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DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 240

[Docket No. FRA–2008–0091]

RIN 2130–AB95

Qualification and Certification of Locomotive Engineers; Miscellaneous Revisions

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: FRA proposes revisions to its regulation governing the qualification and certification of locomotive engineers by prohibiting a railroad from reclassifying a person's locomotive engineer certificate to that of a more restrictive class during the period in which the certificate is otherwise valid while permitting the railroad to place restrictions on the locomotive engineer if appropriate. FRA also proposes to clarify that revocation of an engineer's certificate may only occur for the reasons specified in the regulation. Additionally, FRA proposes provisions that would require each railroad to identify the actions it will take in the event that a person fails a skills performance test or the railroad finds deficiencies with an engineer's performance during an operational monitoring observation or unannounced compliance test. These proposals will address unanticipated consequences arising from reclassifications and clarify the grounds upon which a railroad may revoke a locomotive engineer's certification.

DATES: Written Comments: Written comments on the proposed rule must be received by March 2, 2009. Comments received after that date will be considered to the extent possible without incurring additional expense or delay. FRA anticipates being able to determine these matters without a public, oral hearing. However, if prior to January 30, 2009, FRA receives a specific request for a public, oral hearing accompanied by a showing that the party is unable to adequately present his or her position by written statement, a hearing will be scheduled and FRA will publish a supplemental notice in the **Federal Register** to inform interested parties of the date, time, and location of any such hearing.

ADDRESSES: You may submit comments identified by the docket number FRA–2008–0091 by any one of the following methods:

- *Fax:* 1–202–493–2251;
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590;
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays; or
- Electronically through the Federal eRulemaking Portal, *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name, docket name and docket number or Regulatory Identification Number (RIN) for this rulemaking. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* at any time or to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: John L. Conklin, Program Manager, Locomotive Engineer Certification, U.S. Department of Transportation, Federal Railroad Administration, Mail Stop 25, West Building 3rd Floor West, Room W38–208, 1200 New Jersey Avenue, SE., Washington, DC 20590 (telephone: 202–493–6318); or John Seguin, Trial Attorney, U.S. Department of Transportation, Federal Railroad Administration, Office of Chief Counsel, RCC–10, Mail Stop 10, West Building 3rd Floor, Room W31–217, 1200 New Jersey Avenue, SE., Washington, DC 20590 (telephone: 202–493–6045).

SUPPLEMENTARY INFORMATION:

1. Background

Pursuant to the Rail Safety Improvement Act of 1988, Public Law No. 100–342, § 4, 102 Stat. 624, 625–27 (June 22, 1988) (recodified at 49 U.S.C. 20135), Congress conferred on the Secretary of DOT the authority to establish a locomotive engineer qualification licensing or certification program. The Secretary of Transportation delegated this authority to the Federal Railroad Administrator. 49 CFR 1.49(m). In 1991, FRA implemented this statutory provision by issuing a final rule. 56 FR 28228, 28254 (June 19, 1991) (codified at 49 CFR part 240).

FRA does not test or certify engineers itself. Rather, the regulation requires each railroad to adopt training and certification programs that meet minimum requirements. *See, e.g.*, 49 CFR 240.1 and 240.101. These requirements include, *inter alia,* a determination ''that the person has demonstrated . . . 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.'' 49 CFR 240.211(a). If a candidate passes the certification program, a railroad may issue a certificate to that person for any of the following classes of service: train service engineer, locomotive servicing engineer, or student engineer. 49 CFR 240.107(b). Train service engineers may operate locomotives singly or in multiples and may move them with or without cars coupled to them. Locomotive servicing engineers may operate locomotives singly or in multiples but may not move them with cars coupled to them. Student engineers may operate only under direct and immediate supervision of an instructor engineer. 49 CFR 240.107(c). A railroad may impose additional conditions or operational restrictions on the service an engineer may perform provided those conditions or restrictions are not inconsistent with part 240. 49 CFR 240.107(d).

A certified engineer must undergo periodic retesting and shall have his or her certification revoked if he or she demonstrates a failure to comply with those railroad rules and practices deemed essential for the safe operation of trains specified in § 240.117(e). Section 240.117(e) provides that a certification may only be revoked for six specific types of operating rules and operating practices violations: (1) Failure to control a locomotive or train in accordance with a signal indication that requires a complete stop before passing it; (2) Failure to adhere to limitations concerning train speed when the speed exceeds the maximum authorized limit by at least 10 miles per hour or a violation of restricted speed

that causes a reportable accident or incident under 49 CFR part 225; (3) Failure to adhere to certain federally required procedures for the safe use of train or engine brakes; (4) Occupying a 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 knowingly operating a train with an unauthorized disabled safety device; or (6) Incidents of noncompliance with the regulations regarding the use or possession of alcohol and drugs. 49 CFR 240.117(e); *see also* 49 CFR 219.101 and 240.119(c).

Due to the potentially severe consequences to the individual resulting from the denial of certification, the denial of recertification, or the revocation of a certificate (*e.g.*, making it more difficult to be certified by another U.S. railroad under § 240.225 or being temporarily banned from operating a locomotive or train for any railroad operating in the U.S.), FRA regulations require each railroad to make a deliberative decision and provide for considerable FRA oversight. For example, if a railroad determines that a locomotive engineer may have violated an operating rule specified in § 240.117(e), the railroad is required to suspend the engineer's certificate pending a revocation determination. 49 CFR 240.307(b)(1). Prior to or upon suspending an engineer's certificate, a railroad shall provide notice of the reason for the suspension and an opportunity for a hearing before a presiding officer other than the investigating officer. 49 CFR 240.307(b)(2). Although a person may waive the opportunity for a hearing, the waiver must be in writing and meet certain safeguards to ensure the waiver is made voluntarily and with knowledge and understanding of the person's rights. 49 CFR 240.307(f).

