

NOTICE OF PROPOSED RULEMAKING CERTIFICATION OF CONDUCTORS

**THIS IS A SUMMARY OF THE PROPOSED RULE:
(There are references to Part 240 of FRA's regulations, which relates
to the engineer certification regulation).**

Subpart A - General

§ 242.1 Purpose and scope.

[cf. 240.1]

This part prescribes minimum Federal safety standards for the eligibility, training, testing, certification and monitoring of all conductors to whom it applies. This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements consistent with this part.

§ 242.3 Application and responsibility for compliance.

[cf. 240.3]

This part applies to all railroads, including their contractors, except:

A railroad that operates only on track inside an installation that is not part of the general railroad system of transportation; or (2) Rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

§ 242.5 effect and construction.

[cf. 240.5]

Except as prohibited under § 242.213 nothing in this part shall be (a) construed to create or prohibit an eligibility or entitlement to employment in other service for the railroad as a result of denial, suspension, or revocation of certification under this part; (b) deemed to abridge any additional procedural rights or remedies not inconsistent with this part that are available to the employee under a collective bargaining agreement, the Railway Labor Act, or (with respect to employment at will) at common law with respect to removal from service or other adverse action taken as a consequence of this part.

§ 242.7 Definitions.

[cf. 240.7]

Some of the definitions include:

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

Job aid means information regarding other than main track physical characteristics that supplements the operating instructions of the territory over which the locomotive or train movement will occur. See definitions of “main track” and “physical characteristics” in this section. A job aid may consist of training on the territory pursuant to 49 CFR 242.119, maps, charts or visual aids of the territory, or a person or persons to contact who are qualified on the territory and who can describe the physical characteristics of the territory. At a minimum, a job aid must cover characteristics of a territory including: permanent close clearances, location of permanent derails and switches, assigned radio frequencies in use and special instructions required for movement, if any, and railroad-identified unique operating conditions.

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 provided for in 49 CFR 218.5 and 218.29(a)(1); or
- (2) A person who moves a locomotive or group of locomotives for distances of less than 100 feet and this incidental movement of a locomotive or locomotives is for inspection or maintenance purposes.

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

On-the-job training means job training that occurs in the work place (*i.e.*, the employee learns the job while doing the job). In the context of this part, the on-the-job training portion of the program must be based on a model generally accepted by the educational community, and must consist of the following three key components:

- (1) A brief statement describing the tasks and related steps the employee must be able to perform;
- (2) A statement of the conditions (*ie.*, tools, equipment, documentation, briefings, demonstrations, and practice) necessary for learning transfer; and
- (3) A statement of the standards by which proficiency can be measured through a combination of task/step accuracy, completeness, and repetition.

Passenger conductor means a conductor who has also received emergency preparedness training under part 239 of this chapter

Physical characteristics means the actual track profile of and physical location for points within a specific yard or route that affect the movement of a locomotive or train. Physical characteristics includes both main track physical characteristics and other than main track physical characteristics.

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

- (1) Is a certified conductor under this part; and
- (2) Has been selected as such by a designated railroad officer, in concurrence with the designated employee representative, where present; or
- (3) In absence of concurrence provided in paragraph (2) of this definition, has a minimum of 12 months service working as a train service employee.

If a railroad does not have designated employee representation, then a person employed by the railroad need not comply with items (2) or (3) of this definition to be a qualified instructor.

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

§ 242.9 Waivers.
[cf. 240.9]

A person subject to a requirement of this part may petition the Administrator for a waiver of compliance with such requirement in accordance with 49 C.F.R. §211.

§ 242.11 Penalties and consequences for noncompliance.
[cf. 240.11]

(a) A person who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least \$650 and not more than \$25,000 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 \$100,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense.

In addition, a person 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.

A person who knowingly and willfully falsifies a record or report required by this part may be subject to criminal penalties under 49 U.S.C. 21311.

§ 242.13 Information collection requirements.

[cf. 240.13]

The information collection requirements of this Part were reviewed by the Office of Management and Budget.

Subpart B – Program and Eligibility Requirements

§ 242.101 Certification program required.

[cf. 240.101]

Upon the effective date, each railroad in operation shall have in effect a written program for certifying conductors. A railroad commencing operations after the effective date shall have such a program in effect prior to commencing operations.

Each railroad shall have a certification program approved in accordance with § 242.103 that includes: (1) A designation of the types of service that it determines will be used in compliance with the criteria established in § 242.107; (2) A procedure for evaluating prior safety conduct that complies with the criteria established in § 242.109; (3) A procedure for evaluating visual and hearing acuity that complies with the criteria established in § 242.117; (4) A procedure for training that complies with the criteria established in § 242.119; (5) A procedure for knowledge testing that complies with the criteria established in § 242.121; and (6) A procedure for monitoring operational performance that complies with the criteria established in § 242.123.

