

The Rule

For the reasons discussed in the preamble, FRA amends chapter II, subtitle B of title 49 of the Code of Federal Regulations by adding part 242 to read as follows:

PART 242--QUALIFICATION AND CERTIFICATION OF CONDUCTORS

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Authority: 49 U.S.C. 20103, 20107, 20135, 20138, 20162, 20163, 21301, 21304, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.49.

Subpart A--General

§ 242.1 Purpose and scope.

(a) The purpose of this part is to ensure that only those persons who meet minimum Federal safety standards serve as conductors, to reduce the rate and number of accidents and incidents and to improve railroad safety.

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

(c) The conductor certification requirements prescribed in this part apply to any person who meets the definition of conductor contained in § 242.7, regardless of the fact that the person may have a job classification title other than that of conductor.

§ 242.3 Application and responsibility for compliance.

(a) This part applies to all railroads, except:

(1) Railroads that operate only on track inside an installation that is not part of the general railroad system of transportation (*i.e.*, plant railroads, as defined in § 242.7);

(2) Tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation as defined in § 242.7; or

(3) Rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

(b) Although the duties imposed by this part are generally stated in terms of the duty of a railroad, each person, including a contractor for a railroad, who performs

any function covered by this part, must perform that function in accordance with this part.

§ 242.5 Effect and construction.

(a) FRA does not intend, by use of the term conductor in this part, to alter the terms, conditions, or interpretation of existing collective bargaining agreements that employ other job classification titles when identifying a person who is the crew member in charge of a movement that requires a locomotive engineer.

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

(c) Except as provided in § 242.213, 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.

(d) Nothing in this part shall be deemed to abridge any additional procedural rights or remedies not inconsistent with this part that are available to the employee under a collective bargaining agreement, the Railway Labor Act, or (with respect to employment at will) at common law with respect to removal from service or other adverse action taken as a consequence of this part.

§ 242.7 Definitions.

As used in this part--

Administrator means the Administrator of the FRA or the Administrator's delegate.

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

Conductor means the crewmember in charge of a “train or yard crew” as defined in part 218 of this chapter. See also the definition of “passenger conductor” in this section.

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

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

Drug and alcohol counselor (DAC) means a person who meets the credentialing and qualification requirements of a “Substance Abuse Professional” (SAP), as provided in 49 CFR part 40.

Dual purpose vehicle means a piece of on-track equipment that is capable of moving railroad rolling stock and may also function as roadway maintenance equipment.

File, filed and filing mean submission of a document under this part on the date when the Docket Clerk receives it, or if sent by mail, the date mailing was completed.

FRA means the Federal Railroad Administration.

FRA representative means the FRA Associate Administrator for Railroad Safety/Chief Safety Officer and the Associate Administrator's delegate, including any

safety inspector employed by the Federal Railroad Administration and any qualified state railroad safety inspector acting under part 212 of this chapter.

Ineligible or ineligibility means that a person is legally disqualified from serving as a certified conductor. The term covers a number of circumstances in which a person may not serve as a certified conductor. Revocation of certification pursuant to § 242.407 and denial of certification pursuant to § 242.401 are two examples in which a person would be ineligible to serve as a conductor. A period of ineligibility may end when a condition or conditions are met. For example, when a person meets the conditions to serve as a conductor following an alcohol or drug violation pursuant to § 242.115.

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

Joint operations means rail operations conducted by more than one railroad on the same track regardless of whether such operations are the result of—

- (1) Contractual arrangement between the railroads,

- (2) Order of a governmental agency or a court of law, or
- (3) Any other legally binding directive.

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

Locomotive means a piece of on-track equipment (other than specialized roadway maintenance equipment or a dual purpose vehicle operating in accordance with § 240.104(a)(2) of this chapter):

- (1) With one or more propelling motors designed for moving other equipment;
- (2) With one or more propelling motors designed to carry freight or passenger traffic or both; or
- (3) Without propelling motors but with one or more control stands.

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

- (1) A person who moves a locomotive or group of locomotives within the confines of a locomotive repair or servicing area as provided for in §§ 218.5 and 218.29(a)(1) of this chapter; or
- (2) A person who moves a locomotive or group of locomotives for distances of less than 100 feet and this incidental movement of a locomotive or locomotives is for inspection or maintenance purposes.

Locomotive engineer certificate means a certificate issued pursuant to part 240 of this chapter.

Main track means 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; positive train control as defined in part 236 of this chapter; or any form of absolute or manual block system.

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

On-the-job training means job training that occurs in the workplace, *i.e.*, the employee learns the job while doing the job.

Passenger conductor means a conductor who has also received emergency preparedness training under part 239 of this chapter. See also the definition of “conductor” in this section.

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.

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

Physical characteristics includes both main track physical characteristics (see definition of “main track” in this section) and other than main track physical characteristics.

Plant railroad means a plant or installation that owns or leases a locomotive, uses that locomotive to switch cars throughout the plant or installation, and is moving goods solely for use in the facility’s own industrial processes. The plant or installation could include track immediately adjacent to the plant or installation if the plant railroad leases the track from the general system railroad and the lease provides for (and actual practice entails) the exclusive use of that trackage by the plant railroad and the general system railroad for purposes of moving only cars shipped to or from the plant. A plant or installation that operates a locomotive to switch or move cars for other entities, even if solely within the confines of the plant or installation, rather than for its own purposes or industrial processes, will not be considered a plant railroad because the performance of such activity makes the operation part of the general railroad system of transportation.

Qualified means a person who has successfully completed all instruction, training and examination programs required by the employer, and the applicable parts of this chapter and that the person therefore may reasonably be expected to be proficient on all safety related tasks the person is assigned to perform.

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

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

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

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.

Railroad officer means any supervisory employee of a railroad.

Railroad rolling stock is on-track equipment that is either a “railroad freight car” (as defined in § 215.5 of this chapter) or a “passenger car” (as defined in § 238.5 of this chapter).

Remote control operator (RCO) means a certified locomotive engineer, as defined in § 240.7 of this chapter, certified by a railroad to operate remote control locomotives pursuant to § 240.107 of this chapter.

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

Serve or service, in the context of serving documents, 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 roadway maintenance equipment that does not have the capability to move railroad rolling stock. Any alteration of such equipment that enables it to move railroad rolling stock will require that the equipment be treated as a dual purpose vehicle.

Substance abuse disorder refers to a psychological or physical dependence on alcohol or a drug, or another identifiable and treatable mental or physical disorder involving the abuse of alcohol or drugs as a primary manifestation. A substance abuse disorder is "active" within the meaning of this part if the person is currently using alcohol

or other drugs, except under medical supervision consistent with the restrictions described in § 219.103 of this chapter or has failed to successfully complete primary treatment or successfully participate in aftercare as directed by a DAC or SAP.

Substance Abuse Professional (SAP) means a person who meets the qualifications of a substance abuse professional, as provided in part 40 of this title.

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

Tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation means a tourist, scenic, historic, or excursion operation conducted only on track used exclusively for that purpose (*i.e.*, there is no freight, intercity passenger, or commuter passenger railroad operation on the track).

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

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

§ 242.11 Penalties and consequences for noncompliance.

(a) A person who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least \$650 and not more than \$25,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed \$100,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. See Appendix A to this part for a statement of agency civil penalty policy.

(b) A person who violates any requirement of this part or causes the violation of any such requirement may be subject to disqualification from all safety-sensitive service in accordance with part 209 of this chapter.

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

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

§ 242.13 Information collection requirements.

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

(b) The information collection requirements are found in the following sections: §§ 242.9, 242.101, 242.103, 242.105, 242.107, 242.109, 242.111, 242.113, 242.115, 242.117, 242.119, 242.121, 242.123, 242.125, 242.127, 242.203, 242.205, 242.209, 242.211, 242.213, 242.215, 242.301, 242.401, 242.403, 242.405, and 242.407.

Subpart B – Program and Eligibility Requirements

§ 242.101 Certification program required.

(a) After the pertinent date specified in § 242.105(d) or (e), each railroad shall have a certification program approved in accordance with § 242.103 that includes:

(1) A designation of the types of service that it determines will be used in compliance with the criteria established in § 242.107;

(2) A procedure for evaluating prior safety conduct that complies with the criteria established in § 242.109;

(3) A procedure for evaluating visual and hearing acuity that complies with the criteria established in § 242.117;

(4) A procedure for training that complies with the criteria established in § 242.119;

(5) A procedure for knowledge testing that complies with the criteria established in § 242.121; and

(6) A procedure for monitoring operational performance that complies with the criteria established in § 242.123.

(b) [Reserved].

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

(a) Each railroad shall submit its written certification program and request for approval in accordance with the procedures contained in appendix B of this part according to the following schedule:

(1) A Class I railroad (including the National Railroad Passenger Corporation), Class II railroad, or railroad providing commuter service shall submit a program no later than March 30, 2012; and

(2) A Class III railroad (including a switching and terminal or other railroad not otherwise classified) shall submit a program no later than July 30, 2012.

(b) A railroad commencing operations after the pertinent date specified in paragraph (a) of this section shall submit its written certification program and request for approval in accordance with the procedures contained in appendix B to this part at least 60 days prior to commencing operations.

(c) Each railroad shall:

(1) Simultaneous with its filing with the FRA, serve a copy of the submission filed pursuant to paragraph (a) or (b) of this section, a resubmission filed pursuant to paragraph (h) of this section, or a material modification filed pursuant to paragraph (i) of this section on the president of each labor organization that represents the railroad's employees subject to this part; and

(2) Include in its submission filed pursuant to paragraph (a) or (b) of this section, a resubmission filed pursuant to paragraph (h) of this section, or a material modification filed pursuant to paragraph (i) of this section a statement affirming that the railroad has served a copy on the president of each labor organization that represents the railroad's employees subject to this part, together with a list of the names and addresses of persons served.

(d) Not later than 45 days from the date of filing a submission pursuant to paragraph (a) or (b) of this section, a resubmission pursuant to paragraph (h) of this section, or a material modification pursuant to paragraph (i) of this section, any designated representative of railroad employees subject to this part may comment on the submission, resubmission, or material modification:

(1) Each comment shall set forth specifically the basis upon which it is made, and contain a concise statement of the interest of the commenter in the proceeding;

(2) Each comment shall be submitted to the Associate Administrator for Railroad Safety/Chief Safety Officer, FRA, 1200 New Jersey Avenue, SE., Washington, DC 20590; and

(3) The commenter shall certify that a copy of the comment was served on the railroad.

(e) The submission required by paragraph (a) or (b) of this section shall state the railroad's election either:

(1) To accept responsibility for the training of conductors and thereby obtain authority for that railroad to initially certify a person as a conductor in an appropriate type of service; or

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

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

(g) A railroad's program is considered approved and may be implemented 30 days after the required filing date (or the actual filing date) unless the Administrator notifies the railroad in writing that the program does not conform to the criteria set forth in this part.

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

(2) If the Administrator informs the railroad of deficiencies more than 30 days after the initial filing date, the original program may remain in effect until 30 days after approval of the revised program is received so long as the railroad has complied with the requirements of paragraph (h) of this section.

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

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

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

(i) A railroad that intends to materially modify its program after receiving initial FRA approval shall submit a description of how it intends to modify the program in conformity with the specific requirements of this part at least 60 days prior to implementing such a change.

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

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

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

§ 242.105 Schedule for implementation.

(a) By March 1, 2012, each railroad shall:

(1) In writing, designate as certified conductors all persons authorized by the railroad to perform the duties of a conductor as of January 1, 2012; and

(2) Issue a certificate that complies with § 242.207 to each person that it designates.

