

**FREQUENTLY ASKED QUESTIONS REGARDING
HOW TO COMMENCE FRA REVIEW OF A RAILROAD'S
CERTIFICATION DECISION, AND UNDERSTANDING
THE LOCOMOTIVE ENGINEER REVIEW BOARD
(49 C.F.R. §§ 240.7, 240.401, 240.403 AND 240.405)
AND OPERATING CREW REVIEW BOARD PROCESS
(49 C.F.R. §§ 242.7, 242.501, 242.503 AND 242.505)
(Last Updated 6/4/2013)**

NOTE: This document is meant only as an aid in understanding the initial stage of FRA's dispute resolution process for both the Locomotive Engineer Review Board (Part 240) and Operating Crew Review Board (Part 242). For complete information as to the regulatory requirements, please refer to 49 C.F.R. Parts 240 and 242.

**PETITIONING THE LOCOMOTIVE ENGINEER AND OPERATING CREW
REVIEW BOARDS**

Who are the Board members who will make the decision?

- The Board is composed of employees of the FRA selected by the Administrator. 49 C.F.R. §§ 240.401(c) and 49 C.F.R. § 242.501(c). The Board members are individuals from FRA's Office of Safety staff with background, knowledge and experience relevant to the work of the Board.

Who may request Board review?

- 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 qualification requirements of 49 C.F.R. Parts 240 or 242 when making the decision to deny or revoke certification, may petition the Board to review the railroad's decision. 49 C.F.R. §§ 240.401 and 242.501. A person who petitions the Board is referred to as the petitioner.

What is the difference among the terms denial of certification, denial of recertification and revocation?

- Denial of certification refers to the situation in which a person who is not a certified locomotive engineer or conductor receives notification from a railroad that it will not grant the person initial certification. A railroad might choose to deny a person certification if the railroad decides that the person, despite having finished a railroad-approved training program, cannot pass all of the minimum requirements. For example, the person may not have passed the skills performance or knowledge tests, or the person did not meet the minimum hearing and vision requirements. The rule provides a person with a reasonable opportunity to explore and respond to the negative information that might serve as the railroad's basis for denying certification. See 49 C.F.R. §§ 240.219 and 242.401.

- Denial of recertification refers to the situation in which a person who is a certified locomotive engineer or conductor receives notification from a railroad that it will not be renewing the person's certificate when it is due to expire. The regulations require that railroads renew a certificate at least every three (3) years. 49 C.F.R. §§ 240.217(c) and 242.201(c). Like a denial of certification, a denial of recertification may be based on a person's inability to meet any of the minimum requirements and the rule provides a person with a reasonable opportunity to explore and respond to the negative information that might serve as the railroad's basis for denying recertification. See 49 C.F.R. §§ 240.219 and 242.401.
- Certificate revocation refers to the situation in which the railroad determines that a certified locomotive engineer or conductor either (1) has violated a cardinal operating rule or practice [as specified in 49 C.F.R. §§ 240.117(e) and 242.403(e)] or (2) is ineligible to hold a certificate due to a substance abuse disorder or violations of FRA's alcohol and drug regulations. See 49 C.F.R. §§ 240.119 and 242.115. Prior to revoking a person's certificate, the regulations require a railroad to provide the certified engineer or conductor with "the opportunity for a hearing;" however, that opportunity can be waived. See 49 C.F.R. §§ 240.307 and 242.407.

How much time do I have to file a petition to the Board?

- DENIAL OF CERTIFICATION OR RECERTIFICATION: A person who has been denied a locomotive engineer certification or recertification has 180 days from the date of the railroad's denial decision to file a petition. See 49 C.F.R. §§ 240.403(c). A person who has been denied a conductor certification or recertification has 120 days from the date of the railroad's decision to file a petition, however the Board may extend the filing period for cause shown (see below). 49 C.F.R. § 242.503(c).
- CERTIFICATE REVOCATION: A person has 120 days from the date of the railroad's revocation decision to file a petition. See 49 C.F.R. 240.403(d) and 242.503(c).
 - In computing the 180th or 120th day, please do not count the date the railroad's decision was issued. Also, please be advised that the date the railroad issued its decision may be earlier than the date you received or were served with a copy of that decision.
 - If the 180th or 120th day falls on a day that the Docket Clerk's office is closed [i.e., a Saturday, a Sunday or Federal holiday] you must file your request before the end of the next day in which the Docket Clerk's office is open and accessible. (It is advisable to provide a written explanation with your submission if the deadline falls on a day on which weather or other conditions have made the office of the Docket Clerk arguably inaccessible.)

What if I don't think I can file by the deadline or have already missed the deadline for filing petitions to the Board?