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

[cf. 240.103 & 238.505]

Each railroad shall submit its written certification program and request for approval in accordance with the procedures contained in appendix B to this part. Class I and Class II railroads shall submit a program and request for approval by March 30, 2012; and Class III railroads (including switching and terminal railroads) by July 30, 2012. A railroad commencing operations after these dates shall submit its program and request at least 60 days prior to commencing operations.

Each railroad shall:

Simultaneous with its filing with the FRA, serve a copy of any submission, resubmission, or a material modification filed on the president of each labor organization that represents the railroad's employees subject to this part; and

Not later than 45 days from the date of such filing a submission, any designated representative of railroad employees subject to this part may comment on the submission, resubmission, or material modification:

§ 242.105 Schedule for implementation.

[cf. 240.201]

This section contains the timetable for implementation of the rule.

By March 1, 2012, each railroad shall:

In writing, designate as certified conductors all persons authorized by the railroad to perform the duties of a conductor as of January 1, 2012; and (2) Issue a certificate that complies with § 242.207 to each person that it designates.

No railroad shall permit or require a person, designated as a certified conductor to perform service as a certified conductor for more than a 36-month period. At the end of the 36 month period, he/she must pass the tests and evaluations requested by the rule to remain qualified. A certified conductor who is eligible to receive a retirement pension in accordance with the terms of an applicable agreement or in accordance with the terms of the Railroad Retirement Act within 36 months from the pertinent date for compliance with the procedures for testing and evaluation may request, in writing, that a railroad not recertify that person, until 36 months from the pertinent date for compliance with the mandatory procedures for testing and evaluation

Upon receipt of a written request, a railroad may wait to recertify the person making the request until the end of the 36-month period. If a railroad grants any request, it must grant the request of all eligible persons to every extent possible.

A person who is subject to recertification under 49 CFR part 240 may not make a request pursuant to this section.

§ 242.107 Types of service.

[cf. 240.107]

A railroad may issue certificates for either of the following types of service:

(1) Conductor; and (2) Passenger conductor.

A railroad shall not reclassify the certification of any type of certified conductor to a different type of conductor certification during the period in which the certification is otherwise valid except when a conductor completes 49 CFR part 239 emergency training and is certified as a passenger conductor.

Each railroad is authorized to impose additional conditions or operational restrictions on the service a conductor may perform beyond those identified in this section, provided those conditions or restrictions are not inconsistent with this part.

§ 242.109 Determinations required for certification and recertification.

[cf. 240.109, 240.203 and 240.205]

Each railroad, prior to initially certifying or recertifying any person as a conductor, shall determine in writing that:

(1) The individual meets the eligibility requirements of 242.111, 242.113, 242.115 and 242.403; and (2) The individual meets the vision and hearing acuity standards of § 242.117;(3) The individual has the necessary knowledge, as demonstrated by successfully completing a test that meets the requirements of § 242.121; and (4) Where a person has not previously been certified, that the person has completed a training program that meets the requirements of § 242.119.

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 motor vehicle driving record.

§ 242.111. Prior safety conduct as motor vehicle operator.
[cf.240.111 and 240.115]

No certified or recertified conductor can operate as a conductor if he does not obtain and evaluate the information required within 60 days of the dates required in this section.

If the conductor requests the information required of this section but is unable to obtain it, that person or the railroad certifying or recertifying that person may apply for a waiver under part 211 from the Railroad Safety Board. A railroad shall certify or recertify a person during the pendency of the waiver request if the person otherwise meets the eligibility requirements provided in § 242.109.

Individual's duty. Except for persons designated as conductors under paragraph (a) or (b) of § 242.105 or for persons covered by § 242.109(f), each person seeking certification or recertification under this part shall, within 366 days preceding the date of the railroad's decision on certification or recertification:

(a) make information concerning his or her driving record available to the railroad; and (b) take any additional actions, including providing any necessary consent required by State, Federal, or foreign law to make his or her driving record available; and request that the chief of each driver licensing agency provide a copy of that agency's available information concerning his or her driving record to the railroad; and shall report motor vehicle incidents to the employing railroad within 48 hours of being convicted for, or completed state action to cancel, revoke, suspend, or deny a motor vehicle drivers license for, such violations.

Evaluation of record. When evaluating a person's motor vehicle driving record, a railroad shall not consider information concerning motor vehicle driving incidents that occurred:

(1) Prior to the effective date of this rule;(2) More than 36 months before the month in which the railroad is making its certification decision; or (3) At a time other than that

specifically provided for in § 242.111, § 242.115, or § 242.403 of this part.

The railroad shall provide the data to the railroad's SAP, 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;

If the person is evaluated as currently affected by an active substance abuse disorder, the provisions of § 242.115(d) will apply.

§ 242.113 Prior safety conduct as an employee of a different railroad.