(b) After March 1, 2012, each railroad shall:

(1) In writing, designate as a certified conductor any person who has been authorized by the railroad to perform the duties of a conductor between January 1, 2012 and the pertinent date in paragraph (d) or (e) of this section; and

(2) Issue a certificate that complies with § 242.207 to each person that it designates.

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

(1) Except as provided in paragraph (c)(3) of this section, a person who has been designated as a certified conductor under the provisions of paragraph (a) or (b) of this section and who is eligible to receive a retirement pension in accordance with the terms of an applicable agreement or in accordance with the terms of the Railroad Retirement Act (45 U.S.C. 231) within 36 months from the pertinent date for compliance with the mandatory procedures for testing and evaluation set forth in the applicable provisions of paragraph (d) or (e) of this section, may request, in writing, that a railroad not recertify that person, pursuant to subpart B of this part, until 36 months from the pertinent date for compliance with the mandatory procedures for testing and evaluation set forth in the applicable provisions of paragraph (d) or (e) of this section.

(2) Upon receipt of a written request pursuant to paragraph (c)(1) of this section, a railroad may wait to recertify the person making the request until the end of the 36-month period described in paragraph (c) of this section. If a railroad grants any request, it must grant the request of all eligible persons to every extent possible.

(3) A person who is subject to recertification under part 240 of this chapter may not make a request pursuant to paragraph (c)(1) of this section.

(d) After June 1, 2012, no Class I railroad (including the National Railroad Passenger Corporation), Class II railroad, or railroad providing commuter service shall initially certify or recertify a person as a conductor unless that person has been tested and evaluated in accordance with procedures that comply with subpart B of this part and issued a certificate that complies with § 242.207.

(e) After October 1, 2012, no Class III railroad (including a switching and terminal or other railroad not otherwise classified) shall initially certify or recertify a person as a conductor unless that person has been tested and evaluated in accordance with procedures that comply with subpart B of this part and issued a certificate that complies with § 242.207.

(f) After the applicable dates specified in paragraphs (d) and (e) of this section, no person shall serve as a conductor in any type of service and no railroad shall require or permit any person to serve as a conductor in any type of service unless that person has been tested and evaluated in accordance with procedures that comply with subpart B of this part and issued a certificate that complies with § 242.207.

§ 242.107 Types of service.

(a) Each railroad's program shall state which of the two types of service (conductor and passenger conductor), provided for in paragraph (b) of this section, that it will cover.

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

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

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

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

§ 242.109 Determinations required for certification and recertification.

(a) After the pertinent date specified in § 242.105(d) or (e), each railroad, prior to initially certifying or recertifying any person as a conductor, shall, in accordance with its FRA-approved program, determine in writing that:

- (1) The individual meets the eligibility requirements of §§ 242.111, 242.113, 242.115, and 242.403; and

(2) The individual meets the vision and hearing acuity standards of § 242.117 (“Vision and hearing acuity”);

(3) The individual has the necessary knowledge, as demonstrated by successfully completing a test that meets the requirements of § 242.121 (“Knowledge testing”); and

(4) Where a person has not previously been certified, that the person has completed a training program that meets the requirements of § 242.119 (“Training”).

(b) When evaluating a person's prior safety conduct, a railroad shall not consider information concerning prior conduct that:

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

(2) Occurred at a time other than that specifically provided for in §§ 242.111, 242.115 or 242.403.

(c) In order to make the determination required under paragraph (a) of this section, a railroad shall have on file documents pertinent to those determinations.

(d) A railroad's program shall provide a candidate for certification or recertification a reasonable opportunity to review and comment in writing on any record which contains information concerning the person's prior safety conduct, including information pertinent to determinations required under § 242.115, if the railroad believes the record contains information that could be sufficient to render the person ineligible for certification under this subpart.

(e) The opportunity for comment shall be afforded to the person prior to the railroad's rendering its eligibility decision based on that information. Any responsive comment furnished shall be retained by the railroad in accordance with § 242.203.

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

(g) Nothing in this section, § 242.111 or § 242.113 shall be construed to prevent persons subject to this part from entering into an agreement that results in a railroad's obtaining the information needed for compliance with this subpart in a different manner than that prescribed in § 242.111 or § 242.113.

§ 242.111 Prior safety conduct as motor vehicle operator.

(a) Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) Except as provided in paragraphs (c), (d), (e), and (f) of this section, after the pertinent date specified in § 242.105(d) or (e), each railroad, prior to initially certifying or recertifying any person as a conductor for any type of service, shall

determine that the person meets the eligibility requirements of this section involving prior conduct as a motor vehicle operator.

(c) A railroad shall initially certify a person as a conductor for 60 days if the person:

(1) Requested the information required by paragraph (h) of this section at least 60 days prior to the date of the decision to certify that person; and

(2) Otherwise meets the eligibility requirements provided in § 242.109.

(d) A railroad shall recertify a person as a conductor for 60 days from the expiration date of that person's certification if the person:

(1) Requested the information required by paragraph (h) of this section at least 60 days prior to the date of the decision to recertify that person; and

(2) Otherwise meets the eligibility requirements provided in § 242.109.

(e) Except as provided in paragraph (f) of this section, if a railroad who certified or recertified a person pursuant to paragraph (c) or (d) of this section does not obtain and evaluate the information required pursuant to paragraph (h) of this section within 60 days of the pertinent dates identified in paragraph (c) or (d) of this section, that person will be ineligible to perform as a conductor until the information can be evaluated.

(f) If a person requests the information required pursuant to paragraph (h) of this section but is unable to obtain it, that person or the railroad certifying or recertifying that person may petition for a waiver of the requirements of paragraph (b) of this section in accordance with the provisions of part 211 of this chapter. A railroad shall certify or

recertify a person during the pendency of the waiver request if the person otherwise meets the eligibility requirements provided in § 242.109.

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

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

(2) Take any additional actions, including providing any necessary consent required by State, Federal, or foreign law to make information concerning his or her driving record available to that railroad.

(h) Each person seeking certification or recertification under this part shall request, in writing, that the chief of each driver licensing agency identified in paragraph (i) of this section provide a copy of that agency's available information concerning his or her driving record to the railroad that is considering such certification or recertification.

(i) Each person shall request the information required under paragraph (h) of this section from:

(1) The chief of the driver licensing agency of any jurisdiction, including a state or foreign country, which last issued that person a driver's license; and

(2) The chief of the driver licensing agency of any other jurisdiction, including states or foreign countries, that issued or reissued the person a driver's license within the preceding five years.

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

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

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

(k) Any person who has never obtained a motor vehicle driving license is not required to comply with the provisions of paragraph (h) of this section but shall notify the railroad of that fact in accordance with procedures of the railroad that comply with § 242.109(f).

(l) Each certified conductor or person seeking initial certification shall report motor vehicle incidents described in paragraphs (n)(1) and (2) of this section 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 purposes of this paragraph and paragraph (n) of this section, "state action" means action of the jurisdiction that has issued the motor vehicle driver's license, including a foreign

country. For the purposes of conductor 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.

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

(1) Prior to the effective date of this rule;

(2) More than 36 months before the month in which the railroad is making its certification decision; or

(3) At a time other than that specifically provided for in §§ 242.111, 242.115, or 242.403.

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

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

(2) A conviction for, or completed state action to cancel, revoke, suspend, or deny a motor vehicle driver's license for, refusal to undergo such testing as is required by State or foreign law when a law enforcement official seeks to determine whether a person is operating a vehicle while under the influence of alcohol or a controlled substance.

(o) If such an incident is identified:

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

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

(3) If the person is evaluated as not currently affected by an active substance abuse disorder, the subject data shall not be considered further with respect to certification. However, the railroad shall, on recommendation of the DAC, condition certification upon participation in any needed aftercare and/or follow-up testing for alcohol or drugs deemed necessary by the DAC consistent with the technical standards specified in § 242.115(f)(3).

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

(5) If the person fails to comply with the requirements of paragraph (o)(2) of this section, the person shall be ineligible to perform as a conductor until such time as the person complies with the requirements.

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

(a) Each railroad shall adopt and comply with a program which complies with the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of a program

which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) After the pertinent date specified in § 242.105(d) or (e), each railroad, prior to initially certifying or recertifying any person as a conductor for any type of service, shall determine that the person meets the eligibility requirements of this section.

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

(1) Request, in writing, that the chief operating officer or other appropriate person of the former employing railroad provide a copy of that railroad's available information concerning his or her service record pertaining to compliance or non-compliance with §§ 242.111, 242.115, and 242.403 to the railroad that is considering such certification or recertification; and

(2) Take any additional actions, including providing any necessary consent required by State or Federal law to make information concerning his or her service record available to that railroad.

§ 242.115 Substance abuse disorders and alcohol drug rules compliance.

(a) Each railroad shall adopt and comply with a program which complies with the requirements of this section. When any person, including, but not limited to, each railroad, railroad officer, supervisor, and employee, violates any requirement of a

program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) After the pertinent date specified in § 242.105(d) or (e), each railroad, prior to initially certifying or recertifying any person as a conductor for any type of service, shall determine that the person meets the eligibility requirements of this section.

(c) In order to make the determination required under paragraph (d) of this section, a railroad shall have on file documents pertinent to that determination, including a written document from its DAC which states his or her professional opinion that the person has been evaluated as not currently affected by a substance abuse disorder or that the person has been evaluated as affected by an active substance abuse disorder.

(d) Fitness requirement. (1) A person who has an active substance abuse disorder shall be denied certification or recertification as a conductor.

(2) Except as provided in paragraph (g) of this section, a certified conductor who is determined to have an active substance abuse disorder shall be ineligible to hold certification. Consistent with other provisions of this part, certification may be reinstated as provided in paragraph (f) of this section.

(3) In the case of a current employee of the railroad evaluated as having an active substance abuse disorder (including a person identified under the procedures of § 242.111), the employee may, if otherwise eligible, voluntarily self-refer for substance abuse counseling or treatment under the policy required by § 219.403 of this chapter; and the railroad shall then treat the substance abuse evaluation as confidential except with respect to ineligibility for certification.

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

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

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

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

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

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

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

two years. In the case of more than two such violations, the person shall be ineligible to hold a certificate for a period of five years.

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

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

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

(A) Section 219.102 of this chapter, in the case of a refusal to provide a urine specimen for testing; or

(B) Section 219.101 of this chapter, in the case of a refusal to provide a breath sample for alcohol testing or a blood specimen for mandatory post-accident toxicological testing.

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

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

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

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

(iii) In accordance with the testing procedures of subpart H of part 219 of this chapter, has had an alcohol test with an alcohol concentration of less than .02 and presented a urine sample that tested negative for controlled substances assayed.

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

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

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

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

§ 242.117 Vision and hearing acuity.

(a) Each railroad shall adopt and comply with a program which complies with the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) After the pertinent date specified in § 242.105(d) or (e), each railroad, prior to initially certifying or recertifying any person as a conductor for any class of service, shall determine that the person meets the standards for visual acuity and hearing acuity prescribed in this section.

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

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

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

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

(ii) The person's acuity is such that the person cannot safely perform as a conductor even with conditions attached.

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

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

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

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

(f) Any person with such a certificate notation shall use the relevant corrective device(s) while performing as a conductor unless the railroad's medical examiner subsequently determines in writing that the person can safely perform without using the device.

(g) Fitness requirement: In order to be currently certified as a conductor, except as permitted by paragraph (j) of this section, a person's vision and hearing shall meet or exceed the standards prescribed in this section and Appendix D to this part. 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.

