

1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104-4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-113, section 12(d) (15 U.S.C. 272 note).

**VII. Congressional Review Act**

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides

that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a “major rule” as defined by 5 U.S.C. 804(2).

**List of Subjects in 40 CFR Part 180**

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 8, 2009.

**Lois Rossi,**

*Director, Registration Division, Office of Pesticide Programs.*

■ Therefore, 40 CFR chapter I is amended as follows:

**PART 180—[AMENDED]**

■ 1. The authority citation for part 180 continues to read as follows:

**Authority:** 21 U.S.C. 321(q), 346a and 371.

■ 2. In §180.421 the table in paragraph (a) is amended by revising the entry for “Apple” and by alphabetically adding the entry for “Hop, dried cones” to read as follows:

**§ 180.421 Fenarimol; tolerances for residues.**

(a) \* \* \*

Commodity	Parts per million
Apple .....	0.3
* * * * *	
Hop, dried cones .....	5.0
* * * * *	

\* \* \* \* \*

[FR Doc. E9-30371 Filed 12-22-09; 8:45 am]  
BILLING CODE 6560-50-

**DEPARTMENT OF TRANSPORTATION**

**Federal Railroad Administration**

**49 CFR Part 240**

[Docket No. FRA-2008-0091, Notice No. 4]

RIN 2130-AB95

**Qualification and Certification of Locomotive Engineers; Miscellaneous Revisions**

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

**ACTION:** Final rule.

**SUMMARY:** FRA is making miscellaneous amendments to its regulation governing the qualification and certification of locomotive engineers. These changes address the unanticipated consequences arising from reclassifications, clarify the grounds upon which a railroad may revoke a locomotive engineer’s certification, and make the regulation consistent with other FRA regulations and guidance. In particular, this rule: prohibits a railroad from reclassifying a person’s locomotive engineer certificate to that of a more restrictive class during the period in which the certificate is otherwise valid while permitting the

railroad to place restrictions on the locomotive engineer, if appropriate; clarifies that revocation of an engineer’s certificate may only occur for the reasons specified in the regulation; requires each railroad to identify the actions it will take in the event that a person fails a skills performance test or the railroad finds deficiencies with an engineer’s performance during an operational monitoring observation or unannounced compliance test; requires each railroad to describe the scoring system used by the railroad during performance skills tests, operational monitoring observations and unannounced compliance tests; and makes some minor clarifying revisions to the regulation.

**DATES: Effective Date:** The rule is effective February 22, 2010.

**Petitions for reconsideration:** Any petition for reconsideration of any portion of the rule must be submitted no later than January 22, 2010.

**ADDRESSES:** Petitions for reconsideration of this rule should include the agency name and Docket No. FRA-2008-0091, Notice No. 4, and be submitted by any one of the following methods:

- **Fax:** 1-202-493-2251;
- **Mail:** U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590;
- **Hand Delivery:** U.S. Department of Transportation, Docket Operations,

West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays; or

- Electronically through the Federal eRulemaking Portal, <http://www.regulations.gov>. Follow the online instructions for submitting comments.

**Instructions:** All petitions for reconsideration received will be posted without change to <http://www.regulations.gov>, including any personal information provided. Please see the Privacy Act section of this document.

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

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

Administration, Office of Chief Counsel, RCC-10, Mail Stop 10, West Building 3rd Floor, Room W31-217, 1200 New Jersey Avenue, SE., Washington, DC 20590 (telephone: 202-493-6045).

#### SUPPLEMENTARY INFORMATION:

### I. Background

Pursuant to the Rail Safety Improvement Act of 1988, Public Law 100-342, § 4, 102 Stat. 624, 625-27 (June 22, 1988) (recodified at 49 U.S.C. 20135), Congress conferred on the Secretary of DOT the authority to establish a locomotive engineer qualification licensing or certification program. The Secretary of Transportation delegated this authority to the Federal Railroad Administrator. 49 CFR 1.49(m). In 1991, FRA implemented this statutory provision by issuing a final rule. 56 FR 28228, 28254 (June 19, 1991) (codified at 49 CFR part 240).

By notice of proposed rulemaking (NPRM) published on December 31, 2008 (73 FR 80349), FRA proposed revisions to its regulations governing the qualification and certification of locomotive engineers. The comment period for the NPRM closed on March 2, 2009. FRA received written comments submitted by the Association of American Railroads, the Union Pacific Railroad Company, the Brotherhood of Locomotive Engineers and Trainmen, and the United Transportation Union. FRA also received a written request from the United Transportation Union, Nebraska State Legislative Board, for a hearing. Pursuant to 49 U.S.C. 20103(e), which requires that “[a]n opportunity for an oral presentation shall be provided” when prescribing or amending a railroad safety regulation, FRA held a public hearing on April 14, 2009. The Union Pacific Railroad Company and the BNSF Railway Company provided oral comments at the hearing. Additionally, on April 14, 2009, FRA reopened the NPRM comment period for an additional 30 days so that (i) FRA could make the public hearing transcript available for review and comment by the general public, (ii) interested parties could provide additional comments or documents, and (iii) interested parties could respond to testimony provided at the public hearing.

By letter dated May 18, 2009, the Brotherhood of Locomotive Engineers and Trainmen requested an extension of that comment period, which closed on May 14, 2009. Based on that request, FRA reopened the comment period for an additional 30 days until June 15, 2009. See 74 FR 25,208 (May 27, 2009).

FRA received written, post-hearing comments submitted by the Association of American Railroads, the Brotherhood of Locomotive Engineers and Trainmen, and the United Transportation Union. The comment period for the NPRM closed on June 15, 2009.

### II. General Summary of the Comments

#### A. Prohibiting Reclassification

FRA proposed to amend 49 CFR 240.107 by adding a new paragraph (e) that would prohibit a railroad from reclassifying the certification of any type of certified engineer to a more restrictive class of certificate or to a student engineer certificate during the period in which the certification is otherwise valid. See 73 FR 80349, 80351-80352 (December 31, 2008).

#### Reaction to the NPRM

While some commenters supported the NPRM’s proposal to prohibit reclassifications, others argued against it. Those commenters who opposed the proposal raised four main concerns:

(1) FRA seeks to deny railroads the ability to use skill performance testing failures as opportunities to correct deficiencies in employee skill-sets during the 3-year certificate period which will: (i) Increase denials at recertification and (ii) take away incentive for employees to improve their skills during the remedial training time prior to recertification.