[cf. 240.113 and 240.205]

Except for persons designated as conductors under paragraphs (a) or (b) of § 242.105, or for persons covered by § 242.109(f), each person seeking certification or recertification shall, within 366 days preceding the date of the railroad's decision on certification or recertification:

Request that the former employing railroad provide a copy of that railroad's available information concerning his or her service record pertaining to compliance or non-compliance with §§ 242.111, 242.115 and 242.403 to the other railroad that is considering such certification or recertification; and provide any consent that may be required.

§ 242.115 Substance abuse disorders and alcohol drug rules compliance.

[cf. 240.119 and 240.205]

The regulation adopts similar alcohol and drug requirements that apply to the hours of service employees and under the engineer certification regulations.

In determining whether a person may be or remain certified as a conductor, a railroad shall consider conduct that occurred within a period of 60 consecutive months prior to the review.

§ 242.117 Vision and hearing acuity.

[cf. 240.121 and 240.207]

The standards for visual acuity and hearing acuity are similar to the requirements under the engineer certification regulations.

§ 242.119 Training.

[cf. 240.123 and 240.213]

This section requires that each railroad shall determine that the person has the knowledge to safely perform as a conductor in each type of service that the person will be permitted to perform.

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

(1) The person completed a training program;(2) The person demonstrated his or her knowledge by achieving a passing grade under the testing and evaluation procedures of that training program; and(3) The person demonstrated that he or she is qualified on the physical characteristics of the railroad, or its pertinent segments, over which that person will perform service.

A railroad shall designate in its program (a) the time period in which a conductor must be absent from a territory or yard, before requalification on physical characteristics is required;(b)the procedures used to qualify or requalify a person on the physical characteristics;(c)no later than 365 days after the effective date perform initial instructional briefings to ensure that each of its conductors have knowledge of the Federal railroad safety laws that relate to the safety-related tasks the employees are assigned to perform; and (d) shall determine that the person has demonstrated sufficient knowledge of the railroad's rules and practices for the safe movement of trains.

§ 242.121 Knowledge testing

This section would require railroads to provide for the initial and periodic testing of conductors. That testing would have to effectively examine and measure a conductor's knowledge of 5 subject areas: Safety and operating rules; timetable instructions; compliance with all applicable Federal regulations; the physical characteristics of the territory on which a person will be or is currently serving as a conductor; and the use of any job aid that a railroad may provide a conductor.

Railroads would have discretion to design the tests that will be employed. However, they must be submitted to FRA for approval, and such discretion will be monitored by FRA.

Also, at all testing the railroads are required to provide the person(s) being tested with an opportunity to consult with a supervisory employee, who possesses territorial qualifications for the territory, to explain a question.

§ 242.123 Monitoring operational performance.

[cf. 240.129 and 240.303]

Each railroad shall monitor the conduct of its certified conductors by performing unannounced operating rules compliance tests.

§ 242.125 Certification determinations made by other railroads.

[cf. 240.225]

A railroad may rely on determinations made by another railroad concerning that person's certification.

A hiring railroad may shorten the training of a previously uncertified conductor who has extensive operating experience or who had his/her certification expire.

§ 242.127 Reliance on qualification requirements of other countries.

[cf. 240.227]

A Canadian railroad that is required to comply with this regulation or a railroad that conducts joint operations with a Canadian railroad may certify that a person is eligible to be a conductor.

Subpart C – Administration of the Certification Program

§ 242.201 Time limitations for certification.

[cf. 240.217]

(a) After the pertinent date in paragraph (d) or (e) of § 242.105, a railroad shall not certify or recertify a person as a conductor in any type of service, if the railroad is making:

(1) A determination concerning eligibility under §§242.111, 242.113, 242.115 and 242.403 of this part and the eligibility data being relied on was furnished more than 366 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 450 days before the date of the railroad's certification decision; or

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

(4) A determination concerning demonstrated knowledge and the knowledge examination being relied on was conducted more than 24 months before the date of the railroad's recertification decision if the railroad administers a knowledge testing program pursuant to § 242.121 of this chapter at intervals that do not exceed 24 months.

(b) The time limitations of paragraph (a) of this section do not apply to a railroad that is making a certification decision in reliance on determinations made by another railroad in accordance with paragraph (c)(3) of this section, § 242.125, or § 242.127.

(c) No railroad shall:

(1) Permit or require a person, designated under paragraph (a) or (b) of § 242.105, to perform service as a certified conductor for more than the 36-month period unless that person has been determined to be eligible in accordance with procedures that comply with subpart B;(2) Certify a person as a conductor for an interval of more than 36 months; or (3) Rely on a certification issued by another railroad that is more than 36 months old.

(d) Except as provided for in § 242.105(concerning initial implementation of the program),

a railroad shall issue each person a certificate no later than 30 days from the date of its decision to certify or recertify that person.

§ 242.203 Retaining information supporting determinations.