(h) Except as provided in paragraph (j) of this section, each person shall have visual acuity that meets or exceeds the following thresholds:

(1) For distant viewing, either:

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

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

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

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

(i) Except as provided in paragraph (j) of this section, each person shall have a hearing test or audiogram that shows the person's hearing acuity meets or exceeds the following thresholds: the person does not have an average hearing loss in the better ear greater than 40 decibels with or without use of a hearing aid, at 500 Hz, 1,000 Hz, and 2,000 Hz. The hearing test or audiogram shall meet the requirements of one of the following:

(1) As required in 29 CFR 1910.95(h) (OSHA);

(2) As required in § 227.111 of this chapter; or

(3) Conducted using an audiometer that meets the specifications of and are maintained and used in accordance with ANSI S3.6-2004 "Specifications for Audiometers."

(j) A person not meeting the thresholds in paragraphs (h) and (i) 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 perform as a conductor. In

accordance with the guidance prescribed in Appendix D to this part, a person is entitled to one retest without making any showing and to another retest if the person provides evidence substantiating that circumstances have changed since the last test to the extent that the person could now safely perform as a conductor. The railroad shall provide its medical examiner with a copy of this part, including all appendices. If, after consultation with a railroad officer, the medical examiner concludes that, despite not meeting the threshold(s) in paragraphs (h) and (i) of this section, the person has the ability to safely perform as a conductor, the person may be certified as a conductor and such certification conditioned on any special restrictions the medical examiner determines in writing to be necessary.

(k) As a condition of maintaining certification, each certified conductor shall 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. This notification is required prior to any subsequent performance as a conductor.

§ 242.119 Training.

(a) Each railroad shall adopt and comply with a program that meets the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) After the pertinent date specified in § 242.105(d) or (e), each railroad, prior to the initial issuance of a certificate to any person as a conductor, shall determine that the person has, in accordance with the requirements of this section, the knowledge to safely perform as a conductor in each type of service that the person will be permitted to perform.

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

(1) The person completed a training program that complies with paragraph (d) of this section;

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

(3) The person demonstrated that he or she is qualified on the physical characteristics of the railroad, or its pertinent segments, over which that person will perform service.

(d) A railroad that elects to train a previously untrained person to be a conductor shall develop an initial training program which, at a minimum, includes the following:

(1) Determine how training must be structured, developed, and delivered, including an appropriate combination of classroom, simulator, computer-based, correspondence, on-the-job training, or other formal training. The curriculum shall be designed to impart knowledge of, and ability to comply with applicable Federal railroad safety laws, regulations, and orders, as well as any relevant railroad rules and procedures

promulgated to implement those applicable Federal railroad safety laws, regulations, and orders. This training shall document a person's knowledge of, and ability to comply with, Federal railroad safety laws, regulations, and orders, as well as railroad rules and procedures.

(2) The on-the-job portion of the training program shall consist of the following three key components:

(i) A brief statement describing the tasks and related steps the employee learning the job shall be able to perform;

(ii) A statement of the conditions (*e.g.*, prerequisites, tools, equipment, documentation, briefings, demonstrations, and practice) necessary for learning transfer; and

(iii) A statement of the standards by which proficiency is measured through a combination of task/step accuracy, completeness, and repetition.

(3) Prior to beginning the initial safety-related tasks associated with on-the-job exercises, employers shall make any relevant information or materials, such as operating rules, safety rules, or other rules available to employees involved for referencing.

(4) The tasks and related steps associated with on-the-job exercises for a particular type of conductor service (*e.g.*, passenger conductor) shall be maintained together in one manual, checklist, or similar document. This reference shall be made available to all employees involved in those on-the-job exercises.

(5) When new safety-related railroad laws, regulations, orders, technologies, procedures, or equipment are introduced into the workplace, the railroad must review its training program and modify its training plan accordingly.

(e) Prior to a previously untrained person being certified as a conductor, a railroad shall require the person to:

(1) Successfully complete the formal initial training program developed pursuant to paragraph (d) of this section and any associated examinations covering the skills and knowledge the person will need to possess in order to perform the tasks necessary to be a conductor; and

(2) Demonstrate, to the satisfaction of the railroad with input from a qualified instructor, on-the-job proficiency by successfully completing the tasks necessary to be a conductor. However, a person may perform such tasks under the direct onsite supervision of a person, who has the necessary operating experience, as part of the on-the-job training process prior to completing such training and passing the field evaluation; and

(3) Demonstrate knowledge of the physical characteristics of any assigned territory by successfully completing a test created by a person qualified on the physical characteristics of the territory.

(f) If a railroad uses a written test for purposes of paragraph (e)(3) of this section, the railroad must provide the person(s) being tested with an opportunity to consult with a supervisory employee, who possesses territorial qualifications for the territory, to explain a question.

(g) A person may acquire familiarity with the physical characteristics of a territory through the following methods:

(1) The methods used by a railroad for familiarizing its conductors with new territory while starting up a new railroad;

(2) The methods used by a railroad for starting operations over newly acquired rail lines; or

(3) The methods used by a railroad for reopening of a long unused route.

(h) The methods listed in paragraph (g) of this section shall be described in the railroad's conductor qualification program required under this part and submitted according to the procedures described in Appendix B to this part.

(i) If ownership of a railroad is being transferred from one company to another, the conductor(s) of the acquiring company may receive familiarization training from the selling company prior to the acquiring railroad commencing operation.

(j) A railroad shall designate in its program required by this section the time period in which a conductor must be absent from a territory or yard, before requalification on physical characteristics is required.

(k) A railroad's program shall include the procedures used to qualify or requalify a person on the physical characteristics.

(l) A railroad shall provide for the continuing education of certified conductors to ensure that each conductor maintains the necessary knowledge concerning railroad safety and operating rules and compliance with all applicable Federal regulations, including, but not limited to, hazardous materials, passenger train emergency

preparedness, brake system safety standards, pre-departure inspection procedures, and passenger equipment safety standards, and physical characteristics of a territory.

§ 242.121 Knowledge testing.

(a) Each railroad shall adopt and comply with a program that meets the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) After the pertinent date specified in § 242.105(d) or (e), each railroad, prior to initially certifying or recertifying any person as a conductor for any type of service, shall determine that the person has, in accordance with the requirements of this section, demonstrated sufficient knowledge of the railroad's rules and practices for the safe movement of trains.

(c) In order to make the knowledge determination required by paragraph (b) of this section, a railroad shall have procedures for testing a person being evaluated for certification as a conductor that shall be:

- (1) Designed to examine a person's knowledge of the railroad's operating rules and practices for the safe movement of trains;
- (2) Objective in nature;
- (3) Administered in written or electronic form;
- (4) Cover the following subjects:
 - (i) Safety and operating rules;

- (ii) Timetable instructions;
 - (iii) Compliance with all applicable Federal regulations;
 - (iv) Physical characteristics of the territory on which a person will be or is currently serving as a conductor; and
 - (v) Use of any job aid that a railroad may provide a conductor;
 - (5) Sufficient to accurately measure the person's knowledge of the covered subjects; and
 - (6) Conducted without open reference books or other materials except to the degree the person is being tested on his or her ability to use such reference books or materials.
- (d) The conduct of the test shall be documented in writing and the documentation shall contain sufficient information to identify the relevant facts relied on for evaluation purposes.
- (e) For purposes of paragraph (c) of this section, the railroad must provide the person(s) being tested with an opportunity to consult with a supervisory employee, who possesses territorial qualifications for the territory, to explain a question.
- (f) The documentation shall indicate whether the person passed or failed the test.
- (g) If a person fails to pass the test, no railroad shall permit or require that person to function as a conductor prior to that person's achieving a passing score during a reexamination of the person's knowledge.

§ 242.123 Monitoring operational performance.

(a) Each railroad shall adopt and comply with a program that meets the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) Each railroad shall have a program to monitor the conduct of its certified conductors by performing unannounced operating rules compliance tests. The program shall include procedures to address the testing of certified conductors who are not given an unannounced compliance test in a calendar year pursuant to paragraph (f) of this section. At a minimum, such procedures shall include the following:

(1) A requirement that an unannounced compliance test must be conducted within 30 days of a return to conductor service; and

(2) The railroad must retain a written record indicating the date that the conductor stopped performing service that requires certification pursuant to this part, the date that the conductor returned to performing service that requires certification pursuant to this part, and the date that the unannounced compliance test was performed.

(c) Except as provided in paragraph (f) of this section, each conductor shall be given at least one unannounced compliance test in each calendar year by a railroad officer who meets the requirements of § 217.9(b)(1) of this chapter.

(d) The unannounced test program shall:

(1) Test those persons certified as a conductor pursuant to § 242.107(b)(1) for compliance with one or more operational tests in accordance with the provisions of §217.9 of this chapter; and one or more provisions of §§ 218.99 through 218.109 of this chapter; and

(2) Test those persons certified as a passenger conductor pursuant to § 242.107(b)(2) for compliance with one or more operational tests in accordance with the provisions of § 217.9 of this chapter.

(i) For persons certified as passenger conductors pursuant to § 242.107(b)(2) who do not require compliance with part 218, subpart F of this chapter except under emergency circumstances, the requirement for an annual, unannounced test on the requirements of part 218, subpart F may be satisfied by annual training.

(ii) [Reserved]

(e) Each railroad's program shall indicate the action the railroad will take in the event that it finds deficiencies with a conductor's performance during an unannounced compliance test administered in accordance with this section.

(f) A certified conductor who is not performing a service that requires certification pursuant to this part need not be given an unannounced compliance test. However, when the certified conductor returns to a service that requires certification pursuant to this part, that certified conductor must be tested pursuant to this section within 30 days of his or her return.

§ 242.125 Certification determinations made by other railroads.

(a) A railroad that is considering certification of a person as a conductor may rely on determinations made by another railroad concerning that person's certification. The railroad's certification program shall address how the railroad will administer the training of previously uncertified conductors with extensive operating experience or previously certified conductors who have had their certification expire. If a railroad's certification program fails to specify how it will train a previously certified conductor hired from another railroad, then the railroad shall require the newly hired conductor to take the hiring railroad's entire training program.

(b) A railroad relying on another railroad's certification shall determine that:

(1) The prior certification is still valid in accordance with the provisions of §§ 242.201 and 242.407;

(2) The prior certification was for the same type of service as the certification being issued under this section;

(3) The person has received training on the physical characteristics of the new territory in accordance with § 242.119; and

(4) The person has demonstrated the necessary knowledge concerning the railroad's operating rules in accordance with § 242.121.

§ 242.127 Reliance on qualification requirements of other countries.

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

- (a) The person is employed by the Canadian railroad; and
- (b) The person meets or exceeds the qualifications standards issued by

Transport Canada for such service.

Subpart C – Administration of the Certification Program

§ 242.201 Time limitations for certification.

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

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

(2) A determination concerning visual and hearing acuity and the medical examination being relied on was conducted more than 450 days before the date of the railroad's certification decision;

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

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

(b) The time limitations of paragraph (a) of this section do not apply to a railroad that is making a certification decision in reliance on determinations made by

another railroad in accordance with paragraph (c)(3) of this section, § 242.125, or § 242.127.

(c) No railroad shall:

(1) Permit or require a person, designated under § 242.105(a) or (b), to perform service as a certified conductor for more than the 36-month period beginning on the pertinent date for compliance with the mandatory procedures for testing and evaluation set forth in the applicable provisions of § 242.105(d) or (e) unless that person has been determined to be eligible in accordance with procedures that comply with subpart B of this part.

(2) Certify a person as a conductor for an interval of more than 36 months; or

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

(d) Except as provided for in § 242.105 concerning initial implementation of the program, a railroad shall issue each person designated as a certified conductor a certificate that complies with § 242.207 no later than 30 days from the date of its decision to certify or recertify that person.