(2) Sections 240.209 and 240.211 provide that a person who fails to achieve a passing score under the testing and evaluation requirements of part 240 shall not be permitted to operate as a locomotive servicing or train service engineer prior to that person achieving a passing score. However, the NPRM prohibits a railroad from reclassifying the certificate of any type of certified engineer to a more restrictive class or a student, and thus, would prevent a person who fails from ever operating, testing, or going through remedial training again.

(3) The proposed rule changes will require some type of training for the entire time an engineer’s current certificate is valid and then a denial process when the engineer is up for recertification. This could impose up to three years of training of an engineer with the same outcome as the current reclassification process.

(4) FRA does not recognize the medical component of the engineer certification process. Engineers may be released to return to work after a major illness, because their bodies are medically fit for duty. However, in some instances, they have lost the cognitive

ability to properly perform their job responsibilities. While a doctor may not be able to test for such diminished cognitive abilities, a Designated Supervisor of Locomotive Engineers (DSLE) can observe an engineer’s ability to timely make correct decisions in operating a train. By disallowing a DSLE to make this judgment, FRA is closing off an important avenue of safety by assuming that any time a doctor allows an employee to return to duty, the employee is fit to work.

#### FRA’s Response

(1) The commenters appear to be blending the three requirements of Part 240. Those requirements are (i) unannounced compliance (efficiency) tests, (ii) annual check rides and (iii) skills tests. Federal regulations only require knowledge and skills tests when certifying or recertifying an engineer or relying on a certification granted by another railroad under 49 CFR 240.225(a). However, a railroad may impose more stringent requirements and thus, have additional operational tests and performance evaluations. This rule simply limits such additional test and evaluation failure consequences by prohibiting reclassification. Thus, the rule does not deny railroads the opportunity to correct deficiencies during the 3-year certification period. Indeed, nothing in this rule prohibits a railroad from evaluating engineers and providing any necessary remedial training between certification periods.

(2) FRA’s prohibition on reclassification would not prevent a person who failed to achieve a passing score under the testing and evaluation requirements of part 240 from ever operating a locomotive again. The railroad could simply place a restriction on the certificate of the person who failed (240.107(d)) thereby prohibiting the person from operating a locomotive except under the restrictions specified. Once the person achieves a passing score or shows improvement, the restriction may be lifted. Thus, the person who failed would not be reclassified as a student although the person’s engineer activities could be limited as if the person were a student.

(3) The issue raised by some commenters regarding a railroad having to provide training to a certified person whose certificate has been restricted may be handled by seeking a waiver of the part 240 requirements. As provided in § 240.9, a railroad may apply for a waiver in accordance with the provisions of part 211 of this chapter from training, continuing education, and other requirements for a person who will not be operating as a

locomotive servicing or train service engineer for that railroad. Further, this rule in no way prohibits a railroad from initiating disciplinary sanctions against its employees in the normal and customary manner, including those contained in its collective bargaining agreements. *See* § 240.5.

(4) FRA is not disallowing a DSLE from making a judgment. If the employee is medically fit but a check ride reveals skills deficiencies, restrictions may be placed on the certificate until the person can prove competency.

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

#### B. Restrictions

In its proposal to prohibit reclassification, FRA noted that the proposed provision would not prevent a railroad from placing restrictions on a certificate pursuant to 240.107(d). FRA further noted that restrictions are applied and reviewed in accordance with the internal railroad rules, procedures, and processes developed in coordination with its employees. *See* 73 FR 80349, 80352 (December 31, 2008).

#### Reaction to the NPRM

One commenter questioned how FRA could continue to bear responsibility for the manner in which railroads exercise discretion under part 240 when FRA claims it will leave the matter of restrictions to non-FRA decision-makers. According to the commenter, FRA is removing itself from oversight of restrictions imposed by railroads which will then become subject to the oversight of arbitrators who are not obligated to follow any precedence. Thus, FRA may become bound by arbitrators' decisions, resulting in more

inconsistencies and unanticipated consequences.

#### FRA's Response

Contrary to the commenter's assertion, it has been FRA's understanding that a restriction is not a denial of certification or a revocation under part 240 and thus, disputes regarding restrictions are covered by the Railway Labor Act and should be handled under the procedures provided for in that Act. Furthermore, a restricted train service or locomotive servicing engineer certificate is still a valid certificate that other railroads may rely on when determining whether the person is qualified pursuant to § 240.225. Of course, any railroad that chooses to rely on a restricted certificate issued by another railroad should ensure that the person can demonstrate that they are qualified—and should certainly not ignore the restriction.

#### C. Revocations

FRA proposed to amend 49 CFR 240.307 to clarify and ensure that each railroad understands that it may revoke an engineer's certificate only for that conduct specifically identified in § 240.117(e) or § 240.119(c). FRA was informed by at least one Class I railroad that it believes § 240.307 could be read to allow revocation for deficiencies other than those specified in § 240.117(e) or § 240.119(c). FRA proposed to make clear that such an interpretation is incorrect and contravenes the intent and purpose of part 240 when it was issued. *See* 73 FR 80349, 80353 (December 31, 2008).

#### Reaction to the NPRM

Some commenters supported the proposal, but one commenter argued against it. The commenter who opposed the proposal suggested that limiting revocations to § 240.117(e) and § 240.119(c) violations does not make sense in light of Emergency Order No. 26 (EO 26), which restricts the use of cell phones and other electronic devices in certain circumstances. The NPRM would prohibit railroads from revoking an engineer's certificate for violating EO 26 unless that violation was combined with a § 240.117(e) or § 240.119(c) violation. The commenter believes that a violation of EO 26, in and of itself, should be a revocable offense.

#### FRA's Response

Whether a locomotive engineer should have his or her certificate revoked for violating EO 26 is beyond the scope of the NPRM. In the future, FRA plans to revisit EO 26 and could initiate a rulemaking that would make

the requirements of EO 26 permanent. In any such rulemaking, FRA could consider adding violations of those requirements to the list of revocable offenses under part 240. In the meantime, a railroad may choose to discipline its employees for improper use of electronic devices, but may not revoke an engineer's certification based on a violation of EO 26.

