DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 240

[FRA Docket No. RSOR–9, Notice 10]

RIN 2130–AA74

Qualifications for Locomotive Engineers

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: In January 1997, FRA convened a working group comprised of rail industry and labor representatives to recommend revisions to FRA's requirements for the qualification and certification of locomotive engineers (49 CFR Part 240). The working group examined data, discussed the successes and failures of the current rule, and debated how to improve the regulations over a ten month period. This notice of proposed rulemaking (NPRM) contains miscellaneous proposed amendments derived from those working group meetings. In particular, the FRA proposes to: Improve the decertification process; clarify when certified locomotive engineers are required to operate service vehicles; and address the concern that some designated supervisors of locomotive engineers are insufficiently qualified to properly supervise, train, or test locomotive engineers.

DATES: Written comments concerning this rule must be received no later than November 23, 1998. Comments received after that date will be considered to the extent possible without incurring additional expense or delay.

Requests for a public hearing must be made by October 22, 1998. Any person interested in requesting a hearing should contact Ms. Renee Bridgers, Docket Clerk, at (202) 493–6030 or submit a written request to the address shown below.

ADDRESSES: Written comments (three copies) concerning this rule should be submitted to Ms. Renee Bridgers, Docket Clerk, Office of Chief Counsel, FRA, 400 Seventh Street S.W., Mail Stop 10, Washington, D.C. 20590. Persons desiring to be notified that their written comments have been received by FRA should submit a stamped, self addressed, postcard with their comments. The Docket Clerk will indicate on the postcard the date on which the comments were received and will return the card to the addressee. Written comments will be available for examination during normal business hours both before and after the closing date for comments in Room 7051 at 1120 Vermont Avenue, NW, Washington, D.C. 20005. All hand deliveries should be made to the Seventh Street address.

In the very near future, FRA's docket system will be integrated with the centralized DOT docket facility which will enable the public to view all documents in a public docket through the Internet. At that time, all comments received in this proceeding will be transferred to the central docket facility and all subsequent documents relating to this proceeding will be filed directly in, and be available for inspection through, the centralized docket system. A notice of the docket system change with complete filing and inspection information will be published in the **Federal Register** at the appropriate time.

FOR FURTHER INFORMATION CONTACT: John Conklin, Operating Practices Specialist, Office of Safety Assurance and Compliance, FRA, 400 Seventh Street S.W., Mail Stop 25, Washington, D.C. 20590 (telephone: 202–493–6318); Alan H. Nagler, Trial Attorney, Office of Chief Counsel, FRA, 400 Seventh Street, S.W., RCC–11, Mail Stop 10, Washington, D.C. 20590 (telephone: 202–493–6049); or Mark H. McKeon, Regional Administrator, 55 Broadway, Cambridge, MA 02142 (telephone: 617–494–2243).

SUPPLEMENTARY INFORMATION:

I. Statutory Background

Section 4 of the Rail Safety Improvement Act of 1988 (''RSIA''), Pub. L. 100–342, 102 Stat. 624 (June 22, 1988), later amended and recodified by Pub. L. 103–272, 108 Stat. 874 (July 5, 1994), requires that FRA issue regulations to establish any necessary program for certifying or licensing locomotive operators. This statutory requirement was adopted in the wake of an Amtrak/Conrail accident at Chase, Maryland which was caused by a failure in human performance. Congress thus determined the existence of a safety need for regulations concerning the qualifications of engineers.

In addition to the general need for regulations, Congress required that certain subject areas be addressed within those regulations. Now codified at 49 U.S.C. § 20135, the amended statute currently provides in pertinent part as follows:

(a) General.—The Secretary of Transportation shall prescribe regulations and issue orders to establish a program requiring the licensing or certification, after one year after the program is established, of any operator of a locomotive.

(b) Program requirements.—The program established under subsection (a) of this section—

(1) shall be carried out through review and approval of each railroad carrier's operator qualification standards;

(2) shall provide minimum training requirements;

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

(4) except as provided in subsection (c)(1) of this section, shall require consideration, to the extent the information is available, of the motor vehicle driving record of each individual seeking licensing or certification, including—

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

(B) any conviction within the prior 5 years of an offense described in section 30304(a)(3)(A) or (B) of this title;

(5) may require, based on the individual's driving record, disqualification or the granting of a license or certification conditioned on requirements the Secretary prescribes; and

(6) shall require an individual seeking a license or certification—

(A) to request the chief driver licensing official of each State in which the individual has held a motor vehicle operator's license within the prior 5 years to provide information about the individual's driving record to the individual's employer, prospective employer, or the Secretary, as the Secretary requires; and

(B) to make the request provided for in section 30305(b)(4) of this title for information to be sent to the individual's employer, prospective employer, or the Secretary, as the Secretary requires.

(c) Waivers.—(1) The Secretary shall prescribe standards and establish procedures for waiving subsection (b)(4) of this section for an individual or class of individuals who the Secretary decides are not currently unfit to operate a locomotive. However, the Secretary may waive subsection (b)(4) for an individual or class of individuals with a conviction, cancellation, revocation, or suspension described in paragraph (2)(A) or (B) of this subsection only if the individual or class, after the conviction, cancellation, revocation, or suspension, successfully completes a rehabilitation program established by a railroad carrier or approved by the Secretary.

(2) If an individual, after the conviction, cancellation, revocation, or suspension, successfully completes a

rehabilitation program established by a railroad carrier or approved by the Secretary, the individual may not be denied a license or certification under subsection (b)(4) of this section because of—

(A) a conviction for operating a motor vehicle when under the influence of, or impaired by, alcohol or a controlled substance; or

(B) the cancellation, revocation, or suspension of the individual's motor vehicle operator's license for operating a motor vehicle when under the influence of, or impaired by, alcohol or a controlled substance.

(d) Opportunity for hearing.—An individual denied a license or certification or whose license or certification is conditioned on requirements prescribed under subsection (b)(4) of this section shall be entitled to a hearing under section 20103(e) of this title to decide whether the license has been properly denied or conditioned.

(e) Opportunity to examine and comment on information.—The Secretary, employer, or prospective employer, as appropriate, shall make information obtained under subsection (b)(6) of this section available to the individual. The individual shall be given an opportunity to comment in writing about the information. Any comment shall be included in any record or file maintained by the Secretary, employer, or prospective employer that contains information to which the comment is related.

II. Regulatory Background

One year and a half after the passage of the RSIA, FRA published an NPRM which proposed a certification program for locomotive operators. 54 FR 50890 (Dec. 11, 1989). FRA noted that in the preamble to the final rule that some of the comments received in response to this NPRM suggested ''significant misunderstanding of the proposal.'' 56 FR 28228, 28229 (June 19, 1991). These misunderstandings and the appropriateness of the approach were addressed thoroughly in the final rule's preamble. 56 FR 28228, 28229–30 (June 19, 1991).

The final rule establishing minimum qualification standards for locomotive engineers is a certification program, not a licensing program. In summary, the rule requires railroads to have a formal process for evaluating prospective operators of locomotives and determining that they are competent before permitting them to operate a locomotive or train. The procedures require that railroads: (1) Make a series of four determinations about a person's competency; (2) devise and adhere to an FRA-approved training program for locomotive engineers; and (3) employ standard methods for identifying qualified locomotive engineers and monitoring their performance. At the time of publication, FRA noted that the agency ''is adopting this regulation to minimize the potentially grave risks posed when unqualified people operate trains.'' 56 FR 28228 (June 19, 1991).

In 1993, less than two years after the publication of the final rule, an interim final rule was promulgated ''in response to petitions for reconsideration and requests for clarification.'' 58 FR 18982 (Apr. 9, 1993). Some of the issues addressed in this rule included: (1) The application of the rule to service vehicles which could potentially function as a locomotive or train; (2) the application of the rule to certain minimal, incidental and joint operations; (3) the application of the rule to events involving operational misconduct by a locomotive engineer; (4) the application of the rule to current railroad practices for storing data electronically; (5) the application of the rule to events involving testing and evaluation of a locomotive engineer's knowledge or skills; (6) the application of the procedural provisions of the rule to events involving denial, suspension and revocation of certification; and (7) technical changes to correct minor errors in the rule text. FRA did not provide additional notice and request for public comment prior to making the amendments contained in this interim final rule. ''FRA concluded that such notice and comment were impractical, unnecessary and contrary to the public interest since FRA is, for the most part, only making minor technical changes in response to requests for reconsideration of issues that were previously the subject of detailed notice and extensive comment in the development of the initial final rule in this proceeding.'' 58 FR 18982, 19002 (Apr. 9, 1993). In addition, FRA stated that delay in the effective implementation of this interim rule could result in the diversion of significant resources by all persons and entities effected by this rule. Meanwhile, this interim final rule guaranteed a full opportunity to comment on the amendments.

In 1995, after approximately four years and four months had passed since the initial final rule, FRA issued a second interim final rule. This second interim final rule contained minor modifications that clarified existing procedural rules applicable to the administrative hearing process; a series of changes made to provide for omitted procedures; and changes to correct typographical errors and minor ambiguities that had been detected since the rule's issuance. 60 FR 53133 (Oct. 12, 1995). Since the Administrative Procedure Act, specifically 5 U.S.C. § 553(b)(3), provides that no notice and comment period is required when an agency modifies rules of internal procedure and practice, FRA issued this regulation without provision of such a period of comment prior to its adoption. 60 FR 53133, 53135 (Oct. 12, 1995). However, FRA did provide for a 30 day comment period subsequent to the publication of this interim final rule and stated that any comments received would be considered to the extent practicable.

III. The Railroad Safety Advisory Committee

In 1994, FRA established its first formal regulatory negotiation committee to address roadway worker safety. This committee successfully reached consensus conclusions and recommended an NPRM to the Administrator, persuading FRA that a more consensual approach to rulemaking would likely yield more effective, and more widely accepted, rules. Additionally, President Clinton's March 1995 Presidential Memorandum titled ''Regulatory Reinvention Initiative'' directed agencies to expand their efforts to promote consensual rulemaking. FRA therefore decided to move to a collaborative process by creating a Railroad Safety Advisory Committee (RSAC or the Committee) pursuant to the Federal Advisory Committee Act (Pub. L. 92–463).

RSAC was established to provide recommendations and advice to the Administrator on development of FRA's railroad safety regulatory program, including issuance of new regulations, review and revision of existing regulations, and identification of non-regulatory alternatives for improvement of railroad safety. RSAC is comprised of 48 representatives from 27 member organizations, including railroads, labor groups, equipment manufacturers, state government groups, public associations, and two associate non-voting representatives from Canada and Mexico. The Administrator's representative (the Associate Administrator for Safety or that person's delegate) is the Chairperson of the Committee. The revisions proposed in this NPRM originated from the deliberations of RSAC.

At an RSAC meeting that began on October 31, 1996 and ended on November 1, the Committee agreed to take on the task of proposing miscellaneous revisions to the

regulations addressing Locomotive Engineer Certification (49 CFR Part 240). See 61 FR 54698 (Oct. 21, 1996). The Committee members delegated responsibility for creating a proposal to a working group consisting of the members' representatives. The Qualification and Certification of Locomotive Engineers Working Group (Working Group or Group) met for seven week-long meetings prior to submitting the Working Group's proposal to the Committee.

Considering the temporary nature of the two interim final rules and the thorough review of the regulation provided for in this rulemaking process, the two previously issued interim final rules shall be made final when the following proposed rule is published as a final rule. Of course, the amendments proposed here would govern any conflicts with the previously published interim final rules when published as a final rule.

On May 14, the Committee recommended that the FRA Administrator publish the Working Group's consensually reached effort as a proposed rule. Simultaneously, the Committee recognized that the proposal contains some suggested amendments that may be further improved by being subject to more debate. In order to address these concerns and in keeping with the established RSAC process, ''[f]ollowing issuance of a proposed rule, FRA requests the RSAC to assist FRA in considering comments received; [w]ith respect to either a proposed or final rule, FRA may schedule one or more meetings of the RSAC during which information and views are received from other interested parties.'' FRA's ''The RSAC Process'' (Mar. 27, 1996). In conformity with RSAC's practice, FRA would expect that this task of resolving any remaining details would be performed by the Working Group on behalf of the RSAC regardless of whether these details are raised by RSAC members themselves or in comments from ''other interested parties.''

IV. The Qualification and Certification of Locomotive Engineers Working Group

The Working Group is comprised of representatives from the following organizations:

American Public Transit Association (APTA)
American Short Line and Regional Railroad Association (ASLRRA)
Association of American Railroads (AAR)
Brotherhood of Locomotive Engineers (BLE)
Brotherhood of Maintenance of Way Employes (BMWE)
Brotherhood of Railroad Signalmen (BRS)
Burlington Northern Santa Fe (BNSF)
Canadian Pacific Rail System (CP)
Consolidated Rail Corporation (Conrail)
CSX Transportation, Inc. (CSX)
FRA
Florida East Coast Railway Company
Gateway Western Railway
Herzog Transit Service
Illinois Central Railroad
International Brotherhood of Electrical Workers (IBEW)
Long Island Rail Road (LIRR)
Metro-North Commuter Railroad Company
National Railroad Passenger Corporation (Amtrak)
Norfolk Southern Corporation (NS)
Plasser American Corporation
Railway Progress Institute (RPI)
Transportation Communications International Union (TCU)
Union Pacific Railroad (UP)
United Transportation Union (UTU).

In addition to these Working Group members, the National Transportation Safety Board was represented at some of the meetings.

In its Task Statement (Task No. 96–6) to the Working Group, RSAC charged the Group to report back on the following issues: ''All matters related to the revision of the regulations, including data required for regulatory analysis, with the exception of Control of Alcohol and Drug Use issues (See issues paper for October 31-November 1, 1996 meeting in the docket).'' FRA intends to address the alcohol and drug related issues in a future proposed rule.

The Working Group's goal was to produce a preamble and proposed rule text recommending revisions to 49 CFR part 240, that are warranted by appropriate data and analysis. The Working Group's recommendations would then be sent to RSAC for review. FRA would in turn utilize the consensus recommendations of RSAC as the basis for proposed and final agency action whenever possible, consistent with applicable law and Presidential guidance. The Working Group could also recommend specific safety policies and procedures that the Working Group considered relevant but inappropriate for regulatory action.

To accomplish this goal, the Working Group held seven meetings, all of which were open to the public. Summary minutes were taken, and have been placed in a docket available for inspection in Washington, D.C. FRA worked in concert with the Working Group to develop this NPRM.

At a meeting held on May 14, 1998, RSAC voted to recommend that the Administrator issue this document as a proposed Federal regulation and continue the rulemaking procedures necessary to adopt its principles in a final rule. At the conclusion of the comment period on this proposal, FRA will work with the Working Group in developing a final rule.

The section-by-section analysis discusses all of the proposed amendments to this part.

V. Major Issues

Background

In order to facilitate any discussions concerning this rule, FRA presented RSAC and the Working Group with a thirty-four page ''Issues Paper.'' This document was the agency's attempt to provide background information, unanswered questions, and the pros and cons of possible ''options for consideration'' for all of the issues FRA had identified as areas for reconsideration. The tone of the ''Issues Paper'' was objective and contemplated both dramatic and subtle changes to the regulation.

By the end of the Working Group's first meeting, the Group had created its own list of topics to be discussed at future meetings. At that first meeting, twenty-three issues were identified and set out in an agenda. By the end of the sixth meeting, the Working Group had added five (5) more topics to the agenda. This agenda was challenging, even more so since many of these topics contained multiple sub-issues. The following is a list of the final twenty-eight topics:

1. Modification of the Decertification Provisions to Clarify Railroad Discretion.
2. Modification of the Provisions of § 240.117 to Refine the Operational Misconduct Events that can cause Decertification, including Decertification Rights for Defective Equipment.
3. Permit Alternate Responses to Operational Misconduct Events.
4. Should Operational Tests Result in Decertification.
5. Ways to Improve FRA's Direct Control Over Operational Misconduct.
6. Servicing Track Operations.
7. Should Operational Experience be a Prerequisite for Designated Supervisors of Locomotive Engineers.
8. Use of Contractors as Designated Supervisors of Locomotive Engineers.
9. Accommodating New Railroads—New Territories.
10. Conductor Pilots versus Engineer Pilots.
11. Class 1 Railroads' Acceptance of Class 3 Railroads' Certification.

12. Electronic Data Storage.
13. Improving the Dispute Resolution Procedures.
14. A Person's Right to Exercise Seniority in Another Craft.
15. Reimbursement for Monetary Losses Due to a Railroad's Improper Action Under Part 240, Dispute Resolution Procedures.
16. Requested Ban for Consecutively Running of Part 240 Decertification and Disciplinary Punishments Periods.
17. Data Required to be on Certificates.
18. Reviewing the Hearing and Visual Acuity Standards.
19. Class of Service.
20. Enforcement of Regulations.
21. Review Timing Constraints as Well as Requirement for State and NDR Checks Contained Within Regulation 49 CFR 240.111, 240.217 and 240.113.
22. Supplemental Certification of Tenant Railroad Engineers (49 CFR 240.225 and 240.229).
23. Application of the Rule to Certain Service Vehicles.
24. Modify or Eliminate NDR Checks.
25. § 240.107 Proposal to Modify the Definition of Locomotive Servicing Engineer to Permit Them to Move Sand Cars, Air Repeater Cars, Locomotive Diesel Fuel Cars, etc.
26. Proposal to Lengthen the Certification Period from 3 Years to 5 Years.
27. § 240.7 Proposal to Specifically Exempt Computer Controlled/Remote Controlled Hump Locomotive Operations From part 240.
28. Alleged Conflict Between § 240.221(c) and SA 96–05, Regarding the Identification of Qualified Persons.

In the absence of any proposed changes, it can be assumed that the Working Group consensus was to recommend no change concerning the specific subject. The Working Group recommended and FRA is proposing to make changes on six major topics. A discussion of each of these major topics follows.

A. Application of the Rule to Certain Service Vehicles

Since the rule's inception, there has been profound concern over whether certain service vehicles (or ''specialized roadway maintenance equipment'' as referred to in this proposed rule) should be considered locomotives for the purposes of this rule, and in 1993 FRA promised to issue a notice of proposed rulemaking on this issue. 58 FR 18982, 18983 (Apr. 9, 1993). The definition of a locomotive found in § 240.7 of the final rule is sufficiently broad so that the rule would require certified operators at the controls of vehicles that are deemed locomotives for the purposes of FRA's locomotive safety standards. See 49 CFR part 229. However, in response to petitions filed by the AAR and Sperry Rail Services Incorporated (Sperry), FRA deferred its decision on whether to insist that certified engineers operate four types of vehicles that fit within that previous definition of a locomotive but which are commonly considered ''service vehicles.''

The basis for the deferment was thoroughly explained within the preamble of the interim final rule. 58 FR 18982, 18983 (April 9, 1993). Within that preamble, FRA identified four general types of service vehicles that are different from the types of vehicles traditionally considered locomotives. There is no question that the rule requires qualified and certified locomotive engineers to operate the types of vehicles traditionally considered locomotives. The proposed amendments to the rule attempt to resolve the issue of when other vehicles that may perform the same function as a traditional locomotive are required to be operated exclusively by certified locomotive engineers.

During the Working Group's discussions, the question of FRA's legal authority was raised. FRA's position is that the legislative history of the Rail Safety Improvement Act of 1988 reflects that Congress did not intend to limit the certification rule to persons who operate traditional locomotives. Instead, the legislative history reflects that (1) the statute does not define ''locomotive;'' (2) Congressional committee reports and floor speeches do not explicitly define ''locomotive;'' and, (3) in a joint statement, managers on the part of the House and the Senate agreed that the intent of the bill was to ''require the Secretary [of Transportation] . . . to issue rules, regulations, standards, and orders concerning minimum qualifications for the operators of trains.'' House Conference Report No. 100–637, at 21 (May 19, 1988) (emphasis added). As a result of these findings, FRA does not believe that the statute or the legislative history precludes the agency from regulating the operators of service vehicles that have operational characteristics similar to those of a train.

Given FRA's authority, one follow-up question is whether there is a need for certification of the operators of these vehicles as a general matter. To a great extent, the Working Group's opinion is influenced by the publication of the recently enacted Roadway Worker Protection rule. 61 Fed. Reg. 65959 (Dec. 16, 1996) (codified at 49 C.F.R. 214). The Working Group members recognize that the Roadway Worker Protection rule requires the training and qualification in on-track safety for operators of specialized roadway maintenance equipment. Hence, it would be duplicative, to some degree, to require that these operators of specialized roadway maintenance equipment also be certified as locomotive engineers.

Between 1989 and 1993, there were 188 injuries and five (5) fatalities as a result of workers being struck by maintenance-of-way (MOW) equipment. A review of accidents in which roadway workers were struck indicates that roadway workers have been struck by MOW equipment during the performance of track and structures construction and maintenance performed jointly by ground employees and heavy on-track machinery. FRA expects that implementation of the Roadway Worker Protection rule will prevent at least half of such potential casualties. The probability of occurrence associated with the remaining casualties would not likely be affected by requiring exclusive operation by certified locomotive engineers. Based upon the history of roadway worker casualties, virtually all of these accidents occur at low speeds where train handling is not an issue.