§ 242.203 Retaining information supporting determinations.

(a) After the pertinent date in § 242.105(d) or (e), a railroad that issues, denies, or revokes a certificate after making the determinations required under § 242.109 shall maintain a record for each certified conductor or applicant for certification that contains the information the railroad relied on in making the determinations.

(b) A railroad shall retain the following information:

- (1) Relevant data from the railroad's records concerning the person's prior safety conduct;
 - (2) Relevant data furnished by another railroad;
 - (3) Relevant data furnished by a governmental agency concerning the person's motor vehicle driving record;
 - (4) Relevant data furnished by the person seeking certification concerning his or her eligibility;
 - (5) The relevant test results data concerning hearing and vision acuity;
 - (6) If applicable, the relevant data concerning the professional opinion of the railroad's medical examiner on the adequacy of the person's hearing or vision acuity.
 - (7) Relevant data from the railroad's records concerning the person's success or failure of the passage of knowledge test(s) under § 242.121;
 - (8) A sample copy of the written knowledge test or tests administered; and
 - (9) The relevant data from the railroad's records concerning the person's success or failure on unannounced operating rules compliance tests the railroad performed to monitor the conductor's performance in accordance with § 242.123.
- (c) If a railroad is relying on successful completion of an approved training program conducted by another entity, the relying railroad shall maintain a record for each certified conductor that contains the relevant data furnished by the training entity concerning the person's demonstration of knowledge and relied on by the railroad in making its determinations.

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

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

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

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

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

(g) Nothing in this section precludes a railroad from maintaining the information required to be retained under this section in an electronic format provided that:

(1) The railroad maintains an information technology security program adequate to ensure the integrity of the electronic data storage system, including the prevention of unauthorized access to the program logic or individual records;

(2) The program and data storage system must be protected by a security system that utilizes an employee identification number and password, or a comparable

method, to establish appropriate levels of program access meeting all of the following standards:

- (i) No two individuals have the same electronic identity; and
- (ii) A record cannot be deleted or altered by any individual after the record is certified by the employee who created the record;
- (3) Any amendment to a record is either:
 - (i) Electronically stored apart from the record that it amends; or
 - (ii) Electronically attached to the record as information without changing the original record;
- (4) Each amendment to a record uniquely identifies the person making the amendment;
- (5) The system employed by the railroad for data storage permits reasonable access and retrieval of the information in usable format when requested to furnish data by FRA representatives; and
- (6) Information retrieved from the system can be easily produced in a printed format which can be readily provided to FRA representatives in a timely manner and authenticated by a designated representative of the railroad as a true and accurate copy of the railroad's records if requested to do so by FRA representatives.

§ 242.205 Identification of certified persons and recordkeeping.

- (a) After March 1, 2012, a railroad shall maintain a list identifying each person designated as a certified conductor. That list shall indicate the types of service the

railroad determines each person is authorized to perform and date of the railroad's certification decision.

(b) If a railroad employs conductors working in joint operations territory, the list shall include person(s) determined by that railroad to be certified as conductor(s) and possessing the necessary territorial qualifications for the applicable territory in accordance with § 242.301.

(c) The list required by paragraphs (a) and (b) of this section shall:

(1) Be updated at least annually;

(2) Be available at the divisional or regional headquarters of the railroad; and

(3) Be available for inspection or copying by FRA during regular business hours.

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

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

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

(e) Nothing in this section precludes a railroad from maintaining the list required this section in an electronic format provided that:

(1) The railroad maintains an information technology security program adequate to ensure the integrity of the electronic data storage system, including the prevention of unauthorized access to the program logic or the list;

(2) The program and data storage system must be protected by a security system that utilizes an employee identification number and password, or a comparable method, to establish appropriate levels of program access meeting all of the following standards:

(i) No two individuals have the same electronic identity; and

(ii) An entry on the list cannot be deleted or altered by any individual after the entry is certified by the employee who created the entry;

(3) Any amendment to the list is either:

(i) Electronically stored apart from the entry on the list that it amends; or

(ii) Electronically attached to the entry on the list as information without changing the original entry;

(4) Each amendment to the list uniquely identifies the person making the amendment;

(5) The system employed by the railroad for data storage permits reasonable access and retrieval of the information in usable format when requested to furnish data by FRA representatives; and

(6) Information retrieved from the system can be easily produced in a printed format which can be readily provided to FRA representatives in a timely manner and authenticated by a designated representative of the railroad as a true and accurate copy of the railroad's records if requested to do so by FRA representatives.

§ 242.207 Certificate components.

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

- (1) Identify the railroad or parent company that is issuing it;
 - (2) Indicate that the railroad, acting in conformity with this part, has determined that the person to whom it is being issued has been determined to be eligible to perform as a conductor or as a passenger conductor;
 - (3) Identify the person to whom it is being issued (including the person's name, employee identification number, the year of birth, and either a physical description or photograph of the person);
 - (4) Identify any conditions or limitations, including the type of service or conditions to ameliorate vision or hearing acuity deficiencies, that restrict the person's operational authority;
 - (5) Show the effective date of each certification held;
 - (6) Be signed by an individual designated in accordance with paragraph (b) of this section; and
 - (7) Be of sufficiently small size to permit being carried in an ordinary pocket wallet.
- (b) Each railroad shall designate in writing any person that it authorizes to sign the certificates described in this section. The designation shall identify such persons by name or job title.
- (c) Nothing in paragraph (a) of this section shall prohibit any railroad from including additional information on the certificate or supplementing the certificate through other documents.

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

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

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

§ 242.209 Maintenance of the certificate.

(a) Each conductor who has received a certificate required under this part shall:

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

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

(i) A representative of the Federal Railroad Administration,

(ii) A State inspector authorized under part 212 of this chapter,

(iii) An officer of the issuing railroad, or

(iv) An officer of another railroad when serving as a conductor in joint operations territory.

(b) Any conductor who is notified or called to serve as a conductor and such service would cause the conductor to exceed certificate limitations, set forth in accordance with subpart B of this part, shall immediately notify the railroad that he or she is not authorized to perform that anticipated service and it shall be unlawful for the railroad to require such service.

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

§ 242.211 Replacement of certificates.

(a) A railroad shall have a system for the prompt replacement of lost, stolen or mutilated certificates at no cost to conductors. That system shall be reasonably accessible to certified conductors in need of a replacement certificate or temporary replacement certificate.

(b) At a minimum, a temporary replacement certificate must identify the person to whom it is being issued (including the person's name, identification number and year of birth); indicate the date of issuance; and be authorized by a designated supervisor. Temporary replacement certificates may be delivered electronically and are valid for a period no greater than 30 days.

§ 242.213 Multiple certifications.

(a) A person may hold certification for multiple types of conductor service.

(b) A person may hold both conductor and locomotive engineer certification.

(c) A railroad that issues multiple certificates to a person, shall, to the extent possible, coordinate the expiration date of those certificates.

(d) Except as provided in paragraph (e) of this section, a locomotive engineer, including a remote control operator, who is operating a locomotive without an assigned certified conductor must either be:

(1) Certified as both a locomotive engineer under part 240 of this chapter and as a conductor under this part; or

(2) Accompanied by a person certified as a conductor under this part but who will be attached to the crew in a manner similar to that of an independent assignment.

(e) Passenger railroad operations: If the conductor is removed from a train for a medical, police or other such emergency after the train departs from an initial terminal, the train may proceed to the first location where the conductor can be replaced without incurring undue delay without the locomotive engineer being a certified conductor. However, an assistant conductor or brakeman must be on the train and the locomotive engineer must be informed that there is no certified conductor on the train prior to any movement.

(f) During the duration of any certification interval, a person who holds a current conductor and/or locomotive engineer certificate from more than one railroad shall immediately notify the other certifying railroad(s) if he or she is denied conductor or locomotive engineer recertification under § 242.401 or § 240.219 of this chapter or has his or her conductor or locomotive engineer certification revoked under § 242.407 or § 240.307 of this chapter by another railroad.

(g) A person who is certified to perform multiple types of conductor service and who has had any of those certifications revoked under § 242.407 may not perform any type of conductor service during the period of revocation.

(h) A person who holds a current conductor and locomotive engineer certificate and who has had his or her conductor certification revoked under § 242.407 for a violation of § 242.403(e)(1) through (5) or (e)(12) may not work as a locomotive engineer during the period of revocation. However, a person who holds a current

conductor and locomotive engineer certificate and who has had his or her conductor certification revoked under § 242.407 for a violation of § 242.403(e)(6) through (11) may work as a locomotive engineer during the period of revocation.

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

(i) A person who holds a current conductor and locomotive engineer certificate and who has had his or her locomotive engineer certification revoked under § 240.307 of this chapter may not work as a conductor during the period of revocation.

(j) A person who has had his or her locomotive engineer certification revoked under § 240.307 of this chapter may not obtain a conductor certificate pursuant to this part during the period of revocation.

(k) A person who had his or her conductor certification revoked under § 242.407 for violations of § 242.403(e)(1) through (5) or (e)(12) may not obtain a locomotive engineer certificate pursuant to part 240 of this chapter during the period of revocation.

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

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

(n) In lieu of issuing multiple certificates, a railroad may issue one certificate to a person who is certified to perform multiple types of conductor service or is certified as a conductor and a locomotive engineer. The certificate must comply with § 240.223 of this chapter and § 242.207.

(o) A person who holds a current conductor and locomotive engineer certificate and who is involved in a revocable event under § 242.407 or § 240.307 of this chapter may only have one certificate revoked for that event. The determination by the railroad as to which certificate to revoke for the revocable event must be based on the work the person was performing at the time the event occurred.

§ 242.215 Railroad oversight responsibilities.

(a) No later than March 31 of each year (beginning in calendar year 2013), each Class I railroad (including the National Railroad Passenger Corporation and a railroad providing commuter service) and each Class II railroad shall conduct a formal annual review and analysis concerning the administration of its program for responding to detected instances of poor safety conduct by certified conductors during the prior calendar year.

(b) Each review and analysis shall involve:

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

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

(3) The number and type of operational monitoring test failures recorded by railroad officers who meet the requirements of § 217.9(b)(1) of this chapter; and

(4) If the railroad conducts joint operations with another railroad, the number of conductors employed by the other railroad(s) which: were involved in events described in this paragraph and were determined to be certified and to have possessed the necessary territorial qualifications for joint operations purposes by the controlling railroad.

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

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

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

(1) Incidents involving noncompliance with part 218 of this chapter;

(2) Incidents involving noncompliance with part 219 of this chapter;

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

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

(5) Incidents involving noncompliance with the railroad's operating rules resulting in operation of a locomotive or train past any signal, 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 must be reported 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; and

(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.

(f) For reporting purposes, an instance of poor safety conduct involving a person who holds both conductor certification pursuant to this part and locomotive

engineer certification pursuant to part 240 of this chapter need only be reported once (either under 49 CFR 240.309 of this chapter or this section). The determination as to where to report the instance of poor safety conduct should be based on the work the person was performing at the time the conduct occurred.

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

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

- (i) Imposition of informal discipline;
- (ii) Imposition of formal discipline;
- (iii) Provision of informal training; or
- (iv) Provision of formal training; and

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

- (i) The person was withheld from service;
- (ii) The person was dismissed from employment or
- (iii) The person was issued demerits. If more than one form of punishment was imposed only that punishment deemed the most severe shall be shown.

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

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

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

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

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

(2) The number of incidents within that total which reflect incidents requiring an FRA accident/incident report under part 225 of this chapter; and

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

Subpart D – Territorial Qualification and Joint Operations

§ 242.301 Requirements for territorial qualification.

