

---

This content is from the eCFR and is authoritative but unofficial.

---

## Title 49 - Transportation

### Subtitle B - Other Regulations Relating to Transportation

#### Chapter II - Federal Railroad Administration, Department of Transportation

#### Part 240 - Qualification and Certification of Locomotive Engineers

**Authority:** 49 U.S.C. 20103, 20107, 20135, 21301, 21304, 21311; 28 U.S.C. 2461 note; and 49 CFR 1.89.

**Source:** 56 FR 28254, June 19, 1991, unless otherwise noted.

#### Subpart E Dispute Resolution Procedures

- § 240.401 Review board established.
- § 240.403 Petition requirements.
- § 240.405 Processing certification review petitions.
- § 240.407 Request for a hearing.
- § 240.409 Hearings.
- § 240.411 Appeals.

#### Subpart E - Dispute Resolution Procedures

##### § 240.401 Review board established.

- (a) Any person who has been denied certification, denied recertification, or has had his or her certification revoked and believes that a railroad incorrectly determined that he or she failed to meet the certification requirements of this part 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.

[85 FR 81318, Dec. 15, 2020]

##### § 240.403 Petition requirements.

- (a) To obtain review of a railroad's decision to deny certification, deny recertification, or revoke certification, a person shall file a petition for review that complies with this section.
- (b) Each petition shall:
  - (1) Be in writing;
  - (2) Be 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, DC 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 website 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 email 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;
  - (6) Be filed in a timely manner; and
  - (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 § 240.307 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 that the request for extension is filed before the expiration of the period provided in this paragraph (c); or
  - (2) Provided that the failure to file timely 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 § 240.411.

*[56 FR 28254, June 19, 1991, as amended at 64 FR 60995, Nov. 8, 1999; 64 FR 70196, Dec. 16, 1999; 74 FR 25175, May 27, 2009; 85 FR 81318, Dec. 15, 2020]*

### **§ 240.405 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 email 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, DC 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 website 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) 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) When considering procedural issues, the Board will determine whether the petitioner suffered substantial harm that was caused by 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) 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 part (*i.e.*, based on an incorrect determination that the person failed to meet the certification requirements of this part) 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.

[85 FR 81318, Dec. 15, 2020]

### § 240.407 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 § 240.409.
- (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 U.S. Department of Transportation, Docket Operations (M-30), West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 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.

[60 FR 53137, Oct. 12, 1995, as amended at 64 FR 70196, Dec. 16, 1999; 74 FR 25175, May 27, 2009; 85 FR 81319, Dec. 15, 2020]

### § 240.409 Hearings.

- (a) An administrative hearing for a locomotive engineer 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 § 240.407(c) of this part and paragraph (u)(4) of this section, whenever a party has the right or is required to take action within a period prescribed by this part, or by law, regulation, or directive of the presiding officer, the presiding officer may extend such period, with or without notice, for good cause, provided another party is not substantially prejudiced by such extension. A request to extend a period which has already expired may be denied as untimely.
- (l) An application to the presiding officer for an order or ruling not otherwise specifically provided for in this part shall be by motion. The motion shall be filed with the presiding officer and, if written, served upon all parties. All motions, unless made during the hearing, shall be written. Motions made during hearings may be made orally on the record, except that the presiding officer may direct that any oral motion be reduced to writing. Any motion shall state with particularity the grounds therefor and the relief or order sought, and shall be accompanied by any affidavits or other evidence desired to be relied upon which is not already part of the record. Any matter submitted in response to a written motion must be filed and served within fourteen (14) days of the motion, or within such other period as directed by the presiding officer.
- (m) Testimony by witnesses at the hearing shall be given under oath and the hearing shall be recorded verbatim. The presiding officer shall give the parties to the proceeding adequate opportunity during the course of the hearing for the presentation of arguments in support of or in opposition to motions, and objections and exceptions to rulings of the presiding officer. The presiding officer may permit oral argument on any issues for which the presiding officer deems it appropriate and beneficial. Any evidence or argument received or proffered orally shall be transcribed and made a part of the record. Any physical evidence or written argument received or proffered shall be made a part of the record, except that the presiding officer may authorize the substitution of copies, photographs, or descriptions, when deemed to be appropriate.

- (n) The presiding officer shall employ the Federal Rules of Evidence for United States Courts and Magistrates as general guidelines for the introduction of evidence. Notwithstanding paragraph (m) of this section, all relevant and probative evidence shall be received unless the presiding officer determines the evidence to be unduly repetitive or so extensive and lacking in relevancy that its admission would impair the prompt, orderly, and fair resolution of the proceeding.
- (o) The presiding officer may:
  - (1) Administer oaths and affirmations;
  - (2) Issue subpoenas as provided for in § 209.7 of part 209 in this chapter;
  - (3) Adopt any needed procedures for the submission of evidence in written form;
  - (4) Examine witnesses at the hearing;
  - (5) Convene, recess, adjourn or otherwise regulate the course of the hearing; and
  - (6) Take any other action authorized by or consistent with the provisions of this part and permitted by law that may expedite the hearing or aid in the disposition of the proceeding.
- (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. Between the petitioner before the Operating Crew Review Board and the railroad involved in taking the certification action, 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.

[60 FR 53137, Oct. 12, 1995, as amended at 85 FR 81319, Dec. 15, 2020]

### § 240.411 Appeals.

- (a) Any party aggrieved by the presiding officer's decision may file an appeal in the presiding officer's docket. The appeal must be filed within 35 days of issuance of the decision. 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 § 240.403(d) must be filed in the Board's docket within 35 days of issuance of the decision. 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.

[56 FR 28254, June 19, 1991, as amended at 60 FR 53138, Oct. 12, 1995; 64 FR 60995, Nov. 8, 1999; 74 FR 25175, May 27, 2009; 85 FR 81319, Dec. 15, 2020]