If adversely affected by a railroad's decision regarding revocation, an engineer may petition FRA's Locomotive Engineer Review Board (LERB) to review the decision. 49 CFR 240.401. Following the LERB's decision, the adversely affected party (either the engineer or the railroad) has the right to request an administrative proceeding provided for by FRA. 49 CFR 240.407. The FRA administrative proceeding is a *de novo* hearing to find the relevant facts and determine the correct application of federal regulations and railroad rules and practices to those facts. Any party aggrieved by the presiding officer's decision may file an appeal with the Administrator. 49 CFR 240.411. In the case of a prospective engineer who is denied certification or a certified engineer who is denied recertification when the currently held certificate lapses, the railroad must notify the person ''of information known to the railroad that forms the basis for denying the person certification [or recertification] and provide the person a reasonable opportunity to explain or rebut that adverse information in writing prior to denying certification.'' 49 CFR 240.219(a). The person may then seek review of an adverse certification decision through a similar dispute resolution process that FRA affords to an engineer who has had his or her certificate revoked. 49 CFR 240.401–240.411.

With respect to deficiencies in an engineer's performance that do not rise to the level of revocation, each railroad retains a measure of discretion to fashion, within the context of collective bargaining agreements, appropriate responses, including disciplinary sanctions, to those types of deficiencies. *See, e.g.*, 49 CFR 240.5(d). However, in exercising that discretion, at least one Class I railroad has handled engineer performance deficiencies in a manner not contemplated by FRA when it implemented the engineer certification regulation and not used by the industry generally. The practices of this railroad included reclassifying the certificates of some of its train service engineers to student engineer certificates when it discovered deficiencies in the engineers' performance not specifically identified in § 240.117(e). The railroad did not provide a hearing regarding the reclassification decision. The reason for the reclassifications appears to be related to a deficiency in performance skills, but not a failure to pass a skills performance test required for recertification. In some instances, subsequent skills performance tests were provided and the newly reclassified student engineers that failed those tests were denied certification and their employment was terminated by the railroad.

The consequences of that Class I railroad's policy—*inter alia,* engineers being required to exchange their train service certificates for student engineer certificates based on deficiencies not specified in § 240.117(e) without receiving a hearing pursuant to § 240.307 and the potential for disparate treatment of similarly situated engineers—were simply not anticipated by FRA when it originally issued the regulations contained in part 240. However, because the regulation is silent with respect to reclassifications, FRA has interpreted the plain language of the existing regulation to permit reclassifications despite these unanticipated consequences. Consequently, FRA believes that modification of the existing regulation is necessary to address this issue.

In an effort to eliminate the unanticipated consequences created by unilateral reclassification of an engineer's certificate and to clarify the regulations regarding revocations, FRA proposes to make three specific changes to part 240. First, FRA proposes to prohibit the practice of reclassifying any type of engineer's certification to a more restrictive class of certificate or to a student engineer certificate during the period in which the certification is otherwise valid. Second, FRA proposes to clarify part 240 to ensure that all parties understand that revocation of an engineer's certificate may only occur for the reasons specified in the regulation. Third, FRA proposes to require each railroad to identify the potential actions it may take in the event that a person fails a skills performance test or that the railroad finds deficiencies with an engineer's performance during an operational monitoring observation or unannounced compliance test or otherwise becomes aware of such deficiencies. These proposals are not only consistent with the overall original intent of part 240, but are also consistent with current industry practice concerning reclassification and revocation.

2. Additional Issues

In addition to the proposed changes discussed above, FRA is considering making some minor revisions to update part 240 and make it consistent with other FRA regulations and guidance. Those proposed revisions are detailed below. FRA seeks comments from interested parties on these proposed modifications.

A. Deletion of Implementation and Phase-In Dates

FRA proposes to eliminate the implementation and phase-in dates listed throughout part 240 and any section or section heading that references those dates. The dates have long passed and are no longer relevant.

B. Deletion of Prior Incident Provisions

FRA proposes to delete §§ 240.117(i) and (j). The dates listed in those sections concerning prior incidents have long passed and those sections are no longer needed.

C. Consistency With Other Regulations

FRA proposes to revise the language in part 240 containing references to various provisions in 49 CFR part 232

(*see, e.g.*, §§ 240.117(e)(3) and 240.309(e)(3)) in order to make them consistent with the language in part 232. When FRA previously made substantive modifications to part 240, the provisions of part 232 were still being drafted. As a result, the terms used in some sections of part 240 to describe the provisions of part 232 (*i.e.*, initial terminal, intermediate terminal, or transfer train and yard test) differ from the actual terms used in part 232 (*i.e.*, Class I, Class IA, Class II, Class III, or transfer train brake test).

FRA also proposes to revise the term ''annually monitored'' in § 240.129(c)(2) to read ''monitored each calendar year.'' That revision would make the provision consistent with the language used in § 240.303(b).

D. Consistency With FRA Guidance

FRA proposes to amend §§ 240.129(e) and 240.303(d) in order to make them consistent with guidance provided by FRA in Memorandum OP–04–13 (February 3, 2004) which can be found on FRA's Web site at *http://www.fra.dot.gov/downloads/safety/advisories/op0413.pdf.* Although §§ 240.129(e) and 240.303(d) could be read to require railroads to give engineers three different tests per calendar year, Memorandum OP–04–13 makes clear that railroads are required to only give one test per calendar year under those sections. Accordingly, §§ 240.129(e) and 240.303(d) would be amended to make them consistent with Memorandum OP–04–13.

E. Civil Penalty Schedule

FRA proposes to amend the penalty schedule for § 240.203 listed in the Schedule of Civil Penalties in Appendix A to part 240. Although the text of § 240.203 only lists two subsections ((a) and (b)), the current penalty schedule for § 240.203 lists three subsections ((a), (b), and (c)). FRA proposes to delete the reference to §§ 240.203(a)(1)–(3) in the penalty schedule and revise §§ 240.203 (b) and (c) in the penalty schedule to reference paragraphs (a) and (b). These proposed changes will make the regulatory text and the penalty schedule consistent.