After considering training, the Working Group concentrated on categorizing the vehicles into two classes of service: (1) specialized roadway maintenance equipment, and (2) dual purpose vehicles. The Working Group could not document an accident history or any other reason to require certified operators of specialized roadway maintenance equipment when these vehicles are used ''in conjunction with roadway maintenance and related maintenance of way functions, including traveling to and from the work site.'' § 240.104(a). The sole purpose of this type of vehicle is to perform its intended MOW function.

On the other hand, dual purpose vehicles, by definition, can be used to perform an MOW function and haul cars. Thus, the need to have certified operators of these dual purpose vehicles is genuine where the vehicle is operating more like a locomotive than a service vehicle. The need is not a universal one and the Working Group did not see a need for a dual purpose vehicle to be operated by a certified locomotive engineer when the following conditions are met: (1) The vehicle is operated in conjunction with roadway maintenance and related MOW functions; (2) the vehicle's movement is being conducted ''under the authority of rules designated by the railroad for

maintenance of way equipment [and] under the direct supervision of an employee trained and qualified in accordance with § 214.353 of this chapter, which provides Exclusive Track Occupancy for the roadway equipment with respect to trains;'' (3) the person operating the vehicle has received adequate training pursuant to safety laws regulating roadway workers; and (4) the vehicle has met a minimum standard for operative air brakes.

None of the Working Group members submitted statistics showing that when dual purpose vehicles are being used for maintenance purposes they are causing accidents or incidents that could be prevented by requiring that such vehicles be operated by certified locomotive engineers. Meanwhile, the Working Group did identify one potential problem. One of the proposed conditions for a non-certified locomotive engineer to operate a dual purpose vehicle that will be hauling cars involves a requirement that ''not less than 85% of the total cars designed for air brakes shall have operative air brakes.'' § 240.104(b)(4). The Working Group's intent is to make sure that when a dual purpose vehicle is hauling cars, to or from a work site, under the direction of qualified supervision, and operated by a trained roadway worker, the air brakes on the consist can stop the train within the normal stopping distance for that equipment. This requirement addresses safety concerns raised by a fatal accident involving a burro crane hauling cars from a work site on November 5, 1996 which did not have brake pipe hoses connected between the locomotive crane and the three freight cars being hauled.

FRA wants to be clear that whenever a dual purpose vehicle is hauling cars in a train movement, regardless of whether the train is traveling to or from a work site, it must comply with the safety regulations found in part 232 of this chapter. These proposed revisions to part 240 are not intended to change this requirement, rather the proposed rule is merely aimed at determining when a person who is not a certified locomotive engineer is able to operate a train under certain limited conditions. That is, it is within a railroad's discretion as to whether a locomotive engineer or other person, pursuant to § 240.104(b)(4), should operate a dual purpose vehicle hauling cars; however, regardless of whether the operator is a certified locomotive engineer or not, a railroad is required to operate, inspect and equip all trains in accordance with the requirements regarding power brakes contained in part 232 of this chapter. Thus, while this proposed part 240 exception provides railroads with the discretion to use other than certified locomotive engineers under certain limited circumstances, the railroads would not be granted an exception from complying with part 232 of this chapter.

We would appreciate comments to learn how others perceive the ''85% rule'' found in § 240.104(b)(4). FRA wishes to hear whether commenters believe this rule is necessary. We are also interested to know whether it is under- or over-inclusive. One alternative may be to change this paragraph to read ''any person who operates a dual purpose vehicle which is: (iv) hauling cars and which dual purpose vehicle has been operated, inspected and equipped in accordance with the requirements regarding power brakes contained in part 232 of this chapter.''

One of the components of the Working Group's consensus involves how to address the treatment of emerging technologies within the regulatory arena. That is, manufacturers of service vehicles indicate that the industry is requesting equipment that can perform a specific MOW task and haul an increasing number of cars. As these vehicles improve, some railroads may decide to take advantage of the vehicles' ability to haul cars—even to the exclusion of their MOW function. Without a regulatory mechanism to address these dual purpose vehicles, FRA is concerned that some railroads might seek to use the dual purpose vehicle as a functioning locomotive to avoid the expense of having a certified locomotive engineer at the controls. Some Working Group members, including FRA, believe that such a use would circumvent the legislative intent behind the statute requiring the rule and add an unacceptable safety risk.

B. Qualifications for Designated Supervisors of Locomotive Engineers

The role of the Designated Supervisor of Locomotive Engineers (DSLE) is critical to the safety success of this rule. This role is twofold. One, the DSLE makes the final determination that a locomotive engineer is qualified to safely operate a train. Two, after a person is certified, a DSLE is responsible for qualifying engineers on the physical characteristics of any additional territories the engineer will need to operate over.

Some members of the Working Group, including FRA, are concerned with whether the current qualifications for DSLEs are too lenient. For instance, the rule does not make operational experience a prerequisite. FRA has noted that some railroads have been seeking to establish systems in their implementation programs that do not assure that supervisors will be experienced individuals. Moreover, since implementation of the original rule, FRA has investigated several instances in which there is some evidence that railroads designated persons to be supervisors who have only a minimum amount of operational experience. Although FRA is able to obtain corrective action in those instances where there is evidence that less than fully qualified persons are being selected, the case-by-case approach to this issue is not the most effective way to resolve the matter.

From this starting position, the Working Group considered whether § 240.105 should be amended to specify a minimum length of time that a person must serve as a locomotive engineer before that person would meet the criteria for becoming a designated supervisor of locomotive engineers. For example, one possible solution is to amend § 240.105 so that it includes a requirement that all designated supervisors of locomotive engineers have a minimum of three (3) years of experience operating locomotives. In conjunction with this proposal, the Working Group's review considered whether a minimum number of hours actually operating a train each year should be articulated. One advantage of such an experience requirement might be that DSLE candidates would benefit from real world experience. In fact, some labor and management Working Group members supported a minimum amount of experience requirement since they believe that this type of experience is critical to the development of an engineer's knowledge and skill.

Conversely, other Working Group members point out that the rule should give railroads greater discretion since there is no clear safety rationale based on accident statistics for an experience requirement. These Working Group members state that the current rule assures that persons selected to be DSLEs will be competent since it requires that candidates for supervisor must be certified engineers. It also requires that candidates demonstrate that they have the knowledge, skill, and ability to be effective supervisors of engineers; these criteria include the capacity to effectively test, evaluate, and prescribe appropriate remedial action for noted deficiencies. In the end, the Working Group did not reach a consensus on whether FRA should propose an experience requirement.

As the proposed modifications to § 240.105(b)(4) reflect, the Working Group's discussion disclosed that an

underlying concern was the varying degree to which supervisors are familiar with the physical characteristics of the territories in which they work. Given this universal concern, the Working Group readily agreed to a compromise proposal which would require those persons who are DSLEs to be qualified on the physical characteristics of the portion of the railroad on which they are supervising. As specifically addressed in the proposed rule, railroads are required to address how they intend to implement the qualification of their DSLEs on physical characteristics and include those procedures in their certification programs.

This compromise addresses similar safety concerns to those raised by the lack of operational experience. That is, allegations are raised that some DSLEs could not properly supervise, train, or test the locomotive engineers they supervise without having an engineer's level of education regarding the territory over which they are performing these supervisory duties. This might be especially true when a supervisor is transferred from a relatively flat/level territory to one which contains steep grades. [Steep grade territory would require a greater degree of train handling ability.] The proposed rule would satisfy the concern that, at a minimum, a DSLE who changes territories to a territory presenting tougher train handling challenges would receive an engineer's level of training on the physical characteristics of the new territory. Furthermore, FRA notes that § 240.127(b) already requires that certified locomotive engineers must have ''the skills to safely operate locomotives and/or trains, including the proper application of the railroad's rules and practices for the safe operation of locomotives or trains, in the most demanding class or type of service that the person will be permitted to perform.'' Since it is presumed that a DSLE in a territory would be permitted to perform train handling service in that territory, as well as be prepared to offer remedial advice for noted deficiencies in the skill level of other locomotive engineers, a DSLE would need training that is commensurate with the difficulty of that territory.

The Working Group's discussions recognized that the proposed requirement for DSLEs to be qualified on the physical characteristics of territory over which they supervise may conflict with other findings made by the Group. Consequently, the Working Group discussed these conflicts and agreed to a solution. A detailed discussion of this concern and the proposed solution is found in the section-by-section analysis relating to § 240.127(c)(2).

C. Improving the Dispute Resolution Procedures

FRA had addressed many procedural issues concerning the initial regulation by issuing a second Interim Final Rule. 60 FR 53133 (Oct. 12, 1995). That Interim Final Rule provided improved procedures for the conduct of hearings held in connection with certification of the locomotive engineers pursuant to 49 CFR part 240. It clarified the standards for initial revocation hearings and provides more detailed procedural rules for the review of such decisions within FRA. The intention of this interim measure was to increase the effectiveness and clarity of the provisions involving hearings conducted in connection with the locomotive engineer certification program. From FRA's view, the 1995 interim changes have been successful in achieving their intended goals.

Although FRA has already implemented this Interim Final Rule to improve the clarity of the existing procedures, the agency recognizes that there may be additional procedures that could be clarified or changed that would improve the dispute resolution process located in Subpart E. FRA received two (2) comments in response to this Interim Final Rule, and both comments were distributed to the Working Group for its consideration. One commenter, the AAR, is a member of the Working Group. In summary, the AAR had two concerns. One, AAR stated that by modifying the penalty schedule in Appendix A, FRA has made railroads liable for civil penalties for engineer conduct; ''this would significantly affect and alter the rights of the railroads.'' FRA disagrees that the changes made to the penalty schedule make railroads liable for engineer conduct; instead, FRA's position is that the penalty schedule needed to accurately reflect the existing rule so that it would be clear that railroads would be held responsible for their own conduct when requiring an engineer to exceed certificate limitations. § 240.305(c). Two, the AAR also stated that ''FRA is incorrect in concluding that permitting notice and comment * * *. is 'contrary to the public interest.' '' In hindsight, FRA stands by its reasoning on the denial of notice and comment for the same reasons that were originally provided. That is,

> A number of these changes are critical to the effective implementation of these rules and the delay that notice and comment would cause would be contrary to the public interest in railroad safety. The beginning of a new fiscal year on October 1, 1995, provides some urgency because budgetary constraints will require the use of internal hearing officers on all but emergency matters at the conclusion of Fiscal Year 1995. Moreover, the orderly implementation of part 240 requires prompt revision of its hearing procedures.

60 FR 53133, 53135–36 (Oct. 12, 1995).

The other commenter was a concerned citizen who identifies himself as a consultant to the BLE and as someone who ''has participated in the handling of over two dozen Petitions for Review to FRA's Locomotive Engineer Review Board * * * [and] has served as a consultant or a representative in four administrative hearing cases.'' This commenter was concerned that by eliminating any reference suggesting that an appellate review of the Locomotive Engineer Review Board's (LERB) decision or a railroad's hearing was intended to occur at the administrative proceeding stage, ''the amended rule [would] * * * provide a disincentive for railroads to accord a locomotive engineer, facing potential revocation, due process.'' Furthermore, this citizen was concerned that ''the amended rule would essentially render the LERB impotent as an arbiter in certification disputes.''

In response to these comments and the agency's attempt to revisit the whole issue, FRA raised seven (7) options for consideration in the ''Issues Paper'' presented to the Committee and the Working Group. In addressing this issue, the Working Group formed a Task Force consisting of a some interested Group members to explore different options. After exploring the alternatives, the Working Group accepted the Task Force recommendations that the current system is the best choice, assuming that the petitions to the LERB and the requests for administrative proceedings are handled promptly.

D. Revisiting the Standards for Hearing and Vision

Since FRA has not modified the standards for hearing and visual acuity since publishing the final rule in 1991, FRA suggests that sufficient time has passed to evaluate the effectiveness of this rule and determine whether any modifications are necessary. For instance, several commenters to the 1989 proposed rule raised concerns that were addressed in the preamble to the final rule. 56 FR 28228, 28235–36 (June 19, 1991). Based on these comments, FRA made changes to the standards to allow railroads to use some discretion to permit individualized assessments of acuity and allow greater freedom in

selecting ways to accomplish FRA's goals. Meanwhile, FRA rejected comments that suggested different acuity standards would be better or that no action on this subject was necessary because of existing railroad practices.

When FRA suggested that the Committee and the Working Group review these standards, the agency was aware of only a handful of people dissatisfied with the rule. This dissatisfaction received the following mention in FRA's ''Issues Paper'' presented to the RSAC:

> Meanwhile, FRA is aware of at least two or three persons who were dissatisfied with the way in which the rule was enforced to their detriment. In addition, FRA is aware of at least one instance in which an engineer was denied certification by one railroad due to the inability to recognize and distinguish between the colors of signals and yet was certified by another railroad.

Subsequent to the submission of this issue to the Working Group, the National Transportation Safety Board (NTSB) issued a report determining that a fatal train accident was caused by a train engineer's inability to perceive a red block signal. The following is a portion of the executive summary taken from the NTSB's Railroad Accident Report—Near Head-On Collision and Derailment of Two New Jersey Transit Commuter Trains near Secaucus, New Jersey, February 9, 1996 (NTSB/RAR–97/01):

> On February 9, 1996, about 8:40 a.m., eastbound New Jersey Transit (NJT) commuter train 1254 collided nearly head-on with westbound NJT commuter train 1107 near Secaucus, New Jersey. About 400 passengers were on the two trains. The engineers on both trains and one passenger riding on train 1254 were killed in the collision.
>
> The National Transportation Safety Board determines that the probable cause of NJT train 1254 proceeding through a stop indication and striking another NJT commuter train was the failure of the train 1254 engineer to perceive correctly a red signal aspect because of his diabetic eye disease and resulting color vision deficiency, which he failed to report to New Jersey Transit during annual medical examinations. Contributing to the accident was the contract physician's use of an eye examination not intended to measure color discrimination.

As a result of its investigation, the NTSB made two (2) recommendations to FRA. The first recommendation is numbered R–97–1 and recommends that FRA:

> [r]evise the current color vision testing requirements for locomotive engineers to specify, based on expert guidance, the test to be used, testing procedures, scoring criteria, and qualification standards.

The second recommendation is numbered R–97–2 and recommends that FRA:

> [r]equire as a condition of certification that no person may act as an engineer with a known medical deficiency, or increase of a known medical deficiency, that would make that person unable to meet medical certification requirements.

An NTSB representative met with the Working Group and presented these recommendations and the NTSB's report upon which the recommendations are based.

Upon receipt of the NTSB's recommendations, a task force consisting of Working Group members representing a cross-section of the Group was formed to address the NTSB's recommendations. The task force's efforts were initially impeded because none of the task force members had the medical expertise necessary to make an informed decision. In order to address NTSB recommendation R–97–1 effectively, the task force relied heavily on the resources of one Working Group member, the AAR. The task force scheduled a meeting after securing medical opinions from those currently administering the regulation and arranging for other medical experts to attend that meeting. That task force meeting proved to be productive, especially due to the participation of medical officers from the major railroads, the Federal Aviation Administration (FAA), and the NTSB. Although these medical officers could not vote on the proposals, their counsel was greatly appreciated and carried great weight. The information obtained during these contacts was used to formulate changes both to § 240.121 and formed the basis for the proposed addition of Appendix F. The details of the task force recommendations, which FRA adopted, can be found in the proposed amendments to paragraphs (b), (c)(3), and (e) and which address NTSB recommendation R–97–1.

In working through possible responses to the concern identified by NTSB recommendation R–97–2, the Working Group considered two possible alternative amendments that could work together with the change being proposed in this notice; however, in the end, the Working Group decided not to include these alternative amendments as part of the proposed rule. One of the failed amendments was a self estoppel or disbarment requirement that would obligate the engineer to avoid service as an engineer if that person knew or had reason to know of any medical condition that would make that person unable to operate a locomotive in a safe manner. Similarly, a self reporting scheme was considered. The reporting obligation would have been triggered whenever the engineer develops a medical condition that could reasonably be expected to adversely affect his or her ability to comply with this part or detects a significant change in the severity of such a known medical condition. The engineer would have been required to report the new medical condition or the change in a known medical condition to the employing railroad's medical examiner along with a duty to take appropriate tests (such as those set forth in Appendix F) as the medical examiner may have required.

After serious consideration, the Working Group considered these proposed alternatives to be flawed and generally were too vague to be fairly enforced. They do not give the individual engineer adequate notice of the types of medical condition that would require reporting and declining to operate a train. Reasonable people can and do differ concerning whether a given condition of a given severity would make it unsafe to operate a train. Since FRA has not been able to either (1) demonstrate that accidents or fatalities are occurring because engineers with particular serious medical conditions are operating trains, or (2) define with any particularity the medical conditions about which we are concerned, it would be unreasonable to require locomotive engineers to make subjective medical judgments that may disqualify them from earning a living.

Despite running into the above explained roadblock, the Working Group agreed that the factual basis for NTSB's recommendations contained reasons for concern. The Group then set out on a different tack. The premise of this new approach was to find an objective way to measure a deteriorating medical condition serious enough to require a locomotive engineer take affirmative action and notify the railroad. The duty to notify the railroad was narrowed to include only medical conditions affecting vision and hearing since those were the only medical criteria for certification. The Working Group's consensus on this issue is found in proposed § 240.121(f). As noted above, additional background information on the specifics of these proposals can be found in the section-by section analysis.

No parallel concerns have been raised concerning hearing acuity and its testing procedures. However, the Working Group considered whether changes were necessary to update the hearing requirements. Based on the advice of the medical experts attending the task force

meeting, it was determined that no recommendations for change were necessary.

FRA notes that it has taken the interim action of publishing a Safety Advisory that is based on RSAC recommendations made on May 14. See 63 FR 29297 (May 28, 1998). Safety Advisory 98–1 addresses the vision standards of certified locomotive engineers in order to reduce the risk of accidents arising from engineers having impaired vision. We firmly believe that the RSAC recommendations reflect the current best thinking of the regulated community and that broad sharing of such information can be of assistance to medical examiners who are responsible for administering the existing regulation.

E. Reviewing the Requirements for Consideration of Unsafe Conduct as a Motor Vehicle Operator

Some Working Group members raised the issue of whether the proposed rule should modify or eliminate the consideration of unsafe conduct as a motor vehicle operator, as would be found in the National Driver Register (NDR) and individual state motor vehicle department records. Those requirements originate from the statute requiring the licensing or certification of locomotive operators. See Statutory Background section, supra. FRA went to great lengths to explain the procedures for obtaining and evaluating motor vehicle driving record data in Appendices C and D to Part 240.

Some Working Group members wanted to eliminate motor vehicle data requests from the rule. The reasons for doing so are diverse. One issue is whether the motor vehicle data are useful as a predictor of railroad employment conduct. The experience of some Working Group members is that the data are useful in such a small percentage of cases that the costs far exceed the benefits. In addition, some Working Group members believe the process is an unnecessary invasion of a person's privacy. Meanwhile, the process of requesting the data can be frustratingly time consuming and unreliable.

Although FRA is empathic to the concerns raised by some Working Group members, the agency believes that eliminating the regulatory provisions concerning the review of motor vehicle data would be contrary to the plain meaning and intent of the statute. After further review, the Working Group members agree that elimination of this data review is not possible given the statutory requirements. Further, the Working Group members recognized that the need to identify potential substance abuse disorders was a primary motivator for the creation of these regulations. Based on these determinations, some Working Group members declared their intent to work towards requesting a statutory change.

Since the Working Group resigned itself to the fact that elimination of the review of motor vehicle driving data was outside the Group's authority, the Group focused on identifying problems with the current system and whether the regulation could be modified to resolve any of those problems. Some Group members noted that it is difficult to comply with the procedures for requesting motor vehicle checks. In particular, they mentioned that these checks require: (1) A notarized signed release from the person; (2) handling by mail only; and (3) a separate request to the State in which the person has a valid motor vehicle license. In some Working Group members' experiences, responses from the States and the NDR could take anywhere from two (2) weeks to several months. Occasionally, responses have been lost or claimed not to have been received. These are serious concerns because any delay in receiving information on potential substance abuse problems could effect safety.

Some Working Group members expressed unhappiness regarding the type and accuracy of the data received from the States and the NDR. It was noted that data received from the NDR on an individual person only advises of a probable match for that engineer in a particular State which may have information on traffic violations. The data do not contain specific information on what type of traffic violation(s) are contained on the state record. The person or the railroad must make a separate request to that State to receive specific information on any violations. Mismatches often occur or after requesting additional State records the information indicates other than alcohol or drug related offenses.