#### D. Skills Tests

FRA proposed to amend 49 CFR 240.127 to require each railroad to indicate the action it will take, beyond those required by § 240.211(c), in the event that a person fails a skills performance test. *See* 73 FR 80349, 80352–80353 (December 31, 2008).

#### Reaction to the NPRM

In response to FRA's proposal to amend 49 CFR 240.127 and 240.129 (see section E below), a commenter asserted that there is no reason to require railroads to specify the potential measures to be taken. According to the commenter, a railroad would need the flexibility to change the actions it would take in the event of failure, but the proposal would prohibit a railroad from adopting new approaches to failures unless the changes were reflected in the certification program. Further, the situation will be even worse if FRA requires each railroad to resubmit a revised program each time a change is made.

Another commenter suggested that FRA's proposed language should be used along with the following: "and if said action is subject in any regard to a collective bargaining agreement, the applicable provisions of the collective bargaining agreement shall be included as an appendix to the railroad's program."

#### FRA's Response

The rule balances the need to provide railroads with the flexibility to handle skills test and evaluation failures appropriately with the need to make the test and evaluation process transparent. FRA believes that transparency will help prevent railroads from developing processes for handling skills test failures that could result in unanticipated consequences.

Although FRA considered other options, such as prescribing the specific actions a railroad must take, FRA believes it should be left up to each railroad to decide the appropriate actions to take in light of various factors, including collective bargaining agreements. Indeed, FRA previously proposed prescribing the number of tests and interval between retests and

other consequences of test failure in the 1989 NPRM (54 FR 50890, 50933–50935 (December 11, 1989)), but did not implement those proposals based, in part, on commenters' concerns that the proposals would disrupt contractual agreements (56 FR 28228, 28236–28237 (June 19, 1991)). Further, FRA has found that the vast majority of railroads have adequate policies to deal with skills test failures or deficiencies and have handled them appropriately for many years.

To avoid restricting the options available to the railroads and employee representatives to develop processes for handling skill test failures, FRA designed this proposal to be as flexible as possible. There are a variety of actions and approaches that a railroad can take in response to a skills test failure and FRA does not want to stifle a railroad's ability to adopt an approach that is best for its organization. Some of the actions railroads may want to consider include: develop and provide formal remedial training for engineers who fail skills tests or have deficiencies in their performance; automatically download event recorder data upon a test failure or deficient performance in order to preserve evidence of the failure/deficiency; require two supervisors to ride along on a retest; and retest an engineer on an actual train if the engineer failed a test on a simulator. Each railroad should also consider implementing a formal procedure whereby an engineer is given the opportunity to explain, in writing, the factors that he or she believes caused their skills test failure or performance deficiencies. This explanation may allow a railroad to determine what areas of training to focus on or perhaps discover that the reason for the failure/deficiency was due to something other than a lack of skills.

FRA believes there are numerous other approaches that could and should be considered and evaluated by railroads and their employees. FRA realizes that a railroad's list of actions it will take in response to a skills test failure or deficient performance could be expansive given the various circumstances that could contribute to a test failure or deficient performance. FRA disagrees with the suggestion to add a provision regarding collective bargaining agreements (CBAs). FRA does not enforce CBAs. In addition, railroad discipline policies are beyond the scope of the NPRM and Part 240. See 49 CFR 240.5.

#### E. Operational Monitoring

FRA proposed to amend 49 CFR 240.129 to require railroads to indicate

the action they will take in the event they find deficiencies with an engineer's performance during an operational monitoring observation or unannounced compliance test. See 73 FR 80349, 80353 (December 31, 2008).

#### Reaction to the NPRM

In addition to one commenter's assertion that there is no reason to require railroads to specify the potential measures to be taken (see section D above), other commenters suggested that 49 CFR 240.129 should explicitly state that regardless of whether an engineer's performance is monitored pursuant to § 240.129(b) or is being tested pursuant to § 240.129(e), the only circumstances in which an adverse certification outcome is possible is when the monitoring/testing discloses a violation of § 240.117(e). According to those commenters, if a railroad finds some deficiency that is unrelated to § 240.117(e) (e.g., non-compliance with throttle modulation or train handling procedures, or any other performance deficiencies), it lacks authority under part 240 to take any action whatsoever. Further, on a railroad where engineers are unionized, available disciplinary options are subject to whatever constraints are imposed by the applicable collective bargaining agreement.

Commenters also suggested that 49 CFR 240.129 should include the following changes: (i) The use of simulators should be limited to training only, and using simulators for either testing or monitoring purposes should be explicitly prohibited; (ii) only a DSLE who is qualified on the physical characteristics of the territory over which a test is being conducted—and on the equipment used in the test—should be empowered to make a finding that could have adverse consequences under 49 CFR 240.127 and 49 CFR 240.129; and (iii) where movable banners, barricades or flags are used, the banner/board must, at a minimum, meet the standards for rear end marking devices as prescribed by 49 CFR part 221.

#### FRA's Response

As discussed in section D above, the NPRM attempted to balance the need to provide railroads with flexibility to handle deficiencies appropriately with the need to make the process transparent. FRA believes that transparency will help prevent railroads from developing processes for handling deficiencies that again result in unanticipated consequences.

While the remaining comments regarding § 240.129 are beyond the

scope of the NPRM and FRA declines to address them in detail, FRA would like to clarify the comments regarding the interaction between § 240.129 and § 240.117(e). Although a railroad may not revoke a certificate for deficiencies not covered by § 240.117(e), a railroad may place restrictions on the certificate pursuant to § 240.107(d). See preceding discussion in section II.B. above.

#### F. Scoring Systems

In the NPRM, FRA sought comments as to whether it should require the railroads to explain the scoring system they use to determine whether a person passes or fails a skills test or operational monitoring ride.

#### Reaction to the NPRM

Some commenters suggested that railroad scoring systems should be published in detail and subject to FRA approval. Another commenter advocated against requiring railroads to explain their scoring systems. According to that commenter, FRA lacks evidence of a problem with the railroads' assessment of engineer performance and there are no allegations that railroads are falling short in efforts to ascertain whether engineers are capable of performing safely. Further, the commenter suggested that there is no safety basis for interfering in railroads' decisions on how to construct their scoring systems nor is there an indication of the criteria FRA would use in deciding whether the scoring systems are adequate.