FRA also proposes to amend the penalty schedule for § 240.205 listed in the Schedule of Civil Penalties in Appendix A to part 240. Although the text of § 240.205 only lists subsections (a) and (b), the current penalty schedule for § 240.205 lists subsections (a) and (d). FRA proposes to amend the reference to subsection (d) in the current penalty schedule for § 240.205 to read (b).

F. Inaccurate References

FRA proposes to amend the reference to § 240.15 in § 240.307(j) to read § 240.215. Section 240.15 does not exist.

FRA proposes to amend the reference to 49 CFR 218.5(f) in § 240.7 (subsection (1) of the definition of ''*locomotive engineer*'') to read 49 CFR 218.5. There is no subsection (f) in § 218.5.

FRA proposes to amend the reference to paragraph (c) in § 240.203(a) to read paragraph (b). There is no paragraph (c) in § 240.203.

G. Appendix D

FRA proposes to delete the last paragraph of Appendix D to part 240 which begins ''Although the number of state agencies * * *.'' The paragraph is no longer relevant because all states now participate in the National Driver Register program.

III. Section-by-Section Analysis

Section 240.107 Criteria for designation of classes of service

FRA proposes to amend this section by adding a new paragraph (e) that would prohibit a railroad from reclassifying the certification of any type of certified engineer to a more restrictive class of certificate or to a student engineer certificate during the period in which the certification is otherwise valid. Although reclassification has been referred to by different names by various parties (*e.g.*, demotion, diminution in the quality of a license, etc.), the practice that FRA is proposing to prohibit is the taking of any type of engineering certificate, during the period in which the certificate is valid, and replacing it with a more restrictive class of certificate or a student engineer certificate based on deficiencies found during operational and skills tests that do not require revocation of an engineer's certification under §§ 240.117(e) or 240.119(c).

Although FRA has previously interpreted the plain language of the regulation to permit reclassification, the unanticipated consequences of that practice necessitate its prohibition. As explained earlier in this preamble, the effect of the reclassification policy used by one Class I railroad has been to require some engineers to exchange their train service or locomotive servicing certificates for student engineer certificates without an opportunity for review of the reclassification decision. An engineer who is reclassified to a student could find it more difficult to be certified by another U.S. railroad than an engineer who has not been reclassified. Further, there is significant room for abuse in a system that allows reclassification based on the somewhat subjective scoring of a skills performance test. Thus, FRA proposes to prohibit railroads from requiring an engineer to exchange his or her train service or locomotive servicing certification for a more restrictive class of certificate or a student engineer certificate during the period in which the recertification is otherwise valid.

FRA has considered other options, including permitting reclassification while providing affected engineers with the option of challenging the reclassification through a hearing. However, allowing reclassifications, even with a hearing, could result in the disparate treatment of engineers. If, for example, two train service engineers commit the same operating deficiency, a railroad may decide to reprimand one of the engineers but reclassify the certificate of the other engineer to a student engineer certificate. Assuming the reclassification is upheld during the hearing process, one engineer could return to work as a train service engineer while the other could only return to work as a student engineer. This proposal attempts to eliminate the potential for disparate treatment that could result from the practice of reclassifying engineers' certificates.

The elimination of disparate treatment of locomotive engineers accords with the original design and intent of part 240. As FRA noted in the 1989 NPRM:

> [T]here is at least anecdotal evidence to support the proposition that similar events receive significantly disparate treatment. Such differences exist both within and between railroads. Those differences include decisions on whether a particular person will or will not be brought before the discipline system for a given course of conduct to a wide range of punishments imposed for the same types of failure to adhere to company rules under similar circumstances.

54 FR 50890, 50899–50900 (December 11, 1989). Accordingly, part 240 requires railroads to take specific actions for clearly articulated types of non-compliance in an effort to prevent disparate treatment. For example, §§ 240.117 and 240.119 establish specific revocation periods for instances of non-compliance with operating rules and practices, as well as drug and alcohol regulations. The proposals in this NPRM further FRA's objective to prevent the disparate treatment of engineers by prohibiting the reclassification of an engineer certificate and providing that revocation of an engineer's certificate may only occur for the reasons specified in the regulation.

While the proposal would prohibit the practice of reclassification, it would

not prevent the railroads from continuing to pursue other measures to ensure the safe operation of locomotives. For example, this proposal would not prevent a railroad from placing restrictions on a certificate pursuant to § 240.107(d). As FRA stated in the 1993 interim final rule:

> A second set of interpretive questions has been generated by the desire of some railroads to certify a person as a train service engineer but then impose significant limits or constraints on the operational authority of that person. This section [240.107] permits railroads to take such action and can be employed by them to address issues such as utilizing persons who have sufficient skills to perform in terminal or yard service but lack the knowledge or skill to operate trains beyond terminal areas. Railroads that elect to follow this approach will of course need to structure their implementation program submissions to reflect any differences in the training or testing of these engineers that would flow from their more limited operating responsibilities.

58 FR 18982, 18995 (April 9, 1993). It should be noted, however, that while § 240.107(d) permits a railroad to place restrictions on a certificate, restrictions are applied and reviewed in accordance with internal railroad rules, procedures and processes developed in coordination with its employees. Part 240 does not govern the issuance or review of restrictions; that is a matter handled under a railroad's internal discipline system or collective bargaining agreement.

This proposal would also not prevent a railroad from suspending/revoking a certificate pursuant to § 240.307 for violation of one of the provisions contained in § 240.117(e), or prohibiting a person from operating a locomotive as a train service or locomotive servicing engineer pursuant to § 240.211(c). Further, this proposal would not prevent a railroad from offering an engineer the opportunity to work for the railroad in any other capacity as long as the engineer's current certificate was not reclassified. For example, collective bargaining agreements often contain a provision by which the parties agree to permit flowback from an engineer job to a conductor job if a locomotive engineer should somehow become ineligible to operate locomotives or trains. As FRA has previously clarified, part 240 is not intended to create or prohibit flowback. *See* § 240.5(e) and 64 FR 60966, 60975 (November 8, 1999).