The railroad Working Group members set goals of achieving (1) ''one stop shopping'' for both NDR and State motor vehicle data, (2) simplified request procedures, and (3) accurate data. The other Working Group members agree that these are reasonable requests but that this Group does not have the authority to resolve them. In order to achieve these goals, individual companies, unions and associations plan to contact the National Highway Traffic Safety Administration to discuss what possible improvements can be accomplished and FRA has offered its assistance on these matters.

In an attempt to ease the administrative burden posed by complying with FRA's current regulations concerning motor vehicle data, the Working Group suggested some amendments which FRA is proposing in this notice. In §§ 240.111(a) and (h), the proposal would provide 366 days, as opposed to the current 180 days, for the individual to furnish data on prior safety conduct as a motor vehicle operator. This greater time period should allow for lost or missing requests to be found or resent. It will also provide greater leeway in straightening out potential misinformation.

Further, a new § 240.111(i) is proposed to make sure that railroads receive timely information regarding offenses involving prohibitions on the operation of a motor vehicle while under the influence or impaired by alcohol or a controlled substance. This proposal addresses the concern that by increasing the periods in which individuals have a duty to furnish this information will not affect the timeliness of the information received. The specifics of how this proposal would work can be found in the section-by-section analysis.

F. Addressing Safety Assurance and Compliance

One of the principles of the current rule is that locomotive engineers should comply with certain basic railroad rules and practices for the safe operation of trains or risk having their certification revoked. The rule provides for persons who hold certificates to be held accountable for their improper conduct. The reason for holding people accountable for operational misconduct serves one of the principal objectives of this regulation; that is, by revoking the certificates of locomotive engineers who fail to abide by safe rules and practices, the implementation of the rule is instrumental in reducing the potential for future train accidents.

FRA recommended that the Working Group consider the following five general issues: (1) the degree of discretion accorded railroads in responding to individual incidents; (2) the criteria for the types of operational misconduct events that can trigger revocation of a certificate; (3) the severity of the consequences for engaging in operational misconduct; (4) the value of decertification for violations that occur during operational tests required pursuant to § 240.303; and (5) the effectiveness of FRA's direct control over operational misconduct.

1. Clarifying Railroad Discretion. Prior to the effective date of the 1991 final

rule, railroads regularly applied varying amounts of discretion concerning technical instances of noncompliance, i.e., conduct that does not comply exactly with an operating rule but is unlikely to cause any type of accident. The application of this discretion was often the result of informal procedures with labor organizations representing locomotive engineers. Since the effective date of this regulation, FRA has received numerous inquiries as to whether or not such discretion is permitted by the regulation for technical instances of noncompliance with the decertifiable events specified in § 240.117(e).

Section 240.307(b)(1) provides that it is mandatory for a railroad to suspend a person's certificate when the railroad is in receipt of reliable information indicating that the person is no longer qualified. FRA's purpose in promulgating the rule with this mandatory language was to eliminate railroad discretion, thereby creating uniform enforcement throughout the industry. By eliminating railroad discretion for non-compliance of certain serious operating rules, FRA was trying to avoid uneven enforcement due to favoritism, whether it be from railroad supervisors or labor organizations. In addition, the elimination of discretion prevents railroads and labor organizations from loosely complying with safety laws in return for some economic benefit. Thus, FRA's goal was for all locomotive engineers to be subject to the same decertification events regardless of which railroad employed them.

In addition, FRA's intent was that the decertifiable events specified in § 240.117(e) articulate serious instances of non-compliance, i.e., misconduct of the type that has caused or is likely to cause accidents. If technical instances of non-compliance are occurring which fit the definitions of the decertifiable events specified in § 240.117(e) then the problem may be that these events are defined too broadly. If that is so, the solution may be to further refine these decertifiable events rather than give railroads some kind of limited enforcement discretion.

FRA hypothesizes that if there is perceived uneven enforcement among the railroads due to uneven use of discretion, it may be due to the fact that some railroads have not thoroughly considered the regulatory language in § 240.307. For example, some railroads may consider revocation due to the occurrence of an operational misconduct event, but decide against holding a § 240.307 hearing because the engineer's actions are deemed defensible. The railroad might want to note the incident and the railroad's reasons for not taking further enforcement action in the engineer's file so as to provide a record in defense of a civil money penalty by the agency for failure to withdraw a person from service. *See* § 240.307(a). Other railroads may consistently hold revocation hearings and believe that they must revoke the engineer's certificate if there is a violation of § 240.117(e) regardless of the mitigating factors or defenses. Hence, a question arises as to whether there is suitable railroad discretion already built into the rule which is either under or over-utilized by different railroads.

Based on their consideration of the above information in FRA's ''Issues Paper,'' the Working Group discussed the pros and cons of each option. In doing so, they reached several conclusions about this subject. One conclusion is that uniform enforcement of the rule is an important goal; hence, unbridled railroad discretion would not be in accord with the intent of the rule. A second conclusion is that, under limited and specified circumstances, railroads must consider certain mitigating factors as complete defenses to an alleged violation. The Working Group decided that one of FRA's interpretations should be made an explicit part of the rule since it was clear that some railroads did not understand FRA's position on the subject. That is, certification should not be revoked if an intervening cause prevents or materially impairs a person's ability to comply with the regulation. § 240.307(i)(1). A third conclusion that the Working Group recommends is that those violations of §§ 240.117(e)(1) through (e)(5) that are of a minimal nature and had no direct effect on rail safety should not give cause to revoke a person's certificate. The defenses raised in the second and third conclusions are discussed in further detail within the section-by-section analysis.

In order to ensure the proper application of railroad decisions to forgo revocation based on a defense, the proposal would require a railroad to maintain a record of such decisions. § 240.307(j). FRA could use such records for safety assurance and compliance purposes. The main purposes for reviewing such records are to ensure (1) that decisions are made based on the intent of the rule and (2) that the rule is fairly applied. The fairness requirement involves FRA checking that railroads uniformly apply the rule so that persons similarly situated are similarly treated.

In order to achieve consensus, the Working Group needed to address how to allay the railroad representatives' fears that FRA could impose civil penalties, or take other enforcement action, if FRA judges a railroad to have misapplied these proposed defenses. Some Working Group members representing railroads stated that these proposed concepts are complex and would be applied mainly by non-lawyers. Meanwhile, FRA expressed the need for some enforcement control, otherwise the rule might be so ambiguous as to lead to the unwanted unbridled discretion. The Working Group struck a balance by suggesting that FRA should not take enforcement action for situations in which the railroad makes a good faith determination after a reasonable inquiry. FRA proposes to incorporate that approach in § 240.307(k).

2. *Fine tuning the types of operational misconduct events that can trigger revocation.* FRA has already modified the operational misconduct events listed in § 240.117(e) once since the final rule was promulgated. That modification is contained in the first interim final rule published on April 9, 1993. FRA's changes were necessary to prevent persons from having their certification revoked for certain types of incidents considered too minor to warrant decertification.

Despite these modifications, FRA is aware that some members of the industry are unhappy with the types of events that trigger revocation. In most instances, the complaints are the result of beliefs that the § 240.117(e) cardinal safety rules are either ambiguous or too broad. The Working Group's review of these cardinal safety rules suggests that changes are necessary.

In summary, the Working Group consensus largely advocates adopting previously published interpretations made by FRA in a safety advisory distributed to leaders in the industry known as FRA Safety Advisory—96–02. The Group's consensus is reflected in the proposed modifications to § 240.117(e)(1), (2), (4) and (5).

The one proposed change that is not derived from a previously articulated FRA interpretation involves a modification to the cardinal rule delineating speeding violations. The changes to § 240.117(e)(2) propose the elimination of the phrase ''or by more than one half of the authorized speed, whichever is less,'' and would add a sentence to include violations of restricted speed under certain conditions. Hence, the result is that revocation would no longer be warranted for low speed violations that

occur when a person is not required to operate at restricted speed. For example, a person would no longer risk certificate revocation if the train the person is operating is traveling at 16 to 19 miles per hour (mph) when the maximum authorized speed is 10 mph, and the person is not required to be able to stop the train within one-half the person's range of vision.

The Working Group's decision in making the proposal to eliminate low speed violations from the list of operational misconduct events is based on their own experiences applying the rule. For instance, the Group discussed the difficulties in precision handling at low speeds, especially if the locomotive or train encounters any measurable grade. Another basis for proposing the elimination of this type of speeding violation concerns the admitted inaccuracies of the speed indicators. This issue is also one of fairness to the individual. That is, it does not seem fair to hold a person accountable for operating at 16 mph, when the maximum authorized speed is ten (10) mph, and the regulations only require speed indicators operating at speeds between 10 to 30 mph to be accurate within plus or minus 3 mph. (See § 229.117). Also, a locomotive used as a controlling locomotive at speeds below 20 mph is not required to be equipped with a speed indicator.

In addition, the data do not support a need to continue revoking certificates for low speed violations that occur where restricted speed is not an issue. Between 1991 and 1996, 29 accidents, resulting in three (3) injuries, occurred due to excessive speed between 16 and 19 mph. Sixteen of these accidents involved a violation of restricted speed and would remain decertifiable events under the proposal. Thirteen of these accidents were due to excessive speed, but would no longer be decertifiable events under the proposal. It is important to note that none of the latter group of accidents resulted in any injuries. Many of these accidents were due to harmonic rock which usually occurs between 15 and 20 mph. In general, accidents which occur at such low speeds do not result in casualties. Railroads would retain their right to take disciplinary action in such situations pursuant to § 240.5(d). Furthermore, it would be unfair to apply to these engineers the harsh Federal penalty that is designed for a more serious offense, such as exceeding the maximum authorized speed by more than 10 mph.

3. Adjusting the severity of the consequences for engaging in operational misconduct. Individuals who engage in operational misconduct of the type proscribed in this rule are acting in ways that routinely cause a significant number of train accidents. Denying certificates to those who engage in such conduct both reduces the risk that such individuals will repeatedly engage in such operational misconduct and serves to inspire others to carefully adhere to these critical safety rules. Both factors are intended to help prevent possible future accidents attributable in whole or in part to lack of routine vigilance concerning adherence to critical safety rules by locomotive engineers.

Although FRA's position is that the current system of revocation for operational misconduct is effective, FRA wants to consider whether other methods would be equally or more effective. The consequences for operational misconduct are found in §§ 240.117(g) and (h). Some labor Working Group members requested that the Group explore how additional training of some sort, in addition to or as a substitute for a revocation period, may be considered a suitable alternative. FRA expressed the concern that non-punitive alternatives could result in some engineers taking a more cavalier attitude towards compliance with the regulation. One Working Group member commented that the status quo should be maintained since most locomotive engineers now know and accept the consequences of violations.

Initially, some Working Group members proposed that for a single incident of operational misconduct, a person should receive training only, i.e., no revocation period would be imposed. Some railroad Working Group members objected to this proposal for two basic reasons. One, mandating training would impose a financial burden on a railroad. Second, in at least some situations, additional training would be unnecessary. For example, if a person was recently trained or willfully violated a rule, it might be fruitless to train them again. Furthermore, training alone for a willful offender would not serve to deter future conduct.

The Working Group did not deeply explore radical changes to the current rule. The discussions indicated that the current consequences flowing from operational misconduct were reasonable, but could be improved with some adjustment. FRA raised whether the whole system should be overhauled, e.g., with the implementation of a point system as most states use to implement their individual motor vehicle driver's licensing programs. However, the Working Group consensus is that such drastic changes could be difficult to implement and are not necessary to achieve the intent of the rule. Although the details of how the Working Group's proposal would be implemented are explained in the section-by-section analysis, some general comments concerning how the Group reached consensus may be helpful for those who did not participate in this process.

For instance, the Working Group's proposal includes amending § 240.117(h) so that a person who has completed such evaluation and training could benefit by having the period of revocation reduced by as much as half, as long as the period of revocation initially imposed is one year or less. Although the current rule provides for the same type of railroad discretion for a period of one year, FRA raised to the Working Group the issue of whether it is fair to leave this unfettered discretion with a railroad. That is, the issue raised was whether a person should have the right to request the conditions which would permit the reduction in a period of revocation. The basis for raising this issue was FRA's belief that it is arguable that without such a right, railroads would have the discretion to offer one person a reduction in a revocation period but deny a person similarly situated the same benefit.

After considering this question, the Working Group believes FRA still has a legitimate basis for providing railroads with the discretion to decide when to offer additional training and evaluation in exchange for a reduced revocation period. One reason to provide such discretion is that it is illogical to require railroads to provide evaluation and training when that training is not always beneficial. As discussed earlier, since training is not necessary in every case, a railroad should retain discretion on whether evaluation and training are necessary. To do otherwise would waste railroad and employee resources at their expense. In addition, by declining to reduce a revocation period, a railroad would retain the discretion to enforce a more severe penalty for willful acts or omissions.

The consensus of the Working Group is that the revocation periods were excessive and disproportionate with the nature of the offenses which trigger them. These revised revocation periods were thought by the Group to more accurately reflect the reality of daily railroad operations. They are measured, progressively more stringent, and provide an increased opportunity for mitigation by training. The basic philosophical underpinning is that they are intended to be more remedial than punitive. The goal of this regulation, consistent with the goal of FRA's entire

safety program, is not to emphasize the punishment of employees, but to promote safety by minimizing the likelihood that employees will commit acts or omissions which could have unsafe consequences. FRA will make an annual analysis of which train accidents are identifiable as being caused by the acts or omissions of locomotive engineers. If a nexus can reasonably be established between the modification of the revocation periods and the incipient indicators of an increase in such accidents, FRA will take whatever action is necessary to promote safety.

4. Revisiting whether revocation should be a consequence for violations that occur during operational tests. Under the current rule, a person who violates one of the decertifying events listed in § 240.117(e) during a properly conducted operational monitoring test pursuant to §§ 240.303 or 217.9, is subject to having their certification revoked. FRA has received inquiries as to whether the rule could be changed so that a person shall not have certification revoked for any violation detected during an operational monitoring test. The Working Group considered both the advantages and disadvantages of the current rule and found some middle ground which serves as the basis for the proposal being made in this NPRM.

First, the Working Group addressed the reasons for not counting operational misconduct that occurs during testing. For instance, one opinion was that these tests should be learning experiences for the persons tested. If a mistake is made, additional training is the answer. In that way, certified people could learn from their mistakes in a testing environment where an accident/incident is unlikely.

In response, some members stated that persons who act unsafely by violating one of the § 240.117(e) provisions will receive preferential treatment just because their non-complying activity occurred during an operational monitoring test, rather than under otherwise normal operations. Alternatively, some members believed that an operational monitoring test should be an evaluation of a locomotive engineer's skills and not a learning experience. Therefore, these Working Group members believe that violations detected under such circumstances should result in revocations.

As the discussion of this issue progressed, a related concern was articulated. Some Working Group members expressed concern that operational monitoring tests are used by some supervisors to entrap engineers in tests that are unfair. For example, proponents of this position have alleged that some supervisors have hidden a fusee under a bucket and only revealed the fusee to the engineer at a point where it was impossible for the engineer to stop the train. In other instances, the manner in which the test was conducted made it appear that the true purpose was not to monitor compliance but to make it inappropriately difficult for an engineer to pass. Hence, some labor Working Group members believe that some railroad supervisors have and will continue to use unfair testing conditions to revoke the certificates of people they do not like.

Since FRA already considers an improperly conducted operational test, such as the alleged ''bucket test,'' to be an improper reason for decertification, FRA does not give great deference to the unfair test argument. The Working Group recognized that while FRA's interpretation is helpful, the proposal arose from alleged improper application of the rule. Hence, a modification was suggested to clarify this interpretation. FRA has adopted the consensus view that it publish FRA's interpretation as new § 240.117(f)(3).

On the larger issue, some Working Group members believed that the operational tests are conducted under real world conditions and may often represent the only method of checking whether a certified locomotive engineer makes an effort to comply with railroad operating rules. If a test is properly conducted, a violation found pursuant to a test occurs under the same conditions as other operations. Revocations for operational misconduct that occur prior to the occurrence of accidents constitute desirable prevention and fulfills the intent of the rule. Without including operational tests, revocable events would mainly be found only when an accident occurs. As a result of disagreement as to the veracity of these comments, it was not possible to reach a Working Group consensus on this issue. FRA has decided that there is a sufficient basis to continue allowing revocation consequences to apply when violations of operational testing occurs.

5. Reviewing the effectiveness of FRA's direct control over operational misconduct. The current rule prohibits certain operational conduct which is specified in § 240.305. That section makes it unlawful to (1) operate a train at excessive speed, (2) fail to halt a train at a signal requiring a stop before passing it, and (3) operate a train on main track without authority. This section enables FRA to initiate civil penalty or disqualification actions when such events occur and direct FRA remedial action is appropriate. Since changes to § 240.117(e) are proposed, some parallel modifications may be necessary under § 240.305.

In addition, administration of the existing rule has raised a safety assurance and compliance issue that may require a change to the current rule. In several incidents, FRA has encountered situations in which designated supervisors of locomotive engineers have neglected their supervisory responsibilities and permitted the engineer at the controls to violate the specified prohibitions. Two of these situations resulted in train accidents. FRA raised the issue of whether the rule needs to explicitly provide that engineers serving in supervisory roles who willfully participate in such prohibited activity are also covered by this section.

Although the Working Group agrees that a change is necessary, the Group recommended that the supervisors' conduct does not have to be willful to be prohibited. In this way, all locomotive engineers, supervisors and non-supervisors, would know that they will be held to the same standard of care. This clarification is proposed in §§ 240.117(c)(1), (c)(2), and 240.305(a)(6). While FRA maintains that the provision currently contains this authority, the proposed rule changes would put certified locomotive engineer supervisors on notice that their inappropriate supervisory acts or omissions will trigger revocation and FRA enforcement authority.

Section-by-Section Analysis

Subpart A—General

Section 240.1—Purpose and Scope

FRA proposes to make minor amendments to paragraph (b) so that the regulatory language used by FRA in all of its rules will become more standardized. FRA does not intend that these proposed revisions would substantively change the purpose and scope of this part.

Section 240.3—Application and Responsibility for Compliance.

FRA proposes to amend this section so that the regulatory language used by FRA in all of its rules will become more standardized. FRA does not believe that these revisions would substantively change the purpose and scope of this part.

Paragraphs (a) and (b) contain the same approach as the current rule but with some slight rewording. As under the current provision, the new provision would mean that railroads whose entire operations are conducted on track that is outside of the general system of transportation are not covered by this

part. Most tourist railroads, for example, involve no general system operations and, accordingly, would not be subject to this part. Therefore, FRA continues to intend that this rule shall not be applicable to ''tourist, scenic or excursion operations that occur on tracks that are not part of the general railroad system.'' 54 FR. 50890, 50893, 50915 (Dec. 11, 1989); *see also* 56 FR 28228, 28240 (June 19, 1991). The word ''installation'' is intended to convey a meaning of physical (and not just operational) separateness from the general system. A railroad that operates only within a distinct enclave that is connected to the general system only for purposes of receiving or offering its own shipments is within an installation. Examples of such installations are chemical and manufacturing plants, most tourist railroads, mining railroads, and military bases. However, a rail operation conducted over the general system in a block of time during which the general system railroad is not operating is not within an installation and, accordingly, not outside of the general system merely because of the operational separation.

Paragraph (c) has been proposed so that the rule will more clearly identify that any person or contractor that performs a function covered by this part will be held responsible for compliance. This is not a substantive change since contractors and others are currently responsible for compliance with this part as specified in § 240.11.

Section 240.5—Construction

FRA proposes to amend paragraph (a) so that the regulatory language used by FRA in all of its rules will become more standardized. This change explains the rule's preemptive effect. This proposed amendment reflects FRA's effort to address recent case law developed on the subject of preemption.

FRA proposes to amend paragraph (b) so that the regulatory language used by FRA in all of its rules will become more standardized. The only change is to remove the word ''any.'' This minor edit would not be a substantive revision.

FRA proposes to amend paragraph (e) of this section by adding the words ''or prohibit.'' The purpose of this modification was to clarify that the rule does not prevent ''flowback.'' The term flowback has been used in the industry to describe a situation where an employee who is no longer qualified or able to work in his or her current position, can return to a previously held position or craft. An example of flowback occurs when a person who holds the position of a conductor subsequently qualifies for the position of locomotive engineer, and at some later point in time the person finds it necessary or preferable to revert back to a conductor position. The reasons for reverting back to the previous craft may be as a result of personal choice or of a less voluntary nature; e.g., downsizing, certificate ineligibility or revocation.

Many collective bargaining agreements address the issue of flowback. FRA does not intend to create or prohibit the right to flowback, nor does FRA intend to state a position on whether flowback is desirable. In fact, the exact opposite is true. As a result of discussions with the RSAC members, FRA has agreed to this clarification of the original intent of paragraph (e) so that it is understood by the industry that employees who are offered the opportunity to flowback or have contractual flowback rights may do so; likewise, employees who are not offered the opportunity to flowback or do not have such contractual rights are not eligible or entitled to such employment as a consequence flowing from this federal regulation.