#### FRA's Response

As discussed in the NPRM, FRA is aware of concerns raised by locomotive engineers that they have no way of knowing why and how they failed a skills test or monitoring ride. Further, FRA is aware that at least one railroad has, in the past, deducted points on a performance skills test for non-safety related items that should not have been counted towards the engineer's evaluation score. Thus, FRA continues to believe that requiring railroads to explain their scoring systems will have the benefit of ensuring that the scoring criteria are transparent and the pass/fail determinations are arrived at consistently throughout the railroad. FRA believes that transparency will help prevent railroads from developing part 240-required tests that include items that should not be scored (e.g., fuel conservation, meets schedule, etc.) and will assist FRA in determining how the tests are scored.

### G. Material Modifications

As part of its proposal to require the railroads to update their programs to indicate the action they will take in the event that a person fails a part 240.127 skills test or a railroad finds deficiencies with a locomotive engineer's performance during a part 240.129 observation or test, FRA indicated that it would not consider the program updates to be material modifications pursuant to 49 CFR 240.103(e). See 73 FR 80349, 80353 (December 31, 2008).

#### Reaction to the NPRM

Some commenters suggested that the updates should be considered material modifications pursuant to 240.103(e) but did not articulate a legal basis for doing so. Another commenter suggested that deeming the updates to be material modifications would deny the railroads the flexibility they need to address test failures and performance deficiencies since the proposal would, according to the commenter, prohibit railroads from adopting new approaches to failures unless the changes were reflected in their certification programs.

#### FRA's Response

Based on its review of the comments and 49 CFR part 240, FRA does not consider any of the program updates required by the amendments to 49 CFR 240.127 and 240.129 to be material modifications pursuant to 49 CFR 240.103(e). FRA expects that each railroad will not have to develop a new scoring system or process to handle test failures or deficiencies but will simply document the previously implemented system or process in its program.

### H. Additional Issues (Elimination of Phase-In Dates, etc.)

FRA proposed to: (i) Eliminate the implementation and phase-in dates listed throughout part 240 and any section or section heading that references those dates; delete §§ 240.117(i) and (j); (ii) revise the language in part 240 containing references to various provisions in 49 CFR part 232 (see, e.g., §§ 240.117(e)(3) and 240.309(e)(3)) in order to make them consistent with the language in part 232; (iii) revise the term "annually monitored" in § 240.129(c)(2) to read "monitored each calendar year"; (iv) amend §§ 240.129(e) and 240.303(d) in order to make them consistent with guidance provided by FRA in Memorandum OP-04-13 (February 3, 2004); (v) delete the reference to §§ 240.203(a)(1)-(3) in the penalty schedule and revise §§ 240.203(b) and (c) in the penalty schedule to reference paragraphs (a) and (b); (vi) amend the

reference to subsection (d) in the current penalty schedule for § 240.205 to read (b); (vii) amend the reference to § 240.15 in § 240.307(j) to read § 240.215; (viii) amend the reference to 49 CFR 218.5(f) in § 240.7 (subsection (1) of the definition of "locomotive engineer") to read 49 CFR 218.5; (ix) amend the reference to paragraph (c) in § 240.203(a) to read paragraph (b); and (x) delete the last paragraph of Appendix D to part 240 which begins "Although the number of state agencies \* \* \*."

#### Reaction to the NPRM

The only comments received by FRA on these proposals supported their implementation.

#### FRA's Response

Since FRA did not receive any comments objecting to the proposed amendments and because FRA sees no reason to change its approach, they will be adopted in this final rule as proposed in the NPRM.

#### I. Other Comments

In addition to the comments discussed above, FRA received comments espousing interpretations of various provision of part 240 and commenting on part 240's appellate procedures. For example, one comment suggested that part 240 does not permit a railroad to rely upon past revocable offenses as a basis for denial of recertification. Another comment stated that the appellate procedures in subpart E of Part 240 are unwieldy and too time consuming. Since these comments are beyond the scope of the NPRM, FRA need not address them in this rulemaking. However, FRA notes that it is developing recommendations for implementing the Rail Safety Improvement Act mandate for certification of train conductors and is participating in a Railroad Safety Advisory Committee Working Group concerning the certification of train conductors. Based on that rulemaking, FRA expects that Part 240 will be reviewed and possibly amended in light of the provisions in the conductor certification rule. The comments that are beyond the scope of this rulemaking might be more properly addressed during that process.

### III. Section-by-Section Analysis

#### Section 240.107 Criteria for Designation of Classes of Service

FRA is amending this section by adding a new paragraph (e) that prohibits a railroad from reclassifying the certification of any type of certified engineer to a more restrictive class of

certificate or to a student engineer certificate during the period in which the certification is otherwise valid. Although reclassification has been referred to by different names by various parties (e.g., demotion, diminution in the quality of a license, etc.), the practice that FRA is prohibiting is the taking of any type of locomotive engineer certificate, during the period in which the certificate is valid, and replacing it with a more restrictive class of certificate or a student engineer certificate based on deficiencies found during operational evaluations and skills tests that do not require revocation of an engineer's certification under §§ 240.117(e) or 240.119(c).

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

While this rule prohibits the practice of reclassification, it does not prevent the railroads from continuing to pursue other measures to ensure the safe operation of locomotives. For example, the rule does not prevent a railroad from placing restrictions on a certificate pursuant to § 240.107(d). It should be noted, however, that while § 240.107(d) permits a railroad to place restrictions on a certificate; restrictions are applied and reviewed in accordance with internal railroad rules, procedures and processes. Part 240 does not govern the issuance or review of restrictions; that is a matter handled under a railroad's internal discipline system or collective bargaining agreement.

This rule also does not prevent a railroad from suspending or revoking a certificate pursuant to § 240.307 for violation of one of the provisions contained in § 240.117(e), or prohibiting

a person from operating a locomotive as a train service or locomotive servicing engineer pursuant to § 240.211(c). Further, this rule does not prevent a railroad from offering an engineer the opportunity to work for the railroad in any other capacity provided that the railroad does not reclassify the engineer's certificate. For example, CBAs often contain a provision by which the parties agree to permit flowback from an engineer job to another railroad job if a locomotive engineer should somehow become ineligible to operate locomotives or trains. As FRA has previously clarified, part 240 is not intended to create or prohibit flowback. See § 240.5(e) and 64 FR 60966, 60975 (November 8, 1999).