[cf. 240.215]

(a) A railroad that issues, denies, or revokes a certificate shall maintain detailed records six years for each certified conductor or applicant for certification.

§ 242.205 Identification Of certified persons and record keeping.

[cf. 240.221]

After March 1, 2012, a railroad shall maintain a list identifying each person designated as a certified conductor, including conductors working in joint operations territory.

§ 242.207 Certificate components.

[cf. 240.223]

This section sets forth the information required to be contained on a certificate.

§ 242.209 Maintenance of the certificate.

[cf. 240.305]

Each conductor shall have the certificate in his or her possession while on duty as a conductor and display it upon request .

§ 242.211 Replacement of certificates.

[cf. 240.301]

(a) A railroad shall have a system for the prompt replacement of lost, stolen or mutilated certificates at no cost to conductors. A temporary certificate will be valid for up to 30 days.

§ 242.213 Multiple certifications.

(a) A person may hold certification for multiple types of conductor service, including holding both conductor and locomotive engineer certification.

Except as provided in paragraph (e) of this section, a locomotive engineer, including a remote control operator, who is operating a locomotive without an assigned certified conductor must either be (i) certified as both a locomotive engineer under 49 CFR part 240 and as a conductor under this part or (ii) accompanied by a person certified as a conductor under this part but who will be attached to the crew in a manner similar to that of an independent assignment.

(e) Passenger railroad operations only. If the conductor is removed from a train for a medical, police or other such emergency after the train departs from an initial terminal, the

train may proceed to the first location where the conductor can be replaced without incurring undue delay without the locomotive engineer being a certified conductor. However, an assistant conductor or brakeman must be on the train and the locomotive engineer must be informed that there is no certified conductor on the train, prior to any movement.

(f) A person who holds a current conductor and/or locomotive engineer certificate from more than one railroad shall immediately notify the other certifying railroad(s) if his or her conductor or locomotive engineer recertification has been denied or revoked.

(g) A person who is certified to perform multiple types of conductor service and who has had any of those certifications revoked may not perform any type of conductor service during the period of revocation.

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

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

A person who holds a current conductor and locomotive engineer certificate and who has had his or her locomotive engineer certification revoked under part 240(i.e., engineer certification) may not work as a conductor during the period of revocation.

A person who has had his or her locomotive engineer certification revoked under §242.403(e)(1) through (e)(12) may not obtain a conductor certificate during the period of revocation.

A person who had his or her conductor certification revoked may not obtain a locomotive engineer certificate pursuant to part 240 of this chapter during the period of revocation.

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

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

In lieu of issuing multiple certificates, a railroad may issue one certificate to a person who is certified to perform multiple types of conductor service or is certified as a conductor and a locomotive engineer.

§ 242.215 Railroad oversight responsibilities.
[cf. 240.3 09]

No later than March 31. of each year (beginning in calendar year _____), 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 conductors during the prior calendar year.

Subpart D – Territorial Qualification and Joint Operations

§ 242.301 Requirements for territorial qualification.
{cf. 240.2291

(a) A railroad, including a railroad that employs conductors working in joint operations territory, shall not permit or require a person to serve as a conductor unless that railroad determines that the person is certified as a conductor and possesses the necessary territorial qualifications for the applicable territory.

(b) Each conductor must meet the territorial qualifications on th segment of track wupon which he/she will operate.

(c) If a conductor lacks territorial qualification on main track physical characteristics, he or she shall be assisted by a person who is a certified conductor or certified locomotive engineer and meets the territorial qualification requirements for the main track physical characteristics.

(d) If a conductor lacks territorial qualification on other than main track physical characteristics, where practicable, he or she shall be assisted by a person who is a certified conductor and meets the territorial qualification requirements for other than main track physical characteristics. Where not practicable, the conductor should be provided an appropriate up-to-date job aid.

Subpart E – Denial and Revocation of Certification

§ 242.401 Denial of certification.
[cf. 240.219]

A railroad shall notify a candidate for certification or recertification 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.

The document explaining the basis for the denial shall be served on the person within 10 days after the railroad's decision and shall give the date of the decision.

A railroad shall not determine that a person failed to meet the eligibility requirements of this part and shall not deny the person's certification if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the conductor's ability to comply with the railroad operating rule or practice which constitutes a violation

§ 242.403 Criteria for revoking certification.

[cf.240.117and240.305]

A certified conductor who has demonstrated a failure to comply with railroad rules and practices shall have his or her certification revoked.

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

Limitations on consideration of prior operating rule compliance data. In determining whether a person may be or remain certified as a conductor, a railroad shall consider as operating rule compliance data only conduct in (e)(1) through (e)(11) of this section that occurred within a period of 36 consecutive months prior to the determination.

