CAG-66.
Docket No. CP89-1487-000, Associated Natural Gas Company, a Division of Arkansas Western Gas Company
CAG-67.
Docket Nos. CP88-6-002, 005, RP88-8-008 and 010, United Gas Pipe Line Company
Docket No. RP88-181-000, Sea Robin Pipeline Company
Docket No. RP89-161-000, ANR Pipeline Company
Docket No. RP89-168-000, ANR Storage Company
Docket No. RP88-262-000, Panhandle Eastern Pipeline Company
Docket No. RP89-160-000, Trunkline Gas Company
Docket No. CP88-265-000, Stingray Pipeline Company
Docket Nos. RP88-228-000 and RP89-35-000, Tennessee Gas Pipeline Company

I. Licensed Project Matters

P-1.
Project Nos. 8142-005, 006, 007 and 014, Henwood Associates, Inc. Order on rehearing of May 2, 1989, order.
P-2.
Project No. 7267-006, Joseph Martin Keating. Order regarding water quality certification.
P-3.
Project No. 8133-006, B.S. Inc. Order on appeal of denial of request for extension of the deadline to initiate project construction.

II. Electric Rate Matters

ER-1.
Docket No. ER89-672-000, Public Service Company of Indiana, Inc. Order on rate filing.
ER-2.
Docket No. ER85-477-002, Southwestern Public Service Company. Opinion and order establishing just and reasonable rates.

Miscellaneous Agenda

M-1.
Docket No. RM87-33-001, Hydroelectric Relicensing Regulations Under the Federal Power Act. Order on rehearing
M-2.
Reserved
M-3. (A)
Docket No. RM87-5-001, Inquiry into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines. Order on rehearing.
M-3. (B)
Docket Nos. RM87-5-002 and MG88-21-000, High Island Offshore System
Docket No. MG88-36-000, U-T Offshore System
Docket Nos. RM87-5-002 and MG88-32-000, Trailblazer Pipeline Company
Docket Nos. RM87-5-002 and MG88-27-000, Sea Robin Pipeline Company
Docket No. MG88-43-000, Kentucky West Virginia Gas Company and Equitrans, Inc.
Docket No. MG88-41-000, Superior Offshore Pipeline Company and Texas Sea Rim Pipeline, Inc.
Docket No. RM87-5-002, Northern Border Pipeline Company
Docket No. RM87-5-002 and MG88-30-000, Great Lakes Gas Transmission Company
Docket No. RM87-5-000, Arkla, Inc.
Docket No. MG88-18-000, Blue Dolphin Pipe Line Company
Docket No. MG88-34-000, Canyon Creek Compression Company
Docket No. MG89-8-000, Caprock Pipeline Company
Docket No. MG88-38-000, Columbia Gas Transmission Corporation, *et al.*
Docket No. RM87-5-000, Consolidated Natural Gas Company
Docket No. MG88-39-000, Enron Interstate Pipelines
Docket No. RM87-5-000, INGAA
Docket No. RM87-5-000, Maryland Peoples Counsel
Docket No. MG88-4-000, Mid Louisiana Gas Company
Docket No. MG88-8-000, MIGC, Inc.
Docket No. RM87-5-000, Natural Gas Pipeline Company of America
Docket No. MG88-25-000, Northwest Pipeline Corporation
Docket No. MG88-10-000, Ohio River Pipeline Corporation
Docket No. RM87-5-000, Pacific Interstate Transmission Company, *et al.*
Docket No. MG87-40-000, Pelican Interstate Gas System
Docket No. MG89-6-000, Phillips Gas Pipeline Company
Docket No. MG88-29-000, South Georgia Natural Gas Company
Docket No. MG88-42-000, Texas Gas Transmission Corporation
Docket Nos. RM87-5-000 and MG88-28-000, United Gas Pipe Line Company
Docket No. MG88-37-000, Valero Interstate Transmission Company
Docket No. MG88-46-000, Valley Gas Transmission, Inc.
Docket No. MG89-9-000, West Texas Gathering. Order on clarification of Order No. 497.

I. Pipeline Rate Matters

RP-1. (A)
Docket No. RP90-15-000, Equitrans, Inc. v. Texas Eastern Transmission Corporation. Complaint concerning implementation of gas inventory charge.
RP-1. (B)
Docket Nos. RP85-177-070, RP88-67-026 and CP88-136-016, Texas Eastern Transmission Corporation. Concerning a protest to the service agreement filing.
RP-2. (C)
Docket No. RP85-177-069, Texas Eastern Transmission Corporation. Concerning delivery of storage injection gas.
RP-2.
Docket No. TA87-1-37-009, Northwest Pipeline Corporation. Concerning initial decision on gas purchasing practices.

II. Producer Matters

CI-1. Reserved

III. Pipeline Certificate Matters

CP-1.
Docket No. CP78-123-028, Northwest Alaskan Pipeline Company
Docket No. CP78-124-013, Northern Border Pipeline Company
Docket No. CP90-93-000, Natgas (U.S.) Inc.
Docket Nos. CP79-400-004 and CP79-396-007, United Gas Pipe Line Company, Northern Natural Gas Company and Natgas (U.S.) Inc. Order (1) on an application by Northern Border Pipeline Company to abandon a transportation service for United Gas Pipe Line Company and for the issuance of a certificate to Northern Border to transport gas for Natgas U.S., Inc., and (2) on an application by United, Northern Natural Gas Company and Natgas U.S. for partial abandonment and amendment of existing exchange arrangement.

Lois D. Cashell,

Secretary.

[FR Doc. 89-29020 Filed 12-7-89; 4:03 pm]

BILLING CODE 6717-01-M

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of a Matter to Be Added for Consideration at an Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that the following matter will be added to the "discussion agenda" for consideration at the open meeting of the Board of Directors of the Federal Deposit Insurance Corporation scheduled to be held at 2:00 p.m. on Tuesday, December 12, 1989, in the Board Room on the sixth floor of the FDIC Building located at 550-17th Street, NW., Washington, DC:

Memorandum and resolution re: Proposed amendments to part 303 of the Corporation's rules and regulations, entitled "Applications, Requests, Submittals, Delegations of Authority, and Notices of Acquisition of Control," which amendments establish, with respect to state and/or federal savings associations, interim application and notice procedures governing: (1) The conduct of, and requests to engage directly in, certain activities; (2) the divestiture of equity investments and junk bonds; and (3) prior notice of the establishment or acquisition of a subsidiary.

Requests for further information concerning the meeting may be directed to Mr. Hoyle L. Robinson, Executive Secretary of the Corporation, at (202) 898-3813.

Dated: December 7, 1989.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Executive Secretary.

[FR. Doc. 89-28991 Filed 12-7-89; 1:49 pm]

BILLING CODE 6714-01-M

FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS

TIME AND DATE: 10:00 a.m., Friday, December 15, 1989.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, DC 20551.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Publication for comment of proposed amendments to clarify and simplify Regulation P (Minimum Security Devices and Procedures for Federal Reserve Banks and State Member Banks).

2. Any items carried forward from a previously announced meeting.

Note: This meeting will be recorded for the benefit of those unable to attend. Cassettes will be available for listening in the Board's Freedom of Information Office, and copies may be ordered for $5 per cassette by calling (202) 452-3684 or by writing to: Freedom of Information Office, Board of Governors of the Federal Reserve System, Washington, DC 20551.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board, (202) 452-3204.

Dated: December 7, 1989.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 89-29008 Filed 12-7-89; 3:14 pm]

BILLING CODE 6210-01-M

FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS

TIME AND DATE: Approximately 10:30 a.m., Friday, December 15, 1989, following a recess at the conclusion of the open meeting.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, DC 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED: 1. Matters relating to the Plans administered under the Federal Reserve System's employee benefits program.

2. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

3. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204. You may call (202) 452-3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Dated: December 7, 1989.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 89-29009 Filed 12-7-89; 3:14 pm]

BILLING CODE 6210-01-M

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD:

TIME AND DATE: 10:00 a.m. December 18, 1989.

PLACE: 5th Floor, Conference Room, 805 Fifteenth Street, NW., Washington, DC

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Approval of the minutes of last meeting.

2. Thrift Savings Plan activities report by the Executive Director.

3. Labor Department's audit plans for 1990.

CONTACT PERSON FOR MORE INFORMATION: Tom Trabucco, Director, Office of External Affairs, (202) 523-5660.

Dated: December 5, 1989.

Francis X. Cavanaugh,

Executive Director Federal Retirement Thrift Investment Board.

[FR Doc. 89-28931 Filed 12-6-89; 4:55 am]

BILLING CODE 6760-01-M

Corrections

Federal Register
Vol. 54, No. 236
Monday, December 11, 1989

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 61

[AD-FRL-3620-4]
RIN 2060-AC41

National Emission Standards for Hazardous Air Pollutants; Benzene Emissions From Maleic Anhydride Plants, Ethylbenzene/Styrene Plants, Benzene Storage Vessels, Benzene Equipment Leaks, and Coke By-Product Recovery Plants

Correction

In rule document 89-21429 beginning on page 38044 in the issue of Thursday, September 14, 1989, make the following correction:

§ 61.271 [Corrected]

On page 38078, in the third column, in § 61.271(d)(1), in the fifth line, "December 13, 1989" should read "September 14, 1989".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY-040-09-4111-08]

Environmental Impact Statement; Bridger-Teton National Forest Plan, WY

Correction

In notice document 89-28080 appearing on page 49363 in the issue of Thursday, November 30, 1989, make the following correction:

On page 49363, in the second column, in the first complete paragraph, the first sentence should read "BLM's preferred alternative for the Bridger-Teton LRMP is to offer lands for lease, in accordance with Alternative F, which is the Forest Service Preferred Alternative".

BILLING CODE 1505-01-D

federal register

Monday
December 11, 1989

Part II

Department of Transportation

Federal Railroad Administration

49 CFR Part 240
Qualifications for Locomotive Operators; Notice of Proposed Rulemaking

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 240

[FRA Docket No. RSOR-9, Notice 1]

RIN 2130-AA51

Qualifications for Locomotive Operators

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: FRA proposes to establish minimum qualifications for locomotive operators. The proposed rule would require railroads to have a formal process for training prospective locomotive operators and determining that all operators are competent before permitting them to operate a locomotive or train. The proposed procedures would require that railroads (1) make a series of four determinations about distinct aspects of a person's competency; (2) adhere to an FRA-approved training program for educating locomotive operators; and (3) employ standard methods for identifying qualified operators and monitoring their performance. FRA is proposing this regulation to minimize the potentially grave risks posed when unqualified people operate trains.

DATES: (1) Written comments must be received no later than March 1, 1990. Comments received after that date will be considered to the extent possible without incurring additional expense or delay.

(2) FRA will hold public hearings on this proposal on January 25, and February 7, 1990, at the times and places set forth below. Any person who desires to make an oral statement at the hearings is requested to notify the Docket Clerk at least five working days prior to the hearing, by phone or in writing.

(3) FRA proposes to make the final rule effective on or about December 31, 1990. Addresses: (1) Prepared statements (five copies) and written comments (three copies) should be submitted to the Docket Clerk, Office of Chief Counsel, FRA, 400 Seventh Street SW.,Washington, DC 20590. Persons desiring to be notified that their written comments have been received by FRA should submit a stamped, self-addressed postcard with their comments. The Docket Clerk will indicate on the postcard the date on which the comments were received and will return the card to the addressee. Written comments will be available for examination, both before and after the closing date for comments, during regular business hours in Room 8201 of the Nassif Building at the above address.

(2) The public hearings will be held at the following locations and times:

—Chicago, Illinois (Thursday, January 25, 1990 at 9:30 a.m.)—Courtroom 25, United States District Court, 219 South Dearborn Avenue; and

—Washington, DC (Wednesday, February 7, 1990 at 9:30 a.m.)—Room 2230, Nassif Building, 400 Seventh Street SW.

Persons desiring to make oral statements at the hearings should notify the Docket Clerk by telephone (202-366-0628) or by writing to the Docket Clerk at the address above.

FOR FURTHER INFORMATION CONTACT: Richard M. McCord, Deputy Regional Director for Safety, FRA, Portland, Oregon, (Telephone: 503-326-3011); or Lawrence I. Wagner, Trial Attorney, Office of Chief Counsel, FRA, 400 Seventh Street SW., Washington, DC 20590 (Telephone: 202-366-0628); or Edward R. English, Chief of Maintenance Programs Division, Office of Safety, FRA, 400 Seventh Street SW., Washington, DC 20590 (Telephone: 202-366-9186).

SUPPLEMENTARY INFORMATION:

An Overview of the FRA Proposal

Section 4 of the Rail Safety Improvement Act of 1988 ("RSIA") (Pub. L. 100-342, 102 Stat. 624) requires that FRA issue regulations to establish any necessary program for certifying or licensing locomotive operators. In this notice, FRA proposes to establish such a program for evaluating the competence and fitness of virtually all individuals who operate a locomotive. FRA's proposal builds on features of the processes currently used by individual railroads in qualifying their locomotive operators.

Classification of Operators

In this proposed rule, FRA divides locomotive operators into four distinct classifications that reflect the varying levels of difficulty associated with different types of service: (1) Locomotive servicing operators; (2) restricted train service operators; (3) terminal train service operators; and (4) unlimited train service operators. Locomotive servicing operators would be authorized to move locomotives wherever needed for servicing or maintenance purposes. Restricted train service operators would be permitted to operate only short trains at low speeds. Terminal train service operators would be authorized to operate any locomotive or train, provided that the train's operations do not exceed the distance limits for yard and transfer trains established in FRA's train brake rules. Finally, unlimited train service operators could operate all locomotives and trains in the territory on which they are qualified.

Certification

Under the proposed rule, railroads would issue certificates to qualified locomotive operators and could not require or permit anyone to operate a locomotive unless that person held the proper certificate. FRA would require that, at a minimum, railroads consider five criteria during the certificating process: does the prospective operator have (1) the necessary visual and hearing acuity to perform such service, (2) the necessary knowledge, as demonstrated by passage of a written examination, and (3) the necessary skills to operate a locomotive or train, as demonstrated by passage of a performance skills test; and is the applicant (4) 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, and (5) familiar with the physical characteristics of the territory over which he or she will operate.

Phasing in the Certification System

To ease the transition process, individuals already authorized to operate locomotives at the time the rule becomes effective would be presumed qualified for the purpose of this rule. That presumption would terminate within three years. During those three years, all "grandfathered" operators would have to become fully qualified under this rule.

Certification Decisions

FRA proposes to have railroads continue to discharge their preexisting duty to evaluate operators, but to improve the quality of their decision making process in several ways. For example, 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, the operator will be required to use appropriate corrective devices while on-duty.

In making a determination concerning the person's knowledge, a railroad would have to administer a written examination covering the appropriate rules and safety practices of that railroad. Railroads would have considerable discretion in developing these tests until experience under this rule permits greater standardization. To improve operator competency, FRA proposes to require supplemental training, triggered by the passage of time or by significant changes in operations.

In making a determination about performance skills, a railroad would have to administer a skills test by monitoring the person's computer simulated operation of a train or by monitoring actual operation of a test train. In addition, railroads would have to evaluate data concerning the person's routine performance of duty through an operational monitoring program that would include annual assessments of an operator's skills during routine operations. This testing of operator skills would be structured to reflect the varying levels of service.

Railroads would have to consider the individual's recent conduct as a railroad employee and as a motor vehicle operator—to the extent that the operator candidate voluntarily has created such a behavioral history. A point system would be used with respect to unsafe operation of a train or motor vehicle and alcohol or drug use while on duty as a railroad employee or while operating a motor vehicle.

Any single incident of substance abuse, whether associated with railroad employment or motor vehicle driving, 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. Those who receive appropriate counseling or treatment after an incident would receive no points. Absent such professional findings, each incident would be assigned a value of three points and be considered under the system's criteria for eligibility. The professional would also have to consider whether the person is currently dependent on alcohol or drugs or has a treatable disorder that involves abuse of alcohol or drugs as a manifestation. If the professional concludes that such a condition exists and sufficient intervention has occurred, railroads could permit the person to perform service subject to the aftercare and testing provisions contained in FRA's alcohol and drug rules.

Any types of poor safety performance while at the controls of a train also would generate points. For example, operating without proper authority, excessive speeding, and tampering with safety devices would be the type of unsafe behavior to be assigned three points. Each of these incidents involves a very dangerous situation in which it is appropriate to hold the individual directly responsible.

Only four types of poor safety performance incidents while at the controls of a motor vehicle would have to be considered: reckless driving, excessive speeding, a moving violation in connection with a fatal accident, and driving with a revoked or suspended license. Each of these would generate two points. Certification candidates would have the responsibility for making their driving history available including data available from the National Driver's Register.

Candidates would be given an opportunity to review and comment on any adverse train operation or motor vehicle operation data before a railroad considered it. Any person with more than six points would be ineligible (at least for five years after his or her last incident). Those who have accumulated six points in two separate 5-year periods would become ineligible for life. Those with six points could be certified after they attend a training course. Individuals who have accumulated fewer than six points are eligible and must be certified absent some other disqualifying condition.

Training Future Operators

Standards for the training of future locomotive operators are included in this proposal. Railroads that elect to conduct such training programs would have to conform them to FRA's criteria concerning duration and content and obtain approval of their overall program. Students would be authorized to operate locomotives and trains when directly supervised by instructors.

Administration of the Program

Railroads would issue certificates, and operators must have that certificate in their possession while on duty. Certificates would have to be renewed at 36-month intervals using the same criteria discussed above. FRA requests comment on the wisdom of using longer intervals if the railroads employ an ongoing evaluation of operators' eligibility to remain certified. Absent such an ongoing evaluation program (i.e., one in which the railroads continually monitor for events that could push the employee's eligibility point total over six), FRA will rely on its civil penalty and disqualification procedures to respond to unlawful behavior by certified operators. FRA proposes to make certain operator actions, such as excessive speeding, that are not currently proscribed by regulation unlawful under the provisions of this rule.

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.

In addition to performing this review function, FRA's role would be to monitor the railroads' adherence to the dictates of the certification program contained in this proposal. Resolution of some disputes concerning day-to-day administration of a particular railroad's program, including the employment implications of the rule's provisions, would be left to the existing processes for dispute adjustment developed under section 3 of the Railway Labor Act. This approach is similar to that taken by FRA in devising its alcohol and drug rules contained in part 219.

DETAILED DISCUSSION OF FRA'S PROPOSAL

The Industry in Perspective. Approximately 500 railroads are subject to FRA's safety jurisdiction. They differ enormously, ranging from large such as CSX Transportation, with 21,500 miles of track across 21 states and 41,500 employees, to very small operators such as the Tippecanoe Railroad with only 16 miles of track and one locomotive. Collectively, they use 25,000 locomotives, 1.4 million freight cars, and 7,000 passenger cars to transport 941 million ton miles of freight and 340 million passengers each year.

These railroads employ 34,000 people who are authorized to operate locomotives. Although individual railroads can identify these people, the industry has no centralized data base that contains information on their age, training, or experience. Nor do the large labor unions that represent these employees maintain such data.

Historical Trends. The need for qualified locomotive operators arose in England in 1812 when a railroad locomotive was first placed in commercial service. By 1830 the technology necessary to build the first steam locomotives had been brought to this country, and the first in a long line of "locomotive engineers" was employed to operate a train.

Rudimentary machines, such as the "Tom Thumb," required only basic skills to operate; no formal process was needed for selecting the people who would operate such equipment. As locomotives and the railroads on which they operate grew more complex, formal processes for selecting, training, and qualifying locomotive operators were adopted.

Current Practices. Large railroads have devised careful selection and training programs that rely on criteria such as age, prior work experience, and physical condition. If a qualifying candidate desires to become a locomotive operator, the railroad provides training on the equipment and on the railroad's methods for operating trains, employing on-the-job teaching or classroom instruction or both. At the completion of this training, the railroad determines whether the candidate is qualified to operate a locomotive in train service on that railroad. Once deemed qualified as a locomotive operator, an individual will retain that status by meeting periodic physical examination criteria, passing periodic operating rules examinations, and not receiving adverse reports concerning duty performance.

Until recently, the effectiveness of this process for determining an individual's fitness to operate a train has not been the subject of intense debate. Although Federal and state governments historically have been actively involved in setting fitness criteria for operators of motor vehicles, ships and aircraft, they generally have not addressed locomotive operators. Even when they have adopted laws, the statutory provisions enacted by states have been limited (see for example, the laws of Alabama, Massachusetts, and New York). On the Federal level, the absence of governmental action can be accounted for, at least in part, by the relatively good record of locomotive operators and the fact that the necessary legal authority to issue rules on a broad range of rail safety subjects did not come into existence until 1970.

The Statutory Framework. When that broad authority was granted to FRA in the Federal Railroad Safety Act of 1970, analysis of the accident data indicated that FRA's first priority should be to address issues of track and equipment safety. Its focus appears to have been well placed, producing dramatic decreases in railroad accident rates. For example, since 1979 overall accident rates have declined 62.8 percent; track and equipment-related accidents have declined 75.2 percent; and on-duty fatalities for rail employees have declined 43.6 percent. No other mode of transportation even approached this magnitude of improvement during these years.

As the accident rates have fallen, the pattern of causation has gradually shifted. Human performance accidents, although also declining in absolute numbers, have become an increasing percentage of all accidents and a dominant cause of serious incidents. Until very recently, FRA has lacked the necessary tools. However with passage of the RSIA, a loophole in FRA's enforcement authority was closed when the agency acquired enforcement jurisdiction over individual railroad employees. That jurisdiction was a practical necessity for the establishment of an effective locomotive operator licensing or certification program.

Since the RSIA was enacted on June 22, 1988, FRA has instituted multiple regulatory proceedings on a wide variety of topics, including three that directly address the issue of human performance. On July 22, 1988, FRA revised all of its existing safety rules to make civil penalties applicable to individuals who commit willful violations of those rules. (See the July 28, 1988 issue of the **Federal Register**, 53 FR 28594.) Next, FRA issued a rule to prohibit tampering with safety devices and operational monitoring devices mounted on locomotives. (See the February 3, 1989 issue of the **Federal Register**, 54 FR 5485.) Finally, FRA issued proposed rules to establish the procedures for disqualifying an individual from holding a safety-sensitive function. (See the December 9, 1988 issue of the **Federal Register**, 53 FR 49695.)

The scope of this regulatory program and the magnitude of the task involved in devising an appropriate qualification system for locomotive operators have made it virtually impossible for FRA to issue a final rule in this proceeding prior to June 23, 1989, the target date established by section 4 of the RSIA. Faced with responsibility for addressing an ambitious regulatory agenda and the need to create regulations that effectively address Congressional safety concerns, FRA quickened its regulatory pace to the degree that it could legitimately do so. It has delayed issuance of a regulatory proposal in this proceeding because the number and complexity of the issues required additional time.

The Need for Regulations. In determining the need for any regulation concerning locomotive operator qualifications, FRA identified those train accidents that occurred during the period 1977 through 1987 that were caused by human factors and that appear to reflect poor locomotive operator performance. Although human factor accidents have seen a dramatic reduction in actual numbers, they have not been decreasing at the same rate as accidents attributed to other causes. Within the 18,140 human-factor-caused accidents reported during the period, FRA identified a total of 6,990 train accidents that resulted in 61 fatalities, 1,482 personal injuries and some $387 million in property damage that can be ascribed in whole or in part to poor locomotive operator performance. These accidents included 214 resulting from improper use of the automatic brake, 62 due to improper use of dynamic brake, and 171 caused by improper use of the independent brake valve. These appear to stem from poor performance curable through improved training and monitoring. Also within that total are 1,649 accidents attributed to excessive speed and 3,375 caused by excessive in-train force levels that may not be as directly related to training as to operational monitoring. In many of these accidents the causation appears to relate to either inattentiveness or misconduct.

FRA encountered some difficulty in analyzing the data because of the absence of specific information that indisputably identifies which inadequacies are really the causal factor. The difficulty in estimating any specific effectiveness level is caused by an inability to document with specificity the correlation between testing, training, and actual safety performance. Accident investigations do not generally identify whether the failure of locomotive operators to take effective action stemmed from inadequate training, a failure to recall a vital piece of information learned long ago, or lack of proper execution due to simple inattentiveness. Although FRA has not included draft regulatory text on this topic, FRA is considering the need to revise its accident reporting regulations to require railroads to provide additional data about the qualifications of the locomotive operator when a railroad cites the possibility of poor operator performance as the cause or contributing cause of an accident.

Despite the limitations inherent in the available accident data, FRA believes that there is a need for regulations concerning the qualifications of individuals who operate a locomotive. Consequently, FRA proposes to establish a program under which each railroad will determine that every person it authorizes to operate a locomotive meets or exceeds Federally prescribed minimum standards. For discussion purposes FRA has broken its presentation of the components of this program into the following topical areas: (1) Its scope and nature of the system, (2) its structure, and (3) its administration.

I. The Scope and Nature of the Proposed Program

(a) Types of Operations That Would Be Affected

In general, railroads permit three types of employees to operate locomotives: "engineers," "hostlers," and "transportation officers." These employees may also be known as yard engineers, hostler attendants, road foremen of engines, or traveling engineers. Regardless of title, those authorized by the railroad to operate a locomotive are generally identified on internal company lists. Such arrangements are typical of the 23 railroads that handle more than 80 percent of the freight and carry more than 90 percent of the passengers transported by rail in this country. As would be expected, the larger the railroad, the more elaborate is its program for control of locomotive operation. Although most railroads have used this discretion wisely, a railroad may ignore, misconstrue, or change company policy to meet short term objectives. When that has occurred, the absence of Federal standards has limited FRA's ability to redress the situation. FRA also has found itself handicapped in quickly responding to situations in which there was no rational company policy or where a rational policy was not adhered to.

FRA's proposal covers nearly every person who operates a locomotive, including many not known as "locomotive engineers," and nearly every railroad subject to its safety jurisdiction, including many that may lack a clear company policy on the qualifications to perform such functions. However, as discussed below, certain limited exceptions would be carved out based on the type of railroad operation or the function being performed.

FRA proposes to exclude three types of operations from this rule. The first would be for tourist, scenic or excursion operations that occur on tracks that are not part of the general railroad system (i.e., the standard gage, interconnected network of railroads that makes possible the interchange of goods and passengers throughout the nation). These rail operations frequently do not come under FRA's other rules because they are conducted on a seasonal basis and use short, physically isolated segments of track that never see any other type of operation. (They are covered, however, by FRA's accident reporting rules.) Some do not even use standard gage tracks for their operations. They have been growing in number, volume of passengers carried, frequency of service and duration of their operating season. Many have expanded their equipment rosters and have been electing to use older steam locomotives to propel their trains.

These excursion railroads have been an increasing source of concern for FRA, but prior to imposing qualification standards on their locomotive operators, FRA has concluded that there is a need to examine the broader question of general regulation of these railroads. FRA intends to initiate a safety inquiry to examine the threshold question of whether there is a need to impose safety regulations on these types of operations. FRA will then evaluate the need to bring such operations within the scope of this rule.

The second proposed exclusion addresses operations within the confines of industrial installations. These are commonly referred to as "plant railroads" and are typified by operations such as those in steel mills that do not go beyond the plant's boundaries. Third, the rule would not apply to rapid transit operations in urban areas. The section-by-section analysis of this proposal contains some additional discussion of this topic to help illustrate how this proposal would apply to certain operations that may qualify as rapid transit or as plant railroad. For a general discussion of the extent of FRA's safety jurisdiction, see the relevant portion of Appendix A to 49 CFR Part 209.

FRA also proposes to exclude two types of functions frequently performed on many railroads. This exclusion is intended to permit employees to move locomotives very short distances for inspection or maintenance purposes. FRA has concluded that this function is so minimal as not to warrant coverage under this proposal. Thus, FRA proposes to exclude employees required to operate a locomotive as an incidental aspect of their inspection, maintenance, and servicing duties. This exclusion would apply in two settings. The first involves individuals who operate locomotives only within the confines of a locomotive servicing facility isolated from general operations in accordance with the blue signal regulations (49 CFR 218.29). FRA believes that these limitations are sufficient to provide for the safety of operations. Other considerations are that the locomotives generally do not move at speeds exceeding 5 miles per hour, do not haul cars, and proceed under a very simple set of operating procedures.

Second, FRA proposes to permit an employee to move a locomotive for a distance of not more than 100 feet when necessary to perform an inspection or maintenance task outside a locomotive servicing facility. This exception would apply, for example, when the wheels of a locomotive need to be rotated a fraction of their diameter to permit an inspection of their tread and rim surfaces. Exclusion of people who perform such functions from this rule should not be interpreted as having a bearing on their inclusion or exclusion from the Hours of Service Act coverage where different considerations obtain.

(b) FRA's Approach to Certification

FRA believes that a basic level of instruction and training is required to instill the knowledge and skills necessary to safely operate a train. Since short trains moving at slow speeds in flat terrain are relatively easy to operate, FRA proposes to establish minimum levels of instruction, knowledge, and skill for such operators. For those who will operate longer trains, or trains that move at higher speeds or function in more complicated operational settings, FRA believes that higher levels of instruction, knowledge, and skills are required.

FRA's proposal divides operators into three major proficiency levels. Proficiency in the skills required at a lower level does not entitle the operator to perform duties at a higher level. However, an employee's level of competence should be fully transferable to a new environment. Simply stated, a person competent to run a train on one railroad is fully competent to perform a comparable task elsewhere, provided he or she has been qualified on the territory involved.

FRA's approach recognizes that railroad operating rules contain more similarities than differences for locomotive operators, at least among comparable railroads. The railroads themselves have been striving for a more uniform set of rule books. The recently adopted Uniform Code of Operating Rules, or "code of the west," and the new Northeast Operating Rules Advisory Committee ("NORAC") rule book are examples of this effort to use a more uniform and regionally standardized system for operating trains. Since remaining differences are relatively minor, orientation of a transplanted locomotive operator should pose no real hurdle.

Traditional industry thinking places a large premium on the operator's familiarity with the physical characteristics of the territory over which he or she will be performing service. FRA agrees but believes that territorial familiarity and train handling skill are segregable elements of the education of a locomotive operator. FRA's proposal builds on this fact.

(c) Consequences of Certification

FRA is proposing to establish minimum qualification standards for locomotive operators. As with its other regulations, adoption of FRA minimum standards would permit railroads to adopt or continue in force more rigorous qualification criteria. FRA's proposal is designed to ensure that no unqualified person is authorized or permitted to operate a locomotive. A railroad may permit an individual to operate a locomotive only after it determines that the person has the competence to do so.

FRA's proposed rule would have no direct impact on any person's employment relationship with a railroad. The employment consequences of an individual's meeting or failing to meet FRA criteria are beyond the scope of this rule and would be left for resolution under employment contracts. Certification would mean that a railroad has affirmatively determined that an individual meets the minimum Federal qualifications required to function as a locomotive operator. An individual would not be entitled to employment as a locomotive operator because he or she is certified under this rule.