(a) Except as provided in paragraph (c), (d), or (e) of this section, a railroad, including a railroad that employs conductors working in joint operations territory, shall not permit or require a person to serve as a conductor unless that railroad determines that

the person is certified as a conductor and possesses the necessary territorial qualifications for the applicable territory pursuant to § 242.119.

(b) Each person who is called to serve as a conductor shall:

(1) Meet the territorial qualification requirements on the segment of track upon which he or she will serve as a conductor; and

(2) Immediately notify the railroad upon which he or she is employed if he or she does not meet the required territorial qualifications.

(c) Except as provided in paragraph (e) of this section, if a conductor lacks territorial qualification on main track physical characteristics required by paragraph (a) of this section, he or she shall be assisted by a person who meets the territorial qualification requirements for main track physical characteristics.

(1) For a conductor who has never been qualified on main track physical characteristics of the territory over which he or she is to serve as a conductor, the assistant shall be a person who is certified as a conductor, meets the territorial qualification requirements for main track physical characteristics, and is not an assigned crew member.

(2) For a conductor who was previously qualified on main track physical characteristics of the territory over which he or she is to serve as a conductor, but whose qualification has expired, the assistant may be any person, including an assigned crewmember other than the locomotive engineer so long as serving as the assistant would not conflict with that crewmember's other safety sensitive duties, who meets the territorial qualification requirements for main track physical characteristics.

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

(e) An assistant is not required if the movement is on a section of main track with an average grade of less than 1% over 3 continuous miles, and

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

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

(3) 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.

Subpart E – Denial and Revocation of Certification

§ 242.401 Denial of certification.

(a) A railroad shall notify a candidate for certification or recertification of information known to the railroad that forms the basis for denying the person certification and provide the person a reasonable opportunity to explain or rebut that adverse information in writing prior to denying certification. A railroad shall provide the conductor candidate with any written documents or records, including written statements,

related to failure to meet a requirement of this part which support its pending denial decision.

(b) This section does not require further opportunity to comment if the railroad's denial is based solely on factors addressed by §§ 242.111, 242.115, or 242.403 and the opportunity to comment afforded by § 242.109 has been provided.

(c) If a railroad denies a person certification or recertification, it shall notify the person of the adverse decision and explain, in writing, the basis for its denial decision. The basis for a railroad's denial decision shall address any explanation or rebuttal information that the conductor candidate may have provided in writing pursuant to paragraph (a) of this section. The document explaining the basis for the denial shall be served on the person within 10 days after the railroad's decision and shall give the date of the decision.

(d) A railroad shall not deny the person's certification for failing to comply with a railroad operating rule or practice which constitutes a violation under § 242.403(e)(1) through (11) of this part if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the conductor's ability to comply with that railroad operating rule or practice.

§ 242.403 Criteria for revoking certification.

(a) Each railroad shall adopt and comply with a program which meets the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of a program

which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) It shall be unlawful to fail to comply with any of the railroad rules and practices described in paragraph (e) of this section.

(c)(1) A certified conductor who has demonstrated a failure to comply with railroad rules and practices described in paragraph (e) of this section shall have his or her certification revoked.

(2) A certified conductor who is monitoring, piloting, or instructing a conductor 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, pilot, or instructor must prevent a violation from occurring at all costs; the duty may be met by warning the conductor or the engineer, as appropriate, of a potential or foreseeable violation.

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

(d) Limitations on consideration of prior operating rule compliance data: In determining whether a person may be or remain certified as a conductor, a railroad shall consider as operating rule compliance data only conduct described in paragraphs (e)(1) through (e)(11) 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 take appropriate action to prevent the locomotive engineer of the train the conductor is assigned to from failing to control a locomotive or train in accordance with a signal indication, excluding a hand or a radio signal indication or a switch, that requires a complete stop before passing it, when the conductor is located in the operating cab, or otherwise has knowledge of the signal indication. Appropriate action does not mean that a conductor must prevent a violation from occurring at all costs; the duty may be met by warning an engineer of a potential or foreseeable violation.

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

(i) When the conductor is located in the operating cab and the speed at which the train was operated exceeds the maximum authorized limit by at least 10 miles per hour. Where restricted speed is in effect, railroads shall consider only those violations of the conditional clause of restricted speed rules (*i.e.*, the clause that requires stopping within one half of the locomotive engineer's range of vision), or the operational equivalent thereof, which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as "covered data" under § 225.5 of this chapter. Appropriate action does not mean that a conductor must prevent a

violation from occurring at all costs; the duty may be met by warning an engineer of a potential or foreseeable violation.

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

(3) Failure to perform or have knowledge that a required brake test was performed pursuant to the Class I, Class IA, Class II, Class III, or transfer train brake test provisions of part 232 of this chapter or the Class 1, Class 1A, Class II, or running brake test provisions of part 238 of this chapter.

(4) Failure to take appropriate action to prevent the locomotive engineer of the train the conductor is assigned to from occupying main track or a segment of main track without proper authority or permission. Appropriate action does not mean that a conductor must prevent a violation from occurring at all costs; the duty may be met by warning an engineer of a potential or foreseeable violation.

(5) Failure to comply with prohibitions against tampering with locomotive mounted safety devices; knowingly fail to take appropriate action to prevent the locomotive engineer of the train the conductor is assigned to from failing to comply with prohibitions against tampering with locomotive mounted safety devices; or knowingly fail to take appropriate action to prevent the locomotive engineer of the train the conductor is assigned to from 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) Failure to comply with the provisions of § 218.99 of this chapter (Shoving or pushing movements). Railroads shall only consider those violations of § 218.99 of this chapter which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as "covered data" under § 225.5 of this chapter.

(7) Failure to comply with the provisions of § 218.101 of this chapter (Leaving rolling and on-track maintenance-of-way equipment in the clear). Railroads shall only consider those violations of § 218.101 of this chapter which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as "covered data" under § 225.5 of this chapter.

(8) Failure to comply with the provisions of § 218.103 of this chapter (Hand-operated switches, including crossover switches). Railroads shall only consider those violations of § 218.103 of this chapter which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as "covered data" under § 225.5 of this chapter.

(9) Failure to comply with the provisions of § 218.105 of this chapter (Additional operational requirements for hand-operated main track switches). Railroads shall only consider those violations of § 218.105 of this chapter which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as "covered data" under § 225.5 of this chapter.

(10) Failure to comply with the provisions of § 218.107 of this chapter (Additional operational requirements for hand-operated crossover switches). Railroads

shall only consider those violations of § 218.107 of this chapter which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as "covered data" under § 225.5 of this chapter.

(11) Failure to comply with the provisions of § 218.109 of this chapter (Hand-operated fixed derails). Railroads shall only consider those violations of § 218.109 of this chapter which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as "covered data" under § 225.5 of this chapter.

(12) Failure to comply with § 219.101 of this chapter; however such incidents shall be considered as a violation only for the purposes of § 242.405(a)(2) and (3).

(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 paragraphs (e)(1) through (11) 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 § 242.405.

(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.

(4) A railroad shall not be permitted to deny or revoke an employee's certification based upon additional conditions or operational restrictions imposed pursuant to § 242.107(d).

§ 242.405 Periods of ineligibility.

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

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

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

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

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

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

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

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

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

(2) Certification is denied or revoked for reasons other than noncompliance with § 219.101 of this chapter;

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

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

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

§ 242.407 Process for revoking certification.

(a) Except as provided for in § 242.115(g), a railroad that certifies or recertifies a person as a conductor and, during the period that certification is valid, acquires reliable information regarding violation(s) of § 242.403(e) or § 242.115(e) of this chapter shall revoke the person's conductor certificate.

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

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

(2) Prior to or upon suspending the person's certificate, provide notice of the reason for the suspension, the pending revocation, and an opportunity for a hearing before a presiding officer other than the investigating officer. The notice may initially be given either orally or in writing. If given orally, 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.

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

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

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

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

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

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

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

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

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

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

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

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

(7) The presiding officer may:

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

(ii) Examine witnesses at the hearing;

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

and

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

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

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

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

(11) The decision shall:

(i) Contain the findings of fact as well as the basis therefor, concerning all material issues of fact presented on the record and citations to all applicable railroad rules and practices;

(ii) State whether the railroad official found that a revocable event occurred and the applicable period of revocation with a citation to 49 CFR 242.405 (Periods of revocation); and

(iii) Be served on the employee and the employee's representative, if any, with the railroad to retain proof of that service.

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

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

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

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

That waiver shall:

(1) Be made in writing;

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

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

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

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

(i) A railroad:

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

(2) May decide not to revoke the person's certification as provided for in paragraph (a) of this section if sufficient evidence exists to establish that the violation of § 242.403(e)(1) through (11) 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 § 242.215 for Class I (including the National Railroad Passenger Corporation) and Class II railroads, and § 242.203 for Class III railroads if sufficient evidence meeting the criteria provided 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 conductor's certification, as provided for in paragraph (b) of this section, is not in violation of paragraph (a) of this section.

Subpart F – Dispute Resolution Procedures

§ 242.501 Review board established.

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

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

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

§ 242.503 Petition requirements.

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

(b) Each petition shall:

(1) Be in writing;

(2) Be filed with the Docket Clerk, U.S. Department of Transportation, Docket Operations (M-30), West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, D.C. 20590. The form of such request may be in written or electronic form consistent with the standards and requirements established by the Federal Docket Management System and posted on its web site at <http://www.regulations.gov>.

(3) Contain all available information that the person thinks supports the person's belief that the railroad acted improperly, including:

- (i) The petitioner's full name;
- (ii) The petitioner's current mailing address;
- (iii) The petitioner's daytime telephone number;
- (iv) The petitioner's e-mail address (if available);
- (v) The name and address of the railroad; and
- (vi) The facts that the petitioner believes constitute the improper action by the railroad, specifying the locations, dates, and identities of all persons who were present or involved in the railroad's actions (to the degree known by the petitioner);

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

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

(6) Be filed in a timely manner.

(7) Be supplemented, if requested by the Operating Crew Review Board, with a copy of the information under 49 CFR 40.329 that laboratories, medical review officers, and other service agents are required to release to employees. The petitioner must provide written explanation in response to an Operating Crew Review Board request if written documents that should be reasonably available to the petitioner are not supplied.

(c) A petition seeking review of a railroad's decision to deny certification or recertification or revoke certification in accordance with the procedures required by § 242.407 filed with FRA more than 120 days after the date the railroad's denial or revocation decision was served on the petitioner will be denied as untimely except that the Operating Crew Review Board for cause shown may extend the petition filing period at any time in its discretion:

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

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

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

§ 242.505 Processing certification review petitions.

(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 attempt to 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) Upon receipt of the petition, FRA will notify the railroad that it has received the petition and where the petition may be accessed.

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

(d) A railroad that submits such information shall:

(1) Identify the petitioner by name and the docket number of the review proceeding and provide the railroad's e-mail address (if available);

(2) Serve a copy of the information being submitted to FRA to the petitioner and petitioner's representative, if any; and

(3) File the information with the Docket Clerk, U.S. Department of Transportation, Docket Operations (M-30), West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, D.C. 20590. The form of such information may be in written or electronic form consistent with the standards and requirements established by the Federal Docket Management System and posted on its web site at <http://www.regulations.gov>.

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

(f) Based on the record, the Board shall have the authority to grant, deny, dismiss or remand the petition.

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

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

(i) Standard of review for procedural issues: When considering procedural issues, the Board will determine whether substantial harm was caused the petitioner by virtue of the failure to adhere to the dictated procedures for making the railroad's decision. A finding of substantial harm is grounds for reversing the railroad's decision.

To establish grounds upon which the Board may grant relief, Petitioner must show:

- (1) That procedural error occurred, and
- (2) The procedural error caused substantial harm.