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

#### *Section 240.127 Criteria for Examining Skill Performance*

This section is amended to require each railroad to indicate the types of actions it will take, beyond what is required by § 240.211(c), in the event that a person fails a skills performance test. In addition, this section is amended to require each railroad to describe the scoring system it will use during a skills performance test administered in accordance with the procedures required under § 240.211, including a description of the skills to be tested and the weight or possible score that each skill will be given.

Pursuant to § 240.101 and § 240.103, each railroad's written certification program, including its procedures for skill performance testing under § 240.127 and monitoring operational

performance under § 240.129, is subject to FRA approval. That approval process, in connection with this rule, will permit FRA an opportunity to ensure that each railroad is handling skills test failures in accordance with the intent and spirit of the regulation. The rule will also compel each railroad to carefully consider the process by which it will handle skill test failures and demonstrate to FRA that it is dealing with its engineers in an objective manner. Moreover, requiring a railroad to explain its scoring system will likely have the benefit of ensuring that the scoring criteria are transparent and that pass/fail determinations are arrived at consistently throughout the railroad.

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

#### *Section 240.129 Criteria for Monitoring Operational Performance of Certified Engineers*

This section is amended to require railroads to indicate the types of actions they will take in the event they find deficiencies with an engineer's performance during an operational monitoring observation or unannounced compliance test. In addition, this section is amended to require each railroad to describe the scoring system it will use during an operational monitoring observation or unannounced compliance test administered in accordance with the procedures required under § 240.303.

As explained in the NPRM, FRA believes it is up to each railroad to decide the appropriate action to take in light of various factors, including collective bargaining agreements. Further, FRA has found that the vast majority of railroads have adequate policies to deal with deficiencies with an engineer's performance and have handled them appropriately for many years. For a discussion of the benefits of this amendment and actions railroads may want to consider taking in the event they find deficiencies with an engineer's performance, see FRA's Response in Section II.D. of the preamble to this rule.

Although a railroad will be required to update its certification program under this rule, FRA does not consider the updates to be material modifications pursuant to § 240.103(e). Of course, FRA may find issues during a review or audit of the updated certification program and

will address those issues with the railroad at that time.

#### *Section 240.307 Revocation of Certification*

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

### **IV. Regulatory Impact and Notices**

#### *1. Executive Order 12866 and DOT Regulatory Policies and Procedures*

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

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

**TOTAL 20-YEAR COSTS**

Revisions (Update) to engineer certification programs	\$362,088.00
Description of program scoring systems .....	362,088.00
Total Burden .....	724,176.00
Total 20-Year Costs (Discounted at 3%) .....	703,083.50
Total 20-Year Costs (Discounted at 7%) .....	676,800.00

This analysis determines that over a 20-year period the discounted costs will be approximately \$703,084 when discounted at 3%, and \$676,800 when discounted at 7%.

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

**2. Regulatory Flexibility Act and Executive Order 13272**

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

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

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

There are approximately 733 railroads that would be affected by this regulation. Of this number, approximately 687, or 94 percent, are small entities. Although this regulation affects a substantial number of small entities, FRA does not anticipate that this regulation would impose a

significant economic impact on a substantial number of small entities.

The factual basis for the certification that this final rule will not have a significant economic impact on a substantial number of small entities, is that the average net cost incurred by each of the small railroads due to this regulation will be approximately \$752 (not discounted). Also, each of the affected small railroads will only incur these average costs during the first year of implementation of the regulation. This is far less than one percent of the annual average revenue for small (local) railroads (approximately \$4.0 million<sup>1</sup> in 2007 (not discounted) per small railroad). Accordingly, FRA does not consider this impact to be significant. Nor does FRA anticipate that this regulation would result in long-term or short-term insolvency for any small railroad.

FRA invited comments from all interested parties on this Certification at the NPRM stage of the rulemaking. FRA particularly encouraged small entities that could potentially be impacted by the proposed amendments to participate in the public comment process by submitting comments on this assessment or this rulemaking to the official US DOT docket. Although comments were received pertaining to this rulemaking effort, no comments were received that specifically and directly addressed this Certification. With the absence of comments specifically addressing The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) and Executive Order 13272, FRA will adhere to originally presented Certification that accompanied the NPRM. The Certification basis remains unchanged for the final rule.

**3. Paperwork Reduction Act**

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

CFR section/subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
240.9—Waivers—Petitions for Waiver .....	733 railroads .....	3 petitions .....	1 hour .....	3 hours.
240.101/103—Certification Program: Written Program for Certifying Qualifications of Locomotive Engineers—Amendments.	733 railroads .....	50 amend. prog. ....	1 hour .....	50 hours.

<sup>1</sup> "Railroad Facts", Association of American Railroads, 2008 Edition, p.3. CALCULATION: [\$2.1

billion/523 local (Class III) = \$4.01 million (average revenue)]

