



DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 245

[Docket No. FRA-2022-0019, Notice No. 4]

RIN 2130-AC91

Certification of Dispatchers

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

ACTION: Final rule.

SUMMARY: FRA is establishing regulations for the certification of dispatchers, pursuant to the authority granted in section 402 of the Rail Safety Improvement Act of 2008 (RSIA).

DATES: This regulation is effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: For access to the docket to read background documents or comments received, go to <https://www.regulations.gov> at any time.

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SUPPLEMENTARY INFORMATION:

Abbreviations and Terms Used in This Document

AANP-American Association of Nurse Practitioners

AAR-Association of American Railroads

ADA-Americans with Disabilities Act

ANSI-American National Standards Institute

APTA-American Public Transportation Association

ASLRRA-American Short Line and Regional Railroad Association

ATDA-American Train Dispatchers Association

BRS-Brotherhood of Railroad Signalmen

CAD-computer-aided dispatching

CE-categorical exclusion

CRB or Board-Certification Review Board

DAC-Drug and Alcohol Counselor

D.C. Circuit-U.S. Court of Appeals for the District of Columbia Circuit

DOT-U.S. Department of Transportation

EA-environmental assessment

EIS-environmental impact statement

FRA-Federal Railroad Administration

Hz-hertz

IBEW- International Brotherhood of Electrical Workers

IMOU-implementing memorandum of understanding

mph-miles per hour

MTA-Metropolitan Transportation Authority

NEPA-National Environmental Policy Act

NPRM-Notice of Proposed Rulemaking

NRC-Network Rail Consulting

NS-Norfolk Southern Railway

OJT-On the job training

PTC-Positive Train Control

RIA-Regulatory Impact Analysis

RLO-Rail Labor Organization

RRP-Risk Reduction Program

RSAC-Railroad Safety Advisory Committee

RSIA-Rail Safety Improvement Act of 2008

RWIC-Roadway Worker In Charge

SAP-Substance Abuse Professional

SBA-Small Business Administration

Secretary-Secretary of Transportation

SEPTA-Southeastern Pennsylvania Transportation Authority

SMART-TD- International Association of Sheet Metal, Air, Rail and Transportation

Workers Transportation Division

SSP-System Safety Program

TTD-Transportation Trade Department, AFL-CIO

WLF-Washington Legal Foundation

Table of Contents for Supplementary Information

I. Executive Summary

II. Background

A. Roles and Responsibilities of Dispatchers

B. FRA History of Certification

C. Statutory Background for Dispatcher Certification

D. Report to Congress

E. RSAC Working Group

F. Stakeholder Outreach

G. Notice of Proposed Rulemaking

III. Discussion of Comments and FRA's Conclusions

A. Overview of Comments

B. Comments Supporting the NPRM

1. Labor Organizations and Consulting Company

2. Individual Commenters

C. Comments Opposing the NPRM

1. Comments Alleging There is No Safety Justification for this Rule as the Cost-Benefit Analysis Does Not Support Requiring Dispatcher Certification

2. Comments Relating to RSIA Authority

3. Comments Stating that Contractors and Subcontractors Should Be Responsible for Certifying their Own Employees

4. Comments Related to Evidence that this Rule Would Limit Job Hopping

5. Comments Relating to Evidence that New Dispatcher Duties Necessitate Requiring Certification

6. Comments Asserting that the Rule is Duplicative of Parts 243, 270, and 271

D. Miscellaneous Comments

IV. Section-by-Section Analysis

V. Regulatory Impact and Notices

A. Executive Order 12866 as Amended by Executive Order 14094

B. Regulatory Flexibility Act and Executive Order 13272

1. Statement of the Need for, and Objectives of, the Rule

2. Significant Issues Raised by Public Comments

3. Response to Comments filed by the Chief Counsel for Advocacy of the Small Business Administration

4. Description and Estimate of the Number of Small Entities to which the Rule will Apply

5. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule
 6. A Description of the Steps the Agency has Taken to Minimize the Economic Impact on Small Entities
- C. Paperwork Reduction Act
 - D. Federalism Implications
 - E. International Trade Impact Assessment
 - F. Environmental Assessment
 - G. Environmental Justice
 - H. Unfunded Mandates Reform Act of 1995
 - I. Energy Impact
 - J. Executive Order 13175 (Tribal Consultation)

I. Executive Summary

Purpose of the Regulatory Action

FRA is requiring railroads to develop programs for certifying individuals who perform dispatching tasks on their networks. Under this rule, railroads are required to have formal processes for training prospective dispatchers, as well as verifying that each dispatcher has the requisite knowledge, skills, safety record, and abilities to safely perform all of the safety-related dispatcher duties mandated by Federal laws and regulations, prior to certification. In addition, railroads are required to have formal processes for revoking certification for dispatchers who violate specified minimum requirements.

FRA is promulgating this regulation in response to section 402 of the RSIA, Public Law 110-432, 122 Stat. 4848, 4884 (Oct. 16, 2008), which required the Secretary of Transportation (Secretary) to submit a report to Congress addressing whether certification of “certain crafts or classes” of railroad employees or contractors, including

railroad dispatchers, was necessary to “reduce the number and rate of accidents and incidents or to improve railroad safety.” Section 402 further provides that the Secretary may prescribe regulations requiring the certification of certain crafts or classes if the Secretary determined, pursuant to the report to Congress, that such regulations are necessary to reduce the number and rate of accidents and incidents or to improve railroad safety.

The Secretary submitted a report to Congress on November 4, 2015, stating that, based on FRA’s preliminary research, dispatchers were one of the most viable candidate railroad crafts for certification due to the complex safety-critical work dispatchers perform, the high turnover among dispatchers which has led to a less experienced workforce, and the need to prevent persons with active substance abuse disorders from working as dispatchers.¹ FRA subsequently performed outreach with various stakeholders to compile a list of tasks performed by dispatchers. Upon review of this task list, FRA found that the vast majority of dispatcher tasks are critical to railroad safety with potentially catastrophic consequences if they are not performed properly. Certification addresses these safety concerns by creating minimum training standards, establishing safety records for dispatchers, and requiring certain safety and knowledge checks before a person can become certified. Given the safety critical role of dispatchers in facilitating safe railroad operations (which includes the coordination of emergency services in response to accidents and incidents), FRA determined that the number and rate of accidents and incidents would be expected to decrease and railroad safety would be expected to improve if dispatchers were required to satisfy certain standards and be certified.

Summary of Major Provisions

¹ FRA-2022-0019-0001.

This rule requires railroads to develop written programs for certifying individuals who work as dispatchers on their territories; to submit those written certification programs to FRA for approval; and, once approved by FRA, to implement such programs. Subpart A of this rule contains general provisions, including a formal statement of the rule's purpose and scope.

Subpart B of this rule covers the review and approval process of certification programs, the implementation schedule for this rule, the certification program requirements, and the eligibility determinations a railroad must make to certify a person as a dispatcher. Class I railroads (including the National Railroad Passenger Corporation) and railroads providing commuter service will have to submit their written certification programs to FRA no later than 240 days after the effective date of this rule. Class II and Class III railroads will be required to submit their written certification plans 480 days after this rule goes into effect. New railroads that begin dispatching operations after this rule's effective date will be required to submit their written certification programs to FRA and obtain FRA approval before commencing dispatching operations. FRA will issue a letter to the railroad when it approves a certification program that explains the basis for approval, and a program will not be considered approved until FRA issues the approval letter. In addition, railroads seeking to materially modify their FRA-approved certification programs must obtain FRA approval prior to implementing such modifications.

Railroads are required to evaluate certification candidates in multiple areas, including prior safety conduct as a motor vehicle operator, prior safety conduct with other railroads, substance abuse disorders and alcohol/drug rules compliance, and visual and hearing acuity.

This rule also contains minimum requirements for the training provided to prospective dispatchers. These requirements are intended to confirm that certified

dispatchers have received adequate and sufficient training and testing to ensure that the prospective dispatchers are able to safely perform assigned duties that ensure the safety of train movement before they begin work as dispatchers on the railroad. The requirements are also intended to ensure that certified dispatchers periodically receive training on railroad safety and operating rules and practices, as well as comprehensive training on the use of new dispatching systems and technology before they are introduced on the railroads in revenue service.

Subpart C of this rule addresses how railroads are to administer their dispatcher certification programs. With the exception of individuals designated as certified dispatchers prior to FRA approval of the railroad's dispatcher certification program, this rule prohibits railroads from certifying dispatchers for intervals longer than three years. This three-year limitation, which is consistent with the maximum period for certifying locomotive engineers in 49 CFR 240.217(c) and conductors in 49 CFR 242.201(c), allows for periodic re-evaluation of certified dispatchers to verify their continued compliance with FRA's minimum safety requirements.

Subpart D of this rule addresses the process and criteria for denying and revoking certification. The rule describes the process a railroad must undergo before it denies an individual certification or recertification. This process includes providing the certification candidate with the information that forms the basis for the denial decision and giving the candidate an opportunity to rebut such evidence. The rule also requires that a railroad make any decision to deny an individual certification or recertification in writing and that written decision must meet certain requirements.

A railroad can only revoke a dispatcher's certification if one of seven events occurs. Generally, for the first revocable event that is not related to a dispatcher's use of drugs or alcohol, the person's certification will be revoked for 30 days. If an individual

accumulates more of these violations in the time period specified in the final rule, the revocation period (period of ineligibility) becomes increasingly longer.

If a railroad acquires reliable information that a certified dispatcher has violated an operating rule or practice requiring revocation under this rule, it shall suspend the dispatcher's certificate immediately while it determines whether revocation of the certificate is warranted. In such circumstances, dispatchers are entitled to a hearing. Similar to a railroad's decision to deny an individual certification, a railroad's decision to revoke a dispatcher's certification must satisfy certain requirements. Finally, if an intervening cause prevents or materially impairs a dispatcher's ability to comply with a railroad operating rule or practice, the railroad must not revoke the dispatcher's certification.

Subpart E of this rule describes the dispute resolution process for individuals wishing to challenge a railroad's decision to deny certification, deny recertification, or revoke certification. This dispute resolution process mirrors the process used for locomotive engineers and conductors under 49 CFR parts 240 and 242, respectively.

Finally, this rule contains two appendices. Appendix A discusses the procedures that a person seeking certification or recertification should follow to furnish a railroad with information concerning the individual's motor vehicle driving record. Appendix B provides guidance on the procedures railroads should employ in administering the vision and hearing requirements under §§ 245.117 and 245.118.

This rule does not revise 49 CFR part 241, United States Locational Requirement for Dispatching of United States Rail Operations. Furthermore, this rule does not apply to dispatchers located outside of the United States as "[i]t is a longstanding principle of

American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’”²

Benefits and Costs

FRA analyzed the economic impact of this final rule. The primary benefit of this final rule, as presented in the Regulatory Impact Analysis (RIA), is that it will help ensure that railroads properly train and monitor dispatcher performance to reduce the risk of accidents caused by dispatcher error. This rule will allow railroads to revoke certification of dispatchers who incur serious safety-related violations. This includes failure to properly issue or apply a mandatory directive when warranted or incorrectly granting permission to proceed through a protected track segment.

This rule is expected to reduce the likelihood of an accident occurring due to dispatcher error. FRA has analyzed accidents over the past five years to categorize those where dispatcher training and certification would have impacted the accident. FRA estimated that this rule will prevent 30% of accidents that were caused or likely caused by the dispatcher. FRA estimated that this rule will prevent 10% of accidents where a dispatcher may have contributed to the accident.

The following table shows the estimated 10-year benefits of this rule. The total 10-year estimated benefits would be \$0.6 million (PV, 7 percent) and annualized benefits would be \$0.1 million (PV, 7 percent).

