Sunshine Act Meetings

Federal Register
Vol. 56, No. 118
Wednesday, June 19, 1991

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

FEDERAL ENERGY REGULATORY COMMISSION

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: June, 11, 1991, 56 FR 26849.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: June 12, 1991, 10:00 a.m.

CHANGE IN THE MEETING: The following Docket Number has been added to Item CAG–15 on the Agenda scheduled for June 12, 1991:

Item No., Docket No., and Company

CAG–15—Docket No. RP91–111–000, North Penn Gas Company

Lois D. Cashell,

Secretary.

[FR Doc. 91–14672 Filed 6–14–91; 4:45 am]

BILLING CODE 6717-02-M

FEDERAL HOUSING FINANCE BOARD

TIME AND DATE: 9:00 a.m. Tuesday, June 25, 1991.

PLACE: The Park Hyatt, 24th and M Streets, NW., Washington, DC 20037.

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED: The Board will consider the following:

1. 1992 Budget
2. Strategic Plan
3. Compensation Policy for Bank Presidents

The above matters are exempt under one or more of sections 552(c)(2), (9)(A) and (9)(B) of title 5 of the United States Code. 5 U.S.C. 552b(c)(2), (9)(A) and (9)(B).

CONTACT PERSON FOR MORE INFORMATION: Elaine Baker, Executive Secretary to the Board, (202) 408–2837.

J. Stephen Britt,

Executive Director.

[FR Doc. 91–14663 Filed 6–14–91; 4:55 pm]

BILLING CODE 6725-01-M

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

TIME AND DATE: 11:00 a.m. Monday, June 24, 1991.

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

STATUS: Closed.

MATTERS TO BE CONSIDERED:

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

2. 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: June 14, 1991.

William W. Wiles,

Secretary to the Board.

[FR Doc. 91–14685 Filed 6–14–91; 4:55 pm]

BILLING CODE 6210-01-M

FOREIGN CLAIMS SETTLEMENT COMMISSION

F.C.S.C. Meeting Notice No. 3–91

Notice of Meetings

Announcement in Regard to Commission Meetings and Hearings

The Foreign Claims Settlement Commission, pursuant to its regulations (45 CFR Part 504), and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of open meetings and oral hearings for the transaction of Commission business and other matters specified, as follows:

Date and Time	Subject Matter
Thurs, June 27, 1991 at 10:00 a.m.	Consideration of Proposed Decisions on claims against Iran. Hearings on the Record on objections to Proposed Decisions issued on claims against the Government of the Islamic Republic of Iran: IR–0123—Leslie F. Noell, Jr. IR–1886-Elga Skinders.
Thurs, June 27, 1991 at 2:00 p.m.*.	Oral Hearings on objection to Proposed Decision issued on claim for prisoner of war compensation under the War Claims Act of 1948: SPN–1868—Michael Joseph Bosiljevac, Dec'd.

* The hearing site will be: 601 D Street, NW., Room 10418 (Classroom B), 10th Floor, Patrick Henry Bldg., Washington, DC.

Subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

All meetings are held at the Foreign Claims Settlement Commission, 601 D Street, NW., Washington, DC. Requests for information, or advance notices of intention to observe a meeting, may be directed to: Administrative Officer, Foreign Claims Settlement Commission, 601 D Street, NW., Room 10000, Washington, DC 20579. Telephone: (202) 208–7727.

Dated at Washington, D.C. on June 17, 1991.

Judith H. Lock,

Administrative Officer.

[FR Doc. 91–14729 Filed 6–17–91; 12:08 pm]

BILLING CODE 4410-01-M

NATIONAL TRANSPORTATION SAFETY BOARD

TIME AND DATE: 9:30 a.m., Tuesday, June 25, 1991.

PLACE: Conference Rooms 8A, B, C, Eighth Floor, 800 Independence Avenue, SW., Washington, D.C. 20594.

STATUS: Open.

MATTERS TO BE CONSIDERED:

5416B—Aircraft Accident Report: Northwest Airlines Flights 299 and 1482 (B–727 and DC–9), Detroit, Michigan, December 3, 1990.

NEWS MEDIA CONTACT: Brent N. Bahler Telephone (202) 382–6600.

FOR MORE INFORMATION CONTACT: Bea Hardesty, (202) 382–6525.

Dated: June 13, 1991.

Bea Hardesty,

Federal Register Liaison Officer.

[FR Doc. 91–14689 Filed 6–17–91; 9:07 am]

BILLING CODE 7533-01-M

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS

Notice of a Meeting

The Board of Governors of the United States Postal Service, pursuant to its Bylaws (39 C.F.R. Section 7.5) and the Government in the Sunshine Act (5 U.S.C. Section 552b), hereby gives notice that it intends to hold a meeting at 1:00 p.m. on Monday, July 1, 1991, and at 8:30 a.m. on Tuesday, July 2, 1991, in

Washington, D.C. The July 1 meeting, at which the Board will consider the Postal Rate Commission's May 24, 1991, Opinion and Further Recommended Decision in Docket No R90-1, is closed to the public. (See 56 FR 26457, June 7, 1991)

The July 2 meeting is open to the public and will be held in the Benjamin Franklin Room on the 11th floor of U.S. Postal Service Headquarters, 475 L'Enfant Plaza, S.W. The Board expects to discuss the matters stated in the agenda which is set forth below. Requests for information about the meeting should be addressed to the Secretary of the Board, David F. Harris, at (202) 268-4800.

Agenda

Monday Session

July 1—1:00 p.m. (Closed)

1. Consideration of the Postal Rate Commission's Opinion and Further Recommended Decision in Docket No. R90-1.

Tuesday Session

July 2—8:30 a.m. (Open)

1. Minutes of the Previous Meeting, June 3-4, 1991.
2. Remarks of the Postmaster General. (Anthony M. Frank)
3. Status Report on the Strategic Plan. (Frank R. Power, Assistant Postmaster General, Planning Department)
4. Status Report on the Integrated Logistics Support System (ILSS). (William J. Dowling, Assistant Postmaster General, Engineering and Technical Support Department, and Jean J. Provost, Director, Office of Procurement and Supply Systems)
5. Briefing on the Expedited Mail Service Project. (Robert E. Michelson, General Manager, Expedited Mail Services Division)
6. Status Report on Olympic Sponsorship. (Deborah K. Bowker, Assistant Postmaster General, Communications Department)
7. Capital Investment. (William J. Dowling, Assistant Postmaster General, Engineering and Technical Support Department)
   a. Flats Sorting Machine—Flat Mail Bar Code Sorter Modification.
8. Tentative Agenda for August 8-9, 1991, meeting in Washington, D.C.

David F. Harris,

Secretary.

[FR Doc. 91-14761 Filed 6-17-91; 2:28 pm]

BILLING CODE 7710-12-M

Corrections

Federal Register
Vol. 56, No. 118
Wednesday, June 19, 1991

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.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 651

[Docket No. 90927-1123]

Northeast Multispecies Fishery

Correction

In proposed rule document 91-12638 beginning on page 24169, in the issue of Wednesday, May 29, 1991 make the following correction:

On the same page, in the third column, in the first paragraph, in the fourth line, after "then to" insert the following, "42°11.0′N. Latitude, 70°04.0′W. Longitude; then back to".

BILLING CODE 1505-01-D

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP91-1957-000, et al.]

El Paso Natural Gas Co. et al.; Natural Gas Certificate Filings

Correction

In notice document 91-12064 beginning on page 23562, in the issue of Wednesday, May 22, 1991, make the following corrections:

1. On page 23565, in the third column, the first Docket No. for entry number 11 should read "CP91-1958-000".

2. On page 23566, in the first column, the Docket No. for entry number 12 should read "CI87-910-003".

BILLING CODE 1505-01-D

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 62

RIN 3067-AB68

National Flood Insurance Program; Assistance to Private Sector Property Insurers

Correction

In proposed rule document 91-11642 beginning on page 22670 in the issue of Thursday, May 16, 1991, make the following corrections:

§ Appendix B to Part 62 [Corrected]

1. On page 22674, in the first column, in paragraph a., in the fifth line "62.23" should read "62.63".

2. On the same page, in the same paragraph, in the sixth line "62.63" should read "63.23".

BILLING CODE 1505-01-D

DEPARTMENT OF LABOR

Employmnet and Training Administration

Job Training Partnership Act and Targeted Jobs Tax Credit; Lower Living Standard Income Level

Correction

In notice document 91-12464 beginning on page 24097 in the issue of Tuesday, May 28, 1991, make the following correction:

On page 24099, in the first column, in Table 1., the first entry under "Region" should read "Northeast".

BILLING CODE 1505-01-D

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 1 and 3

RIN 2900-AF09

Omnibus Budget Reconciliation Act of 1990: To Implement Provisions of Public Law 101-508

Correction

In rule document 91-12992 beginning on page 25043 in the issue of Monday, June 3, 1991, make the following correction:

On page 25043, in the third column, under "SUPPLEMENTARY INFORMATION:", in the second paragraph, in the second line, "28" should read "38".

BILLING CODE 1505-01-D

federal register

Wednesday
June 19, 1991

Part II

Department of Transportation

Federal Railroad Administration

49 CFR Part 240
Qualifications for Locomotive Engineers;
Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 240

[FRA Docket No. RSOR-9, Notice 5]

RIN 2130-AA51

Qualifications for Locomotive Engineers

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Final rule.

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

DATES: *Effective Date:* The rule is effective on September 17, 1991.

OTHER DATES: (1) Compliance with the requirements for initially identifying supervisors of locomotive engineers and "grandfathered" certified engineers is authorized on and after the effective date and is mandatory for supervisors and locomotive engineers after October 31, 1991. Submission of programs adopted by individual railroads is mandatory by November 15, 1991 for Class I railroads; May 1, 1992 for Class II railroads; and November 1, 1992 for Class III railroads. Compliance with the requirements for the issuance of identification documents to all certified engineers is authorized on and after August 1, 1991 and is mandatory after December 31, 1991.

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

(3) In a separate notice to be published shortly, FRA will announce the dates for conferences to be held in several cities for the purpose of acquainting the railroads, employees, and other interested parties with the requirements of the rule.

(4) Compliance with the record keeping and reporting requirements of this rule is authorized on or after the rule's effective date. See the Paperwork Reduction Act discussion below for additional information concerning mandatory compliance dates.

ADDRESSES: Any petition for reconsideration should be submitted to the Docket Clerk, Office of Chief Counsel, FRA, 400 Seventh Street, SW., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Richard M. McCord, Regional Director for Safety, FRA, Chicago, Illinois (Telephone: 312-353-6203); 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, Director, Office of Safety Enforcement, Office of Safety, FRA, 400 Seventh Street, SW., Washington, DC 20590 (Telephone: 202-366-9252).

SUPPLEMENTARY INFORMATION: Prior to 1970, FRA lacked the legal authority to issue regulations concerning the qualifications of locomotive engineers. However, the Federal Railroad Safety Act of 1970 ("FRSA") (45 U.S.C. 421, 431 *et seq.*) granted FRA regulatory authority over "all areas of railroad safety" and signalled that authority to include employee "qualifications * * * specifically related to safety." At that time, FRA's accident data indicated that its first priority should be track and equipment safety. Since then the mix of accident causes has gradually shifted. Accidents resulting from failure in human performance, although declining in absolute numbers along with all rail accidents, have increased as a percentage of all accidents and become the dominant cause of serious accidents.

Prior to 1988, FRA's analysis of accident data had not indicated that the agency's regulatory priorities should include adoption of locomotive engineer qualification standards. Even if FRA's analysis had so indicated, until very recently, FRA lacked the necessary tools to effectively regulate in this area. However, with passage of the Rail Safety Improvement Act of 1988 ("RSIA") (Pub. L. 100-342, 102 Stat. 624), FRA acquired enforcement authority over individual railroad employees. That authority was a practical necessity for the establishment of an effective locomotive engineer licensing or certification program.

Section 4 of the RSIA, adopted in the wake of the Amtrak/Conrail accident at Chase, Maryland, directed that FRA adopt appropriate regulations concerning the qualifications of locomotive engineers. Congress thus determined the existence of a safety need for such requirements and required that certain subject areas be addressed within those regulations. Section 4(a) of the RSIA provides in pertinent part as follows:

(l)(1) The Secretary shall, within 12 months after the date of the enactment of this subsection, issue such rules, regulations, orders, and standards as may be necessary to establish a program requiring the licensing or certification of any operator of a locomotive, including any locomotive engineer, after the expiration of 12 months following the establishment of such program.

(2) The program established by the Secretary under paragraph (1)—

(A) shall be implemented through review and approval of each railroad's operator qualification standards;

(B) shall provide minimum training requirements;

(C) shall require comprehensive knowledge of applicable railroad operating practices and operating rules;

(D) shall, except as provided in paragraph (4), require the consideration, to the extent information is available, of the motor vehicle driving record of each individual seeking licensing or certification under such program, including—

(i) any denial of a motor vehicle operator's license by a State for cause within the previous 5 years;

(ii) any cancellation, revocation, or suspension of a motor vehicle operator's license by a State for cause within the previous 5 years; and

(iii) any conviction within the previous 5 years of an offense described under section 205(a)(3) (A) or (B) of the National Driver Register Act of 1982, 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; and

(E) shall require any individual seeking a license or certification under this subsection to—

(i) request the chief driver licensing official of each State in which such individual has within the previous 5 years held a motor vehicle operator's license to provide information to his or her employer or prospective employer, or to the Secretary, as the Secretary may determine, with respect to such individual's driving record; and

(ii) make the request provided for in section 206(b)(5) of the National Driver Register Act of 1982 for information to be transmitted to his or her employer, prospective employer, or the Secretary, as the Secretary may determine.* * *

The remaining provisions of section 4 establish detailed constraints on the use of motor vehicle operator licensing data and make changes to the National Driver Register Act of 1982 to afford individuals access to motor vehicle operator licensing information.

Thus, Congress did not require that FRA assume direct responsibility for the daily implementation of qualification requirements, providing instead that the program could be based on either licensing or certification and that it "shall be implemented through review and approval of each railroad's operator qualification standards."

This final rule establishes requirements for (1) testing visual and aural acuity; (2) assessing training and knowledge and performance skills; and (3) evaluating past conduct. To minimize governmental intervention, FRA is adopting a certification process rather than a traditional government licensing system.

This final rule is not issued within the statutory deadline. Since enactment of the RSIA, FRA has conducted the ambitious regulatory program contemplated by that statute. The scope of that effort and the magnitude of the task involved in devising an appropriate qualification system for locomotive engineers made it impossible to meet the deadline. The number and the complexity of the issues in this proceeding required substantial time for both the NPRM and the final rule.

FRA's NPRM was published in the **Federal Register** on December 11, 1989 (54 FR 50890). Response to the NPRM from all segments of the railroad industry and the general public was extensive, generating in excess of 220 written comments and more than 1,000 pages of transcript reflecting testimony heard during very full days of public hearings. Virtually all commenters expressed negative views about one or more aspects of the proposal, and a number of commenters suggested that FRA withdraw this NPRM and then publish a significantly revised proposal. The nature and tone of many comments suggest significant misunderstanding of the proposal.

GENERAL SUMMARY OF THE COMMENTS

1. Issues of Terminology and Approach

Reaction to the NPRM

FRA's decision to employ the more expansive but unfamiliar term "locomotive operator" was misunderstood by nearly all commenters. FRA explained that use of the term "locomotive operator" was intended to communicate the application of the proposed rule to individuals identified by a wide range of job titles in the industry. However, some commenters perceived the term as denigrating the more traditional "locomotive engineer." In addition, many individual commenters believed that this rulemaking imposes undeserved "punishment" that is being imposed on all locomotive engineers for the aberrant behavior of a single person who caused the tragic accident at Chase, Maryland. Many commenters objected to the proposal as coming hard on the heels of other recently imposed burdens, such as random drug testing that may detect off-duty substance abuse and individual liability for civil penalties or disqualification (including a prohibition against tampering with locomotive safety devices).

FRA's decision to adopt a certification rather than a governmental licensing scheme generated additional confusion. Many commenters viewed FRA "certification" as unnecessary given existing railroad practices and as undue interference with management prerogative and with matters that rail management and labor have addressed in collective bargaining agreements. Commenters argued that FRA had a burden of proving that the existing system for qualifying engineers, which includes use of labor management agreements and long standing dispute resolution mechanisms, was deficient before FRA should disturb it. Many commenters did not perceive the difference between federally mandated qualifications standards and voluntary, collectively bargained arrangements which are subject to the Railway Labor Act ("RLA") (45 U.S.C. 151 *et seq.*).

In a traditional licensing scheme, a governmental agency is responsible for testing knowledge and performance skills; issuing licensing documents; revoking or suspending licenses; and processing reviews and appeals. Other issues, such as obtaining or retaining employment, seniority rights, or rates of pay, are not comprehended by the agency's licensing responsibility although the agency's decisions can have a direct impact on those job-related issues.

Apparently because FRA proposed a certification system rather than a traditional governmental licensing scheme, several commenters made inappropriate suggestions, for example, that FRA plan to bargain for testing conditions on individual railroads. One commenter, the Association of American Railroads (AAR), argued that no legal theory would support a conclusion that decisions by railroads to grant or withhold this "certificate" could ultimately become FRA's responsibility. Other commenters believed that FRA should not address topics already addressed in collective bargaining agreements and that FRA should have no regulatory provisions relating to "due process" considerations given the dispute resolution mechanisms of the RLA.

FRA's Response

FRA is electing to use the term "locomotive engineer," in which many commenters expressed pride, as urged by many commenters. Since there is some risk of confusion, FRA has included regulatory language to minimize that risk.

FRA also has decided to retain the "certification" option provided by the statute and not resort to a more traditional licensing scheme. FRA is opting for certification in large measure because it permits all parties to continue to rely on the promptness and efficiency of existing programmatic structures. These structures, which have evolved over many years on the individual railroads, have familiar procedures and are administered by experienced and knowledgeable personnel. Licensing, on the other hand, would generate a need to duplicate or replace, to some degree, the existing private sector system with a governmental system that might or might not operate with the same degree of promptness or economic efficiency. Creation of a governmental licensing system would also entail significant new agency costs that arguably would have to be shouldered by railroads under the user fees established by the Omnibus Budget Reconciliation Act of 1990 (sec. 10501, Pub. L. 101–508, 104 Stat. 1388). Perhaps because of such cost implications, few commenters urged that FRA substitute licensing for certification.

In a traditional governmental licensing scheme, such as those devised for the aviation and maritime industries, the licensing agency (a) sets criteria for eligibility; (b) evaluates candidates; (c) issues the necessary documents; (d) provides a system for assessing licensee performance; and (e) provides a mechanism for resolving disputes arising from decisions to deny or rescind licenses. The certification approach of this rule differs by making a railroad responsible for some of these functions. FRA is setting eligibility criteria but leaving it to railroads to evaluate candidates by those standards, affording railroads considerable latitude. Their discretion will extend to the design and administration of test and examination procedures. Railroads will be responsible for daily administration of the program, including issuance and retention of licenses. However, railroads will have limited authority to deny or revoke a person's certificate, and FRA will have responsibility for resolution of disputes arising from decisions to deny or rescind certificates.

FRA will exercise limited control in the daily administration of each railroad's program. Although the rule affords railroads considerable discretion, FRA bears responsibility for the manner in which railroads exercise that discretion, since the performance of the railroads under this rule will determine whether its safety purposes are fulfilled. Until now, railroads and their employees could negotiate the terms of employment related to operation of a locomotive. This final rule signals a major change in the status quo. Determinations of qualifications must be accomplished under this rule, and the contractual consequences, if any, of those determinations must be sorted out separately. FRA's role will be to assure that the former are performed in compliance with the rule and to take appropriate remedial action if it detects noncompliance; however, it has no role with respect to the latter. (For example, FRA cannot order a railroad to alter its seniority rosters to accommodate a finding that a railroad wrongfully denied certification.)

This institutional arrangement is similar to those in other transportation modes where governmental bodies grant licenses to drive commercial trucks, fly commercial aircraft, or command commercial vessels. Those governmental actions are then givens that must be accommodated by employment contracts.

2. Appropriateness of the Approach

Reaction to the NPRM

Many commenters argued that FRA's proposal was unduly intrusive into the routine management of railroads and carried staggering cost implications. A common theme found in many of the comments was that FRA had failed to demonstrate a need for many aspects of the proposal. For example, many commenters argued that FRA failed to demonstrate a need to regulate the initial training of engineers, noting that FRA failed to cite accidents clearly attributable to specific weaknesses in existing training practices. Where commenters conceded the need to address a particular issue, they often viewed FRA's choice of remedy as unwise, *e.g.*, an overly simplified response to a complex situation, unwarranted constraint to future innovation, or unduly expensive.

FRA's Response

Questions about the need for, and kind of, Federal regulation are appropriate. Railroads have made unprecedented improvements in the safety of their operations in recent years. 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 approached this record of improvement during these years. Additional safety regulations will have economic consequences, and railroads are legitimately concerned about effects that additional costs can have on the industry's ability to compete for a share of the transportation market.

FRA understands these concerns; however, FRA's discretion in this proceeding is circumscribed by the Congressional determination that additional regulations are needed. As a result, this proceeding has deviated from FRA's usual regulatory practice. Normally, FRA commences with an analysis of accident data that defines a particular safety problem. FRA then reviews the options for solving that problem, and only when it is convinced that Federal rules are needed does FRA contemplate and devise a carefully focused regulatory solution. In devising that solution, FRA attempts to find the regulatory response that will produce an optimal ratio of benefits from the rule to costs associated with compliance. In this proceeding, however, FRA is constrained by the dictates of the RSIA: FRA must (i) approve the qualifications standards set by railroads for engineers; (ii) prescribe minimum training requirements; (iii) require comprehensive knowledge of relevant operating procedures; and (iv) provide for consideration of motor vehicle driving records. As required, FRA's proposal addressed these issues, but did not go beyond them.

FRA's consideration of these issues has benefited greatly from the comments made directly during this proceeding. FRA's overall design for the final rule and its particular provisions have been modified accordingly. In drafting this final rule, FRA has sought to simplify the proposal, avoid constraints to innovation, and promote a positive cost/benefit ratio.

3. Need for a Revised Structure

Reaction to the NPRM

Many commenters suggested that FRA issue a significantly revised proposal, expressing concern about the difficulty of responding to such a complicated proposal to which they objected in one or more ways.

FRA's Response

After reviewing all the comments, FRA has concluded that the NPRM identified all relevant substantive issues and the alternatives available for addressing them: therefore, FRA can in this final rule effectively address the legitimate problems and weaknesses found in the proposal, including those identified by the commenters. None of the comments challenge FRA's safety goals, raises previously unidentified problems, or provides previously unidentified and feasible alternative regulatory approaches to establishing qualification standards. Although it can be argued that a new NPRM could be of some benefit, FRA does not believe that further delay is warranted.

Design of the Final Rule

1. The Concept

A premise of FRA's proposed rule was that every engineer would be trained, tested, and evaluated using the same criteria, with some exceptions for operators of smaller trains at lower speeds. These criteria were distilled from FRA reviews of existing individual railroad programs for setting qualification standards. Rather than make a case-by-case evaluation and approval of individual railroad qualification systems, FRA proposed a general review and approval process. FRA's proposed rule design resembled the motor vehicle licensing scheme employed by state governments for issuance of commercial truck driver licenses.

In contrast to the proposed rule, the final rule takes a more individual approach that tracks the statutory language, *i.e.*, each railroad will formulate an individual program for setting qualifications standards and submit that program to FRA for approval. In formulating its program, each railroad will address specified subject areas while conforming to FRA-established criteria. Each engineer will then be evaluated in terms of meeting the qualification criteria thus established for each subject area.

2. The Regulatory Structure

FRA has reorganized the final rule to reflect this shift, resulting in five subparts rather than the ten found in the proposal. Three of the five subparts contain the major substantive provisions of the rule. One of these subparts provides the elements and the criteria for formulating an individual program concerning each of the subject areas. Another subpart provides for the process of implementing both the overall regulatory program and each of the individual railroad programs subsequent to their approval by FRA. A third subpart provides for the ongoing administration of the railroad programs.

3. Components of a Railroad's Program

FRA is requiring that each railroad adopt its own program for determining the qualifications of its engineers. That program must address the following subjects: (1) Selection of designated supervisors of locomotive engineers; (2) selection of the classes of service for engineers; (3) evaluation of the safety conduct of engineers; (4) evaluation of engineer hearing and visual acuity; (5) education of engineers; (6) testing of engineers; (7) operational monitoring of engineers; and (8) procedural aspects of the operation of the certification program. Each railroad will submit its program to FRA for approval. After approval, the railroad will evaluate every person the railroad wants to authorize to operate a locomotive and determine whether each person meets the qualification requirements to be a locomotive engineer on that railroad. If the railroad determines that the person meets the qualifications for a locomotive engineer, the railroad will certify that person as qualified and issue a certificate documenting that determination.

4. Reasons for Changing the Concept

FRA's proposed rule focused on the common denominators that exist for all railroads and all locomotive engineers. It proposed a qualification system that organized the certification process around the similarities that exist among railroads. FRA proposed gradations in the system only where there appeared to be a major difference that would form a logical basis for distinguishing between the qualifications needed to operate trains of given size and operational complexity. However, commenters repeatedly stressed the individuality of railroads and suggested a better approach to be to sanction individualized solutions on each railroad. Finding these views persuasive, FRA has reoriented its approach in the final rule to permit each railroad to retain its existing program, while bringing it into conformity with a federally established norm. This approach will allow individual programs to differ somewhat as appropriate, yet still result in consistent qualification standards for all railroads.