II. The Certification System

(a) Classes of Service

FRA proposes to establish the five classes of service for locomotive operators outlined below. In describing these classes, FRA has avoided references to industry terms previously used to identify those who operate locomotives. The classes of service embody ascending levels of proficiency that address these key factors: variations in controlling a train that result from the number, nature, and placement of the cars being hauled; variations related directly to the speed or changes in speed of the train and the alternatives available for responding; and finally the variations that result from changes in physical conditions including ascending and/or descending hills.

(1) Student Operators

This lowest classification would permit railroads to educate students on the operation of trains and to provide actual experience at the controls without regard to prior experience. FRA would ensure safety by having student operation occur only under the direct supervision of a fully skilled operator. Student operator classification could be used, for example, to educate new employees or to teach current operators to handle more difficult situations.

(2) Locomotive Servicing Operators

The next higher service classification would apply to individuals who have the levels of knowledge and skills needed to handle a locomotive or a group of locomotives without cars attached. Although the equipment handling skills required to operate a locomotive without cars attached are relatively simple, such operation can require significant knowledge of the railroad's operating practices and physical characteristics. For example, railroads often expect their personnel to move locomotives from servicing areas to train yards or to outlying points. Although fully competent to perform such operations, these individuals may not be qualified to operate locomotives hauling rolling stock.

(3) Restricted Train Service Operators

The next higher classification would apply to individuals who have sufficient knowledge and skill to operate simple trains, defined as trains (1) having fewer than thirty cars in the consist, (2) moving at a speed not exceeding 20 miles-per- hour, and (3) moving in an area where only one train at a time is operated. FRA believes that handling trains that exceed these criteria requires significantly greater knowledge and skill.

(4) Terminal Train Service Operators

The next higher classification would apply to individuals who have sufficient knowledge and skill to operate a wide variety of train consists, but who are not qualified to perform service in high speed operations over extensive territories. FRA proposes to permit these individuals to operate trains of any size at any prescribed speed under any operating scheme, provided the train does not travel more than 20 miles from its point of origin to its destination. Operations that do not exceed twenty miles are currently referred to as "transfer train or yard train movements" under FRA rules and are performed under a wide variety of operating practices. Train size and make-up vary significantly as do operating speeds and the impact of changes in topography. However, these variations are held within a tolerable range by the 20 mile limitation.

(5) Unlimited Train Service Operators

This highest level of proficiency would include those individuals who have sufficient knowledge and skill to operate any form of train consist and whose skills are sufficiently high to perform service in high speed operations over extensive territories. Individuals at this level would have the knowledge and ability to predict with some accuracy the performance of different consists under different operating conditions and the skill to properly maneuver the train through those different operational environments.

(b) Determinations Required Under the Certification Process

Consistent with most current practices in the industry, FRA proposes that each railroad have a program under which it would make four determinations before allowing an individual to operate a locomotive or train. FRA's proposal would establish uniform criteria for determining whether an individual: (1) has the visual and hearing acuity needed to perform their responsibilities; (2) has sufficient knowledge and training to safely operate a locomotive; (3) has effectively demonstrated that they possess the appropriate operating performance skills; and (4) has the requisite safety performance history to be eligible to assume the responsibilities of operating a locomotive.

(1) Physical Capacity

Each person who operates a locomotive must have sufficient vision to receive all manner of visual information concerning the movement of that equipment if there is going to be a reasonable expectation that the unit will be moved safely. In examining the available data, FRA has reason to believe that many of the nearly 500 railroads in this country do not have any visual acuity criteria for their locomotive operators. Although major railroads tend to employ a commonly accepted criteria, FRA has been advised that these criteria are not being fully complied with after an individual has been initially hired. Similarly, each person who operates a locomotive must have sufficient hearing acuity to identify a variety of information that is communicated audibly including warning signals and voice communications. Given the increased reliance on radio transmission of operating information, there appears to be an increasing need to assure minimum acuity levels. FRA believes that the data concerning current industry practice for visual acuity conditions is also applicable here.

FRA proposes that each prospective operator be given a periodic examination by a qualified medical person to determine whether they meet FRA mandated vision and hearing acuity standards. Although more comprehensive physical qualifications could be required for locomotive operators, FRA does not believe that necessary at this time. Unlike other modes of transportation, a railroad has some inherent, safety features that can mitigate an operators physical incapacitation. For example, it is rare that an operator is the sole occupant of the locomotive cab; and other occupants can simply bring the equipment to a halt. In addition, most locomotives are equipped with a variety of safety devices that cause a train to stop if an operator is unresponsive. Similarly, the fact that trains must follow the pathway dictated by the tracks reduces the risk that the equipment will veer out of control.

Analysis of accident data relevant to this issue proved to be difficult, since even dramatic medical events, such as heart failure, that caused a train accident are difficult to retrieve from the available data base. In part, the limitations of the data reflect the fact that the pre-accident medical condition of railroad employees has rarely been the subject of detailed inquiry by accident investigators. FRA's proposal for the particular thresholds for vision and hearing acuity were derived from published FRA research efforts (see Recommendations Concerning Critical Factors in Railroad Employee Medical Standards; C. Abernathy; Report No. DOT-TSC-RR628-PM-76-1; issued March 1976) and analogous DOT requirements for other transportation modes. FRA's proposals are compatible with existing industry guidelines on this subject.

FRA recognizes that there may be instances in which a railroad would be willing to allow a given operator to continue in service even though that person has some impairment that prevents them from meeting these standards. FRA anticipates it will resolve such issues in the context of a waiver proceeding. In such a context FRA would have sufficient detailed information available to make an informed assessment of the safety implications of deviating from these acuity standards.

(2) Knowledge: Training and Testing To Assure Competency

Locomotive operators must know about personal safety, railroad operating practices, general mechanical practices, proper train handling procedures, and proper safety procedures. FRA proposes to establish (a) minimum training requirements to assure that prospective locomotive operators receive an adequate education on those topics and (b) testing requirements to ensure that prospective operators have acquired and retained the requisite knowledge.

(a) Training Programs. FRA proposes to address both training and retraining of locomotive operators. Not all railroads provide the initial education of their employees on how to operate locomotives and trains. Instead, some seek people with prior experience on other railroads. Since the pool of experienced locomotive operators has been fairly large in the last decade, as the larger railroads in the industry have significantly reduced their work forces, small and regional railroads have had no difficulty hiring to meet their staffing needs. Even railroads that do conduct extensive training programs for other jobs do not always do so for locomotive operators. FRA is therefore not proposing a requirement that each railroad have a training program for student operators. But once a carrier elects to conduct a training program for student operators, it would be required to submit that program to FRA for approval.

FRA proposes to require that a railroad with a student training program in progress on the effective date of this rule file that program with FRA. If a program is not in progress on the effective date of this rule, the railroad that elects to initiate one would have to file that program with FRA at least 60 days before it commences training. Upon receipt, FRA would review the program and either approve it or ask for modifications. Such an approval process creates the potential for delay of a program; accordingly, FRA proposes to permit railroads to presume that their program has been approved unless FRA informs them to the contrary, in writing, within 60 days after the program is filed. FRA has also proposed minimum criteria for the structure, content, and duration of any program. Like the distinctions FRA is proposing for the classes of service, the proposed student training program contains gradations that reflect increasing complexity implicit in operating longer trains at higher speeds over more difficult terrain.

FRA's training curricula proposal builds on the foundation laid by the FRA research efforts that produced the Hale study (Proposed Qualification Requirements for Selected Railroad Jobs; A. Hale and H. Jacobs; Report No. DOT-TSC-736; issued May, 1975). It also is in keeping with the student training programs FRA has observed during the last several months on some 20 railroads that FRA studied or conferred with prior to developing this NPRM. FRA's proposed minimum training standards address classroom instruction and skill development and the establishment of curriculum requirements. Details of the proposal are discussed at greater length later in this preamble.

Continuing education is also addressed in this proposal. At a minimum, all railroads currently insist that an already skilled operator be trained on the physical characteristics of a given territory prior to his or her initial operation over that territory or when a significant period of time has elapsed since the person last operated a train over the line. A similar need arises when an experienced locomotive operator is assigned to a new territory. The advent of new technology also generates a need for additional training, e.g., the introduction of the airflow method of conducting airbrake tests or the introduction of advanced train control systems. In addition, some railroads provide refresher training to maintain and improve the knowledge of their locomotive operators.

FRA proposes to require that all railroads have a program to address the need for supplemental training. Although FRA has limited evidence to support the need for an industry wide refresher type training, FRA's proposal would entail only a minimal level of additional training for locomotive operators. The need for additional training would be triggered by the passage of time, the introduction of new technology, or changes in the territory over which the locomotive operator will be performing his or her duties.

(b) Testing Programs. FRA proposes to require that all prospective locomotive operators take a written examination to measure their knowledge of the relevant safety practices and procedures. FRA would set some criteria for the tests and prescribe consequences for failure of initial tests or subsequent periodic tests.

The railroads would have considerable latitude in designing these tests. However, FRA would require that the test be closed-book, cover at least five subject areas and contain no fewer than 150 questions. The passing score would be 85 percent. For railroads whose operators encounter electronic signal systems, the portion of the test relating to signal indications would require a score of 100 percent.

FRA's decision not to propose greater control over these tests reflects several factors. Every railroad is different in some respect. To the extent that a universal body of knowledge can be extracted from the railroads' individual safety practices and rules, FRA cannot design a universal testing program in the brief time envisioned by Congress.

In the long term, FRA believes that the best approach may be to emulate that used by some professions, including the legal profession: a two-part examination, the first testing general knowledge and the second detailed or applied knowledge. Such a testing program would evaluate each operator's fundamental knowledge and then his or her knowledge of the unique operational factors present on the particular railroad.

FRA seeks the views of all parties on the wisdom of pursuing the creation of such a testing system and on the time and resources needed to establish such a system. Assuming that the creation of such a testing program is appropriate, but that it can not be accomplished prior to adoption of a final rule in this proceeding, what is a realistic framework for converting to such a system?

At this point, FRA proposes to allow railroads to continue using their current tests if they meet FRA criteria.

FRA will examine the tests being used by railroads to monitor the quality of their testing and if necessary seek improvements in a particular test program. FRA anticipates that railroads, particularly large railroads, will continue to use the test programs currently being administered because these generally exceed FRA's minimum requirements. For others these proposals will require that new or improved tests be developed or that grading criteria be improved.

FRA proposes to have these knowledge tests administered to each locomotive operator at least once every 36 months, and FRA proposes specific consequences for a person who fails these tests. Those consequences of failure distinguish between the case in which the test constitutes the initial examination of an operator and the case in which it is a subsequent periodic reexamination of a previously certified operator.

(i) *Consequences of Failing Initial Testing.* Subsequent to adoption of this proposed regulation, at least three different groups of people can be expected to take an initial examination. FRA identifies the first of these groups as "grandfathered operators." As noted earlier, FRA anticipates that this certification rule will be phased into effect by allowing railroads to presume for a limited period of time that existing engineers are qualified. This interim presumption of qualification, or grandfathering, requires that such grandfathered operators be administered their initial knowledge test within three years of the effective date of this rule. If such a grandfathered operator fails to achieve a passing score when they initially take this test, FRA proposes to allow that person to continue to operate locomotives for a period of not more than sixty days. During that interval the grandfathered operator must wait a minimum of thirty days and then retake a similar exam. If the grandfathered operator fails the second examination, then he or she cannot be permitted to operate a locomotive until he or she passes a second reexamination. FRA would permit an exception to that prohibition for instance when the railroad wants to permit such a person to operate under the direct supervision of an instructor. A failure of all three tests by a grandfathered operator will necessitate that the person complete a training program before again attempting to pass this testing.

FRA proposes a similar chain of consequences for the second and third groups. The second group would be comprised of student operators who are taking their initial tests after completing a training program. The third potential group of test subjects is composed of individuals who have acquired sufficient education about railroad operations and are perceived as potentially competent to qualify as a locomotive operator but do not meet the criteria for being a grandfathered operator or a student operator. Such people typically could include individuals who were previously deemed fully qualified operators but were not employed or were ill during the interval for grandfathering designation. The major difference is that a person who belongs to either the second or third group will not be permitted to operate a locomotive or train without direct supervision until successful passage of the test.

(ii) *Consequences of Failing Periodic Testing.* FRA proposes that a similar chain of consequences apply to individuals who fail subsequent periodic examinations. The failure of an initial periodic test will start a sixty day probationary period within which the person must successfully pass a retest. During that interval a railroad may, but is not required to, permit the person to continue to operate locomotives and trains under the direct supervision of a qualified operator. Failure of three examinations would also trigger the need to take a retraining program.

In devising these test failure consequences, FRA does not intend to nullify collective bargaining arrangements or company policies that establish more stringent or restrictive approaches to questions of retesting. FRA's intent here is to prevent railroads from adopting more permissive approaches, and either continually exposing people to tests until they pass or allowing people who fail tests to remain in service for indefinite periods prior to retesting.

(3) Performance Skills: Training and Testing Required

In order to be a locomotive operator, each person needs certain minimum performance skills and for each class of service those performance skills become more complex. In a manner similar to that described above, FRA proposes to establish (1) minimum training requirements to assure that future prospective locomotive operators develop adequate train handling skills and (2) testing requirements to ensure that all prospective locomotive operators possesses the requisite train handling skills.

(1) *Training Programs.* As noted above, FRA is not proposing a requirement that each railroad have a basic training program. It will be feasible for many railroads to meet this training requirement simply by hiring operators trained by another railroad. But once any railroad elects to conduct a basic training program they will be required to submit that program to FRA for approval. That program must meet certain criteria. Frequently referred to as hand-on-training or on-the-job training, the performance skills aspect of the training program is the more difficult to prescribe. FRA proposes to establish criteria concerning the duration and content of the program. FRA's criteria contain gradations that reflect the differences implicit in training a person to operate small trains, at slow speeds, in operationally simple environments and those needed to operate a variety of train consists at many speed ranges over significant variations in terrain. FRA has structured its proposal to focus on the training that would more typically be associated with that afforded to people by large railroads who desire to train individuals to be competent to operate any kind of train under any kind of condition—in essence, the kind of training that it would be appropriate if the railroad's intent was to create a "man for all seasons" at the controls of a locomotive.

(i) *Duration and Content.* FRA proposes that all students receive a minimum of sixty hours of performance skill training. The duration and content criteria that FRA proposes are best illustrated by a discussion of FRA's requirements for training a student who, it is contemplated, will become an unlimited train service operator. Such a student must receive a minimum of 480 hours of performance skill training, and operate the train for at least 240 of those hours. The trains to which the student is assigned must include whatever variety of equipment the railroad normally operates, equipment which this person can reasonably be expected to encounter as a qualified operator.

FRA has selected this minimum duration for the actual train operation portion of program because of the nature of railroad operations. Regrettably, there are many periods of time, and these periods can be quite lengthy, when a student at the controls of a locomotive will not be doing anything but waiting. By setting this minimum level, FRA experience indicates all students will receive an adequate level of operational experience during which there will be sufficient opportunity for education and skill development concerning train handling.

FRA also proposes to require that students be exposed to a variety of trains and equipment. FRA has observed instances where students were not being exposed to different locomotive types, with their variations in control configurations and performance responses. Likewise, FRA has observed instances where the trains selected for students to operate were very uniform even though such uniform train consists were not the predominant type of consists operated by that railroad. In drafting the proposed training program language FRA is affording railroads considerable latitude is deciding what structure to impose on their training programs by simply establishing performance standards for this aspect of the program. FRA's intent is to require railroads to develop effective programs that should produce highly qualified operators and to avoid structuring the program in ways that satisfy short term convenience goals for administering a training program. It should also be noted that if a railroad segments its operations because it employs a regional or a divisional structure, the railroad would only be required to expose the student to the variations in equipment and train consist peculiar to the segment where the student will eventually be operating once becoming qualified.

FRA's training proposal assumes that the student will be learning the physical characteristics of the territory as well as learning how to translate that data into effective train handling skills. Since there are multiple reasons why that dual education would not necessarily occur, FRA has included a separate provision to address situations where a student learns train handling skills but does not learn about the physical characteristics of a railroad's trackage on which they will be operating. However, FRA does not intend this rule to constrain railroads that have innovative programs including use of video cassette recorders for teaching people about the physical characteristics of their trackage.

(ii) Use of Simulators. After examining many existing training programs, FRA has decided to propose sanctioning the use of train operation simulators as an alternative to actual train handling experience. FRA proposes to permit railroads to conduct up to one half of their train handling skill performance training on simulators and to reduce the total duration of the program significantly. FRA has identified several different types of "simulators" that are currently being used by railroads. In its most basic configuration, the simulator consists of a locomotive control stand equipped with throttle, direction of movement controls and braking levers or switches. The initial enhancement to that basic mock-up configuration occurs when the controls are connected to an elementary airbrake system and the gauges associated with that system. Additional enhancement comes when this mock-up is augmented by the use of film or graphic displays of the rail right-of-way, particularly through the use of video cassette recordings.

True sophistication does not occur until the locomotive control equipment is connected to a computer that translates the physical manipulations of those control devices into data inputs concerning the resulting implications for the operation of a train. Presently there are two types of computer enhanced simulators available and in service. The more rudimentary of these employs a mathematical model to predict the longitudinal dynamic conditions which will result from particular control manipulations. This type of computer enhancement employs stored information on track configuration and equipment characteristics and displays the in-train force levels being predicted on a cathode ray tube (CRT). The most familiar of these simulators are referred to as TDAs which is short for Train Dynamics Analyzer, a popularization of a supplier's brand name identification. The highest level of simulator sophistication occurs when the computer being used for enhancement has greater capacity. These simulators use combined mathematical models to permit effective replication of all of the documented operational characteristics, concerning track profile, locomotive and car performance characteristics including lateral-over-vertical ratio calculations. The computer systems permit real time monitoring of a person's performance, capacity to interrupt the operation of the program for educational purposes, and the ability to both display the effects of control manipulation on a CRT and/or display it in a printed format. They are augmented by motion and sound replication devices and include a visual system for projecting actual films of the track and right-of-way.

FRA believes that the value of the computer enhanced simulators is difficult to overestimate. A few examples to illustrate their value will suffice. In addition to eliminating the wasted time problem inherent in field operations, the simulator permits a railroad to expose students to multiple situations they could encounter in the field but which are too dangerous to create for training purposes. Simulators make it possible to allow students to start heavy tonnage trains on severe grades; to expose them to component failure response techniques to compensate for events such as the loss of dynamic brakes in mountainous terrain; and to expose them to the management of in-train force levels attendant to poor distribution of empty and loaded cars in train consists when operating through undulating terrain.

FRA proposes to permit railroads that have the more rudimentary computer assisted simulators to substitute one hour of simulator time for two hours of field operations time and to permit up to 120 hours of the skill performance interval to occur on such simulators. For the more sophisticated devices FRA proposes to permit railroads to conduct up to 240 hours of their performance skill development program on the simulator. Moreover, FRA proposes to have one hour of simulator time be the equivalent of five hours of field operations.

FRA's proposal concerning the training of future locomotive operators contains a higher level of detail than other portions of this proposal for several reasons. A major reason for FRA's approach is that it lacks the ability to establish, in the near term, an effective universal test for all locomotive operators to measure either the performance skills or the general knowledge levels of prospective operators. In the absence of an ability to effectively test students, through standardized tests, which would allow trainers latitude when educating student operators, FRA has elected to prescribe the details of the education program. If such a universal testing methodology can be developed, as suggested earlier in this notice, FRA would consider substituting such testing for such a detailed training requirement. The high level of detail being proposed does have some independent benefit however. Although the current training programs of some railroads are very impressive, the overall quality of such programs in the industry is uneven and this proposal would serve to significantly improve the quality of many programs.

(2) Testing Programs. FRA proposes to have each locomotive operator given a performance skill test to measure his or her capacity to safely operate locomotives or trains in accordance with relevant safety practices and procedures. As with knowledge testing, FRA proposes to establish criteria for the tests, including the consequences of failing either (i) initial tests or (ii) subsequent periodic tests.

Of necessity, railroads should and, under this proposal, would be given extensive discretion in designing and administering these tests. However, FRA proposes to establish some criteria concerning: the selection of the person who will conduct the test; the train that must be employed; the duration of the test; and the subject matter to be covered.

FRA proposes to have the performance skills tests administered by a designated person. In order to be designated, such an individual must be a supervisor of the railroad; be fully qualified to operate any train normally operated on that railroad; and have at least five years of experience in such service. FRA will permit that designated person to select the train that will be used for evaluation purposes and the duration of test program. In requiring the use of test train, FRA is not proposing that a railroad operate any train beyond those normally scheduled to be operated. A railroad can comply with this provision by simply having the evaluator and the prospective operator control a train the railroad intended to run in any event.

The primary proposed test constraint is that the test train be of the type that would normally be encountered by the operator being evaluated. FRA is concerned that the discretion being afforded railroads in this context not be abused. For example, it would not be appropriate to limit test train selection in ways that result in the operator being evaluated on a particularly easy or particularly difficult train.

FRA has not specified the duration of the evaluation period. FRA only proposes to require that the duration be sufficient to allow the designated evaluator sufficient time to monitor the operator's skills. Under the wide variety of operational situations that currently exist, FRA anticipates that in rare instances some designated evaluators may need less than one hour to effectively perform this function but in other more typical instances the observation period could last for several hours.

As a consequence of the potential variables that may be encountered by proceeding in this manner, FRA proposes to require that the designated evaluator use a system for identifying relevant data about the test regimen and providing a written explanation or record of their observations and resulting evaluation. FRA has drafted a proposed Appendix as an illustration of the type of system that could be employed.

FRA also proposes to permit railroads to conduct such tests using train operation simulators. Simulator tests would have to meet the same criteria as field tests and would have clear advantages in terms of a railroad's ability to improve the quality of the test program.

FRA proposes to have these performance skill tests administered to each locomotive operator at least once every 36 months and FRA proposes specific consequences for a person who fails these tests. Those consequences of failure distinguish between whether the test constitutes the initial examination of an operator or is a subsequent periodic reexamination of a previously certified operator.

(i) *Consequences of Failing Initial Testing.* Once again, there are at least three different groups of people who can be expected to take an initial examination. As noted earlier, FRA anticipates that this certification rule will be phased into effect by allowing railroads to initially presume people are qualified. The interim presumption of qualification, or grandfathering, concept requires that such grandfathered operators be administered their initial performance skills test within three years of the effective date of this rule. If such a grandfathered operator fails to achieve a passing score when they initially take this test, FRA proposes to immediately bar that person from operating unless operating under the direct supervision of a qualified operator. FRA proposes to have that grandfathered operator retested within a period of not more than fifteen days. If the grandfathered operator fails the second examination, then they can not be permitted to operate a locomotive, unless under direct supervision, until they pass a second reexamination. That reexamination must involve administration of a similar exam, after the lapse of thirty days. A failure of all three tests by a grandfathered operator, will necessitate that the person complete a training program before again attempting to pass this testing.

FRA proposes an analogous chain of consequences for the second and third groups. Members of these groups would be given only one opportunity to retake the exam and any one who fails the initial exam will not be permitted to operate a locomotive or train without direct supervision until successful passage of the test. FRA also proposes to limit the length of time they can function in this supervised manner.

(ii) *Consequences of Failing Periodic Testing.* FRA proposes that a similar chain of consequences apply to individuals who fail subsequent period examinations. The failure of an initial periodic test will start a sixty day probationary period within which the person must successfully pass a retest. During the interval between the first and second examinations a railroad may, but is not required to, permit the person to continue to operate locomotives and trains. Failure of three examinations would also trigger the need to take a retraining program.

(4) Operator Eligibility: Reviewing Prior Safety Conduct

Each person entrusted with operation of a locomotive is being given control of equipment that, if operated unsafely, can produce catastrophic consequences. To help minimize the risk of that occurring, railroads make decisions to exclude from the ranks of prospective locomotive operators individuals who have demonstrated the lack of a conscientious attitude about safely operating locomotives. That pattern of decision making about whether prospective operators evidence a proper regard for their own safety and that of other people constitutes the essence of the "eligibility determination" that FRA is proposing to formalize in this proceeding.

FRA's Proposal Concerning Eligibility. FRA is proposing that all railroads have a formal system for reviewing the prior conduct of prospective locomotive operators that includes clearly delineated procedures by which each railroad would make an evaluation of an individual's fitness before authorizing him or her to operate a locomotive. Although FRA's proposal is merely a continuation of a long standing industry practice, FRA has not been able to identify any clearly articulated or carefully documented approach to this issue which is currently being followed in the rail industry. In the absence of such an approach for determining a person's "eligibility" to be a locomotive operator, there appears to be a widespread pattern of making adhoc evaluations of prospective operators. Currently when railroads make such evaluations they generally tend to rely on the behavioral evidence available to them as a consequence of the prospective operator's tenure as their employee. In rare instances, railroads also have examined a prospective operator's non-employment related behavior.

Investigation into the cause of the Chase, Maryland accident revealed that the locomotive operator who precipitated the accident had been exhibiting non-employment-related behavior that might have raised concern about the wisdom of allowing that individual to continue operating a locomotive. In this instance, the non-employment related behavior involved multiple occasions on which the individual had operated a motor vehicle in a manner that suggested a certain degree of disregard for both personal and public safety. The railroad that authorized this individual to operate its locomotives apparently was not aware of this off-the-job conduct and had based its assessment of the individual's temperament on a traditional informal employment behavior evaluation system. In an apparent effort to prevent a reoccurrence of such a set of circumstances, section 4 of the RSIA requires that any qualification system which FRA imposes must, as a minimum, compel railroads to consider a prospective operator's motor vehicle driving record prior to issuance of a locomotive operator's certificate.

It is in this context that FRA begins its assessment of the factors which should be addressed in any requirement that railroads make determinations concerning the "eligibility" of individuals who seek to become certified locomotive operators. FRA proposes to continue the best aspects of prior industry practice for evaluating the prospective operator's prior railroad employment behavior and to expand upon prior practice by requiring evaluation of additional information. Discussion of FRA's proposal has been organized to address the following issues: (1) Identification of the types of data that should be considered by a railroad; including the sources for obtaining that data; (2) the mechanics of retrieving data from these sources; (3) segregation of the available data into that which may and may not be considered; (4) with respect to the former, identification of which information creates a mandatory duty to withhold certification and which information creates a discretionary or qualified right to do so including the standards that should govern the exercise of any discretion conferred on the railroad; and (5) the manner in which the information should be considered (due process).

(1) *Types and Sources of Data.* As a general proposition the more information available to decision makers, the better the quality of their decisions. Thus, railroads being obligated to evaluate a person's eligibility to operate a locomotive should have extensive access to existing information concerning that individual. Since total access is neither practical nor appropriate, FRA proposes to have railroads consider information from two types of sources: prior behavior in an employment context and prior behavior in the motor vehicle driver context.

(a) *Behavior in an Employment Context.* Although there are limitations on the availability of precise data, the information at FRA's disposal indicates that it is rare for any railroad to consider as a prospective locomotive operator any person who has not had considerable railroad experience. In some instances, there are even collective bargaining agreements that preclude a railroad from considering the training of any individuals for future locomotive operator assignments until senior train service personnel have been offered the opportunity for such training. One consequence of this is that, historically, railroads rarely have had occasion to examine the non-railroad related employment behavior of operator candidates. That in turn means that there is no available experience with evaluating non-railroad related employment behavior for FRA to rely on in formulating criteria for assessing the significance of information from that source. FRA, therefore, does not propose to require railroads to obtain and evaluate for the purpose of this rule data concerning a prospective operator's prior employment behavior in a non-railroad related employment. The absence of such data should not prove problematic because individuals entering the ranks of locomotive operators from such a background will be under close supervision as a student operator for an extended period.

Absent a sudden and dramatic change in railroad personnel selection practices that have remained stable for well over a century, FRA anticipates that most often prospective operators will have acquired multiple years of experience working for the railroad before becoming operator candidates. FRA does propose to require railroads to evaluate that railroad employment-related behavior of operator candidates. In most cases operator candidates will have acquired their railroad experience working for the very railroad that is contemplating authorizing them to operate a locomotive. In these situations the evaluating railroad will already possess the individual's behavioral record.

In those instances in which a prospective operator has been employed by more than a single railroad, the available information suggests that railroads freely exchange such information between themselves. One consequence of this practice is that all railroads will normally have available a significant amount of information about the railroad employment-related safety behavior of their prospective operators. Thus, FRA does not perceive a need to establish requirements that railroads furnish such data to other railroads. Although such information is freely exchanged, there are some potential problems associated with employment related data that must be considered. The initial problem with railroad employment data stems from the fact that railroads frequently will have information about prospective operators that relates to the person's behavior and attitudes that are not exclusively safety oriented.

The railroad industry has an elaborate system, its disciplinary proceedings, for enforcing adherence to company policy and rules that is intertwined with the resolution of minor disputes under section 3 of the Railway Labor Act (45 U.S.C. 151 et seq.). To some degree, involvement with that discipline system will reflect a prospective operator's employment behavior. As such, that data arguably can be relevant to making a decision about a person's "fitness" to be a certified locomotive operator under this proposed rule. Conversely, the data may be totally irrelevant or only marginally relevant for the purposes of FRA's safety concerns but might be perceived as highly prejudicial by a decision maker under this proposed rule. For example, data collected for productivity reasons or other collateral corporate concerns may shed little or no light on a prospective operator's fitness.

In addition to addressing issues whose safety relevancy may be dubious, the current administration of the discipline system is suspect in the view of some observers. For example, there is at least anecdotal evidence to support the proposition that similar events receive significantly disparate treatment. Such differences exist both within and between railroads. Those differences include decisions on whether a particular person will or will not be brought before the discipline system for a given course of conduct to a wide range of punishments imposed for the same types of failure to adhere to company rules under similar circumstances. In part, these differences reflect the fact that the disciplinary system is focused on the question of whether a given individual should have his or her employment terminated or constrained. Although the disciplinary system in the railroad industry has multiple purposes beyond identifying unsafe employees, it does contain some relevant information and FRA does not believe that it is appropriate to exclude all data from that source.

The second problem that can occur involves the quality of the information being relied on. FRA proposes to address that issue by assuring that all operator candidates have an opportunity to review and comment on potentially adverse information. This aspect of the FRA's proposal is discussed in greater detail later in this notice.

(b) *Behavior in a Non-Employment Related Context.* Except for the military services and a few corporations that have enforceable policies precluding a person from engaging in unbecoming non-employment related conduct, most institutions do not attempt to regulate such conduct. The reluctance to attempt to proscribe off-duty conduct is a reflection of value placed on individual freedom in this country. Concern over public safety in the transportation field has resulted in a limited incursion on such freedom. The two most visible aspects of that incursion involve inquiry into any history of alcohol or drug abuse and use of motor vehicle driving data to evaluate the wisdom of allowing a person to pilot an airplane, captain a ship or operate a train.

FRA's proposal to consider non-employment-related behavior is confined in this proceeding to requiring railroads to evaluate a candidate's motor vehicle driving record. Most railroads do not now consider a prospective operator's motor vehicle driving record. Although legally empowered to obtain data from many state agencies, very few railroads avail themselves of the opportunity to request and use such motor vehicle data. FRA's proposal, therefore, does not significantly alter the existing situation except to make acquisition of the data mandatory. Since many parties interested in this proceeding will have only a limited familiarity with the sources of data concerning that topic and since the RSIA created new rights of access to certain aspects of the existing data base, FRA is providing an extensive discussion of this topic.