Total 10-Year Discounted Benefits (2020 Dollars)

Present Value 7% (\$)	Present Value 3% (\$)	Annualized 7% (\$)	Annualized 3% (\$)
620,283	725,177	88,314	85,013

FRA has quantified the monetary impact from accidents reported on FRA accident forms. However, some accident costs are not required to be reported on FRA

² *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284-85 (1949)).

accident forms (e.g., environmental impact). The cost of FRA-reportable damage, such as the cost of direct labor and damage to on-track equipment, track, track structures, and roadbed, only represents a portion of the total cost of train accidents. Other direct accident costs, such as accident clean up, third party property damage, lost lading, environmental damage, loss of economic activity to the community, and train delays are not included in FRA's accident/incident reportable damages from the railroads. That impact may account for additional benefits not quantified in this analysis. If these costs not covered by FRA data were realized, accidents affected by this rulemaking could have much greater economic impact than the quantitative benefit estimates provided here.

The RIA also presents estimates of the costs likely to occur over the first ten years of the final rule. The analysis includes estimates of costs associated with development of certification programs, initial and periodic training, knowledge testing, and monitoring of operational performance. Additionally, costs are estimated for vision and hearing tests, review of certification determinations made by other railroads, and Government administrative costs.

FRA estimated 10-year costs of \$5.4 million discounted at 7 percent. The annualized cost will be approximately \$0.8 million discounted at 7 percent. The following table shows the estimated 10-year costs of the final rule.

Total 10-Year Discounted Costs (2020 Dollars)

Category	Present Value 7% (\$)	Present Value 3% (\$)	Annualized 7% (\$)	Annualized 3% (\$)
Development of Certification Program	982,914	1,010,875	139,945	118,505
Certification Eligibility Requirements	55,345	61,945	7,880	7,262
Recertification Eligibility Requirements	65,831	83,877	9,373	9,833
Training	707,334	812,820	100,708	95,287
Knowledge Testing	233,988	281,581	33,315	33,010
Vision and Hearing	1,586,913	1,909,692	225,941	223,874
Monitoring Operational Performance	256,017	305,956	36,451	35,867

Railroad Oversight Responsibilities	267,530	326,714	38,090	38,301
Certification Card	26,832	32,289	3,820	3,785
Petitions and Hearings	38,667	46,209	5,505	5,417
Government Administrative Cost	1,192,651	1,342,668	169,807	157,402
Total	5,414,022	6,214,626	770,835	728,544

Legal Authority

Pursuant to the RSIA, the Secretary was required to submit a report to Congress addressing whether certification of certain crafts or classes of employees, including dispatchers, was necessary to reduce the number and rate of accidents and incidents or to improve railroad safety.³ If the Secretary determined it was necessary to require the certification of certain crafts or classes of employees to reduce the number and rate of accidents and incidents or to improve railroad safety, section 402 of the RSIA stated the Secretary may prescribe such regulations. The Secretary delegated this authority to the Federal Railroad Administrator.⁴ In response to the RSIA, the Secretary submitted a report to Congress on November 4, 2015,⁵ stating that, based on FRA’s preliminary research, dispatchers and signal employees were potentially the most viable candidate railroad crafts for certification. Based on the analysis in Section II below, the Federal Railroad Administrator has determined that it is necessary to require the certification of railroad dispatchers to improve railroad safety.

II. Background

A. Roles and Responsibilities of Dispatchers

Railroad dispatchers play an integral role in railroad safety and operations. They are responsible for allocating and assigning track use, ensuring that trains are routed

³ See also 49 U.S.C. 20103 (providing FRA’s general authority to “prescribe regulations and issue orders for every area of railroad safety”).

⁴ 49 CFR 1.89.

⁵ FRA-2022-0019-0001.

safely and efficiently, and ensuring the safety of personnel working on and around railroad track. These are cognitively complex tasks that require integrating multiple sources of information in a dynamic context (*e.g.*, information from train schedules, computer displays of current track state, radio communication with various personnel such as locomotive engineers, and in some cases, projecting into the future (*e.g.*, estimating when the train will arrive)) and balancing multiple demands placed on track use (*e.g.*, balancing the need for maintenance-of-way workers to have time to work on the track with the need to make sure that the track will be clear when a train is anticipated to arrive). Some of the main tasks⁶ dispatchers perform involve: operation monitoring (monitoring a computerized train dispatching model board); information collection and data entry (collecting information about slow orders and any blocking protection required by railroad workers on the track); communication (playing an important role in roadway worker planning and protection); emergency response (working to limit the damage to human life and property during an emergency); and knowledge of territory (knowing the specific characteristics of the territory assigned to them).

Over the past five to ten years, the job of a railroad dispatcher has become more complex and demanding. Railroads have decreased the number of dispatchers over the years, and the territory for which an individual dispatcher is responsible is expanding as a result. Also, with the advancement of Positive Train Control (PTC), dispatchers must understand the interface between the computer-aided dispatching system and the train control system, with respect to the safe movement of trains and other on-track equipment. Dispatchers need to understand the operating rules applicable to the train control system,

⁶ As part of a contract with FRA, Foster-Miller, Inc., conducted research to develop a tool for assessing railroad dispatcher task load. Task load is defined as the average time demanded of a dispatcher in carrying out all job-related tasks at a particular desk, over a specified period of time (*e.g.*, one shift). Stephen J. Reinach, Toward the Development of a Performance Model of Railroad Dispatching 2042-46 (Proceedings of the Human Factors and Ergonomics Society 50th Annual Meeting, 2006). A copy of this report can be found at <https://railroads.dot.gov/elibrary/proceedings-human-factors-and-ergonomics-society-50th-annual-meeting-2006>.

including granting permission for movement and protection of roadway workers; unequipped trains; trains with failed or cut-out train control onboard systems; control system fails; and providing for safe operations under the alternative method of operation. Managing PTC failures over the three years since PTC's full implementation has proven to be one of the more challenging new responsibilities for dispatchers because dispatchers must rapidly comprehend malfunctions in PTC systems and implement alternate strategies to ensure continued safety. This represents a significant shift from the traditional responsibilities of dispatchers, positioning them as key figures in the management of crises within railroad systems. To effectively address these challenges, it is imperative that dispatchers undergo specialized training concerning the functionalities of PTC systems and the appropriate protocols for handling failures. The role of dispatchers in coordinating with train crews is essential to secure a unified response to incidents involving PTC failures. This evolution in the responsibilities of dispatchers highlights their role in maintaining safe railroad operations amid the challenges posed by the introduction of sophisticated PTC technologies and the occurrence of system failures.

In addition, the availability of affordable computer systems has made computer-aided dispatching (CAD) feasible for many railroads. The improved communications systems led to the acceptance of radio transmitted directives in place of the traditional paper train orders that had been previously used. These changes in communications and signal technology have also resulted in the closing of block towers and eliminating the job of tower operator, a job that was often on the career path to becoming a dispatcher.

Today, dispatchers are likely to use multiple computer screens and electronic equipment, in addition to a communications system. However, a short line railroad may still use hand-written or verbal authorities to move trains across dark (unsignalled) territory. The industry's adoption of new dispatching technology, changes in operating rules and methods of operation, and railroad industry restructuring all have potential

safety consequences. Additionally, excessive workloads and increases in occupational stress could result from any of these factors.

B. FRA History of Certification

On January 4, 1987, an Amtrak train collided with a Conrail train in Chase, Maryland, resulting in 16 deaths and 174 injuries. At the time, it was the deadliest train accident in Amtrak's history. The subsequent investigation by the National Transportation Safety Board concluded that the probable cause of the accident was the impairment of the Conrail engineer who was under the influence of marijuana at the time of the collision.⁷

Following this accident, Congress passed the Rail Safety Improvement Act of 1988, Public Law 100-342, 4, 102 Stat. 624, 625 (1988), which instructed the Secretary to "issue such rules, regulations, orders, and standards as may be necessary to establish a program requiring the licensing or certification of any operator of a locomotive, including any locomotive engineer." On June 19, 1991, FRA published a final rule establishing a certification system for locomotive engineers and requiring railroads to ensure that they only certify individuals who met minimum qualification standards.⁸ FRA prescribed a certification system where the railroads issue the certificates as opposed to a government-run licensing system. This final rule, published in 49 CFR part 240 (part 240), created certification requirements for engineers that addressed various areas, including vision and hearing acuity; training, knowledge, performance skills; and prior safety conduct.

Seventeen years later, Congress passed the RSIA, which mandated the creation of a certification system for conductors. On November 9, 2011, FRA published a final rule requiring railroads to have certification programs for conductors and to ensure that all

⁷ Railroad Accident Report: Rear-end Collision of Amtrak Passenger Train 94, the Colonial and Consolidated Rail Corporation Freight Train ENS-121, on the Northeast Corridor, Chase, Maryland, January 4, 1987 144 (Nat'l Transp. Safety Bd. 1988).

⁸ 56 FR 28227 (June 19, 1991).

certified conductors satisfy minimum Federal safety standards.⁹ The conductor certification rule, published in 49 CFR part 242 (part 242), was largely modeled after part 240 with some deviations based on the different job classifications. Part 242 also included some organizational improvements which made the regulation more streamlined than part 240.

C. Statutory Background for Dispatcher Certification

In addition to requiring certification for conductors, the RSIA required the Secretary to submit a report to Congress addressing whether certain other railroad crafts or classes of employees would benefit from certification. Specifically, section 402 of the RSIA required that the Secretary issue a report to Congress “about whether the certification of certain crafts or classes of railroad carrier or railroad carrier contractor or subcontractor employees is necessary to reduce the number and rate of accidents and incidents or to improve railroad safety.” As part of that report, section 402 specifically required the Secretary to consider dispatchers as one of the railroad crafts for certification. Pursuant to the report to Congress, section 402 authorized the Secretary to “prescribe regulations requiring the certification of certain crafts or classes of employees that the Secretary determines . . . are necessary to reduce the number and rate of accidents and incidents or to improve railroad safety.”

D. Report to Congress

On November 4, 2015, the Secretary submitted the report to Congress required under the RSIA. The report stated that, based on FRA’s preliminary research, dispatchers and signal repair employees were the most viable candidates for certification. In reaching this determination with respect to dispatchers, the Secretary cited a variety of factors.

⁹ 76 FR 69801 (Nov. 9, 2011).

The report noted that dispatchers perform safety-sensitive work as shown by dispatchers being covered under the hours-of-service laws; and they are subject to regular and pre-employment random drug and alcohol testing. In 2012 and 2013, dispatchers had the highest pre-employment positive drug testing rate among all crafts. Annual drug and alcohol testing data submitted to FRA in 2012 and 2013 showed a 0.68-percent random positive drug testing rate and a 0.79-percent pre-employment positive drug testing rate for dispatch employees compared to a 0.48-percent random positive drug testing rate and a 0.46-percent pre-employment positive drug testing rate for signal employees; and a 0.49-percent random positive drug testing rate and a 0.55-percent pre-employment positive drug testing rate for train and engine service employees.¹⁰ The report noted that 49 CFR parts 240 and 242 require a five-year alcohol and drug background check as well as disqualification of employees for specified alcohol and drug test violations and for refusing such testing. If such requirements were included in a dispatcher certification program, it could help prevent dispatchers with active substance abuse disorders from “job hopping” from one employer to another and reduce the safety risk of having individuals with untreated substance abuse disorders working as dispatchers.