FRA discusses below the comments received in response to the NPRM, organized in the structure of the final rule. A brief synopsis of the relevant portion of the proposal precedes the discussion.

Requirements of the Final Rule

1. Designated Supervisors of Locomotive Engineers

FRA proposed that railroads be required to use a particular type of person, a designated supervisor of locomotive engineers, to make decisions about the performance skills of locomotive engineers. In FRA's judgment, it is difficult for anyone to evaluate those skills without having had substantial experience as a locomotive engineer; accordingly, FRA proposed that these designated supervisors have a minimum of three years of such experience. Commenters criticized this proposal on three grounds: (1) It failed to give sufficient recognition to the fact that simulator technology could play a very useful role in evaluating performance skills under the proper circumstances; (2) it constrained and might even prevent small railroads from using consultants to perform this function; and (3) it posed an unnecessary hardship for large railroads that had been restructuring their work forces.

In response, FRA has deleted the requirement of three years experience, requiring, instead, that railroads have a specific procedure for evaluating those it is considering designating as a supervisor of locomotive engineers. At a minimum, the procedure shall provide a mechanism by which the candidate for designation will demonstrate to the railroad that he or she has the requisite knowledge to perform this function and adequate supervisory experience both to evaluate a locomotive engineer's skills and, where necessary, to prescribe appropriate remedial actions to correct detected deficiencies. Railroads will have the freedom to use existing procedures, such as selecting experienced senior locomotive engineers with supervisory experience, and the power to create trainee programs that substitute training for experience. Since the procedure can be applied to consultants, small railroads lacking the resources to have a designated supervisor as part of its permanent staff can more easily comply with this regulation.

2. Classes of Service

FRA proposed to divide locomotive engineers into five categories corresponding to gradations of proficiency at handling trains of varying degrees of difficulty, addressing such factors as the number, nature, and placement of cars, the speed of the train, and the effect of terrain on train operation.

Commenters criticized the various category thresholds proposed by FRA. In general, commenters suggested changes that reflected the particular operations on their individual railroads, often urging a reduction in the level of training needed for particular classes of service.

In response, FRA is establishing three classes of service in the final rule: Student engineers, locomotive servicing engineers, and train service engineers. Railroads can use one or all of these classes of service. A railroad that does not have much occasion to move locomotives that are not hauling cars may not want to have locomotive servicing engineers as a class of service on that railroad. Likewise, a railroad that will not have occasion to educate student engineers may not have that class of service.

3. Safety Conduct of Engineers

FRA proposed a system for reviewing the prior safety record of persons seeking certification as a qualified locomotive engineer. Under that proposal, a railroad would have been required to review information concerning both the safety conduct of that person as a railroad employee and as a driver of motor vehicles. Specified types of poor safety conduct while driving a motor vehicle and while operating a locomotive were identified and assigned point values. To be eligible for certification, a person's total accumulated points from incidents in all contexts could not exceed a stated numerical value. Virtually every commenter objected to this scheme, maintaining that consideration of railroad employee conduct in this context is redundant, since railroads already consider it.

Commenters argued that FRA should avoid the motor vehicle issue altogether, asserting the irrelevance of motor vehicle driving data to the qualifications of locomotive engineers. However, Congress found otherwise, requiring in section 4 of the RSIA that consideration of such information be made part of this rule. The statute thus rendered moot further debate of this issue.

(a) Availability of Data

(1) *Motor Vehicle Operation.* Even those commenters who recognized the statutory mandate criticized FRA's proposal, some arguing that FRA had gone too far and others saying not far enough. Some commenters invoked the legal concepts of *ex post facto* laws and double jeopardy, while others decried the lack of a provision for remedial efforts such as attendance at driver

education programs. Others noted that some individuals who use public transportation have no motor vehicle driving record, while still others objected to the weighting of various events under the proposed point system and expressed fear that inequitable enforcement of motor vehicle laws could result in loss of employment.

Many commenters suggested that FRA conduct a study to gain some better insight into the relationship between motor vehicle record data and railroad train operation data before taking final regulatory action. During the public hearings and in written comments, a number of railroads and representatives of several labor organizations indicated they would be willing to assist in the conduct of such a study. Such willingness was predicated on the study being conducted in a scientifically valid manner that respected the privacy of individuals who would provide access to the records being studied.

FRA agrees and has decided to defer most aspects of its proposed eligibility criteria predicated on motor vehicle driver data until completion of such a study, which FRA anticipates can be completed within one year. After completion, FRA will then determine the appropriate course of action.

This decision does not, however, apply to the aspect of FRA's proposal concerning motor vehicle data involving alcohol and drug incidents. Most commenters acknowledged that driving under the influence of alcohol or drugs could be relevant to a person's qualification to be an engineer. Consequently, FRA has retained the portion of the proposed rule that requires evaluation of motor vehicle incidents involving alcohol or drugs. As discussed below, FRA's requirements concerning this data have been modified from those initially proposed.

(2) *Train operation.* FRA has been acquiring data on the causes of train accidents for many years. Railroads have been required since 1975 to report rail equipment accidents and incidents that exceed a dollar threshold set forth in its regulations (49 CFR part 225). Except for revisions to this threshold, FRA's accident reporting requirements have remained essentially the same for many years.

As part of those reporting requirements, railroads must use one of the cause codes listed in the "FRA Guide for Preparing Accident/Incident Reports" to indicate what the railroad has determined to be the cause of each reportable accident. An extensive list of cause codes is provided to segregate accident data into relevant analytic groupings. FRA looked at twenty of those cause codes that reflect poor safety performance by a locomotive engineer. FRA identified 6,990 train accidents during the period 1977–1987 that were reported as attributable in whole or in part to one of those cause codes. Those cause codes indicate instances in which a locomotive engineer failed to properly use the train's brake systems, failed to control train speed, failed to obey signal indications, entered track without authority, or failed to operate the train safely in a variety of other ways.

Among the more notable of these accidents were the following: The train handling derailment at Thayer, Iowa on October 17, 1985; the overspeed derailments at Sanataria Springs, New York on March 22, 1985, Crooks, Oregon on November 25, 1985, and Pittsburgh, Pennsylvania on April 11, 1987; the collisions resulting from failures to obey signal indications at Palmer Lake, Colorado on May 27, 1983, Montello, Nevada on June 22, 1985, Lockair, Georgia on November 8, 1985, Bunnell, Florida on April 11, 1987, and Nugget, Wyoming on November 8, 1987; the unauthorized track occupancy collision at Broomfield, Colorado on August 2, 1985; the improper train operation collisions at Eldon, Texas on November 19, 1983, and Marquette, Iowa on February 2, 1985; and of course the multiple failures at Chase, Maryland.

Given the events that preceded the enactment of the RSIA, the kind of accident data just summarized, and FRA's basic safety mission, FRA must address the safety conduct of those seeking certification as a locomotive engineer.

As noted in the NPRM, detailed analysis of the data concerning those nearly 7,000 accidents is difficult, since FRA lacks specific information for each one. Thus, although the cause codes are helpful, the locomotive engineers' actions could have a wide variety of explanations.

FRA has acted to reduce this problem in the future by revising its procedures for investigating train accidents and by amending its accident reporting rules to provide railroad employees, including locomotive engineers, with a mechanism for supplementing the information being furnished FRA (55 FR 37818). Since December 1, 1990, when a railroad characterizes an accident as having been caused in whole or in part by the act, omission, or physical condition of an engineer, the railroad must notify the engineer of that fact and of his or her right to submit a statement to FRA to supplement the railroad's report. A copy of that statement must also go to the railroad and, if the railroad receives such a statement, the railroad must correct any deficiencies in its report to FRA.

(b) Conclusions Based on the Data

FRA believes that the poor safety performance by locomotive engineers reflected in the accidents data it studied stemmed from either some lack of or failure to employ knowledge, skill, or ability.

The provisions in this final rule concerning the training and testing of locomotive engineers respond to the first problem. By requiring that engineers be trained and that they demonstrate their knowledge, skill, and ability, this rule should reduce the number of accidents attributable to this deficiency. FRA's intent is to prevent recurrence of such accidents as the head-on collision at Randles, Missouri in 1982, the derailment at Missouri Valley, Iowa in 1980, the derailment at Crestview, Florida in 1979, and the head-on collision at Lake Point, Utah in 1977.

Failures to apply acquired knowledge, skill, or ability in a specific situation arise from distortions in engineer judgment, generally induced by abuse of alcohol or drugs, stress and fatigue, or lack of routine vigilance.

(1) *Alcohol and drug abuse.* In 1985 FRA issued its rule on the control of alcohol and drug use by rail workers (49 CFR Part 219), which prohibits possession and/or use of alcohol and controlled substances when assigned to perform service covered by the Hours of Service Act. In addition, the rule prohibits reporting for, going on, or remaining on duty while under the influence of or impaired by alcohol or a controlled substance. In response to the RSIA, FRA has included provisions in this final rule requiring consideration of instances of operation of a motor vehicle while under the influence of or impaired by alcohol or a controlled substance.

(2) *Stress and fatigue.* For several reasons, FRA is not addressing accidents that arguably arise from stress and fatigue. First, the hours that railroad employees may be on duty are controlled by the Hours of Service Act (45 U.S.C. 61–64b), which does not give FRA authority to prescribe through regulation the appropriate tour of duty limitations or rest intervals for locomotive engineers. In 1990, the Department submitted proposed legislation that would have given FRA regulatory authority over this area.

Even if FRA had such authority, it now lacks sufficient information to appropriately regulate the hours of duty of locomotive engineers. Accordingly, FRA is conducting research to gain more understanding of sleep deficiency problems for rail workers. Building on efforts of other modal administrations, FRA is designing methods for scientifically testing the degradation in locomotive engineer performance and vigilance due to fatigue. Once effective tests are devised, they will permit FRA to use locomotive simulators to effectively measure skill performance degradation under varying levels of fatigue.

FRA is also studying the issue of how the work schedules of locomotive engineers are determined. Since there is very little documentation on this subject, this study seeks to determine how locomotive engineers are currently being scheduled for work, why there is so much unpredictability in those schedules, how various aspects of current practices contribute to stress and fatigue, and what options exist to improve matters. After such studies have been completed, FRA will consider whether to address this issue in an amendment to this rule.

(3) *Lack of routine vigilance.* Although some accidents can be attributed to fatigue and improper use of controlled substances, others are caused by a lack of routine vigilance by locomotive engineers. By requiring that engineers be periodically monitored and provided remedial training when appropriate, this rule should help reduce such accidents. FRA rejects commenter suggestions that this rule be silent on the issue of poor safety conduct by locomotive engineers.

(c) The Final Rule's Provisions on Safety Conduct

This final rule requires that each railroad adopt procedures for reviewing and evaluating the safety record of each candidate to determine whether he or she is eligible to be a certified locomotive engineer. The procedures shall include evaluation of information concerning the person's prior safety conduct as a railroad employee and the person's prior safety conduct as an operator of a motor vehicle. To the extent that the candidate controls access to the information that will form the basis of the evaluation, FRA is imposing a duty on the candidate to furnish that information or access to that information to the railroad.

FRA is modifying its proposal significantly. As previously noted, one change involves deferring a decision concerning the use of non-alcohol and drug-related motor vehicle licensing information. FRA has also made changes to respond to commenter concern that FRA's proposal could be implemented in a manner that would not be in harmony with FRA's existing rules for controlling substance abuse by railroad workers. In view of several factors, including the decision to defer implementation of some aspects of the motor vehicle operator data pending completion of a study and the need for better integration of its alcohol and drug rules, FRA has decided not to employ the specific point system proposed in the NPRM.

The risk posed by misuse of alcohol and drugs appears in two distinct forms: (1) Substance abuse disorders that are illnesses; and (2) specific instances of inappropriate conduct, such as prohibited use or possession of alcohol or drugs on the job or operation of motor vehicles under their influence, that may suggest a proclivity for reckless conduct in the future. For any given period of time, one form of risk may exist without the other as to any individual. For instance, an employee may use marijuana on the job without having a chemical dependency; or a person who is in an incipient stage of cocaine dependency may manage to resist using the drug while on the job and function normally for a time, until the disordering effects of the drug lead to an unsafe practice. Both forms of risk must be addressed; and, with respect to specific instances of conduct, it may be pertinent whether the conduct occurred within the regulated occupational context.

(1) *Substance abuse disorders.* Whenever a safety-sensitive employee acquires a substance abuse disorder, the risk increases significantly that the physical or psychological dependence, and loss of control often associated with such disorders, will lead the person to appear on the job significantly impaired. Impairment may result from the acute, chronic, or withdrawal effects of the drug (including, for this purpose, alcohol). See, *e.g.*, 53 FR 16640, 16641–16644 (May 10, 1988). Though many who are in the process of developing a chemical dependency will resist use of drugs in the work environment in order to avoid detection and protect their source of income, in the later stages of the disorder this will often prove impossible. Even if drugs are not actually ingested on the job, their effects may be substantial.

Having a substance abuse disorder is not "conduct" properly punishable under any scheme of regulation. A substance abuse disorder may be acquired without violating any law (*e.g.*, alcoholism) and even as a result of misguided medical treatment. However, this status does render the individual unsuitable for safety-sensitive responsibilities during the period the disorder is active (*i.e.*, while drug intake continues and until post-cessation symptoms have been treated). This is a principle that is already embodied in a variety of Federal regulations analogous to this final rule. See, *e.g.*, 49 CFR 391.41 (motor carrier drivers); 14 CFR 67.13 (pilots).

FRA has previously required successful treatment of substance abuse disorders prior to return to service, where chemical tests indicate violation of alcohol or drug use prohibitions and in certain other circumstances. 49 CFR 219.104(d), 219.405. In providing for certification of engineers pursuant to the mandate of the statute, FRA bears a special responsibility to ensure, to the extent practical through regulatory action, that these individuals are free of active substance abuse disorders. The final rule therefore treats an active substance abuse disorder as a condition rendering the person ineligible to hold a certificate. Following successful completion of primary treatment, the individual is entitled to conditional certification. Where the individual self-refers without prompting under the voluntary referral provision of the FRA alcohol/drug regulations (49 CFR 219.403), confidentiality is maintained and there is no effect on certification status provided the engineer follows through with the recommended course of treatment.

(2) *Motor vehicle data.* Information concerning the non-occupational conduct of the candidate for certification, such as that required to be provided with respect to motor vehicle driving history, has possible significance both with respect to the presence of a substance abuse disorder and with respect to a habit or unpredictable pattern of reckless or irresponsible behavior that may carry over into railroad duties. As explained above, FRA has determined that the weight such information should be given as "unsafe conduct" will be the subject of further study.

However, information such as convictions for drunk or drugged driving also raises the question whether the individual has an active substance abuse disorder. This question may be rather urgent, as in the case of an employee who has been convicted twice in the recent past in incidents involving extremely high blood alcohol concentrations. At the other extreme, the information may be consistent with a single incident almost three years prior involving a somewhat lower level of alcohol. The important point is that the information should be considered, along with the railroad service record (attendance, job-related problems, medical problems, etc.), in the context of a clinical evaluation of the employee by an appropriate professional.

Accordingly, the rule provides that any conviction for a specified alcohol/drug offense that occurs during the 36-month period prior to certification will result in an evaluation by an "EAP Counselor" to determine whether the person has an active substance abuse disorder. In this setting, the motor vehicle information is merely a factor to be considered and does not, by itself, dictate any outcome.

(3) *Role of the EAP counselor.* The "EAP Counselor" is a concept derived from the FRA alcohol/drug rule (49 CFR part 219) and refers to an appropriate professional who will be responsible for conducting the evaluation and (in words suggested by a commenter) "managing an appropriate treatment plan." As a practical matter, most large railroad systems will likely employ their salaried or contract employee assistance program (EAP) counselors to perform this function. These individuals have extensive experience in evaluating employee substance abuse problems, referring those individuals for appropriate treatment, and monitoring progress after return to service. Their extensive clinical experience and knowledge of the railroad occupational environment make employee assistance counselors a major asset that must be utilized for substance abuse case management. However, any qualified person, such as a physician with knowledge and experience in the field of substance abuse disorders (*e.g.*, a Medical Review Officer), a certified alcohol/drug counselor working in the community, a psychologist with experience in treating substance abuse disorders, etc., could perform the "EAP Counselor" function with respect to evaluation of the substance abuse disorder. It is intended that the EAP Counselor be able to draw upon the usual sources of assistance for this purpose from the health care and mental health communities. Similarly, a qualified person who is reasonably familiar with the particular railroad occupational environment should be capable of managing aftercare.

Certain commenters in this proceeding suggested that FRA should require certification of EAP counselors for this purpose. FRA recognizes that occupational substance abuse professionals providing services to the railroads are drawn from a wide range of backgrounds and differ in education, experience, and formal credentials. FRA believes that it should be the railroad's responsibility to identify and employ (or contract with) appropriately qualified persons to perform this function, taking into consideration any applicable state requirements. This may mean that the person designated as EAP counselor will need to draw upon diagnoses from other professionals in making a final evaluation; or, with respect to a particular case or category of cases, the function itself may need to be transferred to an appropriate professional with specialized knowledge concerning the particular disorder.

FRA does not believe it is the role of a safety regulatory agency to govern provision of these services through a specialized credentialing system. Given the increasing reliance on contract services in the railroad industry and the number of regional and short line railroads that must obtain these services from local contract sources, it does not appear practical to insist on creation of a new substance abuse specialty within the several health care and mental health fields that provide these services. However, FRA is contributing to the augmentation of employee assistance personnel skills in the railroad industry by sponsoring the development of a flexible curriculum model for EAP personnel serving the railroad industry. This effort, which will be founded on a counselor curriculum developed by the National Institute on Drug Abuse, is intended to supplement the extensive educational and training opportunities available from other sources and to provide a bench mark that railroads can employ in providing supplemental and continuing training for salaried personnel and contract personnel who handle railroad employee referrals.

(d) Misuse of Alcohol and Controlled Substances as Conduct

Quite apart from the presence or absence of an active substance abuse disorder, it is critical both to the success of substance abuse prevention and treatment and to the safety of railroad operations that safety-critical personnel be held accountable for the prohibited use of alcohol and controlled substances.

Section 219.101 of current FRA regulations prohibits engineers and other Hours of Service employees from going or remaining on duty while using, possessing, or being under the influence of or impaired by alcohol or a controlled substance or while having a blood alcohol concentration of .04% or more. Section 219.102 prohibits the same individuals from using a controlled substance without specific medical authorization, whether on or off duty. FRA has previously left to the railroads the responsibility for assessing discipline based on violations of these regulations, subject to minimum standards for evaluation, testing and return to service (§ 219.104(d)). This flexibility has generally permitted employers to fashion appropriate responses within the overall employment context, including labor agreements and cooperative programs that seek to involve employees in substance abuse prevention (*e.g.*, Operation Red Block, Operation Stop). However, this flexibility has also led to a wide range of employer responses to individual cases and carries the risk of permitting individual arbitrators to impose a wide range of sanctions. Further, it may be possible for a person dismissed from one railroad to go to work in a similar position with a second railroad. Accordingly, with the onset of Federally-mandated certification of locomotive engineers, it will be important to establish standards for revocation of certificates—without prejudice to the ability of railroad management to impose more severe discipline.

It is useful to re-emphasize for purposes of this discussion that the revocation periods provided in the final rules are minimum periods for revocation of the locomotive engineer certificate. However, holding a certificate does not create an entitlement to employment as an engineer—it merely establishes eligibility to perform certain duties insofar as the Federal regulations are concerned. An employee may be eligible under the regulations, but unqualified under a more stringent company policy. If the employee is unqualified under company policy and the company therefore elects not to consider an application for certification or recertification under the Federal rule (*i.e.*, since any certificate action would have no practical meaning), then it will be critical for the company to clearly state that company policy is the basis of its action.

This final rule includes specific standards for revocation periods that are intended to ensure adequate minimum sanctions without disrupting other countermeasures currently in place. In general, first-time violators of § 219.102 (prohibited use of controlled substances) would be handled in the same manner required in the FRA alcohol/drug regulations. Subsequent violations would require specific revocation periods. First-time violators of § 219.101 (on-duty use, possession, impairment, BAC .04% or more) would be subject to revocation for 9 months, the same period employed in the alcohol/drug rule for refusal of an FRA mandated chemical test. Those standards are discussed more fully in the section-by-section analysis below.

(5) *Unsafe operation of trains.* Commenters objected to the proposal to hold engineers accountable for unsafe operation of trains, arguing that such a rule would be redundant given the railroads' existing disciplinary system or that, if promulgated, such authority should only rarely be exercised. Several of the Class I railroads argued that FRA has a duty under section 202 of the FRSA to prove that the existing private system for responding to unsafe train operation behavior is flawed before FRA has the legal authority to intervene. They also argued that, even if FRA has the authority, as a matter of policy it should not intervene given the likely complication and confusion that would result. Some commenters expressed concern that the proposal made inadequate allowance for remedial actions and prescribed unduly harsh consequences for unsafe behavior.

A premise of the comments was that the existing system effectively responds to unsafe operation of trains. As noted in the NPRM, FRA has found little evidence supporting or negating that proposition. As FRA's routine investigatory efforts, anecdotal information, commenter responses, and industry literature indicate, administration of the current system is not uniform, *i.e.*, industry handling of alcohol and drug incidents leads to a wide range of responses to similar cases.

FRA recognizes that devising a comprehensive means of responding to operational misconduct by locomotive engineers would require extensive additional study. However, as indicated in the NPRM, FRA data show that noncompliance with five types of railroad operating rules generated a significant portion (more than 5,000) of the 6,990 train accidents described above. The five types of rules are those: (1) Requiring adherence to signal indications; (2) limiting train speed; (3) prescribing operation of the train and engine brake system so as to safely control train operation; (4) prohibiting occupying a track without authority; and (5) prohibiting the unauthorized nullification of locomotive-mounted safety devices.

Given their accident-causing potential, FRA has selected these five kinds of misconduct as requiring attention under this certification program. As noted earlier, FRA's proposed point system was criticized by commenters as faulty. FRA agrees and has amended that approach in this final rule.

FRA's response to unsafe operational conduct by locomotive engineers rests on several policy considerations. First is the need to incorporate sanctions to deter future unsafe conduct. At the same time, we need to account for the fact that unsafe conduct may represent a rare lapse of judgment or may demonstrate a need for supplemental training. As pointed out by commenters, FRA's rule also needs to avoid conflict with its existing rules controlling alcohol and drug use by locomotive engineers. Finally, FRA's rule must recognize the railroads' primary role in detecting the evidence of unsafe conduct, assessing its adequacy, and pursuing appropriate action.

Under the revised approach adopted in this final rule, a railroad's finding that an engineer has failed to comply with one of the five types of safety rules will have two consequences: (1) Revocation of the engineer's certificate for 30 days; and (2) initiation of a probationary period of three to five years during which the engineer will suffer increasingly severe sanctions in the event of additional rules violations. If a second event occurs within three years, the period of mandatory revocation will increase to one year. If a third event occurs within five years, the revocation period increases to five years. After three years with no additional rules violations, a second incident would not result in the one-year revocation. However, that second incident would start a new three-year period within which a second incident would generate a one-year revocation. Moreover, both events would be relevant if a third incident occurs within five years of the first.

FRA has also revised its proposal to mandate responses to alcohol and drug incidents of on-duty possession, use, and impairment. These responses are integrated into the unsafe conduct provisions just described and are fully consistent with FRA's current rules concerning the control of alcohol and drug use by railroad workers.

The revocation periods in this rule have been set so as not to cause unduly harsh punishment in the routine administration of this rule. FRA recognizes that punishment may not always be an appropriate response to the types of conduct addressed in this rule. Particularly flagrant noncompliance, especially that which produces severe consequences, may warrant very serious sanction. Of course, where violations of Federal rules have occurred, FRA may assess civil penalties or disqualify employees from safety-sensitive service. These issues are discussed more extensively in the section-by-section analysis below.

4. Evaluation of Engineer Hearing and Visual Acuity

FRA proposed hearing and visual acuity testing based on standards similar to those found in other transportation modes, published FRA research, and recommended industry guidelines.

Commenters raised four objections to FRA's proposal. As with other aspects of the NPRM, some commenters argued for no action on this subject because of existing practices on a given railroad or group of railroads. Others suggested different acuity standards. Still others urged discretion to permit individualized assessments of acuity. Finally, some commenters wanted greater freedom in selecting ways to accomplish FRA's stated goals. Discussion of this last issue is deferred to the section-by-section analysis below.

FRA has rejected the suggestion that this rule remain silent on the question of physical capacity. As explained in the NPRM, this regulation needs to address a person's physical capacity to serve as an engineer. The absence of reliable scientific data supporting commenter-suggested substitute acuity thresholds means we have no basis for altering those proposed. However, several commenters did provide evidence that supports affording railroads more discretion.