This proposal would not convert part 240's locomotive engineer certification system into a licensing system. Although some parties have referred to the practice of reclassification as a ''diminution in the quality of a license,'' a certificate is not a license and the proposal would not convert a locomotive engineer certificate issued in accordance with part 240 into a license. Indeed, in adopting a certification system (*i.e.*, FRA sets eligibility criteria but leaves it to the railroads to evaluate candidates by those standards) rather than a traditional licensing system (*i.e.*, a government agency sets eligibility criteria and evaluates candidates), FRA noted that part 240 ''afford railroads considerable discretion'' in the daily administration of their certification program but ''FRA bears responsibility for the manner in which the railroads exercise that discretion, since the performance of the railroads'' under part 240 will determine whether their safety purposes are fulfilled. 56 FR 28228, 28229–28230 (June 19, 1991). This proposal continues that relationship. FRA seeks comments from interested parties on this proposal.

Additionally, FRA seeks comments regarding the railroads' assessment of engineer performance during the period in which an engineer's certificate is otherwise valid. Are the current processes set up by the railroads to assess an engineer's performance during the period of certification appropriate? Are railroads accurately assessing the skills and knowledge of engineers? Do engineers have a chance to seek meaningful review of the railroads' assessments during the period in which an engineer's certificate is otherwise valid? FRA seeks comments from interested parties on these topics.

Section 240.127 Criteria for Examining Skill Performance

FRA proposes to amend this section to require each railroad to indicate the action it will take, beyond those required by § 240.211(c), in the event that a person fails a skills performance test. Pursuant to § 240.101 and § 240.103, each railroad must submit its written certification program, including its procedures for skill performance testing under § 240.127 and monitoring operational performance under § 240.129, for FRA approval. That review process, in connection with this proposal, would permit FRA an opportunity to ensure that each railroad is handling skills test failures in accordance with the intent and spirit of the regulation. The proposal will also compel each railroad to carefully consider the process by which it will handle skill test failures and demonstrate to FRA that it is dealing with its engineers in an objective manner.

Although FRA considered other options, such as prescribing the specific actions a railroad must take, FRA believes it should be left up to each railroad to decide the appropriate action to take in light of various factors, including collective bargaining agreements. Indeed, FRA previously proposed prescribing the number of tests and interval between retests and other consequences of test failure in the 1989 NPRM (54 FR 50890, 50933–50935 (December 11, 1989)), but did not implement those proposals based, in part, on commenters' concerns that the proposals would disrupt contractual agreements (56 FR 28228, 28236–28237 (June 19, 1991)). Further, FRA has found that the vast majority of railroads have adequate policies to deal with skills test failures or deficiencies and have handled them appropriately for many years.

To avoid restricting the options available to the railroads and employee representatives to develop processes for handling skill test failures, FRA designed this proposal to be as flexible as possible. There are a variety of actions and approaches that a railroad can take in response to a skills test failure and FRA does not want to stifle a railroad's ability to adopt an approach that is best for its organization. Some of the actions railroads may want to consider include: Provide remedial training for engineers who fail skills tests or have deficiencies in their performance; automatically download event recorder data upon a test failure or deficient performance in order to preserve evidence of the failure/deficiency; require two supervisors to ride along on a retest; and retest an engineer on an actual train if the engineer failed a test on a simulator. Each railroad should also consider implementing a formal procedure whereby an engineer is given the opportunity to explain, in writing, the factors that he or she believes caused their skills test failure or performance deficiencies. This explanation may allow a railroad to determine what areas of training to focus on or perhaps discover that the reason for the failure/deficiency was due to something other than a lack of skills. Indeed, it is disconcerting for FRA to be informed that a certified engineer, who may have been safely operating locomotives for years, no longer has the skills necessary to operate safely; thus FRA also suggests that each railroad consider whether a medical examination might reveal a reason for a diminishment in skills proficiency.

FRA believes there are numerous other approaches that could and should be considered and evaluated by railroads and their employees. FRA realizes that a railroad's list of actions

it will take in response to a skills test failure or deficient performance could be expansive given the various circumstances that could contribute to a test failure or deficient performance.

Although a railroad will be required to update its certification program under this proposal, FRA does not consider the update to be a material modification pursuant to § 240.103(e). Of course, FRA may find issues during a review or audit of the updated certification program and will address those issues with the railroad at that time. FRA seeks comments from interested parties on this proposal.

Additionally, FRA is aware of concerns raised by engineers that they have no way of knowing why and how they failed a skills test or monitoring ride. In particular, some engineers are concerned that they do not know how the scoring systems used by railroads to grade skills and operational monitoring rides function. FRA is seeking comments on whether FRA should require the railroads to explain the scoring system they use to determine whether a person passes or fails a skills test or operational monitoring ride. Requiring a railroad to explain its scoring system will likely have the benefit of ensuring that the scoring criteria are transparent and that pass/fail determinations are arrived at consistently throughout the railroad.

Section 240.129 Criteria for Monitoring Operational Performance of Certified Engineers

FRA proposes to amend this section to require railroads to indicate the action they will take in the event they find deficiencies with an engineer's performance during an operational monitoring observation or unannounced compliance test. As explained in § 240.127 above, FRA believes it is up to each railroad to decide the appropriate action to take in light of various factors, including collective bargaining agreements. Further, FRA has found that the vast majority of railroads have adequate policies to deal with deficiencies with an engineer's performance and have handled them appropriately for many years.

For a discussion of the benefits of this proposal and actions railroads may want to consider taking in the event they find deficiencies with an engineer's performance, see section 240.127 above.

Although a railroad will be required to update its certification program under this proposal, FRA does not consider the update to be a material modification pursuant to § 240.103(e). FRA seeks comments from interested parties on this proposal.