Another important factor in the report was the complicated nature of the work dispatchers perform to ensure the safety and efficiency of railroad operations. Dispatchers are responsible for allocating and assigning main track use to trains from their own employer as well as trains from other railroads. They are also responsible for

¹⁰ As noted in the NPRM, testing results submitted to FRA in 2020 and 2021 showed a 0.94-percent random violation rate (drug and alcohol positives and refusals) and a 0.85-percent pre-employment violation rate for dispatch employees compared to a 0.81-percent random violation rate and a 0.79-percent pre-employment violation rate for signal employees; and a 0.53-percent random positive drug testing rate and a 1.06-percent pre-employment positive drug testing rate for train and engine service employees. Testing results submitted to FRA in 2022 showed a 0.86-percent random violation rate (drug and alcohol positives and refusals) rate and a 5.45-percent pre-employment violation rate for dispatch employees compared to a 1.10-percent random violation rate and a 0.46-percent pre-employment violation rate for signal employees; and a 0.69-percent random positive drug testing rate and a 1.48-percent pre-employment positive drug testing rate for train and engine service employees.

the safety of roadway workers working on or near track.¹¹ The report summarized the demanding nature of dispatching by stating that it entails performing cognitively complex tasks that require rapid decision making, projecting into the future, and balancing numerous demands on track use.

Additionally, the report cited a “great amount of turnover” in the nationwide train dispatching workforce, resulting in a less experienced workforce, as further support for requiring certification. Finally, the report found that, except for train and engine crews, no function of railroad operations is more critical to safety than dispatching. The accumulation of these factors led to the report’s conclusion that dispatchers, along with signal repair employees, were the most viable candidates for certification due to their safety-critical roles.

E. RSAC Working Group

In March 1996, FRA established the Railroad Safety Advisory Committee (RSAC), which provides a forum for collaborative analysis to inform FRA’s rulemaking and program development activities. RSAC includes representatives from all of the agency’s major stakeholder groups, including railroads, labor organizations, suppliers and manufacturers, and other interested parties. When appropriate, FRA assigns a task to RSAC, and after consideration and debate, RSAC may accept or reject the task. If accepted, RSAC establishes a working group that possesses the appropriate expertise and representation of interests to develop recommendations to FRA for action on the task.

On April 21, 2017, a task statement regarding certification of dispatchers was presented to RSAC by email, but no vote was taken. On April 24, 2019, RSAC accepted

¹¹ Train dispatchers bear a substantial responsibility for the safety of roadway workers who perform maintenance and repair operations on or near railroad tracks. They engage in detailed coordination with work crews to establish protected work zones and regulate train movements accordingly. Dispatchers issue authorizations granting roadway workers exclusive access to tracks within designated zones and they maintain continuous communication with workers, providing updates on train locations and potential risks.

a task (No. 19-02) entitled “Certification of Train Dispatchers.”¹² The purpose of the task was “[t]o consider whether rail safety would be enhanced by developing guidance, voluntary standards, and/or draft regulatory language for the certification of train dispatchers.” The task called for the RSAC Train Dispatcher Certification Working Group (Working Group) to perform the following:

- Review critical tasks performed by dispatching employees for safe train operations, particularly with the introduction of PTC technology.

- Review training, duration, content, and methodology for new hire and continuing education.

- Review background checks designed to prevent dispatching employees with active substance abuse disorders from “job-hopping” from one employer to another.

The task statement also asked the Working Group to address the following issues, if appropriate:

- What requirements for training and experience are appropriate?

- What classifications of dispatchers should be recognized, if any?

- To what extent do existing requirements and procedures for certification of locomotive engineers and conductor certification provide a model for dispatcher certification?

- What types of unsafe conduct should affect a train dispatcher’s certification status?

- Do the existing locomotive engineer and conductor certifications provide an adequate model for handling appeals from decertification decisions of the railroads?

¹² At the same meeting, RSAC also accepted a task (No. 19-03) titled “Certification of Railroad Signal Employees.” A separate RSAC Working Group was formed to address this task, and FRA plans to issue a related final rule that would establish certification requirements for signal employees.

The Working Group, which included representatives from the Association of American Railroads (AAR), the American Public Transportation Association (APTA), the American Short Line and Regional Railroad Association (ASLRRA), the American Train Dispatchers Association (ATDA), the Brotherhood of Railroad Signalmen (BRS), SMART Transportation, Commuter Rail Coalition, and National Railroad Construction & Maintenance Association, held its first and only meeting on September 4, 2019, in Washington, DC. At this meeting, the Working Group reviewed the task statement from the RSAC, discussed some of the safety-critical tasks performed by dispatchers, and debated whether certification of dispatchers would be beneficial to railroad safety. At the end of the meeting, action items were assigned, and the next meeting was tentatively scheduled for January 2020.

However, on December 16, 2019, the presidents of ATDA, BRS, and the International Brotherhood of Electrical Workers (IBEW) sent a letter to the FRA Administrator requesting that this RSAC task be withdrawn from consideration at this time. The letter stated the unions were currently involved in numerous activities and were not able to give the task proper attention. AAR and ASLRRA advised the unions that they were not opposed to this request. In response to this letter, FRA withdrew this task from RSAC, and the Working Group became inactive.

F. Stakeholder Outreach

In 2021, FRA revisited the issue of establishing certification requirements for dispatchers. The agency assembled subject matter experts from FRA, ATDA, IBEW, and BRS to exchange facts and information regarding the tasks performed by dispatchers. These parties met virtually several times between May 5, 2021 and June 30, 2021.

As part of FRA's outreach to these labor organizations, a list of tasks performed by dispatchers was developed. These tasks generally involved: track authorities;

mandatory directives; track worker protection; emergency response coordination; or incident management. FRA reviewed each task to determine whether correctly performing the task was critical to railroad safety; what were the potential consequences if errors were made while performing the task; and whether there were any recent examples of issues or concerns with respect to the task. After performing this analysis, FRA concluded that the vast majority of tasks performed by dispatchers (80-90% of the listed tasks) were critical to railroad safety with potentially catastrophic consequences, such as accidents, injuries, and/or deaths, if the tasks were not performed properly. In addition, because dispatchers provide incident management and emergency response coordination, FRA concluded that by properly performing their tasks, dispatchers can help reduce the consequences of accidents and mitigate injuries.

During these virtual meetings, the benefits of certification based on the experience of stakeholders with engineer and conductor certification under 49 CFR parts 240 and 242 were also discussed. Some of the main benefits of certification that were identified included:

- Creating a minimum standard for training to ensure that the training encompasses all skills and proficiencies necessary to properly perform all safety-related dispatcher functions;

- Establishing a record of safety compliance that will follow a dispatcher if they wish to become certified by another railroad and that can be used to review a dispatcher's performance and potential training needs;

- Requiring certain safety checks, such as identifying active substance abuse disorders, that can minimize the risks posed by job hopping; and

- Establishing a system for individuals to dispute a railroad's decision to deny or revoke certification with the aim of creating a fair and consistent process for all parties.

Further, some labor unions noted that they had witnessed industry trends to reduce the length and level of training for dispatchers which would make certification even more beneficial. Based on these meetings, FRA concluded that requiring certification for dispatchers would be an important tool to ensure dispatchers are adequately trained and qualified; have a documented record of performance; and are not able to job hop without a new employer having knowledge of the dispatcher's safety performance record.

Following this initial outreach, FRA held a follow-up conversation with ATDA and IBEW, on March 3, 2022, and ATDA and IBEW informed FRA of elements that they believed would be beneficial in a dispatcher certification program. During this conversation, which was held in videoconference format, FRA asked the attendees to provide individualized feedback on how similar or different a dispatcher certification rule should be to FRA's locomotive engineer and conductor certification rules found in 49 CFR parts 240 and 242.

FRA heard that the agency needs to ensure that comprehensive training is provided to dispatchers, as the current training is inadequate. FRA also heard that railroads are not providing enough training on new technology, and in some cases, training only consists of a PowerPoint presentation or watching a video. It was also noted that dispatchers are often told to ask their managers if they have questions, but managers are not always knowledgeable about the craft and often do not have sufficient expertise to answer such questions.

On March 7, 2022, FRA had a conversation with the railroad industry, including Norfolk Southern Railway (NS), AAR, and ASLRRA. During this conversation, which was conducted in a videoconference format, FRA also asked for individualized feedback on how FRA's locomotive engineer and conductor certification regulations in 49 CFR parts 240 and 242 could be improved upon with respect to dispatcher

certification. Specifically, FRA asked for feedback on any regulatory provisions in 49 CFR parts 240 and 242 that, in their experience, may have been difficult to implement, as well as whether FRA should explore any changes to these regulatory provisions.

AAR expressed opposition to FRA's proposal to issue regulations requiring certification of dispatchers, arguing that there was not a safety benefit to certification. In addition, NS questioned the need for certification regulations in the absence of any identified gaps in coverage by existing railroad training programs. ASLRRRA expressed concern that FRA's proposal to issue regulations requiring dispatcher certification would result in a large paperwork burden with little benefit.

After this conversation, FRA provided a short list of written questions to AAR and ASLRRRA. While AAR did not provide additional feedback in response to FRA's list of questions, ASLRRRA responded to FRA's list of written questions by email on April 13, 2022, a copy of which has been placed in the docket.¹³

On March 10, 2022, FRA staff had a follow-up conversation with ATDA and IBEW to receive information on the types of errors and operating practice violations that should result in a railroad revoking a dispatcher's certification. During this conversation, which was conducted in videoconference format, FRA heard that a dispatcher's certification should not be revoked during an operations test, and that a person training a dispatcher should not have their certification revoked if a person they are training commits a revocable offense, as long as the trainer took appropriate action. However, a list of prospective revocable events was not generated during this meeting.

G. Notice of Proposed Rulemaking

On May 31, 2023, FRA published the Notice of Proposed Rulemaking (NPRM) proposing the establishment of dispatcher certification and provided commenters 60 days

¹³ FRA-2022-0019-0002.

to file comments.¹⁴ On July 5, 2023, FRA extended the comment period by an additional 30 days.¹⁵ On August 22, 2023, FRA extended the comment period again, this time by an additional 15 days, until September 14, 2023.¹⁶

III. Discussion of Comments and FRA's Conclusions

A. Overview of Comments

FRA received a total of 33 comments from railroads, labor organizations, trade associations, a consulting company, and individual commenters. Of the commenters who stated a clear position either in support of or in opposition to this rule, nine commenters expressed their support for this rule and seven commenters stated their opposition to this rule. The order of the topics or comments discussed in this document is not intended to reflect the significance of the comment raised or the standing of the commenter.

Additionally, this summary of comments is intended to provide both a general understanding of the overall scope and themes raised by the commenters, as well as give some specific descriptions to provide context. Not every comment is described in this summary. Comments addressing specific sections of this rule are discussed in the Section-by-Section Analysis. Comments regarding the proposed RIA are addressed in the RIA to the final rule.

B. Comments Supporting the NPRM

FRA received several comments that were generally supportive of requiring dispatcher certification. These comments came from labor organizations, a consulting company, and individual commenters.

1. Labor Organizations and Consulting Company

¹⁴ 88 FR 35574 (May 31, 2023).

¹⁵ 88 FR 42907 (July 5, 2023).

¹⁶ 88 FR 57043 (Aug. 22, 2023).

In stating its support for the proposed rule, the Transportation Trades Department, AFL-CIO (TTD) asserted that safety improvements have occurred as a result of locomotive engineer and conductor certification. TTD also noted that PTC and other technological advancements have increased the complexity of train dispatching, but the training standards applied across railroads are not adequately meeting this challenge. TTD stated that Class I railroads in particular “are not providing a sufficient quality or amount of training for new train dispatchers to learn how to do their jobs” and the end result is that many new dispatchers are having to train themselves.¹⁷

The International Association of Sheet Metal, Air, Rail and Transportation Workers Transportation Division (SMART-TD) also referenced the success of locomotive engineer and conductor certification in its comment. Specifically, it noted that certification has had a positive effect on how engineers and conductors view continuing education. According to SMART-TD, what was previously considered an inconvenience by crew members is now taken seriously as a necessity to maintain their certification status. Additionally, this time spent focusing on continuing education has helped ensure crew members perform their duties as safely as possible.¹⁸

In ATDA’s comment, the union acknowledged its long support for dispatcher certification. In doing so, the union noted the safety-critical nature of the dispatcher position that has only increased in recent years with the consolidation of railroad operations, the elimination of certain positions, and expanding use of new technologies such as PTC and wayside equipment defect detectors. These factors have led to dispatchers being assigned larger territories than ever before. ATDA has noted that, despite the increased complexity of the train dispatcher position, there has been “a dramatic de-emphasis by carriers on the importance of these roles and the fundamental

¹⁷ FRA-2022-0019-0037.