FRA's proposed rule contemplated that there would be few instances of failure to meet the criteria and that in those few cases most candidates could otherwise demonstrate an ability to safely perform as a locomotive engineer. Thus, FRA believed the agency could directly resolve the matter through its own waiver process. Commenters indicate that more than a few instances exist. For example, several commenters cited a number of individuals with only one functioning eye who have learned to adjust for the resulting loss of depth perception and can safely operate locomotives. Commenters from the medical community agreed with FRA's basic theory that individualized evaluations were needed in instances where a person's acuity levels were below the stated minimum, but urged that FRA afford railroads discretion to make those medical judgments. After review of the comments, FRA has decided to afford railroads such discretion in this final rule. Medical discretion will allow railroads to respond appropriately when they encounter individuals who fail to meet the FRA-prescribed acuity levels, but demonstrate that they can compensate to a sufficient degree for their diminished acuity level.

If in the professional judgment of the railroad's medical officer a person not meeting FRA standards can safely perform the tasks of a locomotive engineer on that railroad, the railroad is authorized to certify that person as a locomotive engineer. The medical officer can, if necessary, impose conditions on the service that person is permitted to perform. Although not raised by commenters, FRA's revised approach to this issue is consistent with the spirit of the recently enacted Americans with Disabilities Act (Pub. L. No. 101-336, 104 Stat. 329 (1990)).

FRA received a number of comments about a perceived unfairness of the proposed rule concerning its contemplated requirement for hearing acuity. Several commenters asserted that there has been serious degradation in the hearing acuity of engineers resulting from exposure to high noise levels in locomotives cabs. FRA is portrayed in these comments as having failed to correct this situation and thus as being responsible to some degree for creating potentially disqualifying hearing impairment of people seeking to be certified. This generated a demand that FRA defer action on hearing acuity until it acts to lower the noise levels found in locomotive cabs.

However, FRA does have noise standards for locomotive cabs (see 49 CFR 229.121). The permissible noise exposure levels are consistent with those formulated by the Occupational Safety and Health Administration (OSHA) and have been in effect for more than ten years. The issue of hearing degradation attributable to cab noise levels was extensively discussed and resolved in the regulatory proceedings that led to the adoption of those standards. To date no party has provided a valid basis for suggesting that FRA should alter those noise exposure thresholds. Thus, FRA does not agree that it should defer action until it lowers exposure levels. Moreover, as pointed out in the proposed rule, there is a need to ensure that engineers have the appropriate level of hearing so that they can safely operate trains. Those who want more information on this topic are referred to FRA's final rule published on March 31, 1980 (45 FR 21092).

Commenter concern over these issues has led FRA to conclude that the agency should sponsor a technical conference on the acuity standards being adopted in this rule. Notice of that conference will be provided in the **Federal Register**.

5. Education of Locomotive Engineers

FRA proposed to regulate both the initial training of persons new to locomotive operation and the continuing education of experienced engineers. FRA proposed detailed rules for initial training and more limited, but no less controversial, rules for continuing education.

A number of commenters objected to the detailed requirements for railroads' initial training programs in the proposal. Small railroads were concerned about the apparent cost of compliance. Comments on the proposed continuing education requirement were critical of the provisions relating to maintaining familiarity with the physical characteristics of the territory. Some commenters saw FRA as unduly restrictive by requiring actual train operation over the territory. Others saw the number of trips specified as too few or too many depending on the physical configuration of the territory. These provisions were generally viewed as too costly.

In response to the comments, FRA has changed the proposed rule to allow railroads greater discretion to design their own course of study for the initial training of locomotive engineers, specifying only the general subject matter to be covered. The final rule will thus accommodate those railroads already developing new programs, *e.g.*, using computer-based training techniques or advanced train control systems that will change the knowledge and skill required of engineers. Smaller railroads will also be afforded the latitude to tailor their programs to meet their more limited needs.

Similar changes providing significant discretion have been made with respect to continuing education of engineers. To assure engineer familiarity with a territory, railroads will have the freedom to select the interval at which familiarization must be provided and the authority to use a variety of methods (*e.g.*, hi-rail trips, simulators, and films of the right of way) to keep their engineers conversant with the physical characteristics of the territory they can be called to operate over.

In reviewing the railroads' individual programs, FRA will consider the degree to which each deviates from the norms established by this final rule. Where a program deviates materially, FRA will focus on the rationale for the alternative approach and evaluate the degree to which that approach is likely to produce locomotive engineers with the knowledge, skill, and ability to safely operate trains.

6. Knowledge and Skill Testing of Locomotive Engineers

FRA proposed requiring periodic knowledge and skill performance testing of locomotive engineers. The proposal prescribed the subject matter to be covered, the manner of administering the test, and the consequences of failure.

Some commenters viewed these requirements as redundant, given existing railroad operating rules examinations. Commenters objecting to FRA's limitations on the manner for administering the knowledge test took exception to the number of questions criteria, to the passing score requirements, and to taking written tests without reference materials available. Commenters objecting to FRA's skill performance test were concerned about the consequences of failure.

The concern about redundancy appears to rest on an assumption that the FRA knowledge tests would add yet another tier of examinations to existing periodic rules testing. However, FRA does not anticipate a new tier of tests; instead, FRA expects that railroads will modify their existing periodic rules examinations to include the subject matter specified by FRA to the extent those subjects are not covered by existing tests.

Other commenter criticisms are well taken. FRA agrees that there is no particular value in employing a 150-question test rather than a test with 300 or 100 questions. Similarly, no compelling rationale supports setting 85 percent as the passing grade. There is, however, substantial value in requiring that written objective testing be conducted and that tests be conducted without immediate access to reference materials. Engineers must have effective reading skills to comprehend the myriad written instructions they are given to ensure the safe operation of trains. Tests must be conducted fairly and be reviewable. These are objectives most likely to be achieved through the use of written examinations. Prohibiting immediate access to reference materials assists railroads in determining whether candidates are familiar with the rules and comprehend them. In most situations an engineer will not have time to consult a rule book before taking action to safely control his or her train. However, FRA agrees that a railroad test intended to evaluate an engineer's ability to use reference materials requires access and the rule has been modified to accommodate such testing.

Response to FRA's proposed consequences for test failures generally focused on existing contractual arrangements concerning railroad operating rules examinations. FRA proposed that a person who failed a periodic test would be retested at specified intervals and precluded from operating a locomotive until he or she was successful.

Commenters objected to FRA's disrupting contractual agreements that permit those who fail tests to continue operating trains pending retest and interfering with provisions that specify the number of and intervals between retests. Others urged FRA to supersede those contractual arrangements to avoid the potential for reinstituting the presence of "firemen" on locomotives or to assure public safety by precluding less than fully knowledgeable or fully skilled engineers from operating locomotives.

In part, the concerns of these commenters reflect the government rule/private contract debate discussed earlier. FRA proposed periodic examinations to assure that an engineer maintains the requisite levels of knowledge and skill. If a railroad elects to conduct a separate examination on railroad-specific issues with contractual implications, railroads could create the "fireman flowback" problem they fear. To clarify the intent of this provision, FRA has added an explanatory section to this final rule. Discussion of this new provision is provided in the section-by-section analysis below.

FRA accepts commenter arguments that the rule should focus on FRA's bottom-line objective, *i.e.*, whether a locomotive engineer has the requisite knowledge and performance skills. Accordingly, FRA has eliminated its proposed provisions concerning the number of and interval between retests and other consequences of test failure. Only the prohibition against operating a locomotive prior to success on the test has been retained in the final rule.

7. Monitoring Certified Engineers While Operating Trains

FRA proposed that railroads monitor the routine operations of locomotive engineers to assure that they demonstrate appropriate operating skills and compliance with safety rules. FRA's proposal called for annual unannounced rules compliance tests and in-cab observations of performance.

Few commenters objected to this proposal. Those objecting to unannounced testing argued that such testing (*i.e.*, "efficiency testing") already exists, can breed distrust, will be applied unfairly, and should not apply to railroad managers who only operate trains on rare occasions. Those objecting to in-cab observations wanted FRA to reduce the duration, frequency, and restrictive methods proposed. In general, these commenters wanted discretion to prescribe the duration of the observation period, the interval between observations, and the use of electronic monitoring.

FRA investigatory efforts and accident data have indicated serious deficiencies in current railroad operating rules testing. In the context of safety assessments, FRA has repeatedly advised railroads about the poor quality of their existing "efficiency testing" programs, and the agency's routine monitoring of railroad testing suggests that the minimal failure rates often reported by railroads are misleading. A quality program that ensures the competence of engineers should inspire confidence in rail employees and dispel any lack of trust. The suggestion that FRA should employ a lower standard for one group of locomotive engineers, those who hold managerial positions, is unwarranted. Those who infrequently operate locomotives clearly need such testing. Assuring that testing is conducted for all operators of locomotives according to established criteria should reduce any perception of unfairness.

In response to comments, FRA has amended its proposal for in-cab observations, including elimination of the proposed prescriptions for the duration of monitoring. Designed to permit evaluation of engineer response to an appropriate range of situations, FRA's proposal would have compelled railroads to allocate substantial resources to this task. FRA believes that railroads should be given more discretion on this point. FRA also believes that commenter suggestions that electronic monitoring be permitted have merit. Train monitoring devices ("event recorders" or "black boxes") and advanced train control systems now under development can provide electronically much of the monitoring FRA believes necessary. Moreover, these devices can define the nature and timing of critical events. There is also some risk that FRA's proposed requirements on this issue could be viewed as a disincentive to the use or future installation of such devices. FRA has decided, therefore, to allow the use of such devices in the final rule. These changes obviate the need to adopt commenter suggestions for a longer interval between observations.

Although not directly raised by commenters, FRA's proposal concerning operational monitoring failed to address the question of whether it was permissible to use simulators in satisfying this monitoring requirement. Recognizing the value of simulators of the type FRA is otherwise sanctioning for the purposes of this rule, FRA has modified the final rule to permit the use of simulators for operational monitoring.

8. Implementing Each Railroad's Program

FRA's proposal addressed in some detail the process of converting from the current industry practice to the certification system prescribed by this rule. The NPRM also contained proposed procedures that would be employed in the routine administration of the certification system.

(a) The Conversion Process

The conversion process was discussed primarily in terms of the "grandfathering" of existing engineers, since it envisioned an initial recognition of the qualifications of those currently authorized by railroads to operate locomotives. Under FRA's proposal, railroads would be free to select and identify those individuals it deemed eligible for certification on the basis of their prior experience as engineers. Those persons would be certified without evaluating their eligibility based on prior conduct or testing of their knowledge, skill, or acuity levels. That initial certification would remain in effect for three years, during which the railroads would conduct "formal" evaluations that fully comply with the requirements of this rule.

Commenters raised four objections to FRA's proposed conversion process. Some commenters wondered why FRA did not immediately test all engineers prior to initial certification, given the volume of accidents attributed to poor performance as engineers. Other commenters, particularly individuals who would be affected by this rule, felt that FRA should not require any testing of those who have already proved themselves. Still others argued that requiring older engineers to pass the same kinds of tests that are given to new engineers who have the benefit of long, sophisticated training programs is unfair. A number of commenters urged FRA to use a five-year transition period.

Most commenter objections appeared to stem from an interest in maintaining the status quo. At present, once a railroad qualifies an employee to be an engineer, the railroad does not review that decision unless the railroad takes exception to poor performance by the engineer. While some railroads aggressively monitor the knowledge and skill of their engineers on a periodic basis, most wait until they see a problem before considering whether to re-evaluate an engineer's qualifications. FRA proposed and is requiring all railroads to conduct periodic reassessments because that is the more effective way to prevent accidents.

FRA has not accepted commenter suggestions for no phase-in period for certification of experienced engineers. As noted in the NPRM, the rail industry has compiled an enviable safety record that does not warrant such an extraordinary step.

As to the nature of the tests and capacity of engineers to pass them, FRA believes that the testing proposed is similar to that currently used by many railroads on their operating rules. FRA proposed and is requiring that railroads expand the subjects covered by these "book of rules" examinations to include additional topics required by this final rule, such as train handling and Federal rules concerning the operation of trains. Although railroads already require their engineers to know this additional information and to comply with Federal rules, some commenters expressed concern that engineers will fail these tests in significant numbers—apparently as a result of poor test-taking skills. Such fears can be allayed by administering preliminary examinations, a procedure that can give candidates insight into their command of the subject matter and their test-taking skills. Pretesting could be presented by rail labor organizations, railroads, or outside educational services, as could any needed refresher training.

The final concern expressed by commenters was the duration of the conversion period. Many commenters suggested a five-year period, and a number wanted to delay the start of formal evaluations for those five years. Virtually no rationale was provided in support of these suggestions. However, several reasons appeared in commenter discussion of other issues: (1) Small railroads may require more time than large railroads; (2) delay would limit consideration of prior events for certification purposes; and (3) a five-year recertification cycle suggests a similar period for conversion.

FRA is electing to retain the three-year phase-in-period; however, FRA is staggering the beginning dates to give smaller railroads more time to complete conversion. Commenter concern about the certification import of prior events has been resolved through deletion of the proposed point system and the changes made concerning motor vehicle driving data and train operation data.

(b) FRA Approval of Railroad Programs

FRA has amended the process for implementing the certification program. As a first step, all railroads will identify their designated supervisors of locomotive engineers and then their existing locomotive engineers whom they intend to "grandfather".

All railroads are to complete conversion to the certification program by December 31, 1991. After that date, all who operate locomotives must be certified engineers as required by this rule, either as new engineers certified under approved programs or as grandfathered engineers.

For Class I railroads, commuter railroads, and Amtrak, January 1, 1992 will mark the start of the three-year period for evaluating the qualifications of existing certified engineers. After that date, Class I railroads must certify engineers in accordance with FRA-approved programs.

Those programs will be submitted to FRA no later than November 15, 1991, giving FRA thirty days to make an initial evaluation. FRA will respond in writing only to those railroads whose program submissions are deficient. Since railroads generally have an analogous process in place for making qualification determinations, FRA expects that its initial review and approval should be easier and can be accomplished fairly quickly.

FRA will subsequently conduct a more detailed, extended assessment of the programs, which will include such tasks as evaluating the questions on a railroad's written knowledge examination. Delaying implementation of railroad programs until completion of such a detailed review is not warranted, given the safety record of train operations during the past ten years.

If FRA finds deficiencies during these detailed reviews, FRA will address them with the railroads. Based on past responsiveness, FRA expects this to be an effective way to proceed. FRA, of course, retains the authority to rescind its approval if identified deficiencies are not cured.

A similar pattern will be followed with Class II and Class III railroads. For Class II railroads, June 1, 1992 will mark the start of the three-year period for evaluating the qualifications of their existing certified engineers. After that date, Class II railroads must certify engineers in accordance with their FRA-approved programs. Those programs will be submitted to FRA no later than May 1, 1992. For Class III railroads the relevant dates are November 1, 1992 for submission of programs and December 1, 1992 for implementation of approved programs. Since FRA is phasing in the formal certification decisions for Class II and Class III railroads, FRA is allowing these railroads an extended period in which to certify engineers on the basis of their existing practices.That extension terminates on the same dates such railroads are required to implement their FRA-approved program.

(c) Administration of the Program

FRA proposed that, once the program was established, railroads would routinely conduct evaluations of each engineer's qualifications by examining information relevant to eligibility and by administering tests concerning knowledge, skill, and acuity levels. Such evaluations would be mandatory for all initial certifications of new locomotive engineers and for periodic evaluations of previously certified locomotive engineers. The proposal addressed issues of the certification candidate's rights to due process in the conduct of evaluations; the documentation needed for formal evaluations, including the certificate to be issued to accredited locomotive engineers; the degree of reliance that one railroad might place on evaluations performed by another railroad; and the mechanism for resolving disputes about denial, suspension, or revocation of certification.

Commenters responded to a few of these issues. Several wanted intervals of five years instead of three years for recertification and suggested that railroads be given more time to perform the testing at recertification. Other commenters, usually individuals, wanted greater access to records containing adverse information before railroads could rely on such information. A few commenters desired clarification of FRA's views on how the inter-railroad reliance provisions would function. A few commenters were concerned about administrative details such as the need for better identification of certificate holders and for a method of obtaining replacement certificates. Finally, a number of commenters voiced concerns about the proposed dispute resolution mechanisms.

As noted above, FRA is not adopting a five-year recertification interval. However, comments suggesting the railroads be given more time to conduct the required acuity, knowledge, and skill testing have merit. These suggestions would not seriously impinge on FRA's objective of assuring that such testing be contemporaneous with the qualification decision. Accordingly, FRA is modifying the rule to accommodate these suggestions; details can be found in the discussion of § 240.217 in the section-by-section analysis below.

Due process concerns about the accuracy of information considered by railroads were addressed in the proposed rule only in the context of motor vehicle data. FRA agrees that it should provide similar protection to train operation conduct records and has modified the proposal accordingly. FRA response to commenter desires for clarification concerning the reliance by one railroad on decisions reached by another railroad are also found in the section-by-section analysis, particularly the discussion of §§ 240.225 through 240.229.

FRA response to commenter concern with administrative detail can be found in the section-by-section analysis. With only minor exceptions discussed there, FRA is adopting the proposed administrative provisions.

Commenters expressed concerns about the proposed dispute resolution mechanisms for railroad decisions regarding periodic certification and unsafe conduct.

Commenters did not object to the mechanism FRA proposed for initially resolving questions of whether a person was or was not entitled to obtain or retain certification; they were instead concerned about the appeals process. In response, FRA reviewed its entire approach to the issue and has made several changes in the final rule that are discussed in the section-by-section analysis below.

Under the proposed rule, FRA took responsibility for dispute resolution, and we continue to believe that the propriety of a railroad's decision to deny a person certification—to the extent that denial is based on a railroad's application of the minimum qualification standards of FRA's rule—is FRA's responsibility. The final rule provides the mechanism necessary to carry out that responsibility.

The comments reflected concern about the relationship between FRA decisions on appeal under this rule and extra-regulatory matters. Such FRA decisions will not necessarily be relevant to the person's employment status or any rights or obligations arising from that employment relationship. A railroad and its employees can agree that such decisions are or are not relevant to those issues. Resolution of contractual disputes is entrusted to the dispute resolution mechanisms under the Railway Labor Act.

Given the clarity of this demarcation, FRA does not believe the conflicting decisions feared by some commenters, one from FRA and another from a Railway Labor Act decisionmaker, will occur.

(d) Reliance on Decisions by Other Railroads

FRA's proposal to allow one railroad to rely heavily on the qualification decisions of another railroad prompted a few comments seeking clarification. FRA has made several changes in this regard to reflect changes in the design of the final rule.

The rule addresses reliance in three contexts: (1) Where a locomotive engineer operating in this country has been qualified under foreign law; (2) where a locomotive engineer seeks to work for a different railroad; and (3) where a locomotive engineer is to operate on trackage under the operational control of another railroad.

For the purpose of this rule, FRA proposed to accept qualification decisions made under the regulations issued by Transport Canada, and this final rule retains that provision.

Where a certified locomotive engineer seeks certification by a second railroad, FRA proposed a minimal check of the person's background. Under the final rule, however, the second railroad must first evaluate the engineer's knowledge, skill, and ability and assure that the engineer is familiar with the territory. Only the safety performance and acuity testing aspects of the prior certification will not require reevaluation.

Most locomotive engineers will operate trains only on the tracks of the railroad that issued them their certification as a qualified engineer. However, the reliance issue also involves those situations in which an engineer has occasion to operate over trackage controlled by a foreign railroad, *e.g.*, near large metropolitan areas where the trains of several railroads operate over a single set of tracks.

In such settings, one railroad has responsibility for the control of trains operating over the joint trackage. Since that railroad selects and administers the operating rules for the trackage, it must determine whether a locomotive engineer is qualified to operate in that environment.

FRA has adopted its proposal to permit the controlling railroad to rely on the qualification decisions made by other railroads. However, FRA has modified the relevant provisions to handle situations in which joint operations are an exception. Joint operations can occur unexpectedly; for example, adverse weather conditions result in trains of one railroad being rerouted over the lines of another. In these circumstances, commenters noted, it would be difficult to comply with the reliance provisions of FRA's proposed rule. Commenters raised similar questions with respect to such situations as military trains operated by members of the armed forces, steam excursions requiring special expertise, and track inspection, rail flaw detection, and rail grinding trains that have distinctive operating characteristics. FRA agrees that its proposed rule did not sufficiently accommodate this problem and has modified the final rule accordingly.

(e) Other Details

FRA's proposed rule concerning administration of the certification process by railroads did not cover such details as how to handle replacement of lost or damaged certificates, how to accommodate the need on some railroads to assign certain ministerial functions to people other than those initially envisioned by FRA, the functioning of the process for revoking a certification during its normal duration, and the dispute resolution process involving FRA.

Although commenters did not focus much of their attention on these aspects of the proposed rule, FRA is acting to correct several minor problems it has identified. These are discussed in the section-by-section analysis.

(f) Future Issues

A significant number of commenters argued that FRA's proposal was deficient because it did not address issues of stress and fatigue associated with the work of locomotive engineers. In the view of many of these commenters, safety lapses by engineers were more directly related to these problems than any other.

As noted in the earlier discussion concerning locomotive engineer conduct, FRA did not address these issues in this proposal for several reasons. After the ongoing studies and Congressional decision making have been completed, it may be appropriate for FRA to directly respond to these commenter concerns with subsequent regulatory proposals.

SECTION-BY-SECTION ANALYSIS

This rule contains five subparts that correspond to the organizational structure of the certification process. This new organization is different from and more compact than that employed in the NPRM.

Subpart A

This subpart contains the general provisions of the rule, as did subpart A in the NPRM, but it has been significantly rewritten to, for example, include new sections concerning information collection and the relationship of this rule to other laws.

Section 240.01

Section 240.01 has been revised and expanded to more fully explain the purpose and scope of this rule. The purpose of the rule is to prescribe the minimum standards for qualification, training, and monitoring of virtually any person who operates a locomotive. Although such persons are called "locomotive engineers" under this regulation, the rule will affect a wide variety of personnel, including those holding such job titles as hostler, machinist, utility person, trainmaster, or transportation specialist. Since FRA uses the term "locomotive engineer" throughout the text of the rule and a person reading only the regulatory text could be confused or misled by prior industry practice or nomenclature, FRA has added a new clarifying paragraph (c).

Section 240.03

Section 240.03 contains the same applicability section that FRA proposed. FRA has not accepted the suggestions of a variety of commenters that FRA exclude from this rule operations that are conducted primarily inside an installation, such as steel plants or mining and logging areas. These commenters wanted the authority to operate trains on the general railroad system without the responsibility for meeting the minimum safety criteria of this regulation, arguing they made only limited use of the general system. Although operations within an installation may not require a high degree of sophistication, whenever a locomotive is operating on the general system, minimum standards must apply. The safety risks posed by operations on the general system demand that qualified engineers be at the controls of a locomotive.

Section 240.05

Section 240.05 addresses several legal issues. Paragraphs (a) and (b) note that FRA's rule will preempt existing State law covering the same subject matter, with an exception for State criminal law. The remaining paragraphs address the relationship of this rule to preexisting legal relationships.

Section 240.07

Section 240.07 contains the definitions in proposed 240.05. A few changes have been made in response to commenter suggestions or as a result of the new structure of the rule. For example, FRA has deleted the definition of what constitutes a "designated supervisor of locomotive engineers," deleted the definition of "class instructor." and revised the definition of "locomotive" to mirror that in part 229. FRA also has revised its definition of "simulators" to reflect a more precise grouping of available equipment. That revised definition continues to reflect FRA's belief that, for the purposes of this rule, simulators must be truly analogous to the operation of a real train, not a mere piece of video software.

FRA has not adopted three major changes advocated by commenters. Several suggested that FRA alter the definition of "locomotive." The commenters were concerned that FRA had excluded only hi-rail and specialized maintenance equipment from the scope of the definition and urged exclusion of other equipment. FRA has elected to stay with a narrow set of exclusions. If the equipment in question is deemed a locomotive for the purposes of compliance with part 229, the rule requires that a railroad have a certified engineer at the controls. To illustrate the kinds of issues raised by the comments, FRA intends that engines coupled to rail grinding equipment, self-propelled track inspection equipment, or rail flaw detection cars as well as track mobiles be operated by qualified locomotive engineers. This equipment is operated in the same manner and with the same safety implications as any train. The exclusion covers only equipment designed to maintain the track structure and not normally capable of being operated like a train, such as self-propelled tampers and mobile cranes.

In a similar vein, commenters suggested that FRA narrow the definition of the functions to be covered by this rule by, for example, lengthening the distances that can be operated and expanding the types of movement that can occur without having a certified engineer at the controls. FRA has not accepted this suggestion since it intends to exclude only those incidental movements of locomotives to accomplish inspection and maintenance functions and those operations within a locomotive servicing area with limits marked in accordance with part 218. Adopting the suggested changes, which envisioned movements of nearly a half mile and routine switching functions for certain freight cars, would be contrary to FRA's basic safety premise that all who operate a locomotive on the general system should be qualified, unless there is some other way to provide an equivalent degree of safety. At least one commenter provided a description of a unique factual setting that may indeed present a different way to provide an equivalent degree of protection when conducting operational tests of locomotives. That fact pattern presents the type of issue more appropriately addressed in terms of a waiver of compliance rather than creation of a regulatory provision to accommodate unique facts. Another commenter inferred from the proposal that a railroad could comply with the letter of the rule by moving only 100 feet, then stopping, and then moving another 100 feet with an uncertified person at the controls as long as necessary to reach the destination. As with other rules, blatant efforts to circumvent the intent of the regulation will be treated as noncompliance and responded to appropriately by FRA when detected.

Commenters suggested that FRA employ a new definition for "EAP counselor." FRA has decided to retain the originally proposed definition that mirrors the definition in its rules concerning control of alcohol and drug use by railroad workers (part 219). The reasons advanced by commenters for altering FRA's proposed definition were considered and rejected in the context of amending the alcohol and drug rules.