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

(k) The Board will determine whether the denial or revocation of certification or recertification was improper under this regulation (*i.e.*, based on an incorrect determination that the person failed to meet the certification requirements of this regulation) and grant or deny the petition accordingly. The Board will not otherwise

consider the propriety of a railroad's decision, *i.e.*, it will not consider whether the railroad properly applied its own more stringent requirements.

(l) The Board's written decision shall be served on the petitioner, including the petitioner's representative, if any, and the railroad.

§ 242.507 Request for a hearing.

(a) If adversely affected by the Operating Crew Review Board's decision, either the petitioner before the Board or the railroad involved shall have a right to an administrative proceeding as prescribed by § 242.509.

(b) To exercise that right, the adversely affected party shall, within 20 days of service of the Board's decision on that party, file a written request with the Docket Clerk, U.S. Department of Transportation, Docket Operations (M-30), West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, D.C. 20590. The form of such request may be in written or electronic form consistent with the standards and requirements established by the Federal Docket Management System and posted on its web site at <http://www.regulations.gov>.

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

(d) If a party elects to request a hearing, that person shall submit a written request to the Docket Clerk containing the following:

(1) The name, address, telephone number, and email address (if available) of the respondent and the requesting party's designated representative, if any;

(2) The specific factual issues, industry rules, regulations, or laws that the requesting party alleges need to be examined in connection with the certification decision in question; and

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

(e) Upon receipt of a hearing request complying with paragraph (d) of this section, FRA shall arrange for the appointment of a presiding officer who shall schedule the hearing for the earliest practicable date.

§ 242.509 Hearings.

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

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

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

(d) The presiding officer may authorize discovery of the types and quantities which in the presiding officer's discretion will contribute to a fair hearing without unduly

burdening the parties. The presiding officer may impose appropriate non-monetary sanctions, including limitations as to the presentation of evidence and issues, for any party's willful failure or refusal to comply with approved discovery requests.

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

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

(g) If any document initiating, filed, or served in, a proceeding is not in substantial compliance with the applicable law, regulation, or directive of the presiding

officer, the presiding officer may strike or dismiss all or part of such document, or require its amendment.

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

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

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

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

(l) An application to the presiding officer for an order or ruling not otherwise specifically provided for in this part shall be by motion. The motion shall be filed with the presiding officer and, if written, served upon all parties. All motions, unless made during the hearing, shall be written. Motions made during hearings may be made orally on the record, except that the presiding officer may direct that any oral motion be reduced

to writing. Any motion shall state with particularity the grounds therefor and the relief or order sought, and shall be accompanied by any affidavits or other evidence desired to be relied upon which is not already part of the record. Any matter submitted in response to a written motion must be filed and served within fourteen (14) days of the motion, or within such other period as directed by the presiding officer.

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

(n) The presiding officer shall employ the Federal Rules of Evidence for United States Courts and Magistrates as general guidelines for the introduction of evidence. Notwithstanding paragraph (m) of this section, all relevant and probative evidence shall be received unless the presiding officer determines the evidence to be unduly repetitive or so extensive and lacking in relevancy that its admission would impair the prompt, orderly, and fair resolution of the proceeding.

(o) The presiding officer may:

- (1) Administer oaths and affirmations;
 - (2) Issue subpoenas as provided for in § 209.7 of this chapter;
 - (3) Adopt any needed procedures for the submission of evidence in written form;
 - (4) Examine witnesses at the hearing;
 - (5) Convene, recess, adjourn or otherwise regulate the course of the hearing;
- and
- (6) Take any other action authorized by or consistent with the provisions of this part and permitted by law that may expedite the hearing or aid in the disposition of the proceeding.

(p) The petitioner before the Operating Crew Review Board, the railroad involved in taking the certification action, and FRA shall be parties at the hearing. All parties may participate in the hearing and may appear and be heard on their own behalf or through designated representatives. All parties may offer relevant evidence, including testimony, and may conduct such cross-examination of witnesses as may be required to make a record of the relevant facts.

(q) The party requesting the administrative hearing shall be the "hearing petitioner." The hearing petitioner shall have the burden of proving its case by a preponderance of the evidence. Hence, if the hearing petitioner is the railroad involved in taking the certification action, that railroad will have the burden of proving that its decision to deny certification, deny recertification, or revoke certification was correct. Conversely, if the petitioner before the Operating Crew Review Board is the hearing

petitioner, that person will have the burden of proving that the railroad's decision to deny certification, deny recertification, or revoke certification was incorrect. The party who is not the hearing petitioner will be a respondent.

(r) FRA will be a mandatory party to the administrative hearing. At the start of each proceeding, FRA will be a respondent.

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

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

(u) The decision:

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

(2) Shall be served on the hearing petitioner and all other parties to the proceeding;

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

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

(5) Is not precedential.

§ 242.511 Appeals.

(a) Any party aggrieved by the presiding officer's decision may file an appeal. The appeal must be filed within 35 days of issuance of the decision with the Federal Railroad Administrator, 1200 New Jersey Avenue, SE., Washington, DC 20590 and with the Docket Clerk, U.S. Department of Transportation, Docket Operations (M-30), West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, D.C. 20590. A copy of the appeal shall be served on each party. The appeal shall set forth objections to the presiding officer's decision, supported by reference to applicable laws and regulations and with specific reference to the record. If no appeal is timely filed, the presiding officer's decision constitutes final agency action.

(b) A party may file a reply to the appeal within 25 days of service of the appeal. The reply shall be supported by reference to applicable laws and regulations and with specific reference to the record, if the party relies on evidence contained in the record.

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

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

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

agency action except where the terms of the Administrator's decision (for example, remanding a case to the presiding officer) show that the parties' administrative remedies have not been exhausted.

(f) An appeal from an Operating Crew Review Board decision pursuant to § 242.503(d) must be filed within 35 days of issuance of the decision with the Federal Railroad Administrator, 1200 New Jersey Avenue, SE., Washington, DC 20590 and with the Docket Clerk, U.S. Department of Transportation, Docket Operations (M-30), West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, D.C. 20590. A copy of the appeal shall be served on each party. The Administrator may affirm or vacate the Board's decision, and may remand the petition to the Board for further proceedings. An Administrator's decision to affirm the Board's decision constitutes final agency action.

APPENDIX A TO PART 242—SCHEDULE OF CIVIL PENALTIES

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 \$100,000 for any violation where circumstances warrant. See 49 CFR part 209, Appendix A.

APPENDIX A TO PART 242—SCHEDULE OF CIVIL PENALTIES ¹

| Section | Violation | Willful Violation |
|---|-----------|-------------------|
| Subpart B—Program and Eligibility Requirements | | |
| 242.101—Program failures: | | |
| (a) Failure to have program..... | \$10,000 | \$20,000 |
| (a)(1)-(6) Program that fails to address a subject..... | 2,500 | 5,000 |
| 242.103—Program approval: | | |
| (a)-(b) Failure to follow Appendix B..... | 1,000 | 2,000 |

| | | |
|--|-------|--------|
| (c) Failure to comply with filing requirements..... | 1,000 | 2,000 |
| (h) to resubmit, when directed by FRA..... | 1,000 | 2,000 |
| 242.105—Schedule for implementation: | | |
| (a)-(b) Failure to designate conductors..... | 2,000 | 4,000 |
| (c) Allowing uncertified person to serve as conductor..... | 7,500 | 15,000 |
| (d)-(e) Certifying without complying with subpart B or failure to issue a certificate..... | 2,500 | 5,000 |
| (f) Serving as a conductor without complying with subpart B or being issued a certificate..... | 7,500 | 15,000 |
| 242.107—Types of service: | | |
| (a) Failure to designate types of service..... | 2,000 | 4,000 |
| (c) Reclassifying a certificate..... | 2,500 | 5,000 |
| 242.109—Certification and recertification determinations: | | |
| (a) Failure to determine in writing the requirements of (a)(1), (a)(2), (a)(3), and/or (a)(4)..... | 2,500 | 5,000 |
| (b) Considering excluded data..... | 2,000 | 4,000 |
| (c) Failure to have required documents on file..... | 1,000 | 2,000 |
| (d), (e) Failure to provide timely review opportunity..... | 2,000 | 4,000 |
| 242.111—Motor vehicle operator records: | | |
| (a) Failure to implement program meeting requirements..... | 6,000 | |
| (b) Failure to determine eligibility requirements met..... | 5,000 | 7,500 |
| (c) Failure to initially certify..... | 2,000 | 4,000 |
| (d) Failure to recertify..... | 2,000 | 4,000 |
| (e) Allowing person to serve as conductor before information is evaluated..... | 7,500 | 15,000 |
| (f) Failure to certify or certify during pendency of waiver request..... | 2,000 | 4,000 |
| (g) Failure to take action to make information available..... | 1,000 | 2,000 |
| (h), (i), (j) Failure to request record..... | 1,000 | 2,000 |
| (k) Failure to notify of absence of license..... | 1,000 | 2,000 |
| (l) Failure to report in timely manner or railroad taking certification action for not reporting earlier than 48 hours.... | 1,000 | 2,000 |
| (m), (n) Considering excluded data..... | 2,000 | 4,000 |
| (o) Failure to: | | |
| (1) consider data..... | 6,000 | 10,000 |
| (3),(4) properly act in response to data..... | 2,500 | 5,000 |
| 242.113—Prior safety conduct: | | |
| (a) Failure to implement program meeting requirements..... | 6,000 | |
| (b) Failure to determine eligibility requirements met..... | 5,000 | 7,500 |
| (c) Failure to request record or take required action..... | 2,000 | 2,000 |
| 242.115—Substance abuse / rules: | | |
| (a) Failure to implement program meeting requirements..... | 6,000 | |
| (b) Failure to determine eligibility requirements met..... | 5,000 | 7,500 |

| | | |
|--|-------|-------|
| (c) Failure to have basis for taking action..... | 2,500 | 5,000 |
| (d)-(g) Failure to comply with requirements..... | 2,500 | 5,000 |
| 242.117—Vision and hearing acuity: | | |
| (a) Failure to implement program meeting requirements..... | 6,000 | |
| (b) Failure to determine eligibility requirements met..... | 5,000 | 7,500 |
| (c) Failure to have basis for finding proper acuity..... | 1,000 | 2,000 |
| (d) Acuity examination performed by unauthorized person..... | 1,000 | 2,000 |
| (e) Failure to note need for device to achieve acuity..... | 1,000 | 2,000 |
| (f) Failure to use device needed for proper acuity..... | 1,000 | 2,000 |
| (h)-(j) Failure to comply with requirements..... | 2,500 | 5,000 |
| (k) Failure of conductor to notify..... | 2,500 | 5,000 |
| 242.119—Training | | |
| (a) Failure to implement program meeting requirements..... | 6,000 | |
| (b) Failure to determine eligibility requirements met..... | 5,000 | 7,500 |
| (c) Failure to determine in writing the requirements of (c)(1), (c)(2), and/or (c)(3)..... | 2,500 | 5,000 |
| (d) Failure to: | | |
| (1) Make determination, include proper curriculum, and/or document knowledge and ability..... | 2,500 | 5,000 |
| (2) Failure to include component..... | 1,000 | 2,000 |
| (3) Failure to make information available..... | 1,000 | 2,000 |
| (4) Failure to maintain steps or tasks in one manual or make available..... | 1,000 | 2,000 |
| (5) Failure to review and modify training plan..... | 1,000 | 2,000 |
| (e) Failure to require person to meet requirements..... | 2,500 | 5,000 |
| (f) Failure to provide opportunity to consult..... | 1,000 | 2,000 |
| (g)-(k) Failure to have adequate procedures or include procedures in program..... | 2,500 | 5,000 |
| (l) Failure to have adequate procedures for or provide continuing education..... | 2,500 | 5,000 |
| 242.121—Knowledge testing: | | |
| (a) Failure to implement program meeting requirements..... | 6,000 | |
| (b) Failure to determine eligibility requirements met..... | 5,000 | 7,500 |
| (c) Failure to have adequate procedures for testing knowledge.. | 2,500 | 5,000 |
| (d) Failure to properly document testing..... | 2,500 | 5,000 |
| (e) Failure to provide opportunity to consult..... | 2,500 | 5,000 |
| (f) Failure to document whether test was passed or failed..... | 2,500 | 5,000 |
| (g) Allowing person to serve as a conductor despite test failure.. | 2,500 | 5,000 |
| 242.123—Monitoring operational performance: | | |
| (a)-(b) Failure to implement program meeting requirements..... | 6,000 | |
| (c) Failure to test each conductor annually..... | 2,500 | 5,000 |
| (d) Failure to test properly..... | 2,500 | 5,000 |
| (e) Failure to indicate the action to be take..... | 2,500 | 5,000 |