There are basically two sources of data on this subject. The first source for data is the state agency that has issued the person a motor vehicle driver's license (state of licensure). The second source is comprised of the courts and operator licensing agencies for all the states in which the person has actually operated a motor vehicle. There also is a mechanism, the National Driver Register, for identifying most instances in which either of the two primary data sources concluded that the person's conduct merited suspension, revocation, cancellation, or denial of that individual's driver's license.

The National Driver Register. The National Driver Register (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. Currently the NDR is maintained by the National Highway Traffic Safety Administration (NHTSA) of the Department of Transportation under the provisions of the National Driver Register Act (23 U.S.C. 401 note). Under that statute, state motor vehicle licensing authorities voluntarily notify NHTSA when they take action to deny, suspend, revoke or cancel a person's motor vehicle driver's license. Under the provisions of a 1982 amendment to the NDR Act, four pilot states notify NHTSA concerning certain convictions for operation of a motor vehicle even if these convictions do not result in an immediate loss of driving privileges. The type of convictions reported by the pilot states are those for operation of a motor vehicle while under the influence of, or impaired by, alcohol or a controlled substance. The pilot states also report traffic violations arising in connection with a fatal traffic accident, reckless driving or racing on the highway.

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, color of hair, and social security account number, if a State collects such data.

At the present time there are approximately 155 million licensed motor vehicle drivers in the United States and any given time some 12 million of those licenses will be recently recorded as being revoked or being under suspension. In a typical year some 2 million new licenses will be recorded as having been suspended or revoked.

Access to the NDR data is very limited. At its inception, only state motor vehicle operator licensing agencies and individuals were given a right to request information about whether the NDR contains a listing for any particular person. In recent years it has been permissible for state agencies to furnish NDR data directly to other entities. Dissemination of NDR data has been broadened to permit the Federal Aviation Administration to acquire information about the pilots that it licenses; to allow employers of motor vehicle operators including truck drivers who are subject to the federal safety regulations to receive similar information; and now, under section 4 of the RSIA, to allow railroads that employ railroad locomotive operators subject to FRA jurisdiction to receive such information.

(2) *The Mechanics of Data Retrieval—*

(a) *Employment Records.* The information available to FRA indicates that more than two-thirds of the individuals who would be impacted by this rule are employed by one of a group of some thirty large railroads. Except in rare instances, these people will have been long term employees of that railroad and it is unlikely that they will change employers during the remainder of their railroad careers. Thus, in most instances, the task of evaluating a person's recent railroad employment behavior will not require obtaining data from an outside source. Even for the remaining one-third of the people who'd be effected by this proposal the long term employment relationships with the evaluating railroad will be the rule. For the limited group of prospective operators who have prior railroad experience on a different railroad, FRA proposes to require that the evaluating railroad request the prior employer to furnish it with information about the prospective operator's service record. To the degree that relevant information concerning the prospective operator's service record becomes available, it must be reduced to writing so that it can be relied on in the discharge of the evaluating railroad's duties under this proposal. FRA proposes to allow either the railroad supplying the data to furnish the information in writing or to have the evaluating railroad reduce data received verbally or electronically to a written format. The limited parameters of the information that FRA considers to be "relevant" information within the various types of data that could be found in a person's service record for the purposes of this rule are discussed later in this notice.

(b) *Motor Vehicle Driving Records.* As noted, there are two sources of data about a person's motor vehicle driving record. The first source is the state of licensure, which can be contacted directly, and the second source consists of the courts and operator licensing agencies for all the states in which the person has actually operated a motor vehicle, which can be initially screened through the use of the NDR.

Access to Data from the State of Licensure. The right of both railroad workers and their employers or prospective employers to have access to a state motor vehicle licensing agency's data concerning such workers' motor vehicle driving records is controlled by state law. Although many states have mechanisms by which employers, such as railroads, can obtain such information, there are some states where privacy restrictions would make such information transfers either difficult or impossible. Since individuals generally have a right to obtain information about their driving record, FRA proposes to place the responsibility on prospective locomotive operators for initiating data retrieval from the state agency that granted them their motor vehicle driver license. If a person has never been issued a license, FRA would only require that the operator candidate so inform the railroad. Conversely, if a person had been issued more than a single license within the last five years, he or she would be obligated to seek the information from all the licensing agencies which issued such a document.

Depending on the procedures adopted by a particular state agency, an individual's right to obtain the information on file with the state agency will either involve the operator candidate sending the state agency a brief letter requesting such information 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. FRA proposes to have the state agency furnish the information directly to the railroad as the operator candidate's employer or prospective employer. To cover those rare instances when an operator candidate has been issued multiple licenses, FRA would require that the operator candidate make more than a single request.

Access to NDR data. For a variety of reasons, the individual state that issues a person a motor vehicle driver license will not necessarily have available all the relevant information about that person's driving record. In particular the issuing state may not have information concerning the person's operation of a motor vehicle beyond the licensure state's boundaries. Although it would be theoretically possible to adopt a system under which it would be necessary to canvass each of the remaining 49 states to attempt to capture all potential information from those state agencies, that approach is neither reasonable or practical. Instead, FRA proposes to focus on convictions that typically cause the non-licensure state agency to act to suspend, revoke, or cancel the prospective locomotive operator's motor vehicle driver's license. Since the information that is available through an NDR check and, where necessary, follow-up inquiries to states shown to have pertinent information should identify all of the relevant actions taken by other states, FRA proposes that each locomotive operator candidate be required to request that a search and retrieval be performed of any relevant information concerning his or her driving record contained in the NDR.

Essentially, only individuals and state licensing agencies can obtain access to the NDR data. Since railroads have no direct access to the NDR data, FRA would require that individuals seeking certification as a locomotive operator request that an NDR search be performed and that the individual direct that the results be furnished to the railroad. FRA would require that each person request the NDR information directly from NHTSA unless the prospective operator has a motor vehicle driver's license issued by a state motor vehicle licensing agency that is a "participating state" under the provisions of the NDR Act of 1982. In such instances, the state agency may access the NDR data on behalf of the prospective operator. These state agencies are identified in Appendix C of this proposed regulation.

Requesting NHTSA to Perform the NDR Check. FRA's proposed procedures for requesting NHTSA performance of an NDR check are virtually the same as those currently employed by NHTSA when it receives a request from an individual under the Privacy Act. FRA proposes to have each prospective operator submit a written request to the National Highway Traffic Safety Administration at its offices in Washington, DC. The request must contain as much information as is available concerning the requester including such details as full legal name, nickname or professional name, date of birth and sex, and drivers license number. The request must authorize NHTSA to perform the NDR check and to furnish the results of the search directly to the railroad, which must be properly identified. FRA proposes to have the prospective operator sign the request and have that signature notarized.

These proposed requirements are not intended to be onerous but are designed to improve the reliability of the data search. Any person may supply information in addition to that being mandated by FRA. Furnishing additional information, such as the person's Social Security account number, will help to more positively identify any records that may exist concerning the requester. Although no fee is charged by the NDR for such 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 it should contain the same data being furnished to NHTSA. At present there are only four state licensing agencies that have the capacity to make a direct NDR inquiry of this nature. These are located in the states of North Dakota, Ohio, Virginia and Washington. It is anticipated that the number of states with such capability will increase in the near future and FRA will continue to update the identification of such states by revising the Appendix C to this regulation to identify such state agencies. Since it would be more efficient for a prospective operator to make a single request for both aspects of the information required under this rule, FRA anticipates that state agency inquiry will eventually become 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.

Both NHTSA and the 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 probable match and the inquiry state was not responsible for causing that entry, the agency's response 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. NHTSA's response will include any data submitted by the issuing state in addition to that submitted by other states.

Actions When a Potential NDR Match Occurs. Although the available statistics do not indicate that the response provided after performance of an NDR check for prospective locomotive operators will contain frequent notifications that a probable record match was identified, at least some instances will occur. FRA proposes that if the NDR check results indicate a probable match and the state with the relevant data is the same state which furnished detailed data (because it had issued the person a current driving license), no further action will be required to obtain additional data. If the NDR check results indicate a probable 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 proposes to place responsibility on the railroad to contact the state with the relevant information. FRA would require the railroad 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 railroad 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 propose requiring that a railroad go beyond these modest efforts to obtain the information in the control of such a state agency. FRA proposes to allow the railroad to act upon the pending certification without the data if an individual state agency fails or refuses to supply the records. FRA's proposal though somewhat limited on this point is consistent with the RSIA which pointedly refers to consideration only of "available" information.

If the state licensing agency identified by the NDR check as having relevant information 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 operator candidate are physical description, photographs and handwriting comparisons.

Regardless of how access to the NDR is accomplished, there are only three basic results that can occur: (1) No NDR match will be found; (2) an NDR match will be found, but the listing relates to another person; (3) an NDR match will be found and the listing relates to the prospective operator. In either of the first two instances, the railroad will have a basis for limiting its evaluation of an individual's motor vehicle driving record to that compiled by the state(s) of current licensure in order to comply with this proposal. FRA does not propose to curtail a railroad's authority under state law to seek additional information from state licensing agencies concerning their employees' driving records. If a relevant NDR match does occur, the railroad will have to obtain and consider the data contained on the persons's driving record before permitting the individual to operate a locomotive.

(3) *Segregating the Data Available for Consideration.* Data concerning both the candidate's employment behavior and motor vehicle driving behavior may or may not be appropriate for the task of evaluating a prospective operator's fitness to operate a locomotive. FRA proposes to limit railroads to considering only data that is (a) timely and (b) safety performance related. Within that latter category FRA proposes to distinguish between substance abuse and non-substance-abuse-related behavior.

(a) *Timely Data.* Inquiries concerning a prospective operator's employment history should provide reliable and detailed information. FRA proposes to allow railroads to have access to all data relative to prior railroad service performed by a prospective operator, whether performed for the certifying railroad or for some other railroad. As noted earlier, FRA does not propose to require railroads to seek data concerning a prospective operator's employment related behavior while employed in a non-railroad related job or to seek railroad related employment behavior information for service that was not related to train operations.

Although railroads have considerable freedom in evaluating the significance of the data that becomes available to it under this rule for their employment decisions, FRA proposes to limit railroad discretion when evaluating this information for operator certification purposes because of concern that the older information gets about a person's behavior the more limited usefulness it has when it is being evaluated for the purpose of estimating possible future conduct. To prevent improper reliance on stale information with limited relevance, FRA proposes to preclude railroads from considering, for the purposes of determining whether a certificate should be issued under this rule, all data that is more than five years old. In this way both railroads and individuals will be focused on the kind of near term events that should be probative for evaluating future conduct.

Inquiry of state licensing agencies should provide similarly reliable and detailed information from those jurisdictions, including very recent information from the state of current licensure. Inquiry to the NDR will provide clues regarding states that have on file evidence of convictions for drunk driving, reckless driving, etc. Once the records are checked, the RSIA authorizes looking back 5 years. Neither the statute nor the legislative history clearly indicates whether the interval commences with a legal judgment or the underlying event. The statute eliminates nothing from consideration, not even alcohol/drug related convictions after which rehabilitation is completed although the conference report, like the statute, seems to lean in the direction of requiring that all alcohol/drug convictions must be considered. Moreover, when state motor vehicle licensing agencies furnish data about a person's driving record, it normally is not administratively appropriate or feasible for them to segregate that data for railroad purposes. Instead they tend to furnish the complete record on file with their agency. Although driver record retention practices of the state motor vehicle licensing agencies vary considerably, most states appear to use a minimum retention period in excess of 5 years. In contrast to state retention practices, the NDR data primarily contains information concerning actions that occurred in the preceding three years. The exception to the three year limitation is for data that was the basis for long term suspensions or revocations.

Faced with these variables in record retention practices, FRA does not propose to limit the data that may be obtained for consideration. Instead, FRA proposes to limit railroads to reliance on information contained in motor vehicle records to state actions or convictions which occurred in the five years preceding the evaluation.

(b) *Safety Performance Related Data.* One of FRA's purposes in proposing these rules is to preclude individuals who have indicated that they lack the proper regard for either their own safety or that of others from operating a locomotive. The data that will become available to railroads under this rule will not always be relevant to the direct achievement of that purpose. Thus, FRA proposes to limit a railroad's reliance on both operator's employment data and motor vehicle driving data to those events that strongly suggest how the prospective operator has previously regarded his or her safety responsibilities while performing duties directly analogous to that of a certified locomotive operator. In FRA's judgement that would include all instances of alcohol or controlled substance abuse in either the employment context or the operation of a motor vehicle context. It would also include a variety of non-substance abuse incidents that evidence a failure to adequately discharge serious safety responsibilities in either an employment context or in the motor vehicle operation context.

Substance Abuse Related Data. Substance abuse data concerning a prospective operator can arise from events that occurred while the prospective operator was performing service as a railroad employee or while operating a motor vehicle in a setting totally unrelated to employment. FRA believes that both sources of data are focused on the same underlying problem and should be addressed as though they are part of a seamless web.

Regrettably the problem of substance abuse in the railroad industry, at least in terms of alcohol use, is as old as the industry. Efforts to deal with substance abuse began more than a century ago. However the industry programs to combat the substance abuse problem, including the newer aspects of illicit drug use, were not sufficiently effective to preclude FRA regulatory intervention. Thus, this analysis of detected substance abuse by prospective locomotive operators must begin with the perspective created by FRA's adoption of regulations prohibiting alcohol and drug use. (See 49 CFR part 219.)

Since 1986, FRA has prohibited possession and/or use of alcohol and controlled substances while assigned to perform service covered by the Hours of Service Act. In addition, FRA has prohibited reporting for, going on, or remaining on duty while under the influence or impaired by alcohol or a controlled substance. Thus there are few, if any, prospective operators with prior railroad service who will legitimately be able to assert that they lacked notice that such conduct was contrary to law. From that perspective, there is no basis to preclude a railroad from using any timely substance abuse information that was acquired in connection with an individual's performance of covered service. A possible exception to this involves non-medical use of controlled substances on a railroad whose policy did not, until recently, clearly prohibit such conduct. However, in most cases such non-medical use involved illicit substances. Although it is possible that a future locomotive operator candidate may appear who had been detected as having used, possessed, or been under the influence of drugs or alcohol while performing service to which FRA's regulations do not apply (and, therefore, arguably beyond the realm of safety related behavior), FRA proposes to allow a railroad to consider such data under this rule because of the pervasive corporate prohibitions against such conduct for all railroad employees and its relevance to the prospective operator's potential for substance abuse in safety-sensitive service.

FRA also does not propose to draw distinctions about this data based on the events that gave rise to acquisition of the data. Thus, the basis for the data could be compliance with the portions of FRA's rules requiring post-accident testing and random testing or the provisions that authorize reasonable cause testing under circumstances in which an individual's conduct would provide a legitimate basis to be curious about the possibility that the person's actions were the result of substance use or abuse.

FRA's rules for controlling alcohol and drug use by railroad workers also impose sanctions for those who refuse to submit to either post-accident testing or to a test administered on a random selection basis. Thus, FRA proposes to allow railroads to consider such refusals when conducting evaluations of candidates for the purpose of this rule.

FRA proposes to accord similar regulatory treatment to data concerning operation of a motor vehicle while impaired due to consumption of alcohol or a controlled substance. Convictions for driving under the influence, administrative actions in lieu of conviction and refusal to submit to a law enforcement officer's request to undergo testing will all be available to the railroad for evaluation under this rule. In electing to make available state actions that are less than "convictions" FRA is proposing to ensure that railroads are aware of those situations in which either a court asserts or retains continuing jurisdiction over a person but does not enter a judgement of conviction. Some courts use a procedure whereby a person is on probation pending judgement or is subject to deferred adjudication in order to enable a person to participate in a required rehabilitation program or community service program and thereby avoid a permanent record of conviction. Because of the significance that can attach to such information, FRA proposes to allow railroads to consider information involving the use of such procedures. FRA's proposal would also permit railroads to consider data involving a variety of state administrative responses to unacceptable substance abuse related driving behavior. For instance, some states have implied consent provisions which result in automatic or mandatory cancellations, revocations, or suspensions that are triggered by less than an alcohol or drug related motor vehicle conviction. For example, refusal to submit law enforcement officer's requested test to determine blood alcohol content automatically results in administrative suspension or revocation in many states.

Although some may question the propriety using motor vehicle driving performance for the purpose of evaluating a candidate's fitness to operate a locomotive, there can be no argument that such candidates were fully aware that such conduct was legally proscribed. Prohibitions against operating a motor vehicle while under the influence and the risk of loss of driving privileges when refusing a law enforcement official's request for chemical tests have long been a matter of state law. By acting in contravention of such laws, operator candidates have provided some insight into their attitudes concerning both their personal and public safety.

Non Substance Abuse Related Data. FRA has also identified a number of events, unrelated to substance abuse, that strongly suggest how the prospective operator regards his or her safety responsibilities while performing duties directly analogous to that of a certified locomotive operator. The first group of these events involve the conduct a prospective operator might have engaged in while employed by a railroad either as a locomotive operator or a member of a train crew. The second group of events involve conduct by a prospective operator while engaged in operating a motor vehicle.

FRA's purpose in proposing these rules is to preclude locomotives from being operated by individuals who have indicated that they lack the proper regard for either their own safety or that of others. Thus, many of the actions or inactions that would be relevant to a railroad in determining whether to promote a person or continue a person's employment are not relevant to the question of whether that person should be considered qualified for the purposes of this rule. Since a person's service record with a railroad might include a variety of data, such as an incident of insubordination, which arguably might not be pertinent for the limited purposes of this rule, FRA proposes to limit a railroad's reliance on operator employment data to those events that involve train operations. In FRA's judgement, such actions strongly suggest how the prospective operator regards his or her safety responsibilities while performing duties directly analogous to that of a certified locomotive operator.

Employment Data. Except for a handful of people (individuals without train operation work history in the five years prior to the inquiry), those who will initially seek certification under this rule will be providing each railroad with an opportunity to evaluate the record that the prospective operator has compiled while operating a train during the preceding five years. In that interval these locomotive operator candidates will normally have had extensive experience with compliance with railroad operating rules. FRA has identified four types of events, prohibited by carrier operating rules or Federal regulations, that clearly reflect a serious failure to be attentive to operational safety concerns. All of these are the direct responsibility of locomotive operators. These are: (1) Operating a locomotive or train at excessive speed; (2) permitting a locomotive or train to pass any signal that requires a complete stop before reaching it; (3) failing to comply with a mandatory directive and entering a segment of track without authority; and (4) failure to comply with the prohibitions against wilfully tampering with a safety device contained in 49 CFR part 218. FRA believes that the candidates should be held accountable for instances in which they failed in the past to comport with carrier rules that required such conduct. FRA, therefore, proposes to allow railroads to consider data concerning such events.

A group of people (future student operators, operators trained in the last few years, or experienced operators who have encountered a break in locomotive service but have been working in other train crew capacities) will present railroads with a slightly different service record from that just discussed. Since all personnel performing train service operations will normally have extensive experience with compliance with railroad operating rules, FRA has considered the degree to which railroads should rely on incidents of failure to comply with carrier or federal safety rules while the person was performing in that capacity.

FRA has identified five types of events, prohibited by carrier operating rules or Federal regulations, that clearly reflect a serious failure to be attentive to operational safety concerns, if the individual was directly and personally responsible for compliance with that rule. These are: (1) Noncompliance with a train order, track warrant, timetable, special instruction or other directive with respect to the movement of a train that involves (a) operating a locomotive or train at excessive speed; (b) permitting a locomotive or train to pass any signal that requires a complete stop before reaching it; and (c) failing to comply with a mandatory directive and entering a segment of track without authority; (2) failure to protect train as required by a carrier rule that is consistent with § 218.37; (3) alignment of a switch in violation of a railroad operating rule or operation of a switch under a train; (4) failure to secure a handbrake or a sufficient number of handbrakes; and (5) failure to comply with the prohibitions against wilfully tampering with a safety device contained in 49 CFR Part 218. FRA believes that the candidates should be held accountable for instances in which they were directly and personally responsible for compliance and failed to comport with carrier rules or federal safety rules that required particular safety conduct. Thus, FRA proposes to permit railroads to consider data concerning such events when evaluating operator candidates.

Motor Vehicle Data. FRA has reached a similar conclusion with regard to motor vehicle driver data. There are multiple reasons that could prompt a state licensing agency to suspend, cancel or revoke a person's driver's license, for example, repeated failure to pay parking tickets or a series of minor offenses relating to the condition of a vehicle. Although the state agency would have "cause" to revoke or deny a motor vehicle driver's license for such conduct, those reasons clearly are not necessarily relevant to a railroad's evaluation.

FRA believes that, consistent with the intent of the RSIA, this regulation should be designed to identify both significant individual events and patterns of conduct that would be indicative that a particular individual presents an unacceptable risk of becoming an unsafe train operator. To accomplish that, FRA proposes to allow railroads to have access to the same data that informed the state agency decision but to limit railroads to reliance on only those types of events which reflect a significant disregard for safety or raise serious questions about a person's ability to control a vehicle.

Initially, FRA considered merely identifying those offenses and allowing railroads to have complete discretion about what responsive action should be taken. FRA now believes that, if left in that posture, the rule would not provide adequate guidance to railroads. Some railroads might feel compelled to disqualify good engineers in order to comply with their understanding of the agency's intent; others might resist taking any action even where the offenses provided a crystal clear pattern of bad conduct; and a final group might use the slightest infraction to reduce their seniority rosters.

FRA believes that the process which has evolved in the motor vehicle driver licensing context, grouping offenses into categories bearing certain per-offense weights, is a good model to follow for determining the consequences of poor driving performance. Moreover, FRA believes railroad employment data should be added into the same point system to provide an overall basis for determining a person's eligibility. In essence, FRA contemplates that a railroad locomotive operator evaluation system could be devised under which a high negative score could result in denial of certification. A lower but not insubstantial score might warrant a certification limited to a lower class of service or perhaps conditioned on more frequent supervisory oversight.

Developing an effective system requires a considerable amount of time and effort. Obviously, it is easy to make such a system very complicated in only a short time. In view of the statutory impetus for rapid regulatory action, FRA is not prepared to present a complete model for locomotive operator decisions. Instead, FRA solicits the views of commenters on the wisdom of such an approach and would welcome efforts to help devise such a more complete system from any who favor this approach. As an interim measure, FRA is proposing in this NPRM to employ a rudimentary point system to assist in evaluating the relative consequences that should flow from data involving the poor safety performance of locomotive operators while at the controls of a motor vehicle.

In FRA's judgement, the RSIA contemplates that the commission of serious traffic offenses should be considered as indicia of a basic disregard for public safety or inability to control a vehicle. Since there is no data that permits FRA to make direct correlations between a poor driving record while controlling a motor vehicle and unsafe behavior at the controls of a locomotive, FRA proposes to take a cautious approach to reliance on motor vehicle driving records as a basis for denying a person certification as a locomotive operator. (See the May 18, 1989 edition of the **Federal Register** (54 FR 21581) for a discussion of the correlation between pilots with poor motor vehicle driving records and pilots whose poor piloting performance cause aviation accidents.) Therefore, FRA proposes initially to restrict railroads to consideration only of serious traffic offenses involving a moving vehicle. These would include excessive speed (exceeding the posted limit by more than 15 miles-per-hour), reckless driving, citation for a moving violation in connection with a fatal accident, and driving with a revoked or suspended license. These offenses in the view of Congress and FRA are so egregious that common sense indicates their probable correlation to safe railroad performance. In short, these are the types of events that serve as a basis for denial of a commercial truck driver license (see 49 U.S.C. App 2707), a setting where there is a more demonstrable behavioral correlation. FRA's list of significant events is slightly different from those enumerated in § 205(a)(3) of the National Drivers Register Act because FRA has opted to provide more precision in identifying the types of events addressed by subparagraph (B) of that section.

FRA recognizes that its current proposal will prevent railroads from considering a wide variety of traffic offenses including minor traffic offenses ranging from a failure to pay a toll or parking fee to impeding traffic by driving too slowly. Although FRA has excluded from consideration a number of types of traffic offenses that are not necessarily minor offenses, FRA proposes to exclude them because they are difficult to evaluate in the railroad operations context. For example, running a red light and driving on the wrong side of the road can be very serious events, but empowering railroads to make decisions about a person's fitness to operate a train on the basis of such conduct is not warranted at this point in time. Until FRA has gained more experience concerning the relationship between an operator's behavior at the controls of both motor vehicles and trains, it does not appear to be appropriate to attempt to fully resolve this issue. FRA contemplates initiating a second proceeding to focus on this issue and others surrounding improper conduct by locomotive operators after it has gained more experience in this area.

Although FRA does not believe that it is possible or appropriate to tackle the all aspects of motor vehicle driving data during this initial rulemaking, FRA has concluded that it is important that railroads have access to some data and that limits be placed on the railroad's use of the data, in the certification context, until clearer decisional standards can be provided. There is no way, of course, to bar railroads from making more general use of the available data, (e.g., proceeding under their own rules regarding conduct unbecoming an employee) but the matter of determining the bases on which a railroad may withhold a certification is ultimately FRA's responsibility.

(4) *Consequences of Admissible Data.* Having segregated out the data that may not be considered by railroads, this portion of the discussion focuses on FRA's proposals for the consequences of "admissible" data would be under this rule. FRA has subdivided its discussion of this topic to address (a) the consequences of substance abuse data, (b) the consequences of non-substance abuse safety performance data, and (c) the consequences when there is a mixture of the two different types of information.

Comprehension of the specific consequences being proposed for specific types of adverse data requires an understanding of the framework within which all such decisions would be made. As explained elsewhere in greater detail, FRA proceeds from the perspective that this rule should set the minimum qualifications that an individual must have to be a locomotive operator. Railroads would be free to have more rigorous standards if they so elect. As long as a person meets or exceeds FRA criteria, a railroad would be obligated to certify that individual. Although obligated to issue the certification, the railroad retains discretion, under this rule, whether or not to authorize that person to operate a locomotive. If an individual marginally meets FRA's criteria, the railroad would be given limited discretion to conditionally certify that person. Failure to meet the criteria preclude a railroad from certifying that individual either temporarily or, under certain circumstances, permanently.

Since there are both different types of data being provided by different sources and since there are unresolved concerns over both the relative value and significance that should be attached to motor vehicle driver data, FRA proposes to employ a basic point system to assist in evaluating all poor safety performance data. FRA is proposing a system under which all of the types of events identified as admissible would be given a specific point value. Any candidate who had acquired less than 6 points would be considered "eligible for certification" for the purposes of this rule. Railroads would not have discretion to alter the point value for particular incidents nor would they have the discretion to consider such a candidate "ineligible" under this rule. If a candidate had acquired 6 points the railroad would have the discretion to deem that person "eligible" provided that certain conditions were met. If a candidate had acquired more than six points, the railroad would not have the discretion to certify that person as "eligible" until 5 years had elapsed after the most recent incident being considered. Any person who had a second series of incidents so that his or her total point accumulation again exceeded 6 points would become "ineligible for certification" for the rest of his or her life.

(a) *Consequences of Substance Abuse Data.* As indicated earlier, FRA does not perceive a need to accord differing regulatory treatment to particular types of substance abuse data simply based on whether that data surfaced by virtue of the candidate's employment history or his or her motor vehicle driving history. In both settings there are clear prohibitions against engaging in such conduct and there are adequate safeguards to assure that there is reliable data available about that violation which will be considered by the railroad. Thus, as it must, FRA's analysis of the consequences of detected substance abuse by prospective locomotive operators begins with the perspective created by its adoption of regulations prohibiting on-the-job alcohol and drug use. In selecting this starting point, FRA is not unmindful of the fact that FRA's random drug testing rule does extend the prohibition to off-duty use of illegal drugs and other non-medical use of controlled substances.

FRA's initial rules to control alcohol and drug use by railroad workers did not prescribe the consequences that would flow from an individual's failure to comply with these prohibitions. With the exception of imposing a 9-month disqualification for a refusal to submit to a post-accident test, FRA gave the railroad discretion to determine the consequences when noncompliance was detected. FRA has recently affirmed that basic approach for refusal to submit to a random test. More significantly for the purposes of this rule, FRA also imposed a suspension of unspecified duration for instances in which a random test provided positive results of controlled substance use.

The perspective created by FRA's regulations on employment related substance abuse are fairly consistent with the significance to be attached to analogous motor vehicle driving data under the RSIA. The RSIA and the conference report almost imply a Congressional intent that FRA require withholding of certification if there has been an alcohol/drug offense with no rehabilitation. The statute however does not say this; instead it uses the permissive "may" at the critical point and empowers FRA to determine the outcome in this rule. The statute permits virtually any outcome other than denial of certification to a person who has "completed rehabilitation," and even then the certification may be conditioned.

In order to assist in understanding the statutory framework within which FRA is developed this proposal, FRA has included a summary reflecting the series of three specific requirements contained in section 4 of the RSIA. These provisions read as follows:

(1) In paragraph (1)(2)(D), section 4 provides that:

* * * [The program] shall, except as provided in paragraph (4), require the consideration of, to the extent information is available, of the motor vehicle driving record of each individual seeking licensing or certification under such program, [including a list of specific offenses] and may, based on such driving record, require disqualification of an individual or the granting of a license or certification conditioned on such terms as the Secretary may prescribe;

(2) in paragraph (l)(4)(A), it provides that:

* * * In establishing the program under this subsection, the Secretary may not waive the application of requirements established under section (2)(D) to an individual or class of individuals with a conviction or, cancellation, revocation, or suspension described in paragraph (6) (A) or (B) who have not successfully completed a rehabilitation program established by a railroad or approved by the Secretary.

and (3) in paragraph (l)(6), it provides that:

* * * No individual shall be denied a license or certification under the requirements established under paragraph (2)(D) because of—(A) a conviction for operating a motor vehicle while under the influence of, or impaired by, alcohol or a controlled substance; or (B) the cancellation, revocation, or suspension of the motor vehicle operator's license of such individual on the basis of operating a motor vehicle while under the influence of, or impaired by, alcohol or a controlled substance, if such individual subsequent to such conviction, cancellation, revocation, or suspension has successfully completed rehabilitation program established by a railroad or approved by the Secretary.

FRA interprets section 4 of the RSIA as requiring consideration of all driving history and prohibiting blanket waiver of those without rehabilitation as well as denial of certification for those who have successfully completed rehabilitation. Within these constraints, FRA is faced with determining the response that should occur under many different factual settings. For instance, what response would be appropriate if any alcohol/drug offense is identified? Should FRA's response differentiate between offenses that occurred while the person was on duty from those that occurred while off duty? Equitable results vary widely, of course, depending on the circumstances. On the one hand, a conviction for driving while impaired can be had in some states with a blood alcohol concentration (BAC) of .06%, a level not difficult to achieve if one begins drinking on an empty stomach. It would by no means establish, by itself, a need for formal, structured treatment (although many states would require participation in an alcohol education program). Such a conviction might suggest a disregard for safety, but the indication would not be strong if this were an isolated event that occurred three or four years prior. On the other hand, repeated driving while intoxicated (DWI) offenses at BAC's in excess of .10%, or a single DWI with a BAC above .20%, would indicate a clear need to evaluate the person for chemical dependency. But the single case at .20% might not indicate a disposition to unsafe conduct so much as loss of control.