FRA has also added definitions of "drug" and "substance abuse disorder," also found in part 219 to ensure that the two regulations are consistent. "Drug" is defined as any substance (other than alcohol) that has known mind- or function-altering effects on a human subject, specifically including any psychoactive substance and including, but not limited to, controlled substances. The term is intended to refer to substances that have a significant potential for abuse and/or dependence. Normal ingestion of caffeine in beverages and use of nicotine from tobacco products, even though involving some degree of habituation or dependence, are not intended to be included within the definition.

Similarly, "substance abuse disorder" is defined as a psychological or physical dependence on alcohol or a drug or another identifiable and treatable mental or physical disorder involving the abuse of alcohol or drugs as a primary manifestation. This is essentially the same language employed to govern disposition of employees referred to an employee assistance program under the "co-worker report" (bypass) provision of the alcohol/drug regulations. It describes the condition of chemical dependency, as determined by an appropriate professional. Reference is made to other disorders involving abuse of alcohol and other drugs to avoid disputes concerning diagnoses of "underlying" problems. The point is, very simply, that a person making uncontrolled use of alcohol or drugs is not a suitable candidate for the highly sensitive duties entrusted to a locomotive engineer. Since chemical dependency typically has the aspect of poly-drug abuse, and in essentially all cases bears the potential for abuse of more than one substance, the appropriate long-term therapy is abstinence from alcohol and all other drugs.

The definition explains that the disorder is considered "active" within the meaning of the rule if the person is not currently abstaining from use of alcohol and drugs (except under medical supervision consistent with FRA's alcohol/drug regulations) or has not participated in treatment as required.

FRA is aware that many individuals abuse alcohol and drugs, with consequent ill-effects on their health and potential implications for fitness, without fitting within common definitions of chemical dependency. However, degrees of abuse are difficult to define; and significant disagreements prevail with regard to appropriate therapeutic responses. Accordingly, FRA has not required withholding of certification for patterns of abuse that fall short of chemical dependency. At the same time, FRA does not intend to convey that the concept of chemical dependency need meet the most rigid test used in any particular segment of the health care or mental health communities. For instance, much of the medical community was slow to recognize the dependence potential of cocaine, while other clinicians were properly recognizing and beginning to treat very serious cocaine addiction cases encountered in their practices. The critical point here with respect to safety is that engineers not be in the grip of uncontrolled abuse patterns that, if addressed through treatment and permanent abstinence, could be put behind them.

Finally, FRA has altered the definition of "knowingly." FRA is not changing the proposed standard of care to which parties will be held under certain portions of this rule, but has concluded that the new definition is more clear. The definition found in the rule is modeled on one formulated in recently enacted legislation that addresses a similar issue (see section 12 of Pub. L. 101 615, 104 Stat. 3244).

Sections 240.09 and 240.11

Sections 240.09 and 240.11, essentially renumbered versions of sections found in the NPRM, relate to waivers and the consequences of noncompliance.

Section 240.11 contains the penalty provisions of the rule. FRA has already provided extensive guidance on how it intends to use its enforcement power in this context (53 FR 52918). In addition to FRA's general policy statement concerning exercise of its enforcement authorities (49 CFR part 209, app. A; 53 FR 52918), readers may want to review FRA's comments on the discharge of its responsibilities under the regulations establishing disqualification procedures (54 FR 42894), prohibiting alcohol and drug use by rail workers (50 FR 31508, 31567), and those prohibiting tampering with locomotive-mounted safety devices (54 FR 5485). This section also addresses the potential for criminal sanctions for knowing and willful falsification of records required by this rule, as authorized by section 209(e) of the Federal Railroad Safety Act of 1970. Final decisions to bring charges under this provision would rest with the Department of Justice.

Section 240.13

Section 240.13 is new and is designed to aid those who have an interest in the information collection or record keeping requirements of this rule.

Subpart B

This subpart contains the basic elements of the railroad certification program required by this rule. It has no precise counterpart in the NPRM because it contains the elements that were spread out over five different subparts in the proposal.

Section 240.101

This section requires that each railroad have a written program composed of eight elements, each of which comports with specific provisions relating to that element.

Section 240.103

This section requires each railroad to submit its program and a summary outline to FRA for approval in accordance with the following schedule: Class I railroads, Amtrak, and the commuter railroads by November 15, 1991; Class II railroads by May 1, 1992; and Class III railroads or others not classified elsewhere by November 1, 1992. The format and contents of the submission are discussed at length in appendix B. This section also requires that each railroad indicate how it intends to acquire future engineers. If the railroad wants the power to train a previously uncertified person to become an engineer, the railroad must explain its training regimen for such trainees, including provisions for relying on another railroad or other some outside training organization to provide the actual training. The rule provides only thirty days for FRA review and approval of railroad programs, which will limit the depth of the review that FRA can accomplish. FRA is proceeding in this manner because most railroads have existing programs intended to accomplish a similar goal that can be easily modified; the quality of such programs is generally good; and the problems that may be encountered will not involve basic design flaws and generally will not surface until FRA has had time to observe the actual administration of the program. In screening all submissions FRA should be able to quickly detect any substantial deficiencies. Given the quality of existing programs, FRA sees little value in delaying implementation of the programs for time-consuming agency review. FRA may, of course, disapprove any program during the review cycle or at a later date. FRA will explain any deficiencies in writing. This section provides for timely railroad response to an FRA disapproval action. In addition to its limited initial review of a railroad's program, FRA intends to conduct a more thorough evaluation at a later date to assure that all aspects of the program are properly analyzed.

Section 240.105

In the NPRM, FRA proposed that individuals responsible for evaluating the skills of engineer candidates have a specified level of experience as an engineer and hold supervisory authority within the railroad. FRA's proposal was designed to ensure that these individuals have the requisite knowledge, skill, and judgment to be effective decision makers. However, some commenters objected that experience was not a legitimate substitute for good judgment; that the specified level of three years' experience was unacceptably long base on current industry practices; and that the approach prevented small railroads from continuing to employ part-time evaluators with no direct supervisory duties.

In response to these comments, FRA has amended the proposal to give to railroads the discretion to select the individuals who will evaluate their engineer candidates. Section 240.105, which replaces the proposed definition of "designated supervisors," implements that decision. Each railroad must now have a procedure for determining the qualifications of individuals to serve as designated supervisors of locomotive engineers. The section contains a performance standard for measuring a person's capabilities and, in conjunction with § 240.203, gives FRA the power to respond to abuse of this discretion. Each railroad must have at least one designated supervisor of locomotive engineers, although many railroads would want to have more. FRA has deleted its proposed requirement that the designated supervisor be an employee of the railroad. Thus, a railroad that does not have a reason to have such a designated supervisor available on a full-time basis can obtain the services of a designated supervisor on a part-time or contract basis.

To assure that designated supervisors have the necessary knowledge and skills, paragraph (b)(4) requires that all designated supervisors be certified under this rule. This paragraph should be read in conjunction with § 240.211, which does not permit self-certification under this rule.

This section does not fully respond to commenter suggestions that FRA devise a way of more objectively determining the qualifications of designated supervisors. FRA is unable, at this time, to provide an effective objective testing scheme for such designated supervisors. FRA may consider improved methods for evaluating designated supervisors in the future.

Section 240.107

This section contains the simplified scheme for classifying those authorized to operate locomotives. Section 240.13 of the NPRM proposed five classifications; section 240.107 of this rule establishes three: Train service, locomotive servicing, and student engineer. The gradations of train service that were integral to a standardized training and testing scheme have been eliminated in light of FRA's decision to allow individual railroad programs for training and testing engineers.

This simplified classification scheme will indirectly respond to numerous suggestions by commenters on ways to alter the threshold levels proffered in the NPRM. This simplification does have implications for the "portability" of certificates when an engineer wants to move from one railroad to another. This issue is discussed further in connection with the analysis of § 240.225.

Section 240.109

This section defines the processes required for evaluating a candidate's qualifications. It contains elements of the NPRM that can be found in proposed §§ 240.51 and 240.57. Few commenters focused on these mechanics.

A railroad's procedures must include an evaluation process that effectively examines relevant prior conduct and may reflect the railroad's current approaches. Since motor vehicle data will go directly to the railroad, FRA requires in paragraphs (f) and (g) of this section that the certification candidate be given an opportunity to review those records that contain adverse information. This review will avoid the potential for accidental reliance on records that were somehow erroneously associated with a candidate. It will also allow the candidate to explain or offer any mitigating information the railroad should consider before making an eligibility decision. Since an opportunity for review and comment is not needed in all instances, FRA is only imposing the duty to afford that opportunity to a candidate whose record contains sufficient adverse data to support a determination of ineligibility. This section does not contain detailed procedures for informing the candidate, specific limits on the time for review or submission of rebuttal information, or a variety of other possible controls for implementing the intent of this section. Instead, FRA has required that these be reasonable and be described in the program description submitted for FRA's approval in accordance with § 240.109 and appendix B.

The requirements of this section are equally applicable to the issues presented when a railroad is confronting data concerning prior railroad service. The provisions of these paragraphs are similar to proposed § 240.55.

As originally proposed, FRA has limited railroads to considering only certain types of incidents involving safety-related action or inaction by a person seeking certification or recertification as a train or locomotive servicing engineer. These involve failure to comply with rules designed to prevent accidents. FRA has deleted the NPRM's provisions focusing on individuals who were seeking certification as a student engineer. Commenters have convinced FRA that the proposed provisions, which would have permitted railroads to consider an additional group of incidents concerning student certification candidates who may have provided prior service as a member of a train crew, are not necessary at this time.

This section also responds to commenter concern about the degree to which railroads would be permitted to base their certification decisions on conduct that occurred prior to adoption of this rule. Several commenters offered the view that, by permitting a railroad to rely on incidents of misconduct that occurred before locomotive engineers had any basis of suspecting that such action could render them ineligible for certification, the regulation would constitute an *ex post facto* application of the rule. Other commenters, while not articulating any legal theory to support their views, urged that all locomotive engineers be permitted to start with a clean slate for certification purposes as a matter of basic fairness.

Permitting railroads to impose additional, retroactive consequences for incidents that occurred prior to adoption of this rule would not mean that this regulation has a prohibited *ex post facto* effect. Such retroactive effect, although not absolutely precluded by the Administrative Procedure Act (5 U.S.C. 553), is discouraged under existing law (see *Bowen* v. *Georgetown University Hospital*, 109 S. Ct. 468 (1988)). Moreover, FRA agrees that fairness precludes the use of events that occurred prior to the effective date of this rule, and this section so provides.

This section also permits railroads and candidates to create arrangements whereby the railroad can directly obtain motor vehicle data or prior railroad service data. This last provision responds directly to the concerns of many individual commenters who felt aggrieved that they were being required to personally participate in a procedure that could ultimately render them ineligible.

Section 240.111

This section essentially contains the requirements proposed in § 240.52 of the NPRM. The major difference is that FRA has responded to commenter suggestions that FRA expand the responsibility of the certification candidate for soliciting motor vehicle data. In instances where a railroad's initial check of motor vehicle records revealed the existence of additional information in the control of a state licensing agency, FRA had proposed that the railroad seek the secondary information. Commenters pointed out that railroad access could be as easily stymied when seeking the secondary data as it could under the circumstances that had prompted FRA to make the certification candidate initially responsible for seeking motor vehicle data. Therefore, § 240.111 charges the candidates with responsibility for requesting the information. Finally, § 240.111 has been revised to require timely provision of the information to the railroad.

Section 240.113

This section contains requirements analogous to those just described for seeking motor vehicle records when a railroad needs information concerning prior railroad service. As noted earlier, most commenters wanted FRA to delete any consideration of prior conduct and thus to eliminate this section from the final rule. The few commenters who discussed evaluation of prior conduct data urged that FRA establish a similar duty to provide information because of difficulties railroads have experienced on this score. In response, FRA has established that duty in this section. The section requires timely provision of the information to the railroad.

Section 240.115

This section imposes a duty on railroads to make proper determinations concerning an individual's eligibility to become a certified engineer based on the person's motor vehicle driving record. It draws on §§ 240.53, 240.57, and 240.59 of the NPRM. Similar to proposed § 240.53, this section sets limits on railroads in considering motor vehicle driving data.

As noted earlier, until completion of a study of the possible correlation between safe train operation and motor vehicle conduct, this rule will only permit consideration of data involving incidents of alcohol- or drug-related motor vehicle driving operation. Thus, this section does not address any motor vehicle record data that involves events such as excessive speed, racing on the highway, or reckless driving.

This section identifies the types of events that can be considered and allows both convictions and state actions that revoke, cancel, suspend, or deny licensing to be considered. Actual operation of a vehicle while impaired or under the influence of alcohol or drugs, as well as refusal to undergo testing to determine whether the person is impaired or under the influence, will be considered by the railroad. Paragraph (a) requires that a railroad review the available information concerning the candidate's motor vehicle driving record.

Paragraph (b) requires evaluation of motor vehicle driving records to determine if specified alcohol/drug-related conduct has occurred. If an incident is identified, this information is provided to the EAP Counselor, along with railroad service record data (rules compliance, attendance, other job-related incidents), and the engineer is referred for evaluation. The engineer is required to furnish any other pertinent records concerning counseling or treatment for confidential review by the EAP Counselor. The purpose of this referral and review is to determine whether the person currently has an active substance abuse disorder.

If the person is found not to have an active substance abuse disorder, the data will not be considered further with respect to the certification (and the EAP Counselor retains as confidential the data provided by the employee concerning any prior treatment). However, if the EAP Counselor determines that the person has in the past had an active substance abuse disorder, the EAP Counselor may recommend that certification be conditioned on any needed aftercare. It is intended that this decision be made based on the EAP Counselor's clinical evaluation. For example, an employee treated three years before who could demonstrate sobriety over that period might in an appropriate case receive unconditional certification. By contrast, an employee with a history of substance abuse episodes, including a relapse after treatment a few months before, might receive conditional certification.

As provided in § 240.119, a person with an active substance abuse disorder could not be currently certified. However, that employee would be permitted to utilize the voluntary referral policy of the alcohol/drug rule (§ 219.403) if the employee had not previously taken advantage of the policy. This provision is in contrast to handling under § 240.119, where violation of § 219.101 or § 219.102 leads to adverse certificate action and access to the EAP is a matter of management policy. In those cases (except co-worker reports, which are treated differently), management will have detected violative behavior; and the voluntary referral rule by its own terms will not apply. In the context of motor vehicle driving data, however, referral to the EAP Counselor is necessary for the purpose of evaluation; and cooperation by the employee may be critical to documenting the extent and nature of the substance abuse disorder—*i.e.*, the motor vehicle record will seldom be dispositive in the sense of providing a wholly satisfying foundation for a professional evaluation. Both for the purpose of preserving the experience and training represented by the current employee (an important factor in safety) and for the purpose of encouraging development of all the pertinent clinical indications, it is desirable for the person being evaluated to know that help, if needed, will be available. The same considerations do not apply with equal force to a person who is not a current employee, and the employer would have no obligation to make available the services of the EAP in that case.

The section also prohibits use of data so old as to be irrelevant to present condition or future behavior. With the exception of some information involving substance abuse and unsafe operating safety practices, the rule limits railroads to considering events that occurred within the previous 36 months. FRA originally proposed a five-year period, but has learned that a number of states do not maintain records for that length of time. The final rule's three-year period matches the minimum record retention practices of all state driver licensing agencies and the retention interval for most data found in the NDR.

Section 240.117

This section requires that railroads have a program for examining incidents in which certified locomotive engineers may have failed to comply with railroad safety rules or procedures intended to ensure the safe operation of trains. To comply with this requirement and the related provisions of section 240.307, the railroad's program must afford each locomotive engineer the opportunity to participate in the fact-finding process. Except in relatively rare instances, it will be the railroads themselves that will, before action required by this rule will be taken, detect the evidence of possibly unsafe conduct, make the decision on whether there is sufficient evidence to proceed with formal responsive action, and convince a railroad's hearing officer that the operating rule was violated.

The section makes clear that the railroad's responsibilities for responding to infractions by locomotive engineers are not limited to periodic recertification, providing that any pertinent incident can prompt review of certification status.

Paragraph (e) identifies the five kinds of rule infractions covered by this regulation: failure to comply with railroad rules (1) requiring adherence to a signal indication; (2) limiting the operating speed of the train; (3) prescribing operation of the train and engine brake system so as to safely control train operation; (4) prohibiting occupying a track without authority; or (5) prohibiting the unauthorized nullification of locomotive-mounted safety devices. Railroads should, of course, respond to other forms of unsafe train operation conduct as appropriate.

Paragraph (g) provides that once a railroad has determined that an engineer has failed to comply with its mandatory safety rule concerning one of these five types of incidents, two consequences will occur. First, the railroad will be required to revoke the engineer's certificate for 30 days. Second, that finding will initiate a period during which the engineer will suffer an increasingly more severe response if additional incidents occur in the next 36 to 60 months. If a second event occurs within 36 months of the first event, the period of mandatory revocation will increase to one year. If a third event occurs within 60 months, the revocation period increases to five years. If the locomotive engineer does not engage in unsafe conduct for three years, a second incident will not serve as an aggravating factor warranting imposition of the one-year revocation. However, that second incident will start a new 36-month period during which a second incident can generate a one-year revocation. Moreover, both events will be relevant if a third incident occurs within 60 months. This paragraph also integrates certain aspects of alcohol and drug related data stemming from detected incidents of on-duty possession, use, and impairment. If both this section and § 240.119 apply to a given incident, the longer mandatory period of revocation will control.

Paragraph (g) also addresses instances when the locomotive engineer is found to have violated the pertinent provisions of the railroad's rules twice within a three-year period. Although the railroad must revoke certification and/or deny recertification for at least one year, a railroad can reinstate a person after a minimum period of six months. Prior to reinstatement the engineer must be evaluated by a designated supervisor and the designated supervisor must conclude that the remedial action was effective. If the designated supervisor does not so conclude, the engineer must await passage of the full year interval. A railroad that concludes that the engineer needs supplemental training, prior to early reinstatement, must determine that the engineer has successfully completed that training before it can authorize reinstatement.

If the locomotive engineer is found to have violated the pertinent rules three times in any consecutive 60-month interval the engineer shall be ineligible for certification for five years. No railroad can reinstate a person until after expiration of that 60-month period.

Section 240.119

This section addresses two separate dimensions of the alcohol/drug problem in relation to engineers—(1) active substance abuse disorders and (2) specific alcohol/drug regulatory violations.

Paragraph (a) requires railroads to address both dimensions of this issue in their programs. Paragraph (b) provides that a person with an active substance abuse disorder shall not be currently certified as a locomotive engineer. This means that appropriate action should be taken with respect to a certificate (whether denial or suspension) whenever the existence of an active substance abuse disorder comes to the official attention of the railroad, with the exception discussed below. This section and § 240.115 address certain situations in which inquiry must be made into the possibility that the individual has an active substance abuse disorder if the individual is to obtain or retain a certificate. The fact that specific instances are cited does not exclude the general duty of the railroad to take reasonable and proportional action in other appropriate cases. Declining job performance, extreme mood swings, irregular attendance and other indicators may, to the extent not immediately explicable, indicate the need for an EAP evaluation. These issues are addressed in the FRA Field Manual for Control of Alcohol and Drug Use in Railroad Operations, the revised edition of which will be available in the next few months.

Paragraph (c) deals with conduct constituting a violation of § 219.101 or § 219.102 of the alcohol/drug regulations. Section 219.101 prohibits any employee from going or remaining on duty in covered service while using, possessing, or being under the influence of or impaired by alcohol or a controlled substance or with a blood alcohol concentration of .04% or more. This is conduct that specifically and directly threatens safety in a way that is wholly unacceptable, regardless of its genesis and regardless of whether it has occurred previously. It is roughly analogous to a violation of the railroad's own Rule G, for which the traditional sanction was dismissal (albeit with possibility of reinstatement following a first offense). In its more extreme forms, such conduct is punishable as a felony under the criminal laws of the United States (18 U.S.C. 341 *et seq.*) and a number of states.

Section 219.102 prohibits use of a controlled substance by a covered employee, at any time, on or off duty, except under the exception for approved medical use. Abuse of marijuana, cocaine, amphetamines, and other controlled substances poses unacceptable risks to safety. However, where on-the-job use, possession, or impairment is not established, as is most often the case where urinalysis is the means of detection (*e.g.*, through a random drug test which can detect drugs remaining in the system for some period after actual use), this violation is marginally less serious than a § 219.101 violation.

Under the alcohol/drug regulations, whenever a violation of § 219.101 or § 219.102 is established based on authorized or mandated chemical testing, the employee must be removed from service and may not return until after an EAP evaluation, any needed treatment, or a negative return-to-duty test, and is subject to follow-up testing (§ 219.104). This structure suggests an absolute minimum for action when a locomotive engineer is determined to have violated one of these prohibitions. Considering the need both for general and specific deterrence with respect to future unsafe conduct, additional action should be premised on the severity of the violation and whether the same individual has prior violations.

One key consideration in evaluating this conduct and appropriate responses is the duration of retrospective review. The final rule uses the same nominal period set forth in the statute for consideration of alcohol/drug related motor vehicle conduct—5 years (60 months). This is also the same period used by FRA as a maximum period for follow-up of those who commit violations (§ 219.104(d)) and has been employed in some railroad "bypass agreements" as the retrospective period to determine if the employee has a prior alcohol/drug rule violation or prior treatment. Further, it is employed in this rule as the maximum period of ineligibility for certification following repeated alcohol/drug violations.

Use of a 5-year cycle reflects anecdotal experience in the railroad industry indicating that conduct committed as much as 5 years before may tend to predict future alcohol or drug abuse behavior (and recognizes the reality that most individual violations are probably not detected). On the other side of the coin, it reflects a certain confidence in the resilience of human nature—*i.e.*, a reasonable expectation that the person who remains in compliance for that period of time will not again be found in violation.

The full reach of the 5-year period will not be realized initially. Since § 219.101 did not become effective until February 10, 1986 and § 219.102 was effective on October 2, 1989, even if FRA has not elected to employ the retrospective limitations discussed earlier, conduct prior to those dates could not properly be measured against those standards with respect to certification. Of course, railroads retain the flexibility to consider prior conduct (including conduct more than 5 years prior) in determining whom they will hire and assign as locomotive engineers.

Note that conduct violative of the FRA proscriptions against alcohol and drugs need not occur while the person is serving in the capacity of a locomotive engineer in order to be considered. For instance, an employee who violated § 219.101 while working as a conductor and then sought engineer certification six months later (under the provision described below) would not be currently eligible for certification.

The railroad's responsibility is not limited to periodic recertification. The rule provides that any conduct in violation of § 219.101 or § 219.102 shall prompt a review of certification status.

The rule requires a determination of ineligibility for a period of 9 months for an initial violation of § 219.101. This parallels the 9-month disqualification for refusal to cooperate in post-accident or random testing and also matches most estimates of discipline actually assessed, on average, in the railroad industry. FRA does not believe that a locomotive engineer should be able to seek the shelter of a collective bargaining agreement or more lenient company policy in the case of a clear on-the-job violation, insofar as Federal eligibility to serve as a locomotive engineer is concerned. Specifying a period of ineligibility will serve the interest of deterrence while giving further encouragement to co-workers to deal with the problem before it is detected by management.

In order to preserve and enhance the leverage available to co-workers, the 9-month period is waived only in the case of a qualifying co-worker report (§ 219.405). FRA believes that this distinction in treatment is warranted as a strong inducement to participation by other employees in enforcement of the regulations. Although few actual co-worker reports may be generated, the intended result will be served if an atmosphere of intolerance for drug abusing behavior is reinforced in the workplace and violators know that they will be turned in if they come on the job impaired.

In the case of a second violation of § 219.101, the engineer will be ineligible for a period of 5 years. Given railroad employment practices and commitment to alcohol/drug compliance, it is likely, of course, that any individual so situated would also be permanently dismissed from employment. However, it is important that the employing railroad also follow through and revoke the certificate under this rule so that the engineer does not go to work for another railroad within the 5-year period using the certificate issued by the first railroad as the basis for certification. We note that these sanctions are reasonably consistent with the Commercial Motor Vehicle Safety Act, title XII, Public Law No. 99–570, 100 Stat. 3207–170, which requires the Federal Highway Administration to disqualify a commercial motor vehicle driver for one year in the case of driving a commercial motor vehicle under the influence (defined as a blood alcohol concentration of .04% or greater) and for life in the case of a second offense.

Under this rule, one violation of § 219.102 within the 5-year window would require only temporary suspension and the minimum response described in paragraph (d) (referral for evaluation, treatment as necessary, negative return-to-duty test, and appropriate follow-up). FRA has considered whether a more stern approach should be required, but does not wish to undercut the therapeutic approach to drug abuse employed by many railroads. This approach permits first-time positive drug tests to be handled in a non-punitive manner that concentrates on remediation of any underlying substance abuse problem and avoids the adversarial process associated with investigations, grievances and arbitrations under the Railway Labor Act and collective bargaining agreements. This approach is most often coupled to commitments from labor organizations to lead peer prevention efforts such as Operation Red Block and Operation Stop. While time may yet prove this approach to be excessively lenient, FRA is not persuaded that experience has impeached the seasoned judgment of railroad medical officers, EAP personnel, operating officers, and employees who have committed their companies to this approach.