Section 240.7—Definitions

The proposed rule would add seven terms and revise the definitions of another two terms. The term *Administrator* would be revised to standardize the FRA Administrator's authority in line with FRA's other regulations. The effect of this change would be to take away the Deputy Administrator's authority to act for the Administrator without being delegated such authority by the Administrator. The Deputy Administrator would also lose the authority to delegate, unless otherwise provided for by the Administrator.

A definition for *dual purpose vehicle* would be added to describe a type of vehicle that can sometimes substitute for a locomotive by hauling cars but can also be used in a roadway maintenance function. *Exclusive track occupancy* is proposed to be added since that term is used to clarify an exception to when certified locomotive engineers would not be required to operate service vehicles that have the ability to haul cars. The current rule uses the word qualified without defining it and the proposed rule expands the use of that term. The agency has previously neglected to define FRA as the Federal Railroad Administration, although that abbreviation has been used in the rule. FRA also proposes to define *person* rather than rely on a definition that currently appears in parenthetic remarks within § 240.11.

FRA proposes to redefine the term *railroad* so that it becomes standard language in all of FRA's regulations. These minor changes are not intended to change the applicability of the rule as is presently enforced.

Although FRA has previously defined the term *filing*, as in filing a petition, or any other document, with the FRA Docket Clerk, the rule has not defined what constitutes service on other parties. The proposed definition references the Rules 5 and 6 of the Federal Rules of Civil Procedure (FRCP) as amended. The intent is to incorporate the current FRCP rules and not perpetuate those FRCP rules that are in effect when this regulation becomes final. By defining the term *service*, the expectation is that the proposed rule would clarify the obligations of the parties and improve procedural efficiency.

A proposed definition for *Specialized roadway maintenance equipment* would be added to define a type of machine that may need to be operated by a certified locomotive engineer under certain circumstances. See § 240.104. Although similar, this equipment describes a subset of that equipment referred to in part 214 as a ''roadway maintenance machine;'' the main difference between these similar definitions is that a ''roadway maintenance machine'' may be stationary while *specialized roadway maintenance equipment* cannot be stationary.

Section 240.9—Waivers

FRA proposes to revise this section so that the language used in all of FRA's rules become more standardized. The proposed changes to paragraph (a) reflect FRA's current intent; that is, a person would not request a waiver of one of the rule's provisions unless they were subject to a requirement of this rule and the waiver request was directed at the requirement for which the person wished he or she did not have to abide by. Paragraph (c) would standardize language with other FRA rules which clarify the Administrator's authority to grant waivers subject to any conditions the Administrator deems necessary.

Section 240.11 Consequences for Noncompliance

FRA proposes to reword this section slightly. One change would respond to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101–410 Stat. 890, 28 U.S.C. 2461 note, as amended by the Debt Collection Improvement Act of 1996 Pub. L. 104–134, April 26, 1996 which required agencies to adjust for inflation the

maximum civil monetary penalties within the agencies jurisdiction. The resulting $11,000 and $22,000 maximum penalties being proposed were determined by applying the criteria set forth in sections 4 and 5 of the statute to the maximum penalties otherwise provided for in the Federal railroad safety laws.

Proposed paragraphs (a), (b) and (c) would eliminate a parenthetic definition of person since FRA proposes to define *person* in § 240.7. The citation to a statute has also been proposed as a revision.

Subpart B—Component Elements of the Certification Process

Section 240.103—Approval of Design of Individual Railroad Programs by FRA

After the Working Group had concluded their meetings, FRA noted that this section was in need of updating. The numbered paragraphs under paragraph (a) set forth a schedule for implementing the original final rule. Since these dates have long since passed and any railroad that was conducting operations in 1991 and 1992 should have filed a written program pursuant to this section, the proposed rule suggests updating this section to address railroads commencing operations in the future. This would not be a substantive amendment since the proposed rule treats new railroads in the same way as the current rule. Thus, FRA is proposing the elimination of unnecessary paragraphs in the rule text.

Section 240.104—Criteria for Determining Whether a Railroad Operation Requires a Certified Locomotive Engineer

FRA proposes to add this new section to address the issue of what types of service vehicles should be operated by certified locomotive engineers. Since this was an issue of great interest to many members of the industry represented in the RSAC process, FRA has addressed this issue in detail in the preamble. The proposal presented attempts to reframe the issue by creating exemptions based on the type of operations in which these non-traditional locomotives are involved rather than simply focusing on the type of service vehicle.

Section 240.105—Criteria for Selection of Designated Supervisors of Locomotive Engineers

The change to paragraph (b)(4) requires that those persons who are DSLEs be qualified on the physical characteristics of the portion of the railroad on which they are supervising and that a railroad's program must address how the railroad intends to implement the qualification of a DSLE on the physical characteristics. FRA recommends that DSLEs acquire some operational experience over the territories they supervise because it is arguably the best method for learning how to operate over a territory.

The proposed addition of paragraph (c) is an effort to clear up several issues, some of which may not be obvious. These issues involve: (1) accommodating new railroads that have never certified a locomotive engineer or a DSLE; (2) accommodating railroads that may have had one or a few DSLEs at one time but no longer employ any qualified individuals; and (3) addressing how contractor engineers may be used. A regulatory amendment is necessary to address how railroads, who find themselves without a qualified and certified DSLE, can designate and train such individuals without reliance on outside sources. *See* 56 FR 28228, 28241–42 (June 19, 1991) (stating that a DSLE could be a contractor rather than an employee of the railroad).

One of FRA's philosophies in applying this rule has been that it certainly should not be an impediment to entrepreneurship. New or start-up railroads that have never certified a locomotive engineer or a DSLE have been unable to comply completely with this part without relying on outside sources to supply a certified DSLE. The same can be said of railroads that may have had one or a few DSLEs at one time but no longer employ any qualified individuals. It was never FRA's intent to force railroads to rely on outside sources in order to comply with the regulation. These proposed changes would provide railroads with better guidance than is currently found in the rule text.

For those railroads that do not have DSLEs, the addition of paragraph (c) will enable them to consider several options in creation of their first DSLE. (Once a railroad has its first DSLE, that first DSLE must certify the others by following the general rule rather than this exception). For example, the railroad could hire an engineer from another railroad in compliance with § 240.225 without having to comply with new paragraph (a)(5). If the individual is receiving initial certification or recertification, the railroad could comply with new paragraph (c) as an alternative to compliance with § 240.203(a)(4). Furthermore, the railroad could choose to work with a company that supplies experienced locomotive engineers that can be readily trained, qualified, and certified on the host railroad's territories.

FRA has received numerous inquiries regarding the use of outside contractors for certification purposes and for the temporary use of third party engineers during work stoppages. Section 5 of Appendix B in the current Part 240 regulation makes provision for railroads to use training companies (contractors). Actual certification must be done by the railroad. Use of an outside contractor and how that contractor will be used must be described in the railroad's plan submission.

For instance, a railroad may have temporary engineer employees supplied by a contractor where the contractor has conducted the hearing and visual acuity tests, the preemployment drug screens, the driver's data checks, and operating rules tests. However, the railroad is responsible for maintaining records of those tests since the railroad is the entity actually responsible for providing proper certification.

Any contractor providing temporary engineer employees must overcome the obstacle that the railroad is the entity that must issue the certificate, not the contractor. Therefore, while it is possible for a contractor to carry certificates for several or many different railroads, the contractor is burdened with keeping each of those certificates valid as required of any full-time engineer working for any particular railroad. Furthermore, in order for any engineer to remain certified, recertification must take place within three years on each certificate the person wants to keep valid. *See* § 240.201(c).

FRA hopes this discussion of contractors also clarifies how a short line railroad could manage to have only one full-time locomotive engineer (who is also a DSLE), yet still comply with all the testing required for compliance with the regulation. That is, a contractor could conduct all of the tests and checks for the short line railroad's engineer. The contractor-supplied temporary engineer and the short line railroad's engineer could also conduct the required annual check ride for each other. Of course, a copy of all records must be maintained by the railroad in accordance with § 240.215.

FRA wants to clarify that by empowering the ''chief operating officer of the railroad'' in paragraph (c) the Working Group's intention is that the person ultimately responsible for railroad operations makes this determination. It is not necessary for that person to have the title of ''chief operating officer.'' This intention is

expressed by the use of lower case letters in identifying this person.

Section 240.111—Individual's Duty To Furnish Data on Prior Safety Conduct as Motor Vehicle Operator

Paragraphs (a) and (h) would be modified by changing the time limits from 180 days to 366 days. The Working Group members requested this change because they could demonstrate clear examples of the administrative difficulties being encountered in attempting to meet the current shorter period and the differences between the time periods. The concern that railroad safety could be diminished by lengthening the period of time that a person has to request and furnish data on his or her prior safety conduct as a motor vehicle operator will be directly addressed by the addition of paragraph (i). This new paragraph requires certified locomotive engineers to notify the employing railroad of motor vehicle incidents described in § 240.115(b)(1) and (2) within 48 hours of the conviction or completed state action to cancel, revoke, suspend, or deny a motor vehicle driver's license. This requirement boils down to an obligation for certified locomotive engineers to report to their employing railroad any type of temporary or permanent denial to hold a motor vehicle driver's license when the person has been found (by the state which issued the license) to have either refused an alcohol or drug test, or to be under the influence or impaired when operating a motor vehicle. With this new provision, railroads will be provided with timely data on two of the most serious safety misconduct issues certified locomotive engineers could have in conjunction with their motor vehicle operator's license that may readily transfer to the locomotive engineer context.

In accordance with the regulation and the timely motor vehicle operator's license data, the railroads will need to continue considering these data in a systematic way. This proposal would retain the requirements in § 240.115 that each railroad's program include criteria and procedures for evaluating a person's motor vehicle driving record. Paragraph (c) of § 240.115 requires that if such a motor vehicle incident is identified, the railroad must provide the data to an EAP Counselor along with ''any information concerning the person's railroad service record.'' Furthermore, the person must be referred for evaluation to determine if the person has an active substance abuse disorder. If the person has such a disorder, the person shall not be currently certified. Meanwhile, even if the person is evaluated as not currently affected by an active substance abuse disorder, the railroad shall, on recommendation of the EAP Counselor, condition certification upon participation in any needed aftercare or follow-up testing for alcohol or drugs, or both.

Proposed paragraph (i) also states that, for purposes of locomotive engineer certification, a railroad cannot require a person to submit motor vehicle operator data earlier than specified in the paragraph. The reasoning behind this rule involves several intertwined objectives. For instance, some Working Group members did not want the employing railroad to revoke, deny, or otherwise make a person ineligible for certification until that person had received due process from the state agency taking the action against the motor vehicle license. Otherwise, action pursuant to this part might be deemed premature since the American judicial system is based on the concept of a person being innocent until proven guilty.

By not requiring reporting until 48 hours after the completed state action, the rule has the practical effect of insuring that a required referral to an EAP Counselor under § 240.115(c) does not occur prematurely; however, it does not prevent an eligible person from choosing to voluntarily self-refer pursuant to § 240.119(b)(3). Nor does it prevent the railroad from referring the person to an EAP Counselor pursuant to § 240.119 if there exists other information that identifies the person as possibly having a substance abuse disorder. Further, the restriction applies only to actions taken against a person's certificate and has no effect on a person's right to be employed by that railroad.

Section 240.113—Individual's Duty To Furnish Data on Prior Safety Conduct as an Employee of a Different Railroad

Some Working Group members raised the fact that they have experienced occasions where they had difficulty complying with this section due to the time limit. Paragraph (a) would be modified by increasing the number of days an individual has to furnish data on prior safety conduct as an employee of a different railroad. The period was changed from 180 days to 366 days. The Working Group members requested this change because they recognized administrative difficulties in meeting the shorter period and the differences between time periods. FRA does not believe that railroad safety will be diminished by lengthening the period of time that a person has to request and furnish this data.

Section 240.117—Criteria for Consideration of Operating Rules Compliance Data

FRA last amended this section in its 1993 Interim Final Rule. Since that time, FRA has found that those rule changes had the desired results. However, FRA and the other RSAC members agreed that clarifications in the rule itself, and some minor changes would further improve the rule. In addition, substantial modifications are being proposed to the revocation periods to address some concerns that they were too long and did not encourage needed training.

First, paragraph (c) would be redesignated (c)(1) so that a related provision could be added as (c)(2). Paragraph (c)(2) clarifies what conduct is expected from a supervisor of locomotive engineers. FRA believes this is a clarification since supervisors are responsible for their conduct in the same manner as other certified engineers.

Specifically, paragraph (c)(2) identifies a general situation in which supervisors of locomotive engineers shall have their certification revoked. The thresholds to be met include whether a supervisor is monitoring a locomotive engineer and, while doing so, whether that supervisor fails to take appropriate action to prevent a violation of paragraph (e) of this section. For example, if a DSLE is monitoring a locomotive engineer and, while doing so, the train encounters a properly displayed Approach Signal, and the engineer is not taking effective action to stop at the next signal, the DSLE must take appropriate action. Another example would be a supervisor warning an engineer that the train is speeding and the engineer is in danger of causing a revocable event by operating the train at a speed exceeding 10 miles per hour over the maximum authorized speed.

Appropriate action does not mean that the supervisor must prevent the violation from occurring at all costs; the duty may be met by warning the engineer of a potential or foreseeable violation. Similar to the way in which the rule treats student and instructor engineers, the decision to revoke a supervisor's certification must be made on a case-by-case basis depending on the facts of the particular situation.

A supervisor of locomotive engineers who is involved in duties other than monitoring the locomotive engineer at the controls of the lead locomotive at the time an alleged violation of paragraph (e) occurs will not have his or her certification revoked. For example, if a System Road Foreman of Engines,

who is also a DSLE, is riding a train to evaluate the performance of new locomotives and is involved in one of the scenarios described above, his or her certification would not be in jeopardy for failure to take appropriate action. Of course, the railroad would be free to take whatever disciplinary or administrative action it deemed appropriate.

In clarifying when a supervisor's conduct will be considered a revocable event, the FRA believes that a supervisor who is conducting an unannounced operating rules compliance test, which is also known as an efficiency test, should not be held culpable for the operating locomotive engineer's actions. All the Working Group members agreed that it would defeat the purpose of these tests if supervisors were required to take appropriate action in order to prevent the operational misconduct events the supervisors are monitoring to find. Also, an unannounced operating rules compliance test is performed in a controlled environment so that the supervisor can test the engineer's skills without fear of causing an accident/incident. In contrast, the proposal would continue to hold supervisors (DSLEs) responsible during both the operational monitoring observation under § 240.129 and the skills performance test under § 240.127 since these observations and tests are conducted under uncontrolled actual operating conditions. By making this defense explicit, the intention is to provide an equivalent level of protection or due process to both supervisors and locomotive engineers.

The only change to paragraph (d) would involve shortening the period of 60 months to 36 months in reviewing prior railroad operating rule compliance. This change would bring the rule into line with the other changes made to this section.

The proposed change to paragraph (e) is an attempt to resolve confusion that might surface between the interplay of this section and § 240.1(b). According to § 240.1(b), this part prescribes minimum Federal safety requirements and does not restrict a railroad from implementing additional or more stringent requirements for its locomotive engineers that are not inconsistent with this part. It is possible that a railroad could interpret that section to permit them to revoke a person's certificate for misconduct events more stringent than articulated by rule. FRA wants to be clear that we do not hold that same interpretation and the Working Group wants FRA to clarify this issue by amending the regulation. By adding the word ''only,'' the proposed paragraph (e) reads that ''[a] railroad shall only consider violations of its operating rules and practices that involve * * * '' Thus, the proposed regulation would limit the revocable events to only those listed in § 240.117(e).

Paragraph (e)(1) would be modified to reflect FRA's current interpretation that violations of hand or radio signal indications will not be considered revocable events. Although the agency had attempted to clarify its interpretation of this paragraph in the 1993 Interim Final Rule, FRA's preamble contained conflicting statements. As a result, this issue is ripe for clarification. The modification in the rule will alert the entire industry to a single standard to be applied universally and prevent the need for future misguided revocation proceedings.

In addition, FRA notes that a switch will not be considered a signal. Although some railroads define a switch as a signal, the Working Group agreed with the FRA's interpretation that it would be unfair to treat it as such for certification purposes. That is, a switch is not readily considered a signal given that its intended function is not to alert an engineer to stop. Instead, a switch's intended function is to enable a train to change the track it is operating over.

Paragraph (e)(2) defines what constitutes a speed violation requiring revocation. One modification to this paragraph is the elimination of the phrase ''or by more than one half of the authorized speed, whichever is less.'' As a result of this phrase, violations of restricted speed and low speed violations not reaching 10 miles per hour over the maximum authorized speed could result in revocation. The new paragraph (e)(2) would add a sentence to include violations of restricted speed under certain conditions, however, the new provision would eliminate low speed violations resulting in revocations. For example, a person would no longer risk certificate revocation if the train he or she operated is traveling at 16 mph when the maximum authorized speed is 10 mph.

After the April 9, 1993, interim final rule was published, FRA realized that the application of paragraph (e)(2) to decertification of locomotive engineers for violations of restricted speed, or the operational equivalent of restricted speed, was not the same as the anticipated application. *See* 58 Fed. Reg. 18982. The problem with restricted speed was similar in nature to other problems FRA had hoped to fix with its 1993 interim final rule. That is, the current rule does not distinguish serious offenses from negligible offenses. Railroads, believing themselves to be under a regulatory mandate to take action even for offenses that might not have been the subject of disciplinary action, have in some cases decertified employees where FRA had not anticipated such actions.

See 58 Fed. Reg. 18987. While FRA's 1993 regulatory language cleared up one set of ambiguities, that rule did not effectively address the subset of restricted speed violations.

Concerning the issue of restricted speed, the rule will formally publish FRA's interpretation on this issue. Generally, restricted speed rules provide a maximum speed and a conditional clause stating that a locomotive engineer must be able to stop the train being operated within one half the range of vision. Some railroads have argued that the very fact that a collision occurred or that a misaligned switch was run through at restricted speed, required the railroad to undertake the revocation process. While these incidents indicate a need for further railroad investigation, they will not always result in the need for decertification.

Note: This proposal also seeks to clarify that running through a switch will not be considered a violation of § 240.117(e)(1); i.e., a switch will not be considered a signal requiring a complete stop before passing it; however, running through a switch at restricted speed may be a revocable event when it is a reportable accident/incident pursuant to part 225.

Since FRA disagreed with the assertion that revocation should be mandatory each time a switch is run through or a collision occurs at restricted speed, the agency disseminated its interpretation through letters to industry associations and unions. As we noted when we adopted the initial provisions of this section, FRA's intent was to respond to the type of operational misconduct that was causing accidents. Implicit in FRA's approach was a focus on decertification for significant events instead of for every minor collision or movement through a misaligned switch.

FRA's interpretation of this regulation is captured in the second sentence of paragraph (e)(2) which states that ''[r]ailroads shall consider only those violations of the conditional clause of restricted speed rules, or the operational equivalents thereof, which cause reportable accidents or incidents under 49 CFR Part 225 as instances of failure to adhere to this section.'' Depending on the specific language used in a railroad's code of operating rules, the operational equivalent of restricted speed refers to other limitations on train speed which

include the conditional clause similar to that previously described. Examples of some of the speed rules which are the operational equivalent of restricted speed include those that are called yard speed, reduced speed, caution speed, controlled speed or other than main track speed.

It is important to note that this interpretation, and expected regulatory amendment, does not and would not alter the agency's belief that the current rule is unambiguous concerning the maximum speed portion of the restricted speed rule. That is, if the locomotive or train is operated at a speed which exceeds the maximum authorized speed by at least 10 miles per hour, there would be no need to analyze whether a reportable accident/incident occurred since the conditional clause of the restricted speed rule would not be the violated provision.

Likewise, if a person violates any one of the other provisions of § 240.117(e) while operating at restricted speed, that person is subject to certification implications for violating that other provision. For example, a person operating a locomotive at restricted speed could be found to have violated § 240.117(e)(1) if he or she operated a locomotive past a signal indication that requires a complete stop before passing it. Any reference to damage thresholds would not be applicable since this other provision of § 240.117(e) was simultaneously violated.

This interpretation will benefit the railroad industry by providing a clear line of demarcation. The result should prevent the dilemma of a railroad bringing certification action against an engineer due to a railroad official's belief that federal law requires it to do so. Meanwhile, it will benefit both engineers and railroads by eliminating many truly minor accidents or incidents from impacting certification status.

FRA notes that it has not proposed any specific changes to paragraph (e)(3) which refers to certain brake test requirements in 49 CFR part 232. This paragraph will likely need amending prior to becoming a final rule since two other regulatory proceedings may result in new rules which may supersede this reference. FRA has currently proposed Passenger Equipment Safety Standards to be published at 49 CFR part 238. See 62 FR 49728 (Sept. 23, 1997(citing proposed §§ 238.313, 238.315, and 238.317). FRA also anticipates proposing changes to 49 CFR part 232 itself. See 63 FR 48294 (Sept. 9, 1998). In the final rule, FRA reserves the right to make conforming changes to this paragraph as necessary.