| | | |
|---|-------|--------|
| (f) Failure to test within time limits..... | 2,500 | 5,000 |
| 242.125—Reliance on determination of another: | | |
| (a) Failure to address in program or require newly hired conductor to take entire training program..... | 5,000 | 7,500 |
| (b) Failure to make any required determinations..... | 2,500 | 5,000 |
| 242.127—Relying on requirements of a country: | | |
| (a)-(b) Failure to determine person employed and meets Canadian standards..... | 2,500 | 5,000 |
| Subpart C—Administration of the Certification Program | | |
| 242.201—Time limitations: | | |
| (a), (c), and (d) Exceeding time limit..... | 2,000 | 4,000 |
| 242.203—Supporting information: | | |
| (a), (c)-(e) Failure to have a record..... | 2,500 | 5,000 |
| (b) Failure to have a complete record..... | 2,000 | 4,000 |
| (f) Falsification of a record..... | (-) | 10,000 |
| (g) Failure to comply with requirements if records maintained electronically..... | 2,000 | 4,000 |
| 242.205—Identification of persons: | | |
| (a)-(b) Failure to have a record..... | 2,500 | 5,000 |
| (c) Failure to update or make a record available..... | 2,000 | 4,000 |
| (d) Falsification of a record..... | (-) | 10,000 |
| (e) Failure to comply with requirements if records maintained electronically..... | 2,000 | 4,000 |
| 242.207—Certificate components: | | |
| (a) Improper certificate..... | 1,000 | 2,000 |
| (b) Failure to designate those with signing authority..... | 1,000 | 2,000 |
| (d) Falsification of a certificate..... | (-) | 10,000 |
| 242.209—Maintenance of the certificate: | | |
| (a) Failure of conductor to carry certificate or display certificate when requested..... | 1,000 | 2,000 |
| (b) Failure of conductor to notify railroad of limitations or railroad requiring conductor to exceed limitations..... | 4,000 | 8,000 |
| 242.211—Replacement of certificates: | | |
| (a) Failure to have a reasonably accessible system for certificate replacement..... | 2,000 | 4,000 |
| (b) Failure to comply with requirements for temporary replacement certificates..... | 1,000 | 2,000 |
| 242.213—Multiple certifications: | | |
| (d) Allowing an engineer to operate without a conductor where the engineer is not certified as a conductor or not accompanied by a certified conductor..... | 7,500 | 15,000 |
| (e) Failure to comply with emergency restrictions..... | 2,500 | 5,000 |

| | | |
|---|-------|--------|
| (f) Failure of conductor to notify railroad of denial or revocation..... | 4,000 | 8,000 |
| (g) Performing conductor service with a revoked conductor certificate..... | 7,500 | 15,000 |
| (h), (k) Performing work as an engineer or obtaining an engineer certificate with a conductor certification revoked for a violation of 242.403(e)(1)-(e)(5) or (e)(12)..... | 7,500 | 15,000 |
| (i), (j) Performing work as a conductor or obtaining a conductor certificate with an engineer certification revoked under 240.307..... | 7,500 | 15,000 |
| (l) Denying or revoking engineer certification or recertification based solely on the denial of conductor certification..... | 4,000 | 8,000 |
| (m) Denying or revoking conductor certification or recertification based solely on the denial of engineer certification..... | 4,000 | 8,000 |
| 242.215—Oversight responsibility: | | |
| (a) Failure to perform annual review and analysis or perform on time..... | 2,000 | 4,000 |
| (b)-(i) Incomplete or inaccurate report..... | 2,500 | 5,000 |
| Subpart D—Territorial Qualification and Joint Operations | | |
| 242.301—Territorial qualification: | | |
| (a) Allowing uncertified person or person not territorially qualified to serve as a conductor..... | 7,500 | 15,000 |
| (b) Failure to notify railroad of lack of qualifications..... | 4,000 | 8,000 |
| (c) Failure to provide required assistance..... | 4,000 | 8,000 |
| (d) Failure to provide assistance or up-to-date job aid..... | 4,000 | 8,000 |
| Subpart E—Denial and Revocation of Certification | | |
| 242.401—Denial of certification: | | |
| (a) Failure to notify or provide opportunity for comment..... | 2,000 | 4,000 |
| (c) Failure to notify, provide data, or untimely notification..... | 2,000 | 4,000 |
| 242.403—Revocation criteria: | | |
| (a) Failure to implement program meeting requirements..... | 6,000 | |
| (b) Unlawful failure to comply with rules and practices..... | 2,500 | 5,000 |
| (c) Failure to revoke certification..... | 2,500 | 5,000 |
| (d) Considering excluded data..... | 2,500 | 5,000 |
| (e) Considering unlisted violations of operating rules and practices..... | 2,500 | 5,000 |
| (f) Improperly counting or considering violations..... | 2,500 | 5,000 |
| 242.405—Periods of ineligibility: | | |
| (a)-(c) Imposition of incorrect period of ineligibility..... | 2,500 | 5,000 |
| 242.407—Revocation of certification: | | |
| (a) Failure to revoke certification..... | 7,500 | 15,000 |

| | | |
|---|-------|--------|
| (b) Failure to suspend, notify, provide hearing opportunity, or improper procedures..... | 2,500 | 5,000 |
| (c)-(h) Failure of railroad to comply with hearing or waiver procedures..... | 2,500 | 5,000 |
| (j) Failure of railroad to make record..... | 1,000 | 2,000 |
| (k) Failure of railroad to conduct reasonable inquiry or make good faith determination..... | 5,000 | 10,000 |

¹ A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$100,000 for any violation where circumstances warrant. See 49 CFR part 209, appendix A.

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

This appendix establishes procedures for the submission and approval of a railroad's program concerning the training, testing, and evaluating of persons seeking certification or recertification as a conductor in accordance with the requirements of this part. It also contains guidance on how FRA will exercise its review and approval responsibilities.

Submission by a Railroad

As provided for in § 242.101, each railroad must have a program for determining the certification of each person it permits or requires to perform as a conductor or as a passenger conductor. Each railroad must submit its individual program to FRA for approval as provided for in § 242.103. Each program must be accompanied by a request for approval organized in accordance with this appendix. Requests for approval must contain appropriate references to the relevant portion of the program being discussed.

Requests should be submitted in writing on standard sized paper (8- 1/2 x 11) and can be in letter or narrative format. The railroad's submission shall be sent to the Associate Administrator for Railroad Safety/Chief Safety Officer, FRA. The mailing address for FRA is 1200 New Jersey Avenue, SE., Washington, DC 20590. Simultaneous with its filing with the FRA, each railroad must serve a copy of its submission on the president of each labor organization that represents the railroad's employees subject to this part.

Each railroad is authorized to file by electronic means any program submissions required under this part. Prior to any person submitting a railroad's first program submission electronically, the person shall provide the Associate Administrator with the following information in writing:

- (1) The name of the railroad;
- (2) The names of two individuals, including job titles, who will be the railroad's points of contact and will be the only individuals allowed access to FRA's secure document submission site;
- (3) The mailing addresses for the railroad's points of contact;
- (4) The railroad's system or main headquarters address located in the United States;
- (5) The e-mail addresses for the railroad's points of contact; and
- (6) The daytime telephone numbers for the railroad's points of contact.

A request for electronic submission or FRA review of written materials shall be addressed to the Associate Administrator for Railroad Safety/Chief Safety Officer, Federal Railroad Administration, 1200 New Jersey Avenue, SE., Washington, DC

20590. Upon receipt of a request for electronic submission that contains the information listed above, FRA will then contact the requestor with instructions for electronically submitting its program.

A railroad that electronically submits an initial program or new portions or revisions to an approved program required by this part shall be considered to have provided its consent to receive approval or disapproval notices from FRA by e-mail. FRA may electronically store any materials required by this part regardless of whether the railroad that submits the materials does so by delivering the written materials to the Associate Administrator and opts not to submit the materials electronically. A railroad that opts not to submit the materials required by this part electronically, but provides one or more e-mail addresses in its submission, shall be considered to have provided its consent to receive approval or disapproval notices from FRA by e-mail or mail.

Organization of the Submission

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

Section 1 of the Submission: General Information and Elections

The first section of the request must contain the name of the railroad, the person to be contacted concerning the request (including the person's name, title, telephone number, and mailing address) and a statement electing either to accept responsibility for

educating previously untrained persons to be certified conductors or recertify only conductors previously certified by other railroads. See § 242.103(b).

If a railroad elects not to provide initial conductor training, the railroad is obligated to state so in its submission. A railroad that makes this election will be limited to recertifying persons initially certified by another railroad. A railroad that makes this election can rescind it by obtaining FRA approval of a modification of its program. See § 242.103(f).

If a railroad elects to accept responsibility for training persons not previously trained to be conductors, the railroad is obligated to submit information on how such persons will be trained but has no duty to actually conduct such training. A railroad that elects to accept the responsibility for the training of such persons may authorize another railroad or a non-railroad entity to perform the actual training effort. The electing railroad remains responsible for assuring that such other training providers adhere to the training program the railroad submits. This section must also state which types of service the railroad will employ. See § 242.107.

Section 2 of the Submission: Training Persons Previously Certified

The second section of the request must contain information concerning the railroad's program for training previously certified conductors. As provided for in § 242.119(l) each railroad must have a program for the ongoing education of its conductors to assure that they maintain the necessary knowledge concerning operating rules and practices, familiarity with physical characteristics, and relevant Federal safety rules.

Section 242.119(l) provides a railroad latitude to select the specific subject matter to be covered, duration of the training, method of presenting the information, and the frequency with which the training will be provided. The railroad must describe in this section how it will use that latitude to assure that its conductors remain knowledgeable concerning the safe discharge of their responsibilities so as to comply with the performance standard set forth in § 242.119(l). This section must contain sufficient detail to permit effective evaluation of the railroad's training program in terms of the subject matter covered, the frequency and duration of the training sessions, the training environment employed (for example, use of classroom, use of computer based training, use of film or slide presentations, and use of on-job-training) and which aspects of the program are voluntary or mandatory.

Time and circumstances have the capacity to diminish both abstract knowledge and the proper application of that knowledge to discrete events. Time and circumstances also have the capacity to alter the value of previously obtained knowledge and the application of that knowledge. In formulating how it will use the discretion being afforded, each railroad must design its program to address both loss of retention of knowledge and changed circumstances, and this section of the submission to FRA must address these matters.