A railroad shall only consider violations of its operating rules and practices that involve:

(1) Failure to take appropriate action to prevent the locomotive engineer of the train the conductor is assigned to from failing to control a locomotive or train in accordance with a signal indication, excluding a hand or a radio signal indication or a switch, that requires a complete stop before passing it, when the conductor is located in the operating cab, or otherwise has knowledge of the signal indication. Appropriate action does not mean that a conductor must prevent a violation from occurring at all costs; the duty may be met by warning an engineer of a potential or foreseeable violation.

(2) Failure to take appropriate action to prevent the locomotive engineer of the train the conductor is assigned to from failing to adhere to limitations concerning train speed:

(i) When the conductor is located in the operating cab and the speed at which the train was operated exceeds the maximum authorized limit by at least 10 miles per hour. Where restricted speed is in effect, railroads shall consider only those violations of the conditional clause of restricted speed rules (i.e., that requires stopping within one half of the locomotive engineer's range of vision), or which cause reportable accidents or incidents under part 225, except for accidents and incidents that are classified as "covered data" under § 225.5.

Appropriate action does not mean that a conductor must prevent a violation from occurring at all costs; the duty may be met by warning an engineer of a potential or foreseeable violation.

(ii) When not in the operating cab, the conductor is deemed to have taken appropriate action when in compliance with all applicable Railroad Operating Rules and Special Instructions.

- (3) Failure to perform or have knowledge that a required brake test was performed.
 - (4) Occupying main track or a segment of main track without proper authority or permission .
 - (5) Failure to comply with prohibitions against tampering with locomotive mounted safety devices; or to prevent the locomotive engineer from failing to comply with prohibitions against tampering .
 - (6) Failure to comply with the flagging requirement, rolling equipment in the clear, switches rules, hand operated fixed derails set forth in §218.99, and the alcohol and drug regulations which cause reportable accidents or incidents.
 - (7) Failure to comply with § 218.101(leaving rolling and on-track maintenance-of-way equipment in the clear) which cause a reportable accident or incident; however such incidents shall be considered as a violation only for the purposes of paragraphs (a)(2) and (3) of § 242.405.
 - (8) Failure to comply with §218.103(hand operated switches, including crossover switches) if the failure causes a reportable accident or incident.
 - (9) Failure to comply with §218.105(additional operational requirements for hand-operated main track switches) if the failure causes a reportable accident or incident.
 - (10) Failure to comply with §218.107(Additional operational requirements for hand-operated crossover switches) if the failure causes a reportable accident or incident.
 - (11) Failure to comply with §218,109(Hand operated fixed derails) if the failure causes an accident or incident.
 - (12) Failure to comply with §219.101(alcohol and drugs), but such incidents shall be considered a violation only for purposes of §242.405(a)(2) and (3).
 - (13) A railroad shall not be permitted to deny or revoke an employee's certification based upon additional conditions or operational restrictions imposed pursuant to § 242.107(d). Therefore, a railroad could not revoke a certificate for a more stringent rule or practice as required in this rule.
- (f)(1) If in any single incident that violates more than one operating rule or practice it shall be treated as a single violation.
 - (2) A violation of one or more operating rules or that occurs during an operational compliance test shall be counted in determining the periods of ineligibility.

§ 242.405 Periods of ineligibility.

[cf. 240.11 7(g)-a)]

(a) A period of ineligibility 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) On other than main track where restricted speed or the operational equivalent thereof is in effect, the periods of revocation for violation of §§242.403(e)(6) through (e)(8), (e)(10) or (e)(11) shall be reduced by one half provided that another revocable event has not occurred within the previous 12 months.

(ii) In the case of a single incident involving violation of one or more of the operating rules or practices described in § 242.403 (e)(1) through (e)(11), the person shall have his or her certificate revoked for a period of 30 calendar days.

(iii) In the case of two separate incidents involving a violation of one or more of the operating rules or practices described in paragraphs (e)(1) through (e)(11) of §242.403, that occurred within 24 months of each other, the person shall have his or her certificate revoked for a period of six months.

(iv) In the case of three separate incidents involving violations of one or more of the operating rules or practices, described in paragraphs (e)(1) through (e)(12) of §242.403, that occurred within 36 months of each other, the person shall have his or her certificate revoked for a period of one year.

(v) In the case of four separate incidents involving violations of one or more of the operating rules or practices, described in paragraphs (e)(1) through (e)(12) of § 242.403, that occurred within 36 months of each other, the person shall have his or her certificate revoked for a period of three years.

(vi) Where, based on the occurrence of violations described in paragraph (e)(12) of § 242.403, different periods of ineligibility may result under the provisions of this section and § 242.115, the longest period of revocation shall control.

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

(c) Reduction in period of ineligibility. A person whose certification is denied or revoked shall be eligible for grant or reinstatement of the certificate prior to the expiration of the initial period of revocation only if:

(1) The denial or revocation of certification in accordance with the provisions of paragraph (a)(3) of this section is for a period of one year or less;

(2) Certification is denied or revoked for reasons other than noncompliance with the alcohol and drug regulations.