Paragraph (e)(4) would be revised by adding the words ''or permission.'' FRA considers this revision as merely a clarification of the existing rule. In 1993, this paragraph was modified to prevent minor incidents from becoming revocation issues. The rule was changed so that entering ''main track,'' instead of entering a ''track segment,'' without proper authority would be considered operational misconduct. Main track is defined in § 240.7 as ''a track upon which the operation of trains is governed by one or more of the following methods of operation: timetable; mandatory directive; signal indication; or any form of absolute or manual block system.''

FRA has received inquiries into what is meant by the term ''mandatory directive'' as that word was used in the 1993 rule to clarify the definition of main track. FRA's intent was for this term to be defined in the same way that it has historically been defined in 49 CFR Part 220; that is, ''mandatory directive'' means ''authority for the conduct of a railroad operation.'' It includes all situations where a segment of main track is occupied without permission or authority in accordance with a railroad's operating rules. However, it does not include advisory information, such as that from a yardmaster relative to which track to use in a yard. Hence, in order to clarify this point, FRA has added the words ''or permission'' in paragraph (e)(4).

Paragraph (e)(5) would clarify FRA's existing interpretation concerning what constitutes a tampering violation that requires revocation action. The change would add the phrase ''or knowingly operating or permitting to be operated a train with a tampered or disabled safety device in the controlling locomotive.'' This clarification is intended to answer the question of whether ''tampering'' is defined only as operating with a safety device that was purposefully disabled by the person charged or whether tampering also means knowingly operating a train when the controlling locomotive of that train is equipped with a disabled safety device. Both FRA's current interpretation and the proposed changes concur that tampering can also mean knowingly operating a train when the controlling locomotive of that train is equipped with a disabled safety device.

FRA reached its current interpretation and this amending clarification by reviewing the RSIA and 49 CFR part 218, App. C. The RSIA required DOT to promulgate rules as necessary to prohibit the ''willful tampering with, or disabling of'' safety devices. Section 21 of the RSIA states in part that ''[a]ny individual tampering with or disabling safety or operational monitoring devices in violation of rules, regulations, orders, or standards issued by [DOT], or who knowingly operates or permits to be operated a train on which such devices have been tampered with or disabled by another person, shall be liable for such penalties as may be established by [DOT], which may include fines under section 209, suspension from work, or suspension or loss of a license or certification issued under subsection (I) [of 45 U.S.C. 202].'' Subsection (I) refers to the locomotive engineer certification rule which was introduced by Congress at the same time. Thus, it appears that Congress envisioned that a person who tampers with, knowingly operates, or permits to be operated a train with a disabled safety device could be liable for suspension or loss of locomotive engineer certification.

Moreover, the proposed change comports with the agency's existing regulations concerning tampering with safety devices. When devising this proposal, the Working Group referred to 49 CFR 218.55, 218.57 and part 218, App. C (''Statement of Agency Policy on Tampering''). After considering FRA's existing interpretations, it was concluded that extending this policy to locomotive engineers in the certification process was necessary.

Paragraphs (f)(2) and (3) would clarify FRA's existing interpretation that violations of the misconduct events listed in paragraph (e) of this section that occur during properly conducted operational compliance tests shall be considered for certification, recertification, or revocation purposes. One reason for further clarification is that some RSAC members complained that these operational monitoring tests can be used by supervisors to entrap engineers in tests that are unfair. For example, FRA has heard allegations that some supervisors have been able to get engineers decertified by hiding a fusee under a bucket and only revealing the fusee to the engineer at a point where it is impossible for the engineer to stop the train. Although FRA has not observed any such tests, the agency currently considers an ''improperly'' conducted operational test, i.e., a test not conducted according to a railroad's own operating rules, such as the alleged ''bucket test,'' to be an improper reason for decertification. Hence, the agency agreed with the RSAC members that the rule needs amending to caution the regulated community that improper testing cannot lead to revocation. Meanwhile, the RSAC members agreed that an operational monitoring test pursuant to §§ 240.117 and 240.303 is

an evaluation of a locomotive engineer's skills and should, therefore, have certification consequences flow if violations occur.

The only change to proposed paragraph (g)(3)(i) was to correct a typographical error. The word ''in'' was added after the word ''described.''

Paragraphs (g)(3)(ii), (iii), and (iv) would be added for three purposes. One, an additional period of revocation was added so that it will take four, instead of the current three, separate incidents involving violations of one or more of the operating rules or practices pursuant to paragraph (e) before the longest period of revocation is implemented. Two, the periods of revocation have been shortened; hence, a second offense period is shortened from one year to six months and a third offense period is reduced from five years to one year. The occurrence of a fourth offense would trigger a three year revocation, instead of the current five year maximum. These two changes are desirable since the Working Group members agreed that the one year and five year penalties were overly punitive for second and third offenses respectively.

Third, the time interval in which multiple offenses would trigger increasingly stiffer periods of revocation would be reduced. As a result of these time interval reductions, if a period of 24 months, reduced from 36 months, passes between a first and second offense, the second offense revocation period will be treated in the same way as a first offense. If a period of 36 months, reduced from five years, passes between a second and third offense, or a third and fourth offense, this later offense will also be treated in the same way as a first offense.

Under both the proposed and current revocation period schedules, the period of revocation is based on a floating window. Hence, under the proposal, if a second offense occurs 25 months after the first offense, the revocation period will be the same as a first offense; however, if a third offense occurs within 36 months of the first offense, the revocation period will be one year. The anomaly will be that the person's certificate could be revoked twice for one month under paragraph (g)(3)(i) but that the third incident could result in a one year revocation under paragraph (g)(3)(iii) without the benefit of the interim six month revocation period under paragraph (g)(3)(ii). Although this may on its face appear to be peculiar, the Working Group members agreed that it was fair given the totality of the circumstances. FRA recommends that when computing a revocation period, one should review whether there were any other revocation incidents during the prior 24 and 36 months from the most recent incident; creation of a timetable can be useful in making this determination.

The proposed rule would add paragraph (g)(4) to retroactively apply the new, shorter periods of ineligibility to most incidents that have occurred prior to the effective date of this rule. The Working Group discussed the fairness of retroactively applying this rule rather than leaving the more burdensome, longer periods of revocation in place for those people who hold revoked certificates. In addition, the Working Group discussed their intent that future ineligibility periods would be determined by the ''floating window'' effective on the date of the next incident. Since the date of the subsequent incident is the deciding factor, it should be unnecessary to address this issue in the rule text. Furthermore, although § 240.5(e) already states that this part shall not be construed to create any entitlement, the Working Group noted that they did not intend to create a right to compensation for any employee who may have benefited by a reduced period of ineligibility as a result of the addition of paragraph (g)(4).

Paragraph (h) would be amended by adding the words ''or less'' after ''one year.'' The reason for this amendment is to capitalize on the addition of a separate revocation period for a fourth offense and to allow further mitigation of what has been perceived by the RSAC members as penalties that are too harsh. That is, the railroads' discretion to reduce a revocation period has been extended from only second offenses to first, second, and third offenses. As before, all of the requirements of (h) would need to be met prior to a reduction in a revocation period. Also, a reference to paragraph (g)(2) has been corrected to cite to (g)(3).

Paragraph (j) and its subparagraphs utilize the same technique as previously used in paragraph (i) to make a fair transition after amendments are made to the regulation. This additional paragraph would resolve questions concerning the validity of railroad decisions made in conformity with the provisions of this section prior to its proposed revisions by this amendment. Railroad decisions made in conformity with the initial wording of this section were valid at the time they were rendered and it is not the Working Group's recommendation or FRA's intent to retroactively invalidate those decisions.

Although the Working Group believes that the prior decisions should not be rendered invalid by this amendment, as a matter of fairness to those who violated the underlying railroad rule under the previous wording of this provision, those incidents should not have further prospective effect on the certification status of those locomotive engineers. Under §§ 240.117(d) and (g), prior incidents of operational misconduct result in progressively longer periods of ineligibility. Proposed § 240.117(j) precludes railroads from considering prior incidents that would no longer violate the rule. Not all prior railroad decisions are affected. Only operational misconduct incidents that would not be a violation under the proposed rule are affected. Subsection 240.117(j) identifies those events. In drafting proposed § 240.117(j), the Working Group was attempting to be fair to both railroads and employees. The railroads should not be penalized for complying with the rule as it previously read. Moreover, any economic consequences suffered by employees came as a result of the railroad's operation of its disciplinary authority. If the exercise of that authority was proper at the time, a change in the federal rule does not alter that determination. However, because the RSAC has now determined that, henceforth, certain types of incidents are too minor to warrant decertification, further reliance on such lesser violations would be unfair to the employee. Even though such violations were appropriately handled at the time, giving them a cumulative effect in the certification process no longer makes sense in terms of RSAC's new perception of their importance to the Federal scheme.

Section 240.121—Criteria for Vision and Hearing Acuity Data

The main purpose behind the proposal to amend this section is to prevent potential accidents due to a locomotive engineer's medical condition that could compromise or adversely affect safe operations. Although FRA originally desired that RSAC review the current medical qualifications, this issue gained greater urgency following the investigation of a collision in which a locomotive engineer's alleged deteriorating vision was considered a factor. See Railroad Accident Report—Near Head-On Collision and Derailment of Two New Jersey Transit Commuter Trains near Secaucus, New Jersey, February 9, 1996 (NTSB/RAR–97/01). Specific recommendations were made by the NTSB and those recommendations were

directly addressed by RSAC in paragraphs (b), (c)(3), (e) and (f). See NTSB Safety Recommendation R–97–1 and R–97–2, which were previously discussed in the preamble section titled ''D. Revisiting the Standards for Hearing and Vision.''

Paragraph (b) suggests two modifications in order to address the factual concern identified in NTSB's investigation. One, a reference to newly proposed Appendix F has been added so that the color vision tests, and scoring criteria would be specified. Two, the testing procedures and qualification standards are specified by recommending that the tests be performed in accordance with the directions supplied by the manufacturer of the chosen test or any American National Standards Institute (ANSI) standards that are applicable. As requested by the NTSB, this proposal was based on expert guidance from several railroad medical officers, an FAA medical officer and an NTSB medical officer. While the second modification is a recommendation and not a requirement, FRA's position is that the proposal would provide sufficient guidance to those administering the tests as to where they should look in confirming that they are conducting the tests properly; by including this recommendation, FRA would be calling attention to the need for test administrators to follow proper medical testing methodology and thereby avoid the problem of mistakenly providing the wrong type of test.

It was suggested that paragraph (c)(3) be amended to address NTSB recommendation R–97–1. For instance, a reference to proposed Appendix F was necessary to integrate the specified color vision tests proposed. The word ''railroad'' was added before ''signals'' to further elaborate to the medical examiners conducting such tests that the key is being able to distinguish railroad signals; without such a clarification, the medical experts warned that medical examiners unfamiliar with the railroad environment might focus their attention on colors that do not appear as railroad signals. Another clarification to this paragraph is the addition of the words ''successfully completing one of the tests.'' The task force discussed that although these tests should be readily available, not every medical office will have more than one of these tests. In addition, given the specified failure criteria, it would be unnecessary to initiate multiple tests if one is successfully completed since that would be redundant.

Paragraph (e) would be amended to include the words ''upon request.'' The reason for adding these words is to create a right for a person who has failed to meet the required vision or hearing acuity standards. The effect will be that instead of a railroad having the discretion to determine whether a person is otherwise qualified to operate a locomotive, the person has a right to request such a medical evaluation from the railroad's medical examiner. The objective in making this change is to encourage uniform and consistent actions so that persons with similar medical deficiencies will be treated similarly.

Other significant changes to paragraph (e) are proposed based on the task force finding that some railroad medical examiners either do not work directly for the railroad or are unfamiliar with railroad operations. The most significant proposal to address this concern would require the medical examiner to consult a designated supervisor of locomotive engineers (DSLE) prior to determining whether a person who fails to meet any hearing or vision standard has the ability to safely operate. Currently, there is no explicit consultation requirement although good sense would suggest that a medical examiner should consult someone with railroad expertise if they had any questions about railroad operations. The task force clearly intended for the decision to remain with the medical examiner, not the DSLE.

The following proposals also attempt to educate the medical examiner who may be unfamiliar with FRA's rule or railroad operations. By requiring that the railroads provide their medical examiners with a copy of this part as amended, it should insure that those conducting the tests will use approved tests and understand the standards to be met. The words as amended are intended to require that the railroad provide updated copies of the regulation when future proposed changes become effective.

Paragraph (f) is intended to achieve similar goals to those suggested by NTSB. It would create a reporting obligation for any certified locomotive engineer based on objective, deteriorating changes in a person's hearing or vision that is likely to effect safety. In practice, it would be expected that the railroad would need to take appropriate steps to evaluate a person who notifies the railroad's medical department or an appropriate railroad official of this condition. Certainly, it is reasonable for FRA to expect that a railroad will retest such a person to determine the extent of the deteriorating condition. Most likely, it would be necessary for a medical examiner to follow the requirements of paragraph (e) of this section, which would include a consultation with a DSLE.

In developing paragraph (f), the medical officers advising the task force recommended using the phrase ''best correctable vision or hearing.'' This recommendation recognizes that a person could have suffered deterioration to any aspect of their hearing or vision, and yet corrective lenses or a more powerful hearing aid could provide the person with a level of vision or hearing that is equivalent, or better, to what the person had prior to the deterioration. In addition, while the individual should be concerned and may want to report any deteriorating vision or hearing to the railroad, the requirement to report would be limited to those instances in which the deteriorating condition results in the person no longer meeting one or more of the prescribed vision or hearing standards or requirements of this section despite the use of corrective devices. FRA's position is that this proposal is unambiguous as to the person's obligation and should be enforceable if made final.

Section 240.123—Criteria for Initial and Continuing Education

Paragraphs (d), (d)(1), and (d)(2) would be added to help resolve numerous inquiries FRA has received regarding how engineers can become familiar with the physical characteristics of a territory on new railroads being created, or on portions of a railroad being reopened after years of non-use. The new paragraphs seek to clarify the rule and reflect FRA's current interpretation. The Working Group recommended that rather than have the agency repeatedly address these issues on a case-by-case basis, it would be a better use of resources, and fairer to all parties, if the guidance were published so that FRA would treat all railroads uniformly, not be overly burdensome, and not compromise safety.

Initially, the Working Group sought to address this issue in an appendix to the rule. The idea was that this information is guidance not requiring a rule change. Based on further evaluation, the Working Group recognized that the purposes of the guidance would substantively change the rule. Thus, a place for this proposed guidance has been integrated into the rule text itself.

Section 240.127—Criteria for Examining Skill Performance

DSLEs are required to conduct skill performance tests pursuant to § 240.127. This formal test is required prior to

initial certification or recertification of the engineer. A consensus was reached that a DSLE can determine an engineer's train handling abilities without being familiar with the territory over which the engineer is operating. Based on that consensus, the Working Group decided that the proposed rule should not require DSLEs to be qualified on the physical characteristics of the subject territory in order to conduct this test.

Meanwhile, § 240.127(c)(2) requires that the testing procedures selected by the railroad shall be conducted by a DSLE. Without an exception, a Catch-22 issue arises as to whether it is possible for a railroad to designate a person as a DSLE when that person does not meet the definition of a DSLE (because the person is not qualified on the territory over which the person is supposed to conduct a skill performance test). To relieve this conflict, the Working Group's solution was to propose that § 240.127(c)(2) be amended so that it would read ''Conducted by a designated supervisor of locomotive engineers, who does not need to be qualified on the physical characteristics of the territory over which the test will be conducted.'' This proposal accommodates the Working Group's findings regarding the need for qualified DSLEs.

Subpart C—Implementation of the Certification Process

Section 240.217—Time Limitations for Making Determinations

All of the modifications being proposed for this section involve changes to time limits. The RSAC members requested these changes because they recognized administrative difficulties in meeting the shorter and inconsistent periods. FRA does not believe that these time extensions will make the data so old that they will no longer be indicative of the person's ability to safely operate a locomotive or train.

When the rule was originally published, time limits were established which seemed reasonable and prudent. The rule contained numerous time limits of varying length, which has lead to confusion by those governed by the rule. Since publication of the rule, experience by the regulated community has shown the potential for simplification and consistency without sacrificing safety.

Section 240.223—Criteria for the Certificate

The proposed amendment to paragraph (a)(1) would require that each certificate identify either the railroad or ''parent company'' that is issuing it. This change would provide relief to companies, primarily holding companies that control multiple short line railroads, from having to issue multiple certificates. For these companies, complying with the current requirement of identifying each railroad has become a major logistical problem. ASLRRA, the original author of this proposal, has stated that a holding company managing multiple short line railroads is the equivalent of a major railroad operating over its many divisions; thus, it is fair to treat them similarly. However, the individuals must still qualify under the program of each short line railroad for which they are certified to operate and each of those railroads must maintain appropriate records as required by this part.

Section 240.225—Reliance on Qualification Determinations Made by Other Railroads

The proposed modification of this section addresses several concerns. First, new paragraph (a) addresses the perception that the larger railroads often administer a more rigorous training program than the smaller railroads due to the nature of their operations. While the Working Group did not intend to minimize the quality of the training programs of many smaller railroads or the expertise and professionalism of their locomotive engineers, it did intend to address the fact that small railroads often have more straightforward operations which are geographically compact and not topographically diverse.

The proposal would require a railroad's certification program to 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. By articulating both the problem and mandating the safe solution, the Working Group believes the proposal will save resources.

This issue is of considerable moment due to the current economic climate. Railroad ton-miles per year are at historically high levels. Whereas a few years ago, the industry was offering severance packages to train and engine crews, more recently the demand for skilled workers in these crafts has led to significant hiring of new employees. Larger railroads have found smaller railroads to be fertile fields for such hiring efforts.

One example of such a problem might involve a train service engineer from a Class III operation. That person would probably be trained under the standard Class III certification program and, therefore, would receive approximately 3 and ½ weeks of training. This is the minimum training acceptable for basic railroad yard type operations (slow speed moves with limited numbers of cars). This training would not be acceptable for Class I and II railroad operations since these usually encompass higher speeds, heavier and longer trains, and utilize more complex methods of operation.

Section 240.229—Requirements for Joint Operations Territory

The proposal to amend paragraph (c) reflects a Working Group desire to realign the burden for determining which party is responsible for allowing an unqualified person to operate in joint operations. These changes are based on the experiences of the Working Group members who believe that an inordinate amount of the liability currently rests with the controlling railroad. The perceived unfairness rests on the fact that it is not always feasible for the controlling railroad to make all of the determinations required of current paragraph (c). The guest railroad may provide the controlling railroad with a long list of hundreds or thousands of locomotive engineers that it deems eligible for joint operations; following up on a long, and ever changing list is made much more difficult since a controlling railroad does not control the personnel files of the engineers on this list.

The proposed realignment would lead to a sharing of the burden among a controlling railroad, a guest railroad and a guest railroad's locomotive engineer. The parties responsibilities are found respectively in paragraphs (c)(1) through (3). Although a controlling railroad still has the same obligations to make sure the person is qualified, paragraph (c)(2) would require that a guest railroad make these same determinations before calling a person to operate in joint operations. Paragraph (3) reiterates the responsibility the rule places on engineers to notify a railroad when the person is being asked to exceed certificate limitations. While this proposed amendment might seem duplicative to some people in light of § 240.305(c), the Working Group believed that some people might not readily recognize their responsibility unless specifically referenced in this section.

Section 240.231—Requirements for Locomotive Engineers Unfamiliar With Physical Characteristics in Other Than Joint Operations

The proposed addition of this section will improve safety and clear up a complicated issue. Section 240.1 requires ''that only qualified persons operate a locomotive or train.'' The term qualified has a proposed definition in § 240.7; that definition states that qualified ''means a person who has passed all appropriate training and testing programs required by the railroad and this part and who, therefore, has actual knowledge or may reasonably be expected to have knowledge of the subject on which the person is qualified.'' The rule is currently silent as to the use of pilots except for joint operations territory pursuant to § 240.229(e); however, even in this exception, a qualified person is described as ''either a designated supervisor of locomotive engineers or a certified train service engineer determined by the controlling railroad to have the * * * necessary operating skills including familiarity with its physical characteristics concerning the joint operations territory.'' Therefore, while the regulation does not preclude a locomotive engineer from operating under the direction of a qualified engineer pilot, FRA's official interpretation is that other employees may not serve as pilots even if they are qualified on the operating rules and physical characteristics of the territory. This is a controversial interpretation since railroads have a history of using conductors and other craft employees as pilots.