FRA proceeds from the perspective that the challenge is to erect a structure for utilizing alcohol/drug information from either railroad employment or motor vehicle records that is preventive rather than punitive and predictable rather than capricious. However, it is important that the structure of this rule fit well into the overall pattern FRA has established for control of alcohol/drug use in railroad operations.

Drug Abuse Model. FRA proposes to follow a path initially blazed when considering our drug use policy. Beginning October 2, 1989 any non-medical use of controlled substances will be barred by FRA rule. Thus, a subsequent conviction for driving while under the influence of a controlled substance might be positive proof of a violation of our drug rule. Even a prior violation might be cause for concern that the drug abuse habit is continuing. Though currently FRA specifies minimum consequences only with respect to drug use detected through random testing, there is reason to believe that will change as FRA conforms the balance of the rule to the random testing provisions. The random testing rule does not bar more stringent adverse action consistent with any pertinent employment contract, but it does provide that an employee determined to have made unauthorized use of a controlled substance may not be returned to service unless: (a) the individual has been evaluated for any treatable substance abuse disorder; (b) any necessary treatment has been successfully completed, as determined by the employee assistance program (EAP) counselor; (c) a return-to-work test is negative; and (d) the individual is subject to aftercare and follow-up testing as determined necessary for a period of up to 60 months.

With respect to the drug abuser identified through motor vehicle records, FRA believes that this is almost precisely the basic structure to be employed. Even an employee recently hired who was determined to have been convicted two or three years before should be sent to the counselor for evaluation. If the EAP counselor, medical review officer (MRO), or other appropriate officer determined that there was no current treatable disorder (based on a medical examination, interview, review of employment history, etc.), it would make no sense to require the person to go receive formal, structured treatment. Chronic casual drug use (e.g., marijuana use two or three times a week with nothing else) might most profitably be treated on an outpatient basis. If, on the other hand, evaluation suggested a chemical dependency, then the individual could be required to receive appropriate inpatient treatment. This is a judgment to be made by the medical or substance abuse professional. If a dispute arises regarding the judgment, it should be resolved by medical arbitration which is available under most collective bargaining arrangements.

Alcohol Model. Alcohol, which FRA anticipates will greatly preponderate in the motor vehicle data bases presents a more difficult problem. Drug abusers can be told to stop abusing drugs, but one cannot tell a citizen to stop drinking without good reason. It is, therefore, necessary to focus on two separate problems. The first is that in the alcohol area, like the drug realm, FRA is proposing to proceed without adopting overall medical standards. However in this instance, the only standard available is freedom from a current clinical diagnosis of uncontrolled alcoholism. This standard is already in place for motor carrier drivers and aviators. It makes eminent sense that it should apply to locomotive operators. Although this approach may create some inconsistencies, the implicit creation of a medical standard as part of the eligibility criteria is the only way to put the information derived from motor vehicle records in an appropriate context with respect to follow-up of those permitted to continue in service after any required treatment. The Congressional requirement that "rehabilitation" be deemed to expunge prior alcohol offenses indicates that this is the frame of reference Congress intended. However, since many DWI/DUI offenders are not alcoholics, the Congressional framework requires elaboration. As noted above, it would make little sense to require inpatient treatment of the social drinker who only occasionally imbibes to excess; indeed, no responsible treatment center would accept such a person for inpatient treatment. On the other hand, alcohol education programs attempted by the states for DWI offenders have had little effect; and there is no empirical evidence to indicate that counseling models directed at controlled drinking (as opposed to abstinence) would be much more effective. Complicating the matter further is the fact that drinking episodes may be caused by underlying problems, only some of which may be treatable.

FRA proposes to posit a framework for decision making that builds on the framework for drugs. FRA proposes that any prospective operator with an alcohol-related conviction or suspension/revocation (including a suspension for refusal of a chemical test) must be evaluated for any treatable substance abuse disorder. If the operator candidate is diagnosed as an alcoholic, then normal primary treatment should be completed as deemed necessary, followed by return-to-service drug/alcohol urine testing, aftercare to maintain abstinence, and follow-up drug/alcohol urine testing. Those diagnosed as alcoholics would be tested according to the judgment of the railroad for up to five years using a urine alcohol/drug test or other effective method (such as a breath test), the same maximum prescribed for drug abuse follow-up. For the employee who successfully completes primary treatment and is certified, subject to follow-up, the "points" associated with discovery of the alcoholism would not be considered for a certification decision. If the operator candidate is not diagnosed as an alcoholic, then primary "rehabilitation" may be limited to counseling regarding abuse of alcohol, but the employee could be required to participate in a program of education or training with respect to abuse of alcohol or drugs (*see* e.g., § 219.405(e)).

FRA believes that the key to dealing with the alcohol issue is identifying the nature of the problem (or at least categorizing the problem), since it dictates whether future abstinence may be required. As FRA reads the statute, it has authority to issue a rule that makes possible a rational response to disparate circumstances.

The more difficult problem is how the rule should address the follow-up for the non-alcoholic. If the individual is evaluated as not requiring formal treatment, but evidences a streak of recklessness that may include later job-related drinking, how does FRA or the railroad limit that potential? FRA commences from the position that social and legal norms will not allow us to require total abstinence. However, it appears that individuals who engage in such conduct should be held accountable under this rule for their poor discharge of safety performance duties. Thus, FRA proposes to include such incidents for as part of overall safety performance evaluations point system.

FRA will separately propose amendments to the alcohol/drug regulations (49 CFR part 219) that will provide for followup testing of employees who violate prohibitions with respect to alcohol/drug use, possession or impairment, building on the follow-up requirements for random testing published last November (53 FR 47103, Nov. 21, 1988; *see* § 219.605(e)). Comment is requested in this docket as to whether, as a condition of certification, similar follow-up should be required for the non-alcoholic who has refused a chemical test on the highway or who has been convicted of an offense involving driving while intoxicated or under the influence of a controlled substance. It will be noted that unauthorized use of controlled substances will be prohibited at any time effective October 2, 1989; thus, reliably documented detection of such conduct in any context may indicate the need for responsive action by the railroad.

Although additional railroad counter measures would be beyond the scope of the FRA program for qualifying locomotive operators, nothing in this proposal would impair the right of a railroad to condition the operator's service (though not the granting of the FRA certificate) on submission to an appropriate regimen of unannounced testing for an appropriate period of time as a matter of company policy. The only appropriate tests would be on-the-job tests of blood or breath or a "two-sample" urine testing procedure, since urine from a single sample may contain residues of alcohol from periods when the employee was at liberty to drink. Blood or urine testing is bound to be expensive and objectionable as a routine practice, so breath testing is the only likely alternative. A large railroad with a logical breath testing program could readily provide for periodic, unannounced testing of locomotive operators with DWI/DUI convictions within a certain time period in the past. For instance, a single conviction in the 5-year period could warrant a two-year window of testing (from date of violation).

Transition to a New System. At the time this regulation goes into effect, many prospective operators will have already made much relevant history. Some will have had DWI's and received treatment from the EAP. Some will have had DWI's and received treatment from outside sources without the knowledge of the railroad or its EAP. Others will have had DWI's followed by maturation or self-enforced abstinence, with the consequence that their recent service record and motor vehicle driving record are excellent. Still others will have continuing substance abuse problems. It is inevitable that many currently serving locomotive operators who will wish to be Federally qualified will step forward under FRA's alcohol/drug rule and refer themselves voluntarily for "rehabilitation" in order to find the shelter provided by the statute with respect to past behavior. It is important that FRA let the substance abuse or medical professionals evaluate the individual's problem and either prescribe a course of counseling and/or treatment or pronounce therapy already received as adequate.

To accomplish its policy goals FRA proposes to utilize the EAP counselors in a two step process under this rule. FRA proposes to have the counselors receive all of the available and "admissible" data concerning substance abuse. Employing traditional professional standards for making such evaluations, the counselor would review data, including interviewing the candidate or taking other actions deemed appropriate in particular circumstances. If, after that review of these incidents, the counselor concludes that the events were followed by an appropriate course of counseling or treatment these incidents would not be given weights for the point system. The counselor would then evaluate whether the candidate is currently affected by a psychological or physical dependence on one or more controlled substances or by any other identifiable and treatable mental or physical disorder involving abuse of alcohol or drugs as a primary manifestation. If the counselor concludes that the candidate is currently affected or dependent, the counselor would respond in accordance with existing provisions of FRA's alcohol and drug rules concerning the handling of voluntary referrals. Since FRA believes that it is important that FRA do whatever is reasonable to encourage subsequent follow-up, FRA proposes to permit conditioning of the certification on participation in aftercare and chemical testing, as appropriate, but only to the degree such actions are provided for in part 219.

If a counselor concludes that the counseling or treatment response to the prior incident was unsuccessful and the candidate is not currently affected or dependent, FRA proposes to assign a value of three points to those alcohol and drug related incidents and to consider such points under its evaluation system. If the person had only a single incident in the five year interval being considered, the railroad would not have a basis to deem that person unqualified under this rule. If a candidate had two incidents in a five year interval, a railroad would have the discretion to consider that person qualified under this rule but in order to certify that individual as a locomotive servicing or any class of train service operator the candidate must successfully complete a training program. Under FRA's basic system, if a candidate has experienced three incidents, the railroad would not be authorized to certify that person until 5 years had elapsed after the most recent incident. FRA notes, however, that with respect to past conduct involving more than one event, some "treatable" disorder is likely to be found by the EAP counselor and allowing such events to be sheltered may be particularly appropriate, given the fact that past circumstances may have provided little impetus to voluntarily seek employment counseling. Further, this approach will mitigate the apparent harshness of having to entirely disqualify an operator candidate based on actions that did not carry this adverse sanction under Federal law at the time they occurred. Under FRA's approach, operator candidates would bear the burden of convincing the counselor that they have progressed sufficiently along the rehabilitation path and are not currently dependent. FRA would not attempt to disturb the discretion of the counselor making such evaluations.

To some limited degree imposition of consequences for individuals who are not dependent or do not have an identifiable medical disorder can be viewed as running counter to FRA's preferred method of treating substance abuse incidents as manifestations of a substance abuse disorder. Yet there is a need to establish clearly defined limits for operator conduct and to hold substance abusers accountable when they exceed those limits. FRA welcomes comments on ways to more effectively balance these competing interests in the context of this rule.

One possible alternative would be to have the EAP counselor play a different role from that outlined above. Under such an alternative the counselor would receive all of the data and be permitted to clean the slate of everyone with the "points" being banked for possible later use, if appropriate. One advantage to such an alternative is that it avoids a risk inherent in FRA's proposed solution. That risk is that everyone will be declared "treatable" unless there is some extraneous reason for not doing that. It can also be argued that the alternative precludes interpretation of the intent of the preferred approach as sending a message to alcoholics and others that safety related misconduct will be excused because of addiction.

Mandatory Rehabilitation and Reinstatement. In developing its policies with respect to misuse of alcohol and drugs by safety-sensitive railroad employees, FRA has consistently avoided imposition of any requirement that an employer provide the opportunity for company-supervised rehabilitation and subsequent right to reinstatement, where the employee has failed to take advantage of the right of voluntary referral (49 CFR part 219, subpart E) and is, instead, detected through the efforts of management. The reason for this policy position is that means of detecting violations will not deter prohibited conduct if the employee believes that the consequence of waiting to be "caught" is the same as seeking help.

The issue of locomotive operator certification does not present a different case, since the RSIA does not mandate an opportunity for rehabilitation (though it does provide for certain consequences where rehabilitation is, in fact, successfully completed). But it does suggest more complicated scenarios in which the issue of an opportunity for rehabilitation and reinstatement will arise. The following discussion examines common examples, but others can be posited.

Motor vehicle offenses prior to applying for certification; current employee. In the discussion above, we have indicated that persons already employed by the railroad in positions subject to Part 219 will be able to secure the opportunity for rehabilitation by seeking the assistance of the EAP counselor prior to applying for an FRA certificate. This will provide protective shelter in relation both to the certification process and other employment-related consequences that might otherwise obtain, assuming that the employee is truly prepared to deal successfully with the substance abuse disorder. This is, of course, a shelter that would not be available to an employee who had previously received assistance under the FRA rule or similar carrier policy.

Motor vehicle offense after certification. Similarly, an employee who experiences an off-the-job offense after being certified will be the first to know and can refer under the existing policy. A question arises as to whether the right would be available after the conviction had been reported to the railroad. *See* 49 CFR 219.401(e)(2). It would appear that Federal rules should work together to encourage the earliest possible referral, since a motor vehicle incident may indicate a rapidly deteriorating personal situation that should be dealt with as soon as possible. No particular reason appears why the opportunity for rehabilitation (with conditional right of reinstatement) should be available after the railroad discovers the unsafe conduct through a motor vehicle records check. FRA solicits comment as to whether the proposed rule, Part 219, or both, should be amended to address this issue.

Positive on-the-job test. Clearly, if an alcohol/drug violation is detected through a supervisory observation or chemical test on the job, the railroad is currently under no obligation to offer an opportunity for rehabilitation and reinstatement. Nothing in this proposal would change that outcome. However, if as a matter of collectively bargained right or management policy the violator is allowed to retain an employment relationship while undergoing rehabilitation, then the rules described above would operate.

FRA solicits comments with respect to any additional problems that may be encountered in integrating the policies of FRA's alcohol/drug rule and the rules proposed in this notice.

(b) *Consequences of Non-Substance Abuse Safety Performance Related Conduct.* Quite apart from the question of the consequences of substance abuse data, FRA anticipates that railroads will be confronted with data concerning a prospective operator's poor performance in safety related situations in either a railroad employment context or in a non-employment context of operating a motor vehicle. Both prior railroad service records and motor vehicle records involve multiple issues regarding what the certification consequences should be when various types of evidence are discovered.

Unsafe Train Operation Data. As noted earlier, FRA proposes to hold individuals responsible under this rule for their personal failure to follow one or more of a limited set of established federal or industry standards concerning the safe operation of trains. FRA is taking that approach because of the potential safety risks incurred when the following types of rules are not adhered to: (i) Noncompliance with a train order, track warrant, timetable, special instruction or other direction with respect to the movement of a train that involves (a) operating a locomotive or train at excessive speed; (b) permitting a locomotive or train to pass any signal that requires a complete stop before reaching it; or (c) failing to comply with a mandatory directive and entering a segment of track without authority; (ii) failure to protect train as required by a carrier rule that is consistent with § 218.37; (iii) alignment of a switch in violation of a railroad operating rule or operation of a switch under a train; (iv) failure to secure a handbrake or a sufficient number of handbrakes; and (v) failure to comply with the prohibitions against wilfully tampering with a safety device contained in 49 CFR Part 218.

In devising its response to this type of poor safety conduct, FRA has remained sensitive to the fact that most carrier operating rules place a train's conductor in charge of the crew and make him or her responsible for the actions of all the crew. Thus, FRA has formulated its program to hold individuals responsible only for that aspect of compliance with the requirements that was the direct and personal responsibility of the individual who is now a candidate to be locomotive operator.

FRA proposes the following structured response to such poor railroad train operation conduct: (1) A candidate who has been adjudged as having been directly and personally responsible for committing three or more of these violations of carrier or federal rules in the last five years may not be certified until five years have elapsed since occurrence of the last event in that sequence; (2) if that barred operator does return to service and either accumulates three more such incidents or is disqualified under an FRA proceeding conducted under part 209, no railroad may ever certify that individual under this rule; and (3) a person adjudged of having committed two of these violations may not be certified unless that individual undergoes a retraining program equal to the operational training of student operators.

Unsafe Motor Vehicle Operation Data. As noted, the commission of serious traffic offenses will be considered as indicia of a potentially basic disregard for public safety under this proposed rule and FRA proposes to restrict railroads to consideration of the following types of offenses: (i) Excessive speed (exceeding the posted limit by more than 15 miles-per-hour), (ii) reckless driving, (iii) citation for a moving violation in connection with a fatal accident, and (iv) driving with a revoked or suspended license. Because of the limits on its ability to correlate safety performance in a motor vehicle with safety performance in a locomotive cab, FRA proposes to employ a conservative approach to setting the threshold at which such events will provide a basis for precluding an individual from certification. Thus, FRA proposes to assign a value of two points to such incidents. If the candidate has been accumulating a poor driving record in the last 5 years FRA's proposal would preclude from certification, as either student or full fledged operator, only individuals who have been adjudged to have committed four or more serious motor vehicle driving offenses. Such individuals would have acquired more points than permitted under FRA's six point ceiling for qualifying. If an individual has committed more than one but less than four such offenses, a railroad would be authorized to temporarily certify that person. That temporary certification would be issued on the condition that such certification would terminate if the person is involved in any one of the types of poor safety performance incidents identified in this regulation. Those with only a single offense could not be deemed unqualified on the basis of motor vehicle driving history.

(c) *Consequences of Multiple Types of Data.* In reviewing data concerning an operator candidate, it is possible that a railroad will encounter instances where a candidate's records indicate multiple instances of poor safety performance but no accumulation of any single type of incidents. In those situations FRA proposes to have the railroads accumulate the total number of points attributable to any admissible incidents. If that cumulative total exceeds 6 points, the person would be deemed unqualified until the passage of five years after the most recent incident. If the person has accumulated 6 points, the railroad could not certify that individual until the person had attended a retraining program equal to the operational training of student operators. If the cumulative total is less than six points the railroad could not—based on prior conduct—deem the person unqualified under this rule.

Using this aspect of the proposed system, a person with either of the following kinds of marginal safety conduct could be deemed qualified if the relevant conditions are complied with: one substance abuse incident and one railroad performance incident or three motor vehicle driving incidents. A person with one incident from each category would not be eligible to qualify until the lapse of the five year interval from the most recent incident.

FRA seeks commenter response not only to the proposed adoption of an integrated system for evaluating prior conduct but to the wisdom of employing an alternate approach under which driving history and railroad employment history would have separate and distinct point systems. Under this alternate approach, a prospective operator's driving history (including any alcohol or drug related incidents) would have particular point values and as long as the total number of points remained below a threshold value, the operator would be eligible for certification. A similar system would exist for poor railroad safety performance incidents. The only intermingling of the two types of data (driving history and railroad history) would occur in the context of medical qualification standards. In that context, the railroad would have to determine—based on all of the available data—whether the person was currently dependent on alcohol or drugs.

(5) *Due Process Considerations.* FRA proposes to create procedural safeguards concerning the use of behavioral information. At a minimum, there is a need to ensure the prospective operator is given access to the data and an opportunity to review and comment on it before the railroad acts in reliance on the data. FRA is concerned that in any large scale administrative scheme, such as that involved with motor vehicle licensing, there is an ever present possibility that record keeping errors will occur. The consequence of such an error under this proposed rule could adversely impact an individual's ability to pursue his or her chosen occupational field. Thus, FRA proposes to afford such a potentially affected person a reasonable opportunity to review and comment in writing about the behavioral record being evaluated by the railroad.

FRA proposes to give prospective operators a right to review any written employment record that the railroad will rely on when making its fitness determination. FRA proposes to require that the railroad notify the person of its intent to use such a record, make the record or a copy of it available to that person and then afford a reasonable opportunity for the person to offer their comments to the railroad. Similarly, under FRA's proposal, after a railroad obtains a person's driving record, the railroad will be required to notify the person of that fact, make the record or a copy of it available and afford a reasonable opportunity for comments.

The question of establishing a mechanism for reviewing the propriety of particular aspects of railroad certification decisions, such as those relating to eligibility, would normally need to be discussed only in the context of FRA's proposals for the overall administration of the certification program. Although FRA provides such a discussion later in this document, FRA is aware of the level of concern expressed by the regulated community over possible problems stemming from commencement of the use of motor vehicle driving data. Thus, FRA is alerting readers to the fact that it has accommodated the unique provisions of the RSIA, which appear to require creation of an administrative review process which would directly involve FRA in evaluating railroad decisions to deny certification based in whole or in part on motor vehicle operator driving data.

III Program Administration Concepts

(a) Basic Ideas

FRA proposes to create a certification procedure that will ensure the competency of each operator to perform various kinds of train service. Once a person becomes a "certified operator", all parties will know that he or she has successfully demonstrated the federally determined minimum level of knowledge and skills to operate a locomotive or train. Although a railroad would have the latitude to impose more stringent requirements for its employees, under this proposal a railroad would be required to certify any person who meets federal minimums. Railroads that elect to use more stringent standards and conclude that an individual fails to meet their more rigorous criteria would only have the option of not entrusting operation of locomotives and trains to those who fail to meet corporate criteria.

FRA proposes to have all locomotive operators undergo a full certification procedure within three years from the effective date of this rule.

(b) Initiation of the Program

Section 4 of the RSIA requires that any certification program for locomotive operators become effective within twelve months after issuance of the rule establishing that program. Effective implementation of the program envisioned in this proposal can be not accomplished in that interval in FRA's judgment. Not one of the approximately 500 railroads that would have to comply with this rule will have all of the program elements in place as part of its existing procedures. Until the railroads have the program elements in place, they will not be able to commence evaluating the 30,000 or more existing operators. Curtailing nationwide rail service until a sufficient number of operators can be "certified" under this rule is neither practical nor necessary since FRA data that supports the belief that most existing operators have an appropriate level knowledge and performance skills. Thus, FRA proposes to employ the concept of interim certification for the initial compliance phase of this rule. FRA proposes to have a three year interim certification period during which all locomotive operators undergo the full certification procedure prescribed by this rule. During the three year interval that would begin with the effective date of this rule, FRA believes all railroads will be able to make an orderly and effective transition to the proposed formal certification program.

On the effective date of this rule, there will be three different groups who will have to become certified. The first group is composed of persons who are or have been considered qualified to operate locomotives and trains under various company policies. The second group consists of people who are currently in training to become locomotive operators. The third group contains those who will at some point in the future seek to become locomotive operators. FRA proposes slightly different methods for implementing this program for each group so that railroads can implement this system without impairing the nation's ability to have essential rail service.

(1) Current Operators

The conversion method that FRA proposes to use for the first group would, in effect ratify prior railroad company decisions about a person's knowledge and skills, by allowing railroads to "grandfather" a person into the certification system. This "grandfather" concept being proposed is based on FRA's belief that there is no available evidence to suggest that there are significant numbers of current operators who lack the necessary knowledge and skills to operate locomotives and trains safely. That belief is grounded on FRA's safety assessment efforts over the last few years and the inability of FRA to identify with assurance either inadequate knowledge or insufficient skill levels as a recurring contributing causal factor for such train accidents.

Under FRA's proposal each railroad will be permitted to "grandfather" those locomotive operators that it deems qualified to operate locomotives and trains. Each railroad will be free to decide which of its current workers are deemed qualified to operate locomotives or trains and to determine what class of service that person is qualified to perform. Although FRA is allowing railroads considerable discretion in deciding which people it considers to be qualified on the effective date of the rule, FRA has introduced several factors to prevent abuse of that discretion. For example, FRA proposes to have the railroad identify the operational experience that the railroad relied on in reaching that conclusion. In view of the discretion being afforded railroads, FRA does not propose to create a right to administrative review by FRA of decisions made under this "grandfathering" provision.

Grandfathered operators will be given three years from the effective date of this rule to acquire a full certification that is based on a railroad's actual individualized determinations concerning their competency and fitness. That means they will have to take and pass a knowledge test and have their performance skills evaluated in the manner previously described. In addition, they will have to undergo the motor vehicle record check and acuity evaluations provided for in this proposal. If the process is not completed within that interval, the operator will not be legally eligible to operate locomotives or trains.

(2) Current Students

The second group of people who will be impacted by this rule are persons currently in a training program. Railroads will be permitted to consider those who complete the program before the rule becomes effective as grandfathered operators under FRA's proposal. Those who are still in a training program on the effective date of the rule would have to undergo the full certification procedure before being deemed qualified. In addition to requiring that such future students undergo a full certification procedure, FRA proposes that the training program they will be given must meet FRA's proposed criteria. In this way all parties will know that future operators have received a training program designed to uniformly provide them with the necessary knowledge and skills.

(3) Former Operators

There are a limited group of people who have previously been deemed qualified to operate locomotives who will not become "grandfathered" operators. Their absence from the grandfather classification normally will occur because they are currently not working for a railroad, or because of inadvertent error in identifying such people. FRA proposes to have those persons undergo the full certification procedure before being deemed qualified under this rule.

(c) The Certification Procedure

FRA proposes to give railroads the ability to devise their own individual procedures for certifying operators within the framework of this rule. What FRA requires is that the railroad be able to demonstrate that the person, certified as being qualified, has in fact been determined to meet the regulatory criteria. Some sense of the freedom that FRA proposes to give railroads can be illustrated by the following examples. Under FRA's proposal, a railroad is free to establish a procedure under which the prospective operator must acquire and present to the railroad the data concerning their visual and hearing acuity as well as their motor vehicle driving records. Conversely, the railroad could require that the person be tested by the railroad's medical staff and execute any documents needed for the railroad to obtain the person's driving records. Railroads are free to use any sequencing of the steps in the process that they deem desirable. When it comes to testing, FRA proposes to require railroads to test a person's knowledge in writing but permit the railroad to select the design of the tests. Thus, railroads will have the ability to use a variety of testing methods including the use of multiple choice, fill-in-the-blank or essay questions. They could rely on a standardized test administered by multiple railroads or continue to use their existing tests. Railroads are free to establish their own weighing scales for grading such tests and may elect to provide training in advance of such testing. Instead of formulating a rigid procedural mechanism for making certification decisions, FRA proposes to have railroads document their procedural choices only in terms of their end result. Thus, FRA only proposes to have railroads maintain sufficient information to identify the basis on which a railroad made the determinations required when certifying a person as an operator. Conversely, the railroad would be required to provide, in writing, a detailed explanation of the basis for any decision to deny certification and furnish that to the prospective operator within 30 days of the denial.

FRA has also given railroads the power to select which corporate officer will be empowered to make the certification decision. However, FRA proposes to require that the person with that responsibility be identified on the certificate.

(d) Identification of Certified Operators

FRA is proposing a certification system under which each railroad would be required to issue a certificate to individuals that meet FRA's criteria qualification criteria which attests to that determination. The certificate envisioned by FRA would be small enough to fit within an ordinary pocket wallet and will contain essential information about the operator and the kind of service that person is authorized to perform. FRA proposes that, within six months of the effective date of this rule, all operators will possess such a certificate and must carry it with them when they are on duty. Certified operators would be required to display the certificate upon request by FRA personnel or railroad supervisory personnel, including supervisors from another railroad, if the operator is handling a locomotive or train in joint operations territory.

(e) The Consequences of Certification

The system being proposed by FRA does not directly affect any individual's employment rights. It is based on the concept that railroad employment decisions are strictly a matter between the individual and the company. It is only when a company wants to have an individual perform the task of operating a locomotive that the FRA rules would have any impact. Even then, the impact of FRA's rule would be limited to preventing a railroad from authorizing an unqualified person to operate a locomotive. FRA's proposed certification requirement is totally neutral on the employment question. The fact that an individual failed to meet FRA criteria would not preclude that person from performing other types of service for the company. Likewise, a company's conclusion that an individual is qualified followed by issuance of a certificate does not confer any federal benefit or rights on that individual to be employed as a locomotive operator. For example, a railroad could decide that a person who met FRA criteria did not meet some additional corporate standard for locomotive service and thus the railroad could decide that it did not want to hire that individual. Such decisions would not be impacted by this rule. Similarly, if the railroad had already hired the person the railroad could decide that it did not want to have that person perform service as a locomotive operator for any variety of reasons.

By contrast, FRA's proposal will impose obligations on any railroad that permits a person to operate a locomotive on its tracks. FRA's proposal would affect the duties not only of the railroad that the prospective operator is employed by but any railroad that permits that person to operate a locomotive over its lines. The most common example of the situations where this issue will present itself is in instances of joint operations. Joint operations are a very widespread method of providing rail service in which two or more railroads operate over a single track. Such operations are most often the result of contractual arrangements, such as trackage rights agreements, but can be the result of an order from a governmental body, or a judicial proceeding. FRA does not propose to disturb such existing arrangements. It proposes to allow the railroad that controls such operations to continue to assure itself that all locomotive operators performing service on its lines are qualified. There currently are a variety of ways that the controller of joint operations establishes the qualifications of "foreign" line operators. These range from requiring that "foreign" line operators submit to their training, testing and evaluation to delegating full responsibility for training, testing and evaluating to the "foreign" line company. FRA's proposal would allow railroads to retain their existing arrangements but clearly delineate the fact that the company that controls operations retains responsibility for all persons who operate a locomotive on their lines. FRA proposes to accomplish this by permitting railroads to "endorse" the qualification decision of the railroad that employs the operator. Although FRA proposes to allow railroads that control joint operations latitude in testing a prospective operator's knowledge and performance skills, FRA is also giving railroads the responsibility to determine that all such individuals have sufficient knowledge and skill to be capable of operating a locomotive or train under circumstances that may be unique to the operator's general operating responsibilities for his or her employing railroad.

(f) Duration of the Certification

FRA proposes to have such certificates effective for a period of 3 years. Although a three year interval is consistent with current industry practices for monitoring operators knowledge and physical condition, FRA welcomes comments on the advisability of employing a longer or shorter interval. For example, if convinced that a five year interval would not entail undue risk that a person's knowledge, skill and physical condition would deteriorate to unacceptable levels, FRA believes that such a longer interval would be more consistent with its motor vehicle history provision. Whatever the length of the interval, it would be necessary to begin the process of "recertification", toward the completion of that interval. FRA proposes that those seeking recertification will be given what amounts to an entirely new set of determinations including a new search of the motor vehicle driver record system. This approach will assure that railroads are evaluating current information. While this approach is the most feasible one with regard to railroad generated data, it is not the only method for assuring that railroads have up-to-date information on motor vehicle driving data. Although FRA's draft rule language is couched in terms of a single approach, FRA has not totally ruled out alternate approaches to that issue and seeks comments on these alternate approaches.

One of the alternate approaches identified by FRA would permit the individual seeking recertification to report whether he or she had been convicted of any of the relevant driving offenses in the intervening years since their prior certification. If the prospective operator made a negative report, the railroad could rely on that representation and not conduct a review of the records. If the prospective operator reports a conviction during that period, then the standard records check would have to be conducted. The major drawback to this approach is the degree to which it relies on the candor of individual operators to report such incidents. FRA has not selected this option initially because of concerns over such candor that were generated by recent DOT audit of a similar program approach used by the Federal Aviation Administration. In that audit nearly 76% of the people failed to report to FAA that they had been convicted of driving-while-intoxicated. For more details of this audit and the FAA's responses readers can review the April 14, 1989 issue of the **Federal Register** (54 FR 15144). FRA has not totally rejected this alternative because there are ways to effectively police such reporting schemes to enhance the reliability of the reporting. Such monitoring schemes, however, tend to be viewed as being as onerous as the approach initially selected by FRA. FRA solicits commenter views on whether the regulated community has would prefer that FRA employ such an alternative approach or give railroads the option of using this method or that specifically proposed by FRA.