Additionally, for the reasons explained above, FRA is seeking comments on whether FRA should require the railroads to explain the scoring system they use to determine whether a person passes or fails a skills test or operational monitoring ride.

Section 240.307 Revocation of Certification

FRA proposes to amend this section to clarify and ensure that railroads understand that they may revoke an engineer's certificate only for that conduct specifically identified in § 240.117(e) or § 240.119(c). FRA has been informed by at least one Class I railroad that it believes § 240.307 could be read to allow revocation for deficiencies other than those specified in § 240.117(e) or § 240.119(c). FRA proposes to make clear that such an interpretation is incorrect and contravenes the intent and purpose of part 240 when it was issued. As FRA stated in the 1993 interim final rule:

> Revocation of certification can occur when the locomotive engineer in question is found to have violated one of the five cardinal safety rules or the rules controlling alcohol and drug use.
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> * * * * *
>
> When considering revocation, FRA[] * * * contemplated that decisions to revoke certification would only be based on noncompliance with an operational safety directive or a violation of FRA's rules controlling alcohol and drug use by railroad workers.
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> * * * * *
>
> As noted above, FRA contemplated that decisions to revoke certification would be based on noncompliance with the operational safety directives contained in § 240.117 and § 240.119.

58 FR 18982, 18989, 18999–19000 (April 9, 1993). To eliminate any ambiguity, FRA is proposing to clarify the regulation to ensure that it is applied in accordance with FRA's intent. FRA seeks comments from interested parties on this proposal.

IV. Regulatory Impact and Notices

1. Executive Order 12866 and DOT Regulatory Policies and Procedures

This proposed rule has been evaluated in accordance with existing policies and procedures, and determined to be non-significant under both Executive Order 12866 and DOT policies and procedures. *See* 44 FR 11034 (February 26, 1979). FRA has prepared and placed in Docket No. FRA–2008–0091 a Regulatory Analysis addressing the economic impact of this proposed rule. Document inspection and copying facilities are available at the DOT Central Docket Management Facility located in Room W12–140 on the Ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590. Docket material is also available for inspection electronically through the Federal eRulemaking Portal at *http://www.regulations.gov.* Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk at the Office of Chief Counsel, RCC–10, Mail Stop 10, Federal Railroad Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590; please refer to Docket No. FRA–2008–0091.

In this proposed rule, FRA is clarifying and/or amending certain sections of its existing regulation pertaining to the qualification and certification of locomotive engineers. Costs that may be incurred due to the proposed rule are presented below. The revision or amendments to a railroad's certification program will not need to be submitted to FRA, but must be available to present to FRA inspectors. The table below presents the estimated 20-year monetary costs associated with the proposed rule, at discount rates of 3 percent and 7 percent.

Total 20-year costs	($)
Revisions to engineer certification programs	345,168
Total Cost	345,168
Total 20-Year Costs (Discounted at 3%)	335,115
Total 20-Year Costs (Discounted at 7%)	322,587

This analysis determines that over a 20-year period the discounted costs would be approximately $322,587.

The benefits that would accrue cannot be expressed in monetary terms; however, FRA is confident that such benefits would meet or exceed the costs associated with implementation of the proposed rule. The main benefit of this proposed rule is that railroads will no longer be able to use this regulation in a manner not contemplated by FRA. FRA also anticipates benefits flowing from a more precise and complete regulation. Benefits resulting from this proposed rule are process improvements that assist FRA in working with a railroad to resolve problems associated with the engineer certifications. The proposed rule works with railroad carriers' needs and operating environments to produce a regulatory scheme that is economically efficient while providing FRA oversight. Savings, that have not been quantified, would accrue from the consolidated provisions of the rule and the clarification of the railroads' certification programs.

2. Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) and Executive Order 13272 (67 FR 53461, August 16, 2002) require agency review of proposed and final rules to assess their impact on small entities. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), FRA has prepared and placed in the docket a Certification Statement that assesses the small entity impact of this proposed rule, and certifies that this proposed rule is not expected to have a significant economic impact on a substantial number of small entities.

Document inspection and copying facilities are available at the DOT Central Docket Management Facility located in Room W12–140 on the Ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC 20590. Docket material is also available for inspection electronically through the Federal eRulemaking Portal at *http://www.regulations.gov.* Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk at the Office of Chief Counsel, RCC–10, Mail Stop 10, Federal Railroad Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590; please refer to Docket No. FRA–2008–0091.

The U.S. Small Business Administration (SBA) stipulates in its ''Size Standards'' that the largest a railroad business firm that is ''for-profit'' may be, and still be classified as a ''small entity,'' is 1,500 employees for ''Line-Haul Operating Railroads,'' and 500 employees for ''Switching and Terminal Establishments.'' ''Small entity'' is defined in the Act as a small business that is not independently owned and operated, and is not dominant in its field of operation. SBA's ''Size Standards'' may be altered by Federal agencies after consultation with SBA and in conjunction with public comment. Pursuant to that authority, FRA has published a final policy that formally establishes ''small entities'' as railroads which meet the line haulage revenue requirements of a Class III railroad. The revenue requirements are currently $20 million or less in annual operating revenue. The $20 million limit (which is adjusted by applying the railroad revenue deflator adjustment) is based on the Surface Transportation Board's threshold for a Class III railroad carrier. FRA uses the same revenue dollar limit to determine whether a railroad or shipper or contractor is a small entity.

There are approximately 718 railroads that would be affected by this regulation. Of this number, approximately 678, or 94 percent, are small entities. Consequently, this regulation affects a substantial number of small entities. However FRA does not anticipate that this regulation would impose a significant economic impact on a substantial number of small entities.

The factual basis for the certification that this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities, is that the only net cost incurred by small railroads due to this proposed regulation would be $376 (not discounted), which small railroads would incur during the first year of implementation of the regulation. This is far less than one percent of the annual average revenue for all small railroads ((approximately $47,000 in 2006 (not discounted)) per small railroad. Accordingly, FRA does not consider this impact to be significant. Nor does FRA anticipate that this regulation would result in long-term or short-term insolvency for any small railroad.