¹⁸ FRA-2022-0019-0035.

training and qualifications necessary to carry out the required duties and responsibilities in a safe and efficient manner.”¹⁹ ATDA indicated new dispatchers typically receive abbreviated training and are rushed into their positions due to staffing shortages.

According to ATDA, “[n]owhere has the inadequacy of proper training and qualifications been more apparent than in the lack of value placed on territory specific qualifications or knowledge of the physical characteristics of the territory the dispatcher is responsible for.”²⁰ This was shown by a recent FRA audit of NS that found that NS dispatchers were not familiar with the locations and types of wayside defect detectors on their territory and that NS’s dispatcher training program did not have any territory-specific familiarization requirements.²¹ ATDA stated this problem is not confined to NS, as it has received many reports from its members of having to work on territories they were either not trained on or had not worked on in years. ATDA asserts that dispatcher certification will address these concerns by ensuring that railroads place a greater emphasis on training dispatchers especially with respect to physical characteristics knowledge and familiarization.

TTD also referred to the deficiencies found during the NS audit as further support for this rulemaking. TTD noted that dispatcher certification would help address these deficiencies by improving the training dispatchers receive, which would have an overall positive effect on railroad safety.²² IBEW continued the theme of concern expressed by other labor organizations about the current state of dispatcher training. IBEW mentioned that dispatchers perform safety-sensitive work, and an untrained or undertrained dispatcher is more prone to commit an error which could have grave safety implications. IBEW stated that this rule would provide administrative oversight to dispatchers, to make sure they are trained effectively, practically, and consistently across the industry. In

¹⁹ FRA-2022-0019-0038.

²⁰ FRA-2022-0019-0038.

²¹ FRA, Norfolk Southern Safety Assessment (2023), *available at* railroads.dot.gov/elibrary/norfolk-southern-safety-assessment.

²² FRA-2022-0019-0029.

doing so, IBEW contends this rule will provide for a safer rail network.²³ Network Rail Consulting (NRC) commented that it agreed with the approach FRA took for this rule and it welcomed FRA’s development of minimum standards for training, qualification, and testing of dispatchers.²⁴

2. Individual Commenters

One commenter stated that certification will ensure the integrity of train dispatching as a profession, and that dispatchers meet a high standard of knowledge and performance through the training requirements in this rule. This commenter also suggested this rule will encourage the mentorship of younger, less experienced dispatchers by more experienced dispatchers.²⁵ Another commenter expressed their support for this rule calling dispatcher certification an “excellent idea” that will help prevent accidents like the 2016 accident in Germany where 11 people died and 80 people were injured when two trains collided because a dispatcher had been playing a game on their cell phone.²⁶ One individual supported certification because it enhances public safety by ensuring “that dispatchers are competent in their role and function through standard hiring practices, periodic evaluations, health and safety requirements and exhibited performance.”²⁷ This is particularly important given that dispatching is a complex job that is “multi-faceted, mentally demanding, and challenging to perform.”²⁸ Another commenter simply stated that dispatchers should be certified.²⁹

FRA’s Response

FRA appreciates the comments received from labor organizations, NRC, and individuals expressing their support for this rule. These comments largely corroborate

²³ FRA-2022-0019-0039.

²⁴ FRA-2022-0019-0033.

²⁵ FRA-2022-0019-0007.

²⁶ FRA-2022-0019-0032.

²⁷ FRA-2022-0019-0034.

²⁸ FRA-2022-0019-0034.

²⁹ FRA-2022-0019-0011.

FRA's background, provided above and in the NPRM, describing the issues dispatchers are facing in the field and why dispatcher certification would be beneficial to railroad safety. In particular, the increasing complexities of railroad dispatching combined with the expressed concerns about the current state of dispatcher training warrant greater oversight. By placing more stringent requirements on the training dispatchers receive and by ensuring that dispatchers are properly qualified on the territories they work on, this rule promotes railroad safety. Also, as TTD and SMART-TD specifically noted, the safety benefits of certification have already been established through the success of locomotive engineer and conductor certification. Therefore, FRA agrees with these commenters that this rule will be beneficial to rail safety.

C. Comments Opposing the NPRM

FRA received various comments from trade associations, a policy center, and individuals opposing the NPRM. These comments address a range of categories that are discussed below.

1. Comments Alleging that there is No Safety Justification for this Rule as the Cost-Benefit Analysis Does Not Support Requiring Dispatcher Certification

FRA received several comments related to the costs and benefits of the proposed rule. Comments were received from AAR, ASLRRA, and the Washington Legal Foundation (WLF) who each commented that the costs of this rule outweighed the benefits. A more detailed response to these comments is provided in the RIA. An individual commenter added that railroad dispatchers are already highly qualified and there is no need for additional costly regulations as he only experienced two incidents in his career where a dispatcher made a mistake that resulted in an investigation.³⁰

³⁰ FRA-2022-0019-0006.

AAR and ASLRRA commented on several of FRA's cost estimates for provisions of the rule. ASLRRA commented that FRA's estimates for the time to develop the certification programs were low. They suggested that it would take 550 hours for ASLRRA to develop a model program and 19 hours per small railroad to implement. For unannounced compliance tests (monitoring operational performance), AAR and ASLRRA estimated that the time per supervisor would be much more than the two hours per year that FRA estimated. Regarding dispute resolution hearings, AAR and ASLRRA noted that the cost assessments for hearings are underestimated, and the actual cost would amount to 22 percent of the total estimated costs of the proposed rule.

AAR and ASLRRA also alleged that FRA underestimated wage-related costs by using the 2020 railroad wage rates which "do not take into account the 24% wage increase that railroad employees received as part of the 2022 collective bargaining process or the 10.7% increase in Federal government employee pay rates."³¹

ASLRRA stated that the rule fails to assess how this rule would impact short lines and failed to include an Initial Regulatory Flexibility Assessment which discussed the burden on small entities. ASLRRA also stated that the rule would have a significant economic impact on a substantial number of small entities.

FRA also received comments pertaining to the estimated benefits from the RIA associated with the proposed rule. AAR and ASLRRA commented that most of the accidents FRA claimed dispatchers may have contributed to in the NPRM RIA either had no dispatcher involvement or were not caused by dispatcher error resulting in an overestimate of the benefit assessment.

AAR and ASLRRA alleged in their joint comment that there was no safety justification for this rulemaking. In support of this contention, they claimed that "[t]he

³¹ FRA-2022-0019-0041.

last decade was the safest on record for railroads.”³² The associations cited to various statistics showing a reduction in rail accidents since 2000.

Lastly, APTA stated in their comment that FRA failed to account for additional pay that dispatchers may receive once certified.

FRA’s Response

FRA received several comments regarding cost estimates of certain provisions of the rule. Based on ASLRRA’s comment regarding the time to develop a certification program, FRA has revised the estimated time for ASLRRA to develop a model program to 550 hours and increased the estimate for small railroads to implement from 8 hours to 15 hours. FRA has now only accounted for one template program produced by ASLRRA. Holding companies will likely use the template program developed by ASLRRA, instead of producing their own template, as discussed in the RIA associated with the NPRM. In addition, FRA has reassessed the costs for petitions and hearings based on comments from AAR and ASLRRA. The categories of employees have been revised and estimates have been increased. FRA has determined these estimates by looking at the number of petitions and hearings associated with the conductor and engineer certification programs. This baseline was then adjusted for the population size of dispatcher employment. Additionally, government costs for petitions and hearings have been increased, and now include more categories of employees involved in the process.

With respect to AAR and ASLRRA’s comment that the time estimate for supervisors on unannounced compliance tests is too low, FRA is maintaining its estimate as supervisors should already be doing this as part of their regular duties, and to comply with other FRA regulations. The two hours per year is the additional time for paperwork

³² FRA-2022-0019-0041.

or to organize this monitoring throughout the year. Since the supervisor currently does this monitoring and the dispatcher will be performing their normal duties, no additional time will be required due to this regulation.

In response to AAR and ASLRRA's comments on the 2020 wage rates used in the NPRM, FRA notes that the wage rates used during NPRM drafting were the most recent available data, as provided by the Surface Transportation Board's wage data series and General Schedule pay scales. Regarding ASLRRA's comment on an Initial Regulatory Flexibility Assessment, FRA, in the proposed rule, conducted an Initial Regulatory Flexibility Assessment and estimated the percentage of average annual revenue that the rule would impose on small entities. FRA estimated that 140 railroads would be impacted by this regulation, which may be considered a substantial number, but the impact will not be significant. As stated in the Final Regulatory Flexibility Assessment and Certification, in the final rule, FRA has estimated the costs to be only 0.02% of average annual revenue for Class III railroads. Therefore, FRA is certifying that this final rule will not have a significant economic impact on a substantial number of small entities. On the issue of FRA's estimate of benefits, FRA has decreased the number of accidents/incidents from ten (in the NPRM RIA) to one accident/incident under the "May Have Contributed" category in the RIA associated with this final rule based on the comments received from AAR and ASLRRA.

Turning to the contention from AAR and ASLRRA that there is no safety justification for this rule, FRA disagrees with the premise that because railroad safety has improved over the last 20 years, the agency does not need to take actions that could further improve safety. Moreover, the associations neglected to mention in their comment that one of the changes in the railroad industry over the past few decades has been the introduction of certification requirements. The locomotive engineer certification

requirements in part 240 went into effect in 1991,³³ and the conductor certification requirements in part 242 became effective just over a decade ago in 2012.³⁴ Thus, it stands to reason that certification has been one of the factors that has improved railroad safety in recent decades and instituting such requirements for dispatchers could lead to similar improvements in the future.

Finally, in response to APTA's comment on certification pay, FRA does not think that pay will increase solely due to certification. Salary negotiations are based on many factors and are typically long-term agreements that would not be impacted by one individual regulation.

2. Comments Relating to RSIA Authority

In their joint comments on the proposed rule, AAR and ASLRRA challenge FRA's assertion that section 402 of the RSIA authorized the Secretary to prescribe regulations requiring the certification of dispatchers. AAR and ASLRRA assert that Congress only authorized DOT to issue regulations requiring certification if the Secretary determined in a report to Congress that regulations are "necessary to reduce the number and rate of accidents and incidents or to improve railroad safety."³⁵ AAR and ASLRRA contend the Secretary failed to make such a determination in the 2015 report to Congress.

FRA's Response

While section 402 of the RSIA required the Secretary to issue a report to Congress "about whether the certification of certain crafts or classes of railroad carrier or railroad carrier contractor or subcontractor employees is necessary to reduce the number and rate of accidents and incidents or to improve railroad safety," it did not require the Secretary to make an official determination in this report that the issuance of dispatcher

³³ 56 FR 28227, 28228 (June 19, 1991).

³⁴ 76 FR 69802 (Nov. 9, 2011).

³⁵ Rail Safety Improvement Act of 2008, Public Law 110-432, section 402, 122 Stat. 4848, 4884 (2008).

certification regulations was necessary to reduce the number and rate of accidents and incidents or to improve railroad safety, as a necessary precondition to the initiation of this rulemaking.