- Late petitions will be denied as untimely except that the Board for cause shown may extend the petition filing period at any time in its discretion:
 - (1) Provided the request for extension is filed before the deadline; or
 - (2) Provided that the failure to timely file was the result of excusable neglect. 49 C.F.R. §§ 240.403(d) and 242.503(c).
- Thus, a person who has not missed the deadline can file a request for an extension knowing that the Board has wide discretion to grant the request. See 64 Fed. Reg. 60966, 60983 (Nov. 8, 1999). Such a petitioner needs to demonstrate some justification for the Board to grant the extension as the regulation requires cause to be shown. Moreover, it is recommended that a petitioner specify how much additional time will be needed to file the petition keeping in mind that only reasonable requests will be granted.
- If the deadline has already passed, the petitioner must allege the facts constituting “excusable neglect,” and the mere assertion of excusable neglect unsupported by facts is insufficient. Excusable neglect requires a demonstration of good faith on the part of the party seeking an extension of time and some reasonable basis for noncompliance with the time specified in the rules. In most cases, demonstrating justification requires sending the Board evidence substantiating the reason an extension is needed along with any explanation. Absent a showing along these lines, relief will likely be denied.

Where do I file my petition to the Board?

- Petitions for review of a railroad’s decision to deny, recertify or revoke a locomotive engineer’s certification must be submitted to the Docket Clerk, Office of Chief Counsel, Federal Railroad Administration, 1200 New Jersey Avenue, SE, Stop-10, Washington, D.C. 20590. 49 C.F.R. § 240.403(b)(2). Petitions for review of a railroad’s decision to deny, recertify or revoke a conductor’s certification must be submitted to the Docket Clerk, U.S. Department of Transportation, Docket Operations (M-30), West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE, Washington, D.C. 20590, or electronically at <http://www.regulations.gov>. 49 C.F.R. § 242.503(b)(2).

What are the acceptable forms for petitioning the Board?

- The two (2) acceptable forms for petitioning the Locomotive Engineer Review Board include hand delivery and mailing. Hand delivery requires physically

delivering your written request to the FRA Docket Clerk at 1200 New Jersey Avenue, SE, in Washington, D.C. Mailing requires sending your written request by United States Postal Service or private delivery service to the address listed above.

- Petitions to the Operating Crew Review Board for the review of a railroad's decision to deny, recertify or revoke a conductor's certification may be hand delivered or mailed as provided above, and may additionally be submitted by fax or electronically, consistent with the standards and requirements established by the Federal Docket Management System and posted on its Web site at <http://www.regulations.gov>.
 - Filers are encouraged to use the electronic submission system at <http://www.regulations.gov>. To have a docket created, DOT's Docket Operations and FRA have developed a procedure by which a filer may electronically submit a document to a pre-existing docket called a "shell docket." When you go to <http://www.regulations.gov>, enter FRA's shell docket number "FRA-2007-0003" in the box for "Enter Keyword or ID." Once you search for this shell docket, you will open a new window for the shell docket and see that it is titled "Instructions on submitting comments for Guidance Documents to FRA." Then, click on "Comment Now." FRA would expect that users will enter the required information and upload a file, although it may not be necessary to type a comment in the comment box provided. Finally, click on "Submit" to preview and submit your comment.
 - If you wish to file by fax, FRA recommends that you call DOT's Docket Operations at (202) 366-9826 or toll free at (800) 647-5527 to confirm that its fax number is (202) 493-2251. Filers should be aware that the quality of a scanned fax may not be as good as the scan of a mailed hard copy or uploaded file.
- No matter which acceptable form you use, FRA recommends that you retain a receipt or other proof of the date you filed your request.

Other information for properly filing a petition to the Board.

- In response to acts of terrorism beginning on September 11, 2001, FRA amended the definition of "filing" so that delays in mail delivery would not unfairly result in the rejection of what would likely have been timely filed requests for further FRA review. 67 Fed. Reg. 22 (Jan. 2, 2002). The amended definition states that "[f]ile, filed and filing mean submission of a document under this part on the date when the Docket Clerk receives it, or if sent by mail on or after September 4, 2001, the date mailing was completed."

- Pursuant to this definition, if you file by hand delivery then you must make sure that the FRA or DOT Docket Clerk receives it no later than the date it is due. If you file by USPS or other mail services, you must make sure that the postmark or your receipt reflects that your request was mailed no later than the date it is due.

What do I need to provide in my petition to the Board?

- Locomotive engineer petitions must be submitted in triplicate, and both locomotive engineer and conductor petitions must contain all available information that the person thinks supports the person's belief that the railroad acted improperly. 49 C.F.R. §§ 240.403(b) and 242.503(b). That information includes:
 - (1) Your name, address, telephone number, and email address (if available). If you are represented by an attorney or any other representative, you must also provide the same basic information for that person. If this information changes prior to the Board issuing its decision, it is your obligation to file a letter with the FRA or DOT Docket Clerk explaining the changes; please keep in mind that a failure to update this information may result in the Board being unable to serve you or your representative with a copy of an order or the Board's final decision.
 - (2) The name and address of the railroad.
 - (3) The facts that you believe 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 you).
 - (4) An explanation of the nature of the remedial action sought.
 - (5) Copies of all written documents in your or your representative's possession that document that railroad's decision.