FRA invites comments from all interested parties on this Certification. FRA particularly encourages small entities that could potentially be impacted by the proposed amendments to participate in the public comment process by submitting comments on this assessment or this rulemaking to the official U.S. Department of Transportation (DOT) docket. A draft of the proposed rule has not been submitted to the Small Business Administration (SBA) for formal review. However, FRA will consider any comments submitted by the SBA in developing the final rule.

3. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The sections that contain the new information collection requirements are duly designated, and the estimated time to fulfill each requirement is as follows:

CFR section/subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
240.9—Waivers—Petitions for Waiver.	718 railroads	3 petitions	1 hour	3
240.101/103—Certification Program: Written Program for Certifying Qualifications of Locomotive Engineers—Amendments.	718 railroads	50 amend. prog	1 hour	50
	20 railroads	20 new prog	40 hours	800
	20 railroads	20 reviews	1 hour	20
	718 railroads	30 mod. prog	45 minutes	23
—Certification Programs for New Railroads.				
—New Railroads Final Review and Submission of Certification Program.				
—Material Modifications to Approved Prog.				
240.105—Selection Criteria For Designated Supervisors of Locomotive Engineers (DSLEs)—Examinations of DSLEs.	718 railroads	50 examinations	1 hour	50
—Written Report by Railroad Chief Operating Officer of Testing of DSLE.	10 railroads	10 reports	1 hour	10
240.109—Candidate's Review and Written Comments on Prior Safety Conduct Data.	17,667 candidates	25 responses	1 hour	25

CFR section/subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
240.111—Request for State Driving Data and National Driver Register Data—Driver's License Data Requests.	17,667 candidates	17,667 requests	15 minutes	4,417
	718 railroads	177 notifications + 177 requests.	15 minutes	89
	718 railroads		15 minutes	5
	53,000 candidates	20 comments	15 minutes	1
	718 railroads	4 letters 200 calls.	10 minutes	33
—National Driver Register Data: Notification by Railroad to Employees of Matches and Employee Requests to State Agency for Relevant Data.				
—Written Responses from Candidate on Driver's License Data.				
—Notice to Railroad of Absence of License.				
—Individual Duty to Furnish Data on Prior Conduct as Motor Vehicle Operator—Ph. Calls.				
240.113—Individual Duty to Furnish Data on Prior Safety Conduct as an Employee of A Different Railroad—Requests to Former Employing Railroad of Service Record and Railroad Responses.	17,667 candidates	353 requests + 353 responses.	15 min.; 30 min	265
240.119—Employee Self-Referral to EAP Counselor for Substance Abuse Disorder.	53,000 locomotive engineers	50 self-referrals	5 minutes	4
240.121—Criteria—Hearing/Vision Acuity Subsequent Years—Copies of Part 240 Appendix F to RR Medical Examiner.	20 new railroads	20 copies	15 min	5
	718 railroads	20 reports	1 hours	20
	718 railroads	10 notifications	15 minutes	3
—Medical Examiners Consultation with DSLE to Issue Conditional Certification Report.				
—Notification—Hearing/Vision Change by Certified Engineer to Railroad.				
New	718 railroads	718 amended programs	5 hours	3,590
New				
240.201/221/223/301—List of DSLEs.	718 railroads	718 railroads	60 minutes	718
	718 railroads	718 updates	60 minutes	718
—List of Design. Qual. Locomotive Engineers.				
240.201/217/223/301—Locomotive Engineers Certificate.	53,000 candidates	17,667 cert	5 minutes	1,472
240.205—Data to EAP Counselor and Furnishing of Records by Employee.	718 railroads	177 records	5 minutes	15
240.207—Medical Certificate on Hearing/Vision Acuity—Tests and Certificate Issuance.	53,000 candidates	17,667 cert	70 minutes	20,612
	718 railroads	10 determination	2 hours	20
—Written Determination by Medical Examiner Waiving Necessity of Wearing Hearing/Vision Corrective Device.				
240.219—Denial of Certification—Notification to Employee of Adverse Information and Employee Response.	17,667 candidates	30 letters + 30 responses	1 hour	60
	718 railroads	30 notifications	1 hour	30
—Notification of Adverse Decision.				

CFR section/subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
240.229—Requirements for Joint Operations Territory—Notification by Engineer of Non-Qualification to Operate Train on Track Segment.	321 railroads	184 calls	5 minutes	15
240.309—Railroad Oversight Responsibilities—Instances of Identified Poor Safety Conduct.	15 railroads	6 annotations	15 minutes	2
TESTING REQUIREMENTS 240.209/213—Written Test.	53,000 candidates	17,667 tests	2 hours	35,334
240.211/213—Performance Test.	53,000 candidates	17,667 tests	2 hours	35,334
240.303—Annual Op. Monit.	53,000 candidates	53,000 tests	2 hours	106,000
Obs. Test—Annual Operating Rules Compliance Test.	53,000 candidates	53,000 tests	1 hour	53,000
RECORDKEEPING REQUIREMENTS 240.215—Recordkeeping—Cert. Loc. Eng.	718 railroads	17,667 records	30 minutes	8,834
240.305—Engineer's Non-Qualification Notice.	53,000 candidates	100 notific	5 minutes	8
—Engineer's Notice to RR—Loss of Qualification.	1,060 candidates	2 letters	30 minutes	1
240.307—Notice to Engineer of Disqualification.	718 railroads	900 notific. letters	1 hour	900
240.309—Railroad Oversight Responsibilities.	51 railroads	51 reviews	40 hours	2,040
—Performance of Annual Reviews/Analysis.	51 railroads	12 reports	1 hour	12
—Railroad Report of Findings.				