Section 402 of the RSIA authorizes the Secretary (and by delegation, FRA) to prescribe regulations requiring the certification of certain crafts or classes of railroad carrier employees (or railroad carrier contractor or subcontractor employees) “pursuant to” the report to Congress that was required by section 402(b) of the RSIA. The phrase, “pursuant to,” is defined to mean “in a way that agrees with or follows (something).”³⁶ Thus, in section 402 of the RSIA, Congress authorized FRA to prescribe regulations that are consistent with the 2015 report to Congress. In the 2015 report, the Secretary stated that dispatchers were potentially the most viable candidates for certification due to the complex safety-critical work they perform and the high turnover in the dispatching force which was contributing to a less experienced workforce. The report also noted that dispatcher certification could improve safety by preventing individuals with active substance abuse disorders from working as dispatchers.³⁷ Based on the report’s findings and the agency’s outreach to stakeholders,³⁸ FRA determined that the number and rate of accidents and incidents would be expected to decrease and railroad safety would be expected to improve if it required certification of dispatchers.

Moreover, FRA notes that it has broad authority to “prescribe regulations and issue orders for every area of railroad safety,” including this regulation.³⁹

3. Comments Stating that Contractors and Subcontractors Should Be Responsible for Certifying their Own Employees

³⁶ www.britannica.com.

³⁷ FRA-2022-0019-0001.

³⁸ See Section II.F for a discussion of FRA’s outreach to stakeholders.

³⁹ 49 U.S.C. 20103(a). The Secretary has delegated this authority to the Federal Railroad Administrator. 49 CFR 1.89.

In AAR and ASLRRA's joint comment, they state that contractors should be responsible for certifying their own employees, as they are in the best position to implement and manage a certification program of their employees, and other parts of FRA's regulations allow for contractors to have their own programs. They further note that dispatching is highly specialized work and that many short line railroads do not have the requisite expertise to oversee a dispatcher certification program. They also contend it would be "an inefficient waste of resources for dozens of railroads to certify the same individual in any given period."⁴⁰ Lastly, AAR and ASLRRA state that "[r]ailroads are equally incentivized to ensure safety of dispatcher operations no matter which party is responsible for implementing and managing the dispatcher certification program."⁴¹

In a separate comment, ASLRRA noted that no other part of FRA's regulations requires a railroad to determine whether a non-employee has the necessary qualifications to perform a task. ASLRRA also criticized the NPRM for not providing guidance on how a small railroad should coordinate with other railroads if a contractor dispatcher gets decertified on their railroad.⁴²

FRA also received comments regarding this issue that did not express support for or opposition to the NPRM, but requested clarification on how this rule would work in practice. One individual asked why this rule did not apply to training organizations, contractors, and learning institutions. This person also asked whether railroads would be responsible for keeping the performance records of dispatchers who are contractors.⁴³ Atlantic Railways submitted a comment asking whether a dispatch center that dispatches for several railroads can create a model program that can be adopted by all the railroads that use that dispatch center and whether such a model program has been proposed.⁴⁴

⁴⁰ FRA-2022-0019-0041.

⁴¹ FRA-2022-0019-0041.

⁴² FRA-2022-0019-0042.

⁴³ FRA-2022-0019-0008.

⁴⁴ FRA-2022-0019-0043.

FRA's Response

After giving this issue careful consideration, consistent with the NPRM, and consistent with FRA's certification regulations for locomotive engineers and conductors in parts 240 and 242, FRA maintains that railroads are in the best position to be held responsible for establishing and implementing a dispatcher certification program. If a railroad has dispatch tasks being performed over its track, then it should be held responsible for ensuring those tasks are being performed by individuals who meet the necessary qualifications, even if such persons are not employees of the railroad. Even though AAR and ASLRRA stated in their joint comment that railroads would be equally incentivized to make sure their dispatching operations are safe regardless of who is responsible for the certification program, the associations offer no support for this position. To the contrary, it seems that a railroad would make a greater effort to ensure the safety of its dispatching operations if it would be held accountable for any failures to comply with this rule.

With respect to the associations' concern that some railroads, especially short line railroads, do not have the expertise to oversee a dispatcher certification program, part 245 specifically allows for the involvement of third parties in this process. Sections 245.107(b)(1)(iii) and 245.119(b) explicitly note that third parties may perform the training required in a certification program. In fact, there is nothing in this rule that prevents a contractor or other third party from drafting, implementing, and managing a railroad's dispatcher certification program. Therefore, railroads that do not have the requisite internal expertise are allowed to hire a contractor to perform these duties. These contractors can be as actively involved in the railroad's day-to-day compliance with this rule as the railroad desires, but because FRA is in the business of regulating railroads, the agency feels that the responsibility for this compliance should ultimately lie with the railroad. Even though FRA allows for contractors to have their own training programs

under 49 CFR part 243 (part 243), certification is different, as will be discussed below, and FRA's other certification regulations in parts 240 and 242 only provide for railroads to have certification programs. Thus, FRA intends to maintain this consistency across its certification regulations.

AAR and ASLRRA also allege that this rule would result in an inefficient waste of resources as dozens of railroads would have to certify the same individual. However, this comment ignores the streamlined process for certifying dispatchers provided by § 245.125 which allows a railroad to rely on certain certification determinations made by another railroad. In such situations, the only determinations that the certifying railroad would be required to make under § 245.125(b) are that the other railroad's certification is still valid; that the dispatcher received training on the physical characteristics of the territory; and that the dispatcher has demonstrated the necessary knowledge of the railroad's operating rules, territory, dispatch systems, and technology. Thus, for many contractor dispatchers who dispatch for dozens of railroads, it should be an expedited process for them to obtain the necessary certifications from other railroads. Furthermore, since many of these contractors dispatch for several railroads from a single facility, it should further expedite the process since most, if not all, of their relevant certification files should be in a central location. Despite the associations' critique of this process, the alternative would be to risk having dispatchers working on territories they have not been trained on and do not have the requisite knowledge to dispatch over.

In response to ASLRRA's comment that no other part of FRA's regulations require railroads to make determinations about a non-employee's qualifications, FRA notes that is inaccurate. FRA acknowledges that while it is more common for railroads to use contractors for dispatching, some railroads hire contractors to serve as locomotive engineers and conductors on their trains. In such situations, the railroad would still have to certify these non-employees under part 240 or part 242. With respect to ASLRRA's

comment seeking guidance on how small business railroads should coordinate with other railroads when a contractor dispatcher is decertified, FRA does not see a need to issue such guidance. When a dispatcher's certification is revoked, § 245.213(c)(1) places the onus on the dispatcher, not the revoking railroad, to notify any other railroad the person has a dispatcher certificate with, of the revocation. The only instance where this rule would require a railroad to share information about a dispatcher's revocation with another railroad is if the railroad received a written request pursuant to § 245.113(c). However, in such circumstances, the railroad would be notified in writing of the need to share this information with another railroad, so further guidance from FRA is unnecessary.

Turning to the questions FRA received from other commenters on this topic, a railroad is required to retain all information required under § 245.203 even if a dispatcher is a contractor. As for Atlantic Railways' question, a dispatch center would be allowed to create a model program that could be used by several railroads. FRA is not aware of any model programs currently in development, but FRA imagines that several entities will be creating such programs once this rule goes into effect.

4. Comments Related to Evidence that this Rule Would Limit Job Hopping

In their comments on the proposed rule, AAR and ASLRRRA challenged the assertion that dispatchers switch jobs more frequently than other crafts and stated that FRA presented no evidence in support of this claim. They also contended that because dispatchers become experts on the safe movement of trains through a specific territory, there is a strong disincentive for them to change jobs and have to learn a new territory. Lastly, in addition to questioning the accuracy of the positive alcohol and drug test rates for dispatchers referenced in the 2015 report to Congress, AAR and ALSRRA argue that dispatchers with substance abuse disorders are already screened through pre-employment drug and alcohol testing and the railroads' continuous monitoring of dispatchers.

FRA's Response

This final rule is designed to take a proactive approach to minimize (and hopefully eliminate) job hopping among dispatchers. While FRA does not have data showing the frequency of job hopping among dispatchers, it is known throughout the industry that it does occur. AAR and ASLRRA suggest dispatchers are disincentivized to change jobs because it would require them to gain expertise on a new territory. However, FRA is not concerned about dispatchers who voluntarily change jobs; rather this rule is intended to curtail job hopping when a dispatcher loses their job with one railroad due to a substance abuse problem or a rules violation. Given the current lack of regulations requiring previous employment background checks, it is relatively easy for dispatchers to leave their current employer after committing a rules violation and find work on another railroad. Furthermore, while AAR and ASLRRA assert that railroads are well positioned to identify dispatchers with substance abuse problems, there is no guarantee that a person with a substance abuse problem will test positive during a pre-employment test. Additionally, dispatcher certification, through the safety checks required by §§ 245.113 and 245.115, will make it difficult for dispatchers who commit certain safety violations to continue performing safety-sensitive work for another railroad.

5. Comments Relating to Evidence that New Dispatcher Duties Necessitate Requiring Certification

AAR and ASLRRA are critical of FRA's assertion that dispatching has become more complex over the last five to ten years. Specifically, they allege that in making this claim, FRA cites to a report by Foster-Miller, Inc., that was written more than 17 years ago. They also assert that FRA did not provide any data or analysis to show that a dispatcher's job is made more complex by PTC.

FRA's Response

In criticizing FRA's reliance on the 2006 Foster-Miller report, AAR and ALSRRA misconstrue the NPRM. While FRA cited to the Foster-Miller report to

provide an overview of some of the tasks dispatchers perform, FRA does not reference the 2006 report as support for its position that dispatching has become more complex over the past five to ten years. In fact, after the NPRM states that “[o]ver the past 5 to 10 years, the job of a railroad dispatcher has become more complex and demanding[,]” there is no further reference to the Foster-Miller report.⁴⁵ Instead, FRA cited to a decrease in the number of dispatchers which has caused an increase in the size of the territories dispatchers are responsible for, as support for its assertion; a point that AAR and ALSRRA do not dispute.

AAR and ASLRRA also disagree with FRA’s characterization that PTC has made dispatching more complex. They argue that it has made dispatching easier because PTC serves as a back-up system to prevent human factor accidents. FRA agrees that PTC has improved railroad safety, but that does not mean it has made dispatching easier. In recent years, dispatchers have had to learn the complexities of implementing numerous new technologies that have been introduced into the industry such as PTC. Today’s dispatcher is in a constant state of learning based on the rapid evolution of technologies and processes which makes the dispatcher’s job more challenging even if the end result is a safer railroad network.

6. Comments Asserting that the Rule is Duplicative of Parts 243, 270, and 271

AAR and ASLRRA contend that the gaps in FRA’s regulations that this rule is trying to fill are either non-existent or immaterial. They argue that by adding these new certification requirements, FRA is harming railroad safety “by causing confusion and diverting resources from higher priority safety risks.”⁴⁶ They further state that there is significant overlap between this rule and part 243 and that in the NPRM, FRA incorrectly stated that part 243 does not require dispatchers to undergo a performance skill

⁴⁵ 88 FR 35574, 35576 (May 31, 2023).

⁴⁶ FRA-2022-0019-0041.

evaluation conducted by a qualified instructor. They cite to 49 CFR 243.201(c)(2) as evidence that performance skill evaluations are required under part 243 to demonstrate on-the-job training (OJT) proficiency. They also note that experienced employees are required to undergo refresher training in accordance with 49 CFR 243.201(e).

With respect to the System Safety Program (SSP)/Risk Reduction Program (RRP) requirements in 49 CFR parts 270 and 271 (parts 270 and 271), AAR and ASLRRA take the position that requiring dispatcher certification casts aside the risk analysis performed under parts 270 and 271 and could lead to railroads focusing on lower priority risks associated with dispatchers. In response to FRA's assertion that not all railroads have to comply with parts 270 and 271, they allege that the SSP/RRP requirements apply to more than 83% of the line-haul mileage and 95% of the workers in the industry, making this distinction immaterial.