Do I need to provide anyone else with a copy of my hearing request?

- No. FRA will notify the railroad that it has received the petition and provide the railroad with a copy of the petition. 49 C.F.R. §§ 240.405(b) and 242.505(b).

What happens after I file a petition to the Board?

- Each petition shall be acknowledged in writing by FRA. The acknowledgment shall contain the docket number assigned to the petition and a statement of FRA's intention that the Board will render a decision on this petition within 180 days from the date that the railroad's response is received or from the date upon which the railroad's response period has lapsed. 49 C.F.R. §§ 240.405(a) and 242.505(a).
- When FRA sends written notification to the railroad of the petition, the railroad is instructed that it will be given a period of 60 days to submit to FRA any information that the railroad considers pertinent to the petition. The Board has discretion to consider a late railroad response as long as it is practicable to do so. 49 C.F.R. §§ 240.405(c) and 242.505(c).
- The railroad is required to send the petitioner and petitioner's representative, if any, a copy of the information being submitted to FRA. 49 C.F.R. §§ 240.405(d) and 242.505(d).
- After the railroad's response is received or upon expiration of the 60 day response period, each petition will then be referred to the Board for a decision. 49 C.F.R. §§ 240.405(e) and 242.505(e). The Board typically meets once per month.
- Notice of the Board's decision will be provided in writing to all the parties. 49 C.F.R. §§ 240.405(g) and 242.505(l).

If I disagree with the railroad's response, will I have an opportunity to submit additional information or argument?

- The regulation does not provide a petitioner with an opportunity to respond to the railroad's response. Consequently, the Board has generally refused to consider such supplemental responses filed by petitioners.
- The exception to this general rule is that the Board would consider a petitioner's supplemental response if it alleged that the railroad's response contained evidence that was not presented at the railroad's hearing.

On what grounds will the Board overturn a railroad's decision?

- "When considering procedural issues, the Board's standard for review will be to determine whether substantial harm was caused the petitioner by virtue of the failure to adhere to the dictated procedures for making the railroad's decision. A finding of substantial harm is grounds for reversing the railroad's decision." 58 Fed. Reg. 18982, 19001 (Apr. 9, 1993).

- “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 reversal.” *Id.*
- “As to legal issues involving interpretation of regulations or statutes administered by FRA, the Board will provide ‘de novo’ review, which means that the Board will not be bound by legal interpretations reached by the railroad in making its decision.” *Id.*
- “A railroad shall not determine that the person failed to meet the qualification requirements of this part and shall not revoke the person’s certification . . . if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the [locomotive engineer or conductor’s] ability to comply with the railroad operating rule or practice which constitutes a violation [under 49 C.F.R. §§ 240.117(e)(1) through (e)(5) or 242.403(e)(1) through (e)(11)].” 49 C.F.R. §§ 240.307(i)(1) and 242.407(i)(1).

What relief can the Board grant?

- The decision-making power of the Board is limited to determining whether the denial or revocation of certification or recertification was improper pursuant to the Federal regulations (*i.e.*, based on an incorrect determination that the person failed to meet the qualification requirements of this regulation) and grant or deny the petition accordingly. In reaching its decision, the Board may request and rely upon additional evidence or argument from the parties that was not initially submitted. The Board is not empowered to mitigate the consequences of the railroad decision, if that decision is valid under this regulation. The Board is only empowered to make determinations concerning qualifications under this regulation. The contractual consequences, if any, of those determinations must be resolved under dispute resolution mechanisms that do not directly involve FRA. For example, FRA cannot order a railroad to alter its seniority rosters or make an award of back pay to accommodate a finding that a railroad wrongfully denied certification.

How can I review the applicable federal regulations myself?

- FRA’s web site <http://www.fra.dot.gov/>, which is updated regularly, provides access to the regulations, the Federal Register notices in which the regulations were first published, or hotlinks to other web sites which maintain electronic copies of the Code of Federal Regulations (CFR) which is a codification of the regulations published in the Federal Register. The U.S. Government Printing Office (GPO) maintains a web site that contains both the Federal Register and the CFR in a manner that allows you to view recent and past publications, as well as conduct advanced searches of individual or multiple government publications

at <http://www.gpo.gov/fdsys/search/home.action>. GPO also maintains an electronic CFR website at www.ecfr.gov. You may also purchase volumes of the CFR, or other government publications, through the GPO website at <http://www.gpo.gov/customers/p-i-sales.htm>, by e-mail at gpo@custhelp.com; by telephone at (202) 512-1800 or toll free at (866) 512-1800; and by fax at (202) 512-2104. Many public libraries, especially law libraries, also maintain a copy of the CFR.

Who can I contact if I have any questions regarding these procedures or the status of my petition?

- Please direct such inquiries to FRA's Safety Law Division at (202) 493-6052 and request to speak with the attorney assigned to locomotive engineer and conductor certification.