A second violation of § 219.102 would subject the employee to a mandatory 2-year period of ineligibility. A third violation within 5 years would lead to a 5-year period of ineligibility.

The rule also addresses violations of §§ 219.101 and 219.102 in combination. A person violating § 219.101 after a prior § 219.102 violation would be ineligible for 3 years; and the same would be true for the reverse sequence. A person violating either section thereafter (cumulative 3rd violation) would be ineligible for 5 years from the most recent violation.

Refusals and failures to participate in chemical tests are treated as if the test were positive. A post-accident blood analysis for alcohol and controlled substances, for instance, in the worst case could establish use on the job, violation of the .04% alcohol prohibition, or—with other evidence—impairment. Such a refusal would be "scored" as if a § 219.101 violation. The same would be true for refusal to take a breath alcohol test. Refusal of a drug urinalysis, which in most cases could only be used to establish a § 219.102 violation, would be treated as if it were a violation of that section.

The refusal or failure to participate in testing as required under part 219 would be treated as provided in the rule even though the testable event did not involve a mandatory 9-month disqualification under part 219. Under part 219 a "refusal" triggers a mandatory disqualification only in the case of post-accident and random tests. The term "failure to participate" is used here to denote other instances of noncooperation involving a federally mandated or authorized test (*e.g.*, reasonable cause, follow-up) where FRA regulations do not specify the responsive action.

The specific periods of ineligibility obviously represent decisions about which "reasonable minds may differ." However, they have antecedents in other fields of regulation and reflect FRA's best judgment of what would be both fair to locomotive engineers and reasonably effective from the point of view of deterrence. It is important that practice among the railroads with respect to certification be as uniform as possible, regardless of more stringent disciplinary action that may (and likely would) be taken in the case of some of the cases posited. Further, it is a legitimate objective to avoid excessive FRA involvement in reviewing requests for exceptions for alleged hardship, particularly since railroad disciplinary policy can normally be expected to address most cases at the other extreme of the range of culpability.

Paragraph (d) prescribes the conditions under which employees may be certified or recertified after a determination that the certification should not be granted, or should be suspended or revoked, due to a violation of § 219.101 or § 219.102 of the alcohol/drug regulations. These conditions closely parallel the return-to-duty provisions of the alcohol/drug rule, but are more stringent in the following respects:

- Return-to-duty testing shall be for both alcohol and controlled substances, regardless of the nature of the original violation.
- Follow-up tests must include at least 6 alcohol tests and 6 drug tests during the first 12 months following return to service and may include tests for both alcohol and controlled substances throughout the period.

Alcohol tests may be on either blood or breath samples using methods described in the alcohol/drug regulation. Alcohol tests must be conducted while the employee is in "duty status" in the sense that the employee is available for duty and is subject to the commingled service provisions of the Hours of Service Act. The regulation does not require compensation of the employee for the time spent in this testing, which is a condition precedent to retention of the certificate; but the issue of compensation is ultimately resolved by reference to the collective bargaining agreement or other terms and conditions of employment under the Railway Labor Act.

Paragraph (e) ensures that an engineer, like any other covered employee, may self-refer for treatment under the alcohol/drug rule (§ 219.403) before being detected in violation of alcohol/drug prohibitions and is entitled to confidential handling of that referral and subsequent treatment. This means that the railroad will not normally receive notice of any substance abuse disorder identified by the EAP Counselor. However, the paragraph also provides that the railroad policy must (rather than may) provide that confidentiality is waived if the engineer fails to participate successfully in treatment as directed by the EAP Counselor, to the extent that the railroad must receive notice that the employee has an active substance abuse disorder so that appropriate certificate action can be taken. The effect of this provision is that the certification status of an engineer who seeks help and cooperates in treatment will not be affected, unless the engineer fails to follow through.

Section 240.121

This section contains requirements for visual and hearing acuity testing that a railroad must incorporate in its program. FRA's proposal for visual and hearing acuity were proposed as § 240.43 of the NPRM.

As FRA pointed out when it issued the proposal, any person who operates a locomotive must have sufficient vision and hearing acuity if there is to be a reasonable expectation that trains will be operated safely by that person. Since many railroads do not have standards for either visual or hearing acuity or any program to periodically monitor these aspects of an engineer's health, FRA proposed to require both periodic examinations and minimum acuity thresholds.

This section contains FRA's revised criteria for a railroad's program concerning acuity standards. Since none of the commenters provided scientific evidence or documented research findings that provide a sound basis for setting acuity thresholds for locomotive engineers different from those used in other transportation modes, FRA has retained the acuity values proposed in the NPRM in paragraphs (c) and (d).

FRA has modified this section, by the inclusion of the wording in paragraphs (c) and (d), to afford railroads some discretion in applying these criteria. Commenters have persuaded FRA that some individuals, although not meeting these threshold acuity levels, may be able to compensate in other ways that will permit them to function at an appropriate safety level despite their physical limitations. FRA, therefore, has revised this section by the inclusion of paragraph (e) to permit a railroad to have procedures whereby doctors can evaluate such individuals and make discrete determinations about each person's ability to compensate for his or her physical limitations. If the railroad's doctor concludes that an individual has compensated for his or her limitations and can safely operate a locomotive on that railroad, the railroad can certify that person under this regulation once it possesses the doctor's professional medical opinion to that effect.

FRA has also revised the wording of paragraph (d) of this section. One aspect of the revision deletes the authorization to have hearing acuity tests performed without the use of audiometers. As pointed out by several commenters, audiometers are generally available throughout this country. Thus, there should not be any problem, or at most a minimal problem in isolated cases, for engineers to obtain access to these devices for testing purposes. Since there is no scientifically reliable basis on which to determine hearing acuity absent the use of this device, FRA is requiring that they be used. The other aspect of the revision involves the reference to the calibration standards which must be adhered to when determining that an audiometer is functioning properly. As one commenter noted, FRA could simplify compliance with its rule by requiring use of the same calibration standard that OSHA employs for other workers. FRA agrees and has used the same calibration standard mandated by OSHA.

Section 240.123

This section contains FRA's revised approach to the education of locomotive engineers. It melds ideas contained in §§ 240.61 through 240.67 of the NPRM and converts them to design and performance criteria. It also contains the concepts of section 240.19 of the NPRM that dealt with the need for maintaining familiarity with physical characteristics.

This section contains the requirement that each railroad provide for the continuing education of its engineers. At a minimum, that continuing education effort must address the need to keep engineers conversant with the personal safety directives of the railroad, the operating rules and practices of the railroad with which the engineer must comply, the rules for inspecting and testing the mechanical condition of rolling equipment with which the engineer must comply, and the methods of safe train handling, including familiarity with physical characteristics. As noted earlier, this section does not require that a railroad conduct its training at FRA-determined intervals or for specified durations as was proposed. This section affords each railroad the latitude to design its own program so long as that design addresses each of the required elements.

In designing its program, railroads must ensure that their engineers are kept advised of changes. These changes can include a wide range of subjects such as new or amended guidance provided in documents such as new "general orders" or "special instructions," amendments to its "book of rules," changes that occur in the physical characteristics of the territory with which the engineer is required to be familiar, and the introduction of new technology. The railroad must also provide for programs to ensure that each engineer stays familiar with existing rules and procedures that were initially learned years ago, as well as with the physical characteristics of the territory learned at some point in the past but unused for a significant period. Since the railroads' training programs must be described and submitted to FRA for approval, the exercise of the discretion being afforded railroads by this section will be monitored by FRA.

This section also contains requirements for the initial training of persons not previously trained as engineers. It identifies the subject matter to be covered and contains minimum constraints on the manner in which the training is to be conducted.

Section 240.125

This section, derived from § 240.73 of the NPRM, requires that railroads provide for the periodic testing of engineers. That testing must effectively examine and measure an engineer's knowledge of five subject areas: the personal safety directives of the railroad, the operating rules and practices of the railroad, the rules for inspecting and testing the mechanical condition of rolling equipment, the methods of safe train handling including familiarity with physical characteristics, and compliance with Federal safety laws.

Again, railroads have discretion to design the tests that will be employed; for most railroads that will entail some modification of their existing "book of rules" examination to include new subject areas. This section does not specify things like the number of questions to be asked or the passing score to be obtained. It does retain the proposed requirement that the test not be conducted with open reference books unless use of such materials is part of a test objective. This section also requires that the test be in writing. FRA was not unmindful of commenter concern over the test taking skills of some individuals or of the possibility that some persons may have literacy problems when FRA decided to require a written test. However, FRA believes that minimum reading and comprehension skills are needed to assure safe train operations by a locomotive engineer. Some commenters asserted that there may be existing engineers who lack such basic skills. Those individuals, perhaps assisted by their railroad and co-workers, will have ample opportunity to achieve the requisite degree of literacy before being required to pass such a test for recertification purposes. This section affords each railroad latitude in designing its own testing effort so long as that design addresses each of these elements. Since the testing effort selected by the railroad must be submitted to FRA for approval, the exercise of the discretion being afforded railroads by this section will be monitored by FRA.

Section 240.127

This section, originally found in § 240.83 of the NPRM, requires that railroads provide for the periodic testing of an engineer's applied knowledge and performance skills. At a minimum, that testing effort must effectively examine and measure an engineer's knowledge and skill when operating a train or a locomotive. The test can be conducted when the engineer is operating either an actual train or a simulator. Whether real or simulated, the train must be representative of the type of train the engineer could reasonably expect to encounter in normal operations and must be operated over the type of terrain the engineer can reasonably be expected to encounter. The test must cover the engineer's applied knowledge of the operating rules and practices of the railroad with which the engineer must comply, the rules for inspecting and testing the mechanical condition of rolling equipment with which the engineer must comply, the methods of safe train handling including familiarity with physical characteristics, and compliance with Federal safety laws.

Unlike the proposed rule, this section does not specify the duration of the operation of the test train that must be witnessed. Deletion of that requirement responds to repeated commenter assertions that the proposal was unduly restrictive in requiring a lengthy period of test observation. This section does not authorize the use of anything less than a Type 1 or Type 2 simulator, since other simulators do not provide a sufficient replication of the real world environment to provide the degree of assurance needed concerning an individual's applied knowledge and skills. Again, a railroad's submitted plan regarding duration of the observation period for testing purposes is subject to FRA approval.

Section 240.129

This section derived from § 240.93 of the NPRM, requires that each railroad provide for the annual observation and compliance testing of its engineers' applied knowledge and performance skills. At a minimum, that compliance testing effort must effectively examine engineer response when operating a train or a locomotive and confronted with an unforeseen situation that requires affirmative reaction to less favorable conditions than those that existed prior to initiation of the test. The test can be conducted when the engineer is operating either an actual train or a simulator, but it must be done without prior warning to the engineer being tested.

The test required under this section is intended to improve routine compliance with major operating rules such as those that require engineers to operate prepared to stop within one-half the person's range of vision, or to approach a signal at reduced speed prepared to stop or make a diverging movement. Very few comments were received about this aspect of the monitoring proposal. Among those comments, two that have been rejected by FRA merit mention. One commenter urged that FRA not require tests because of a belief that covert testing breeds distrust and another commenter urged that this requirement not be applicable to those who only occasionally operate trains. FRA's routine field observations, experiences during system assessments, and some of the accident data clearly show the need for covert testing, since in its absence major safety rules intended to prevent collisions and derailments are often violated. FRA would expect that rail employees, whose safety is at issue, would understand this program as inuring to their benefit. The need for testing compliance with operating rules does not disappear because a person only occasionally operates a locomotive. There may in fact be a heightened value in assuring that those who do not routinely operate locomotives have their knowledge and skill periodically tested. One commenter did raise a valid concern that must be addressed by railroads during their design and implementation efforts: The failure of some railroads to properly control the placement of loads and empties when making up a train's consist. Unorthodox placement of loaded and empty freight cars does have the potential for generating severe train handling problems when engineers are required to respond to a compliance test conducted in territory that already presents an engineer with difficult train handling situations.

This section also requires an annual observation of each certified engineer by a supervisor of locomotive engineers, not as part of a test, but to provide for observation performance in routine operations, rather than merely in test environments. FRA has revised the portion of the section that pertains to such operational monitoring in light of the comments received. Railroads will be free to select the duration of the monitoring effort devoted to each individual engineer. Railroads also will have the option of using some or all of the following techniques: on-board observations, simulator observations, and evaluation of train operation event recorder data. As with prior provisions, this section affords each railroad latitude in designing its own monitoring effort, so long as that design addresses each of these elements. Since the testing and monitoring effort selected by the railroad must submitted to FRA for approval, the exercise of the discretion being afforded railroads by this section will be monitored by FRA.

This section has been revised to clearly indicate the duties of a railroad responsible for conducting joint operations under this section. FRA will permit but not require a railroad responsible for conducting joint operations, which involve certified engineers from other railroads operating over its territory, to annually observe and perform compliance tests of all such engineers under § 240.229.

Subpart C

Reflecting FRA's effort to simplify this rule, this subpart sets out the steps for implementing the railroads' certification programs. This subpart has no counterpart in the NPRM because its provisions appeared throughout the proposal.

Section 240.201

This section contains the timetable for implementation of the rule; its provisions are drawn primarily from §§ 240.1, 240.3, and 240.61 of the proposed rule.

This section requires that railroads identify supervisors of locomotive engineers and qualified engineers by November 1, 1991. All engineers must be issued certificates documenting their status by the end of 1991. Beginning in January 1992, no person may operate a locomotive without having an engineer's certificate in his or her possession.

Class I railroads, Amtrak, and commuter railroads may designate additional locomotive engineers without formal qualification findings until the end of 1991. Beginning in January 1992, those railroads must make the series of formal determinations required under this rule before issuing additional certificates. Similar provisions apply to Class II and Class III railroads effective May 31, 1992 and November 30, 1992, respectivey. Any railroad that comes into existence before the date for mandatory compliance with formal procedures applicable to similar railroads may employ the grandfathering approach of this section. A railroad that commences operation after the pertinent date for mandatory compliance by similar railroads must comply with the formal determination procedures of this rule. This section also contains a requirement that railroads make formal determinations concerning those they have grandfathered within 36 months of the date for compliance by their class of railroad.

Section 240.203

This section, derived from §§ 240.21, 240.41, 240.71 and 240.81 of the proposal, imposes a duty on railroads to make proper decisions in designating locomotive engineers.

Paragraph (a) requires that a railroad evaluate candidates in accordance with its approved program and determine that those it designates as locomotive engineers, including students, meet the criteria of this rule. The paragraph is organized to assure that railroads make the basic decisions about all engineers to preclude ineligible persons or those with unacceptably poor acuity levels from gaining access to the controls of a locomotive.

Paragraph (b) permits railroads that are conducting the initial training of persons as engineers to upgrade those students to the status of train or locomotive servicing engineer. It also authorizes such advancement without revisiting questions of the person's eligibility and acuity, provided the upgrading occurs within the time limits specified.

Section 240.205

This section, derived from §§ 240.21, 240.51, and 240.55 of the proposal, imposes a duty on railroads to employ proper procedures and make appropriate decisions in selecting persons to be locomotive engineers.

Paragraph (a) requires that a railroad evaluate candidates in accordance with its approved program and determine that those it designates as locomotive engineers, including students, meet the criteria of this rule. Paragraph (b) requires that the railroad have appropriate documentation to assure that railroads have the basic data to support their decisions about all engineers including decisions to preclude ineligible persons from being authorized access to the controls of a locomotive.

Section 240.207

This section, derived from §§ 240.41 and 240.45 of the proposed rule requires that a railroad have either a medical examiner's certificate documenting that the candidate has been tested and found to meet the acuity thresholds or a written opinion from the railroad's medical examiner that the candidate has adequate acuity to perform safely as an engineer. In response to commenter suggestions, the section permits the actual administration of the acuity test to be done by a wider variety of personnel than was contemplated by the NPRM. Allowing broader participation in the conduct of the test while maintaining responsibility for proper conduct of the test, at higher levels, should assist in lowering the cost of conducting such tests. FRA has also changed the reference to the calibration standard to be consistent with the OSHA calibration requirements (29 CFR part 1910) that apply when railroads are testing the hearing acuity of other railroad workers.

If the acuity testing reveals that a person needs corrective lenses or a hearing aid to function as an engineer, that fact must be noted on the actual certificate issued to the engineer and imposes a duty on the engineer to use the needed device while operating a locomotive. The wording of this section has also been revised to accommodate situations in which improvements occur that obviate the need for corrective devices.

A number of commenters q' estioned who would have responsibility 'or absorbing the costs associated with obtaining the necessary tests. This section does not address that issue since it is not a safety matter but may be an appropriate subject for discussion among the affected parties.

Section 240.209

This section, drawn from §§ 240.73 and 240.79 of the proposed rule, requires that a railroad employ the FRA-approved testing procedures in concluding that a person has sufficient knowledge concerning the railroad's rules and practices for the safe operation of trains. It also contains a requirement to document that testing and a prohibition against permitting a person who has failed a test to operate as a train or locomotive servicing engineer until successful completion of a reexamination.

This section differs from the proposed rule in that it tracks the performance approach to test and examination designs contained in § 240.125 and it omits all references to the conduct of reexaminations. FRA has concluded in both instances that commenter suggestions for altering the proposal were valid. FRA is sensitive to the fact that precluding those who fail such tests from operating a locomotive until successful passage of a reexamination will place a premium on proper preparation for such tests. But allowing those who have failed to demonstrate the knowledge needed to operate a locomotive, as was urged by a number of commenters, is simply not acceptable from a safety perspective.

Section 240.211

This section, drawn from §§ 240.83 and 240.89 of the proposed rule, requires that a railroad employ the skill testing procedures approved by FRA in concluding that a person has the ability to safely operate locomotives and trains. The same analysis provided for § 240.209 applies to this section with one change. Paragraph (d) prohibits a designated supervisor of locomotive engineers from sitting in judgment of his or her own skills. Railroads that have only a single designated supervisor of locomotive engineers will have to make arrangements with other parties to facilitate skill performance evaluation of its designated supervisor.

Section 240.213

This section, drawn from § 240.61 of the proposed rule, imposes a duty on railroads to make determinations concerning a student's overall knowledge, applied knowledge, and skill in the safe operation of trains before certifying that person as a train or locomotive servicing engineer.

The section has been written to better accommodate the potential for a wide variety of providers who may train students to be engineers. It requires that a railroad relying on skill training off its own lines examine the candidate's familiarity with the physical characteristics of the certifying railroad's trackage.

Section 240.215

This section, derived from §§ 240.103 and 240.107 of the NPRM, contains the record keeping responsibilities of railroads for those persons it has certified as locomotive engineers. FRA has revised this section to specify the records that must be kept by the railroad. FRA has provided this detailed recitation to eliminate any possible misunderstandings that might arise from the use of the phrase, "the information relied on," that was in the proposed rule. This section consolidates record keeping duties that were scattered throughout the NPRM.

Section 240.217

This section, drawn from §§ 240.45, 240.77, and 240.87 of the NPRM, contains the various time constraints that FRA has established to preclude railroads from relying on stale information when evaluating a candidate for certification or recertification. All of the time constraints in this section have been lengthened in response to commenter requests.

Section 240.219

This section, drawn from §§ 240.57, 240.59, 240.107, and 240.113 of the NPRM, establishes the procedures to be followed when a railroad decides to deny a person certification or recertification.

This section has no equivalent in the proposed rule. Although several sections of the NPRM provided for notice to candidates that the railroad possessed adverse information and required that candidates be given an opportunity to review and respond to that information, these provisions were not consistent and did not reach all the kinds of adverse data that a railroad might possess. Several commenters expressed concern about this situation. Thus, FRA has decided to clearly provide for an opportunity for review in all instances. Since some provisions of this final rule contain a similar but discrete opportunity for review, FRA does not intend to impose a second opportunity under this section. Moreover, the proposed rule impliedly required a railroad to communicate to the candidate, and document in writing, the basis for any decision to deny. This section clearly obligates a railroad to perform that function within a reasonable time after it makes its decision to deny.

Section 240.221

This section, proposed § 240.105, requires that each railroad maintain a list of its designated supervisors of locomotive engineers and certified locomotive engineers. This section has been revised slightly to resolve three different concerns about its content. First, FRA has specifically provided for the periodic updating of the list so that it retains its usefulness. Second, FRA has responded to commenter concern over where such information must be kept available by establishing an optional special approval process for railroads that conduct far flung operations but want to maintain data at a central location. Finally, FRA has included a provision addressing the duty of a railroad that controls operations over joint operations territory and certifies engineers for the limited purpose of operating over such territory under § 240.229 to comply with this section.

Section 240.223

This section, which appeared as proposed § 240.101, contains the requirements for the certificate that must be carried by each locomotive engineer. FRA has revised this section slightly to provide for better identification of the person to whom it has been issued by adding a duty to include the person's employee identification number if one is used by the railroad or the person's social security number if no unique identification code is used by the railroad. It also requires that identification data be included to provide assurance that the bearer of the card is the person to whom it was issued. The identification data can be either a physical description (height, weight, eye color and hair color) or a photograph. This change responds to commenter suggestions that FRA require that a photograph of the engineer be part of the certificate. While railroads are not foreclosed from using photographs, FRA is not convinced that their use should be mandated. The revised section also requires that the certificate include the date of the engineer's most recent operational monitoring test.

Although it has been suggested, FRA has not imposed specific duties on a railroad to institute security and audit procedures to preclude unauthorized acquisition and use of blank certificate forms. FRA is confident that railroads, on their own initiative, will take effective steps to properly monitor and control access to these documents.

Section 240.225

This section, derived from proposed § 240.25, contains the requirements that apply when a previously certified engineer is about to begin service for a different railroad. It has been revised to reflect the renumbering of various provisions occasioned by reorganization of this part. It also has been changed, in response to a commenter suggestion, to preclude a railroad from upgrading the class of service an engineer may perform on the second railroad without tests to determine the engineer's ability to handle the demands of the upgraded classification. It also imposes a duty on the second railroad to determine that the transferring engineer has the necessary knowledge concerning the new railroad's operating rules and practices and that the engineer has the necessary skills, including familiarity with physical characteristics of the second railroad. The need for this detailed independent assessment by the second railroad stems from the decision to eliminate the more stratified classification system for types of locomotive engineers contained in the NPRM.

Section 240.227

This section contains the requirements for a railroad that wants to rely on the system of locomotive engineer qualification established by the Canadian Government. It is virtually unchanged from the provisions of proposed § 240.27 of the NPRM, except to show Transport Canada as the Canadian agency with responsibility for rail safety.

Section 240.229

This section, proposed § 240.23, contains requirements for railroads responsible for conducting joint operations with another railroad. Several commenters suggested that FRA clarify this section to account for unusual situations in which a train from another railroad or another entity needs to operate on its lines, *i.e.*, a steam train operated on an excursion trip, a short-term detour routing caused by adverse weather conditions, or other *ad hoc* joint operations. FRA agrees that the proposal focused on longer term operations and did not adequately address these unusual situations. FRA, therefore, has revised this section to permit railroads to conduct joint operations by providing a qualified person to accompany a "foreign" train over its lines. In this way, the railroad with responsibility for conducting the joint operations will have a simple and prompt response capability when confronted with the types of situations posed by the commenters. Since the person providing guidance on how to negotiate the joint operations territory will have to offer guidance on or provide for proper train handling procedures while traversing the territory, FRA has included criteria for what will constitute a qualified person in such situations.

This section also has been revised to clearly permit a controlling railroad, certifying a person for the limited purpose of operating over joint operations territory, to fulfill its duty to issue that person a certificate by endorsing the preexisting certificate issued by the other railroad as provided for in paragraph (c) of § 240.223.

Subpart D

This subpart reflects FRA's effort to simplify this rule. It provides for the routine administration of the railroad certification programs. This subpart has no counterpart in the NPRM, but contains the provisions of proposed subpart J and elements found in other subparts in the proposal.

Section 240.301

This section has no counterpart in the proposed rule. Although FRA proposed a fairly comprehensive approach to the issuance and reissuance of certificates and their possible revocation or suspension, FRA's proposal did not contain a clear requirement that railroads have a system for the replacement of lost or damaged certificates. Several commenters were concerned that, in the absence of such a requirement, they could encounter problems replacing certificates. In response, FRA has decided to require that railroads have a system that allows the replacement of certificates when necessary. Commenters urging adoption of such an approach suggested that engineers should not have to bear any expenses in connection with obtaining replacements. This provision does not attempt to resolve the question of who will bear the cost of operating such a replacement system, since that is not a safety matter and is an appropriate subject for discussion among the affected parties.

Section 240.303

This section, which appeared as proposed § 240.93, contains the requirements for conducting the operational monitoring and compliance testing of certified engineers. It imposes a duty on railroads to adhere to their approved monitoring program and to conduct their unannounced compliance test program in a particular manner. Few comments were received on this proposal and FRA has revised this section only to reflect the greater latitude given railroads to design the implementation of its program (see the earlier discussion of § 240.129) for routine periodic operational monitoring of each engineer. Since FRA will allow railroads to select the best way to conduct annual monitoring from among several options, in lieu of the proposed requirement for an extended on-board observation, FRA has not accepted commenter suggestions that these observation be conducted at 18-month intervals. This options approach was discussed above in connection with the discussion of § 240.129.