FRA's Response

As an initial matter, AAR and ASLRRA's narrative that this rule is duplicative of parts 243, 270, and 271 appears to be contradicted by congressional direction. As they note in their joint comment, FRA issued the training regulations in part 243, the SSP regulations in part 270, and the RRP regulations in part 271 because of a statutory mandate in the RSIA.⁴⁷ However, in the same law, Congress explicitly permitted requiring the certification of certain crafts if the Secretary determined it was necessary to improve railroad safety.⁴⁸ Had Congress determined that certification requirements were duplicative of what was already mandated by the RSIA, it would not have required the Secretary to study whether other crafts or classes of employees could benefit from

⁴⁷ Rail Safety Improvement Act of 2008, Public Law 110-432, sections 103, 109, 401(a), 122 Stat. 4848, 4853-56, 4866-67, 4883 (2008).

⁴⁸ Rail Safety Improvement Act of 2008, Public Law 110-432, section 402, 122 Stat. 4848, 4884 (2008).

certification, or given the Secretary the statutory authority to issue additional certification regulations.

Turning to any overlap between this rule and part 243, FRA stands by its position proffered in the NPRM that this rule complements, not duplicates, part 243. FRA concedes that the NPRM statement that part 243 does not require dispatchers to undergo performance skill evaluations is incorrect. However, these skill evaluations required under part 243 only apply to newly hired employees or persons who have been assigned a new safety-related task. Part 245 builds off the initial performance skill evaluations required in part 243 by mandating that dispatchers also receive an unannounced compliance test each calendar year to ensure that dispatchers continue to safely perform their duties after their initial certification. Part 243 has no such continuing compliance testing requirement. While 49 CFR 243.205 requires employers to perform periodic oversight tests and inspections to determine whether their employees are complying with Federal railroad safety laws and regulations, the rule does not require that all employees receive such tests and inspections. In fact, under part 243, an employee could work for decades without being tested or inspected. Therefore, § 245.123 fills a significant gap in FRA's training rule.

Also, as noted in the NPRM, part 243 does not require railroads to have formal processes in place for promptly removing dispatchers from service if they violate one or more basic regulatory standards that could have a significant negative impact on the safety of rail operations. AAR and ALSRRA failed to address this fact in their comment. Part 245 complements part 243 by mandating that railroads remove dispatchers from service if they commit one of the egregious safety violations enumerated in § 245.303(e). This rule also requires railroads to perform certain safety checks before certifying a person as a dispatcher. These safety checks pertain to a person's prior safety conduct, both working on railroads and as a motor vehicle operator; their history of substance

abuse disorders; and their visual and hearing acuity. These are basic safety requirements that are not addressed in part 243. Thus, FRA does not find this new rule duplicative of FRA's training rule.

FRA is also unconvinced by AAR and ALSRRA's argument that this rule is duplicative of parts 270 and 271. As stated in the NPRM and as implicitly acknowledged in their joint comment, there is no guarantee in parts 270 and 271 that railroads will address risks associated with dispatching. Parts 270 and 271 permit railroads to prioritize risks,⁴⁹ thus even if a railroad identifies aspects of dispatching as a risk, the railroad may not implement any mitigation efforts to reduce that risk if it determines other risks are higher priorities. Given this possibility, it is unclear how part 245 can be viewed as duplicative of parts 270 and 271. Moreover, FRA disputes the assertion from the associations that this rule casts aside the risk analysis railroads are required to perform under the parts 270 and 271. Nothing in this rule changes a railroad's responsibilities under those rules. They can continue to perform the risk analysis and the necessary mitigations to comply with parts 270 and 271 while also implementing a dispatcher certification program.

In conclusion, FRA does not see this new rule as duplicative or a hindrance to other existing regulations. As stated in the 2015 report to Congress, the purpose of certification is to document and verify that the holder of the certificate has achieved certain training and proficiency and to create a record of safety compliance infractions that can be reviewed when hiring experienced individuals. While developing this rule, FRA has been mindful of other regulations that may touch upon topics covered in this rule, including FRA's training, qualification, and oversight regulations in part 243; SSPs and RRP in parts 270 and 271; and fatigue risk management programs in parts 270 and

⁴⁹ See e.g., 49 CFR 270.5 (definition of "risk-based hazard management") and 271.103(b)(3).

271. However, FRA finds that this rule would complement, rather than duplicate, those regulations.

D. Miscellaneous Comments

FRA received a couple of comments that raised miscellaneous issues. Some commenters felt that FRA should require that certain programs be certified either in addition to or instead of dispatchers. One commenter listed Unified Train Control System, Movement Planner, Trip Optimizer, and PTC as programs that should have to be certified.⁵⁰ Another commenter added that many of the errors that occur in the dispatching field are due to failures in technology, yet there are no requirements “for such programs to be monitored, certified, and overseen to ensure they aren’t providing inaccurate information to the train dispatcher.”⁵¹ FRA appreciates these comments and acknowledges that this is an issue that may warrant consideration by FRA in the future. However, requiring that certain programs be certified is beyond the scope of this rulemaking.

One individual suggested that screening dispatchers for diabetes had merit, but they also expressed concern that dispatchers would be held out of service for failing a physical.⁵² This commenter did not elaborate on why dispatchers should be screened for diabetes. Since FRA is unaware of any reason why a person’s diabetes diagnosis would affect their ability to safely perform the job of a dispatcher, FRA sees no reason to add such a requirement to this rule.

IV. Section-by-Section Analysis

⁵⁰ FRA-2022-0019-0010.

⁵¹ FRA-2022-0019-0015.

⁵² FRA-2022-0019-0020.

This section responds to public comments and identifies any changes made from the provisions as proposed in the NPRM. Provisions that received no comment, and are otherwise being finalized as proposed, are not discussed again here.

Section 245.3 Application and Responsibility for Compliance.

This section specifies that this rule applies to all railroads except for those railroads described in paragraph (a). Paragraph (a)(1) of this section exempts those railroads that do not have any dispatch tasks from the requirements of this part. FRA revised this paragraph from what appeared in the NPRM to clarify that “dispatch” is the term defined in § 245.7, not “dispatch tasks.”

Section 245.5 Effect and Construction.

This section addresses several legal issues including that FRA does not intend to alter the terms, conditions, or interpretations of existing collective bargaining agreements that use job classification titles other than dispatcher for a person who dispatches a train. AAR and ASLRRRA allege that FRA fails to understand that this new rule will require the altering of collective bargaining agreements to satisfy the requirements of this new rule. Based on this comment, it appears the associations are misconstruing paragraph (a) in this section. Paragraph (a) does not state that collective bargaining agreements will not have to be altered as a result of this new rule. To the contrary, FRA understands that, due to the new requirements in this rule, collective bargaining agreements may need to be modified. Paragraph (a) simply states that the rule does not affect the use of job classification titles other than dispatcher in collective bargaining agreements for persons who dispatch trains.

Section 245.7 Definitions.

This section defines a number of terms that have specific meaning in this part. As an initial matter, FRA has removed the definition of “controlled track” from this section as that term does not appear in the final rule.

FRA received a number of comments regarding its proposed definition of “dispatch.” TTD, ATDA, and IBEW all requested that FRA provide more specificity to the definition. In particular, all three labor organizations appeared to support ATDA’s suggestion that paragraph (1)(iii) of this definition be revised to “[i]ssuing a mandatory directive, including, but not limited to, speed restrictions, highway-rail grade crossing protections, or those which establish working limits for roadway workers.”⁵³ FRA agrees with the labor organizations that this proposed revision is an improvement on the NPRM definition, as it more accurately reflects what FRA is trying to convey. FRA therefore adopts this change in the final rule.

AAR and ASLRRA submitted a comment requesting that FRA clarify that the definition of “dispatch” only applies to persons covered by the definition of “dispatching service employee” found in 49 U.S.C. 21101(2), and it does not apply to persons performing *de minimis* dispatching functions. In particular, AAR and ASLRRA wanted to ensure the definition did not apply to positions such as bridge tenders, tower operators, control operators, and yardmasters who have traditionally not been treated as dispatchers, but who sometimes perform *de minimis* dispatching functions. They also expressed concern that FRA was attempting to include certain roadway workers in the definition of “dispatch” without a valid safety justification. They contend that expanding the definition would require railroads to alter their collective bargaining agreements and “would create an expensive, unworkable administrative mess.”⁵⁴ Lastly, AAR and ASLRRA discussed back-office employees who manage and analyze data that is used by dispatchers. They stated that there was no basis for FRA to expand the definition of “dispatch” to these employees. An individual commenter also sought clarification from FRA on what type of work would require certification under this rule. Specifically,

⁵³ FRA-2022-0019-0038.

⁵⁴ FRA-2022-0019-0041.

would the definition of “dispatch” apply to “Terminal/Supervisors” and trainmasters.⁵⁵

Another commenter asked whether it was a person’s job title that determined whether they had to be certified or did it depend on the territory they worked on.⁵⁶

As a general rule, FRA did not intend for this rule to apply to yardmasters, bridge tenders, tower operators, control operators, terminal supervisors, trainmasters, roadway workers, or back-office employees. FRA believes the vast majority of workers with these titles will be excluded from the definition of “dispatch” as it appears in this final rule. As the commenters expressed, these workers typically would not be encompassed in the definition of “dispatch” because either: (1) they do not meet the definition of a “dispatching service employee” as defined by 49 U.S.C. 21101(2); or (2) paragraph (2) of this definition applies to the work they perform. Paragraph (2) of this definition excludes from the definition of “dispatch” actions of personnel in the field: (i) effecting implementation of a written or verbal authority or permission for a railroad operation, including an authority for working limits granted to a roadway worker;⁵⁷ (ii) operating a function of a signal system designed for use by those personnel; or (iii) sorting and grouping rail cars inside a railroad yard to assemble or disassemble a train.

While most workers with the job titles listed above will be excluded from this rule under paragraph (2) or because they do not meet the definition of “dispatching service employee” in 49 U.S.C. 21101(2), a person’s job title is irrelevant to the determination of whether they must be certified under this rule. Instead, it is the work function being performed that determines whether an individual must be certified. For example, a person could have the job title of “yardmaster” but if they perform functions that meet the

⁵⁵ FRA-2022-0019-0023.

⁵⁶ FRA-2022-0019-0012.

⁵⁷ In this final rule, FRA revised paragraph (2)(i) of this definition to remove a redundancy that appeared in the NPRM, but the substance of the definition is unchanged.

definition of “dispatch” in this section, they would have to be certified despite their job title.

The American Association of Nurse Practitioners (AANP) submitted a comment on the definition of “medical examiner” in the proposed rule. Noting that approximately 70% of all nurse practitioner graduates deliver primary care, AANP requested that FRA revise the definition of “medical examiner” to include nurse practitioners and thereby authorize them to make determinations in accordance with this rule. AANP asserted that the definition of “medical examiner” in the proposed rule was based on FRA’s locomotive engineer certification regulations in 49 CFR part 240, which are now 32 years old and not reflective of the current practice environment where nurse practitioners provide a substantial portion of care. While FRA has not revised the definition of “medical examiner” to specifically include nurse practitioners, FRA clarifies that if a nurse practitioner is a licensed or certified technician, FRA’s regulations in 49 CFR parts 240 and 242 (and this final rule) allow the nurse practitioner to perform the vision and hearing examinations required in those parts (and in this rule). However, given the complex nature of this issue and FRA’s lack of regulatory requirements for medical examiners, the question of whether nurse practitioners should be allowed to serve as medical examiners (and if so, whether they should be required to comply with specific regulatory or industry standards) is best addressed in a future rulemaking during which comments can be solicited specifically on this issue. Accordingly, only a doctor of medicine or doctor of osteopathy is authorized by this final rule to conduct a medical evaluation to determine whether a person can safely work as a certified dispatcher if the person fails the visual or hearing acuity examination. FRA did revise the last sentence of this definition changing “employee” to “individual” since not all persons examined by a railroad medical examiner will be railroad employees.