The changes to the rule reflect a true consensus-built proposal that recognizes the complexity of the problem. Simply requiring locomotive engineer pilots in all situations, or in no situations, is neither practical nor desirable. Hence, while supervisors of locomotive engineers may need to consult the rule more frequently in order to ensure compliance, the rule will accommodate more flexibility than the current FRA position that only locomotive engineer pilots are acceptable.

Paragraph (a) is a general statement of policy that explicitly states the basic concept that, unless an exception applies, only certified engineers who are also qualified on the territory upon which they are to operate are truly qualified. Paragraph (b) allows a non-qualified engineer to have a pilot while (b)(1) and (b)(2) identify what type of person may serve as a pilot depending on different conditions. In either case, paragraph (b) would specifically require that a railroad's program must address how these individuals will attain qualifications for pilot service.

Paragraph (b)(1) would require that when an engineer has never been qualified as an engineer on a territory, the railroad must provide a certified engineer pilot who is both qualified and not an assigned crew member. The reasoning behind an engineer pilot in this instance lies on the fact that engineers must have a more detailed knowledge of the physical characteristics than persons of other crafts in order to anticipate how to safely operate their trains. Meanwhile, the requirement that this certified engineer pilot not be a crew member is based on the idea that crew members would have their own duties that would prevent them from providing the controlling engineer their undivided attention. Certainly, this undivided attention is necessary when the controlling engineer has no expectation of what physical characteristics of the territory are like around the next curve or past the next signal.

Paragraph (b)(2) would allow any qualified person to be a pilot if the controlling engineer was previously qualified on the territory and lost that qualification due to time limitations. Of course, a railroad could choose to use a qualified engineer pilot, but this provision allows the railroad more flexibility. The concept behind easing the engineer pilots only requirement relies on the Working Group members' experiences; that is, engineers who have been previously qualified on a territory would need less guidance and expertise to refamiliarize themselves with the physical characteristics of that territory.

Paragraph (c) would allow certified engineers who are unqualified on the physical characteristics of a territory to operate trains under specific circumstances. The four circumstances only apply to track segments with an average grade of less than one percent (1%) over a distance of three (3) miles. In other words, if a movement requires the engineer to operate on a track with heavy grade, a pilot will be required regardless of the four circumstances.

Paragraph (c)(1) would allow certified engineers to operate without a pilot on tracks other than a main track, regardless of distance. FRA suggests that where railroads anticipate the need to apply this exclusion, switch targets indicate names or numbers so that engineers who are unfamiliar with a rail yard can safely move their trains to the designated location within the rail yard. Most train operations conducted off main track require reduced speed limitations and thus have fewer and less severe safety implications.

Paragraph (c)(2) would allow certified engineers to operate on a main track without a pilot for a distance not exceeding one mile, regardless of maximum authorized speed. As an example, this exception would allow an unqualified engineer to operate movements from a yard on the south side of a main track, using the main track for less than a mile, to a yard on the north side of the main track.

Paragraph (c)(3) would allow certified engineers to operate on any track without a pilot, regardless of distance, provided the established or permanent maximum authorized speed limit for all operations does not exceed 20 miles per hour.

Paragraph (c)(4) would allow certified engineers to operate on any track without a pilot, regardless of distance where existing operating rules require movements to proceed prepared to stop within one half the engineer's range of vision. This does not allow railroads to make special requirements of only their engineers who are not qualified; that is, the conditional clause of the restricted speed type restriction must apply to all operations on that track. Hence, it would be a violation of the rule if a railroad ordered an engineer who is not qualified to operate on a main track with restricted speed instructions that did not also apply at all times to every other locomotive and train operation on that track.

In considering whether to suspend or revoke a person's certificate when the person is operating pursuant to one of the exceptions in paragraph (c), the railroad should consider the following issues: (1) whether the locomotive engineer notified a railroad official that he or she was unqualified to operate over the territory; (2) whether the locomotive engineer was ordered by a railroad official to operate over the territory despite the official's knowing that the locomotive engineer was unqualified; and, (3) if one of the exceptions in paragraph (c) applied, whether there was a direct relationship between the alleged operational misconduct event pursuant to § 240.117(e)(1) through (5) and the locomotive engineer's unfamiliarity with the territory.

If an alleged violation is caused by the engineer's territorial unfamiliarity, proposed § 240.307(i) could be referenced as a defense to the alleged misconduct. For example, if an engineer is operating for a distance of less than one mile without a pilot and the train passes a signal requiring a complete stop that was around a curve, it is

arguable that the engineer passed the signal due to his or her unfamiliarity and lack of a pilot; thus, revoking an engineer's certificate under such circumstances would be improper.

On the other hand, if an alleged violation occurs that is unrelated to the engineer's unfamiliarity with the territory, the engineer would be held liable for his or her conduct. For example, if an engineer is operating without a pilot in unfamiliar territory and the type of operation requires that any operation on the track does not exceed 20 MPH pursuant to § 240.231(c)(3), than an engineer should probably have his or her certificate revoked for operating at 10 MPH or more above the maximum authorized speed. It is unlikely under such conditions that the physical characteristics somehow would have helped cause the alleged violation since a pilot would be required if the unfamiliar territory was over heavy grade. *See* § 240.231(c).

Subpart D—Administration of the Certification Program

Section 240.305—Prohibited Conduct

Parallel to the discussion in the section-by-section analysis above concerning § 240.117(c)(2), the Working Group recommended adding paragraph (a)(6) to strengthen FRA's authority to take enforcement action against DSLEs under appropriate circumstances. That is, a DSLE, who is already a certified locomotive engineer, must realize that if he or she allows prohibited conduct to occur without taking ''appropriate action,'' other than in a test monitoring capacity, FRA could take enforcement action against the DSLE. ''Appropriate action'' is not defined in the regulation and would depend on the facts and circumstances of each case.

The regulatory language, and the reasoning behind that language, mirrors the § 240.117(c)(2) amendment. Given FRA's authority pursuant to § 240.11, it is arguable that the agency currently has this authority. However, to reiterate, this amendment certainly would put supervisors on notice that they cannot actively or passively acquiesce to misconduct events caused by certified engineers they are observing.

In addition, several paragraphs would be added to § 240.305(a) so that the prohibited conduct list is equivalent to the list of misconduct events in § 240.117(e) which require the railroad to initiate revocation action. This section is needed so that FRA may initiate enforcement action. For example, FRA may want to initiate enforcement action in the event that a railroad fails to initiate revocation action or a person is not a certified locomotive engineer under this part. Furthermore, FRA will make conforming changes to paragraph (a)(3) as necessary considering proposed Passenger Equipment Safety Standards to be published at 49 CFR part 238. See 62 FR 49728 (Sept. 23, 1997. Also, FRA anticipates proposed changes to 49 CFR part 232 that may requiring conforming changes to paragraph (a)(3). See 63 FR 48294 (Sept. 9, 1998).

Section 240.307—Revocation of Certification

When the final rule was published in 1991, FRA intended that the notice of suspension in paragraph (b) would be written notice. FRA explicitly stated in the preamble to that first final rule on this subject that ''[p]aragraph (b) requires that before suspending a certificate, or contemporaneous with the suspension, the railroad shall give the engineer written notice of the reason for the pending revocation action and provide an opportunity for a hearing.'' 56 FR 28228, 28251 (June 19, 1991). Despite these intentions, the rule itself failed to specify that notice must be made in writing. Consequently, many persons effected by this rule have not received written notice of proposed actions against them.

FRA proposed to the Working Group that the word ''written'' be added to paragraph (b)(2) so that the agency's intentions would be reflected in the rule. The Working Group surprised FRA by countering that this was not the only problem with this paragraph and that without clarification, written notice would pose problems for some operations. A discussion ensued so the Working Group could identify the problems and attempt to resolve them.

The main problem identified by the addition of the word ''written'' to paragraph (b)(2) was that a railroad may be in ''receipt of reliable information indicating the person's lack of qualification under this part,'' have the desire to immediately suspend the person's certificate, but lack the means to immediately draft a competent written notice. See § 240.307(b)(1). As a compromise, the Working Group proposed that the initial notice may be either verbal or written. Confirmation of the suspension must be made in writing at a later date. The amount of time the railroad has to confirm the notice in writing depends on whether or not a collective bargaining agreement is applicable. The Working Group believed that if no collective bargaining agreement is applicable, 96 hours is sufficient time for a railroad to provide this important information.

Another of the problems identified by the Working Group was that throughout § 240.307, the regulation refers to an individual whose function is the ''charging official.'' Several Working Group members noted that the railroad industry does not generally use this term and that a better description of the individual the regulation is referring to would be ''investigating officer.'' FRA voted for, and now proposes, the change of this term, but wants to clarify that the agency's position is that both terms refer to the railroad official who accepts the prosecutorial role.

Paragraph (c) would be modified to reflect the consequences of adding paragraph (i). Paragraph (i) provides specific standards of review for railroad supervisors and hearing officers to consider when deciding whether to suspend or revoke a person's certificate due to an alleged violation of an operational misconduct event. Pursuant to paragraph (i), either defense must be proven by substantial evidence.

One issue that has bothered both FRA and many persons affected by this rule involves the presiding officer's actions pursuant to paragraph (c)(10). Paragraph (c) specifies that unless a hearing is held pursuant to a collective bargaining agreement as specified in paragraph (d) or is waived according to paragraph (f), the railroad is required to provide a hearing consistent with procedures specified in paragraph (c). Paragraph (c)(10) requires that the presiding officer prepare a written decision, which on its face seems like a straightforward requirement. However, some petitioners have argued that procedural error has occurred when written decisions have been signed by a presiding officer's supervisor or a railroad official other than the presiding officer. The issue appears to be whether the presiding officer must also be the decision-maker or whether the presiding officer can merely take the passive role of presiding over the proceedings only. There is also a separate issue of whether a railroad official who is someone other than the presiding officer may have a conflict of interest that should disqualify that railroad official from signing the written decision; i.e., there may be the appearance of impropriety if the non-presiding railroad official has ex-parte communications with the charging official (or investigating officer). This kind of ethical issue could be raised in a petition to the LERB as a procedural issue and could be alleged to cause a petitioner substantial harm.

The agency's intentions were articulated in the preamble to the 1993

interim final rule. FRA stated that ''FRA's design for Subpart D was structured to ensure that such decisions would come only after the certified locomotive engineer had been afforded an opportunity for an investigatory hearing at which the hearing officer would determine whether there was sufficient evidence to establish that the engineer's conduct warranted revocation of his or her certification.'' 58 FR 18982, 18999 (Apr. 9, 1993). FRA also discussed in this 1993 preamble how the revocation process pursuant to this part should be integrated with the collective bargaining process. FRA stated that if the collective bargaining process is used ''the hearing officer will be limited to reaching findings based on the record of the hearing'' and not other factors as may be allowed by a bargaining agreement; the rule was written to ''guard against hearing officers who might be tempted to make decisions based on data not fully examined at the hearing.'' 58 FR 18982, 19000 (Apr. 9, 1993). Hence, it appears that the agency did not even contemplate that someone other than the presiding officer might make the revocation decision.

In contrast to the agency's initial position, several Working Group members said that their organizations have set up this process to allow someone other than the presiding officer to make the revocation decision. This other person is always a railroad official who reviews the record made at the railroad hearing. Although this is not what the agency expected when it drafted the original final rule in 1991, FRA and the LERB have found this practice acceptable as long as the relevant railroad official has not been the charging official (or investigating officer, as proposed). The theory of this NPRM is that fairness of the hearing and the decision is maintained by separating the person who plays the prosecutorial role from the person who acts as the decision-maker. Thus, the Working Group recommends and FRA proposes to codify this position in paragraph (c)(10). FRA has reservations, however, about such decisions being made by persons who have not had the opportunity to evaluate the credibility of witnesses in the case by receiving their testimony at first hand. FRA seeks comments on this issue.

Paragraph (i)(1) would make it explicitly known that a person's certificate shall not be revoked when there is substantial evidence of an intervening cause that prevented or materially impaired the person's ability to comply. FRA has always maintained this position and the RSAC members agreed that it would be useful to incorporate it into the rule. FRA expects that railroads which have previously believed they were under a mandate to decertify a person for a violation regardless of the particular factual defenses the person may have had, will more carefully consider similar defenses in future cases. In 1993, FRA stated that ''[f]actual disputes could also involve whether certain equitable considerations warrant reversal of the railroad's decision on the grounds that, due to certain peculiar underlying facts, the railroad's decision would produce an unjust result not intended by FRA's rules.'' 58 FR 18982, 19001 (Apr. 9, 1993). The example FRA used in 1993 applies to this proposal as well. That is, the LERB ''will consider assertions that a person failed to operate the train within the prescribed speed limits because of defective equipment.'' Similarly, the actions of other people may sometimes be an intervening cause. For instance, a conductor or dispatcher may relay incorrect information to the engineer which is relied on in making a prohibited train movement.

Meanwhile, locomotive engineers and railroad managers should note that not all equipment failures or errors caused by others should serve to absolve the person from certification action. The factual issues of each circumstance must be analyzed on a case-by-case basis. For example, a broken speedometer would certainly not be an intervening factor in a violation of § 240.117(e)(3) (failure to do certain required brake tests).

Paragraph (i)(2) would constitute an important change to the enforcement philosophy of this part and was a popular concept among the RSAC members. This section, which only applies to the operational misconduct events, requires railroads to forgo revocation when two criteria are met. First, the violation must be of a minimal nature; for example, on high speed track at the bottom of a steep grade, the front of the lead unit in a four unit consist hauling 100 cars enters a speed restriction at 10 miles per hour over speed, but the third unit and the balance of the train enters the speed restriction at the proper speed, and maintains that speed for the remainder of the train. Other examples would include slowing down for speed restrictions that are located within difficult train-handling territory, flat switching-kicking cars, snow plow operations, and certain industrial switching operations requiring short bursts of speed to spot cars on steep inclines. While a railroad would be free to take such disciplinary action as it deems appropriate consistent with the collective bargaining agreement and the Railway Labor Act, the consensus of the Working Group is that this is a violation so minimal that safety is not compromised and federal government intervention is not warranted.

However, a violation could not be considered of a minimal nature if an engineer blatantly disregarded the operating rules. For example, using the same consist and location in the previous example, if the entire train were operated through the speed restriction at 10 miles per hour over the prescribed speed, then the event could not be considered of a minimal nature.

Second, for paragraph (i)(2) to apply, there must also be substantial evidence that the violation did not have either a direct or potential effect on rail safety. This proposed defense would certainly not apply to a violation that actually caused a collision or injury because that would be a direct effect on rail safety. It would also not apply to a violation that, given the factual circumstances surrounding the violation, could have resulted in a collision or injury because that would be a potential effect on rail safety. For instance, an example used to illustrate the term ''minimal nature'' described a situation involving a train that had the first two locomotives enter a speed restriction too fast, yet the balance of the train was in compliance with the speed restriction; since the train in this example would not be endangering other trains because it had the authority to travel on that track at a particular speed, there would be no direct or potential effect on rail safety caused by this violation.

In contrast, if a train fails to stop short of a banner, which is acting as a signal requiring a complete stop before passing it, during an efficiency test, that striking of a banner may have no direct effect on rail safety but it has a potential effect since a banner would be simulating a railroad car or another train. Meanwhile, there is a difference between passing a banner versus making an incidental touching of a banner. If a locomotive or train barely touches a banner so that the locomotive or train does not run over the banner, break the banner, or cause the banner to fall down, this incidental touching should be considered a minimal nature violation that does not have any direct or potential effect on rail safety. This is because such an incidental touching is not likely to cause damage to equipment or injuries to crew members even if the banner was another train.

Similarly, if a train has verbal and written authority to occupy a segment of main track, the written authority refers to the correct train number, and the

written authority refers to the wrong locomotive because someone transposed the numbers, the engineer's violation in not catching this error before entering the track without proper authority could be considered of a minimal nature with no direct or potential effect on rail safety. Since the railroad would be aware of the whereabouts of this train, the additional risk to safety of this paperwork mistake is practically none. Under the same scenario, where there are no other trains or equipment operating within the designated limits, there may be no potential effect on rail safety as well as no direct effect.

Paragraph (j) would require that railroads keep records of those violations in which they elect not to revoke the person's certificate pursuant to paragraph (i). The keeping of these records is substantially less burdensome than the current rule since the current rule requires this type of recordkeeping plus the opportunity for a hearing under § 240.307. The purpose for keeping such records is so that FRA can oversee enforcement of the rule. As noted earlier in the preamble (when explaining one of RSAC's major issues as addressing safety assurance and compliance by clarifying railroad discretion), paragraph (j)(1) would require that railroads keep records even when they decide not to suspend a person's certificate due to a determination pursuant to paragraph (i). Paragraph (j)(2) would require that railroads keep records even when they make their determination prior to the convening of the hearing held pursuant to § 240.307.

Paragraph (k) would address concerns from some Working Group members that problems could arise if FRA disagrees with a railroad's decision not to suspend a locomotive engineer's certificate for an alleged misconduct event pursuant to § 240.117(e). The idea behind new paragraph (i) is that as long as the railroads make good faith determinations after reasonable inquiries, they should have a defense to civil enforcement for making, what the agency believes is, an incorrect determination. Since paragraph (i) will require the railroads to make some difficult decisions based on factual circumstances on a case-by-case basis, the RSAC members felt that it was only fair that the railroads should not be penalized for making what the agency in hindsight may decide to be the wrong decision. However, railroads shall be put on notice that if they do not conduct a reasonable inquiry or act in good faith, they are subject to civil penalty enforcement.

Section 240.309—Railroad Oversight Responsibilities

This recordkeeping section needs modification to better reflect the types of poor safety conduct identified in § 240.117(e). Paragraph (e)(3) would also need amending to include a reference to part 238 [Passenger Equipment Safety Standards] if that proposed rule becomes final. Paragraphs (e)(6), (7) and (8) currently concern train handling issues that are no longer considered operational misconduct events. Hence, the new paragraphs (e)(6), (7) and (8) mirror those operational misconduct events that were mistakenly left off this list of conduct that needs to be reported for study and evaluation purposes.

New paragraph (h) would correct a clerical error which had mistakenly created two paragraphs labeled as (e).

Subpart E—Dispute Resolution Procedures

Section 240.403—Petition Requirements

The proposed changes to paragraph (d) would shorten the amount of time an aggrieved person can take to file a petition with the LERB from 180 days to 120 days. The main reason for this change is wrapped up in the overall concept that the entire certification review process should be as short as possible because timely decisions are more meaningful. Another reason for shortening this filing period is that the RSAC members, many of whom have had significant exposure to the LERB petition process, found this time period unnecessarily long in order to complete a petition. These industry leaders recognize that the evidence typically needed for the LERB's review is readily available at the time the railroad makes its revocation decision. Petitioners need to send the LERB this evidence and add an explanation as to why they believe the railroad's decision was improper. Since this period of time was so great, some RSAC members reported that it only encouraged aggrieved persons to procrastinate before deciding whether to file a petition.

Section 240.405—Processing Qualification Review Petitions

Paragraph (a) would be modified to include a public pronouncement of FRA's goal to issue timely decisions. Many of the RSAC members applauded the thoroughness of the LERB's decisions; meanwhile, all of the Working Group members, including FRA, agreed that the LERB needs to issue all of its decisions in a timely fashion. As FRA discussed in the RSAC meetings, FRA has improved the process; however, FRA's efforts have led to mixed results. Therefore, by publishing FRA's goal of rendering decisions within 180 days from the date FRA has received all the information from the parties and stating that intention in a letter to Petitioner, FRA will be recognizing these decisions as projects requiring specific deadlines.

Paragraph (c) would lengthen the amount of time the railroad will be given to respond to a petition from 30 days to 60 days. After several years of responding to petitions, the RSAC members representing railroads complained of the great burden and difficulty they had in issuing timely responses. Although there was some reluctance to lengthening this period and thereby the overall process, there was consensus that this 30-day time period was unfairly short. FRA would expect that when possible, railroads will continue to file responses as soon as possible rather than wait until the sixtieth day to file.

Paragraph (d)(3) would be added so that railroads which submit information in response to a petition will be required to file such submission in triplicate. While this proposal creates an additional mandatory paperwork burden for the railroads that choose to respond, it should not be a great hardship since most railroads have been voluntarily supplying FRA with three copies of their submissions. Many submissions contain several hundred pages since they typically include a copy of the hearing transcript developed at the railroad on-the-property hearing pursuant to § 240.307. When the Docket Clerk receives a single copy of a railroad's response to a petition, the Docket Clerk typically makes two additional photocopies of the response or calls the railroad's representative to see if the railroad is willing to voluntarily provide two additional copies; consequently, making this a mandatory requirement will ease an administrative burden for FRA and clarify what FRA really needs to process the petition. Since persons filing petitions are specifically required to submit each petition in triplicate, this requirement would provide parity between the parties. Furthermore, without this requirement, the burden placed on the Docket Clerk could cause undesirable delay in this process.