(3) The person is evaluated by a railroad officer and determined to have received adequate remedial training;

(4) The person successfully completes any mandatory program of training or retraining, if that is determined to be necessary by the railroad prior to return to service; and

(5) At least one half the pertinent period of ineligibility specified in paragraph (a)(3) of this section has elapsed.

§ 242.407 Process for revoking certification.

[cf. 240.307]

(a) Except as provided for in § 242.115(g)(relating to voluntary referral for substance abuse), a railroad that certifies or recertifies a person as a conductor and, during the period that certification is valid, acquires reliable information regarding violation(s) of § 242.403(e) or § 242.115(e)(relating to alcohol or drug violations within 60 months prior to a review) shall revoke the person's conductor certificate.

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

(1) Upon receipt of reliable information regarding violation(s) of § 242.403(e) or § 242.115(e) of this chapter, immediately suspend the person's certificate;

(2) Prior to or upon suspending the person's certificate, provide notice of the reason for the suspension, the pending revocation, and an opportunity for a hearing before a presiding officer other than the investigating officer. Written confirmation which conforms to the notification provisions of an applicable collective bargaining agreement shall be deemed to satisfy the written confirmation requirements of this section. In the absence of an applicable collective bargaining agreement provision, the written confirmation must be made within 96 hours.

(3) Convene the hearing within the deadline prescribed by either paragraph (c)(1) of this section or the applicable collective bargaining agreement as permitted under paragraph (d) of this section;

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

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

(6) When appropriate, impose the pertinent period of revocation provided for in § 242.405 or § 242.115; and

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

(c) Except as provided for in paragraphs (d), (f), (i) and (j) of this section, a hearing required by this section shall be conducted in accordance with the following procedures:

(1) The hearing shall be convened within 10 days of the date the certificate is suspended unless the conductor requests or consents to delay in the start of the hearing.

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

(3) The presiding officer will exercise the powers necessary to regulate the conduct of the hearing for the purpose of achieving a prompt and fair determination of all material issues in controversy.

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

(5) Testimony by witnesses at the hearing shall be recorded verbatim.

(6) All relevant and probative evidence shall be received unless the presiding officer determines the evidence to be unduly repetitive or so extensive and lacking in relevancy that its admission would impair the prompt, orderly, and fair resolution of the proceeding.

(7) The presiding officer may:

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

(ii) Examine witnesses at the hearing;

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

(iv) Take any other action authorized by or consistent with the provisions of this part and permitted by law that may expedite the hearing or aid in the disposition of the proceeding.

(8) Parties may appear and be heard on their own behalf or through designated representatives. Parties may offer relevant evidence including testimony and may conduct such examination of witnesses as may be required for a full disclosure of the relevant facts.

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

(10) No later than 10 days after the close of the record, a railroad official, other than the investigating officer, shall prepare and sign a written decision in the proceeding.

(11) The decision shall:

(i) Contain the findings of fact as well as the basis therefor, concerning all material issues of fact presented on the record; and

(ii) Be served on the employee.

(12) The railroad shall have the burden of proving that the conductor's conduct was not in compliance with the applicable railroad operating rule or practice or part 219 of this chapter.

(d) A hearing required by this section which is conducted in a manner that conforms procedurally to the applicable collective bargaining agreement shall be deemed to satisfy the procedural requirements of this section.

(e) A hearing required under this section may be consolidated with any disciplinary or other hearing arising from the same facts, but in all instances a railroad official, other than the investigating officer, shall make separate findings as to the revocation required under this section.

(f) A person may waive the right to the hearing provided under this section. That waiver shall:

(1) Be made in writing;

(2) Reflect the fact that the person has knowledge and understanding of these rights and voluntarily surrenders them; and

(3) Be signed by the person making the waiver.

(g) A railroad that has relied on the certification by another railroad under the provisions of § 242.127 or § 242.301, shall revoke its certification if, during the period that certification is valid, the railroad acquires information which convinces it that another railroad has revoked its certification. The requirement to provide a hearing under this section is satisfied when any single railroad holds a hearing and no additional hearing is required prior to a revocation by more than one railroad arising from the same facts.

(h) The period of certificate suspension prior to the commencement of a hearing shall be credited towards satisfying any applicable revocation period imposed in accordance with the provisions of § 242.405.

(i) A railroad:

(1) Shall not revoke the person's certification as provided for in paragraph (a) of this section if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the conductor's ability to comply with the railroad operating rule or practice which constitutes a violation under § 242.403(e)(1) through (e)(11) of this part; or

(2) May decide not to revoke the person's certification as provided for in paragraph (a) of this section if sufficient evidence exists to establish that the violation of § 242.403(e)(1) through (e)(11) of this part was of a minimal nature and had no direct or potential effect on

rail safety.

(j) The railroad shall place the relevant information in the records.