Another alternative that might be employed in this area would be to allow railroads to rely on evidence of insurability. Under this concept railroads would be allowed to rely on the investigative practices of casualty insurance companies to ferret out and evaluate the driving records of locomotive operators who are seeking recertification. If the prospective operator could provide evidence of insurability, then the railroad could rely on that evidence instead of seeking data about that person's driving record. FRA had originally entertained the idea of allowing railroads to substitute such evidence of insurability for the detailed fitness evaluation proposed in this rule but found that the propensity of railroad companies to self insure for loss or damages, including those resulting from unsafe locomotive operator conduct, had virtually eliminated insurance underwriting of this kind of risk. Thus, there are few, if any, established practices for evaluating the insurance risks posed by having "unsafe" locomotive operators in service. There is no absence of underwriting in the automobile insurance context which leads FRA to view evidence of insurability as a possible alternate solution to the recertification checks of person's driving record. There are some difficulties posed by this approach that may render it unworkable. For example, there are varying criteria used by casualty companies when making such insurance decisions in the automotive context because that is a virtually unregulated business decision by insurance companies. However, it might be possible to devise an acceptable set of evaluation criteria to guide such decision making. Assuming that criteria could be devised, FRA has no information about whether those impacted by this rule would have a desire to avail themselves of such an approach. FRA also seeks public comment on this alternate approach.

If, during a three year interval, a certified operator commences working for a railroad different from the one that issued the certificate, there is a basis under FRA's system for requiring that the second railroad only perform a limited set of evaluations focused on questions presented by differences in carrier operating rules and the physical characteristics between the two railroads. Under FRA's proposal, the certification by the new railroad would not serve to extend the interval created by the initial railroad's certification. At the conclusion of that interval, it will be necessary to again fully evaluate the operators qualifications to continue as a certified operator.

(g) Operational Monitoring

FRA accident data can be interpreted to suggest that the most pressing need that this rule should address is not concerns about the basic knowledge and skills of locomotive operators but concerns that they not develop a tendency to become complacent and inattentive. One of the most effective tools to combat such a problem is periodic monitoring of operator compliance with operating rules.

The railroad industry has long had a practice of conducting such monitoring activities under the rubric of "efficiency testing" and FRA has required railroads to have a program for such monitoring activities since 1978 under the provisions of 49 CFR part 217. To date, FRA has given railroads considerable discretion about how to conduct FRA required operational monitoring activities. FRA's investigative activities have indicated that railroads do not universally employ their discretion wisely. For example, in several of its system assessments of major railroads FRA has documented serious deficiencies in individual railroads' operational monitoring practices. (See for instance FRA System Safety Assessments Reports concerning SouthEastern Pennsylvania Transportation Authority and Consolidated Rail Corporation.)

FRA, therefore, proposes to establish specific criteria for conducting the operational monitoring of certified locomotive operators. FRA's proposal is to have each railroad conduct an on-board evaluation of each operator at least annually and to have each operator's compliance with the operating rules operationally tested at least once a year. FRA contemplates that railroads will use a single on-board evaluation to satisfy both this monitoring provision and the performance skills test proposed elsewhere in this notice. Such an approach would be acceptable to FRA provided that such dual purpose testing occurs within the time interval prescribed for performance skill testing. The remaining facets of the testing program would have to conducted so that: tests are conducted in both an announced and unannounced manner; testing occurs throughout the entire period of a day (unless the railroad conducts operations for a lesser period of time); and railroads equipped with signal systems emphasize adherence to restrictive signal indications in their testing. FRA's proposal would allow railroads that operate event recorder equipped locomotives to employ analysis of the data collected by those devices for this monitoring program as an alternative to on-board evaluations. FRA does not now contemplate permitting the use of event recorder data as a substitute for unannounced testing efforts. Although FRA has not proposed a specific approach for implementing an event recorder alternative, FRA is open to comments on the wisdom of creating such an alternative and possible suggestions on how to devise an effective regulatory formulation of such an alternative.

(h) Unlawful Behavior by Operators

FRA's proposal for certifying locomotive operators is designed to ensure that all operators are qualified, in terms of their knowledge, skill and ability, and are "eligible" to perform service at least to the degree that they have not demonstrated a prior history of taking undue safety risks. It is not designed to resolve many kinds of day-to-day issues of a particular operator's conduct. As noted, FRA proceeds from the belief that possession of an operator's certificate establishes that the individual is both proficient and not demonstrably unsafe and, therefore, should be authorized to operate a locomotive for a given interval.

It is entirely possible that during the interval before recertification will be required an operator's conduct will make it appropriate to review whether that operator should be allowed to continue to operate a locomotive. Although railroads already have one mechanism for responding to such conduct—subjecting the operator to disciplinary proceedings that can result in loss of or suspension of the operator's employment—there are many factors unrelated to safety considerations that could prompt a railroad not to exercise its disciplinary prerogatives. FRA is considering augmenting the remedial power of railroads by creating an ongoing oversight of the conduct of locomotive operators certified under this rule.

As envisioned by FRA, each railroad would be responsible for canceling or revoking its certification of an operator, if that person is involved in unlawful behavior during the certification interval. The power to withdraw certification would be invoked by the railroad whenever to operator had been involved in one or more poor safety performance incidents. Depending on the type of points system FRA adopts (unified— where all events are part of a single total—or bifurcated— where driving history and railroad operations remain separate categories), once the operator has accumulated sufficient points to preclude recertification, the railroad would be required to affirmatively act to withdraw the existing certification. In order to make either point system approach effective FRA would have to require that operators report to the railroads all relevant motor vehicle driving incidents that occur during the certification interval.

The primary alternative to that oversight approach is to use a certification of short duration and to rely on the railroads to wisely and effectively use their independent disciplinary powers to remedy behavior that occurs during the interval between certification determinations. FRA proposes to follow the short interval approach in this notice but welcomes comments on the wisdom of adopting the continuing oversight alternative.

FRA also proposes to improve the agency's capacity to respond to unlawful operator conduct. The RSIA grants FRA the authority to disqualify certain individuals. Under the statute FRA may disqualify individuals who are shown to be unfit to perform safety sensitive functions, based on the individual's violation of an FRA safety rule regulation or order. FRA has proposed adoption of the procedures that will control disqualification proceedings (53 FR 49695; December 9, 1988) and will soon issue final rules on this topic. In that proceeding, FRA identified the fact that it considered virtually all train service personnel, which would include locomotive operators, as performing a safety sensitive function.

Currently, FRA has only a limited set of rules that are specifically focused on and would govern the behavior of an individual operating a locomotive. Existing FRA rules basically prohibit locomotive operators from possessing or using alcohol and controlled substances; willfully tampering with safety devices such as cab signals and alerters; and coupling to or moving rolling equipment protected by blue signals. Thus, FRA is already postured to respond through a disqualification proceeding, if appropriate, to certain kinds of unsafe operator behavior.

In reviewing its accident data, FRA has identified three types of events that are prohibited by carrier operating rules but not current Federal regulations. In each instance FRA is confronted with potential action or inaction by an operator about control of a train which clearly is the direct and immediate responsibility of the locomotive operator and which would reflect a serious failure to be attentive to significant operational safety concerns. These are: (1) Operating a locomotive or train at excessive speed; (2) permitting a locomotive or train to pass any signal that requires a complete stop before reaching it; and (3) failing to comply with a mandatory directive and entering a segment of track without authority.

FRA proposes to make such conduct unlawful as a matter of federal regulation for the purposes of this rule. Thus, a violation of that prohibition could serve to form a predicate for disqualifying a locomotive operator. As being proposed by FRA, the unlawful conduct of the individual locomotive operator would be attributable, for civil penalty purposes, to a railroad company that established the underlying operating rule. Although FRA does not anticipate having to seek recourse against railroads for locomotive operator noncompliance with the railroad's operating rules on a frequent basis, there may be instances in which it is appropriate to hold the railroad accountable for the unsafe conduct of its operators.

(i) Process for Reviewing Adverse Determinations

Once this rule is in effect there will be some instances, in which a railroad will make a determination adverse to the hopes of a prospective operator. Section 4 of the RSIA requires that, as a minimum, FRA provide an administrative hearing for operators who believe they have been improperly denied or granted a conditional certification on the basis of their driving history. Thus, any review scheme proposed in this rule must include some degree of FRA involvement.

Selection of the Reviewing Body

In many instances, if not all instances, the dissatisfied prospective operator will want recourse to some reviewing body different from the railroad that rendered the unfavorable decision. Short of judicial review of such decisions or recourse to administrative bodies such as Equal Employment Opportunity Commission, there are only two non-railroad mechanisms immediately available for adjudicating such reviews: an FRA-managed process or the grievance resolution procedures of the Railway Labor Act administered by the National Railroad Adjustment Board (NRAB), any of its divisions or delegates, or other boards of adjustment.

The NRAB has a long history of resolving analogous issues. The processes developed by the NRAB are familiar to most of the parties who can be expected to seek recourse to them and the quality of decisions rendered by the NRAB is well recognized. Thus, FRA initially favored having these disputes handled by that mechanism. Further study has revealed several limitations to use of the NRAB for these purposes. As noted earlier, the functions of the NRAB are significantly different from that FRA and, as has become evident in recent NRAB decisions in the alcohol and drug area, there is some danger of conflicting or inconsistent decision making that could adversely impact administration of the FRA program. Moreover, the NRAB setting brings with it attendant risks that safety regulatory policy issues will become intertwined with or subordinated to labor-management issues that are not of concern to the administration of FRA's safety program. Finally, data publicly disseminated by the National Mediation Board concerning near term fiscal problems for the NRAB, which are producing extensive case backlog and delays in case resolution.

Because of these facts FRA has temporarily rejected use of the NRAB alternative. Although FRA has rejected that alternative in making this proposal, FRA seeks the views of interested parties on whether it should rethink its entire position on this issue or at least permit the use of that mechanism as an alternative that could be selected in lieu of using the FRA system described below. In short, to permit operator candidate to have an election of remedies. Commenters favoring an election of remedies approach are asked to specifically address how they would integrate the statutory constraint concerning review of driving history into such an approach. Moreover, FRA desires to hear the views of interested parties about the availability of NRAB review for all operator certification candidates, particularly those employed by small railroads and public transportation authorities.

Although it has significant manpower and resource allocation implications for the agency, FRA proposes to shoulder responsibility for review of adverse railroad certification decisions. FRA proposes to create a special organization to resolve disputes of this nature. Although actual creation of this organization requires issuance of an internal FRA order, FRA has decided to reflect the existence of the organization and its general composition in this proposed rule to foster better public comprehension of the system FRA envisions under this regulation. FRA proposes to have this organization evaluate both adverse decisions that are based in whole or in part on motor vehicle driving data, which the RSIA appears to intend FRA to review, and all other disputed certification determinations that are properly the province of FRA review.

The actual procedures that an aggrieved certification candidate would follow under this proposal require that the person petition FRA for review of the railroad's certification decision. To initiate that process a person FRA would merely require the individual to furnish a written description of the facts and circumstances that serve as the basis for the allegation that the railroad improperly denied certification and provide a copy of the railroad's denial letter.

After giving the railroad an opportunity to submit pertinent information, FRA will decide whether the certification was wrongfully denied and issue an order granting or denying the petition. Any party that was aggrieved by that decision would have a right to challenge that order by filing a request for a hearing within 90 days.

That hearing would be a trial-type evidentiary hearing similar to that envisioned for the disqualification proceedings in Part 209. After review of the agency's decision the hearing officer would issue an order either affirming or reversing the agency's initial decision. The hearing officer's order would constitute final agency action on the matter unless an aggrieved party filed an appeal with the FRA Administrator.

FRA's proposal to make such hearings into formal, trial-type evidentiary proceedings exceeds the RSIA requirements for such hearings. However, the nature of the review that would need to be conducted in some instances appears to warrant such treatment. Moreover, providing the opportunity for trial-type proceeding is designed to ensure that, should the agency's final action undergo judicial review, it will not be trial de-novo. There are certain complications in taking this approach because of the administrative burdens and potential for delay associated with such a cumbersome review process. FRA anticipates that most disputes will be very straight-forward matters and that there will be hearings only in rare instances where there are significant factual disputes. FRA solicits comments on this aspect of the proposal as well. Specifically, FRA would be interested in views on the question of whether more informal approaches, such as that employed in resolving requests for waivers of compliance with its safety regulations (see 49 CFR Part 211), would be an adequate substitute in the opinion of interested parties.

The Degree to Which Decisions are Reviewable

FRA is proposing to establish minimum qualification standards and to permit railroads to adopt more stringent criteria. Issues concerning an individual railroad's more rigorous criteria are not a subject that FRA can appropriately review. Resolution of such issues are properly the subject of dispute resolution procedures found in the Railway Labor Act and many collective bargaining arrangements. Under the review procedures of this rule, FRA will only be concerned with questions about a failure to meet minimum FRA standards. Even within that limited subject area, FRA's review will be constrained to some degree. For example, in the absence of standardized testing, FRA will not attempt to substitute its opinion for that of the railroad on matters of subjective judgment. Thus, individuals who take and fail a operating skills performance tests and seek FRA review can anticipate that FRA will look at the overall quality of the test procedures to assure compliance with this rule but can not expect FRA to substitute its opinion for the judgment of the designated railroad evaluator about the quality of their skills.

Section-by-Section Analysis

FRA contemplates dividing this rule into subparts each of which would contain multiple sections. This proposal contains all of the anticipated subparts including those that are being reserved for future proposals.

Subpart A

This part of the proposal contains the general provisions of the rule, including in § 240.1, a formal statement of the rules purpose and scope. This section also contains a clear recitation of the fact that this rule would not constrain a railroad's ability to prescribe additional or more stringent requirements for its locomotive operators.

The statutory definition of a "railroad" includes all entities that can be construed as railroads by virtue of providing non-highway ground transportation over rails, electromagnetic guideways, or other technologies not yet in use. Thus, § 240.3 specifically identifies the fact that FRA is proposing to have these rules apply only to railroad that operates on standard gauge tracks and not situations where the railroad is employing different technologies for providing transportation service.

Section 240.3 also identifies several other situations in which FRA proposes that this rule would not apply despite the presence of standard gauge trackage. The first exclusion mirrors the statutory exclusion for rapid transit operations in urban areas that are not connected with the general system. Caution is needed because there are some rapid transit type operations that, given their links to the general system, are within FRA's jurisdiction and FRA specifically intends to have these rules apply to those rapid transit type operations. For example, the operations of Port Authority Trans Hudson (PATH) are the type rapid transit operations that FRA proposes to have this rule apply to.

The second exclusion addresses several types of operation that occur on tracks that are not part of the general railroad system (i.e., the standard gage, interconnected network of railroads that makes possible the interchange of goods and passengers throughout the nation). This exclusion would encompass operations commonly described as tourist, scenic, or excursion service to the extent it occurs on tracks that are not part of the general railroad system. This exclusion also addresses operations that occur within the confines of industrial installations commonly referred to as "plant railroads" and typified by operations such as those in steel mills that do not go beyond the plant's boundaries.

In both these instances, the key factor for exclusion is the fact that the track over which the operations are occurring is not part of the general railroad system of transportation. Again caution must be exercised in examining whether a particular factual situation meets this criteria since, even where a railroad operates outside the general system, other railroads that are unequivocally part of the general system may have occasion to enter the first railroad's property (e.g., a major railroad goes into an automobile plant to set out or pick up cars). FRA intends to adhere to its current policy of not treating such actions as creating a basis for sweeping the plant railroad under FRA's jurisdiction except for the limited area of compliance with the track safety standards. In the track standard area, FRA policy has been to treat the plant railroad as the track owner for the tracks being operated over by the general system railroad. In converse situations, where the plant railroad itself operates beyond the plant boundaries on the general system, FRA also intends to adhere to its current policy of considering the plant railroad to be subject to FRA's rules during the operations that occur on the general system trackage.

Section 240.5 contains the definitions that FRA proposes to employ in this rule. As with any new set of regulations the definitions for this proposal contain considerable information about the structure of the regulation. In this instance FRA's proposal contains a variety of terms that are different from colloquial usage of the terms in the industry and therefore should be examined carefully. The following examples illustrate the kinds of factors addressed by these definitions. FRA proposes to use the expansive definition of what constitutes a locomotive developed during revision of the Locomotive Safety Standards in 1982. Implicit in this approach is the fact that FRA's proposal will include operators of steam locomotives as well as operators of so called trackmobiles and cab control equipment. Under the definition of "locomotive operator", FRA proposes to incorporate the exclusionary concepts for inspection and maintenance activities discussed earlier. FRA has also defined the group of individuals who will be authorized to perform performance skill testing. FRA proposes to designate such persons as "designated supervisors of locomotive operators" and to establish minimum criteria for any person who will be so identified.

Section 240.7 identifies FRA's ability to grant waivers of compliance with the requirements of this rule. Requests for such waivers can be filed by any interested party. For example, a person with visual acuity problems could seek to have FRA grant a waiver of compliance with that provision. In reviewing that request, FRA would conduct a factual investigation to determine whether there was a basis to deviate from the general criteria without compromising or risking a diminution of rail safety.

Section 240.9 contains the penalty provisions of the proposed rule. As noted earlier, FRA has already provided extensive public guidance on how it intends to employ the enforcement power that exists under this provision. In addition to FRA's policy statements concerning exercise of its enforcement and disqualification authorities, readers may want to review FRA's comments on the discharge of its responsibilities under the regulations prohibiting alcohol and drug use by rail workers and those prohibiting tampering with locomotive mounted safety devices. This section also addresses the issue of imposing criminal sanctions for knowing and willful falsification of records required by this rule. The potential imposition of criminal sanctions is authorized by section 209(e) of the Federal Railroad Safety Act. Decisions to seek convictions under this provision would rest with the Department of Justice, not FRA.

Subpart B

This subpart contains the basic requirements for having qualified operators. Section 240.11 requires all railroads to determine that knowledgeable and skilled operators are at the controls of every train, even if that might impinge on the desire of some individuals to experience the thrill of "running a train". FRA specifically proposes to prohibit railroads from requiring or permitting an unqualified person to operate on their lines. This prohibition would apply regardless of whether or not that person is an employee of the railroad. Under FRA's proposal, responsibility for determining who is qualified in joint operations would rest with the railroad that is responsible for the control of operations. Railroads that control the operations will have the duty to make a set of evaluations for each "foreign line" operator. The details of FRA's proposal on this point are contained in the discussion of subpart C below.

This subpart also contains the class of service concept that FRA is introducing in this rule. Five distinct levels of operator service are identified and the limits of their operational authority are explicitly provided for in this section. Note that a person deemed qualified to perform the more extensive operation is deemed qualified to perform the less challenging tasks.

As structured by FRA, § 240.13 also would permit a railroad to decide to employ only one class of operator or multiple classes. For example, a railroad that served the steel industry and whose operations were fully described by FRA's terminal service operator classification might elect to have all of its operators fit within that class of service designation. Such a railroad could then tailor both its knowledge and performance skill testing programs to that single group of operators. FRA has elected to propose this type of tiering arrangement in lieu of one based directly or indirectly on the size of the railroad. This type of operations oriented approach is the most safety relevant method of distinguishing between the varying operational realities that exist in the industry. It also will provide a simple method for any railroad that finds it appropriate to adjust their operations on a short notice basis.

Proposed § 240.15 addresses situations in which a railroad elects to impose additional limitations on the service a person can perform. The most prevalent reason for imposing such limitations involves a need to restrict locomotive operators to territory with which they have some familiarity with its physical characteristics. This section provides a mechanism to reinforce such railroad decisions when they are based on a safety rationale. FRA is proposing complementary provisions to ensure that individuals are not called on to perform service for which they are not qualified. These are described in the discussion of subpart J.

The concept of familiarity with the physical characteristics of the territory is deeply imbedded in the railroad industry because the safe and efficient operation of a train requires that the locomotive operator have knowledge of the geography and topography of the line of road and have a comprehension of the train performance implications of that data. FRA has addressed the issue of assuring that operators have sufficient knowledge about the physical characteristics of the territory over which they are being authorized to operate a train at several points in this proposal. Since this concept has two elements (knowledge and comprehension) and applies to at least three different groups of operators (current operators, new operators, and those with some prior experience) and is one of the most pervasive retraining practices in the industry, FRA's proposal addresses different aspects of this concept in their relevant contexts.

For example, all operators normally would have their knowledge of the physical characteristics tested through inclusion of relevant questions on this topic in the § 240.71 or § 240.77 testing. However, if a railroad so desires that testing could be done through a discrete examination for this explicit purpose. For "grandfathered" operators, the comprehension aspect automatically would be satisfied by prior operation over the territory. But, if more than a year has elapsed since a grandfathered operator performed service on a line, at least one round trip while accompanied by a qualified operator would be required under the retraining provisions of § 240.67. The topic is also relevant to "new" operators. A "new" operator would include newly trained operators and those with many years of service but without previous experience on this territory. In this setting FRA's proposal would address the topic in the context of its student training proposal in § 240.63. Although FRA has segmented its requirements concerning familiarity with physical characteristics, to associate them with the relevant aspects of this program, FRA's proposal concerning the knowledge and comprehension of physical characteristics follows the historical practices of the railroad industry.

Subpart C

This portion of the rule identifies the distinct determinations each railroad must make for each locomotive operator candidate and the various methods that railroads can rely on as alternate strategies for evaluating a prospective operator's qualifications. For example, § 240.21 authorizes railroads to upgrade a person from the student operator category to service operator status by relying on the training program. It relieves a railroad of the duty to conduct an intermediate review of their other qualification criteria. Thus, a person who was certified as a student operator and then upgraded to a locomotive or train service operator would not have to be given a new set of acuity tests or a new motor vehicle records review until the three year interval of their new certificate expired.

Section 240.23 contains provisions to address instances in which an operator might be considered a "foreign line" operator because he or she is operating a locomotive during a detour movement or over a segment of joint operations trackage. Essentially, FRA would permit the railroad controlling operations considerable latitude in selecting the method for discharging its responsibilities. The railroad could conduct an independent set of determinations, perform a partial set of determinations, focused perhaps on its operating practices, or simply respect the certifying railroad's decision. FRA's proposal for this provision does reflect the "grandfathering" concept for implementing this rule after its adoption.

Section 240.25 contains provisions to address instances in which an operator commences working for different railroad from the one that originally evaluated the operator. These provisions would also permit a railroad to continue to rely on the determinations made prior to an operator experiencing a break in service or prior to a change in corporate structure or ownership. Finally, this subpart contains a provision, section 240.27, which is designed to accommodate qualification determinations that are made pursuant to requirements issued by the Canadian Transport Commission in 1987.

Subpart D

This subpart contains FRA's proposed method for making the transition to certification status for those currently involved in operating a locomotive, the "grandfathering" concept for implementing this rule after its adoption. Section 240.31 contains the detailed elements of the "grandfathering" provision for most railroads and § 240.33 contains the analogous provisions for railroads that conduct joint operations. Note that the railroad's duty to make a formal determination concerning the "grandfathered" operator within 36 months and the person's lack of authority to continue in service as a qualified operator beyond that date are expressly provided for in these sections.

Subpart E

Section 240.41 contains the requirement that all operators be examined at intervals of not more than three years to determine that they possess the minimum levels of vision and hearing need to operate a locomotive. Both the need for such standards and the testing interval proposed are currently employed or exceeded by virtually all large railroads and commuter operators. Thus, FRA's proposal will have a minimal impact on most operators. FRA believes that only some of the emerging regional railroads and the smaller railroads will be impacted by this proposal.

FRA proposes in this subpart to have a written document to attest to the vision and hearing examination but would permit the examination to be conducted by a wide range of trained professionals. Section 240.43 contains the acuity standards that FRA proposes for an operator's vision and hearing. In essence, FRA proposes that distant vision be 20/40 with or without the use of corrective lenses. This is the same Departmental standard required for commercial truck drivers and commercial seafarers and is similar to the recommended standards of the Association of American Railroads and the FRA's research data. It is slightly lower than the requirement for commercial pilots. FRA also proposes a field of the vision and color recognition criteria. FRA's proposed hearing levels permit the use of hearing aids and would only preclude a person who is unable to perceive 50% of auditory sounds throughout the normal range of hearing. Again FRA's proposed levels for minimum acuity levels are similar to those established for commercial truck drivers, commercial seafarers and the recommendations of AAR and FRA research.

Section 240.45 requires that the examination to measure a person's hearing and vision acuity be conducted by licensed medical service personnel such as medical doctors, physician assistants and optometrists. This section also requires that when a person needs a corrective device to meet the acuity standards that fact must be noted on the person's certification documents. The person is obligated to use the corrective device while on duty. As noted earlier, an operator who does not meet these criteria can seek a waiver of compliance under the provisions of § 240.7.

Subpart F

This subpart contains the basic requirements for conducting an evaluation of a prospective operator's "eligibility". Section 240.51 sets forth the basic requirements for obtaining the data concerning the prospective operator's prior employment behavior and his or her motor vehicle driving behavior. Railroads would have the primary responsibility for obtaining employment data but the primary obligation shifts to the prospective operator to take the actions that will result in the railroad obtaining the necessary information about driving behavior. This section contains the requirement that the railroad furnish the operator candidate with an opportunity to review and comment in writing on any poor safety performance data before the railroad reviews and evaluates it.

Section 240.52 contains the corollary duty of operator candidates to seek driving history data. Depending on state agency practices, the operator candidate may have to incur nominal fees or use existing state procedures to obtain the state's records. FRA's proposal makes it mandatory that candidates adhere to such state procedural rules. Similarly the actions needed to secure the NDR data may cause the candidates to incur minimal expenses in getting their request notarized or in complying with state procedures. FRA's proposed language does not afford the candidates latitude in such instances. Since it is possible that some operator candidates will either have obtained more than one license or never have obtained any license, FRA has included proposed provisions to address both contingencies.

Section 240.53 contains the requirement for obtaining additional information from the non-issuing state agency if the NDR check reflects a probable matching record. Since results of the NDR check will be sent to the railroad, this section places primary responsibility on the railroad to obtain the data. As with the operator candidate obligations, FRA proposes to require that the railroad abide by all state agency procedures for furnishing such information and would require the candidate to assist the railroad in obtaining the NDR identified data. This section also contains a provision for addressing instance in which a railroad is unable to obtain data after reasonable efforts to do so.

Section 240.53 and 240.55 contain the respective limitations that would apply when a railroad is faced with adverse driving history information and railroad employment records concerning a prospective operator. Both contain prohibitions against using outdated information and against relying on information that does not constitute safety performance data. As drafted, substance abuse incidents will go initially to the MRO, EAP counselor or equivalent person to determine whether the event or events were followed by an appropriate course of counseling. If the person making that determination finds an appropriate course of counseling or treatment occurred, the events will not be considered under § 240.57. If the conclusion is that successful rehabilitation is not in progress or completed, then a determination must be made about whether the candidate is suffering from psychological or chemical dependency involving the use of alcohol or drugs. If that a dependency situation exists then the candidate will be treated in the same manner provided for in § 219.405(d) and the railroad can conditionally certify the person. If no dependency is found, the points ascribable to the incidents shall be considered in accordance with the provisions of section 240.57.

Section 240.57 contains the proposal to prescribe the course of conduct the railroad must follow based on the prospective operator's safety performance record. As noted earlier, a person with a poor record who has accumulated more than six points is ineligible for certification. That ineligibility will last for a five year interval unless the person has been involved in more than a single occasion of acquiring in excess of six points. Repeated poor performance would result in a lifelong disqualification.

Section 240.59 contains the provisions for conditionally approving operator candidates with marginal records. It permits certification of individuals recovering from substance abuse dependency and those who have behaved marginally but have undergone additional training to improve their future safety performance.

Subpart G

This subpart contains FRA's proposed requirements for the training of locomotive operators. It addresses initial training of individuals who desire to become locomotive operators and the supplemental training of previously qualified operators.

Section 240.61 is structured to reflect the fact that FRA proposes to allow railroads to decide whether they have a need to train people and only when they answer in the affirmative do the requirements of this section become applicable. Once the section becomes applicable, a railroad is required to file its training program with FRA. That filing must include a detailed description of the program and include copies of the written instructional materials being used in the course so that it will be possible to determine whether the program meets the criteria established in § 240.63. In addition, if the railroad makes a significant change in the program, FRA must be informed in writing of the change and, if appropriate, given a copy of the new or modified instructional materials or the relevant portions of such materials.

FRA plans to review and evaluate these training programs. Since prior experience has demonstrated that such review cycles can be lengthy, FRA proposes to allow a railroad that has not had an affirmative response from FRA to presume that their program has been approved. Such a presumption will take effect sixty days from the date of the program's filing with FRA. Although FRA will thereby assure that delays in the review cycle do not hinder initiation of such training programs, FRA reserves the right to revoke any approval, if it subsequently determines that the program does not comply with § 240.63. Finally this section contains two different deadlines for filing such programs in order to accommodate the fact that both existing and future programs will be effected by this rule.

Section 240.63 contains the essential elements for all locomotive operator training programs. FRA proposes to have all programs contain two distinct components. Under FRA's proposal for the classroom component, the industry tendency to use very informal, learn by watching, or unstructured on-the-job training approaches will no longer be acceptable. Railroads will still be allowed to use such methods, but they will have to be used in a more structured context and employed only in a limited effort to supplement a more formal classroom type presentation. As part of its efforts to upgrade the quality of instruction, FRA also proposes to require that the railroad formalize its selection of training personnel and ensure that these people have the requisite skills. Although the larger railroads currently appear to do an adequate job in this area, a number of the intermediate size and smaller railroads appear to have inadequate practices. It should be noted that FRA proposes to require that railroads make a special effort to train newly hired workers as well as more senior workers who are not familiar with the risks associated with train operations. In FRA's judgment it is essential that such people be educated about the proper actions to take to ensure their personal safety before allowing those people to work in close proximity to moving equipment.

FRA proposes to specify both a minimum duration for each subject matter that must be addressed and for the overall classroom component of the program. The duration factors that FRA selected reflect FRA's judgment on the minimum number of hours needed and not on optimum or necessarily desirable levels of training effort. The proposal reflects a distillation of FRA studies of this subject, its prior involvement in a training program on a large railroad and current industry programs reviewed by FRA in the context of performing recent safety assessments on a number of railroads.

FRA also proposes to establish criteria for the operational experience component of the training program that is designed to teach performance skills to the operator trainee. FRA's basic concerns are that the person actually receive experience handling trains, not simply spend time in the cab making observations and that the person experience a variety of train operation experiences, not merely log a given number of hours on a single type of train because that is the fastest way to accumulate the requisite number of operational hours. Again, FRA has set minimum duration factors with gradations to reflect FRA judgment about the minimum level of training needed based on the available data. Implicit within the proposed duration factor is an assumption that the trainees are operating on the railroad on which they will later be certified to operate and are thus continuing the historical pattern of learning both the performance skills and the physical characteristics of the territory at the same time. FRA also proposes to assure that each railroad exercise care in selecting the individuals who are responsible for providing the actual train handling/performance skill training by setting forth minimum experience levels for such instructors.