Section 240.411—Appeals

Although FRA has proceeded without legal challenge, some questioned the fact that the current rule does not specify that the Administrator has the power to remand or vacate. A remand is a tool which allows the appellate decision-maker to send a case back to

the tribunal or body from which it was appealed for further deliberation. For example, if the Administrator reverses a judgment made pursuant to § 240.409, the Administrator may remand the matter for a new proceeding or hearing to be carried out consistent with the principles announced in the Administrator's decision. The authority to vacate may be necessary if the Administrator wishes to annul or set aside an entry of record or a judgment. Since the powers to remand and vacate should prove beneficial to the dispute resolution procedures, they are proposed as additions to paragraph (e).

The phrase ''when these administrative remedies have been exhausted'' is included as part of the regulation so that parties would understand that a remand, or other intermediate decision, would not constitute final agency action. The inclusion of this phrase is made in deference to those parties that are not represented by an attorney or who might otherwise be confused as to whether any action taken by the Administrator should be considered final agency action.

Appendix A to Part 240—Schedule of Civil Penalties

FRA proposes that footnote number 1 to this schedule of civil penalties should be revised to reflect recent changes in the law. The Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101–410 Stat. 890, 28 U.S.C. 2461 note, as amended by the Debt Collection Improvement Act of 1996 Pub. L. 104–134, April 26, 1996 required agencies to adjust for inflation the maximum civil monetary penalties within the agencies jurisdiction. The resulting $11,000 and $22,000 maximum penalties were determined by applying the criteria set forth in sections 4 and 5 of the statute to the maximum penalties otherwise provided for in the Federal railroad safety laws.

At the time it issues a final rule, FRA will consider whether any additional revision of the current penalty schedule is necessary. Although penalty schedules are statements of policy and FRA is not obligated to provide an opportunity for public comment, FRA would welcome comments on this issue.

Regulatory Impact

E.O. 12866 and DOT Regulatory Policies and Procedures

This notice of proposed rulemaking has been evaluated in accordance with existing regulatory policies and is considered to be nonsignificant under Executive Order 12866 and is not significant under the DOT policies and procedures (44 F.R. 11034; February 26, 1979). FRA has prepared and placed in the docket a regulatory evaluation of the proposed rule.

FRA expects that overall the proposed rule will save the rail industry approximately $890,000 Net Present Value (NPV) over the next twenty-years. The NPV of the total twenty-year additional costs associated with the proposed rule is $1,086,959. The NPV of the total twenty-year monetary cost savings expected to accrue to the industry from the proposed rule is $1,976,684. For some rail operators, the total costs they incur may exceed the total costs they save. For others, the cost savings will outweigh the costs incurred.

FRA believes it is reasonable to expect that several injuries and fatalities would be avoided as a result of implementing some of the proposed changes. FRA also believes that the safety of rail operations will not be compromised as a result of implementing the cost savings changes.

The following table presents estimated twenty-year monetary impacts associated with the proposed rule modifications.

Description	Costs incurred	Costs saved
Supervisors of Locomotive Engineers—.		
Qualifications	$1,053,207	.....
First Designated Supervisor	.....	$16,844
Extending Culpability	17,798	.....
Revocable Event Criteria (Speed)	.....	232,486
Ineligibility Schedule	.....	574,746
Vision and Hearing Acuity	14,185	.....
New Railroads/New Territories	.....	16,844
Pilots for Locomotive Engineers	.....	1,047,282
Written Notice of Revocation	1,769	.....
Added Railroad Discretion	.....	88,481
Total (rounded)	1,086,959	1,976,684
Net Savings (rounded)	.....	889,725

Additionally, note that the NPV of the total savings to individual locomotive engineers that commit second and third violations of railroad operating rules and practices within a three-year period is expected to total approximately $2,487,263 over the next twenty years. However, because one engineer's lost employment opportunity would remain another locomotive engineer's gained opportunity, these cost savings are presented for information purposes only.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.) requires an assessment of the impacts of rules on small entities. ''Small entity,'' is defined in 5 U.S.C. 601 as a small business concern that is independently owned and operated, and is not dominant in its field of operation. The United States Small Business Administration (SBA) stipulates in its ''Size Standards'' that the largest a ''for-profit'' railroad 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.'' Table of Size Standards,'' U.S. Small Business Administration, January 31, 1996, 13 CFR part 121.

The proposed rule would affect small railroads as defined by the SBA. For government entities the definition of small entities is based on population served (50,000). Governmental jurisdictions and transit authorities providing intercity and commuter rail service impacted by this rulemaking do not serve communities with population levels below 50,000.

Because FRA does not have information regarding the number of people employed by railroads, it cannot determine exactly how many small railroads, by SBA definition, are in operation in the United States. Using the SBA parameters, Class III railroads would probably classify as small businesses. Therefore, FRA has issued an interim policy establishing the delineation of Class III as being representative of small businesses for the railroad industry. The Regulatory Flexibility Assessment for this NPRM is included in the Regulatory Evaluation that was placed in the docket for this rulemaking.

About 650 of the approximately 700 railroads in the United States are probably Class III railroads and would be considered small businesses by FRA. Small railroads that would be affected by the proposed rule provide less than 10 percent of the industry's employment, own about 10 percent of the track, and operate less than 10 percent of the ton-miles. Approximately 50 of these railroads are tourist, scenic, excursion, or museum railroads that operate on the general railroad system.

The proposed standards were developed by an industry Working Group that has members from ASLRRA that represent the interests of small freight railroads and some excursion railroads operating in the United States.

A representative of the Tourist Railway Association, Incorporated is a member of the Rail Safety Advisory Committee which was responsible for approving the proposed standards developed by the Working Group. Individual small rail operators have an opportunity to comment on this NPRM.

FRA has not estimated the level of impact of this rule on small entities at this time. The impact on a particular entity will vary in proportion to the size of the railroad. FRA requests information regarding the number of locomotive engineers employed by Class III railroads as well as information regarding the average number of locomotive engineer certification revocations that occur each year on Class III railroads. This information will assist FRA in estimating the level of impact on small entities.

FRA has identified four specific proposed requirements that would result in additional regulatory burden for small railroads. The proposed extension of culpability to DSLEs, locomotive engineers' right to receive further medical evaluation following a vision and hearing acuity test, distribution of the Final Rule to medical officers, and written notification of suspension of certification would all affect small railroads. The level of costs associated with these standards should vary in proportion to the size of each railroad. Railroads with fewer locomotive engineers would experience lower costs. These standards do not offer opportunities for larger railroads to experience economies of scale.

Also note that railroads would be relieved of some of the costs associated with current Federal regulations. Small railroads are actually expected to benefit relatively more than their larger counterparts from three particular proposals. The criteria for requiring pilots for locomotive engineers not qualified on the physical characteristics of a territory grant exemptions based on factors favorable to small railroads such as operating speed and type of terrain. The allowance for a single certificate for certified locomotive engineers qualified to operate on more than one railroad would have particular applicability to small railroads owned by holding companies. Finally, the joint operations requirement for the shared responsibility of determining which locomotive engineers are qualified to operate over the host railroad's territory would provide small railroads that provide other railroads trackage rights over all or part of their territory with significant opportunities for cost savings.

FRA expects that overall the economic benefits that would accrue to small railroads if the requirements of this proposal are implemented will exceed the regulatory costs. FRA is also confident that the costs associated with particular requirements will be justified by the safety benefits achieved.

The Working Group considered proposals made by the ASLRRA to provide small railroads with economic relief from some of the burdens imposed by the existing and proposed federal regulations addressing locomotive engineer qualifications and certification. Initially, the ASLRRA proposed that recertification of locomotive engineers occur every 5 years, versus the current 3 year interval. The Working Group considered this proposal. However, the proposal would decrease the level of confidence that railroads have regarding the level of safety with which trains are operated. The recertification process provides railroads with the opportunity to ascertain that locomotive engineers can operate trains in a safe manner. Unsafe locomotive engineer train operating practices are detected during the tests administered as part of the recertification process and can be corrected through appropriate training. Because the timing of training of locomotive engineers coincides with their recertification, lengthening the recertification interval could translate into delaying needed refresher training sessions. This would decrease the level of safety with which trains are operated. This extension would advance the economic interests of small entities but, would not advance the interests of rail safety.

Taking into account the safety concerns of the Working Group, the ASLRRA proposed that recertification remain at a 3 year interval, but that the National Driver Register (NDR) check and the hearing and vision tests be performed at 5 year intervals (instead of the current 3 year interval) for Class III railroads that do not operate passenger trains, do not operate in territory where passenger trains are operated, do not operate in territory with a grade of two percent or greater over a distance of two continuous miles or, do not operate in signal territory, and, within the past year, have not transported any hazardous materials in hazard classes 1 (explosives), 2.3 (poisonous gases) or 7 (radioactive materials). The rationale for allowing longer intervals between hearing and vision acuity tests for locomotive engineers in smaller operations is that on site management would be more likely to notice changes in a person's medical condition. By excluding territories with passenger rail traffic, steep grades, signals, and railroads that haul hazardous materials from the extension, the proposal limits the impact of the extension to situations with the lowest level of exposure to accidents and the lowest severity of accident.

Extending the interval between NDR checks, however, raises safety concerns. This NPRM proposes requiring implementation of an honor system through which locomotive engineers self report to the railroads their motor vehicle driving incidents involving reckless behavior. The NDR check for motor vehicle drivers will confirm whether there were any incidents of reckless behavior while driving a highway vehicle. This information provides employers insight into whether a person can be trusted with the operation of a locomotive. The potential, and in certain cases even the incentive, exists for locomotive engineers who operate cars under the influence of alcohol or drugs to not self-report and protect their certification and jobs. Increasing the interval between NDR checks would actually increase the amount of time an engineer could continue to operate trains without the railroad being aware of reckless motor vehicle driving incidents. This, in turn, would increase the risk of an accident occurring due to reckless behavior while operating a locomotive or train.

Nevertheless, in an attempt to expedite the regulatory process associated with this rulemaking the ASLRRA withdrew their proposal for extending intervals from this particular rulemaking activity. Thus, the intervals for both the NDR checks, as well as the hearing and vision tests, remain at 3 years. FRA remains open and receptive to exploring the merits of extending the interval between hearing and vision acuity tests based on supporting data that is presented.

FRA requests information regarding the monetary savings and costs as well as the safety impacts associated with providing greater flexibility to small entities affected by the proposed requirements. FRA also requests comment regarding implementation time frames for small railroads. In the past, so as not to unduly burden small entities, FRA has allowed for delayed implementation dates for railroads that have fewer than 400,000 annual employee hours. FRA requests information regarding any undue burdens that the proposed implementation dates would cause small entities.

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 and the estimated time to fulfill each requirement are as follows:

CFR section/subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual burden cost
NEW REQUIREMENTS					
240.105—Selection Criteria For Design. Supervisors of Locomotive Engineers.	25 railroads	25 reports	1 hour	25	$425
Qualification—DSLEs—phys. characteristics.	698 railroads	698 amend	6 hours	4,188	164,728
240.111—Indiv. Duty to Furnish Data on Prior Safety Conduct as M.V. Operator.	698 railroads	400 calls	10 min	67	2,680
240.117—Criteria For Consideration of Operating Rules Compliance Data.	698 railroads	3 appeals	42 hours	126	5,040
240.121—Criteria—Hearing/Vision Acuity—First Year.	698 railroads	698 copies	15 min	175	5,425
Criteria—Hearing/Vision—Subseq. Yrs	25 new railroads	25 copies	15 min	6	186
Medical Examiner Consultation w DSLE.	698 railroads	17 reports	1 hour	17	527
Notification—Hearing/Vision Change	698 railroads	10 notificatns	15 min	3	120
240.229—Reqmnts—Joint Oper. Terr.	321 railroads	184 calls	5 min	15	600
240.307—Revocation of Certification	698 railroads	650 notices	10 min	108	3,348
240.309—Railroad Oversight Resp	43 railroads	10 annotation	15 min	3	120
CURRENT REQUIREMENTS					
240.9—Waivers	698 railroads	5 waivers	1 hour	5	165
Certification Program	25 new railroads	25 programs	200hrs/40 hrs	4,520	140,120
Final Review + Program Submission	25 new railroads	25 reviews	1 hour	25	775
240.11—Penalties For Non-Compliance	698 railroads	2 falsification	10 min	20 min	13
240.111—Request—State Driving Lic. Data	13,333 candidates	13,333 reqsts	15 minutes	3,333	133,320
Request for NDR Data—State Agency	50 candidate	50 requests	30 minutes	25	1,000
Response—State Agency—NDR Data	1 state/gov. entity	50 requests	15 minutes	13	403
Railroad Notification—NDR match	698 railroads	267 requests	30 minutes	134	4,757
Written Response from Candidate	698 railroads	267 comment	15 minutes	67	2,680
Notice to Railroad—No License	40,000 candidates	4 letters	15 minutes	1	40
240.113—Notice to Railroad Furnishing Data on Prior Safety Conduct.	13,333 candidates	267 requests/267 responses.	15 min/30 min	200	6,803
240.115—Candidate's Review + Written Comments—Prior Safety Conduct Data.	13,333 candidates	400 responses	30 min	200	8,000
240.123—Criteria For Init./Cont. Educ	30 railroads	30 amend	1 hour	30	1,200
240.201/223/301—List of DSLEs	698 railroads	698 updates	15 minutes	175	7,000
—List of Design. Qual. Loc. Engineers	698 railroads	698 updates	15 minutes	175	5,425
—Locomotive Engineers Certificate	40,000 candidates	13,333 cert	5 minutes	1,111	34,441
—List—Des. Persons to sign L.E. Cert	698 railroads	20 lists	15 minutes	5	165
240.205—Data to EAP Counselor	698 railroads	267 records	5 minutes	22	880
240.207—Medical Certificate	40,000 candidates	13,333 cert	70 minutes	15,555	1,555,50
240.209/213—Written Test	40,000 candidates	13,333 tests	2 hours	26,666	826,646
240.211/213—Performance Test	40,000 candidates	13,333 tests	2 hours	26,666	826,646
240.215—Recordkeeping—Cert. Loc. Eng	698 railroads	13,333 record	10 minutes	2,222	68,882
240.219—Denial of Certification	13,333 candidates	1,333 lettrs/1,333 respnse.	30 min./1 hr	2,000	73,997
—Written Basis For Denial	698 railroads	1,333 notific	1 hour	1,333	45,322
240.227—Canadian Cert. Data	Canadian RRs	200 certific	15 minutes	50	1,550
240.303—Annual Op. Monit. Obs.	40,000 candidates	40,000 tests	4 hours	160,000	6,400,000
Annual Operational Observation	40,000 candidates	40,000 tests	2 hours	80,000	3,200,000
240.305—Engineer's Non-Qual. Notific	40,000 candidates	400 notific	15 minutes	100 hours	4,000
Engineer's Notice—Loss of Qualification.	40,000 candidates	600 letters	1 hour	600	24,000
240.307—Notice to Engineer—Disqual	698 railroads	650 letters	1 hour	650	20,150
240.309—Railroad Oversight Resp	44 railroads	44 reviews	80 hours	3,520	197,120
240.401—Engineer's Appeal to FRA	698 railroads	76 petitions	2 hours	152	6,080
240.405—Railroad's Response to Appeal	698 railroads	76 responses	30 minutes	38	1,786
240.407—Request For a Hearing	698 railroads	11 responses	30 minutes	6	240
240.411—Appeals	698 railroads	2 notices	2 hours	4	160

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), the FRA solicits comments concerning: whether these information collection requirements are necessary for the proper performance of the function 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 Robert Brogan at 202–493–6292.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Robert Brogan, Federal Railroad Administration, RRS–21, Mail Stop 25, 400 7th Street, S.W., Washington. D.C. 20590.

OMB is obligated 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 cannot 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 a final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

Environmental Impact

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

Federalism Implications

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

List of Subjects in 49 CFR Part 240

Penalties, Railroad employees, Railroad safety, Reporting and recordkeeping requirements.

Therefore, in consideration of the foregoing, FRA proposes to amend Part 240, Title 49, Code of Federal Regulations as follows:

PART 240—[AMENDED]

1. The authority citation for Part 240 is revised to read as follows:

Authority: 49 U.S.C. Chs. 20103, 20107, 20135; 49 CFR 1.49.

2. Section 240.1 is amended by revising paragraph (b) to read as follows:

§ 240.1 Purpose and scope.

(a) * * *

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

* * * * *

3. Section 240.3 is revised to read as follows:

§ 240.3 Application and responsibility for compliance.

(a) Except as provided in paragraph (b) of this section, this part applies to all railroads.

(b) This part does not apply to—

(1) 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.

(c) Although the duties imposed by this part are generally stated in terms of the duty of a railroad, any person, including a contractor for a railroad, who performs any function covered by this part must perform that function in accordance with this part.

4. Section 240.5 is amended by revising the title and paragraphs (a), (b) and (e) to read as follows:

§ 240.5 Preemptive effect and construction.

(a) Under 49 U.S.C. 20106, issuance of the regulations in this part preempts any State law, regulation, or order covering the same subject matter, except an additional or more stringent law, regulation, or order that is necessary to eliminate or reduce an essentially local safety hazard; is not incompatible with a law, regulation, or order of the United States Government; and does not impose an unreasonable burden on interstate commerce.

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

(c) * * *

(d) * * *

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

§ 240.7 [Amended].

5. Section 240.7 is amended by revising the definitions of *Administrator* and *Railroad* and adding definitions of *Dual purpose vehicle, Exclusive Track Occupancy, FRA, Person, Qualified, Service,* and *Specialized roadway maintenance equipment,* to read as follows:

* * * * *

Administrator means the Administrator of the Federal Railroad Administration or the Administrator's delegate.

* * * * *

Dual purpose vehicle means a piece of on-track equipment which can function as either a locomotive or specialized roadway maintenance equipment.

* * * * *

Exclusive Track Occupancy means a method of establishing work limits on controlled track in which movement authority of trains and other equipment is withheld by the train dispatcher or control operator, or restricted by flagmen, as prescribed in § 214.321 of this chapter.

* * * * *

FRA means the Federal Railroad Administration.

* * * * *

Person means an entity of any type covered under 1 U.S.C. 1, including but not limited to the following: a railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor.

Qualified means a person who has passed all appropriate training and testing programs required by the railroad and this part and who, therefore, has actual knowledge or may reasonably be expected to have knowledge of the subject on which the person is qualified.

Railroad means any form of nonhighway ground transportation that runs on rails or electromagnetic guideways and any entity providing such transportation, including:

(1) Commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and

(2) High speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

* * * * *

Service has the meaning given in Rule 5 of the Federal Rules of Civil Procedure as amended. Similarly, the computation of time provisions in Rule 6 of the Federal Rules of Civil Procedure as amended are also applicable in this part. See also the definition of ''filing'' in this section.

* * * * *

Specialized roadway maintenance equipment is equipment powered by any means of energy other than hand power which is designed to be used in conjunction with maintenance, repair, construction or inspection of track, bridges, roadway, signal, communications, or electric traction systems.

* * * * *

6. Section 240.9 is amended by revising paragraphs (a) and (c) to read as follows:

§ 240.9 Waivers.

(a) A person subject to a requirement of this part may petition the Administrator for a waiver of compliance with such requirement. The filing of such a petition does not affect that person's responsibility for compliance with that requirement while the petition is being considered.

(b) * * *

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

7. Section 240.11 is amended by revising the title and paragraphs (a), (b) and (c) to read as follows:

§ 240.11 Penalties and consequences for noncompliance.

(a) Any 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 $500 and not more than $11,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed $22,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. See appendix A to this part for a statement of agency civil penalty policy.

(b) Any 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 in accordance with part 209 of this chapter.

(c) Any 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.

(d) * * *

8. Section 240.103 is amended by removing paragraphs (a)(1), (a)(2), (a)(3) and (a)(4) and revising paragraph (a) to read as follows:

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

(a) Each railroad shall submit its written program and a description of how its program conforms to the specific requirements of this part in accordance with the procedures contained in appendix B and shall submit its certification program for approval at least 60 days before commencing operations.

* * * * *

9. Section 240.104 is added to read as follows:

§ 240.104 Criteria for determining whether a railroad operation requires a certified locomotive engineer.

Any person who operates a locomotive or group of locomotives when moving with or without being coupled to other rolling equipment shall be a certified locomotive engineer except:

(a) Any person who operates specialized roadway maintenance equipment in conjunction with roadway maintenance and related maintenance of way functions, including traveling to and from the work site; or

(b) Any person who operates a dual purpose vehicle which is:

(1) Being operated in conjunction with roadway maintenance and related maintenance of way functions, including traveling to and from the work site;

(2) Moving under authority of rules designated by the railroad for maintenance of way equipment under the direct supervision of an employee trained and qualified in accordance with § 214.353 of this chapter, which rules provide Exclusive Track Occupancy for the roadway equipment with respect to trains;

(3) Being operated by an individual trained and qualified in accordance with §§ 214.341, 214.343, and 214.355 of this chapter; and

(4) When hauling cars, not less than 85% of the total cars designed for air brakes shall have operative air brakes.