(k) Provided that the railroad makes a good faith determination after a reasonable inquiry that the course of conduct provided for in paragraph (i) of this section is appropriate, the railroad which does not suspend a conductor's certification, as provided for in paragraph (b) of this section, is not in violation of paragraph (a) of this section.

Subpart E – Dispute Resolution Procedures

§242.501 Review board established.

[cf. 240.401]

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

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

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

§ 242.503 Petition requirements.

[cf. 240.403]

(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, Office of Chief Counsel, Federal Railroad Administration, 1200 New Jersey Avenue, SE., 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 petitioner's e-mail address (if available);
- (v) The name and address of the railroad; and
- (vi) The facts that the petitioner believes constitute the improper action by the railroad, specifying the locations, dates, and identities of all persons who were present or involved in the railroad's actions (to the degree known by the petitioner);

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

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

(6) Be filed in a timely manner.

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

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

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

(d) A party aggrieved by a Board decision to deny a petition as untimely or not in compliance with the requirements of this section may file an appeal with the Administrator in accordance with § 242.511.

§ 242.505 Processing certification review petitions.

[cf. 240.405]

(a) Each petition shall be acknowledged in writing by FRA. The acknowledgment shall contain the docket number assigned to the petition and a statement of FRA's intention that the Board will render a decision on this petition within 180 days from the date that the railroad's response is received or from the date upon which the railroad's response period has lapsed pursuant to paragraph (c) of this section.

(b) FRA shall notify the railroad that it has received the petition and provide the railroad with a copy of the petition.

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

(d) A railroad that submits such information shall identify the petitioner and provide a copy of the information being submitted to FRA to the petitioner, and submit the information in triplicate.

(3) Submit the information in triplicate to the Docket Clerk, Federal Railroad Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590;

(e) Each petition will then be referred to the Operating Crew Review Board for a decision, and based on the record, the Board, acting upon the majority opinion of its members and with the advice of its Senior Counsel, shall grant, deny or remand the petition.

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

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

(i) Standard of review for procedural issues Pursuant to its reviewing role, the Board will consider procedural disputes, which involve questions of whether the process followed by the railroad, such as correct adherence to time limits prescribed in FRA's rule or a governing agreement, was appropriate and fair. The standard that the Board applies to a procedural dispute is to determine whether substantial harm was caused the petitioner by virtue of the failure to adhere to the dictated procedures for making the railroad's decision. A finding of substantial harm is grounds for reversing the railroad's decision.

(j) Standard of review for legal issues. Pursuant to its reviewing role, the Board will consider whether the railroad's legal interpretations of regulations or statutes administered by FRA are correct based on a de novo review.

(k) The Board will determine whether the denial or revocation of certification or recertification was improper under this regulation (i.e., based on an incorrect determination that the person failed to meet the certification 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.

§ 242.507 Request for a hearing.

[cf. 240.407]

If adversely affected by the Operating Crew Review Board decision, either the petitioner before the Board or the railroad involved shall have a right to an administrative proceeding as prescribed by § 242.509 by filing a written request within 20 days of receiving service of the decision.

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

The specific requirements that must be contained in the request for a hearing are set out in

this section.

§ 242.509 Hearings.
[cf. 240.409]

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

(b) The presiding officer may exercise the powers of the 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. The hearing shall be a de novo hearing to find the relevant facts and determine the correct application of this part to those facts. The presiding officer may determine that there is no genuine issue covering some or all material facts and limit evidentiary proceedings to any issues of material fact as to which there is a genuine dispute.

(d) The presiding officer may authorize discovery of the types and quantities which in the presiding officer's discretion will contribute to a fair hearing without unduly burdening the parties. The presiding officer may impose appropriate non-monetary sanctions, including limitations as to the presentation of evidence and issues, for any party's willful failure or refusal to comply with approved discovery requests.

(e) Every petition, motion, response, or other authorized or required document shall be signed by the party filing the same, or by a duly authorized officer or representative of record, or by any other person. If signed by such other person, the reason therefor must be stated and the power of attorney or other authority authorizing such other person to subscribe the document must be filed with the document. The signature of the person subscribing any document constitutes a certification that he or she has read the document; that to the best of his or her knowledge, information and belief every statement contained in the document is true and no such statements are misleading; and that it is not interposed for delay or to be vexatious.

(f) After the request for a hearing is filed, all documents filed or served upon one party must be served upon all parties. Each party may designate a person upon whom service is to be made when not specified by law, regulation, or directive of the presiding officer. If a party does not designate a person upon whom service is to be made, then service may be made upon any person having subscribed to a submission of the party being served, unless otherwise specified by law, regulation, or directive of the presiding officer. Proof of service shall accompany all documents when they are tendered for filing.

(g) If any document initiating, filed, or served in, a proceeding is not in substantial compliance with the applicable law, regulation, or directive of the presiding officer, the presiding officer may strike or dismiss all or part of such document, or require its amendment.