CFR section/subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
—Certification Programs for New Railroads .....	20 railroads .....	20 new prog. ....	40 hours .....	800 hours.
—New Railroads Final Review and Submission of Certification Program.	20 railroads .....	20 reviews .....	1 hour .....	20 hours.
—Material Modifications to Approved Prog. ....	733 railroads .....	30 mod. prog. ....	45 minutes .....	23 hours.
240.105—Selection Criteria For Designated Supervisors of Locomotive Engineers (DSLEs)—Examinations of DSLEs.	733 railroads .....	50 exams .....	1 hour .....	50 hours.
—Written Report by Railroad Chief Operating Officer of Testing of DSLE.	10 railroads .....	10 reports .....	1 hour .....	10 hours.
240.109—Candidate’s Review and Written Comments on Prior Safety Conduct Data.	17,667 candidates .....	25 responses .....	1 hour .....	25 hours.
240.111—Request for State Driving Data and National Driver Register Data—Driver’s License Data Requests.	17,667 candidates .....	17,667 requests .....	15 minutes .....	4,417 hours.
—National Driver Register Data: Notification by Railroad to Employees of Matches and Employee Requests to State Agency for Relevant Data.	733 railroads .....	177 notific. + 177 requests.	15 minutes .....	89 hours.
—Written Responses from Candidate on Driver’s License Data.	733 railroads .....	20 comments .....	15 minutes .....	5 hours.
—Notice to Railroad of Absence of License .....	53,000 candidates .....	4 letters .....	15 minutes .....	1 hour.
—Individual Duty to Furnish Data on Prior Conduct as Motor Vehicle Operator—Ph. Calls.	733 railroads .....	200 calls .....	10 minutes .....	33 hours.
240.113—Individual Duty to Furnish Data on Prior Safety Conduct as an Employee of A Different Railroad—Requests to Former Employing Railroad of Service Record and Railroad Responses.	17,667 candidates .....	353 requests + 353 resp..	15 min.; 30 min. ....	265 hours.
240.119—Employee Self-Referral to EAP Counselor for Substance Abuse Disorder.	53,000 locomotive engineers.	50 self-referrals .....	5 minutes .....	4 hours.
240.121—Criteria—Hearing/Vision Acuity: Subsequent Years—Copies of Part 240 Appendix F to RR Medical Examiner.	20 new railroads .....	20 copies .....	15 min .....	5 hours.
—Medical Examiner Consultation with DSLE to Issue Conditional Certification Report.	733 railroads .....	20 reports .....	1 hour .....	20 hours.
—Notification—Hearing/Vision Change by Certified Engineer to Railroad.	733 railroads .....	10 notific. ....	15 minutes .....	3 hours.
<b>New Requirements:</b>				
240.127/129 Criteria for Examining Skill Performance/Operational Perf.—Revision of RR Certification Programs Engineer’s Failures/Deficiencies and Scoring System.	733 railroads .....	46 amended programs + 687 amended prog..	48 hours + 8 hour .....	7,704 hours.
240.201/221/223/301—List of DSLEs .....	733 railroads .....	733 updates .....	60 minutes .....	733 hours.
—List of Design. Qual. Locomotive Engineers ....	733 railroads .....	733 updates .....	60 minutes .....	733 hours.
240.201/217/223/301—Locomotive Engineers Certificate.	53,000 candidates .....	17,667 cert .....	5 minutes .....	1,472 hours.
240.205—Data to EAP Counselor and Furnishing of Records by Employee.	733 railroads .....	177 records .....	5 minutes .....	15 hours.
240.207—Medical Certificate on Hearing/Vision Acuity—Tests and Certificate Issuance.	53,000 candidates .....	17,667 cert .....	70 minutes .....	20,612 hours.
—Written Determination by Medical Examiner Waiving Necessity of Wearing Hearing/Vision Corrective Device.	733 railroads .....	10 determin .....	2 hours .....	20 hours.
240.219—Denial of Certification—Notification to Employee of Adverse Information and Employee Response.	17,667 candidates .....	30 letters + 30 responses.	1 hour .....	60 hours
—Notification of Adverse Decision .....	733 railroads .....	30 notific. ....	1 hour .....	30 hours.
240.229—Requirements for Joint Operations Territory—Notification by Engineer of Non-Qualification to Operate Train on Track Segment.	321 railroads .....	184 calls .....	5 minutes .....	15 hours.
240.309—Railroad Oversight Responsibilities—Instances of Identified Poor Safety Conduct.	15 railroads .....	6 annotations .....	15 minutes .....	2 hours.
<b>TESTING REQUIREMENTS:</b>				
240.209/213—Written Test .....	53,000 candidates .....	17,667 tests .....	2 hours .....	35,334 hours.
240.211/213—Performance Test .....	53,000 candidates .....	17,667 tests .....	2 hours .....	35,334 hours.
240.303—Annual Op. Monit. Obs. Test .....	53,000 candidates .....	53,000 tests .....	2 hours .....	106,000 hrs.
—Annual Operating Rules Compliance Test	53,000 candidates .....	53,000 tests .....	1 hour .....	53,000 hours.
<b>RECORDKEEPING REQUIREMENTS:</b>				
240.215—Recordkeeping—Certification of Locomotive Engineers.	733 railroads .....	17,667 record .....	30 minutes .....	8,834 hours.

CFR section/subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
240.305—Engineer's Non-Qualification Notice.	53,000 candidates .....	100 notific .....	5 minutes .....	8 hours.
—Engineer's Notice to RR—Loss of Qualification.	1,060 candidates .....	2 letters .....	30 minutes .....	1 hour.
240.307—Notice to Engineer of Disqualification ..	733 railroads .....	900 notific. letters .....	1 hour .....	900 hours.
240.309—Railroad Oversight Responsibilities .....	51 railroads .....	51 reviews .....	40 hours .....	2,040 hours.
—Performance of Annual Reviews/Analysis .....	51 railroads .....	12 reports .....	1 hour .....	12 hours.
—Railroad Report of Findings.				

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. For information or a copy of the paperwork package submitted to OMB, contact Robert Brogan at 202-493-6292 or Kimberly Toone at 202-493-6132.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC 20503, Attention: FRA Desk Officer. Comments may also be sent via e-mail to the Office of Management and Budget at the following address:

*oira\_submissions@omb.eop.gov.*

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

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

4. Federalism Implications

Executive Order 13132, "Federalism" (64 FR 43255, Aug. 10, 1999), requires FRA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" are defined in the Executive Order to include regulations that have "substantial direct effects on the States,

on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

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

5. International Trade Impact Assessment

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

This rule is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing

business overseas or for foreign firms doing business in the United States.

6. Environmental Impact

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

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

\* \* \* \* \*  
The following classes of FRA actions are categorically excluded:  
\* \* \* \* \*

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

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

7. Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 2 U.S.C. 1531), each Federal agency "shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the

private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law)." Section 202 of the Act (2 U.S.C. 1532) further requires that "before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$141,300,000 or more in any one year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement" detailing the effect on State, local, and tribal governments and the private sector. This final rule will not result in the expenditure, in the aggregate, of \$141,300,000 or more in any one year, and thus preparation of such a statement is not required.

8. Energy Impact

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

9. Privacy Act

Anyone is able to search the electronic form of all comments or petitions for reconsideration received into any agency docket by the name of the individual submitting the comment or petition for reconsideration (or signing the comment or petition for reconsideration, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete

Privacy Act Statement in the Federal Register published on April 11, 2000 (65 FR 19477-78) or you may visit <http://www.regulations.gov/search/footer/privacyanduse.jsp>.