FRA also received several comments on the proposed definition of “qualified instructor.” TTD, ATDA, and IBEW submitted similar comments addressing paragraph (4) of the proposed definition (paragraphs (2) and (3) of the definition in the final rule) which states that if a railroad has designated employee representation, a qualified instructor must either be selected in concurrence with the designated employee representative or have at least one year of experience as a certified dispatcher. The labor organizations propose to change the “or” in paragraph (4) to an “and” and that the definition require a minimum of two years experience as a certified dispatcher. Therefore, under the organizations’ proposal, a qualified instructor for a railroad that had designated employee representation would have to be selected in concurrence with the designated employee representative and have at least two years service as a certified dispatcher. In support of its position, ATDA stated that requiring concurrence from a union representative would be beneficial because its “representatives are typically working train dispatchers themselves, making them some of the best individuals suited to determine a train dispatcher’s proficiency and have a vested interest in ensuring that candidates receive the best training and instruction possible.”⁵⁸ The unions also agreed that one year of dispatching experience was insufficient for someone to be a qualified instructor, and pointed to the fact that many railroads do not consider a dispatcher to be fully proficient until they have five years of experience. TTD alleged that some Class I railroads are having newly certified conductors train conductor candidates, and this is creating dangerous conditions that this rule should aim to avoid with respect to dispatchers by requiring two years of dispatching experience.

In contrast, APTA submitted a comment requesting that paragraph (4) of this definition be deleted altogether. APTA contends selecting a qualified instructor is

⁵⁸ FRA-2022-0019-0038.

inherently the responsibility of the railroad and should not be subject to another party's consent. Alternatively, APTA suggests a railroad could list its minimum standards to become a qualified instructor in its certification program.

After review of these comments, FRA has decided not to adopt these proposals. FRA disagrees with APTA that railroads with designated employee representation should not have to obtain concurrence from labor. The required concurrence of the designated employee representative has been retained to facilitate input by labor, specifically in situations involving qualified instructor candidates with minimal experience (*i.e.*, less than 12 months experience working as a dispatcher).

While FRA agrees with the labor organizations that it would be beneficial for qualified instructors to have more than one year of dispatching experience and FRA encourages railroads to select qualified instructors with more than one year of dispatching experience, FRA is concerned that requiring two years of experience would be too burdensome for some railroads especially given the high turnover rate among dispatchers. Furthermore, FRA does not have sufficient support to justify imposing a two-year requirement. FRA also does not concur with requiring that all qualified instructors on railroads with designated employee representation have both concurrence from labor and at least one year of dispatcher experience. This revision would essentially give a designated employee representative veto power over any person the railroad chooses as a qualified instructor. The goal of this definition is to provide for the involvement and consultation of labor in the selection of qualified instructors while also maintaining the railroad's autonomy. The proposal by the organizations would fail to strike that balance.

Even though FRA is not instituting any of the proposed changes to this definition suggested by APTA and the labor organizations, it is revising the definition that was in the proposed rule. The definition in the NPRM had some redundancies, and after careful consideration, FRA has decided to change the format of this definition so that it mirrors

the definition of qualified instructor in part 242. FRA has determined that this version of the definition is more comprehensible and it clarifies that when a railroad has designated employee representation, the railroad must first attempt to obtain labor's concurrence of the railroad's selection of a qualified instructor. Only if the railroad is unable to obtain labor's concurrence, may it move to paragraph (3) of the definition and select a person, without such concurrence, who has at least one year of service working as a dispatcher.

Section 245.11 Penalties and Consequences for Noncompliance.

This section acknowledges FRA's authority to issue civil penalties for any violations of this part. IBEW expressed its support for the proposed language in this section and its agreement that individuals should only receive penalties for willful violations.

Section 245.103 FRA Review of Certification Programs.

This section covers FRA's process for reviewing and approving certification programs. ATDA and TTD submitted comments contending that paragraph (a) of this section should be revised so that Class II railroads must submit their certification programs to FRA within eight months of the effective date of the final rule instead of 16 months as stated in the NPRM. These labor organizations contend that Class II railroads have sufficient resources to complete their programs within this reduced timeframe, and that the 16-month timeframe is excessive and would delay the implementation of this important safety requirement. IBEW submitted a similar comment stating that those Class II railroads who have the resources to complete their programs within eight months should do so to avoid unnecessary delays in implementing this rule.

Despite these comments, FRA has decided not to make any changes to the program submission schedule from the proposed rule. In the 240 days between the deadlines referenced in paragraphs (a)(1) and (2) of this section, FRA will be devoting its resources to reviewing approximately 41 certification programs from Class I and

commuter railroads⁵⁹ and is unlikely to have the capacity to begin its review of Class II programs until after the date referenced in paragraph (a)(2). Also, FRA is concerned that the eight-month deadline proposed by the labor organizations may put too much of a strain on some Class II railroads. Thus, while FRA shares the organizations' desire for a speedy implementation of this rule, FRA does not believe that giving Class II railroads this additional time to submit their certification programs will delay implementation.

Paragraph (b) of this section states that railroads that begin dispatching operations after this rule goes into effect, cannot commence such dispatching operations until FRA has reviewed and approved the railroad's certification program. FRA made some minor revisions to this paragraph from the proposed rule to make it clearer, but these changes did not affect the substance of the paragraph. Paragraph (c) of this section provides the method railroads must use to submit their certification programs to FRA. In the NPRM, this paragraph stated that dispatcher certification programs should be uploaded to a secure document submission site. However, after further consideration, FRA determined it would be easier for both railroads and the agency if programs were submitted by email. Paragraph (c) has been revised accordingly in this final rule.

With respect to paragraph (d) of this section, which requires railroads to notify certain parties when it submits its certification program to FRA, AAR and ASLRRA commented that railroads should not have to have their certification programs approved by the labor union president and all of the railroad's dispatcher employees. AAR and ASLRRA claim such a requirement would be a substantial change from what is required in the locomotive engineer and conductor certification rules and is arbitrary and capricious. Specifically, they are concerned that a labor union president could hold up

⁵⁹ Federal Railroad Administration, "Certification of Dispatchers Final Rule Regulatory Impact Analysis."

their approval causing the railroad to miss the deadline for submitting the certification program to FRA.

AAR's and ASLRRA's concern with respect to paragraph (d) of this section is unwarranted as this rule does not require railroads to obtain approval of their programs from labor union presidents or their dispatching employees. This rule only provides these individuals with the opportunity to review and comment on these programs. FRA believes the source of AAR and ASLRRA's confusion is the reference to a "request for approval" in paragraph (d)(1). However, this document, which is described in greater detail in § 245.107(a), is a request for approval from FRA, not from a labor union president or dispatching employee. In an effort to avoid further confusion, FRA is adding a reference to § 245.107(a) in paragraph (d)(1).

Several labor organizations, including ATDA, IBEW, and TTD, expressed concerns about the comment period in paragraph (e) only being 45 days. They are particularly concerned about the initial influx of programs they will have to review after this rule first goes into effect, and that 45 days will not be enough time to review these programs and provide comments. Therefore, the unions are requesting that the comment period be extended to 90 days. TTD also noted that unions would likely receive these certification programs shortly after they receive Positive Train Control Safety Plan Requests for Information to review. This would put a strain on their resources and rushed feedback from stakeholders will not be as beneficial to FRA.

Based on these comments from the labor organizations, FRA has extended the comment period from 45 days to 60 days. This change will provide commenters with additional time to draft and submit meaningful comments that will assist FRA in its review of these programs. However, in an effort to avoid further delays to the implementation of this rule, FRA is declining to extend the comment period to 90 days. FRA understands that labor organizations are particularly concerned about the initial

influx of programs they will need to review when this rule first goes into effect, but once the effective date of this rule is established, the unions will have several months to plan how to efficiently allocate their resources during the timeframes when they can expect to receive a large number of programs to review. Also, FRA will consider late-filed comments to the extent practicable and will extend comment periods on a case-by-case basis if circumstances warrant (especially during these initial periods where there is a high volume of programs to review).

AAR and ASLRRA are also opposed to the FRA review and approval process that is described in paragraph (f). Specifically, they contend that the proposed process allows for FRA “to arbitrarily hold railroads in limbo for an indefinite time period even if their programs are fully compliant”⁶⁰ and does nothing to ensure that FRA’s review process is handled expeditiously. Instead, AAR and ASLRRA contend that FRA should implement the same review and approval process found in parts 240 and 242 where a certification program or material modification is considered approved 30 days after it is submitted unless FRA notifies the railroad in writing that its program has been disapproved.

FRA is declining to adopt this suggestion as it is untenable following a 2020 decision from the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit). In *Brotherhood of Locomotive Engineers and Trainmen v. Federal Railroad Administration*, the D.C. Circuit invalidated FRA’s passive approval of a modification to Kansas City Southern Railway’s locomotive engineer certification program. In its decision, the court noted that the Administrative Procedure Act “requires agencies to reasonably explain to reviewing courts the bases for the actions they take and the

⁶⁰ FRA-2022-0019-0041.

conclusions they reach.”⁶¹ The court found FRA’s passive approval system allowed for a “complete absence of any accompanying explanation for the agency’s approval” of the certification program.⁶² Since the administrative record did not contain any explanation or reasoning for the determinations made by FRA in approving the program, the court vacated and remanded the case for FRA to provide a more complete explanation of the agency’s action or to take new agency action altogether.⁶³

Given the D.C. Circuit’s criticism of the passive approval system in part 240, FRA will not include a similar system in this rule. Therefore, paragraph (f) of this section creates a new system where a program is not considered approved by FRA until the agency issues an approval letter to the railroad. Contrary to AAR and ASLRRA’s comment, FRA will not arbitrarily hold railroads in limbo for an indefinite period of time. FRA will make every effort to meet its goal of issuing a decision on a program within 120 days of submission. This goal was 90 days in the NPRM but because FRA extended the comment period in paragraph (e) of this section, it felt that 120 days was a more realistic goal to complete its review of these programs. However, FRA acknowledges that meeting this goal will not always be feasible and will be especially difficult during the initial implementation of this rule when FRA receives several programs to review at the same time. During this time, railroads will be able to continue to operate as they did prior to this rule going into effect so it is unclear how railroads will be harmed by such delays.

AAR and ASLRRA also commented that FRA should provide more clarity to its definition of “material modification” found in paragraph (g)(1) as they allege the vagueness of the proposed definition could result in stifling innovations in safety

⁶¹ *Brotherhood of Locomotive Engineers & Trainmen v. Fed. R.R. Admin.*, 972 F.3d 82, 115 (D.C. Cir. 2020).

⁶² *Brotherhood of Locomotive Engineers & Trainmen*, 972 F.3d at 116-17.

⁶³ *Brotherhood of Locomotive Engineers & Trainmen*, 972 F.3d at 117.

systems. In particular, they want FRA to “allow railroads to use different delivery methods and to incorporate new technology without treating those changes as material modifications. Likewise, they state that FRA should limit material modifications to significant content-based changes that are likely to impact safety and not treat edits to test questions, structure, and timelines as material modifications.”⁶⁴

FRA disagrees with the AAR and ASLRRA suggestion to limit what is considered a material modification under this rule. The term “material modification” is specifically triggered when there is a change in an approved certification program that significantly affects the certification process. This can include alterations in the training curriculum, modifications to the testing or assessment methods, changes to the duration of the program or program components such as training, changes in the number of test questions or the scoring system, or any other changes that would substantially impact the way dispatchers are trained, evaluated, and certified. It is vital that FRA have the opportunity to review these proposed changes to a certification program to ensure they align with the overall goals of maintaining safety and compliance.