Under FRA's proposal a railroad that wanted to train a person to perform limited train service, (i.e.; operate short trains at slow speeds; the kind of trains typically found on a small railroad) would have to give that person a total of 90 hours of classroom training and 60 hours of operational training for a total of 150 hours of training. On the other end of the spectrum, a large railroad that wanted to have a person capable of operating any train on the system, would have to give that person a minimum of 150 hours of classroom training and 480 hours of operational training for a total of 600 hours of training. As noted earlier, FRA proposes to allow railroads to reduce the number of hours needed to provide a person with proper operational training by employing a simulator. This section contains the specifics of that proposal to permit substitution of simulator training for actual time in the cab of a locomotive. FRA's proposal distinguishes between types of simulators but contains a minimum level of actual train operation time regardless of the type of simulator employed. If a large railroad were to employ this training option by using the more sophisticated Type 1 simulator, the total hours of training that FRA proposes to require could be reduced by nearly 150 hours. Use of a less sophisticated simulator would also bring significant reductions in the duration of the training program.

FRA anticipates that some railroads and even some non railroad entities will provide training for locomotive operators. Both this section and section 240.21 are designed to accommodate such an approach to this training requirement.

Section 240.69 contains FRA's proposal for the supplemental training of previously qualified operators. FRA's proposal to require supplemental training is limited and is based on the passage of time, the introduction of new technology, or on a lack of familiarity with the physical characteristics of a given territory.

FRA proposes to require that locomotive operators receive two types of training based on the passage of time. The first type of such training amounts to periodic refresher training. Such supplemental education would have to occur at roughly 36-month intervals and be of at least an eight hour duration. During that period, the operator would receive instruction concerning issues relating to mechanical safety topics and proper train handling techniques. The second aspect of FRA's supplemental training proposal that is predicated on the passage of time is the need to have operators maintain familiarity with the physical characteristics of the territory over which he or she can be called upon to operate a train. Given the significance of such familiarity, FRA proposes to require that if more than twelve months have elapsed since an operator operated a train over a territory it will be necessary for that individual to receive refresher training. Supplemental training concerning physical characteristics can be accomplished by operation of a locomotive for at least one round trip on that territory or attendance at a classroom training program focused on this topic and augmented by a film depicting actual operation over that territory.

The other aspect of the supplemental training proposal is predicated on changed circumstances. The need for such training can occur either when a person is initially learning to become familiar with the physical characteristics of a territory or when new technology is introduced. FRA proposes that an individual who is attempting to learn a new territory make at least three round trips over the territory. The operator must be accompanied by a another locomotive operator or designated supervisor of locomotive operators who is already conversant with the physical characteristics of that territory. The final aspect of supplemental training involves educating operators concerning new technologies. FRA proposes to identify the only two types of changes that currently warrant inclusion in a mandatory program. Although it can be argued that a prudent railroad would want to include a wider range of technologies for retraining purposes, FRA does not believe that such prudence is the proper test for federally mandating supplemental training. FRA proceeds from the posture that use of the technology should require a significantly different method for controlling a train before mandating that retraining be given. In FRA's judgment, the use of air flow methodology for conducting train airbrake tests and the new advanced train control systems undergoing research and development meet or exceed that threshold and warrant mandatory retraining. Conversely, the introduction of new locomotive cab designs or the use of end-of-train monitoring devices do not meet that test because they basically involve continued use of the existing methods of controlling the operation of a train.

Subpart H

This subpart contains the provisions concerning the testing of an operator's knowledge. Section 240.71 establishes the requirement to perform such testing before allowing new operators to enter service and to test "grandfathered" operators within 36 months of the effective date of this rule.

Section 240.73 contains the criteria for all such tests including those required for recertification under § 240.77. FRA proposes to establish only the basic criteria for these tests. Railroads are both free and encouraged to employ more extensive testing than that which FRA proposes to require. Indeed, FRA hopes that many of the large railroads that have devised far more comprehensive testing programs will assist the other railroads that lack the resources to develop such excellent programs. The criteria FRA proposes would require some railroads to eliminate poor practices that have arisen over the course of time including the use of very brief, overly simplified exams that may be taken with open rule books as well as the use of oral exams that lack any clear structure or uniformity. FRA also proposes to strengthen the signal testing aspects of many current test programs.

FRA proposes that railroads cover at least five different subjects in their tests. FRA's list of subject matter areas to be covered by these tests may require some railroads to rethink their testing practices to a limited degree. Although many railroads have excellent operating rules tests, not all railroads have addressed such topics as compliance with Federal safety rules or personal safety practices when designing the more traditional operating rules type exams for locomotive operators. FRA also encourages railroads to consider including testing of a person's knowledge about the physical characteristics of the territory when examining a person's knowledge of train handling practices.

Section 240.75 addresses the consequences of failing an initial knowledge test. It is subdivided to focus on three different groups of persons who will encounter such tests. The first group is comprised of individuals who are initially being grandfathered into this certification program. If such a person fails their initial examination, FRA proposes to allow the railroad to permit that person to continue to operate a locomotive for a period of not more than 60 days after it is determined that the failure occurred. Within that interval, and no sooner than 30 days after the first test, the person can retake the examination and the railroad is required to provide such a retake examination. Failure of the first retake exam will result in the railroad not being authorized to permit the person to operate a locomotive until the candidate successfully passes a subsequent examination. A second retake examination may occur but may not take place sooner than 30 days after the first retake. FRA does not propose to require that a railroad provide a second retake examination. If such a second retake is afforded the person and it results in a third failure, the railroad cannot permit the person to operate a locomotive or train until the person successfully completes a full scale training program.

FRA proposes a similar set of provisions for student operators who have completed a training program and for a small miscellaneous group of other operator candidates. The pool of other candidates is primarily composed of persons who potentially would have qualified under the "grandfathered" operator concept but were excluded from the ambit of that provision by virtue of the fact that they were not working for a railroad on the effective date of the rule. It would also include those who experience a lapse in service as an operator for any variety of reasons. In these instances FRA proposes to take a more restrictive approach and preclude the person from operating a locomotive, absent direct supervision, if they fail the initial test.

Section 240.77 contains the proposed requirement that railroads administer similar tests to operators at three year intervals. As noted earlier, FRA proposes that such recertification tests, like other aspects of the recertification process, occur within 90 days of the date that the current certification period terminates.

Section 240.79 delineates the consequences of failing a recertification test. FRA will allow retesting as in the initial testing effort but would preclude railroads from permitting the operator to operate a locomotive, absent direct supervision, until successfully passing the recertification test.

Subpart I

This subpart contains a similar set of provisions to that proposed for operator knowledge but focused on the issue of the operator's train handling skills. FRA's proposed provisions for evaluating a person's train handling skills are necessarily more generalized than those for knowledge testing. In addition, they are more subjective because they necessarily entail a undefinable and unquantifiable element of judgement. FRA proposes to require that railroads assign this evaluation responsibility only to people who have actual experience performing the tasks involved. In essence, FRA proposes to continue having railroads rely on the type of experienced person typically identified in the industry as road foreman of engines or traveling engineers. FRA is not concerned about the title given the evaluator but is very concerned that the person bring the proper background to the task of making complex judgments. FRA has included a proposed delineation of the experience levels needed for such evaluators in its definition of "designated supervisor of locomotive operators" set forth in § 240.5(d).

Section 240.81 contains the requirement to conduct a performance skill test for all operators. It contains the authority to delay the initial testing of grandfathered operators for a period of not to exceed three years.

Section 240.83 contains the criteria for testing. FRA proposes to require railroads to evaluate prospective operators under whatever conditions would be considered the most demanding type of service that the person could reasonably be expected to operate once deemed qualified. FRA's intent in this regard is to preclude railroads from oversimplifying the test conditions and utilizing test environments that really do not allow an effective assessment of the prospective operator. Of particular concern to FRA is the fact there have been instances where operators have elected for many years to perform service in positions where there were only minimal demands on their skills. Then, due to changed circumstances, they were given responsibility to operate under very demanding conditions. One fairly typical illustration of this type of problem involves a situation in which an operator elects, courtesy of seniority factors, to perform yard service for many years and then finds that the yard job is no longer available and that the new assignment requires operating heavy tonnage trains over undulating topography at slow to moderate speeds. FRA proposes to have railroads evaluate that operator on the more demanding service, if in fact the operator is eligible to perform that duty. FRA's intent is not to require railroads to conduct an exhaustive analysis to select the most arduous testing conditions tailored to each of their operators. Its intent is to compel railroads to exercise reasonable care in selecting their test trains so that they are evaluating operators under conditions that constitute fairly typical circumstances that the railroad would expect the operator to encounter in the normal course of events.

Once the railroad has selected the train or trains that provide the proper evaluation mechanism, FRA proposes to permit the person making the evaluation considerable latitude in making the necessary assessment of the operator. FRA's proposed test criteria only require that the test be of sufficient duration to permit an effective evaluation. In some circumstances that duration period could be as brief as one hour or under other circumstances could last for several hours. FRA has not proposed a rating system for the evaluators or even a check list of the particular actions that warrant careful attention. However, the need for more detail in the test criteria is a subject that FRA is particularly interested in receiving comment on. FRA's decision not to propose a specific guide or checklist for such evaluations is based on the fact that many railroads have devised such guidance materials for their personnel. Review of a number of these guides has convinced FRA that there is considerable diversity of opinion about how to approach this topic and FRA has not found evidence that any particular approach is more or less effective than any other. In general what the current individual railroad guides do is provide a reminder to consider in more or less detail five basic subjects during the evaluation. Depending on the individual railroad, more or less detail and emphasis is given to the following areas: operating rules and practices; equipment inspection and testing; train handling procedures; familiarity with the physical characteristics of the territory; and, to a limited degree, compliance with Federal safety rules. FRA is not proposing use of a specific Federally devised form or, for that matter, proposing use of any form. FRA only proposes to require that the designated supervisors document the relevant data on which they base their evaluation. The level of detail for that documentation is contained in § 240.109. This section also allows a railroad to use a simulator for conducting these tests.

Section 240.85 identifies the consequences of failing an initial performance skill test. This section also distinguishes between the three groups of prospective operators: grandfathered, student and other candidates. Although FRA proposes to permit all people more than a single opportunity to pass this test, the consequence of failure would serve to immediately bar all prospective engineers from operation of a locomotive unless operating under the direct supervision of a qualified operator. For grandfathered operators, FRA proposes to permit retesting 15 days after the initial test. This brief interim period should provide sufficient opportunity for the applicant to improve his or her skills. It will also minimize the financial impact for that operator. FRA does not propose to permit the grandfathered operator to continue running a locomotive without supervision during that interval because the safety implications of failing such a test are too drastic and immediate from a safety perspective. If the grandfathered operator fails a retest, FRA proposes to authorize railroads to provide a third chance to pass the test. This second retest can be given at the railroad's option. If the railroad does provide the second retest FRA proposes to require that the second retest occur within no less than 30 days after the first retest. FRA proposes to give other candidates only two chances to pass the test. In these situations the second test must occur within 60 days of the initial test. Repeated test failures will require that the person attend a training program that complies with this rule prior to attempting passage of a second round of testing.

Sections 240.87 and 240.89 require recertification testing on a three year basis and set forth the consequences of failing such recertification tests. Again because of the safety implications of test failure, no railroad will be authorized toallow a person who fails such a test to operate without supervision until they successfully pass the retest. FRA only proposes to permit two opportunities for passing the recertification tests before imposing a duty to obtain retraining prior to seeking additional testing.

Subpart J

This subpart contains FRA's proposals for monitoring and controlling the in-service behavior of certified locomotive operators. In § 240.91 FRA proposes to make unlawful, as a matter of Federal regulation, three types of locomotive operator conduct that are prohibited by carrier operating rulesbut are not currently cognizable as violations of Federal regulation. In each instance FRA is confronted with potential action or inaction by an operator about control of a train which clearly is the direct and immediate responsibility of the locomotive operator and which would reflect a serious failure to be attentive to significant operational safety concerns. These are: (1) Operating a locomotive or train at excessive speed; (2) permitting a locomotive or train to pass any signal that requires a complete stop before reaching it; and (3) failing to comply with a mandatory directive and entering a segment of track without authority.

FRA proposes to consider speed which exceeds the limits established by timetable, train order or similar mandatory directive by 10 mph or more to be excessive. Similarly, operating a locomotive or train at a rate which exceeds the allowable speed by 50%

regardless of the threshold value for speed would be considered excessive. In this context signals would encompass the same wide range of devices currently employed by the industry and is not limited to automatic roadway signals regulated by FRA in Parts 233, 235, and 236 of the FRA regulations.

Section 240.91 also contains FRA's proposed prohibition against requiring service in excess of that which an operator is allowed to perform by virtue of his or her class of service or familiarity with the physical characteristics of the territory. This section also imposes a duty on an operator to alert the railroad to his or her limitations when being scheduled to operate trains. This provision and § 240.25 address those situations in which a railroad has elected to impose additional limitations on the service a person can perform by providing a mechanism to reinforce such railroad decisions when they are based on a safety rationale.

Section 240.93 contains the requirement that railroads monitor in a specific manner the routine performance of operator conduct. It contains a provision regarding what might be described as check rides and unannounced, covert testing to ensure compliance with significant operational safety requirements. As formulated by FRA it would ensure that each operator receives, on an annual basis, both a check ride and at least one covert unannounced operational test each year.

FRA has reserved § 240.95 for the possibility that it will be convinced by commenters to include in the final rule a requirement that railroads conduct a program of constantly monitoring the eligibility status of certified operators. FRA has included tentative wording for such a requirement to aid commenters in focusing their discussion of the wisdom of adopting such a requirement.

Subpart K

This subpart contains the program records that would be required by this proposed rule. There are basically two typesof documents involved under FRA's proposal. The first is a certificate similar to the motor vehicle driving license carried by most adults. The second involves a variety of file type materials that would contain detailed information that forms the basis for the decision to issue or deny a person the certificate. FRA proposes a uniform period of five years for retention of these records with the exception of the certificate which would have no specific retention factor since its viable duration is obvious on its face.

Section 240.101 contains the proposed requirement to have each railroad issue a certificate to its operators and to have each operator carry or have in his or her possession that certificate while on duty. It also imposes a duty on the operator to display the certificate upon request by proper authorities.

Section 240.105 sets forth the proposed criteria for the document FRA proposes to have each locomotive operator carry while on duty. Basically FRA is proposing that a wallet sized document with the relevant information be issued by each railroad. Among the data would be information about a variety of possible limitations that have been placed on the operator. These could include limits on the operational territory and the need to use a device to improve audio or visual acuity. This section also contains a prohibition against efforts to falsify that certificate.

Section 240.105 also contains the basic requirement that railroads have available the data they rely on when deciding to issue or deny a person a certificate. This section also contains a prohibition against efforts to falsify that supporting data.

Section 240.107 requires railroads to identify individuals who may fit into one or more of three different categories. The first requirement is to identify the individuals the railroad considers to be its supervisor or supervisors of locomotive operators. The second requirement would be to identify the person or persons who will be authorized to sign the railroad's locomotive operator certificates. The third would be to identify the operators who will be deemed qualified under the grandfather provisions of this rule.

Section 240.109 contains a specific set of proposed criteria for documenting the testing data that each railroad would be relying on in its decision making.

Subpart L

Subpart L contains the procedures for resolving allegations that a railroad improperly refused to grant aperson a certification as a locomotive operator or denied that individual recertification. FRA's proposal for these procedures reflects the basic conceptual premise that the certification system being presented permits railroads to have their own more selective criteria for locomotive operators provided that such criteria exceed those established in this rule.

One consequence of that conceptual foundation is that there may be potential bases for allegations that a railroad improperly tested a person to determine acuity levels,knowledge or performance skills which are not properly brought to FRA for review. For example, assertions that an individual railroad's knowledge testing contained a racial bias that discriminated against one or more minorities would constitute achallenge to the program more appropriately resolved by the legal mechanisms designed to handle equal employment opportunity issues. Similarly, a challenge to a determination that an operator lacked the requisite performance skills based on a record of repeated instances of tardy operation of trains according to carrier operating schedules would constitute a challenge that is more appropriately resolved through the dispute resolution procedures of the Railway Labor Act.

FRA proposes to limit its review to those instances in which a railroad denies or fails to certify a person either initially or at a recertification date because the railroad has decided that the individual fails to meet FRA criteria. To facilitate that review FRA proposes to require railroads which are relying on an individual's failure to meet the minimum criteria established by this regulation as the basis for denying certification to state the basis for their determination. That statement must be provided in writing to the individual being deemed unfit and must identify the specific manner in which that individual fails to meet FRA'scriteria. Railroads would be required to furnish that data within 30 days of the decision not issue a person the certificate.

FRA proposes to employ a relatively simple, efficient and expeditious process for resolving these disputes.

Under section 240.111 FRA proposes to create a special internal organization to resolve disputes of this nature. Although actual creation of this organization requires issuance of an internal FRA order, FRA has decided to reflect the existence of the organization and its general composition in this proposed rule to foster better public comprehension of the system FRA envisions under this regulation.

Section 240.113 contains the actual procedures that an aggrieved certification candidate would follow under this proposal. In essence, FRA would require that the person petition FRA for review and initiation of that process would merely require the individual to furnish a written description of the facts and circumstances that serve as the basis for the allegation that the railroad improperly denied certification.

Section 240.115 contains the procedures that FRA would follow upon receipt of the petition. FRA anticipates that most of these disputes will be very straightforward matters. Thus, FRA proposes to furnish the railroad with a copy of the person's petition and then give the railroad a 30 day response interval. Based on that written record and perhaps a field investigation by FRA regional staff, the FRA review panel will make a decision on the matter. The decision will take the form of either a grant or denial of the petition. Where granting a petition, the FRA review panel will issue an order requiring that a certificate be issued.

Section 240.117 gives the railroad or individual a right to a formal hearing in the proceeding after FRA has made an initial determination. Again very simple procedures are being proposed. Because both the railroad and the individual may have reason to contest the hearing officer's decision, both would have the right to participate in the hearing and any subsequent appeal. Section 240.119 contains the procedures for such hearings. Since FRA anticipates that such hearings only will occur in instances where there are significant factual disputes, FRA proposes to make such hearings relatively formal proceedings. Unlike current FRA procedures for rulemaking and waiver proceedings, these hearings would employ the use of testimony from sworn witnesses, rules of evidence, and cross-examination of witnesses. Following such a hearing, a party aggrieved by the hearing officer's decision could appeal to the FRA Administrator.

Appendices

FRA proposes to include at least three appendices to this rule. In the final rule Appendix A would contain a penalty schedule similar to that FRA has issued for all of its existing rules. Because such penalty schedules are statements of policy, notice and comment are not required prior to their issuance. (see 5 U.S.C.553(b)(3)(A)). Nevertheless interested parties are welcome to submit their views on what penalties may be appropriate.

FRA proposes to place in Appendix B the procedures that a prospective operator must follow to furnish the railroad with information about his or her motor vehicle driving record. FRA also proposes to place in Appendix C the list of participating state motor vehicle licensing agencies that can directly furnish data to operator candidates. Since, as noted earlier, there are multiple advantages when operator candidates can complete the task of obtaining data by contacting a single entity, FRA proposes to make that the preferred practice under this rule.

FRA has reserved a space for a fourth possible appendix on possible performance testing criteria. In this notice FRA has provided only an outline of what types of concerns the appendix might cover if FRA becomes convinced that the need for standardization requires greater FRA intervention. As noted earlier, FRA is not proposing to set detailed criteria for the actual conduct of the performance skill tests. However, this appendix would provide an example of how a form could be devised to assist in promoting uniformity in the application of this test.

Regulatory Impact

E.O.12291 and DOT Regulatory Policies and Procedures

This proposed rule has been evaluated in accordance with existing regulatory policies and is considered to be non-major under Executive Order 12291. However, it is considered to be significant under the DOT policies and procedures (44 FR 11034; February 26, 1979) because it initiates a substantial regulatory program.

Consequently, FRA has prepared and placed in the rulemaking docket a regulatory evaluation addressing the economic impact of this proposed rule. It may be inspected and copied at Room 8201, 400 Seventh Street, SW., Washington, DC. Copies may be obtained by submitting a written request to the FRA Docket Clerk at the same address.

The economic evaluation identifies total estimated potential benefits, from avoidance of accidents and incidents, of $325 million and total estimated costs of $66 million over a twenty year period that can be associated with adoption of this proposal. Both benefits and costs are stated at a discounted present value (10% discount factor) for a program life of 20 years using constant 1988 dollars. The 20 year estimated program life appears reasonable given the relatively long tenure of locomotive operators, the useful life of any equipment used for this rule's purposes and the recurring costs assumed over the life of the program.

There are two points that bear mention concerning FRA's economic evaluation. In determining the quantifiable benefits from the proposed rule, FRA selected accidents that occurred during the period 1977 through 1987 which were caused by human factors that appear to reflect poor locomotive operator performance. Although human factor accidents have seen a dramatic reduction in actual numbers, they have not been decreasing at the same rate as accidents attributed to other causes. Within the 18,140 human factor caused accidents reported during the period, FRA identified a total of 6,990 train accidents that resulted in 61 fatalities, 1482 personal injuries and some $325 million in property damage which can be ascribed to poor locomotive operator performance. Within those accidents were 214 resulting from improper use of the automatic brake, 62 due to improper use of dynamic brake, and an additional 171 due to improper use of the independent brake valve. These appear to stem from poor performance curable through improved training. Also within that total are some 1649 accidents attributed to excessive speed and 3375 caused by excessive in-train force levels that may not be as directly related to training. The difficulty that FRA encountered in analysis of the data involves the absence of specific information that indisputably identifies inadequate training as a causal factor.

This data problem resulted in FRA encountering difficulty in reliably estimating a specific effectiveness level for accident avoidance that could be employed in estimating the benefits associated with adoption of this rule. The difficulty in estimating any specific effectiveness level is caused by an inability to document with specificity the correlation between testing, training, and actual safety performance. In essence, accident investigation data in the railroad industry at times reflect a conclusion that locomotive operators did not take effective action. The investigations generally do not isolate whether that stemmed from inadequate training, a failure to recall a vital piece of information learned long ago, or lack of proper execution due to simple inattentiveness. Although data limitations do not make it possible for FRA to reliably estimate a specific level of effectiveness for this rule, it would only require about a 20% realization of the potential benefits to make this proposed rule economically justified. FRA believes that such a level of realization is achievable.

Regulatory Flexibility Act

FRA certifies that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. These rules would apply to railroads and individuals seeking to operate locomotives for such railroads. Although a substantial number of small railroads would be subject to this regulation, the economic impact of this rule would not be significant for several reasons. Small railroads historically have not elected to train their own operators and thus generally would not incur the training costs associated with this proposed rule.

Thus, the only costs that a small railroad normally would incur are those associated with routine administration of the certification program. Since small railroads individually and in the aggregate employ only a few locomotive operators, FRA concludes that this economic impact would not be significant. As noted, FRA estimates that roughly 34,000 locomotive operators are currently in service. Each of these individuals could be expected to incur some nominal expenses under this rule. Every three years, each operator would be required to pay a fee of less than $10 for furnishing motor vehicle driver's license data. This fee reflects the costs associated with getting a document notarized and state motor vehicle agency documentation charges.

The proposed rule would have no direct impact on small units of government, businesses or other organizations. State rail agencies will be free to participate in the administration of this program but are not required to do so. State motor vehicle driver's licensing agencies can anticipate on a nationwide basis that they will annually receive 10,000 additional requests for motor vehicle driver's licensing data. Since such state agencies' costs are reimbursed through fees paid by the person making the data request, this proposed rule would not have a direct adverse economic impact on these agencies.

FRA specifically requests comment on the impact of this proposed rule on small entities. It welcomes any suggestions for incorporating alternate strategies to further reduce any impact on small railroads.

Paperwork Reduction Act

There are collection of information requirements contained in this proposed rule. In accordance with the Paperwork Reduction Act of 1980, the proposed requirements are being submitted to the Office of Management and Budget for approval. FRA has endeavored to keep the burden associated with this proposal as simple and as minimal as possible for such a program. For some entities that already have similar programs in place, the burden created will be minimal. For others, the burden could be extensive.

There are significant variables in the time required to comply with these requirements. Thus a total overall estimate of the reporting burden is not easily arrived at and could be seriously misleading. FRA, therefore, has elected to identify each of the proposed sections that contain information collection requirements and indicate the time estimated to fulfill each requirement. All of these estimates include time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information.

Proposed section	Brief description	Estimated average time
240.7	Petition for a waiver of compliance	1 hour each.
240.11, 240.21 & 240.107	Certification & Recertification	1 hour each person.
240.31 & 240.107	Grandfather Certification	1 hour each person.
240.41 & 240.45	Medical Examiner Certification	1 hour each person.
240.51 & Appendix B	Obtaining and Reviewing prior employment information	1 hour per person.
	Obtaining motor vehicle driving records	3 hours per person.
	Review and Verification of motor vehicle record submitted by State agency and NDR.	1 hour per person.
240.57 & 240.59	Written response to adverse record	1 hour each.
240.61	Evaluation of prior conduct information	2 hours each.
240.65 & 240.67	Training program approval	10 hours per railroad.
240.73	Development of supplemental training programs	40 hours per railroad.
240.71, 240.75, 240.77 & 240.107	Development of knowledge test	40 hours per railroad.
240.81, 240.85, 240.87 & 240.107	Taking that knowledge test	2 hours per person.
240.93 & 240.107	Conduct of skill performance test	6 hours per person.
240.101	Conduct of operational monitoring program	6 hours per person.
	Design of Certificate	30 minutes per railroad.
240.103	Filling out the certificate	1 hour per person.
240.105	Maintain supporting information	30 minutes per person.
240.113	Identification of supervisors	1 hour per railroad.
240.115	Review petition	30 minutes per person.
240.117	Railroad response to Review Board	10 hours each.
	Formal Hearing Requests	5 hours each.

FRA solicits comments on the accuracy of the FRA estimates, the practical utility of the information, and alternative methods to obtain this information that might be less burdensome. Persons desiring to comment on this topic should submit their views in writing to FRA and to The Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: FRA Desk Officer, Washington, DC 20503.

The costs estimated to be associated with the proposed information collection requirements are contained in the draft regulatory evaluation. As stated earlier, FRA solicits comments and will consider alternative procedures for obtaining information concerning a certification candidate's driving record, specifically in accessing the National Driver's Register. FRA is particularly interested in ideas that would minimize use of the NDR during the early years of this program. For example, should FRA modify the requirement for performing such NDR checks to only those instances in which the operator candidate remains eligible for certification based on the data available from the state or states of licensure. Viable commenter suggestions will be considered together with the alternatives identified to date including: (1) Employing a longer interval for recertifications (e.g. five years instead of three years); (2) reliance on voluntary disclosure or evidence of insurability; or (3) a combination of alternatives (e.g. use of voluntary disclosure by the candidate with random checks of the NDR or some other method to police the validity of self reporting).

Environmental Impact

FRA has evaluated this proposed regulation in accordance with its procedures for ensuring full consideration of the environmental impacts of FRA actions as required by the National Environmental Policy Act (42 U.S.C. 4321 et seq.), other environmental statutes, Executive Orders and related directives. This proposed regulation meets the criteria that establish this as a non-major action for environmental purposes.

Federalism Implications

This proposed rule will not have a substantial effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Thus in accordance with Executive Order 12612, preparation of a Federalism Assessment is not warranted.

List of Subjects in 49 CFR Part 240

Railroad safety, Railroad operating procedures.

Request for Public Comments

FRA proposes to adopt a new part 240 of title 49 of the Code of Federal Regulations, as set forth below. FRA solicits comment on all aspects of this proposed rule whether through written submissions, or participation in the public hearings, or both. FRA may make changes in the final rule based on comments received in response to this notice.

The Proposal

Therefore, in consideration of the foregoing, FRA proposes to amend chapter II, subtitle B of title 49, Code of Federal Regulations as follows:

1. By revising Part 240 to read as follows:

PART 240—QUALIFICATION AND CERTIFICATION OF LOCOMOTIVE OPERATORS

Authority: 45 U.S.C. 431 and 438, as amended; Pub. L. 100-342 and 1.49 (m).

Subpart A—General

§ 240.1 Purpose and scope.

This part prescribes minimum requirements for the training, qualification, and certification of all operators of locomotives. Each railroad may prescribe additional or more stringent requirements for its locomotive operators.

§ 240.3 Applicability.

(a) Except as provided in paragraph (b) of this section, this part applies to all railroads that operate locomotives on standard gage track that is part of the general railroad system of transportation.

(b) This part does not apply to:

(1) rapid transit operations in an urban area that are not connected with the general system of transportation; and

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

§ 240.5 Definitions.

As used in this part—

(a) *Alcohol* means ethyl alcohol (ethanol) and includes use or possession of any beverage, mixture or preparation containing ethyl alcohol.

(b) *Class Instructor* is a person who has been selected by a railroad to teach others and who has demonstrated to that railroad a knowledge of the subjects under instruction adequate to fulfill the responsibilities of that position.

(c) *Controlled Substance* has the meaning assigned by 21 U.S.C. 802 and includes all substances listed on Schedules I through V as they may be revised from time to time (21 CFR parts 1301–1316).

(d) *Current Employee* is any employee with more than one year of experience in transportation service on that railroad or another railroad.

(e) *Designated Supervisor of Locomotive Operators* is a person who:

(1) Is a supervisory employee of the railroad,

(2) Is fully qualified to operate trains in road service, and

(3) Has a minimum of three years experience as a fully qualified locomotive operator performing road train service.

(f) *EAP Counselor* means a person qualified by experience, education or training to counsel people affected by substance abuse problems and to evaluate their progress in recovering from or controlling such problems. An EAP Counselor can be a qualified full-time salaried employee of the railroad, a qualified practitioner who contracts with the railroad on a fee-for-service or other basis or a qualified physician designated by the railroad to perform functions in connection with alcohol or substance abuse evaluation or counseling. As used in this rule, the EAP Counselor owes a duty to the railroad to make an honest and fully informed evaluation of the condition and progress of an employee.

(g) *FRA Representative* means the Associate Administrator for Safety, FRA, 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.

(h) *Instructor Operator* means a person who:

(1) Is a qualified locomotive operator under this part;

(2) Has been selected by the railroad to teach others proper train handling procedures; and

(3) Has demonstrated an adequate knowledge of the subjects under instruction.

(i) *Joint Operations* means rail operations conducted by more than one railroad on the same track regardless of whether such operations are the result of:

(1) Contractual arrangement between the railroads,

(2) Order of a governmental agency or a court of law, or

(3) Any other legally binding directive.

(j) *Knowingly* means having actual knowledge or the knowledge presumed to be possessed by a reasonable person who acts in such circumstances including knowledge obtained from the exercise of due care.

(k) *Locomotive* means a piece of on-track equipment, other than hi-rail or specialized maintenance equipment—

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

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

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

(l) *Locomotive operator* 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 or servicing area as defined in 49 CFR 218.5 (f); 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.

(m) *Medical examiner* means a person licensed as a doctor of medicine, doctor of osteopathy, or as a physician's assistant.