Section 240.305

This section, which appeared as § 240.93 of the NPRM, proscribes certain types of conduct once the initial phase of the certification program is implemented. As noted in the preamble discussion of the proposed rule, FRA has identified three types of events not covered by current Federal safety rules that FRA believes should be regulated here: Operating a locomotive or train at excessive speed; failing to stop at signals requiring a stop; and entering a segment of track without proper authority. FRA received very few comments on this proposal. Those rare comments from individual engineers objected to the idea that FRA would now have enforcement powers similar to those of railroad companies; other comments urged adoption of the section so as to provide a basis for disqualification proceedings under part 209.

FRA is adopting the section but with two changes. First, this section will not become effective before railroads have completed their initial selection of locomotive engineers and had an opportunity to issue the certificates required by this rule. Second, FRA has revised this section to make the prohibitions against the three types of conduct mentioned above clearly applicable to both railroads and individual engineers. Although the wording of this section does not reflect that railroad companies and individuals are held to different standards, the fact is that FRA can only take civil penalty action against individuals who willfully violate the provisions of this section.

In devising the wording of this section and in administering the new authority contained in this section, FRA will approach the question of whether particular facts warrant the initiation of civil penalty action or some other remedial response in accordance with FRA's statement of enforcement policy in appendix A to part 209. FRA will also be guided by the following principles in interpreting the operational constraint provisions of this section. FRA will consider whether train speed is excessive by looking at the limits for train speed established by the timetable, train order, or similar mandatory directive. Where FRA observes, or has evidence supporting a finding that, a train's speed exceeding the maximum by one half the authorized speed but less than a 10-mile-per-hour overspeed, FRA will acknowledge the calibration limitations of locomotive speed indicators. In determining whether a train has been operated past a signal that requires a complete stop in contravention of a railroad rule requiring a stop, FRA will be guided by railroad interpretations of the application of that rule to particular factual settings. In this context the term "signal" encompasses 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 its regulations. Similarly, FRA will be guided by the individual railroad's operating rules and practices, including railroad interpretations of these rules and practices when evaluating whether a train entered a segment of track without proper authority.

Section 240.307

This section, which appeared as § 240.95 of the NPRM, requires that a railroad proceed in a specified manner when it acquires information indicating that a certified engineer no longer meets these qualification standards.

The rare comments received on this matter focused on the topic of loss of eligibility due to poor safety conduct and generally urged FRA either to ignore the topic or invoke the FRA disqualification procedures. As previously explained it is not appropriate for FRA to ignore issues such as loss of eligibility or simply rely on its disqualification procedures. Since an engineer can cease to meet these qualification standards in a variety of ways, FRA is retaining, but revising, these provisions. Paragraph (a) now provides that a railroad shall suspend the certificate of an engineer about whom it has acquired convincing information indicating he or she no longer meets the qualification criteria of this rule.

Paragraph (b) requires that before suspending a certificate, or contemporaneous with the suspension, the railroad shall give the engineer written notice of the reason for the pending revocation action and provide an opportunity for a hearing. The duration of the suspension is limited since the engineer can demand that the hearing be held within 10 calendar days of the suspension. If the person is ill, injured, or unavailable for sufficient cause, the hearing can be delayed. At the hearing, the railroad hearing officer shall determine on the record, if such a conclusion is reached by the hearing officer, the basis for the hearing officer's finding that the engineer no longer meets the qualifications established by this regulation. Based on such a conclusion the railroad shall revoke the locomotive engineer's certificate.

Since there is reason to believe that the parties to a hearing required under this section may wish to consolidate that hearing with disciplinary or other proceedings arising from the same facts, FRA has provided for such consolidation in paragraph (c). FRA also has sanctioned, in paragraph (d), parties' adhering to different procedural arrangements, such as those concerning disciplinary matters that were arrived at through collective bargaining in lieu of adhering to the procedural constraints specified in subparagraphs (b)(1) and (b)(2).

Paragraphs (e) and (f) address the issue of what response is required when a person has been certified by more than one railroad. Such dual certification typically occurs so that an engineer can operate in joint operations territory, but may also occur when an engineer holds dual employment. Under such circumstances, when information is acquired causing belief that the person may no longer meet the requirements of this part, the duty to hold a hearing under this section need be satisfied by only one of the railroads. If the railroad holding the hearing concludes that the person's certificate must be revoked, other railroads will be bound by that determination. Railroads will receive notification of such revocation because the locomotive engineer is obligated to advise all affected railroads of such adverse action under the provisions of § 240.305(d). Paragraphs (e) and (f) do not dictate which railroad should hold the hearing.

Section 240.309

This section, derived from §§ 240.51, 240.55, 240.57, and 240.59 of the NPRM, establishes internal review and analysis procedures to be followed by Class I and Class II railroads. As discussed earlier, most commenters objected to FRA's proposal to identify particular types of unsafe performance, assign each type a point value, and then predicate loss of eligibility on the accumulation of a certain number of points. The commenters strongly urged FRA to allow railroads to employ their existing, non-regulatory system of imposing punishment for failures to comply with safety directives, rather than adopt a rigid point system. That approach is rejected because it would be inappropriate to resolve issues at the heart of a Federal safety rule through a collective bargaining mechanism.

As discussed earlier, FRA is requiring railroads to have their own individual systems for examining and evaluating incidents of noncompliance with its rules and procedures for the safe operation of trains. FRA has formulated the information collection requirements of this section to ensure that railroads collect data on engineer safety behavior and feed that information back into its operational monitoring efforts, thereby enhancing safety. As acknowledged by commenters, railroads lack a current system for routinely monitoring and evaluating the effectiveness of their existing discipline system. Although some types of disciplinary data may be monitored for limited purposes, such as the conduct of labor relations activities, the broad spectrum of such data is not routinely integrated and applied to the evaluation of the effectiveness of railroad safety programs. Several commenters endorsed this type of information gathering as an interim response.

This section requires that, beginning on January 1, 1992, large and medium sized railroads have an internal auditing plan to keep track of 10 distinct kinds of events that involve poor safety conduct by locomotive engineers. For each event, the railroad will have to indicate what response it took to that situation. The railroad will evaluate this information, together with data showing the results of annual operational testing and the causation of FRA reportable train accidents, to determine what additional or different efforts, if any, are needed to improve the safety performance of that railroad's certified locomotive engineers.

FRA is not requiring that a railroad furnish this data or its analysis of the data to FRA. Instead, FRA requires that the railroad be prepared to submit such information when requested.

Subpart E

FRA proposed to establish a simplified set of procedures to permit quick resolution of any disputes concerning a railroad's decision to deny certification or recertification or to revoke certification. Except for comments suggesting that FRA defer to the existing dispute resolution mechanisms of the Railway Labor Act, in lieu of creating a separate set of dispute resolution procedures, FRA received only one substantive comment on its proposal concerning this issue. That commenter urged that FRA use the identical procedures for this process that FRA has adopted for instituting FRA-initiated disqualification proceedings. FRA believes the commenter fails to recognize the significant differences that exist in the two distinct settings. These differences make it inappropriate for FRA to burden the engineer, the railroad, or the agency to the same degree in both situations. In the context of disputes about qualifications under this rule, FRA will be reviewing a detailed record of events rather than conducting a fact finding effort of its own.

Section 240.401

This section, § 240.111 in the proposed rule, has been adopted with only minor editorial changes.

Section 240.403

This section was identified as § 240.113 in the proposed rule. Paragraphs (c) and (d) have been reworded to indicate that failure to adhere to the time limit of 180 days for seeking FRA review will result in dismissal of the review petitions as untimely. In addition, some minor editorial changes have been made to this section.

Section 240.405

This section, § 240.115 of the proposed rule, has been adopted without change.

Section 240.407

This section, § 240.117 of the proposed rule, has been adopted without substantive change.

Section 240.409

This section, § 240.119 of the proposed rule, has been adopted without substantive change.

Section 240.411

This section, § 240.120 of the proposed rule, has been adopted without change.

Appendix A

FRA noted in the NPRM that Appendix A of the final rule would contain a schedule of civil penalties similar to that FRA has issued for all of its regulations. Although such an appendix is a statement of policy, FRA solicited public comments expressing views on how FRA should handle this matter. Despite the extensive number of comments filed, no party commented on this appendix. Appendix A specifies the civil penalty FRA will ordinarily assess for the violation of a particular provision of this rule and reserves FRA's right to assess a penalty up to the statutory maximum where circumstances warrant. The process by which FRA will seek to impose such penalties is described in part 209.

Appendix B

FRA is providing both the organizational requirements and a narrative description of the submission required under §§ 240.101 and 240.103. FRA is not requiring that railroad submissions be made on a Federally mandated form. Instead, FRA is prescribing only minimal constraints on the organization and manner of presenting information. FRA requires that the submission be divided into six sections. FRA requires that each section deal with a different subject matter and that the railroad identify the appropriate person to be contacted in the event FRA needs to discuss some aspect of the railroad's program which relates to that section.

Although FRA is not prescribing in detail the form of the submission, FRA will make available, during the meetings held to discuss compliance with this rule, sample formats for such submissions. To assist those who must generate these submissions, FRA has provided a narrative description of the kinds of topics that should be covered in a railroad's submission. This narrative description is intended to aid railroads in preparing their submissions and should not be read as modifying or replacing any of the specific requirements of the relevant regulatory section(s) to which it relates.

Appendix C

In this appendix FRA is providing a narrative discussion of the procedures that a person seeking certification or recertification will have to follow to furnish a railroad with information concerning his or her motor vehicle driving record. The appendix has been modified to reflect the changes made to § 240.113, which places full responsibility on the individual to seek data.

Appendix D

This appendix contains the list of participating state motor vehicle licensing agencies that can directly furnish data on both NDR information and the state's own internal recorded information. As noted in the proposed rule, there are multiple advantages when a certification candidate can discharge both aspects of his or her responsibilities under § 240.113 by contacting such agencies. Thus, FRA has made this the preferred practice under this rule.

Appendix E

FRA has included an appendix that contains recommended practices for conducting skill performance tests. FRA has provided in this appendix an outline of the types of concerns that should be addressed during the administration of a skill performance test and guidance on 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 an Procedures

This 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 economc impact of this 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 $334 million and total estimated costs of $50 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 engineers, 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 that 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. Of 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 $325 million in property damage that can be ascribed to poor locomotive operator performance. Those accidents included 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 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.

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 resulted in FRA's 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 14 percent 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 rule will not have a significant economic impact on a substantial number of small entities. These rules will apply to railroads and individuals seeking to operate locomotives for railroads. Although a substantial number of small railroads will be subject to this regulation, the economic impact of this rule will not be significant for several reasons. Small railroads historically have not elected to train their own engineers and thus generally will not incur the training costs associated with this rule. Thus, the only costs that a small railroad normally will incur are those associated with routine administration of the certification program. Since small railroads individually and in the aggregate employ only a few locomotive engineers, FRA concludes that this economic impact will not be significant. As noted, FRA estimates that roughly 34,000 locomotive engineers are currently in service. Each of these individuals could be expected to incur some nominal expenses under this rule. Every three years, each engineer may 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 paying state motor vehicle agency documentation charges.

The proposed rule will 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 rule would not have a direct adverse economic impact on these agencies.

Paperwork Reduction Act

There are collection of information requirements contained in this rule and, in accordance with the Paperwork Reduction Act of 1980, the record keeping and reporting requirements contained in this rule have been submitted to the Office of Management and Budget for approval. The information collection requirements of this rule will become effective when they are approved by OMB. FRA has endeavored to keep the burden associated with these rules 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 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.

Section	Brief description	Estimated average time
240.9	Request for Waiver	1 hour each.
240.101 & 240.103 & 240.107 & 240.109 & 240.119 & 240.121 & 240.123 & 240.125 & 240.127 & 240.129 & 240.303 & Appendix B.	Certification Program —preparation if perform student training. —preparation if do not perform student training. —submission to FRA.	200 hours each railroad. 40 hours. each railroad. 1 hour each railroad.
240.111 &	Request for State License Data.	15 minutes per person.
Appendix C	Request for NDR data.	30 minutes per person.
240.111 &	Notice of Absence of License.	15 minutes per person.
Appendix D	Additional data-follow-up request.	30 minutes per person.
240.111	Request for Railroad Data.	15 minutes per person.
	Response to Data Request.	30 minutes per person.
240.115	Review of Eligibility Data.	30 minutes per person.
240.201 &	List of—Designated Supervisors updating.	15 minutes per railroad.
240.221	—Certified Engineers updating.	15 minutes per railroad.
240.201 & 240.207 & 240.223 & 240.229 & 240.301.	Locomotive Engineers Certificates.	5 minutes per person.
240.205	Data to EAP Counselor.	5 minutes per person.
240.207	Medical Certificate	30 minutes per person.
240.209 &	Written Test	2 hours per person.
240.211 &	Performance Test	2 hours per person.
240.213	Annual Operational Monitor Test.	1 hour per person.
	Annual Operational Observation.	2 hours per person.
	—Examination Grading.	15 minutes per person.
240.215	Record Keeping for each Engineer.	1 hour per person.
240.219	Certification Denial Notice.	1 hour per person.
	Response to Notice	1 hour per person.
240.221	Request Electronic listing.	30 minutes per railroad.
240.227	Canadian Certification Data.	15 minutes per person.
240.305	—Engineer's Notice of Non-Qualification.	15 minutes per person.
	—Engineer's Notice of loss of qualification.	1 hour per person.
240.307	Notice to Engineer of Disqualification.	1 hour per person.
240.309	Railroad Annual Review & Analysis.	80 hours per railroad.
240.401 & 240.403.	Engineer Appeals to FRA if lose certification.	30 minutes per person.
240.405	Railroad Response to Appeal.	15 minutes per person.
240.407	Request for Hearing	30 minutes per person.
240.411	Appeals	30 minutes per person.
Appendix C	Notice to Engineer about State with Driver Record.	15 minutes per person.
	Response to Follow-up request for Data.	15 minutes per person.

Although FRA solicited comments on the accuracy of the FRA estimates, the practical utility of the information, and alternative methods for obtaining this information that might be less burdensome, FRA did not receive many comments on this aspect of its proposal. As stated earlier, FRA received virtually no comments on the alternative procedures for obtaining information concerning a certification candidate's driving record, specifically in accessing the National Driver Register. The comments that addressed the issue of information collection were limited to suggestions that FRA employ a longer interval for certification (*e.g.*, five years instead of three years). The five-year interval is an alternative FRA found to be undesirable for the reasons previously given. The costs estimated to be associated with the information collection requirements are contained in the regulatory evaluation.

Environmental Impact

FRA has evaluated this 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 regulation meets the criteria that establish this as a non-major action for environmental purposes.

Federalism Implications

This rule will not have a substantial effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. 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.

The Rule

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

1. By adding a new part 240 to read as follows:

Part 240—Qualification and Certification of Locomotive Engineers

Subpart A—General

Subpart B—Component Elements of the Certification Process

Subpart C—Implementation of the Certification Process

Subpart D—Administration of the Certification Programs

Subpart E—Dispute Resolution Procedures

Authority: 45 U.S.C. 431 and 438, as amended; Pub. L. 100-342; and 49 CFR 1.49(m).

Subpart A—General

§ 240.1 Purpose and scope.

(a) The purpose of this part is to ensure that only qualified persons operate a locomotive or train.

(b) This part prescribes minimum Federal safety requirements for the eligibility, training, testing, certification, and monitoring of all locomotive engineers. This part does not restrict a railroad from implementing additional or more stringent requirements for its locomotive engineers that are not inconsistent with this part.

(c) The qualifications for locomotive engineers prescribed in this part are pertinent to any person who operates a locomotive, unless that person is specifically excluded by a provision of this part, regardless of the fact that a person may have a job classification title other than that of locomotive engineer.

§ 240.3 Applicability.

(a) 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 Construction.

(a) Under section 205 of the Federal Railroad Safety Act of 1970 (45 U.S.C. 434), issuance of these regulations preempts any State law, rule, regulation, order, or standard covering the same subject matter.

(b) FRA does not intend by issuance of these regulations to preempt any provisions of State criminal law that impose sanctions for reckless conduct that leads to actual loss of life, injury, or damage to property, whether such provisions apply specifically to railroad employees or generally to the public at large.

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

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

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

§ 240.7 Definitions.

As used in this part—

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

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).

Current Employee is any employee with at least one year of experience in transportation service on a railroad.

Designated Supervisor of Locomotive Engineers is a person designated as such by a railroad in accordance with the provisions of § 240.105 of this part.

Drug means any substance (other than alcohol) that has known mind or function-altering effects on a human subject, specifically including any psychoactive substance and including, but not limited to, controlled substances.

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 a 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.

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.

Instructor Engineer means a person who

(1) Is a qualified locomotive engineer 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.

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.

Knowingly means having actual knowledge of the facts giving rise to the violation or that a reasonable person acting in the circumstances, exercising due care, would have had such knowledge.

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 passenger traffic or both; or

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

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

(1) A person who moves a locomotive or group of locomotives within the confines of a locomotive repair 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.

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

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.

Railroad means all forms of non-highway ground transportation that run on rails 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.

Railroad Officer means any supervisory employee of a railroad.

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

Substance abuse disorder refers to a psychological or physical dependence on alcohol or a drug or another identifiable and treatable mental or physical disorder involving the abuse of alcohol or drugs as a primary manifestation. A substance abuse disorder is "active" within the meaning of this Part if the person (1) is currently using alcohol and other drugs, except under medical supervision consistent with the restrictions described in § 219.103 of this chapter or (2) has failed to successfully complete primary treatment or successfully participate in aftercare as directed by an EAP Counselor.

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

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

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

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

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

Type II Simulator 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) Pictorially, audibly, and graphically illustrates the route to be taken;

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

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

Type III 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 programmed for specific train consists and the known physical characteristics of the line illustrated.

§ 240.9 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 a 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 or she deems necessary.

§ 240.11 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 is a statement of policy that 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 willfully falsifies any record required by this Part may be subject to criminal penalties under the provisions of 45 U.S.C. 438.

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

§ 240.13 Information collection requirements.

(a) The information collection requirements of this Part are being reviewed by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) and have not yet been assigned an OMB control number.

(b) The information collection requirements are found in the following sections: § 240.101, § 240.103, § 240.105, § 240.107, § 240.109, § 240.111, § 240.113, § 240.115, § 240.117, § 240.119, § 240.121, § 240.123, § 240.125, § 240.127, § 240.129, § 240.201, § 240.205, § 240.207, § 240.209, § 240.211, § 240.213, § 240.215, § 240.219, § 240.221, § 240.223, § 240.227, § 240.229, § 240.301, § 240.303, § 240.305, § 240.307, § 240.309, § 240.401, § 240.403, § 240.405, § 240.407, § 240.411.

Subpart B—Component Elements of the Certification Process

§ 240.101 Certification program required.

(a) After September 17, 1991, each railroad in operation on that date and subject to this Part shall have in effect a written program for certifying the qualifications of locomotive engineers.

(b) A railroad commencing operations after September 17, 1991, shall have such a program in effect prior to commencing operations.

(c) After the pertinent date specified in paragraphs (e), (f), or (g) of § 240.201, each railroad shall have a certification program approved in accordance with § 240.103 that includes:

(1) A procedure for designating any person it determines to be qualified as a supervisor of locomotive engineers that complies with the criteria established in § 240.105;

(2) A designation of the classes of service that it determines will be used in compliance with the criteria established in § 240.107;

(3) A procedure for evaluating prior safety conduct that complies with the criteria established in § 240.109;

(4) A procedure for evaluating visual and hearing acuity that complies with the criteria established in § 240.121;

(5) A procedure for training that complies with the criteria established in § 240.123;

(6) A procedure for knowledge testing that complies with the criteria established in § 240.125;

(7) A procedure for skill performance testing that complies with the criteria established in § 240.127; and

(8) A procedure for monitoring operational performance that complies with the criteria established in § 240.129.

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

(a) Each railroad shall submit its written program and a description of how its program conforms to the specific requirements of this part in accordance with the procedures contained in appendix B and the following schedule:

(1) A Class I railroad (including National Railroad Passenger Corporation) and a railroad providing commuter service shall submit no later than November 15, 1991;

(2) A Class II railroad shall submit no later than May 1, 1992; and

(3) A Class III railroad (including a switching and terminal railroad or any other railroad not otherwise classified) shall submit no later than November 1, 1992.

(4) A railroad commencing operations after the pertinent date previously specified in this paragraph shall submit its certification program for approval at least 60 days before commencing operations.

(b) That submission shall state the railroad's election either:

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

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

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

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

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

(2) If the Administrator informs the railroad of deficiencies more than 30 days after the initial filing date, the original program may remain in effect until 30 days after approval of the revised program is received.

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

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

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

(e) A railroad that intends to materially modify its program after receiving initial FRA approval shall submit a description of how it intends to modify the program in conformity with the specific requirements of this Part at least 30 days prior to implementing such a change.

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

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

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

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

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

(b) The railroad shall examine any person it is considering for qualification as a supervisor of locomotive engineers to determine that he or she:

(1) Knows and understands the requirements of this part;

(2) Can appropriately test and evaluate the knowledge and skills of locomotive engineers;

(3) Has the necessary supervisory experience to prescribe appropriate remedial action for any noted deficiencies in the training, knowledge or skills of a person seeking to obtain or retain certification; and

(4) Is a certified engineer.

§ 240.107 Criteria for designation of classes of service.

(a) Each railroad's program shall state which of the three classes of service, provided for in paragraph (b) of this section, that it will cover.

(b) A railroad may issue certificates for any or all of the following classes of service:

(1) Train service engineers,

(2) Locomotive servicing engineers, and

(3) Student engineers.

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

(1) Train service engineers may operate locomotives singly or in multiples and may move them with or without cars coupled to them;

(2) Locomotive servicing engineers may operate locomotives singly or in multiples but may not move them with cars coupled to them; and

(3) Student engineers may operate only under direct and immediate supervision of an instructor engineer.

(d) Each railroad is authorized to impose additional conditions or operational restrictions on the service an engineer may perform beyond those identified in this section provided those conditions or restrictions are not inconsistent with this part.

§ 240.109 General criteria for eligibility based on prior safety conduct.

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

(b) A railroad shall evaluate the prior safety conduct of any person it is considering for qualification as a locomotive engineer and the program shall require that a person is ineligible if the person has an adverse record of prior safety conduct as provided for in § 240.115, § 240.117, or § 240.119.

(c) The program shall require evaluation of data which reflect the person's prior safety conduct as a railroad employee and the person's prior safety conduct as an operator of a motor vehicle, provided that there is relevant prior conduct. The information to be evaluated shall include:

(1) The relevant data furnished from the evaluating railroad's own records, if the person was previously an employee of that railroad;

(2) The relevant data furnished by any other railroad formerly employing the person; and

(3) The relevant data furnished by any governmental agency with pertinent motor vehicle driving records.

(d) The railroad's process for evaluating information concerning prior safety conduct shall be designed to conform wherever necessary with the procedural requirements of § 240.111, § 240.113, § 240.115, § 240.117, § 240.119, and § 240.217.

(e) When evaluating a person's motor vehicle driving record or a person's railroad employment record, a railroad shall not consider information concerning motor vehicle driving incidents or prior railroad safety conduct that

(1) Occurred prior to the effective date of this rule; or

(2) Occurred at a time other than that specifically provided for in § 240.115, § 240.117 or § 240.119 of this subpart.

(f) A railroad's program shall provide a candidate for certification or recertification a reasonable opportunity to review and comment in writing on any record which contains information concerning the person's prior safety conduct, including information pertinent to determinations required under § 240.119 of this subpart, if the railroad believes the record contains information that could be sufficient to render the person ineligible for certification under this subpart.

(g) The opportunity for comment shall be afforded to the person prior to the railroad's rendering its eligibility decision based on that information. Any responsive comment furnished shall be retained by the railroad in accordance with § 240.215 of this part.

(h) The program shall include a method for a person to advise the railroad that he or she has never been a railroad employee or obtained a license to drive a motor vehicle. Nothing in this section shall be construed as imposing a duty or requirement that a person have prior railroad employment experience or obtain a motor vehicle driver's license in order to become a certified locomotive engineer.

(i) Nothing in this section, § 240.111, or § 240.113 shall be construed to prevent persons subject to this part from entering into an agreement that results in a railroad's obtaining the information needed for compliance with this subpart in a different manner than that prescribed in § 240.111 or § 240.113.

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

(a) Except for initial certifications under paragraphs (b), (h), or (i) of § 240.201 or for persons covered by § 240.109(h), each person seeking certification or recertification under this part shall, within 180 days preceding the date of the railroad's decision on certification or recertification:

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

(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 each 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 C unless the person's motor vehicle driving license was issued by one of the driver licensing agencies identified in appendix D.

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

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

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

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

(g) Any person who has never obtained a motor vehicle driving license is not required to comply with the provisions of paragraph (b) of this section but shall notify the railroad of that fact in accordance with procedures of the railroad that comply with § 240.109(d).

(h) The actions required for compliance with paragraph (a) of this section shall be undertaken within the 180 days preceding the date of the railroad's decision concerning certification or recertification.

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

(a) Except for initial certifications under paragraphs (b), (h), or (i) of § 240.201 or for persons covered by § 240.109(h), each person seeking certification or recertification under this part shall, within 180 days preceding the date of the railroad's decision on certification or recertification:

(1) Take the actions required by paragraph (b) of this section to make information concerning his or her prior railroad service 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 service record available to that railroad.

(b) Each person seeking certification or recertification under this Part shall request, in writing, that the chief operating officer or other appropriate person of the former employing railroad provide a copy of that railroad's available information concerning his or her service record to the railroad that is considering such certification or recertification.