List of Subjects in 49 CFR Part 240

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

The Rule

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

PART 240—[AMENDED]

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

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

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

§ 240.7 Definitions.

Locomotive engineer \* \* \*

(1) A person who moves a locomotive or group of locomotives within the confines of a locomotive repair or servicing area as provided for in 49 CFR 218.5 and 218.29(a)(1); or

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

§ 240.101 Certification program required.

(a) Each railroad subject to this part shall have in effect a written program for certifying the qualifications of locomotive engineers.

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

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

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

§ 240.107 Criteria for designation of classes of service.

(e) A railroad shall not reclassify the certification of any type of certified engineer to a more restrictive class of certificate or a student engineer

certificate during the period in which the certification is otherwise valid.

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

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

(e) When evaluating a person's motor vehicle driving record or a person's railroad employment record, a railroad shall not consider information concerning motor vehicle driving incidents or prior railroad safety conduct that occurred at a time other than that specifically provided for in § 240.115, § 240.117 or § 240.119 of this subpart.

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

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

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

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

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

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

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

§ 240.117 Criteria for consideration of operating rules compliance data.

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

■ 9. Section 240.127 is amended by adding new paragraphs (e) and (f) to read as follows:

**§ 240.127 Criteria for examining skill performance.**

\* \* \* \* \*

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

(f) Each railroad's program shall describe the scoring system used by the railroad during a skills test administered in accordance with the procedures required under § 240.211. The description shall include the skills to be tested and the weight or possible score that each skill will be given.

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

**§ 240.129 Criteria for monitoring operational performance of certified engineers.**

\* \* \* \* \*

(c) \* \* \*

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

\* \* \* \* \*

(e) The testing and examination procedures selected by the railroad for the conduct of a monitoring program shall be:

(1) Designed so that each locomotive engineer shall be given at least one unannounced test each calendar year;

(2) Designed to test:

(i) Engineer compliance with provisions of the railroad's operating rules that require response to signals that display less than a "clear" aspect, if the railroad operates with a signal system that must comply with part 236 of this chapter;

(ii) Engineer compliance with provisions of the railroad's operating rules, timetable or other mandatory directives that require affirmative response by the locomotive engineer to less favorable conditions than that which existed prior to initiation of the test; or

(iii) Engineer compliance with provisions of the railroad's operating rules, timetable or other mandatory directives violation of which by engineers were cited by the railroad as

the cause of train accidents or train incidents in accident reports filed in compliance with part 225 of this chapter in the preceding calendar year;

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

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

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

(g) Each railroad's program shall describe the scoring system used by the railroad during an operational monitoring observation or unannounced compliance test administered in accordance with the procedures required under § 240.303.

■ 11. Section 240.201 is revised to read as follows:

**§ 240.201 Implementation.**

(a) Each railroad shall designate in writing any person(s) it deems qualified as a designated supervisor of locomotive engineers. Each person so designated shall have demonstrated to the railroad through training, testing or prior experience that he or she has the knowledge, skills, and ability to be a designated supervisor of locomotive engineers.

(b) Each railroad shall designate in writing all persons that it will deem to be qualified as certified locomotive engineers for the purpose of initial compliance with paragraph (d) of this section, except as provided for in paragraph (h) of this section.

(1) Each person so designated shall have demonstrated to the railroad through training, testing or prior experience that he or she has the knowledge and skills to be a certified locomotive engineer.

(2) Each railroad shall issue a certificate that complies with § 240.223 to each person that it designates as qualified under the provisions of paragraph (b) of this section.

(c) No railroad shall permit or require a person, designated as qualified for certification under the provisions of paragraph (b) of this section, to perform service as a certified locomotive or train service engineer for more than a 36-month period unless that person has been determined to be qualified in

accordance with procedures that comply with subpart C.

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

(e) No Class I railroad (including the National Railroad Passenger Corporation) or railroad providing commuter service shall designate any person it deems qualified as a designated supervisor of locomotive engineers or initially certify or recertify a person as a locomotive engineer in either locomotive or train service unless that person has been tested, evaluated, and determined to be qualified in accordance with procedures that comply with subpart C.

(f) No Class II railroad shall designate any person it deems qualified as a designated supervisor of locomotive engineers or initially certify or recertify a person as a locomotive engineer in any class of locomotive or train service unless that person has been tested, evaluated and determined to be qualified in accordance with procedures that comply with subpart C.

(g) No Class III railroad (including a switching and terminal or other railroad not otherwise classified) shall designate any person it deems qualified as a designated supervisor of locomotive engineers or initially certify or recertify a person as a locomotive engineer in any class of locomotive or train service unless that person has been tested, evaluated and determined to be qualified in accordance with procedures that comply with subpart C.

(h) Each person designated as a locomotive engineer shall be issued a certificate that complies with § 240.223 prior to being required or permitted to operate a locomotive.

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

**§ 240.203 Determinations required as a prerequisite to certification.**

(a) Except as provided in paragraph (b), each railroad, prior to initially certifying or recertifying any person as an engineer for any class of service, shall, in accordance with its FRA-approved program determine in writing that:

\* \* \* \* \*

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

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

(a) Each railroad, prior to initially certifying or recertifying any person as an engineer for any class of service, shall determine that the person meets the eligibility requirements of § 240.115 involving prior conduct as a motor vehicle operator, § 240.117 involving prior conduct as a railroad worker, and § 240.119 involving substance abuse disorders and alcohol/drug rules compliance.

\* \* \* \* \*

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

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

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

\* \* \* \* \*

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

**§ 240.209 Procedures for making the determination on knowledge.**

(a) Each railroad, prior to initially certifying or recertifying any person as an engineer for any class of train or locomotive service, shall determine that the person has, in accordance with the requirements of § 240.125 of this part, demonstrated sufficient knowledge of the railroad's rules and practices for the safe operation of trains.

\* \* \* \* \*

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

**§ 240.211 Procedures for making the determination on performance skills.**

(a) Each railroad, prior to initially certifying or recertifying any person as an engineer for any class of train or locomotive service, shall determine that the person has demonstrated, in accordance with the requirements of § 240.127 of this part, the skills to safely operate locomotives or locomotives and trains, including the proper application of the railroad's rules and practices for the safe operation of locomotives or trains, in the most demanding class or type of service that the person will be permitted to perform.