(n) *Newly Hired Employee* is any person who is hired with no prior railroad experience, or one with less than one year of experience in transportation service on that railroad or another railroad.

(o) *Railroad* means all forms of non-highway ground transportation that run on rail or electromagnetic guideways, including:

(1) Commuter or other short-haul rail passenger service in a metropolitan or suburban area and

(2) High speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads.

Such term does not include rapid transit operations within an urban area that are not connected to the general railroad system of transportation.

(p) *Railroad Officer* means any supervisory employee of a railroad.

(q) *Segment* means any portion of a railroad assigned to the supervision of one superintendent or equivalent transportation officer.

(r) *Type 1 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 illustrates the route to be taken;

(3) Graphically 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 programed for specific train consists and the known physical characteristics of the line pictorially illustrated.

(s) *Type 2 Simulator* means a replica of the control equipment for a locomotive 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) Graphically illustrates the route to be taken;

(3) Graphically 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 programed for specific train consists and the known physical characteristics of the line pictorially illustrated.

§ 240.7 Waivers.

(a) Any person may petition the Federal Railroad Administration for a waiver of compliance with any requirement prescribed in this part.

(b) Each petition for a waiver under this section must be filed in the manner and contain the information required by part 211 of this chapter.

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

§ 240.9 Consequences for noncompliance.

(a) Any person (including a railroad, and any manager, supervisor, official, or other employee or agent of a railroad) who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least $250, but not more than $10,000 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 $20,000 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) Any person (including a railroad, and any manager, supervisor, official, or other employee or agent of a railroad) who violates any requirement of this part or causes the violation of any such requirement may be subject to disqualification from all safety sensitive service in accordance with part 209 of this chapter.

(c) Any person (including a railroad, and any manager, supervisor, official, or other employee or agent of a railroad) who knowingly and wilfully falsifies any record required by part in violation of § 240.103 or § 240.105 may be subject to criminal penalties under the provisions of 45 U.S.C. 438.

Subpart B—Railroad Responsibilities

§ 240.11 Qualified operators required.

(a) After ______, no railroad subject to this part shall permit or require any person to operate a locomotive unless that person is certified as a qualified operator under the provisions of this part and has been issued a certificate that complies with the provisions of § 240.101.

(b) At an interval of not to exceed thirty six months, each railroad shall recertify that an individual is a qualified locomotive operator. That interval shall be measured from the date of the initial certification or from the date of each subsequent recertification.

(c) If a railroad relies on a certification made by another railroad, under the provisions of subpart C of this part, the interval shall be measured from the date the first railroad rendered its decision.

(d) Except where interim determinations may be made under subpart D of this part, in order to certify or recertify any person as a qualified operator, each railroad shall make the determinations required by subpart C of this part.

§ 240.13 Designation of classes of operator services.

(a) Each railroad shall designate in its certificate which of the five classes of operations, provided for in paragraph (b) of this section, that it determines an individual is qualified to perform.

(b) There shall be five classes of qualified operators:

(1) Unlimited train service operators,

(2) Terminal train service operators,

(3) Restricted train service operators,

(4) Locomotive servicing operators, and

(5) Student operators.

(c) The following operational constraints apply to each class of operator certificate:

(1) Unlimited train service operators may operate locomotives singly or in multiples and may move them with or without cars coupled to them during any train operations including those that exceed the limitations for movements prescribed for Terminal and Limited train service operators.

(2) Terminal train service operators may operate locomotives singly or in multiples and may move them with or without cars coupled to them during operations that are limited to switching cars, making up and breaking up trains, and the movement of trains where the movements do not exceed the definition of a yard or transfer train movement contained in 49 CFR 232.13(e)(1).

(3) Restricted train service operators may operate locomotives singly or in multiples and may move them with or without cars coupled to them provided that during operations:

(i) Speeds do not exceed 20 mph;

(ii) No more than 30 cars are coupled to the locomotive(s) at any one time; and

(iii) No more than cne train is being operated on the same line segment.

(4) Locomotive servicing operators may only operate locomotives singly or in multiples but may not move cars.

(5) Student operators may only operate under direct and immediate supervision of an instructor operator.

§ 240.15 Exceeding classification limits prohibited.

No railroad shall permit or require a certified locomotive operator to perform a type of service that exceeds the limits as set forth in § 240.13 for his or her operational classification.

§ 240.17 Additional limitations on service.

(a) Each railroad is authorized to impose additional operational restrictions on the service a qualified train service operator may perform beyond those identified in § 240.15.

(b) No railroad shall permit or require a locomotive operator to operate a locomotive or train that would cause that person to exceed such additional operational restrictions imposed by the railroad.

§ 240.19 Familiarization with physical characteristics.

(a) No railroad shall permit or require a certified locomotive operator to operate a locomotive or train over its operational territory or any segment of that territory unless that person has demonstrated familiarity with the physical characteristics of the relevant operational territory.

(b) The following actions constitute demonstrating familiarity with the physical characteristics:

(1) Operation of trains over the entire territory prior to the effective date of this rule (for operators covered by subpart D) or as part of a training program (for student operators), provided that no more than one year has elapsed since the person last operated a train over the territory; or

(2) Attendance at a supplemental training program that complies with § 240.67(a).

Subpart C—Basis for Qualification Determinations

§ 240.21 Qualification determinations required for operators.

(a) Except where the interim certification permitted by subpart D of this part applies, prior to certifying any individual as an operator for any class of service, each a railroad shall determine:

(1) That the individual meets the visual and hearing acuity standards of § 240.43; and

(2) That the individual meets the eligibility requirements of § 240.57;

(b) In addition to complying with paragraph (a) of this section, prior to certifying any individual as a qualified locomotive servicing operator or any class of train service operator, each railroad shall determine:

(1) That the individual has the necessary knowledge, as demonstrated by successfully completing a test that meets the requirements of § 240.71 or § 240.77;

(2) That the individual has the necessary operating performance skills which have been established for the class of service which that person will be performing, as demonstrated by successfully completing an operational performance test that meets the requirements of § 240.81 or § 240.87; and

(3) That the individual is familiar with the physical characteristics of the territory on which he or she will operate in accordance with the requirements of § 240.19; and

(4) Except with regard to operators who are being recertified, that the individual has successfully completed a training program under § 240.63 for the class of service he or she is being certified for.

(c) A railroad may certify a student operator as either a locomotive servicing operator or a train service operator without further review of their medical or driver records required under paragraph (a) of this section if:

(1) The person successfully completed a training program that complies with §§ 240.61 and 240.63; and

(2) A period of not more than twenty-four months has elapsed since the student operator certification was issued.

§ 240.23 Qualification determinations required for operators performing in joint operations territory.

(a) Each railroad that is responsible for controlling the conduct of joint operations with another railroad may certify a person as a qualified locomotive operator for the purposes of joint operations either by making the determinations required by § 240.21 or by relying on the certification issued by another railroad under that section.

(b) If the controlling railroad relies on the certification issued by another railroad, the controlling railroad shall determine:

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

(2) That the person certified as a locomotive operator by the other railroad has the necessary knowledge concerning the controlling railroad's operating rules;

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

(4) That the person certified as a locomotive operator by the other railroad has the necessary familiarity with the physical characteristics for the joint operations territory.

§ 240.25 Reliance on determinations by other railroads.

After ____, any railroad that is considering certification of an individual as a qualified operator may give full faith and credit to determinations made by another railroad concerning that person's qualifications provided that:

(a) Those determinations are current within the provisions of § 240.11;

(b) The person receives training on and visually observes the physical characteristics of the new territory in accordance with § 240.67; and

(c) The person has the necessary knowledge concerning its operating rules.

§ 240.27 Reliance on other qualification requirements.

(a) A railroad that conducts joint operations with a Canadian railroad may certify, for the purposes of compliance with this Part, that a locomotive operator is a qualified operator provided it determines that:

(1) The operator is employed by the Canadian railroad; and

(2) The operator meets or exceeds the qualifications standards of the Canadian Transport Commission for such service.

(b) Any Canadian railroad that is required to comply with this regulation may certify that a locomotive operator is a qualified operator for the purpose of compliance with this part provided it determines that:

(1) The operator is employed by the Canadian railroad; and

(2) The operator meets or exceeds the qualifications standards of the Canadian Transport Commission for such service.

Subpart D—Interim Qualification Presumed

§ 240.31 Interim presumption of qualifications (grandfathering of existing operators).

(a) Each railroad in operation on ______ (the effective date of this rule), may certify that any individual employed by it on that date is a "qualified operator" for the purpose of compliance with this part, provided that the railroad:

(1) Has previously considered that person qualified to operate a locomotive on the basis of that person's training or experience; and

(2) Identifies that person in accordance with § 240.107, including identification of the class or type of service that person is considered qualified to perform in accordance with those established in § 240.13.

(b) No railroad shall permit or require a grandfathered operator to perform locomotive or train service duties after that date (i.e., 36 months after the effective date of this rule) unless that person has been determined to be qualified in accordance with procedures that comply with § 240.21.

§ 240.33 Interim presumptions for joint operations.

(a) Each railroad which controls joint operations and is in operation on the effective date of this rule, may certify that an individual is a qualified operator for joint operational purposes provided that:

(1) This person is employed by another railroad on that date;

(2) This person is deemed by the employing railroad to be a "qualified operator" under the provisions of this part;

(3) The railroad responsible for the control of the joint operations has previously considered this person qualified to operate a locomotive on its trackage; and

(4) The railroad identifies this person in accordance with § 240.107.

(b) No railroad shall permit or require an operator certified under paragraph (a) of this section to perform locomotive or train service after _______ (i.e., 36 months after the effective date of this rule) unless that person has been determined to be qualified in accordance with the requirements of subpart C of this part.

Subpart E—Medical Qualification Decisions

§ 240.41 Determinations required.

(a) Each railroad shall determine that any individual it certifies under § 240.11(a) to be a qualified locomotive operator has visual acuity and hearing acuity that meets or exceeds the levels prescribed in § 240.43.

(b) In order to make the determination required under paragraph (a) of this section, the certifying railroad shall possess a medical examiner's certificate that the individual has been medically examined and meets these acuity standards.

§ 240.43 Acuity standards.

(a) Each locomotive operator 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 signals.

(b) Each locomotive operator shall have hearing acuity that meets or exceeds the following thresholds:

(1) If tested by use of an audiometric device (calibrated to American National Standard Z24.5–1951), the person does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without use of a hearing aid; or

(2) If tested without use of an audiometric device, the person perceives a forced whisper in the better ear at not less than 5 feet with or without use of a hearing aid.

§ 240.45 Acuity examinations required.

(a) Any examination required for compliance with § 240.43 shall be performed by a medical examiner except that

(1) A licensed optometrist may perform the portion of the examination that pertains to visual acuity; and

(2) A licensed audiologist may perform the portion of the examination that pertains to hearing acuity.

(b) The examination required for compliance with § 240.41 shall be performed within 90 days preceding and at the same intervals as that prescribed for the initial certification and any subsequent certifications made in compliance with § 240.11.

(c) The results of the examination shall be documented in writing and either the original or a copy shall be maintained by the railroad under the provisions of § 240.105.

(d) If the examination discloses that the person needs either corrective lens and/or a hearing aid to meet the thresholds acuity levels established in § 240.43, that fact shall be noted on the certificate issued under the provisions of § 240.101 and the operator shall wear the relevant device while operating a locomotive or train.

Subpart F—Eligibility Decisions

§ 240.51 Railroad's duty to obtain and evaluate information concerning prior conduct.

(a) Each railroad shall obtain information concerning the prior conduct of an individual before making a certification or recertification decision under subpart C of this part. The information shall include data concerning that person's prior conduct as a railroad employee and the prior conduct of that individual as an operator of a motor vehicle during the 60 months preceding this evaluation.

(b) 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 qualified locomotive operator.

(c) Each railroad shall evaluate the information obtained in accordance with paragraph (a) of this section and determine that any person it certifies under the provisions of subpart C as a qualified operator meets the eligibility requirements prescribed in § 240.57.

(d) Each railroad shall review the information it has compiled concerning a prospective operator's conduct as its employee and/or the information furnished by any other railroad, if the prospective operator was employed by any another railroad.

(e) All information concerning an individual's prior railroad employment conduct that a railroad will consider in making an eligibility determination under this subpart shall be reduced to writing prior to its being considered by the railroad.

(f) Each railroad shall review:

(1) The information compiled by any state agency that issued or reissued the prospective operator a motor vehicle driver license in the last five years and furnished by the agency in accordance with § 240.52(b)(1);

(2) The information furnished as the result of the National Driver Register check performed in accordance with § 240.52(b)(2); and

(3) The information furnished as the result of compliance with paragraph (g) of this section, if the National Driver Register check reveals the existence of additional information, provided by a state agency other than the state agency or agencies that issued the prospective operator a license within the last 5 years which potentially relates to the prospective operator.

(g) If it receives information from a driver licensing agency or the National Highway Traffic Safety Administration, as the result of performance of a National Driver Register check in compliance with § 240.52(b)(2), that additional information may exist in the files of a state agency not contacted under § 240.52(b)(1) concerning a person being considered for certification or recertification, a railroad shall

(1) Request, in writing, that the chief of the driver licensing agency or agencies which compiled the information provide a copy of that agency's available information concerning the prospective operator to the railroad;

(2) Take any additional action required by State or Federal law to obtain that additional information concerning the prospective operator's driving record; and

(3) Upon receipt of that additional information, verify that the information does relate to the prospective operator through comparison of physical description, photographs or handwriting comparisons.

(h) Prior to evaluating any records concerning prior conduct by an individual obtained in compliance with this section, each railroad shall give the person seeking to be certified an opportunity to review such record or records if that record(s) contains information of the type identified in §§ 240.53 and/or 240.55 which could provide a basis for determining that the individual does not meet to eligibility criteria of § 240.57.

(i) Any person who must be given access to a record or records under paragraph (h) of this section shall be given an opportunity to comment on that record(s) in writing, if the person so desires prior to the railroad's evaluation of the record(s). Any such comment shall be retained by the railroad in accordance with § 250.103.

240.52 Individual's duty to furnish motor vehicle operator licensing records.

(a) Each person seeking certification or recertification under this part shall:

(1) Take the actions required by paragraphs (b) through (f) of this section to make information concerning his or her driving record available 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 driving record available to that railroad.

(b) Each person seeking certification or recertification under this part shall:

(1) Request, in writing, that the chief of the driver licensing agency, identified in paragraph (c) of this section, provide a copy of that agency's available information concerning his or her driving record to the railroad that is considering such certification or recertification; and

(2) Request, in accordance with the provisions of paragraph (d) or (e) of this section, that a check of the National Driver Register be performed to identify additional information concerning his or her driving record and that any resulting information be provided 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 which last issued that person a driver's license; and

(2) The chief of the driver licensing agency of any other state or states 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, 400 Seventh Street, SW., Washington, DC 20590 in accordance with the procedures contained in Appendix B unless the person's motor vehicle driving license was issued by one of the driver licensing agencies identified in Appendix C.

(e) If the person's motor vehicle driving license was issued by one of the driver licensing agencies identified in Appendix C, 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) Any person who has never obtained a motor vehicle driving license shall notify the railroad of that fact in writing and is not required to comply with the provisions of paragraph (b).

(g) The request required for compliance with paragraph (a) of this section shall be performed within the 90 days preceding and at the same interval as that prescribed for the initial certification and any subsequent certifications made in compliance with § 240.11 of this part.

§ 240.53 Limitations on consideration of motor vehicle licensing data.

(a) When evaluating a person's motor vehicle driving record, a railroad shall not consider information concerning motor vehicle driving incidents that occurred more than 60 months before the month in which the railroad is making its certification decision.

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

(1) A conviction for, or state action for cause to cancel, revoke, suspend, or deny a motor vehicle drivers license for operating a motor vehicle while under the influence of or impaired by, alcohol or a controlled substance;

(2) A conviction for, or state action for cause to cancel, revoke, suspend, or deny a motor vehicle driver's license for refusal to undergo such testing as is required by State 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.

(3) A conviction for any of the following serious traffic violations:

(i) Excessive speeding involving any charge of operating at more than 15 miles per hour or more above the posted speed limit;

(ii) Reckless driving, as defined by State law, local law or regulation;

(iii) A moving violation of State law or local law arising in connection with a fatal traffic accident; and

(iv) Driving with a revoked or suspended license.

(c) No railroad shall assign numerical weights for the purposes of § 240.57 to motor vehicle incidents of the type identified in paragraphs (b)(1) and (b)(2) of this section, if:

(1) An EAP counselor conducts a review under the provisions of § 240.59; and

(2) The EAP counselor finds that the event(s) was followed by an appropriate course of counseling or treatment

(d) The individual seeking certification or recertification has the burden of convincing the EAP counselor of the nature, duration and effectiveness of that counseling and the finding of the EAP counselor will not be disturbed.

§ 240.55 Limitations on consideration of railroad employment data.

(a) When evaluating a person's railroad employment record a railroad shall not consider information concerning prior railroad performance of safety duty incidents that occurred more than 60 months before the month in which the railroad is making it's certification decision.

(b) A railroad shall only consider information concerning the following types of safety duty incidents:

(1) Any finding that the person used or possessed alcohol or a controlled substance while assigned by a railroad to perform service;

(2) Any finding that a person reported for, went on, or remained on duty in covered service while under the influence of or impaired by alcohol or a controlled substance;

(3) Any finding that a person refused to cooperate in providing a blood or urine sample as required by part 219 of this chapter;

(4) Any finding that a person, while performing service as a locomotive operator was responsible for

(i) Permitting a locomotive or train to operate at a speed that exceeded the maximum authorized limit by 10 miles per hour or more or exceeded the maximum speed by more than one half of the authorized speed, which ever is less;

(ii) Permitting a locomotive or train to pass any signal that requires a complete stop before passing it;

(iii) Failing to comply with any mandatory directive by entering a segment of track without authority; and

(iv) Failing to comply with the prohibitions of part 218 of this chapter by wilfully tampering with a safety device.

(5) Any finding that, while performing service related to the operation of trains and directly responsible for compliance, a person failed to comply with any mandatory directive concerning the operation of a train that involved any of the following:

(i) Operation of a locomotive or train at a speed that exceeded the maximum authorized limit by 10 miles per hour or more than half of the authorized speed;

(ii) Permitting a locomotive or train to pass any signal that requires a complete stop before passing it;

(iii) Entering a segment of track without authority;

(iv) Failure to protect a locomotive or train as required by a carrier operating rule that is consistent with 49 CFR 218.37;

(v) Misalignment of a switch or operation of switch under a train;

(vi) Failure to secure a handbrake or a sufficient number of handbrakes; and

(vii) Failure to comply with the prohibitions of part 218 of this chapter by wilfully tampering with a safety device.

(c) No railroad shall assign numerical weights for the purposes of § 240.57 to railroad performance of safety duty incidents of the type identified in paragraph (b) of this section, if:

(1) An EAP counselor conducts a review under the provisions of § 240.59; and

(2) The EAP counselor finds that the event(s) was followed by an appropriate course of counseling or treatment

(d) The individual seeking certification or recertification has the burden of convincing the EAP counselor of the nature, duration and effectiveness of that counseling and the finding of the EAP counselor will not be disturbed.

§ 240.57 Railroad evaluation of the consequences of adverse information.

(a) Except for incidents for which an EAP counselor has made a finding of acceptable counseling or treatment under § 240.59, any incident identified in either paragraphs (b)(1) or (b)(2) of § 240.53 or § 240.55, shall be assigned a value of 3 points for the purpose of evaluating their significance under this part.

(b) Any incident identified in § 240.53 (b)(3) shall be assigned a value of two points for the purpose of evaluating their significance under this part.

(c) Each railroad shall evaluate the significance of any such incidents in accordance with the following provisions:

(1) Any individual who has accumulated less than six points shall not determined to be ineligible to be a locomotive operator under this part;

(2) Any individual who has accumulated six points may be determined to be eligible to be a locomotive operator but that certification shall be conditioned on adherence to requirements imposed in compliance with § 240.59;

(3) Any person who has accumulated more than six points shall be determined to be ineligible to be a locomotive operator under this part until 5 years have elapsed since the occurrence of the most recent incident; and

(4) Any person who has accumulated more than six points and this is the second time that the individual has accumulated more than six points, shall be determined to be ineligible under this part.

§ 240.59 Conditional certifications.

(a) Any person who has been involved in any incident identified in paragraphs (b)(1) or (b)(2) of § 240.53 and/or paragraphs (b)(1) through (3) of § 240.55 shall not be certified as a locomotive operator until that person has been evaluated by an EAP counselor to determine:

(1) If the incident was followed by an appropriate course of counseling or treatment; and

(2) If the person is currently affected by a psychological or physical dependence on one or more controlled substances or by another identifiable and treatable mental or physical disorder involving abuse of alcohol or drugs as a primary manifestation.

(b) Prior to being certified any person identified in paragraph (a)(2) of this section shall have successfully completed any course of counseling or treatment determined to be necessary by the EAP counselor prior to performing any service as a locomotive operator as provided for under part 219 of this chapter.

(c) Any person identified in paragraph (b) of this section who is being certified under this section shall continue in any program of counseling or treatment deemed necessary by the EAP counselor and provided for under part 219 of this chapter.

(d) Any person who has accumulated six points because of having been involved in multiple incidents identified in § 240.53 and/or § 240.55 shall not be certified as a locomotive or train service operator until that person has completed a training program that meets or exceeds the requirements contained in § 240.63.

Subpart G—Training Programs

§ 240.61 Structure and approval of training programs for student locomotive operators.

(a) After ______, any railroad that conducts a training program to qualify a person as a locomotive operator shall have a program that:

(1) Is composed of classroom, skill performance, and familiarization with physical characteristics components that meet or exceed the requirements of § 240.63; and

(2) Includes both knowledge testing that complies with § 240.71 and performance skill testing that complies with § 240.81.

(b) Each railroad to which paragraph (a) of this section applies shall submit a detailed description of that training program to the Federal Railroad Administration for approval within the following intervals:

(1) If the training program is in existence on the effective date of this rule, the railroad shall file that program description no later than ninety days after the effective date of the rule and have available for inspection a copy of its instructional materials; or

(2) If the training program is not in existence on the effective date of this rule, the railroad shall file that program description at least ninety days prior to initiation of any instructional effort based on that program and have available for inspection a copy of its instructional materials.

(c) Each railroad shall be notified in writing upon approval or disapproval of its program. Approval shall be presumed, if the Federal Railroad Administration has not notified the railroad in writing of disapproval within sixty days after the program is filed.

(d) The Federal Railroad Administration reserves the right to revoke any approval, whether express or implied, if it subsequently determines that the program does not comply with the requirements of § 240.63.

§ 240.63 Content and duration of student training programs.

(a) For the purposes of this section the categories identified in this paragraph refer to the minimum training to be afforded a person seeking to perform the following types or class of service:

(1) "Category A" is for individuals who are seeking to become unlimited train service operators and thus perform operations that exceed the operational limitations for locomotives and trains contained in the Category B, C, and D operations.

(2) "Category B" is for individuals who are seeking to become terminal train service operators and thus perform operations that are limited to switching cars, making up and breaking up trains, and the movement of trains where the movement does not exceed the definition of a yard or transfer train movement as contained in the Power Brake Law, 49 CFR 232.13(e)(1).

(3) "Category C" is for individuals who are seeking to become locomotive servicing operators and thus perform operations that are limited to moving locomotives, without cars attached, over yard and main tracks between the locations where the locomotives are repaired or maintained, and the locations where the locomotives are put into or removed from road or yard service;

(4) "Category D" is for individuals who are seeking to become restricted train service operators and thus perform operations that are limited to the movement of locomotives and trains at speeds not exceeding 20 mph; with trains of less than 30 cars; and do not occur on line segments where more than one train at a time is operated.

(b) The classroom component of the program required under § 240.61 shall:

(1) Be conducted under the supervision of a qualified class instructor;

(2) Be subdivided into segments or periods of appropriate duration to effectively cover the subject matter areas identified in paragraph (b)(4) of this section;

(3) Involve the use of actual on-track equipment during less than one-half of the duration of the subject matter training period; and

(4) Meet the minimum duration for the category of service in which the person will be certified as specified in the following chart:

Subject	Minimum duration (in hours) of training for each operational class of service category			
	A	B	C	D
Personal safety, newly hired employees only	40	40	40	24
Operating rules	40	40	20	20
Mechanics	24	12	12	12
Air brakes (includes brake tests)	24	16	12	12
Train handling	30	16	8	16
Hazardous materials emergency response	16	16	8	8
Other Federal regulations, locomotive inspection, hours of service, drug and alcohol, radio procedure	16	16	16	16
Administrative matters	8	8	8	8
Total (current employees)	158	128	84	92
Total (newly hired)	198	168	124	116

(c) The performance skill component of the training program shall:

(1) Be conducted under the supervision of a qualified instructor operator located in the same control compartment,

(2) Be conducted so that the student operator is at the controls of a locomotive for at least one half of the time,

(3) Be conducted so that the student experiences whatever variety of types of

trains are normally operated over the territory; and

(4) Meet the minimum duration for the category of service in which the person will be certified provided that each student shall be given the minimum total of actual train operation (i.e., combined actual and simulator operation) that is identified in the following chart:

	Minimum duration (in hours) of training for each operational class of service category			
	A	B	C	D
Performance skill training (includes physical characteristics familiarization).....	480	240	60	60

(d) The minimum duration for the performance skills training identified in paragraph (c) of this section may be satisfied through the use of simulator training in accordance with the provisions of paragraphs (e), (f) and (g) of this section.

(e) If training on a simulator is substituted for a portion of the actual train operation experience when teaching performance skills, each student shall be given the minimum period of actual train operation that is identified in the following chart:

Type of simulator being substituted	Minimum period of actual train operations for each class of service			
	A	B	C	D
Type 1 simulator....	240	120	30	30
Type 2 simulator....	360	180	60	60

(f) One hour of training on a Type 1 simulator can be counted as up to 5 hours of total train operation experience.

(g) One hour of training on a Type 2 simulator can be counted as up to 2 hours of total train operation experience.

(h) The familiarization with physical characteristics component of the training program shall:

(1) Be conducted while the student operator is operating under the supervision of a instructor operator; and

(2) Be conducted so that the student operator is at the controls of a locomotive while making at least three round trips over the entire territory across which the student will be authorized to operate.

(i) Nothing in paragraph (h) of this section shall prevent training from being provided directly by a railroad other than that which employs the student operator's employing railroad or training by a non-railroad entity provided that the employing railroad complies with § 240.65.

§ 240.65 Supplemental training required.

(a) Each railroad to which this part applies shall make available to locomotive operators an educational training program that complies with § 240.67 of this part.

(b) The educational training program required by this section shall be made available when any of the following events occur:

(1) A locomotive operator is being authorized or directed by the railroad to operate over territory across which he or she has not previously performed locomotive operator service;

(2) A locomotive operator is being authorized or directed by the railroad to operate over territory across which he or she has not operated as a locomotive operator in more than 365 days;

(3) A locomotive operator is being authorized or directed by the railroad to operate a locomotive equipped with significant new technology as defined in § 240.67; or

(4) A period of more than 30 but less than 40 months has elapsed since the locomotive operator received an educational training program that meets the requirements of either § 240.63 or § 240.67.

§ 240.67 Structure, duration and content of supplemental training programs.

(a) Each supplemental training program that is being provided by a railroad, in compliance with paragraphs (b) (1) or (2) of § 240.65, shall

(1) Be designed to provide a locomotive operator with familiarity with the physical characteristics of the territory across which the operator is being or will be authorized to operate; and

(2) Result in that individual operating at least three round trips over the territory while at the controls of a locomotive and accompanied by an operator already familiar with and qualified on that territory.

(b) Each supplemental training program that is being provided by a railroad, in compliance with paragraph (b)(3) of § 240.65, shall be designed to provide a locomotive operator with familiarity with new technology and of sufficient duration to teach the operator how to properly perform his or her assigned responsibilities concerning that technology.

(c) Each supplemental training program that is being provided by a railroad, in compliance with paragraph (b)(4) of § 240.65, shall comply with the following:

(1) At a minimum, each operator will receive 8 hours of instruction;

(2) The instruction will be provided in a classroom type setting; and

(3) The subject matter covered will include:

(i) Good personal safety practices,

(ii) Relevant operating practices,

(iii) Relevant mechanical inspection practices,

(iv) Proper airbrake inspection procedures,

(v) Proper train handling procedures, and

(vi) Proper procedures for handling hazardous materials.

Subpart H—Testing Operator Knowledge

§ 240.71 Initial testing required.

(a) No railroad shall certify a person as a qualified locomotive servicing operator or a train service operator under the provisions of §§ 240.21 or 240.23 unless that person has taken and passed a knowledge test that complies with § 240.73, except as provided for in paragraph (b) of this section.

(b) A railroad may certify a person as a qualified locomotive servicing operator or train service operator under the provisions of § 240.31 (interim or grandfather basis for qualifications) for a period of not to exceed 36 months from the effective date of this rule without first having taken and passed a knowledge test that complies with § 240.73.

§ 240.73 Criteria for knowledge tests.

(a) Testing under this section shall be designed to examine a person's knowledge of the railroad's rules and practices for the safe operation of trains.

(b) Each test shall:

(1) Be objective in nature, in written rather than oral form, and cover the following subjects:

(i) Personal safety practices;

(ii) Operating practices;

(iii) Equipment inspection practices;

(iv) Train handling practices; and

(v) Compliance with Federal safety rules.

(2) Be sufficient to:

(i) Effectively examine the subjects covered, and

(ii) To accurately measure the person's knowledge; and

(3) In no event contain less than 150 questions.

(c) The minimum passing score for such tests shall be at least 85 percent and no testing shall be done with open reference books or materials.

(d) Any railroad that is testing an individual's knowledge concerning the aspects and indications of operational signals shall have a minimum passing score of 100 percent for the signal portions of such test.

§ 240.75 Consequences of failing initial testing.

(a) *Grandfathered Operators.* If, prior to taking the test, the person being tested has been deemed a qualified operator under the grandfathering provisions of § 240.31, the following requirements shall apply:

(1) If the person fails to achieve both of the passing scores provided for in paragraphs (c) and (d) of § 240.73 and if this is the first test the person has taken under this part, a railroad shall not permit that person to continue to operate a locomotive as either a locomotive servicing operator or any class of train service operator for a period of more than 60 days.

(2) During that sixty-day interval, the person shall be given a reexamination.

(3) That reexamination shall comply with the requirements of § 240.73 and must not occur less than 15 days from the date of the first test.

(4) In the event that the person takes a reexamination and fails to achieve both of the passing scores provided for in paragraphs (c) and (d) of § 240.73, no railroad shall permit or require that person to operate a locomotive as either a locomotive servicing operator or any class of train service operator until that person successfully passes a reexamination.

(5) That second reexamination shall comply with the requirements of § 240.73 and must not occur less than 30 days from the date of the second test.

(6) In the event that the person takes a second reexamination and fails to achieve both of the passing scores provided for in paragraphs (c) and (d) of § 240.73, no railroad shall permit or require that person to operate a locomotive except as student operator completing a training program that complies with § 240.61.