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. Pursuant to 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning: Whether these information collection requirements are necessary for the proper performance of the functions of FRA, including whether the information has practical utility; the accuracy of FRA's estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan, FRA Information Clearance Officer, at 202–493–6292, or Ms. Nakia Jackson at 202–493–6073.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Mr. Robert Brogan or Ms. Nakia Jackson, Federal Railroad Administration, 1200 New Jersey Avenue, SE., 3rd Floor, Washington, DC 20590. Comments may also be submitted via e-mail to Mr. Brogan or Ms. Jackson at the following address: *robert.brogan@dot.gov; nakia.jackson@dot.gov.*

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

The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal. FRA is not authorized to impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of the final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

4. Federalism Implications

Executive Order 13132, ''Federalism'' (64 FR 43255, Aug. 10, 1999), requires FRA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' are defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

This NPRM has been analyzed in accordance with the principles and

criteria contained in Executive Order 13132. This proposed rule would not have a substantial effect on the States or their political subdivisions; it would not impose any compliance costs; and it would not affect the relationships between the Federal government and the States or their political subdivisions, or the distribution of power and responsibilities among the various levels of government. Consequently, FRA concludes that this NPRM has no federalism implications.

5. International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards.

This proposed rulemaking is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

6. Environmental Impact.

FRA has evaluated this proposed rule in accordance with its ''Procedures for Considering Environmental Impacts'' (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this proposed rule is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. *See* 64 FR 28547 (May 26, 1999). Section 4(c)(20) reads as follows:

(c) Actions categorically excluded. Certain classes of FRA actions have been determined to be categorically excluded from the requirements of these Procedures as they do not individually or cumulatively have a significant effect on the human environment.

* * * * *

The following classes of FRA actions are categorically excluded:

* * * * *

(20) Promulgation of railroad safety rules and policy statements that do not result in significantly increased emissions or air or water pollutants or noise or increased traffic congestion in any mode of transportation.

In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this proposed rule is not a major Federal action significantly affecting the quality of the human environment.

7. Unfunded Mandates Reform Act of 1995

Pursuant to section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), each Federal agency ''shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' Section 202 of the Act (2 U.S.C. 1532) further requires that ''before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) [currently $141,000,000] in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement'' detailing the effect on State, local, and tribal governments and the private sector. The proposed rule would not result in the expenditure, in the aggregate, of $141,000,000 or more in any one year, and thus preparation of such a statement is not required.

8. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any ''significant energy action.'' 66 FR 28355 (May 22, 2001). Under the Executive Order, a ''significant energy action'' is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this NPRM in accordance with Executive Order 13211. FRA has determined that this NPRM is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this NPRM is not a ''significant energy action'' within the meaning of Executive Order 13211.

9. Privacy Act

FRA wishes to inform all potential commenters that anyone is able to search the electronic form of all comments received into any agency docket by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://www.regulations.gov/search/footer/privacyanduse.jsp.*

List of Subjects in 49 CFR Part 240

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

The Proposed Rule

For the reasons discussed in the preamble, FRA proposes to amend Part 240 of chapter II, subtitle B of title 49 of the Code of Federal Regulations as follows:

PART 240—[AMENDED]

1. The authority citation for part 240 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20135, 21301, 21304, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.49.

2. Section 240.7 is amended by revising paragraph (1) of the definition of ''*Locomotive engineer*'' to read as follows:

§ 240.7 Definitions.

* * * * *

Locomotive engineer * * *

(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

* * * * *

3. Section 240.101 is amended by revising paragraphs (a), (b) and (c) introductory text to read as follows:

§ 240.101 Certification program required.

(a) Each railroad subject to this part shall have in effect a written program

for certifying the qualifications of locomotive engineers.

(b) Each railroad shall have such a program in effect prior to commencing operations.

(c) Each railroad shall have a certification program approved in accordance with § 240.103 that includes:

* * * * *

4. Section 240.107 is amended by adding a new paragraph (e) to read as follows:

§ 240.107 Criteria for designation of classes of service.

* * * * *

(e) A railroad shall not reclassify the certification of any type of certified engineer to a more restrictive class of certificate or a student engineer certificate during the period in which the certification is otherwise valid.

5. Section 240.109 is amended by revising paragraph (e) as follows:

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

* * * * *

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

* * * * *

6. Section 240.111 is amended by revising paragraph (a) introductory text to read as follows:

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

(a) Except for persons covered by § 240.109(h), each person seeking certification or recertification under this part shall, within 366 days preceding the date of the railroad's decision on certification or recertification:

* * * * *

7. Section 240.113 is amended by revising paragraph (a) introductory text to read as follows:

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

(a) Except for persons covered by § 240.109(h), each person seeking certification under this part shall, within 366 days preceding the date of the railroad's decision on certification or recertification:

* * * * *

8. Section 240.117 is amended by revising paragraph (e)(3) and by removing paragraphs (g)(4), (i), and (j) to read as follows:

§ 240.117 Criteria for consideration of operating rules compliance data.

* * * * *

(e) * * *

(3) Failure to adhere to procedures for the safe use of train or engine brakes when the procedures are required for compliance with the Class I, Class IA, Class II, Class III, or transfer train brake test provisions of 49 CFR part 232 or when the procedures are required for compliance with the class 1, class 1A, class II, or running brake test provisions of 49 CFR part 238;

* * * * *

9. Section 240.127 is amended by adding a new paragraph (e) to read as follows:

§ 240.127 Criteria for examining skill performance.

* * * * *

(e) Each railroad's program shall indicate the action the railroad will take in the event that a person fails an initial examination or a reexamination of his or her performance skills in accordance with the procedures required under § 240.211.

10. Section 240.129 is amended by revising paragraphs (c)(2) and (e) and adding a new paragraph (f) to read as follows:

§ 240.129 Criteria for monitoring operational performance of certified engineers.