For example, conductors need to have their fundamental knowledge of operating rules and procedures refreshed periodically. Each railroad needs to advise FRA how that need is satisfied in terms of the interval between attendance at such training, the nature of the training being provided, and methods for conducting the training. A matter of

particular concern to FRA is how each railroad acts to assure that conductors remain knowledgeable about the territory over which a conductor is authorized to perform but from which the conductor has been absent. The railroad must have a plan for the familiarization training that addresses the question of how long a person can be absent before needing more education and, once that threshold is reached, how the person will acquire the needed education. Similarly, the program must address how the railroad responds to changes such as the introduction of new technology, new operating rule books, or significant changes in operations including alteration in the territory conductors are authorized to work over.

Section 3 of the Submission: Testing and Evaluating Persons Previously Certified

The third section of the request must contain information concerning the railroad's program for testing and evaluating previously certified conductors. As provided for in § 242.121, each railroad must have a program for the ongoing testing and evaluating of its conductors to assure that they have the necessary knowledge and skills concerning operating rules and practices, familiarity with physical characteristics of the territory, and relevant Federal safety rules. Similarly, each railroad must have a program for ongoing testing and evaluating to assure that its conductors have the necessary vision and hearing acuity as provided for in § 242.117.

Section 242.121 requires that a railroad rely on written procedures for determining that each person can demonstrate his or her knowledge of the railroad's rules and practices and skill at applying those rules and practices for the safe performance as a conductor. Section 242.121 directs that, when seeking a demonstration of the person's

knowledge, a railroad must employ a written test that contains objective questions and answers and covers the following subject matters: (i) safety and operating rules; (ii) timetable instructions; (iii) physical characteristics of the territory; and (iv) compliance with all applicable Federal regulations. The test must accurately measure the person's knowledge of all of these areas.

Section 242.121 provides a railroad latitude in selecting the design of its own testing policies (including the number of questions each test will contain, how each required subject matter will be covered, weighting (if any) to be given to particular subject matter responses, selection of passing scores, and the manner of presenting the test information). The railroad must describe in this section how it will use that latitude to assure that its conductors will demonstrate their knowledge concerning the safe discharge of their responsibilities so as to comply with the performance standard set forth in § 242.121.

Section 242.117 provides a railroad latitude to rely on the professional medical opinion of the railroad's medical examiner concerning the ability of a person with substandard acuity to safely perform as a conductor. The railroad must describe in this section how it will assure that its medical examiner has sufficient information concerning the railroad's operations to effectively form appropriate conclusions about the ability of a particular individual to safely perform as a conductor.

Section 4 of the Submission: Training, Testing, and Evaluating Persons Not Previously Certified

Unless a railroad has made an election not to accept responsibility for conducting the initial training of persons to be conductors, the fourth section of the request must contain information concerning the railroad's program for educating, testing, and evaluating persons not previously trained as conductors. As provided for in § 242.119(d), a railroad that is issuing an initial certification to a person to be a conductor must have a program for the training, testing, and evaluating of its conductors to assure that they acquire the necessary knowledge and skills concerning operating rules and practices, familiarity with physical characteristics of the territory, and relevant Federal safety rules.

Section 242.119 establishes a performance standard and gives a railroad latitude in selecting how it will meet that standard. A railroad must describe in this section how it will use that latitude to assure that its conductors will acquire sufficient knowledge and skill and demonstrate their knowledge and skills concerning the safe discharge of their responsibilities. This section must contain the same level of detail concerning initial training programs as that described for each of the components of the overall program contained in sections 2 through 4 of this Appendix. A railroad that plans to accept responsibility for the initial training of conductors may authorize another railroad or a non-railroad entity to perform the actual training effort. The authorizing railroad may submit a training program developed by that authorized trainer but the authorizing railroad remains responsible for assuring that such other training providers adhere to the training program submitted. Railroads that elect to rely on other entities, to conduct

training away from the railroad's own territory, must indicate how the student will be provided with the required familiarization with the physical characteristics for its territory.

Section 5 of the Submission: Monitoring Operational Performance by Certified Conductors

The fifth section of the request must contain information concerning the railroad's program for monitoring the operation of its certified conductors. As provided for in § 242.123, each railroad must have a program for the ongoing monitoring of its conductors to assure that they perform in conformity with the railroad's operating rules and practices and relevant Federal safety rules.

Section 6 of the Submission: Procedures for Routine Administration of the Conductor Certification Program

The final section of the request must contain a summary of how the railroad's program and procedures will implement the various specific aspects of the regulatory provisions that relate to routine administration of its certification program for conductors. At a minimum this section needs to address the procedural aspects of the rule's provisions identified in the following paragraph.

Section 242.109 provides that each railroad must have procedures for review and comment on adverse prior safety conduct, but allows the railroad to devise its own system within generalized parameters. Sections 242.111, 242.115 and 242.403 require a railroad to have procedures for evaluating data concerning prior safety conduct as a motor vehicle operator and as railroad workers, yet leave selection of many details to the

railroad. Sections 242.109, 242.201, and 242.401 place a duty on the railroad to make a series of determinations but allow the railroad to select what procedures it will employ to assure that all of the necessary determinations have been made in a timely fashion; who will be authorized to conclude that person will or will be not certified; and how it will communicate adverse decisions. Documentation of the factual basis the railroad relied on in making determinations under §§ 242.109, 242.117, 242.119 and 242.121 is required, but these sections permit the railroad to select the procedures it will employ to accomplish compliance with these provisions. Sections 242.125 and 242.127 permit reliance on certification / qualification determinations made by other entities and permit a railroad latitude in selecting the procedures it will employ to assure compliance with these provisions. Similarly, § 242.301 permits the use of railroad selected procedures to meet the requirements for certification of conductors performing service in joint operations territory. Sections 242.211 and 242.407 allow a railroad a certain degree of discretion in complying with the requirements for replacing lost certificates or the conduct of certification revocation proceedings.

This section of the request should outline in summary fashion the manner in which the railroad will implement its program so as to comply with the specific aspects of each of the rule's provisions described in the preceding paragraph.

FRA Review

The submissions made in conformity with this appendix will be deemed approved within 30 days after the required filing date or the actual filing date whichever is later. No formal approval document will be issued by FRA. FRA has taken the responsibility

for notifying a railroad when it detects problems with the railroad's program. FRA retains the right to disapprove a program that has obtained approval due to the passage of time as provided for in section § 242.103.

Rather than establish rigid requirements for each element of the program, FRA has given railroads discretion to select the design of their individual programs within a specified context for each element. The rule, however, provides a good guide to the considerations that should be addressed in designing a program that will meet the performance standards of this rule.

In reviewing program submissions, FRA will focus on the degree to which a particular program deviates from the norms identified in its rule. To the degree that a particular program submission materially deviates from the norms set out in its rule, FRA's review and approval process will be focused on determining the validity of the reasoning relied on by a railroad for selecting its alternative approach and the degree to which the alternative approach is likely to be effective in producing conductors who have the knowledge and ability to safely perform as conductors.

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

The purpose of this appendix is to outline the procedures available to individuals and railroads for complying with the requirements of §§ 242.109 and 242.111 of this part. Those provisions require that railroads consider the motor vehicle driving record of each person prior to issuing him or her certification or recertification as a conductor.

To fulfill that obligation, a railroad must review a certification candidate's recent motor vehicle driving record. Generally, that will be a single record on file with the state agency that issued the candidate's current license. However, it can include multiple records if the candidate has been issued a motor vehicle driving license by more than one state agency or foreign country.

Access to State Motor Vehicle Driving Record Data

The right of railroad workers, their employers, or prospective employers to have access to a state motor vehicle licensing agency's data concerning an individual's driving record is controlled by state law. Although many states have mechanisms through which employers and prospective employers such as railroads can obtain such data, there are some states in which privacy concerns make such access very difficult or impossible. Since individuals generally are entitled to obtain access to driving record data that will be relied on by a state motor vehicle licensing agency when that agency is taking action concerning their driving privileges, FRA places responsibility on individuals, who want to serve as conductors to request that their current state drivers licensing agency or agencies furnish such data directly to the railroad considering certifying them as a conductor. Depending on the procedures adopted by a particular state agency, this will involve the candidate's either sending the state agency a brief letter requesting such action or executing a state agency form that accomplishes the same effect. It will normally involve payment of a nominal fee established by the state agency for such a records check. In rare instances, when a certification candidate has been issued multiple licenses, it may require more than a single request.

Once the railroad has obtained the motor vehicle driving record(s), the railroad must afford the prospective conductor an opportunity to review that record and respond in writing to its contents in accordance with the provisions of § 242.401. The review opportunity must occur before the railroad evaluates that record. The railroad's required evaluation and subsequent decision making must be done in compliance with the provisions of this part.

APPENDIX D TO PART 242—MEDICAL STANDARDS GUIDELINES

(1) 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 § 242.117.

(2) 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 |
|--|---|
| PSEUDOISCHROMATIC 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. |

(3) 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 chart and § 242.117(h)(3).

(4) An examinee who fails to meet the criteria in the chart, 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 for serving as a conductor at night, during adverse weather conditions or under other circumstances. The intent of § 242.117(j) is not to provide an examinee with the right to make an infinite number of requests for further evaluation, but to provide an examinee with at least one

opportunity to prove that a hearing or vision test failure does not mean the examinee cannot safely perform as a conductor. Appropriate further medical evaluation could include providing another approved scientific screening test or a field test. All railroads should retain the discretion to limit the number of retests that an examinee can request but any cap placed on the number of retests should not limit retesting when changed circumstances would make such retesting appropriate. Changed circumstances would most likely occur if the examinee's medical condition has improved in some way or if technology has advanced to the extent that it arguably could compensate for a hearing or vision deficiency.

(5) Conductors 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.

APPENDIX E TO PART 242—APPLICATION OF REVOCABLE EVENTS

| Revocable Event | Application of Revocable Events | | | | | | |
|---|--|------------------------------|------------------------------|------------------------------|---|---|---|
| | Periods of Revocation | | | | Employees with Multiple Certifications | | |
| | Main Track | | | | Other than Main Track Where Restricted Speed or the Operational Equivalent Is in Effect | Main Track or Other than Main Track | |
| | 1st Offense | 2nd Offense Within 24 Months | 3rd Offense Within 36 Months | 4th Offense Within 36 Months | No Offense Within Previous 12 Months | Offense (as a Conductor) | Offense (as an Engineer) |
| 1 Signal requiring complete stop before passing | | | | | Not Applicable | Employee May <u>Not</u> Work as an Engineer During the Period of Revocation | Employee May <u>Not</u> Work as a Conductor During the Period of Revocation |
| 2 Restricted Speed & Speed; 10 mph over | | | | | | | |
| 3 Required Air Brake Test | | | | | | | |
| 4 Occupying Main Track without Authority | | | | | Half Revocation Period | Employee May Work as an Engineer During the Period of Revocation | Not applicable |
| 5 Disabling a Safety Device | | | | | | | |
| 6 Shoving Movements | | | | | | | |
| 7 Equipment Fouling Adjacent Tracks | | | | | | | |
| 8 Hand Operated Switches (Crossovers) | | | | | | | |
| 9 Hand Operated Switches Connected to Main Track | | | | | Not Applicable | | |
| 10 Hand Operated Crossover Switches (before & after movement) | | | | | Half Revocation Period | | |
| 11 Hand Operated Derails | | | | | | | |
| 12 Drug & Alcohol | Different periods of revocation may be applied (see 242.403 & 242.115) | | | | Not Applicable | Employee May <u>Not</u> Work as an Engineer During the Period of Revocation | Employee May <u>Not</u> Work as a Conductor During the Period of Revocation |

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Joseph C. Szabo
Administrator.

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