(b) Student Operators. If, prior to taking the test, the person being tested has been deemed a student operator under the provisions of § 240.21, the following requirements shall apply:

(1) If the person fails to achieve both of the passing scores provided for in paragraphs (c) and (d) of § 240.73 and if this is the first test the person has taken under this part, a railroad shall not permit that person to continue to operate a locomotive, except as a student operator under the direct supervision of an instructor operator, for a period of more than 60 days.

(2) During that sixty day interval, the person shall be given a reexamination.

(3) That reexamination shall comply with the requirements of § 240.73 and must not occur less than 15 days from the date of the first test.

(4) In the event that the person takes a reexamination and fails to achieve both of the passing scores provided for in paragraphs (c) and (d) of § 240.73, no railroad shall permit or require that person to operate a locomotive, except as a student operator under the direct supervision of an instructor operator, until that person successfully passes a reexamination.

(5) That second reexamination shall comply with the requirements of § 240.73 and must not occur less than 30 days from the date of the second test.

(6) In the event that the person takes a second reexamination and fails to achieve both of the passing scores provided for in paragraphs (c) and (d) of § 240.73, no railroad shall permit or require that person to operate a locomotive except as a student operator completing a second training program that complies with § 240.61.

(c) *Other Operator Candidates.* If, prior to being tested, the person being tested has not been deemed either a qualified operator under the grandfathering provisions of § 240.31 or a student operator under the provisions of § 240.21, the following requirements shall apply:

(1) If the person fails to achieve both of the passing scores provided for in paragraphs (c) and (d) of § 240.73 and if this is the first test the person has taken under this part, a railroad shall not permit that person to continue to operate a locomotive, except as a student operator under the direct supervision of an instructor operator, for a period of more than 60 days.

(2) During that sixty day interval, the person shall be given a reexamination.

(3) That reexamination shall comply with the requirements of § 240.73 and must not occur less than 15 days from the date of the first test.

(4) In the event that the person takes a reexamination and fails to achieve both of the passing scores provided for in paragraphs (c) and (d) of § 240.73, no railroad shall permit or require that person to operate a locomotive, except as a student operator under the direct supervision of an instructor operator, until that person successfully passes a reexamination.

(5) That second reexamination shall comply with the requirements of § 240.73 and must not occur less than 30 days from the date of the second test.

(6) In the event that the person takes a second reexamination and fails to achieve either of the passing scores provided for in paragraphs (c) and (d) of § 240.73, no railroad shall permit or require that person to operate a locomotive except as a student operator completing a second training program that complies with § 240.61.

§ 240.77 Recertification testing required.

(a) After ________ each railroad to which this part applies shall administer written tests to all individuals seeking recertification as a locomotive operator.

(b) Testing required in paragraph (a) of this section shall be performed within 90 days preceding and at the same interval prescribed for subsequent certifications made in compliance with § 240.11.

(c) Testing under this section shall be designed to examine a person's knowledge of the railroad's rules and practices for the safe operation of trains and shall comply with criteria for initial testing established under § 240.71.

§ 240.79 Consequence of failing recertification test.

(a) If the person being tested in compliance with the requirements of § 240.77 fails to achieve both of the passing scores provided for in paragraphs (c) and (d) of § 240.73, no railroad shall permit or require that person to continue to operate a locomotive as either a locomotive servicing operator or any class of train service operator for a period of more than 60 days unless that person successfully passes a reexamination within that 60 day interval.

(b) That reexamination shall comply with the requirements of § 240.73 and must not occur less than 15 days from the date of the first test.

(c) If the person takes a reexamination and fails to achieve both of the passing scores provided for in paragraphs (c) and (d) of § 240.73, no railroad shall permit or require that person to operate a locomotive, except as a student operator under the direct supervision of an instructor operator, until that person successfully passes a reexamination.

(d) That second reexamination shall comply with the requirements of § 240.73 and must not occur less than 30 days from the date of the second test.

(e) If the person takes a second reexamination and fails to achieve both of the passing scores provided for in paragraphs (c) and (d) of § 240.73, no railroad shall permit or require that person to operate a locomotive except as a student operator completing a training program that complies with § 240.61.

Subpart I—Performance Skills Testing Programs

§ 240.81 Initial testing required.

(a) No railroad shall certify a person as a qualified locomotive servicing operator or a train service operator under the provisions of §§ 240.23 or 240.25 unless that person has taken and passed a performance skills test that complies with § 240.83, except as provided for in paragraph (b) of this section.

(b) A railroad may certify a person as a qualified locomotive servicing operator or train service operator under the provisions of § 240.31 (interim or grandfather basis for qualifications) for a period of not to exceed 36 months from the effective date of this rule without first having taken and passed a performance skills test that complies with § 240.83.

§ 240.83 Criteria for initial testing.

(a) Testing under this section shall be designed to examine a person's skills in safely operating locomotives or trains including the proper application of the railroad's rules and practices for the safe operation of locomotives or trains when performing the most demanding class or type of service that the person will be permitted to perform.

(b) Each test required under § 240.81 shall be conducted by a designated supervisor of locomotive operators and shall:

(1) 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;

(2) Be of sufficient length to effectively evaluate the person's ability to operate trains; and

(3) Be conducted when the person is at the controls of the type of train normally operated on that railroad or segment of railroad and which this person might be permitted or required by the railroad to operate in the normal course of events after certification.

(c) The observations and evaluation of the designated supervisor of locomotive operators shall be documented in writing by the person conducting the test in accordance with the provisions of § 240.109.

(d) A railroad may substitute the use of a locomotive operations simulator to conduct the testing required under this section if:

(1) A Type 1 simulator is employed for the test, and

(2) The simulator is programmed to provide a test that meets the criteria of paragraphs (a) through (c) of this section.

§ 240.85 Consequences of failing initial testing.

(a) *Grandfathered operators.* If, prior to taking the test, the person being tested has been deemed a qualified operator under the grandfathering provisions of § 240.31, the following requirements shall apply:

(1) If the person's performance, in the view of the designated supervisor of locomotive operators, fails to demonstrate that the person is able to safely operate a locomotive or train in the type or class of service for which he or she is being tested and if this is the first test the person has taken under this part, no railroad shall permit or require that person to continue to operate a locomotive as either a locomotive servicing operator or any class of train service operator until the person successfully passes a reexamination.

(2) That reexamination shall comply with the requirements of § 240.83 and must not occur less than 15 days from the date of the first test.

(3) If the person fails the reexamination, no railroad shall permit or require that person to operate a locomotive, except as a student operator under the direct supervision of an instructor operator, until that person successfully passes a reexamination.

(4) That second reexamination shall comply with the requirements of § 240.83 and must not occur less than 30 days from the date of the second test.

(5) If the person fails a second reexamination, no railroad shall permit or require that person to operate a locomotive except as a student operator completing a training program that complies with § 240.61.

(b) Student Operators. If, prior to taking the test, the person being tested has been deemed a student operator under the provisions of § 240.21 the following requirements shall apply:

(1) If the person's performance, in the view of the designated supervisor of locomotive operators, fails to demonstrate that the person is able to safely operate a locomotive or train in the type or class of service for which he or she is being tested and if this is the first test the person has taken under this part, no railroad shall permit or require that person to continue to operate a locomotive except as a student operator under the direct supervision of an instructor operator, for a period of more than 60 days.

(2) During that interval, the person must successfully pass a reexamination.

(3) That reexamination shall comply with the requirements of § 240.83 and must not occur less than 30 days from the date of the first test.

(4) In the event that the person takes a reexamination and fails to demonstrate to a designated supervisor of locomotive operators the ability to safely operate a locomotive or train in the type or class of service for which he or she is being tested, no railroad shall permit or require that person to operate a locomotive unless that person is completing a second training program that complies with § 240.61.

(c) Other Operator Candidates. If, prior to taking the test, the person being tested has not been deemed either a qualified operator under the grandfathering provisions of § 240.31 or a student operator under the provisions of § 240.21, the following requirements shall apply:

(1) If the person's performance, in the view of the designated supervisor of locomotive operators, fails to demonstrate that the person is able to safely operate a locomotive or train in the type or class of service for which he or she is being tested and if this is the first test the person has taken under this part, no railroad shall permit that person to operate a locomotive, except as a student operator under the direct supervision of an instructor operator, for a period of more than 60 days.

(2) During that interval, the person must successfully pass a reexamination.

(3) That reexamination shall comply with the requirements of § 240.83 and must not occur less than 30 days from the date of the first test.

(4) In the event that the person takes a reexamination and the person's performance, in the view of the designated supervisor of locomotive operators, fails to demonstrate that the person is able to safely operate a locomotive or train in the type or class of service for which he or she is being tested, no railroad shall permit or require that person to operate a locomotive except as a student operator completing a training program that complies with § 240.61.

§ 240.87 Recertification testing required.

(a) After ________, each railroad to which this part applies shall administer performance skills tests to all individuals seeking recertification as a locomotive operator.

(b) Testing required in paragraph (a) of this section shall be performed in the 90 days preceding and at the same interval prescribed for subsequent certifications made in compliance with § 240.11 of this part.

(c) Testing under this section shall be designed to examine a person's knowledge and skill in applying the railroad's rules and practices for the safe operation of trains and shall comply with criteria for initial testing established under § 240.83 of this part.

§ 240.89 Consequence of failing recertification testing.

(a) If the performance of the person being tested in compliance with the requirements of § 240.87 fails to demonstrate, in the view of the designated supervisor of locomotive operators, that the person is able to safely operate a locomotive or train in the type or class of service for which he or she is being tested fails to convince a designated supervisor of locomotive operators that they are able to safely operate a locomotive or train in the type or class of service for which they are being tested, no railroad shall permit or require that person to continue to operate a locomotive as either a locomotive servicing operator or any class of train service operator until the person successfully passes a reexamination.

(b) That reexamination shall comply with the requirements of § 240.83 and must not occur less than 15 days from the date of the first test.

(c) In the event that the person takes a reexamination and the person's performance, in the view of the designated supervisor of locomotive operators, fails to demonstrate that the person is able to safely operate a locomotive or train in the type or class of service for which he or she is being tested, no railroad shall permit or require that person to operate a locomotive, except as a student operator under the direct supervision of an instructor operator, until that person successfully passes a reexamination.

(d) Any additional reexamination shall comply with the requirements of § 240.83 and must not occur less than 15 days from the date of the first test.

(e) If the person takes a second reexamination and the person's performance, in the view of the designated supervisor of locomotive operators, fails to demonstrate that the person is able to safely operate a locomotive or train in the type or class of service for which he or she is being tested, to convince a designated supervisor of locomotive operators that they are able to safely operate a locomotive or train in the type or class of service for which they are being tested, no railroad shall permit or require that person to operate a locomotive, except as a student operator completing a training program that complies with § 240.61.

Subpart J—Unlawful Behavior by Operators and Operational Monitoring Requirements

§ 240.91 Operator responsibilities.

(a) It shall be unlawful for any locomotive operator, while performing service as a locomotive operator, to:

(1) Permit a locomotive or train to operate at a speed that exceeds the maximum authorized limit by 10 miles per hour or more or exceeds the maximum speed by more than one-half of the authorized speed, whichever is less;

(2) Permit a locomotive or train to pass any signal that requires a complete stop before passing it; or

(3) Fail to comply with any mandatory directive concerning the movement of a train by entering a segment of track without authority.

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

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

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

(i) A representative of the Federal Railroad Administration,

(ii) An officer of the issuing railroad, or

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

(c) Any locomotive operator who is notified or called to operate a locomotive or train that would cause him or her to exceed the limits set forth in subpart B shall immediately notify the railroad that he or she is not qualified to perform that anticipated service.

§ 240.93 Operational monitoring requirements.

(a) Each railroad to which this part applies shall have a program to monitor the conduct of its locomotive operator by performing both on-board observations and by conducting unannounced tests.

(b) The program shall be conducted so that each locomotive operator shall be given at least one on-board observation by a qualified supervisor of locomotive operators in each calendar year and the duration of the observation shall be equal to at least one half the operator's assigned period of duty.

(c) The program shall be conducted so that each locomotive operator shall be given at least one unannounced test each calendar year.

(d) The unannounced test program shall:

(1) Test operator compliance with provisions of the railroad's operating rules that require response to signals that display less than a "clear" aspect, if the railroad operates with a signal system that must comply with part 236 of this chapter;

(2) Test operator compliance with provisions of the railroad's operating rules, timetable or other mandatory directives that require affirmative response by the locomotive operator to less favorable conditions than that which existed prior to initiation of the test;

(3) Be conducted that so that the administration of these tests is effectively distributed throughout whatever portion of a 24 hour day that the railroad conducts its operations; and

(4) Be conducted so that individual tests are administered without prior notice to the operator being tested.

§ 240.95 Reserved for possible procedures for oversight responsibilities; revoking or suspending certificates.

(a) Each railroad shall maintain a record of all adverse information evaluated under § 240.57 of this part and shall continually monitor all operators currently certified by it to determine whether those operators have been involved in any additional incidents identified under §§ 240.53 and 240.55.

(b) If at any time during the duration of a certificate a railroad learns that an operator certified by it has been involved in one or more incidents, resulting in that operator accumulating more than six points as provided for under § 240.57, the railroad shall act to revoke or suspend the locomotive operator's certificate as provided for in subsection (c) of this section.

(c) The railroad shall conduct a proceeding to revoke or suspend that certificate either:

(1) Adheres to procedures for a post-suspension proceeding which conforms to the requirements of an applicable collective bargaining agreement, together with the procedures for the adjustment of disputes under section 3 of the Railway Labor Act or

(2) Adheres to the following procedures:

(i) Prior to or upon withdrawing a person from service as a locomotive operator, or prior to revoking or suspending an operator certificate, which ever occurs first, the railroad shall provide notice of the reason for its action and an opportunity for hearing before a presiding officer other than the charging official;

(ii) The hearing shall be convened within the period specified in the applicable collective bargaining agreement or, if there is no agreement, the hearing is convened within 10 calendar days of the effective date of the suspension. (In the event that the locomotive operator is unavailable for the hearing due to injury, illness or other sufficient cause the hearing shall be held within 10 days of the date the person becomes available for the hearing.);

(iii) The hearing determines that the person did in fact operate the locomotive or train or a motor vehicle in a manner identified in §§ 240.53 and/or 240.55 and that revocation or suspension of the person's certificate is the appropriate remedial action.

Subpart K—Program Documentation

§ 240.101 Criteria for the certificate.

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

(1) Identify the railroad 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;

(4) Identify any limitations, including the class of service, that restrict the persons operational authority;

(5) Show the date of its issuance;

(6) Be signed by an individual designated under the provisions of § 240.105; and

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

(b) Nothing in paragraph (a) of this section shall prohibit any railroad from including additional information on its certificate or supplementing the certificate through other documents.

(c) 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.

§ 240.103 Supporting documents required.

(a) Each railroad that issues a certificate required under § 240.11 shall maintain a record for each person to whom a certificate is issued.

(b) That record shall contain the information relied on in making each of the determinations required by this part.

(c) 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 record; or

(2) Otherwise falsify that record through material misstatement, omission, or mutilation.

§ 240.105 Identification of qualified persons.

(a) Each railroad to which this part applies shall identify in writing each person it considers as a designated supervisor of locomotive operators and the basis for that designation.

(b) Each railroad to which this part applies shall designate in writing any person that it considers authorized to sign certificates required by § 240.11 and, if that authorized person is not a designated supervisor of locomotive operators, identify the basis for this authorization.

(c) No later than the effective date of this rule each railroad shall:

(1) Identify, in writing, each person it considers to be a qualified operator under the provisions of § 240.31;

(2) Identify the class of service for which that person is deemed qualified; and

(3) Identify the basis for their designation as a qualified operator.

(d) The records required under this section shall be

(1) Kept available for inspection and copying by FRA representatives; and

(2) Retained for a period of not less than five years after the year in which the record was created.

§ 240.107 Documenting tests.

(a) A copy of any written knowledge test administered under § 240.71 or § 240.77 shall be kept on file for a period of not less than five years after the year in which it was last administered.

(b) Any railroad that employs a designated supervisor of locomotive operators to conduct field evaluation of a person's operating performance skills when administering such testing in compliance with § 240.81 or § 240.87 shall:

(1) Require supervisor to document in writing the relevant operating facts on which the evaluation is based; and

(2) Keep that evaluation on file for a period of not less than five years after the year in which the test was administered.

(c) Any railroad that uses a simulator to conduct evaluation of a person's operating performance skills, when administering such testing in compliance with § 240.81 or § 240.87 shall:

(1) Document the relevant operating facts on which the evaluation is based; and

(2) Keep that evaluation on file for a period of not less than five years after the year in which the test was administered.

(d) All records required under this section shall be made available to FRA representatives upon request.

Subpart L—Dispute Resolution Procedures

§ 240.111 Review board established.

(a) Any individual may petition the Federal Railroad Administration if he or she believes that a railroad failed to comply with this regulation when determining whether he or she is qualified to be a certified locomotive operator under this regulation.

(b) The Federal Railroad Administrator has delegated initial responsibility for adjudicating such disputes to the Locomotive Operator Review Board.

(c) The Locomotive Operator Review Board shall be composed of at least three employees of the Federal Railroad Administration selected by the Administrator.

§ 240.113 Petition requirements.

(a) Any person who believes that a railroad has improperly failed or refused to issue them certification or recertification as a locomotive operator may petition the Locomotive Operator Review Board for review of that action.

(b) Each petition shall:

(1) Be in writing;

(2) Be submitted in triplicate to the Docket Clerk, Federal Railroad Administration, 400 Seventh Street SW., Washington, DC 20590;

(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) Current mailing address;

(iii) Daytime telephone number;

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

(v) 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; and

(5) Be supplemented by a copy of all written documents in the petitioner's possession that document that railroad's decision.

§ 240.115 Processing qualification review petitions.

(a) Each petition shall be acknowledged in writing by FRA and the acknowledgement shall contain the docket number assigned to the petition.

(b) Upon receipt of the petition, FRA will notify the railroad that it has received the petition and provide the railroad with a copy of the petition.

(c) The railroad will be given a period of not to exceed 30 days to submit to FRA any information that the railroad considers pertinent to the petition.

(d) A railroad that submits such information shall:

(1) Identify the petitioner by name and the docket number of the review proceeding;

(2) Provide a copy of the information being submitted to FRA to the petitioner.

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

(f) The Board will determine whether the denial of certification or recertification was improper and grant or deny the petition accordingly.

(g) Notice of that decision will be provided in writing to both the petitioner and the railroad.

§ 240.117 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 within 20 days of service of the Board's decision on them.

(c) Failure to request a hearing within the period provided in paragraph (b) of this section constitutes a waiver of the right to a hearing.

(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, and telephone number of the respondent the requesting party's designated representative, if any;

(2) The specific facts that the requesting party alleges the railroad and/or the Board wrongly determined in making its decision; and

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

(e) Upon receipt of a hearing request complying with paragraph (d) of this section, the Federal Railroad Administration shall schedule a hearing at the earliest practicable date.

§ 240.119 Hearings.

(a) An administrative hearing for review of a locomotive operator qualification petition shall be conducted by a presiding officer and can be any person authorized by the FRA Administrator, including an administrative law judge.

(b) The presiding officer may exercise the powers of the Federal Railroad Administrator to regulate the conduct of the hearing for the purpose of achieving a prompt and fair determination of all material issues in controversy.

(c) The presiding officer shall convene and preside over the hearing.

(d) Testimony by witnesses at the hearing shall be given under oath and the hearing shall be recorded verbatim.

(e) The presiding officer shall employ the Federal Rules of Evidence for United States Courts and Magistrates as general guidelines for the introduction of evidence. 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.

(f) The presiding officer may:

(1) Administer oaths and affirmations;

(2) Issue subpoenas as provided for in § 209.7 of part 209 in this chapter;

(3) Adopt any needed procedures for the submission of evidence in written form;

(4) Examine witnesses at the hearing;

(5) Convene, recess, adjourn or otherwise regulate the course of the hearing; and

(6) 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.

(g) The party favored by FRA's disposition of the initial petition under § 240.115 may participate in the hearing as a third party. Parties may appear and be heard on their own behalf or through designated representatives. Respondents may offer relevant evidence including testimony and may conduct such cross-examination of witnesses as may be required for a full disclosure of the relevant facts.

(h) 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.

(i) At the close of the record, the presiding officer shall prepare a written decision in the proceeding.

(j) The decision:

(1) Shall contain the findings of fact and conclusions of law, as well as the basis therefore, concerning all material issues of fact or law presented on the record;

(2) Shall be served on the respondent and any other directly affected party;

(3) Shall not become final for 35 days after issuance;

(4) Constitutes final agency action unless an aggrieved party files an appeal within 35 days after issuance; and

(5) Are not precedental.

(k) The FRA shall have the burden of proving that its grant or denial of the initial petition was in accordance with law and supported by substantial evidence.

§ 240.120 Appeals.

(a) Any party aggrieved by the presiding officer's decision may file an appeal. The appeal must be filed within 35 days of issuance of the decision with the Federal Railroad Administrator, 400 Seventh Street SW., Washington, DC 20590. 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.

(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 the record.

(c) The Administrator may extend the period for filing an appeal or a response for good cause shown, provided that the written request for extension is served before expiration of the applicable period provided in this section.

(d) The Administrator has sole discretion to permit oral argument on the appeal. On the Administrator's own initiative or written motion by any party, the Administrator may grant the parties an opportunity for oral argument.

(e) The Administrator may affirm, reverse, alter or modify the decision of the presiding officer and the Administrator's decision constitutes final agency action.

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

Appendix B to Part 240—Procedures for Obtaining NDR 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 §§ 240.51 and 240.53 of this part. Those provisions require that railroads consider the motor vehicle driving record of each person prior to issuing or reissuing him or her certification as a qualified locomotive operator.

To fulfill that obligation a railroad must review an operator 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. In addition, the railroad must determine whether the operator 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 such workers' 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 operators to request that their current state drivers 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 either involve the candidate 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 an operator 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 operator 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. The National Driver Register (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. Currently the NDR is maintained by the National Highway Traffic Safety Administration (NHTSA) of the Department of Transportation under the provisions of the National Driver Register Act (23 U.S.C. 401 note). Under that statute, state motor vehicle licensing authorities voluntarily notify NHTSA when they take action to deny, suspend, revoke or cancel a person's motor vehicle driver's license and, under the provisions of a 1982 amendment to the statute, four pilot states notify NHTSA concerning convictions for operation of a motor vehicle while under the influence of, or impaired by, alcohol or a controlled substance; traffic violations arising in connection with a fatal traffic accident, reckless driving or racing on the highway even if these convictions do not result in an immediate loss of driving privileges.

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, color of hair, and social security account number, if a State collects such data.

Access to NDR Data

Essentially only individuals and state licensing agencies 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 operator 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 that is participating under the provisions of a 1982 amendment to the National Driver Register Act. Participating states can access the NDR data on behalf of the prospective operator. The state agencies that currently participate in that access program are identified in Appendix C of this regulation.

—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 National Highway Traffic Safety Administration at the following address: Chief, National Driver Register, National Highway Traffic Safety Administration, 400 Seventh Street SW., 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;

(h) Drivers 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 operator 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 more positively identify 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. At present there are only a limited number of state licensing agencies that have the capacity to make a direct NDR inquiry of this nature. It is anticipated that the number of states with such capability will increase in the near future, therefore, FRA will continue to update the identification of such states by revising Appendix C to this regulation to identify such state agencies. Since it would be more efficient for a prospective operator to make a single request for both aspects of the information required under this rule, FRA anticipates that state agency inquiry will eventually become 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.

—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 later 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 contact the state with the relevant information. FRA requires the railroad 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 railroad 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 go beyond these efforts to obtain the information in the control of such a state agency and 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 operator candidate are physical description, photographs and handwriting comparisons.

Once the railroad has obtained the motor vehicle driving record which, depending on the circumstance, may consist of more than two documents, the railroad must afford the prospective operator an opportunity to review that record and respond in writing to its contents. 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 § 240.55.

Appendix C to Part 240—Identification of State Agencies That Perform NDR Checks

Under the provisions of § 240.53 of this part, each person seeking certification or recertification as a locomotive operator must request that a check of National Driver Register (NDR) be conducted and that the resulting information be furnished to their employer or prospective employer. Under the provisions of paragraph (d) of § 240.53, each person seeking certification or recertification as a locomotive operator must request that National Highway Traffic Safety Administration conduct the NDR check, unless he or she was issued a motor vehicle driver license by one of the state agencies identified in this appendix. If the operator candidate received a license from one of the designated state agencies, he or she must request the state agency to perform the NDR check. The state motor vehicle licensing agencies listed in this appendix participate in a program that authorizes these state agencies, in accordance with the 1982 amendments to the National Driver Register Act, to obtain information from the NDR on behalf of individuals seeking data about themselves. 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 operator candidates make use of this method in preference to directly contacting NHTSA.

Although the number of state agencies that participate in this manner is limited, FRA anticipates that an increasing number of states will do so in the future. This appendix will be revised periodically to reflect current participation in the program. As of March 1, 1989, the motor vehicle licensing agencies of the following states participate under the provisions of the 1982 amendment to the NDR Act: North Dakota, Ohio, Virginia, and Washington.

Appendix D to Part 240—Potential Performance Test Criteria [Reserved]

FRA recognizes that appraisals of operator performance historically have been made by railroad managers in an informal manner. Some major railroads have been using an observation form to document an appraisal because such forms tend to ensure a more thorough and systematic assessment of operator performance.

The Need for a Systematic Approach

There are numerous criteria that should be monitored when observing a person to determine whether that individual should be considered to be a qualified locomotive operator and the details of those criteria will vary for the different classes of service, types of railroads, and terrain over which trains are being operated. At a minimum, an observer's attention should concentrate on several general areas during any appraisal. Compliance with the railroad's operating rules, including its safety, train handling rules, and compliance with Federal regulations would be carefully evaluated. But, in order to effectively evaluate employees, it is necessary to have something against which to compare their performance. Any carrier who fails to have adequate operating, safety, or train handling rules will experience difficulty in establishing an objective method of measuring an individual's skill level. Any carrier which requires the evaluation of an individual's performance relative to train handling should have established preferred operating ranges for throttle use, brake application, and train speed. The absence of such criteria results in the lack of a meaningful yardstick for the observer to use in measuring others. It is essential to have a definite standard for the operator to know what he or she is being measured against.

Evaluating the performance of certain train operation skills will tend to occur in all situations. For example, it would be rare to observe any operator for a reasonable period of time and not have some opportunity to review an operator's compliance with basic safety rules, basic operating rules, and the performance of a brake test. As the complexity of the operation increases so does the number of items that the operator must comply with. Higher speeds, mountainous terrain, and various signal systems place increased emphasis on the need for operator compliance with more safety, operating, and train handling rules. Accounting for such variables in any universal monitoring scheme immediately results in a fairly complex system.

FRA is not proposing adoption of a federally mandated, all encompassing, list of what should be observed for, but rather is suggesting the minimums of what to observe for when conducting skills performance test. Instead, FRA proposes to give railroads the discretion to determine what each carrier feels is most important in order to ensure that its locomotive operators function in a safe manner. Some railroads already have well developed criteria for conducting such evaluations and will not have any need to alter their existing practices. Since all railroads are not in that posture, FRA is providing the following information to assist railroads in developing a meaningful test.

In FRA's judgement, the kinds of operating practices that should be observed for are identified below. Obviously, the less sophisticated the railroad's operations are the fewer the number of identified practices that would be relevant.

—Does the employee have the necessary books, (Operating Rules, Safety Rules, Timetable, etc.)?
—Are predeparture inspections properly conducted (Radio, Air Brake Tests, Locomotive etc.)?
—Does the employee comply with applicable safety rules?
—Does the employee read the bulletins, general orders, etc.?
—Enroute, does the employee:
  —Comply with applicable Federal Rules? (Radio)
  —Monitor gauges?
  —Properly use the horn, whistle, headlight?
  —Couple to cars at a safe speed?
  —Properly control in train slack and buff forces?
  —Properly use the train braking systems?
  —Comply with speed restrictions?
  —Display familiarity with the physical characteristics?
  —Comply with signal indications?
  —Respond properly to unusual conditions?

—At the conclusion of the trip, does the employee:
—Apply a hand brake to the locomotives?
—Properly report locomotive defects?

The Need for Objectivity, Use of Observation Form

It is essential that railroads conduct the performance skills testing in the most objective manner possible, whether this testing is conducted as a portion of the operator's initial qualification testing or periodic retesting. There is some potential for the subjective views of the person conducting the evaluation to enter into decisions concerning the competency of a particular individual to handle the position of locomotive operator. Steps can be taken, and need to be taken, to minimize the risk that personality factors adversely influence the testing procedure.

One way to reduce the entry of subjective matters into the qualification procedures is through the use of a document that specifies those criteria that the observer is to place emphasis on. The use of an observation form will reduce but not eliminate subjectivity. Any supervisory observation trip will contain some amount of subjectivity. While compliance with the operating rules or the safety rules is clear in most cases, with few opportunities for deviation, train handling offers many options with few absolute right answers. The fact that an engineer applies the train air brakes at one location rather than a few yards away does not necessarily indicate a failure but a question of judgment. The use of dynamic braking versus air brakes at a particular location may be a question of judgment unless the carrier has previously specified the use of a preferred braking method. In any case the operator's judgment, to apply or not apply a braking system at a given location, is subject to the opinion of the observer. The carrier should attempt to reduce the subjectivity through the establishment of preferred methods of train handling.

The individual performing the observation must be familiar with the carrier's preferred train handling methods, equipment, and must be qualified on the territory being used for the observation trip. In addition, the observer must be knowledgeable regarding the carrier's operating and safety rules. There simply is no value in having an unqualified person attempt to pass judgment on the skills of another.

Many of the major carriers in the nation already have some type of observation form in use. A few have attempted to develop numeric scoring system which the FRA sees as the ultimate goal for all systems of measuring engineer performance. In devising a form, FRA does not anticipate the need for major railroads to change the forms currently in use since they already have effective observation forms. Regional railroads or short lines that have not devised a form are encouraged to create and implement one.

For railroads developing any evaluation form, the areas of concern identified earlier will not be relevant in all instances. Railroads that do not have sophisticated operations would only need short list of subjects. For example, most smaller railroads would not require line items pertaining to compliance with signal rule compliance or the use of dynamic brakes. Conversely, in all instances the observation forms should include the time and location that the observer started and ended the observation. FRA believes that there should be a minimum duration for all performance skills examinations. FRA contemplates allowing railroads to select a duration appropriate for their individual circumstances and the proposed rule require only that the period be "of sufficient length" to effectively evaluate the person. In exercising its discretion FRA would prefer that the minimums selected by a railroad be stated in terms of a distance since the examination has to be of a sufficient duration to adequately monitor the operator's skills in a variety of situations. FRA also suggests that the format for the observation form include a space for recording the observer's comments. Provision for comments ideally would allow for the inclusion of "constructive criticism" without altering the import of the evaluation and would permit subjective comments where merited.

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Administrator.

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