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

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

(b) When evaluating a person's motor vehicle driving record, a railroad shall not consider information concerning motor vehicle driving incidents that occurred more than 36 months before the month in which the railroad is making its certification decision and shall only consider information concerning the following types of motor vehicle incidents:

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

(c) If such an incident is identified,

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

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

(3) If the person is evaluated as not currently affected by an active substance abuse disorder, the subject data shall not be considered further with respect to certification. However, the railroad shall, on recommendation of the EAP Counselor, condition certification upon participation in any needed aftercare and/or follow-up testing for alcohol or drugs deemed necessary by the EAP Counselor consistent with the technical standards specified in § 240.119(d)(3) of this part.

(4) If the person is evaluated as currently affected by an active substance abuse disorder, the person shall not be currently certified and the provisions of § 240.119(b) will apply.

§ 240.117 Criteria for consideration of operating rules compliance data.

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

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

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

(d) *Limitations on consideration of prior operating rule compliance data.* In determining whether a person may be or remain certified as a locomotive engineer, a railroad shall consider as operating rule compliance data only conduct described in paragraph (e) of this section that occurred within a period of 60 consecutive months prior to the determination. A review of an existing certification shall be initiated promptly upon the occurrence and documentation of any occurrence of conduct described in this paragraph.

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

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

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

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

(4) Entering track segment without proper authority;

(5) Failure to comply with prohibitions against tampering with locomotive mounted safety devices; and

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

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

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

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

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

(3) Be determined according to the following standards:

(i) In the case of a single incident involving violation of one or more of the operating rules or practices described paragraphs (e)(1) through (e)(5) of this section, the person shall be ineligible to hold a certificate for a period of one month.

(ii) In the case of two separate incidents involving violations of one or more of the operating rules on practices described in paragraph (e) of this section that occurred within 36 months of each other, the person shall be ineligible to hold a certificate for a period of one year.

(iii) In the case of more than two such violations in any consecutive 60 month interval, the person shall be ineligible to hold a certificate for a period of five years.

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

(h) *Future eligibility to hold certificate.* Only a person whose certification has been denied, suspended or revoked for a period of one year in accordance with the provisions of paragraph (g)(2) for reasons other than noncompliance with § 219.101 of this chapter shall be eligible for grant or reinstatement of the certificate prior to the expiration of the initial period of ineligibility. Such a person shall not be eligible for grant or reinstatement unless and until—

(1) The person has been evaluated by a designated supervisor of locomotive engineers and determined to have received adequate remedial training;

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

(3) At least one half the pertinent period of ineligibility specified in paragraph (g)(2) has elapsed.

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

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

(b) *Fitness requirement.* (1) A person who has an active substance abuse disorder shall not be currently certified as a locomotive engineer.

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

(3) In the case of a current employee of the railroad evaluated as having an active substance abuse disorder (including a person identified under the procedures of § 240.115), the employee may, if otherwise eligible, voluntarily self-refer for substance abuse counseling or treatment under the policy required by § 219.403 of this chapter; and the railroad shall then treat the substance abuse evaluation as confidential except with respect to current ineligibility for certification.

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

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

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

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

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

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

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

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

(iii) In the case of one violation of § 219.101 of this chapter, the person shall be ineligible to hold a certificate for a period of 9 months (unless identification of the violation was through a qualifying "co-worker report" as described in § 219.405 of this chapter and the engineer waives investigation, in which case the certificate shall be deemed suspended during evaluation and any required primary treatment as described in paragraph (d)). In the case of two or more violations of § 219.101, the person shall be ineligible to hold a certificate for a period of five years.

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

(A) § 219.102, in the case of a refusal or failure to provide a urine specimen for testing; or

(B) § 219.101, in the case of a refusal or failure to provide a breath sample (subpart D), or a blood specimen for mandatory post-accident toxicological testing (subpart C)).

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

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

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

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

(iii) Presented a urine sample for testing under Subpart H of this Part that tested negative for controlled substances assayed and has tested negative for alcohol under paragraph (d)(4) of this section.

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

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

(4) Return-to-service and follow-up alcohol tests shall consist of—

(i) Analysis of a breath specimen for alcohol under safeguards consistent with those specified for reasonable cause breath testing under subpart C of part 219 of this chapter; or

(ii) Analysis of a blood specimen for alcohol in the same manner as prescribed in § 219.303(c) of this chapter. Alcohol tests shall be conducted while the employee is in duty status. However, this paragraph shall not be construed to require compensation of an employee or applicant for any period devoted exclusively to such tests.

(5) Satisfaction of the more stringent return-to-service requirements of this paragraph shall also be deemed to satisfy the requirements of § 219.104(d) of this chapter.

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

(e) *Confidentiality protected.* Nothing in this part shall affect the responsibility of the railroad under § 219.403 of this chapter ("Voluntary Referral Policy") to treat voluntary referrals for substance abuse counseling and treatment as confidential; and the certification status of an engineer who is successfully assisted under the procedures of that section shall not be adversely affected. However, the railroad shall include in its voluntary referral policy required to be issued pursuant to § 219.403 of this chapter a provision that, at least with respect to a certified locomotive engineer or a candidate for certification, the policy of confidentiality is waived (to the extent that the railroad shall receive from the EAP Counselor official notice of the substance abuse disorder and shall suspend or revoke the certification, as appropriate) if the person at any time refuses to cooperate in a recommended course of counseling or treatment.

§ 240.121 Criteria for vision and hearing acuity data.

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

(b) *Fitness Requirement.* A person who does not have visual acuity and hearing acuity that meets or exceeds the levels prescribed in this section shall not, except as permitted by paragraph (e) of this section, currently be certified as a locomotive engineer.

(c) Except as provided in paragraph (e), each person shall have visual acuity that meets or exceeds the following thresholds:

(1) for distant viewing either

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

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

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

(3) the ability to recognize and distinguish between the colors of signals.

(d) Except as provided in paragraph (e) of this section, each person shall have hearing acuity that meets or exceeds the following thresholds when tested by use of an audiometric device (calibrated to American National Standard Specification for Audiometers, S3.6–1969): the person does not have an average hearing loss in the better ear greater than 40 decibels at 500Hz, 1,000 Hz, and 2,000 Hz with or without use of a hearing aid.

(e) A person not meeting the thresholds in paragraphs (c) and (d) of this section may be subject to further medical evaluation by a railroad's medical examiner to determine that person's ability to safely operate a locomotive. If the medical examiner concludes that, despite not meeting the threshold(s), the person has the ability to safely operate a locomotive, the person may be certified as a locomotive engineer and such certification conditioned on any special restrictions the medical examiner determines in writing to be necessary.

§ 240.123 Criteria for initial and continuing education.

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

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

(c) A railroad that elects to train a previously untrained person to be a locomotive engineer shall provide initial training which, at a minimum:

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

(2) includes both knowledge and performance skill testing;

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

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

(i) Personal safety,

(ii) Railroad operating rules,

(iii) Mechanical condition of equipment,

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

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

(vi) Compliance with Federal regulations;

(5) is conducted so that the performance skill component shall

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

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

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

§ 240.125 Criteria for testing knowledge.

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

(b) A railroad shall have procedures for testing a person being evaluated for qualification as a locomotive engineer in either train or locomotive service to determine that the person has sufficient knowledge of the railroad's rules and practices for the safe operation of trains.

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

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

(2) objective in nature;

(3) administered in written form;

(4) cover the following subjects:

(i) Personal safety practices;

(ii) Operating practices;

(iii) Equipment inspection practices;

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

(v) compliance with Federal safety rules;

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

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

(d) The conduct of the test shall be documented in writing and the documentation shall contain sufficient information to identify the relevant facts relied on for evaluation purposes.

§ 240.127 Criteria for examining skill performance.

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

(b) A railroad shall have procedures for examining the performance skills of a person being evaluated for qualification as a locomotive engineer in either train or locomotive service to determine whether the person has the skills to safely operate locomotives and/or trains, including the proper application of the railroad's rules and practices for the safe operation of locomotives or trains, in the most demanding class or type of service that the person will be permitted to perform.

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

(1) 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;

(2) Conducted by a designated supervisor of locomotive engineers;

(3) Cover the following subjects during the test period

(i) Operating practices;

(ii) Equipment inspection practices;

(iii) Train handling practices; and

(iv) Compliance with Federal safety rules;

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

(5) Conducted when the person either

(i) 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 or

(ii) Is at the controls of a Type I or Type II simulator programmed to replicate the responsive behavior 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.

(d) The conduct of the test shall be documented in writing by the designated supervisor and the documentation shall contain:

(1) The relevant facts concerning the train being operated;

(2) The constraints applicable to its operation; and

(3) The factors observed and relied on for evaluation purposes by the designated supervisor.

§ 240.129 Criteria for monitoring operational performance of certified engineers.

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

(b) A railroad shall have procedures for monitoring the operational performance of those it has determined as qualified as a locomotive engineer in either train or locomotive service.

(c) The procedures shall:

(1) Be designed to determine that the person possesses and routinely employs the skills to safely operate locomotives and/or trains, including the proper application of the railroad's rules and practices for the safe operation of locomotives and trains;

(2) Be designed so that each engineer shall be annually monitored by a designated supervisor of locomotive engineers;

(3) Be designed so that the locomotive engineer is either accompanied by the designated supervisor for a reasonable length of time or has his or her train handling activities electronically recorded by a train operations event recorder;

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

(i) 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 or

(ii) Is at the controls of a Type I or Type II simulator programmed to replicate the responsive behavior 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.

(e) The testing and examination procedures selected by the railroad for the conduct of a monitoring program shall be:

(1) Designed so that each locomotive engineer shall be given at least one unannounced test each calendar year.

(2) Designed to test engineer 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;

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

(4) Designed to test engineer compliance with provisions of the railroad's operating rules, timetable or other mandatory directives violation of which by engineers were cited by the railroad as the cause of train accidents or train incidents in accident reports filed in compliance with part 225 of this Chapter in the preceding calendar year;

(5) Designed 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

(6) Designed so that individual tests are administered without prior notice to the engineer being tested.

Subpart C—Implementation of the Certification Process

§ 240.201 Schedule for implementation.

(a) After October 30, 1991, each railroad in operation on that date shall designate in writing any person(s) it deems qualified as a designated supervisor of locomotive engineers. Each person so designated shall have demonstrated to the railroad through training, testing or prior experience that he or she has the knowledge, skills, and ability to be a designated supervisor of locomotive engineers.

(b) No later than November 1, 1991, each railroad shall designate in writing all persons that it will deem to be qualified as certified locomotive engineers for the purpose of initial compliance with paragraph (d) of this section, except as provided for in paragraph (h) of this section.

(1) Each person so designated shall have demonstrated to the railroad through training, testing or prior experience that he or she has the knowledge and skills to be a certified locomotive engineer.

(2) Each railroad shall issue, no later than December 31, 1991, a certificate that complies with § 240.223 to each person that it designates as qualified under the provisions of paragraph (b) of this section.

(c) No railroad shall permit or require a person, designated as qualified for certification under the provisions of paragraph (b) of this section, to perform service as a certified locomotive or train service engineer for more than the 36-month period beginning on the pertinent date for compliance with the mandatory procedures for testing and evaluation set forth in the applicable provisions of paragraph (e), (f) or (g) of this section unless that person has been determined to be qualified in accordance with procedures that comply with subpart C.

(d) After December 31, 1991, no railroad shall permit or require any person to operate a locomotive in any class of locomotive or train service unless that person has been certified as a qualified locomotive engineer and issued a certificate that complies with § 240.223.

(e) After December 31, 1991, no Class I railroad (including the National Railroad Passenger Corporation) or railroad providing commuter service shall designate any person it deems qualified as a designated supervisor of locomotive engineers or initially certify or recertify a person as a locomotive engineer in either locomotive or train service unless that person has been tested, evaluated, and determined to be qualified in accordance with procedures that comply with subpart C.

(f) After May 31, 1992 no Class II railroad shall designate any person it deems qualified as a designated supervisor of locomotive engineers or initially certify or recertify a person as a locomotive engineer in any class of locomotive or train service unless that person has been tested, evaluated and determined to be qualified in accordance with procedures that comply with subpart C.

(g) After November 30, 1992 no Class III railroad (including a switching and terminal or other railroad not otherwise classified) shall designate any person it deems qualified as a designated supervisor of locomotive engineers or initially certify or recertify a person as a locomotive engineer in any class of locomotive or train service unless that person has been tested, evaluated and determined to be qualified in accordance with procedures that comply with subpart C.

(h) A railroad may continue to designate any person it deems qualified as a designated supervisor of locomotive engineers or as a certified engineer, on the basis of paragraph (b) determinations, prior to the pertinent date by which a railroad of its class must comply with the procedures for testing and evaluating persons required under subpart C. Each person designated as a locomotive engineer shall be issued a certificate that complies with § 240.223 prior to being required or permitted to operate a locomotive.

(i) A railroad commencing operations prior to the pertinent date for compliance by a railroad of its class may designate any person it deems qualified as a designated supervisor of locomotive engineers or as a certified locomotive engineer on the basis of paragraph (b) until the pertinent date for compliance with the procedures for testing and evaluating required under subpart C. Each person designated as a locomotive engineer shall be issued a certificate that complies with § 240.223 prior to being required or permitted to operate a locomotive.

§ 240.203 Determinations required as a prerequisite to certification.

(a) Except as provided in paragraph (c), after the pertinent date specified in paragraph (e), (f), or (g) of § 240.201, each railroad, prior to initially certifying or recertifying any person as an engineer for any class of service, shall, in accordance with its FRA-approved program determine in writing that:

(1) The individual meets the eligibility requirements of §§ 240.15, 240.117 and 240.119; and

(2) The individual meets the vision and hearing acuity standards of § 240.121;

(3) The individual has the necessary knowledge, as demonstrated by successfully completing a test that meets the requirements of § 240.125;

(4) The individual has the necessary applied knowledge and operating performance skills, as demonstrated by successfully completing an operational performance test that meets the requirements of § 240.127; and

(5) Where a person has not previously been certified, that the person has completed a training program that meets the requirements of § 240.123.

(b) A railroad may certify a person as a student engineer after determining that the person meets the vision and hearing acuity standards of § 240.121. A railroad may subsequently certify that student engineer as either a locomotive servicing engineer or a train service engineer without further review of his or her acuity status provided it determines that:

(1) The person successfully completed a training program that complies with § 240.123;

(2) The person meets the eligibility requirements of §§ 240.109 and 240.119; and

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

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

(a) After the pertinent date specified in paragraph (e), (f), or (g) of § 240.201, each railroad, prior to initially certifying or recertifying any person as an engineer for any class of service, shall determine that the person meets the eligibility requirements of § 240.115 involving prior conduct as a motor vehicle operator, § 240.117 involving prior conduct as a railroad worker, and § 240.119 involving substance abuse disorders and alcohol/drug rules compliance.

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

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

(a) After the pertinent date specified in paragraph (e), (f), or (g) of § 240.201, each railroad, prior to initially certifying or recertifying any person as an engineer for any class of service, shall determine that the person meets the standards for visual acuity and hearing acuity prescribed in § 240.121.

(b) In order to make the determination required under paragraph (a), a railroad shall have on file either:

(1) a medical examiner's certificate that the individual has been medically examined and meets these acuity standards; or

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

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

(ii) The person's acuity is such that he or she cannot safely operate a locomotive even with conditions attached.

(c) Any examination required for compliance with this section shall be performed by or under the supervision of a medical examiner or a licensed physician's assistant such that:

(1) A licensed optometrist or a technician responsible to that person may perform the portion of the examination that pertains to visual acuity; and

(2) A licensed or certified audiologist or a technician responsible to that person may perform the portion of the examination that pertains to hearing acuity.

(d) If the examination required under this section discloses that the person needs corrective lenses or a hearing aid, or both, either to meet the threshold acuity levels established in § 240.121 or to meet a lower threshold determined by the railroad's medical examiner to be sufficient to safely operate a locomotive or train on that railroad, that fact shall be noted on the certificate issued in accordance with the provisions of this part.

(e) Any person with such a certificate notation shall use the relevant corrective device(s) while operating a locomotive in locomotive or train service unless the railroad's medical examiner subsequently determines in writing that the person can safely operate without using the device.

§ 240.209 Procedures for making the determination on knowledge.

(a) After the pertinent date specified in paragraph (e), (f), or (g) of § 240.201, each railroad, prior to initially certifying or recertifying any person as an engineer for any class of train or locomotive service, shall determine that the person has, in accordance with the requirements of § 240.125 of this Part, demonstrated sufficient knowledge of the railroad's rules and practices for the safe operation of trains.

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

(i) Exhibited his or her knowledge by achieving a passing grade in testing that complies with this Part or

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

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

§ 240.211 Procedures for making the determination on performance skills.

(a) After the pertinent date specified in paragraph (e), (f), or (g) of § 240.201, each railroad, prior to initially certifying or recertifying any person as an engineer for any class of train or locomotive service, shall determine that the person has demonstrated, in accordance with the requirements of § 240.127 of this Part, the skills to safely operate locomotives or locomotives and trains, including the proper application of the railroad's rules and practices for the safe operation of locomotives or trains, in the most demanding class or type of service that the person will be permitted to perform.

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

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

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

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

(d) No railroad shall permit a designated supervisor of locomotive engineers to test, examine or evaluate his or her own performance skills when complying with this section.

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

(a) After the pertinent date specified in paragraph (e), (f), or (g) of § 240.201, each railroad, prior to the initial issuance of a certificate to any person as a train or locomotive service engineer, shall determine that the person has, in accordance with the requirements of § 240.123 of this Part, the knowledge and skills to safely operate a locomotive or train in the most demanding class or type of service that the person will be permitted to perform.

(b) In making this determination, a railroad shall have written documentation showing that:

(1) The person completed a training program that complies with § 240.123 of this part;

(2) The person demonstrated his or her knowledge and skills by achieving a passing grade under the testing and evaluation procedures of that training program; and

(3) The person is familiar with the physical characteristics of the railroad or its pertinent segments.

§ 240.215 Retaining information supporting determinations.

(a) After the pertinent date in paragraphs (e), (f) or (g) of § 240.201, a railroad that issues, denies, or revokes a certificate after making the determinations required under § 240.203 shall maintain a record for each certified engineer or applicant for certification that contains the information the railroad relied on in making the determinations.

(b) The information concerning eligibility that the railroad shall retain includes:

(1) Any relevant data from the railroad's records concerning the person's prior safety conduct;

(2) Any relevant data furnished by another railroad;

(3) Any relevant data furnished by a governmental agency concerning the person's motor vehicle driving record; and

(4) Any relevant data furnished by the person seeking certification concerning his or her eligibility.

(c) The information concerning vision and hearing acuity that the railroad shall retain includes:

(1) The relevant test results data concerning acuity; and,

(2) If applicable, the relevant data concerning the professional opinion of the railroad's medical examiner on the adequacy of the person's acuity.

(d) The information concerning demonstrated knowledge that the railroad shall retain includes:

(1) Any relevant data from the railroad's records concerning the person's success or failure of the passage of knowledge test(s); and

(2) A sample copy of the written knowledge test or tests administered.

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

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

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

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

(f) If a railroad is relying on successful completion of an approved training program conducted by another entity, the relying railroad shall maintain a record for each certified engineer that contains the relevant data furnished by the training entity concerning the person's demonstration of knowledge and performance skills and relied on by the railroad in making its determinations.

(g) If a railroad is relying on a certification decision initially made by another railroad, the relying railroad shall maintain a record for each certified engineer that contains the relevant data furnished by the other railroad which it relied on in making its determinations.

(h) All records required under this section shall be retained for a period of six years from the date of the certification, recertification, denial or revocation decision and shall be made available to FRA representatives upon request during normal business hours.

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

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

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

§ 240.217 Time limitations for making determinations.

(a) After the pertinent date in paragraphs (e), (f) or (g) of § 240.201, a railroad shall not certify or recertify a person as a qualified locomotive engineer in any class of train or engine service, if the railroad is making:

(1) A determination concerning eligibility and the eligibility data being relied on were furnished more than 180 days before the date of the railroad's certification decision;

(2) A determination concerning visual and hearing acuity and the medical examination being relied on was conducted more than 180 days before the date of the railroad's certification decision;

(3) A determination concerning demonstrated knowledge and the knowledge examination being relied on was conducted more than 360 days before the date of the railroad's certification decision; or

(4) A determination concerning demonstrated performance skills and the performance skill testing being relied on was conducted more than 360 days before the date of the railroad's certification decision;

(b) The time limitations of paragraph (a) do not apply to a railroad that is making a certification decision in reliance on determinations made by another railroad in accordance with § 240.227 or § 240.229.

(c) Except as provided in § 240.201 concerning implementation dates for initial certification decisions and paragraph (b) of this section, no railroad shall:

(1) Certify a person as a qualified locomotive engineer for an interval of more that 36 months; or

(2) Rely on a certification issued by another railroad that is more than 12 months old.

(d) Except as provided for in § 240.201 concerning initial implementation of the program, a railroad shall issue each person designated as a certified locomotive engineer a certificate that complies with § 240.223 no later than 30 days from the date of its decision to certify or recertify that person.

§ 240.219 Denial of Certification.

(a) A railroad shall notify a candidate for certification or recertification of information known to the railroad that forms the basis for denying the person certification and provide the person a reasonable opportunity to explain or rebut that adverse information in writing prior to denying certification.

(b) This section does not require further opportunity to comment if the railroad's denial is based solely on factors addressed by §§ 240.115, 240.117, and 240.119 and the opportunity to comment afforded by those sections has been provided.

(c) If it denies a person certification or recertification, a railroad shall notify the person of the adverse decision and explain, in writing, the basis for its denial decision. The document explaining the basis for the denial shall be mailed or delivered to the person within 10 days after the railroad's decision and shall give the date of the decision.

§ 240.221 Identification of qualified persons.

(a) After November 1, 1991, a railroad shall maintain a written record identifying each person designated by it as a supervisor of locomotive engineers.

(b) After November 1, 1991, a railroad shall maintain a written record identifying each person designated as a certified locomotive engineer. That listing of certified engineers shall indicate the class of service the railroad determines each person is qualified to perform and date of the railroad's certification decision.

(c) If a railroad is responsible for controlling joint operations territory, the listing shall include person(s) certified in accordance with § 240.229.

(d) The listing required by paragraphs (a), (b), and (c) shall be updated at least annually.

(e) The record required under this section shall be kept at the divisional or regional headquarters of the railroad and shall be available for inspection or copying by FRA during regular business hours.

(f) A railroad may obtain approval from FRA to maintain this record electronically or maintain this record at the railroad's general offices, or both. Requests for such approval shall be filed in writing with the Associate Administrator for Safety and contain sufficient information to explain how FRA will be given access to the data that is fully equivalent to that created by compliance with paragraph (e).

§ 240.223 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 (including the person's name, date of birth and employee identification number, and either a physical description or photograph of the person);

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

(5) Show the date of its issuance;

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

(7) Show on the date of the person's last operating performance test as required by § 240.129 and § 240.303; and

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

(b) Each railroad to which this part applies shall designate in writing any person, other than a supervisor of locomotive engineers, that it authorizes to sign the certificates described in this section. The designation can identify such persons by name or job title.

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

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

(1) Make, cause to be made, or participate in the making of a false entry on that certificate; or

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

§ 240.225 Reliance on qualification determinations made by other railroads.

After December 31, 1991, any railroad that is considering certification of a person as a qualified engineer may rely on determinations made by another railroad concerning that person's qualifications. A railroad relying on another's certification shall determine that:

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

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

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

(d) The person has demonstrated the necessary knowledge concerning its operating rules in accordance with § 240.125.

(e) The person has demonstrated the necessary performance skills concerning its operating rules in accordance with § 240.127.

§ 240.227 Reliance on qualification requirements of other countries.

(a) A railroad that conducts joint operations with a Canadian railroad may certify, for the purposes of compliance with this part, that a person is qualified to be a locomotive or train service engineer provided it determines that:

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

(2) The person meets or exceeds the qualifications standards issued by Transport Canada for such service.

(b) Any Canadian railroad that is required to comply with this regulation may certify that a person is qualified to be a locomotive or train service engineer provided it determines that:

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

(2) The person meets or exceeds the qualifications standards issued by Transport Canada for such service.

§ 240.229 Requirements for joint operations territory.

(a) After December 31, 1991, no railroad that is responsible for controlling the conduct of joint operations with another railroad shall permit or require any person to operate a locomotive in any class of train or engine service unless that person has been certified as a qualified locomotive engineer for the purposes of joint operations and issued a certificate that complies with § 240.223.

(b) Each railroad that is responsible for controlling the conduct of joint operations with another railroad shall certify a person as a qualified locomotive engineer for the purposes of joint operations either by making the determinations required under subpart C of this part or by relying on the certification issued by another railroad under this part.

(c) 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 engineer under the provisions of this Part by the railroad which employs that individual;

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

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

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

(d) A railroad that controls joint operations and certifies locomotive engineers from a different railroad may comply with the requirements of paragraph (a) of this section by noting its supplemental certification decision on the original certificate as provided for in § 240.223(c).

(e) A railroad responsible for controlling the conduct of joint operations with another railroad shall be deemed to be in compliance with paragraph (a) of this section when it provides a qualified person to accompany a locomotive engineer who lacks joint operations certification during that engineer's operations in joint operations territory. As used in this section qualified person means either a designated supervisor of locomotive engineers or a certified train service engineer determined by the controlling railroad to have the necessary knowledge concerning the controlling railroad's operating rules and to have the necessary operating skills including familiarity with its physical characteristics concerning the joint operations territory.

