, the presiding officer may require them to be corrected or stricken.
- (h) Any party has the right to be represented by a union representative or an attorney.
- (i) Any person testifying at a hearing or by deposition is entitled to an attorney.
- (j) This provides for consolidation or separation where there are 2 or more petitions being considered at the same time.
- (k) This section allows extensions to be granted where the opposing party is not substantially prejudiced.
- (l) This provision sets out the procedures for making a motion. There is a 14 -day response period for a motion.
- (m) Testimony shall be under oath and recorded verbatim.

- (n) The presiding officer shall apply the Federal Rules of Evidence as general guidelines.
- (o) The presiding officer may administer oaths, issue subpoenas, examine witnesses, etc.
- (p) The petitioner before the LERB, the railroad, and the FRA shall be parties at the hearing. All parties may present witnesses and conduct cross-examination.
- (q) The party requesting the hearing shall be the “hearing petitioner” and shall have the burden of proof.
- (r) FRA is a mandatory party to the administrative hearing.
- (s) The record will normally be closed at the conclusion of the hearing, unless the presiding officer rules otherwise.
- (t) This section sets out what must be contained in the final decision. It shall set out findings of fact and conclusions of law. The decision constitutes final agency action unless an aggrieved party files an appeal within 35 days after issuance.

#### **§ 240.411–Appeals**

- (a) Any party aggrieved by the presiding officer's decision may file an appeal within 35 days of issuance of the decision with the Federal Railroad Administrator.

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 filed, the presiding officer's decision constitutes final agency action.

- (b) A party may file a reply to the appeal within 25 days of service of the appeal. The reply shall be supported by reference to applicable laws and regulations and with specific reference to the record, if the party relies on evidence contained in the record.
- (c) The Administrator may extend the period for filing an appeal or a response for good cause shown.
- (d) On the Administrator's own initiative or written motion by any party, the Administrator may grant the parties an opportunity for oral argument.

- (e) Administrator may remand, vacate, affirm, alter or modify decision and this constitutes final agency action when administrative remedies have been exhausted.

**APPENDIX A**-This sets forth the schedule of civil penalties.

**APPENDIX B**-This appendix establishes the procedures the railroad must follow in its certification program.

**APPENDIX C**- Procedures for obtaining and evaluating motor vehicle driving record.

**APPENDIX D**-Identification of state agencies that perform national driver register check.

**APPENDIX E**- Recommended procedures for conducting skill performance tests.

49 U.S.C. § 20135  
49 C.F.R. Part 240