10. Section 240.105 is amended by revising paragraph (b)(4) and by adding paragraph (c) to read as follows:

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

* * * * *

(b) * * *

(4) Is a certified engineer who is qualified on the physical characteristics of the portion of the railroad on which that person will perform the duties of a designated supervisor of locomotive engineers.

(c) If a railroad does not have any Designated Supervisors of Locomotive Engineers, and wishes to hire one, the chief operating officer of the railroad shall make a determination in writing that the Designated Supervisor of Locomotive Engineers designate possesses the necessary performance skills in accordance with § 240.127. This determination shall take into account any special operating characteristics which are unique to that railroad.

11. Section 240.111 is amended by revising paragraphs (a) introductory text, (a)(1), and (h), and adding paragraph (i) to read as follows:

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

(a) Except for initial certifications under paragraph (b), (h), or (i) of § 240.201 or for persons covered by § 240.109 (h), each person seeking certification or recertification under this part shall, within 366 days preceding the date of the railroad's decision on certification or recertification:

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

* * * * *

(h) The actions required for compliance with paragraph (a) of this section shall be undertaken within the 366 days preceding the date of the railroad's decision concerning certification or recertification.

(i) Each certified locomotive engineer or person seeking initial certification shall report motor vehicle incidents described in § 240.115(b)(1) and (2) 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. For the purposes of engineer certification, no railroad shall require reporting earlier than 48 hours after the conviction, or completed state action to cancel, revoke, or deny a motor vehicle drivers license.

12. 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 initial certifications under paragraph (b), (h), or (i) of § 240.201 or 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:

* * * * *

13. Section 240.117 is revised to read as follows:

§ 240.117 Criteria for consideration of operating rules compliance data.

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

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

(c)(1) A certified engineer who has demonstrated a failure to comply, as described in paragraph (e) of this section, with railroad rules and practices for the safe operation of trains shall have his or her certification revoked.

(2) A supervisor of locomotive engineers who is monitoring a locomotive engineer and fails to take appropriate action to prevent a violation of paragraph (e) of this section, shall have his or her certification revoked. Appropriate action does not mean that a supervisor must prevent a violation from occurring at all costs; the duty may be met by warning an engineer of a potential or foreseeable violation. A designated supervisor of locomotive engineers will not be held culpable under this section when this monitoring event is conducted as part of the railroad's operational compliance tests as defined in §§ 217.9 and 240.303 of this chapter.

(d) Limitations on consideration of prior operating rule compliance data. Except as provided for in paragraph (i) of this section, in determining whether a person may be or remain certified as a locomotive engineer, a railroad shall consider as operating rule compliance data only conduct described in paragraph (e) of this section that occurred within a period of 36 consecutive months prior to the determination. A review of an existing certification shall be initiated promptly upon the occurrence and documentation of any conduct described in this section.

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

(1) Failure to control a locomotive or train in accordance with a signal indication, excluding a hand or a radio signal indication or a switch, that requires a complete stop before passing it;

(2) Failure to adhere to limitations concerning train speed when the speed at which the train was operated exceeds the maximum authorized limit by at least 10 miles per hour. Railroads shall consider only those violations of the conditional clause of restricted speed rules, or the operational equivalent thereof, which cause reportable accidents or incidents under 49 CFR part 225, as instances of failure to adhere to this section;

(3) Failure to adhere to procedures for the safe use of train or engine brakes when the procedures are required for compliance with the transfer, initial, or intermediate terminal test provisions of 49 CFR part 232 (see 49 CFR 232.12 and 232.13);

(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 knowingly operating or permitting to be operated a train with an unauthorized disabled safety device in the controlling locomotive. (See 49 CFR part 218 subpart D and appendix C to part 218);

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

(f) (1) If in any single incident the person's conduct contravened more than one operating rule or practice, that event shall be treated as a single violation for the purposes of this section.

(2) A violation of one or more operating rules or practices described in paragraph (e)(1) through (e)(5) of this section that occurs during a properly conducted operational compliance test subject to the provisions of this chapter shall be counted in determining the periods of ineligibility described in paragraph (g) of this section.

(3) An operational test that is not conducted in compliance with this part, a railroad's operating rules, or a railroad's program under § 217.9, of this chapter will not be considered a legitimate test of operational skill or knowledge, and will not be considered for certification, recertification or revocation purposes.

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

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

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

(3) Be determined according to the following standards:

(i) In the case of a single incident involving violation of one or more of the operating rules or practices described in paragraphs (e)(1) through (e)(5) of this section, the person shall have his or her certificate revoked for a period of one month.

(ii) 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)(5) of this section, that occurred within 24 months of each other, the person shall have his or her certificate revoked for a period of six months.

(iii) In the case of three separate incidents involving violations of one or more of the operating rules or practices that occurred within 36 months of each other, the person shall have his or her certificate revoked for a period of one year.

(iv) In the case of four separate incidents involving violations of one or more of the operating rules or practices that occurred within 36 months of each other, the person shall have his or her

certificate revoked for a period of three years.

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

(4) Be reduced to the shorter periods of ineligibility imposed by paragraphs (g) (1) through (3) of this section, if the incident:

(i) Occurred prior to [effective date of the final rule]; and

(ii) Involved violations described in paragraphs (e)(1) through (5) of this section; and

(iii) Did not occur within 60 months of a prior violation as described in paragraph (e)(6) of this section.

(h) *Future eligibility to hold certificate.* Only a person whose certification has been denied or revoked for a period of one year or less in accordance with the provisions of paragraph (g)(3) of this section for reasons other than noncompliance with § 219.101 of this chapter shall be eligible for grant or reinstatement of the certificate prior to the expiration of the initial period of revocation. Such a person shall not be eligible for grant or reinstatement unless and until—

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

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

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

(i) In no event shall incidents that meet the criteria of paragraphs (i) (1) through (4) of this section be considered as prior incidents for the purposes of paragraph (g)(3) of this section even though such incidents could have been or were validly determined to be violations at the time they occurred. Incidents that shall not be considered under paragraph (g)(3) of this section are those that:

(1) Occurred prior to May 10, 1993;

(2) Involved violations of one or more of the following operating rules or practices:

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

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

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

(iv) Entering track segment without proper authority;

(3) Were or could have been found to be violations under this section in effect prior to May 10, 1993 and contained in the 49 CFR, parts 200 to 399, edition revised as of October 1, 1992; and

(4) Would not be a violation of paragraph (e) of this section.

(j) In no event shall incidents that meet the criteria of paragraphs (j) (1) through (2) of this section be considered as prior incidents for the purposes of paragraph (g)(3) of this section even though such incidents could have been or were validly determined to be violations at the time they occurred. Incidents that shall not be considered under paragraph (g)(3) of this section are those that:

(1) Occurred prior to [effective date of the final rule];

(2) Involved violations of one or more of the following operating rules or practices:

(i) Failure to control a locomotive or train in accordance with a signal indication that requires a complete stop before passing it;

(ii) Failure to adhere to limitations concerning train speed when the speed at which the train was operated exceeds the maximum authorized limit by at least 10 miles per hour or by more than one half of the authorized speed, whichever is less;

(3) Were or could have been found to be violations under this section in effect prior to [effective date of the final rule and contained in the 49 CFR, parts 200 to 399, edition revised as of October 1, 1998]; and

(4) Would not be a violation of paragraph (e) of this section.

14. Section 240.121 is amended by revising paragraphs (b), (c)(3) and (e), and adding paragraph (f) to read as follows:

§ 240.121 Criteria for vision and hearing acuity data.

* * * * *

(b) *Fitness requirement.* In order to be currently certified as a locomotive engineer, except as permitted by paragraph (e) of this section, a person's vision and hearing shall meet or exceed the standards prescribed in this section and appendix F. It is recommended that each test conducted pursuant to this section should be performed according to any directions supplied by the manufacturer of such test and any American National Standards Institute (ANSI) standards that are applicable.

(c) * * *

(3) The ability to recognize and distinguish between the colors of railroad signals as demonstrated by successfully completing one of the tests in appendix F.

(d) * * *

(e) A person not meeting the thresholds in paragraphs (c) and (d) of this section shall, upon request, be subject to further medical evaluation by a railroad's medical examiner to determine that person's ability to safely operate a locomotive. The railroad shall provide its medical examiner with a current copy of this part, including all appendices. If, after consultation with one of the railroad's designated supervisors of locomotive engineers, the medical examiner concludes that, despite not meeting the threshold(s) in paragraphs (c) and (d) of this section, the person has the ability to safely operate a locomotive, the person may be certified as a locomotive engineer and such certification conditioned on any special restrictions the medical examiner determines in writing to be necessary.

(f) As a condition of maintaining certification, it is the obligation of each certified locomotive engineer to notify his or her employing railroad's medical department or, if no such department exists, an appropriate railroad official if the person's best correctable vision or hearing has deteriorated to the extent that the person no longer meets one or more of the prescribed vision or hearing standards or requirements of this section.

15. Section 240.123 is amended by adding paragraph (d) to read as follows:

§ 240.123 Criteria for initial and continuing education.

* * * * *

(d) Pursuant to paragraphs (b) and (c) of this section, a person may acquire familiarity with the physical characteristics of a territory through the following methods if the specific conditions included in the description of each method are met. The methods used by a railroad for familiarizing its engineers with new territory while starting up a new railroad, starting operations over newly acquired rail lines, or reopening of a long unused route, shall be described in the railroad's plan submission as described in appendix B of this part.

(1) If ownership of a railroad is being transferred from one company to another, the engineer(s) of the acquiring company may receive familiarization training from the selling company prior to the acquiring railroad commencing operation; or

(2) Failing to obtain familiarization training from the previous owner, opening a new rail line, or reopening an unused route would require that the engineer(s) obtain familiarization through other methods. Acceptable methods of obtaining familiarization include using hyrail trips or initial lite locomotive trips in compliance with what is specified in the part 240 plan submission.

16. Section 240.127 is amended by revising paragraph (c)(2) to read as follows:

§ 240.127 Criteria for examining skill performance.

* * * * *

(c) * * *

(2) Conducted by a designated supervisor of locomotive engineers, who does not need to be qualified on the physical characteristics of the territory over which the test will be conducted;

* * * * *

17. Section 240.217 is amended by revising paragraphs (a)(1), (a)(2), (a)(3), (a)(4), and (c)(2) to read as follows:

§ 240.217 Time limitations for making determinations.

(a) * * *

(1) A determination concerning eligibility and the eligibility data being relied on were 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 366 days before the date of the railroad's recertification decision;

(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 performance skills and the performance skill testing being relied on was conducted more than 366 days before the date of the railroad's certification decision;

(b) * * *

(c) * * *

(2) Rely on a certification issued by another railroad that is more than 36 months old.

* * * * *

18. Section 240.223 is amended by revising paragraph (a)(1) to read as follows:

§ 240.223 Criteria for the certificate.

(a) * * *

(1) Identify the railroad or parent company that is issuing it;

* * * * *

19. Section 240.225 is revised to read as follow:

§ 240.225 Reliance on qualification determinations made by other railroads.

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

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

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

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

(d) The person has demonstrated the necessary knowledge concerning the railroad's operating rules in accordance with § 240.125;

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

20. Section 240.229 is amended by revising paragraph (c) to read as follows:

§ 240.229 Requirements for joint operations territory.

* * * * *

(c) A railroad that controls joint operations may rely on the certification issued by another railroad under the following conditions:

(1) The controlling railroad shall determine:

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

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

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

(iv) That the person certified as a locomotive engineer by the other railroad has the necessary familiarity with the physical characteristics for the joint operations territory; and,

(2) The railroad which employs the individual shall determine that the person called to operate on the controlling railroad is a certified engineer who is qualified to operate on that track segment; and,

(3) Any locomotive engineer who is called to operate on another railroad shall:

(i) Be qualified on the segment of track upon which he or she will operate in accordance with the requirements set forth by the controlling railroad; and,

(ii) Immediately notify the railroad upon which he or she is employed if he or she is not qualified to perform that service.

* * * * *

21. Section 240.231 is added to subpart C to read as follows:

§ 240.231 Requirements for locomotive engineers unfamiliar with physical characteristics in other than joint operations.

(a) Except as provided in paragraph (b) of this section, no locomotive engineer shall operate a locomotive over a territory unless he or she is qualified on the physical characteristics of the territory pursuant to the railroad's certification program.

(b) Except as provided in paragraph (c), if a locomotive engineer lacks qualification on the physical characteristics required by paragraph (a), he or she shall be assisted by a pilot qualified over the territory pursuant to the railroad's program submission.

(1) For a locomotive engineer who has never been qualified on the physical characteristics of the territory over which he or she is to operate a locomotive or train, the pilot shall be a person qualified and certified as a locomotive engineer who is not an assigned crew member.

(2) For a locomotive engineer who was previously qualified on the physical characteristics of the territory over which he or she is to operate a locomotive or train, but whose qualification has expired, the pilot may be any person, who is not an assigned crew member, qualified on the physical characteristics of the territory.

(c) Pilots are not required if the movement is on a section of track with an average grade of less than 1% over 3 continuous miles, and

(1) The track is other than a main track; or

(2) The maximum distance the locomotive or train will be operated does not exceed one mile; or

(3) The maximum authorized speed for any operation on the track does not exceed 20 miles per hour; or

(4) Operations are conducted under operating rules that require every locomotive and train to proceed at a speed that permits stopping within one half the range of vision of the locomotive engineer.

22. Section 240.305 is amended by revising paragraph (a) to read as follows:

§ 240.305 Prohibited conduct.

(a) It shall be unlawful to:

(1) Operate a locomotive or train past a signal indication, excluding a hand or a radio signal indication or a switch, that requires a complete stop before passing it; or

(2) Operate a locomotive or train at a speed which exceeds the maximum authorized limit by at least 10 miles per hour. Only those violations of the conditional clause of restricted speed rules, or the operational equivalent thereof, which cause reportable accidents or incidents under 49 CFR part 225, shall be considered instances of failure to adhere to this section; or

(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 transfer, initial, or intermediate terminal test provisions of 49 CFR part 232 (see 49 CFR 232.12 and 232.13); or

(4) Fail to comply with any mandatory directive concerning the movement of a locomotive or train by occupying main track or a segment of main track without proper authority or permission;

(5) Fail to comply with prohibitions against tampering with locomotive mounted safety devices, or knowingly operating or permitting to be operated a train with an unauthorized disabled safety device in the controlling locomotive. (See 49 CFR part 218 subpart D and appendix C to part 218);

(6) Be a supervisor of locomotive engineers who is monitoring a locomotive engineer and fails to take appropriate action to prevent a violation of paragraphs (a)(1) through (a)(5) of this section. A designated supervisor of locomotive engineers will not be held culpable under this section when this monitoring event is conducted as part of the railroad's operational compliance tests as defined in §§ 217.9 and 240.303 of this chapter.

* * * * *

23. Section 240.307 is amended by revising paragraphs (b)(2), (c) introductory text and (c)(10), and adding paragraphs (i), (j), and (k) to read as follows:

§ 240.307 Revocation of certification.

* * * * *

(b) * * *

(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. The notice may initially be given either verbally or in writing. If given verbally, it must be confirmed in writing and the written confirmation must be made promptly. 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.

* * * * *

(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:

* * * * *

(10) At the close of the record, a railroad official, other than the investigating officer, shall prepare and sign a written decision in the proceeding.

* * * * *

(i) The railroad shall not determine that the person failed to meet the qualification requirements of this part and shall not revoke the person's certification as provided for in paragraph (a) of this section if substantial evidence exists that:

(1) An intervening cause prevented or materially impaired the locomotive engineer's ability to comply with the railroad operating rule or practice which constitutes a violation under § 240.117 (e)(1) through (e)(5); or

(2) The violation of §§ 240.117 (e)(1) through (e)(5) 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 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 substantial evidence, meeting the criteria provided for in paragraph (i) of this section, becomes available either:

(1) Prior to a railroad's action to suspend the certificate as provided for in paragraph (b)(1) of this section; or

(2) Prior to the convening of the hearing provided for in this section.

(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 locomotive engineer's certification, as provided for in paragraph (a) of this section, is not in violation of paragraph (a) of this section.

24. Section 240.309 is amended by revising paragraphs (e) introductory text, (e)(3), (e)(5), (e)(6), (e)(7), and (e)(8), removing paragraph (e)(10), and redesignating the second paragraph (e) as paragraph (h).

§ 240.309 Railroad oversight responsibilities.

* * * * *

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

* * * * *

(3) Incidents involving noncompliance with the procedures required for compliance with the transfer, initial, or intermediate terminal test provisions of 49 CFR part 232;

(4) * * *

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

(6) Incidents involving noncompliance with the provisions of restricted speed, and the operational equivalent thereof, that require reporting under the provisions of part 225 of this chapter;

(7) Incidents involving occupying Main Track or a segment of Main Track without proper authority or permission;

(8) Incidents involving the failure to comply with prohibitions against tampering with locomotive mounted safety devices, or knowingly operating or permitting to be operated a train with an unauthorized or disabled safety device in the controlling locomotive;

* * * * *

25. Section 240.403 is amended by revising paragraph (d) to read as follows:

§ 240.403 Petition requirements.

* * * * *

(d) A petition seeking review of a railroad's decision to revoke certification in accordance with the

procedures required by § 240.307 filed with FRA more than 120 days after the date of the railroad's revocation decision will be denied as untimely.

26. Section 240.405 is amended by revising paragraphs (a) and (c), and adding paragraph (d)(3).

§ 240.405 Processing qualification review petitions.

(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) * * *

(c) The railroad will be given a period of not to exceed 60 days to submit to FRA any information that the railroad considers pertinent to the petition.

(d) * * *

(3) Submit the information in triplicate to the Docket Clerk, Federal Railroad Administration, 400 Seventh Street SW., Washington, DC 20590;

* * * * *

27. Section 240.411 is amended by revising paragraph (e) to read as follows:

§ 240.411 Appeals.

* * * * *

(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 when these administrative remedies have been exhausted.

28. Appendix A to part 240 is revised to read as follows:

Appendix A to Part 240—Schedule of Civil Penalties [1]

Section	Violation	Willful violation
[applicable sections and civil penalty amounts to be determined in final rule]		

[1] A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to $22,000 for any violation where circumstances warrant. See 49 CFR part 209, Appendix A.

* * * * *

29. Appendix F is added to read as follows:

Appendix F to Part 240—Medical Standards Guidelines

The purpose of this appendix is to provide greater guidance on the procedures that should be employed in administering the vision and hearing requirements of §§ 240.121 and 240.207.

In determining whether a person has the visual acuity that meets or exceeds the requirements of this part, the following testing protocols are deemed acceptable testing methods for determining whether a person has the ability to recognize and distinguish among the colors used as signals in the railroad industry. The acceptable test methods are shown in the left hand column and the criteria that should be employed to determine whether a person has failed the particular testing protocol are shown in the right hand column.

Accepted tests	Failure criteria
Pseudoisochromatic Plate Tests	
American Optical Company 1965	5 or more errors on plates 1–15.
AOC—Hardy-Rand-Ritter plates—second edition	Any error on plates 1–6 (plates 1–4 are for demonstration—test plate 1 is actually plate 5 in book).
Dvorine—Second edition	3 or more errors on plates 1–15.
Ishihara (14 plate)	2 or more errors on plates 1–11.
Ishihara (16 plate)	2 or more errors on plates 1–8.
Ishihara (24 plate)	3 or more errors on plates 1–15.
Ishihara (38 plate)	4 or more errors on plates 1–21.
Richmond Plates 1983	5 or more errors on plates 1–15.
Multifunction Vision Tester	
Keystone Orthoscope	Any error.
OPTEC 2000	Any error.
Titmus Vision Tester	Any error.
Titmus II Vision Tester	Any error.

In administering any of these protocols, the person conducting the examination should be aware that railroad signals do not always occur in the same sequence and that ''yellow signals'' do not always appear to be the same. It is not acceptable to use ''yarn'' or other materials to conduct a simple test to determine whether the certification candidate has the requisite vision. No person shall be allowed to wear chromatic lenses during an initial test of the person's color vision; the initial test is one conducted in accordance with one of the accepted tests in the above chart and § 240.121(c)(3).

Chromatic lenses may be worn in accordance with any subsequent testing pursuant to § 240.121(e) if permitted by the medical examiner and the railroad.

An examinee who fails to meet the above criteria, may be further evaluated as determined by the railroad's medical examiner. Ophthalmologic referral, field testing, or other practical color testing may be utilized depending on the experience of the examinee. The railroad's medical examiner will review all pertinent information and, under some circumstances, may restrict an examinee who does not meet the criteria from operating the train at night, during adverse weather conditions or under other circumstances.

Engineers who wear contact lenses should have good tolerance to the lenses and should be instructed to have a pair of corrective glasses available when on duty.

Issued in Washington, D.C. on September 8, 1998.

Jolene M. Molitoris,

Administrator.

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