Subpart D—Administration of the Certification Programs

§ 240.301 Replacement of certificates.

A railroad shall have a system for the prompt replacement of lost, stolen or mutilated certificates and that system shall be reasonably accessible to certified locomotive engineers in need of a replacement certificate.

§ 240.303 Operational monitoring requirements.

(a) After December 31, 1991, each railroad to which this part applies shall, prior to FRA approval of its program in accordance with § 240.201, have a program to monitor the conduct of its certified locomotive engineers by performing both operational monitoring observations and by conducting unannounced operating rules compliance tests.

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

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

(d) The unannounced test program shall:

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

(3) Test engineer compliance with provisions of the railroad's operating rules, timetable or other mandatory directives the violations of which by engineers were cited by the railroad as the cause of train accidents or train incidents in accident reports filed in compliance with part 225 of this chapter for the preceding year;

(4) 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;

(5) be conducted so that individual tests are administered without prior notice to the locomotive engineer being tested; and

(6) be conducted so that the results of the test are recorded on the certificate and entered on the record established under § 240.215 within 30 days of the day the test is administered.

§ 240.305 Prohibited conduct by certified engineers.

After December 31, 1991,

(a) It shall be unlawful to:

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

(2) Operate a locomotive or train past any signal, without completely stopping the locomotive or train, when that signal requires a complete stop before passing it; or

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

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

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

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

(i) A representative of the Federal Railroad Administration,

(ii) 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 engineer 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.

(d) During the duration of any certification interval, a locomotive engineer who has a current certificate from more than one railroad shall immediately notify the other certifying railroad(s) if he or she is denied recertification by a railroad or has his or her certification revoked by a railroad.

(e) Nothing in this section shall be deemed to alter a certified locomotive engineer's duty to comply with other provisions of this chapter concerning railroad safety.

§ 240.307 Revocation of certification.

(a) A railroad that issues a person certification or recertification as a qualified locomotive engineer and, during that certification interval, acquires information which convinces the railroad that the person no longer meets the qualification requirements of this part, shall revoke the person's certificate as a qualified locomotive engineer.

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

(1) Upon receipt of reliable information indicating the person's lack of qualification under this part, immediately suspend the person's certificate;

(2) Prior to or upon suspending the person, provide notice of the reason for this suspension, the pending revocation, and an opportunity for hearing before a presiding officer other than the charging official;

(3) Convene the hearing within ten calendar days of the suspension when so demanded by the person;

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

(5) When appropriate, impose the pertinent period of revocation provided for in § 240.117 or § 240.119; and

(6) Retain the record of the hearing for 3 years after the date the decision is rendered.

(c) The hearing may be consolidated with any disciplinary or other hearing arising from the same facts but the presiding officer for the hearing shall make separate findings as to the revocation required under this section.

(d) A hearing that conforms procedurally to the applicable collective bargaining agreement shall be deemed to satisfy the procedural requirements of this section.

(e) A railroad that has relied on the certification by another railroad under the provisions of § 240.227 or § 240.229, shall revoke its certification if, during the pendency of that certification interval, the railroad acquires information which convinces it that another railroad has revoked its certification after determining, in accordance with the provisions of this section, that the person no longer meets the qualification requirements of this part.

(f) The requirement to provide a hearing under this section does not impose a duty on more than one railroad to hold a hearing prior to the revocation by more than one railroad arising from the same facts.

§ 240.309 Railroad oversight responsibilities.

(a) No later than March 31 of each year (beginning in calendar year 1993), each Class I railroad (including the National Railroad Passenger Corporation and a railroad providing commuter service) and Class II railroad shall conduct a formal annual review and analysis concerning the administration of its program for responding to detected instances of poor safety conduct by certified locomotive engineers during the prior calendar year.

(b) Each review and analysis shall involve:

(1) The number and nature of the instances of detected poor safety conduct including the nature of the remedial action taken in response thereto;

(2) The number and nature of FRA reported train accidents attributed to poor safety performance by locomotive engineers;

(3) The number and type of operational monitoring test failures and observations of inadequate skill performance recorded by supervisors of locomotive engineers; and

(4) If it conducts joint operations with another railroad, the number of locomotive engineers employed by such other railroad(s) to which such events were ascribed which the controlling railroad certified for joint operations purposes.

(c) Based on that review and analysis each railroad shall determine what action(s) it will take to improve the safety of train operations to reduce or eliminate future incidents of that nature.

(d) If requested in writing by FRA, the railroad shall provide a report of the findings and conclusions reached during such annual review and analysis effort.

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

(1) Incidents involving noncompliance with part 218;

(2) Incidents involving noncompliance with part 219;

(3) Incidents involving noncompliance with part 232;

(4) Incidents involving noncompliance with the railroad's operating rules involving operation of a locomotive or train to operate at a speed that exceeds the maximum authorized limit;

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

(6) Incidents involving noncompliance with the railroad's operating practices including train handling procedures resulting in improper use of dynamic brakes;

(7) Incidents involving noncompliance with the railroad's operating practices (including train handling procedures) resulting in improper use of automatic brakes;

(8) Incidents involving noncompliance with the railroad's operating practices (including train handling procedures) resulting in improper use of a locomotive's independent brake;

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

(10) Incidents involving noncompliance with the railroad's operating practices that require operation of a train at a speed that permits stopping within less than the engineers range of vision.

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

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

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

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

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

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

(i) Imposition of informal discipline;

(ii) Imposition of formal discipline;

(iii) Provision of informal training; or

(iv) Provision of formal training; and

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

(i) The person was withheld from service;

(ii) The person was dismissed from employment or

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

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

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

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

Subpart E—Dispute Resolution Procedures

§ 240.401 Review board established.

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

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

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

§ 240.403 Petition Requirements.

(a) To obtain review of a railroad's decision to deny certification, deny recertification, or revoke certification, a person shall file a petition for review that complies with this section.

(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) The petitioner's current mailing address;

(iii) The petitioner's 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;

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

(6) Be filed in a timely manner.

(c) A petition seeking review of a railroad's decision to deny certification or recertification filed with FRA more than 180 days after the date of the railroad's denial decision will be denied as untimely.

(d) A petition seeking review of a railroad's decision to revoke certification in accordance with the procedures required by § 240.307 filed with FRA more than 180 days after the date of the railroad's revocation decision will be denied as untimely.

§ 240.405 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 Engineer Review Board for a decision.

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

(g) Notice of that decision will be provided in writing to both the petitioner and the railroad. The decision will include findings of fact on which it is based.

§ 240.407 Request for a hearing.

(a) If adversely affected by the decision, either the original petitioner or the railroad involved shall have a right to an administrative hearing concerning that decision.

(b) To exercise that right, the adversely affected party shall file a written request 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 and the requesting party's designated representative, if any;

(2) The specific facts that the requesting party alleges 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.

§ 240.409 Hearings.

(a) An administrative hearing for review of a locomotive engineer qualification petition shall be conducted by a presiding officer, who 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 this subpart, 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) Is not precedential.

(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.

§ 240.411 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 in 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 [1]

Section	Violation	Willful violation
Subpart B—Component Elements		
240.101—Program Failures		
(a) Failure to have program	$5,000	$10,000
(b) Program that fails to address a subject	2,500	5,000
240.103—Failure to:		
(a) follow Appendix B	1,000	2,000
(d) to resubmit, when directed by FRA	1,000	2,000
240.105—Failure to have adequate procedure for selection of supervisors	2,500	5,000
240.107—Classes of Service		
(a) Failure to designate classes of service	2,000	4,000
240.109—Limitations on considering prior conduct records		
(a) Failure to have procedure for determining eligibility	2,500	5,000
(e) Considering excluded data	2,000	4,000
(f,g) Failure to provide timely review opportunity	2,000	4,000
240.111—Furnishing Motor Vehicle Records		
(a) Failure to action required to make information available	1,000	2,000
(b) Failure to request:		
(1) local record	1,000	2,000
(2) NDR record	1,000	2,000
(f) Failure to request additional record	1,000	2,000
(e) Failure to notify of absence of license	750	1,500
(h) Failure to submit request in timely manner	750	1,500
240.113—Furnishing prior employment information		
(a) Failure to take action required to make information available	1,000	2,000
(b) Failure to request record	1,000	2,000
240.115—Criteria for considering prior motor vehicle conduct		
(b) Considering excluded data	2,000	4,000
(c) Failure to		
(1) consider data	5,000	7,500
(3,4) properly act in response to data	2,500	5,000
240.117—Consideration of operational rules compliance records		
(a) Failure to have program and procedures	5,000	10,000
(b–d) Failure to have adequate program or procedure	2,500	5,000
240.119—Consideration of substance abuse /rules compliance records		
(a) Failure to have program and procedures	5,000	10,000
(b–e) Failure to have adequate program or procedure	2,500	5,000
240.121—Failure to have adequate procedure for determining acuity	2,500	5,000
240.123—Failure to have		
(a) adequate procedures for continuing education	2,500	5,000
(b) adequate procedures for training new engineers	2,500	5,000
240.125—Failure to have		
(a) adequate procedures for testing knowledge	2,500	5,000
(d) adequate procedures for documenting testing	2,500	5,000
240.127—Failure to have		
(a) adequate procedures for evaluating skill performance	2,500	5,000
(c) adequate procedures for documenting skills testing	2,500	5,000
240.129—Failure to have		
(a–b) adequate procedures for monitoring performance	2,500	5,000
Subpart C—Implementation of the Process		
240.201—Schedule for Implementation		
(a) Failure to select supervisors by specified date	1,000	2,000
(b) Failure to identify grandfathered engineers	2,000	4,000
(c) Failure to issue certificate to engineer	1,000	2,000
(d) Allowing uncertified person to operate	5,000	10,000
(e–g) Certifying without complying with subpart C	2,500	5,000
(h–i) Failure to issue certificate to engineer	1,000	2,000
(j) Allowing person to continue to operate after 12/31/92 without testing or evaluation	2,500	5,000
240.203 (a) Designating a person as a supervisor without determining that		
(1) person knows and understands this part;	2,500	5,000
(2) person can test and evaluate engineers;	5,000	7,500
(3) person has experience to prescribe remedies	2,500	5,000

Section	Violation	Willful violation
(b) Certifying a person without determining that		
(1) person meets the eligibility criteria;	5,000	7,500
(2) person meets the medical criteria;	2,500	5,000
(3) person has demonstrated knowledge	2,500	5,000
(4) person has demonstrated skills	2,500	5,000
(c) Certifying a person without determining that		
(1) person has completed training program	2,500	5,000
(2) person meets the eligibility criteria	2,500	5,000
(3) time has elapsed	2,500	5,000
240.205—Procedures for determining eligibility based on prior safety conduct		
(a) Selecting person lacking eligibility	5,000	7,500
(d) Failure to have basis for taking action	2,500	5,000
240.207—Ineligibility based on medical condition		
(a) Selecting person lacking proper acuity	2,000	4,000
(b) Failure to have basis for finding of proper acuity	1,000	2,000
(c) Acuity examinations performed by unauthorized person	1,000	2,000
(d) Failure to note need for device to achieve acuity	1,000	2,000
(e) Failure to use device needed for proper acuity	1,000	2,000
240.209—Demonstrating knowledge		
(b) Failure to properly determine knowledge	2,500	5,000
(c) Improper test procedure	2,000	4,000
(d) Failure to document test results	1,000	2,000
(e) Allowing person to operate despite test failure	2,500	5,000
240.211—Demonstrating skills		
(b) Failure to properly determine knowledge	2,500	5,000
(c) Improper test procedure	2,000	4,000
(d) Failure to document test results	1,000	2,000
(e) Allowing person to operate despite test failure	2,500	5,000
240.213—Completion of approved training program		
(a) Failure to properly determine	2,500	5,000
(b) Failure to document successful program completion	2,000	4,000
240.215—Supporting information		
(a, f–h) Failure to have a record	1,000	2,000
(b) Failure to have complete record	500	1,000
(i) Falsification of record	(–)	10,000
240.217—Time limits for making determinations		
(a, c) Exceeding time limit	2,000	4,000
240.219—Denial of certification		
(a) Failure to notify or provide opportunity for comment	2,000	4,000
(c) Failure to notify, provide data, or untimely notification	2,000	4,000
240.221—Identification of persons		
(a–b) Failure to have record	2,000	4,000
(c) Failure to update record	2,000	4,000
(b) Failure to issue certificate	1,000	2,000
(e–f) Failure to make record available	1,000	2,000
240.223—Certificate criteria		
(a) Improper certificate	500	1,000
(b) Failure to designate those with signatory authority	500	1,000
(d) Falsification of certificate	(–)	10,000
240.225—Railroad Relying on Determination of Another		
(a) Reliance on expired certification	2,500	5,000
(b) Reliance on wrong class of service	2,500	5,000
(c) Failure to familiarize person with new operational territory	2,000	4,000
(d) Failure to determine knowledge	2,000	4,000
240.227—Railroad Relying on Requirements of a Different Country		
(a) Joint operator reliance		
(1) on person not employed	1,000	2,000
(2) on person who fails to meet Canadian requirements	1,000	2,000
(b) Canadian railroad reliance		
(1) on person not employed	1,000	2,000
(2) on person who fails to meet Canadian requirements	1,000	2,000
240.229—Railroad Controlling Joint Operation Territory		
(a) Allowing uncertified person to operate	2,000	4,000
(b) Certifying without making determinations or relying on another railroad	2,500	5,000
(c) Certifying without determining:		
(1) certification status	2,500	5,000
(2) knowledge	2,500	5,000
(3) skills	2,500	5,000
(4) familiarity with physical characteristics	2,000	4,000
(d) Failure to provide qualified person	2,000	4,000
Subpart D—Program Administration		
240.301—Failure to have system for certificate replacement	2,000	4,000
240.303—Monitoring operations		
(a) Failure to have program	5,000	10,000
(b) Failure to observe each person annually	1,000	2,000
(c) Failure to test each person annually	1,000	2,000
(d) Failure to test properly	1,000	2,000
240.305—Certified engineer conduct		
(a) Failure of engineer to		
(1) properly control speed	2,500	5,000
(2) stop at signal	2,500	5,000

Section	Violation	Willful violation
(3) obey rules for track occupancy authority	2,500	5,000
(b) Failure of engineer to		
(1) carry certificate	1,000	2,000
(2) display certificate when requested	1,000	2,000
(c–d) Failure of engineer to notify railroad of limitations, revocation or denial	4,000	8,000
240.309—Revocation of certification		
(a) Failure to withdraw person from service	2,500	5,000
(b) Failure to notify, provide hearing opportunity; or untimely procedures	2,000	4,000
240.307—Oversight responsibility report		
(a) Failure to report or to report on time	500	1,000
(b–f) Incomplete or inaccurate report	2,000	4,000

[1] A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to $20,000 for any violation where circumstances warrant. See 49 CFR part 209, appendix A.

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

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

Submission by a Railroad

As provided for in § 240.101, each railroad must have a program for determining the qualifications of each person it permits or requires to operate a locomotive. In designing its program a railroad must take into account the trackage and terrain over which it operates, the system(s) for train control that are employed, the operational design characteristics of the track and equipment being operated including train length, train makeup, and train speeds. Each railroad must submit its individual program to FRA for approval as provided for in § 240.103. Each program must be accompanied by a request for approval organized in accordance with this appendix. Requests for approval must contain appropriate references to the relevant portion of the program being discussed. Requests should be submitted in writing on standard sized paper (8-1/2 x 11) and can be in letter or narrative format. The railroad's submission shall be sent to the Associate Administrator for Safety, FRA. The mailing address for FRA is 400 Seventh Street, SW., Washington, DC 20590.

Organization of the Submission

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

Section 1 of the Submission: General Information and Elections

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

If a railroad elects not to conduct the training of persons not previously trained to be a locomotive engineer, the railroad is not obligated to submit information on how the previously untrained will be trained. A railroad that makes this election will be limited to recertifying persons initially certified by another railroad. A railroad that initially elects not to accept responsibility for training its own locomotive engineers can rescind its initial election by obtaining FRA approval of a modification of its program (see § 240.103(e)).

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

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

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

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

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

Section 3 of the Submission: Training Persons Previously Certified

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

Section 240.123(b) provides a railroad latitude to select the specific subject matter to be covered, duration of the training, method of presenting the information, and the frequency with which the training will be provided. The railroad must describe in this section how it will use that latitude to assure that its engineers remain knowledgeable concerning the safe discharge of their train operation responsibilities so as to comply with the performance standard set forth in § 240.123(b). This section must contain sufficient detail to permit effective evaluation of the railroad's training program in terms of the subject matter covered, the frequency and duration of the training sessions, the training environment employed (for example, and use of classroom, use of computer based training, use of simulators, use of film or slide presentations, use of on-job-training) and which aspects of the program are voluntary or mandatory.

Safe train handling involves both abstract knowledge about the appropriate use of engine controls and the application of that knowledge to trains of differing composition traversing varying terrain. Time and circumstances have the capacity to diminish both abstract knowledge and the proper application of that knowledge to discrete events. Time and circumstances also have the capacity to alter the value of previously obtained knowledge and the application of that knowledge. In formulating how it will use the discretion being afforded, each railroad must design its program to address both loss of retention of knowledge and changed circumstances, and this section of the submission to FRA must address these matters.

For example, locomotive engineers need to have their fundamental knowledge of train operations refreshed periodically. Each railroad needs to advise FRA how that need is satisfied in terms of the interval between attendance at such training, the nature of the training being provided, and methods for conducting the training. A matter of particular concern to FRA is how each railroad acts to assure that engineers remain knowledgeable about safe train handling procedures if the territory over which a locomotive engineer is authorized to operate is territory from which the engineer has been absent. The railroad must have a plan for the familiarization training that addresses the question of how long a person can be absent before needing more education and, once that threshold is reached, how the person will acquire the needed education. Similarly, the program must address how the railroad responds to changes such as the introduction of new technology, new operating rule books, or significant changes in operations including alteration in the territory engineers are authorized to operate over.

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

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

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

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

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

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

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

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

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

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

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

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

Section 240.129 requires that a railroad annually observe each locomotive engineer demonstrating his or her knowledge of the railroad's rules and practices and skill at applying those rules and practices for the safe operation of a locomotive or train. Section 240.129 directs that the observation be conducted by a designated supervisor of locomotive engineers but provides a railroad latitude in selecting the design of its own observation procedures (including the duration of the observation process, reliance on tapes that record the specifics of train operation, and the specific aspects of the engineer's performance to be covered). The section also gives a railroad the latitude to employ either a Type 1 or a Type 2 simulator (properly programmed) to conduct monitoring observations. A railroad must describe in this section how it will use that latitude to assure that the railroad is monitoring that its engineers demonstrate their skills concerning the safe discharge of their train operation responsibilities. A railroad that intends to employ train operation event recorder tapes to comply with this monitoring requirement shall indicate in this section how it anticipates determining what person was at the controls and what signal indications or other operational constraints, if any, were applicable to the train's movement.

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

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

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

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

FRA Review

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

FRA initially proposed specifying the details for most aspects of the programs being submitted under this appendix. The proposed rule contained a distillation of the essential elements of pre-existing training, testing, evaluating, and monitoring programs that appear to result in railroads having locomotive engineers who operate locomotives and trains safely. The proposal contained very specific details for each aspect of the program that appeared to contribute to that result. Those details included such things as the duration of classes intended to teach operating rules as well as the interval and methodology for acquiring familiarization with physical characteristics of an engineer's operational territory. Railroads commenting on the proposed rule did not question the validity of the FRA's views concerning the essential elements of an effective program but did convince FRA that they should be given more discretion to formulate the design of their individual programs.

Rather than establish rigid requirements for each element of the program as initially proposed, FRA has given railroads discretion to select the design of their individual programs within a specified context for each element. The proposed rule, however, provides a good guide to the considerations that should be addressed in designing a program that will meet the performance standards of this final rule. In reviewing program submissions, FRA will focus on the degree to which a particular program deviates from the norms identified in its proposed rule. To the degree that a particular program submission materially deviates from the norms set out in its proposed rule which was published in the **Federal Register** on December 11, 1989 (54 FR 50890), FRA's review and approval process will be focused on determining the validity of the reasoning relied on by a railroad for selecting its alternative approach and the degree to which the alternative approach is likely to be effective in producing locomotive engineers who have the knowledge, skill, and ability to safely operate trains.

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

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

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

Access to State Motor Vehicle Driving Record Data

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

The National Driver Register

In addition to seeking an individual state's data, each engineer candidate is required to request that a search and retrieval be performed of any relevant information concerning his or her driving record contained in the National Driver Register. 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 change to the statute, states are also authorized to notify NHTSA concerning convictions for operation of a motor vehicle while under the influence of, or impaired by, alcohol or a controlled substance, and for 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, 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 engineer request that an NDR search be performed and direct that the results be furnished to the railroad. FRA requires that each person request the NDR information directly from NHTSA unless the prospective operator has a motor vehicle driver license issued by a state motor vehicle licensing agency that is "participating" under the provisions of the National Driver Register Act of 1982. Participating states can directly access the NDR data on behalf of the prospective engineer. The state agencies that currently are authorized to access NDR data in that manner are identified in appendix D 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) Driver's license number (unless that is not available).

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

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

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

FRA requires that the request be in writing and contain as much detail as is available to improve the reliability of the data search. Any person may supply additional information to that being mandated by FRA. Furnishing additional information, such as the person's Social Security account number, will help to 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 D to this regulation to identify such state agencies. Since it would be more efficient for a prospective locomotive engineer to make a single request for both aspects of the information required under this rule, FRA anticipates that 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 or convicted the person of one of the violations referenced earlier in this appendix.

Actions When a Probable NDR Match Occurs

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

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

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

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

Under the provisions of § 240.111 of this part, each person seeking certification or recertification as a locomotive operator must request that a check of the National Driver Register (NDR) be conducted and that the resulting information be furnished to his or her employer or prospective employer. Under the provisions of paragraphs (d) and (e) of § 240.111, each person seeking certification or recertification as a locomotive engineer must request that 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 certification 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 National Driver Register Act of 1982, 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 certification 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 December 31, 1989, the motor vehicle licensing agencies of the following states participate under the provisions of the 1982 changes to the NDR Act: North Dakota, Ohio, Virginia, and Washington.

Appendix E to Part 240—Recommended Procedures for Conducting Skill Performance Tests

FRA requires (see § 240.127 and § 240.211) that locomotive engineers be given a skill performance test prior to certification or recertification and establishes certain criteria for the conduct of that test. Railroads are given discretion concerning the manner in which to administer the required testing. FRA has afforded railroads this discretion to allow individual railroad companies latitude to tailor their testing procedures to the specific operational realities. This appendix contains FRA's recommendations for the administration of skill performance testing that occurs during operation of an actual train. It can be modified to serve in instances where a locomotive simulator is employed for testing purposes. These recommended practices, if followed, will ensure a more thorough and systematic assessment of locomotive engineer performance.

The Need for a Systematic Approach

There are numerous criteria that should be monitored when a designated supervisor of locomotive engineers is observing a person to determine whether that individual should be certified or recertified as a qualified locomotive engineer. 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, the attention of a designated supervisor of locomotive engineers should concentrate on several general areas during any appraisal. Compliance with the railroad's operating rules, including its safety directives and train handling rules, and compliance with Federal regulations should be carefully monitored. But, in order to effectively evaluate employees, it is necessary to have something against which to compare their performance. In order to hold a locomotive engineer accountable for compliance, a railroad must have adequate operating, safety and train handling rules. Any railroad that fails to have adequate operating, safety, or train handling rules will experience difficulty in establishing a objective method of measuring an individual's skill level. Any railroad that requires the evaluation of an individual's performance relative to its train handling rules needs to 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 designated supervisor of locomotive engineers to use in measuring the performance of locomotive engineers. It also is essential to have a definite standard so that the engineer and any reviewing body can know what the certification candidate 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 for a designated supervisor of locomotive engineers to observe any operator for a reasonable period of time and not have some opportunity to review that engineer's compliance with some basic safety rules, compliance with basic operating rules, and 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 therefore recommends that designated supervisors of locomotive engineers employ a written aid to help record events and procedures that as a minimum should be observed for when conducting a skills performance test. FRA is providing the following information to assist railroads in developing such a written aid so as to ensure meaningful testing. When conducting a skills performance test, a designated supervisor of locomotive engineers should be alert to the following:

—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?
—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?

Obviously, the less sophisticated the railroad's operations are, the fewer the number of identified practices that would be relevant. Hence, this list should modified accordingly.

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 the locomotive engineer's initial qualification testing or periodic retesting. There will always be some potential for the subjective views, held by the designated supervisor of locomotive engineers conducting the testing, to enter into evaluations concerning the competency of a particular individual to handle the position of locomotive engineer. 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 designated supervisor of locomotive engineers is to place emphasis on. The use of an observation form will reduce but not eliminate subjectivity. Any skill performance test 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 engineer's judgment, to apply or not apply a braking system at a given location, is subject to the opinion of the designated supervisor of locomotive engineers.

A railroad should attempt to reduce or eliminate such subjectivity through use of some type of observation or evaluation. 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 a 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 allows railroads to select a duration appropriate for their individual circumstances, requiring only that the period be "of sufficient length to effectively evaluate the person." In exercising its discretion FRA suggests 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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Gilbert E. Carmichael,
Administrator.

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