* * * * *

(c) * * *

(2) Be designed so that each engineer shall be monitored each calendar year by a Designated Supervisor of Locomotive Engineers, who does not need to be qualified on the physical characteristics of the territory over which the operational performance monitoring will be conducted;

* * * * *

(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:

(i) 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;

(ii) 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; or

(iii) 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;

(3) 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

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

(f) Each railroad's program shall indicate the action the railroad will take in the event that it finds deficiencies with a locomotive engineer's performance during an operational monitoring observation or unannounced compliance test administered in accordance with the procedures required under § 240.303.

11. Section 240.201 is revised to read as follows:

§ 240.201 Implementation.

(a) Each railroad 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) 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 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 a 36-

month period unless that person has been determined to be qualified in accordance with procedures that comply with subpart C of this part.

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

(e) 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 of this part.

(f) 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 of this part.

(g) 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 of this part.

(h) 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.

12. Section 240.203 is amended by revising paragraph (a) introductory text to read as follows:

§ 240.203 Determinations required as a prerequisite to certification.

(a) Except as provided in paragraph (b) of this section, 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:

* * * * *

13. Section 240.205 is amended by revising paragraph (a) to read as follows:

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

(a) Each railroad, prior to initially certifying or recertifying any person as an engineer for any class of service, 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.

* * * * *

14. Section 240.207 is amended by revising paragraph (a) to read as follows:

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

(a) Each railroad, prior to initially certifying or recertifying any person as an engineer for any class of service, shall determine that the person meets the standards for visual acuity and hearing acuity prescribed in § 240.121.

* * * * *

15. Section 240.209 is amended by revising paragraph (a) to read as follows:

§ 240.209 Procedures for making the determination on knowledge.

(a) 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.

* * * * *

16. Section 240.211 is amended by revising paragraph (a) to read as follows:

§ 240.211 Procedures for making the determination on performance skills.

(a) 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.

* * * * *

17. Section 240.213 is amended by revising paragraph (a) to read as follows:

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

(a) 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.

* * * * *

18. Section 240.215 is amended by revising paragraph (a) to read as follows:

§ 240.215 Retaining information supporting determinations.

(a) 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.

* * * * *

19. Section 240.217 is amended by revising paragraph (a) introductory text to read as follows:

§ 240.217 Time limitations for making determinations.

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

* * * * *

20. Section 240.221 is amended by revising paragraphs (a) and (b) to read as follows:

§ 240.221 Identification of qualified persons.

(a) A railroad shall maintain a written record identifying each person designated by it as a supervisor of locomotive engineers.

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

* * * * *

21. Section 240.225 is amended by revising paragraph (a) introductory text to read as follows:

§ 240.225 Reliance on qualification determinations made by other railroads.

(a) A railroad that is considering certification of a person as a qualified engineer may rely on determinations made by another railroad concerning that person's qualifications. The railroad's certification program shall address how the railroad will administer the training of previously uncertified engineers with extensive

operating experience or previously certified engineers who have had their certification expire. If a railroad's certification program fails to specify how to train a previously certified engineer hired from another railroad, then the railroad shall require the newly hired engineer to take the hiring railroad's entire training program. A railroad relying on another's certification shall determine that:

* * * * *

22. Section 240.303 is amended by revising paragraphs (a) and (d) to read as follows:

§ 240.303 Operational monitoring requirements.

(a) 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.

* * * * *

(d) The unannounced test program shall:

(1) Test engineer compliance with:

(i) 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;

(ii) 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; or

(iii) Provisions of the railroad's operating rules, timetable or other mandatory directives the violations of which 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;

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

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

(4) 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.

23. Section 240.305 is amended by removing the introductory text and revising paragraph (a)(3) to read as follows

§ 240.305 Prohibited conduct.

(a) * * *

(3) Operate a locomotive or train without adhering to procedures for the safe use of train or engine brakes when the procedures are required for compliance with the Class I, Class IA, Class II, Class III, or transfer train brake test provisions of 49 CFR part 232 or when the procedures are required for compliance with the class 1, class 1A, class II, or running brake test provisions of 49 CFR part 238;

* * * * *

24. Section 240.307 is amended by revising paragraphs (a) and (j) introductory text to read as follows:

§ 240.307 Revocation of certification.

(a) Except as provided for in § 240.119(e), a railroad that certifies or recertifies a person as a qualified locomotive engineer and, during the period that certification is valid, acquires information regarding violations of § 240.117(e) or § 240.119(c) of this chapter, 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.

* * * * *

(j) The railroad shall place the relevant information in the records maintained in compliance with § 240.309 for Class I (including the National Railroad Passenger Corporation) and Class II railroads, and § 240.215 for Class III railroads if sufficient evidence meeting the criteria provided in paragraph (i) of this section, becomes available either:

* * * * *

25. Section 240.309 is amended by revising paragraphs (a) and (e)(3) to read as follows:

§ 240.309 Railroad oversight responsibilities.

(a) No later than March 31 of each 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 locomotive engineers during the prior calendar year.

* * * * *

(e) * * *

(3) Incidents involving noncompliance with the procedures for the safe use of train or engine brakes when the procedures are required for compliance with the Class I, Class IA, Class II, Class III, or transfer train brake test provisions of 49 CFR part 232 or when the procedures are required for compliance with the class 1, class 1A, class II, or running brake test provisions of 49 CFR part 238;

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Appendix A to Part 240 [Amended]

26. Appendix A to part 240—Schedule of Civil Penalties is amended by removing the entries for sections 240.203(a) through (a)(3); redesignating the entries for sections 240.203(b) through 240.203(b)(4) as 240.203(a) through (a)(4); redesignating the entries for sections 240.203(c) through (c)(3) as 240.203(b) through (b)(3); and redesignating the entry for section 240.205(d) as 240.205(b) as follows:

Appendix D to Part 240 [Amended]

27. Appendix D is amended by removing the last paragraph.

Issued in Washington, DC, on December 23, 2008.

Clifford C. Eby,

Acting Administrator.

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