\* \* \* \* \*

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

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

(a) Each railroad, prior to the initial issuance of a certificate to any person as

a train or locomotive service engineer, shall determine that the person has, in accordance with the requirements of § 240.123 of this part, the knowledge and skills to safely operate a locomotive or train in the most demanding class or type of service that the person will be permitted to perform.

\* \* \* \* \*

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

**§ 240.215 Retaining information supporting determinations.**

(a) A railroad that issues, denies, or revokes a certificate after making the determinations required under § 240.203 shall maintain a record for each certified engineer or applicant for certification that contains the information the railroad relied on in making the determinations.

\* \* \* \* \*

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

**§ 240.217 Time limitations for making determinations.**

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

\* \* \* \* \*

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

**§ 240.221 Identification of qualified persons.**

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

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

\* \* \* \* \*

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

**§ 240.225 Reliance on qualification determinations made by other railroads.**

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

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

\* \* \* \* \*

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

**§ 240.303 Operational monitoring requirements.**

(a) Each railroad to which this part applies shall, prior to FRA approval of its program in accordance with § 240.201, have a program to monitor the conduct of its certified locomotive engineers by performing both operational monitoring observations and by conducting unannounced operating rules compliance tests.

\* \* \* \* \*

(d) The unannounced test program shall:

(1) Test engineer compliance with:

(i) One or more provisions of the railroad's operating rules that require response to signals that display less than a "clear" aspect, if the railroad operates with a signal system that must comply with part 236 of this chapter;

(ii) One or more provisions of the railroad's operating rules, timetable or other mandatory directives that require affirmative response by the locomotive engineer to less favorable conditions than that which existed prior to initiation of the test; or

(iii) Provisions of the railroad's operating rules, timetable or other mandatory directives the violations of which by engineers were cited by the railroad as the cause of train accidents or train incidents in accident reports filed in compliance with part 225 of this chapter for the preceding year;

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

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

(4) Be conducted so that the results of the test are recorded on the certificate and entered on the record established under § 240.215 within 30 days of the day the test is administered.

■ 23. Section 240.305 is amended by removing the introductory text and

revising paragraph (a)(3) to read as follows:

**§ 240.305 Prohibited conduct.**

(a) \* \* \*

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

\* \* \* \* \*

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

**§ 240.307 Revocation of certification.**

(a) Except as provided for in § 240.119(e), a railroad that certifies or recertifies a person as a qualified locomotive engineer and, during the period that certification is valid, acquires information regarding violations of § 240.117(e) or § 240.119(c) of this chapter, which convinces the railroad that the person no longer meets the qualification requirements of this part, shall revoke the person's certificate as a qualified locomotive engineer.

\* \* \* \* \*

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

\* \* \* \* \*

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

**§ 240.309 Railroad oversight responsibilities.**

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

\* \* \* \* \*

(e) \* \* \*

(3) Incidents involving noncompliance with the procedures for

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

\* \* \* \* \*

**Appendix A to Part 240 [Amended]**

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

27. Appendix B is amended by revising the 5th paragraph of *Section 4 of the Submission: Testing and Evaluating Persons Previously Certified* and the last paragraph of *Section 6 of the Submission: Monitoring Operational Performance by Certified Engineers* to read as follows:

**Appendix B to Part 240—Procedures for Submission and Approval of Locomotive Engineer Qualification Programs**

\* \* \* \* \*

*Section 4 of the Submission: Testing and Evaluating Persons Previously Certified*

\* \* \* \* \*

Section 240.127 provides a railroad latitude in selecting the design of its own testing and evaluation procedures (including the duration of the evaluation process, how each required subject matter will be covered, weighing (if any) to be given to particular subject matter response, selection of passing scores, and the manner of presenting the test information). However, the railroad must describe the scoring system used by the railroad during a skills test administered in accordance with the procedures required under § 240.211. The description shall include the skills to be tested and the weight or possible score that each skill will be given. The section should also provide information concerning the procedures which the railroad will follow that achieve the objectives described in FRA's recommended practices (see appendix E) for conducting skill performance testing. The section also gives a railroad the latitude to employ either a Type 1 or a Type 2 simulator (properly programmed) to conduct the test and evaluation procedure. A railroad must describe in this section how it will use that latitude to assure that its engineers will demonstrate their skills concerning the safe discharge of their train operation responsibilities so as to comply with the performance standard set forth in § 240.127.

\* \* \* \* \*

*Section 6 of the Submission: Monitoring Operational Performance by Certified Engineers*

\* \* \* \* \*

Section 240.129 requires that a railroad annually observe each locomotive engineer demonstrating his or her knowledge of the railroad's rules and practices and skill at applying those rules and practices for the safe operation of a locomotive or train. Section 240.129 directs that the observation be conducted by a designated supervisor of locomotive engineers but provides a railroad latitude in selecting the design of its own observation procedures (including the duration of the observation process, reliance on tapes that record the specifics of train operation, and the specific aspects of the engineer's performance to be covered). The section also gives a railroad the latitude to employ either a Type 1 or a Type 2 simulator (properly programmed) to conduct monitoring observations. A railroad must describe in this section how it will use that latitude to assure that the railroad is monitoring that its engineers demonstrate their skills concerning the safe discharge of their train operation responsibilities. A railroad must also describe the scoring system used by the railroad during an operational monitoring observation or unannounced compliance test administered in accordance with the procedures required under § 240.303. A railroad that intends to employ train operation event recorder tapes to comply with this monitoring requirement shall indicate in this section how it anticipates determining what person was at the controls and what signal indications or other operational constraints, if any, were applicable to the train's movement.

\* \* \* \* \*

**Appendix D to Part 240 [Amended]**

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

Issued in Washington, DC, on December 17, 2009.

**Karen J. Rae,**

*Deputy Administrator.*

[FR Doc. E9-30439 Filed 12-22-09; 8:45 am]

**BILLING CODE 4910-06-P**

**DEPARTMENT OF TRANSPORTATION**

**National Highway Traffic Safety Administration**

**49 CFR Part 571**

[Docket No. NHTSA 2009-0189]

**RIN 2127-AK65**

**Federal Motor Vehicle Safety Standards; Designated Seating Positions**

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

**ACTION:** Final rule; partial response to petitions for reconsideration.

**SUMMARY:** This document responds, in part, to petitions for reconsideration of an October 2008 final rule that amended