(h) Any party to a proceeding may appear and be heard in person or by an authorized representative.

(i) Any person testifying at a hearing or deposition may be accompanied, represented, and advised by an attorney or other representative, and may be examined by that person.

(j) Any party may request to consolidate or separate the hearing of two or more petitions by motion to the presiding officer, when they arise from the same or similar facts or when the matters are for any reason deemed more efficiently heard together.

(k) Except as provided in § 242.507(c) of this part and paragraph (u)(4) of this section, whenever a party has the right or is required to take action within a period prescribed by this part, or by law, regulation, or directive of the presiding officer, the presiding officer may extend such period, with or without notice, for good cause, provided another party is not substantially prejudiced by such extension. A request to extend a period which has already expired may be denied as untimely.

(l) An application to the presiding officer for an order or ruling not otherwise specifically provided for in this part shall be by motion. The motion shall be filed with the presiding officer and, if written, served upon all parties. All motions, unless made during the hearing, shall be written. Motions made during hearings may be made orally on the record, except that the presiding officer may direct that any oral motion be reduced to writing. Any motion shall state with particularity the grounds therefor and the relief or order sought, and shall be accompanied by any affidavits or other evidence desired to be relied upon which is not already part of the record. Any matter submitted in response to a written motion must be filed and served within fourteen (14) days of the motion, or within such other period as directed by the presiding officer.

(m) Testimony by witnesses at the hearing shall be given under oath and the hearing shall be recorded verbatim. The presiding officer shall give the parties to the proceeding adequate opportunity during the course of the hearing for the presentation of arguments in support of or in opposition to motions, and objections and exceptions to rulings of the presiding officer. The presiding officer may permit oral argument on any issues for which the presiding officer deems it appropriate and beneficial. Any evidence or argument received or proffered orally shall be transcribed and made a part of the record. Any physical evidence or written argument received or proffered shall be made a part of the record, except that the presiding officer may authorize the substitution of copies, photographs, or descriptions, when deemed to be appropriate.

(n) The presiding officer shall employ the Federal Rules of Evidence for United States Courts and Magistrates as general guidelines for the introduction of evidence. Notwithstanding paragraph (m) of this section, 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.

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

(u) The decision:

- (1) Shall contain the findings of fact and conclusions of law, as well as the basis for each concerning all material issues of fact or law presented on the record;
- (2) Shall be served on the hearing petitioner and all other parties to the proceeding;
- (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.

§ 242.511 Appeals.

[cf. 240.411]

- (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, 1200 New Jersey Avenue, SE., Washington, DC 20590 and with the Docket Clerk, U.S. Department of Transportation, Docket Operations (M-30), West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, D.C. 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. If no appeal is timely filed, the presiding officer's decision constitutes final agency action.
- (b) A party may file a reply to the appeal within 25 days of service of the appeal. The reply shall be supported by reference to applicable laws and regulations and with specific reference to the record, if the party relies on evidence contained in the record.
- (c) The Administrator may extend the period for filing an appeal or a response for good cause shown, 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 remand, vacate, affirm, reverse, alter or modify the decision of the presiding officer and the Administrator's decision constitutes final agency action except where the terms of the Administrator's decision (for example, remanding a case to the presiding officer) show that the parties' administrative remedies have not been exhausted.
- (f) An appeal from an Operating Crew Review Board decision pursuant to § 242.503(d) must be filed within 35 days of issuance of the decision with the Federal Railroad Administrator, 1200 New Jersey Avenue, SE., Washington, DC 20590 and with the Docket

Clerk, U.S. Department of Transportation, Docket Operations (M-30), West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, D.C. 20590. A copy of the appeal shall be served on each party. The Administrator may affirm or vacate the Board's decision, and may remand the petition to the Board for further proceedings. An Administrator's decision to affirm the Board's decision constitutes final agency action.

APPENDIX A TO PART 242—SCHEDULE OF CIVIL PENALTIES

This Appendix sets forth the penalties for violations.

APPENDIX B TO PART 242--PROCEDURES FOR SUBMISSION AND APPROVAL OF CONDUCTOR CERTIFICATION PROGRAMS

[cf. Appendix B to part 240]

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 conductor in accordance with the requirements of this part. It also contains guidance on how FRA will exercise its review and approval responsibilities.

APPENDIX C TO PART 242—PROCEDURES FOR OBTAINING AND EVALUATING MOTOR VEHICLE DRIVING RECORD DATA

[cf. Appendix C to Part 240]

This appendix outlines the procedures available to individuals and railroads for complying with the requirements of §§ 242.109 and 242.111. 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 conductor.

APPENDIX D TO PART 242—MEDICAL STANDARDS GUIDELINES

[cf. Appendix F to Part 240]

This appendix provides greater guidance on the procedures that should be employed in administering the vision and hearing requirements of § 242.117.