AAR’s and ASLRRA’s desire to not include the incorporation of new technologies as material modifications is unworkable. There are significant safety concerns at play when incorporating new technologies, and if these new technologies do not receive the proper level of regulatory oversight, that could lead to safety risks being introduced into the system which could undermine public confidence in railroad safety. New technologies also have the potential to affect working conditions and the environment which is why it is vital that stakeholders are engaged in the process of modifying a certification program based on new technologies as is provided for in paragraph (e) of this section. Therefore, FRA determined it would be inappropriate to

⁶⁴ FRA-2022-0019-0041.

allow railroads to introduce new technologies into their previously approved certification programs without considering them to be material modifications to such programs.

NRC commented that there should be a standard process for submitting material modifications where railroads explain the reason for the modification and discuss the dynamic risk assessments, training impact, desired outcomes, and mitigations resulting from the modification. Railroads are welcome to include this information in their request for approval (described in § 245.107(a)(3)), but it is not required. FRA is concerned that NRC's proposal would be unduly burdensome and could stifle innovation and hinder a railroad's freedom to make business decisions that are in its best interest by creating a new requirement that the railroad justify its decision to modify its program. While railroads are encouraged to make modifications to their programs that will optimize railroad safety, ultimately the only requirement for a modification is that it complies with part 245. FRA is, however, amending paragraph (g) of this section to include a reference to the request for approval discussed in § 245.107(a)(3).

Lastly, TTD expressed its support for paragraph (h)(3) of this section, which requires that railroads with current dispatching operations, as of the effective date of this final rule, resubmit their certification program within 30 days of being notified by FRA that their program has been disapproved. TTD cited to instances of railroads not bringing their certification programs into compliance with parts 240 and 242, and specifically referenced recent accidents involving NS as support for their position. TTD recommended that FRA "amend this section to propose fines for railroads that repeatedly are not compliant with the certification requirements"⁶⁵ in this rule. FRA appreciates TTD's comment; however, such an amendment is unnecessary as § 245.11 already provides for FRA to issue civil penalties for violations of this part. FRA will publish a

⁶⁵ FRA-2022-0019-0037.

civil penalty schedule for this part on its website. FRA is revising paragraph (h)(3)(iii) of this section to refer to “paragraph (g)(4) of this section” as the proposed rule incorrectly referenced paragraph (g)(3) instead.

Section 245.105 Implementation Schedule for Certification Programs.

This section contains the timetable for the implementation of this final rule. APTA submitted a comment that railroads should be allowed to designate those individuals who are in an initial training program when this rule goes into effect so that they can become certified dispatchers upon completion of the training program, pursuant to paragraph (c)(1) of this section. APTA contends that implementing certification requirements in the middle of a training program would be disruptive to the participants and instructors.

In response to APTA’s comment, paragraph (d) of this section allows railroads to continue to designate as certified dispatchers, those individuals who have been authorized by the railroad to perform the duties of a dispatcher, until the date that FRA approves the railroad’s certification program. Therefore, all railroads will be able to continue to designate individuals as certified dispatchers for several months after the effective date of this rule which should include any person who is in a dispatcher training program on the effective date of this rule. Railroads will no longer be able to designate persons as certified dispatchers under paragraph (d) once FRA approves the railroad’s program. FRA understands that some individuals will likely be in the middle of a training program when this occurs, but railroads will have several months to prepare for this occurrence and to figure out the best way to minimize any disruption.

FRA is revising paragraph (d) from the proposed rule to clarify that railroads are only allowed to “designate” persons as certified dispatchers in accordance with paragraph (d) between **[INSERT DATE 300 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]** and the date FRA approves the railroad’s certification

program. Once FRA approves a railroad's certification program, the designation system described in paragraph (d) is terminated, and a person must go through the full certification process described in subpart B of this rule. Paragraph (d)(1) has also been revised from the proposed rule because the NPRM stated that paragraph (d) applied to persons authorized by a railroad to perform the duties of a dispatcher between the effective date of the final rule and the date FRA approves the railroad's certification program. However, paragraph (d) only applies to persons authorized by a railroad to perform the duties of a dispatcher between **[INSERT DATE 300 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]** and the date FRA approves the railroad's certification program.⁶⁶

NRC's comment on paragraph (f) of this section is that all dispatchers should be certified within 6 to 12 months after FRA approves a railroad's program. FRA interprets this comment to mean that NRC thinks an individual should have to get recertified in accordance with the requirements of subpart B of part 245 within 6 to 12 months after FRA approves the railroad's program. FRA is electing not to adopt this suggestion as it thinks NRC's proposal would place too great a burden on large railroads in particular and may not be administratively feasible. As was stated in the NPRM, FRA sees a benefit to railroads (especially large railroads) spacing out the recertification process for its dispatchers so they recertify approximately one-third of their dispatchers each year.⁶⁷ This suggested approach would not be allowed under NRC's proposal as all dispatchers would have to be recertified within that first year after FRA approves the railroad's program. This would create a cycle where every three years, the majority of the railroad's dispatchers would be due for recertification and the railroad would have to

⁶⁶ Paragraph (c) of this section applies to all persons who have been authorized to perform dispatcher duties on or before **[INSERT DATE 300 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

⁶⁷ See 88 FR 35574, 35585 (May 31, 2023).

complete the recertification process in a short period of time. Such a system would likely have a deleterious effect on the quality of the recertification process and thus, would be harmful to railroad safety.

Finally, AAR and ASLRRA think FRA should eliminate paragraphs (f)(1) through (3) which allow dispatchers who are approaching retirement age to submit a request to their railroad that they not be recertified, in accordance with subpart B of part 245, until three years from the date the railroad's program is approved by FRA. They contend this provision is contrary to FRA's safety rationale for this rule and would allow a dispatcher to forego the full certification process for up to six years. They also argue this would be more burdensome on the railroads as they would have to keep track of a special category of employees and establish special protocols for them.

FRA is choosing to keep paragraphs (f)(1) through (3) in this final rule. These paragraphs simply allow dispatchers who meet the requirements of paragraph (f)(1) to make a request that the railroad not make them go through the full recertification process until their initial certification expires (three years after FRA approves the railroad's certification program). FRA included these paragraphs under the assumption that it would not be an efficient use of a railroad's resources to perform the full recertification process on a designated dispatcher who is going to retire before the end of their designation period. However, if, as AAR and ASLRRA suggest, a railroad finds that it would be more burdensome to keep track of this special category of employees, the railroad may deny these requests. The only obligation these paragraphs put on a railroad to grant these requests is found in paragraph (f)(2) which states that *if* a railroad grants any such request, it must grant all other requests "to every extent possible." In addition, this paragraph does not create a loophole where a dispatcher could go six years without having to go through the full recertification process. Paragraph (f) plainly states, with no exceptions, that no person shall be allowed to serve as a dispatcher more than three years

after their railroad's program is approved without going through the full recertification process described in subpart B of part 245. Nothing in paragraphs (f)(1) through (3) contradicts this language in paragraph (f).

Section 245.107 Requirements for Certification Programs.

This section provides the organizational requirements and a narrative description of what must be included in a railroad's certification program. After further review of the proposed rule, FRA determined more guidance was needed on material modifications to a previously approved program and on the request for approval that must accompany a railroad's submission to FRA. In paragraph (a)(1) in this final rule, FRA clarified that when a railroad submits a material modification to its program, it must provide FRA with a copy of the complete certification program with all the material modifications incorporated. This will assist FRA's review in determining whether the program as a whole (with the incorporated material modifications) satisfies the requirements of this part. In paragraph (a)(2), FRA added language stating that a railroad's request for approval of an initial program submission shall include a statement that the railroad is seeking approval of its program. FRA also added a paragraph describing what a railroad must include in its request for approval when making a material modification. Paragraph (a)(3) in the final rule states that such request for approval must include an explanation of all the material modifications the railroad wants to make to its program. This requirement will ease FRA's burden in identifying the changes the railroad is making to its previously approved program.

With respect to paragraph (b)(2)(ii), FRA mistakenly referred to § 245.119(g) in the NPRM. For the final rule, FRA has changed this reference to § 245.119(i) which contains the continuing education requirements for a training program. Lastly, FRA moved what was § 245.125(b) in the NPRM into this section by adding paragraphs (b)(2)(vi) and (b)(4)(iv). Paragraph (b)(2)(vi) of this section states that Section 2 of a

railroad's program shall address how it will administer the training of previously certified dispatchers who have had their certification expire. Paragraph (b)(4)(iv) of this section states that Section 4 of the program must address how the railroad will administer the training of previously uncertified persons with extensive dispatching experience. If Sections 2 and 4 of a program do not address these issues, such persons will be required to undergo the railroad's entire training program.

Section 245.111 Prior Safety Conduct as Motor Vehicle Operator.

This section contains the requirements and procedures that railroads are required to follow when evaluating the motor vehicle records of a candidate for dispatcher certification or recertification. TTD, ATDA, and IBEW submitted comments on this section expressing concern that a 60-day time period may not allow enough time to request and obtain driving records as part of the recertification process, due to administrative delays outside the recertification candidate's control. However, paragraph (c) requires candidates for dispatcher recertification to request their driving records at least 60 days prior to the date on which their certification expires. Therefore, at least 120 days will elapse between the date on which candidates for recertification requests their driving records and the end of the 60-day "grace period" authorized by paragraph (c). However, if a candidate for certification or recertification is unable to obtain their driving records, despite the grace period provided in paragraphs (b) and (c), paragraph (e) authorizes either the railroad or the candidate to submit a waiver petition for regulatory relief.

FRA also received comments from IBEW and NRC expressing concern that requiring railroads to include a review of driving records in their certification programs may inadvertently result in barring candidates who have unsatisfactory driving records from obtaining dispatcher certification and recertification. An individual commenter

added that reviewing driving records to discover substance abuse issues is warranted but railroads should not review such records for speeding violations.⁶⁸

The intent of this section is to obtain and review motor vehicle records to identify candidates for dispatcher certification and recertification who may have an active substance abuse disorder so they can be referred for evaluation and any necessary treatment before they are allowed to perform safety sensitive service. As explained in paragraph (m) of this section, the only motor vehicle incidents railroads may consider are related to being under the influence of, or impaired by, alcohol or a controlled substance. Railroads may not consider a person's speeding violations or other aspects of their motor vehicle driving record that are not related to alcohol or drug use when making a determination on dispatcher certification.

In the NPRM, paragraph (h)(2) of this section required all persons seeking certification or recertification to request driving records from the chief of the driver licensing agency of any jurisdiction, including states or foreign countries, that issued or reissued that person a driver's license in the past five years. This paragraph mirrored 49 CFR 240.111(c)(2).⁶⁹ However, FRA determined that a five-year lookback period was unnecessary in this final rule since paragraph (l)(2) of this section only allows railroads to consider motor vehicle driving incidents that occurred within the three years prior to the date of the railroad's certification decision. Thus, FRA changed the lookback period to three years. Furthermore, rather than focusing on when a jurisdiction *issued or reissued* a driver's license, FRA thought the more appropriate inquiry was whether a person *held* a driver's license from a jurisdiction within the previous three years. This paragraph has been revised in accordance with these changes.

⁶⁸ FRA-2022-0019-0020.

⁶⁹ The Rail Safety Improvement Act of 1988 required the five-year lookback period for persons seeking locomotive engineer certification. Public Law 100-342, 4, 102 Stat. 624, 625 (1988). However, no such requirement applies to this rule.

Paragraph (k) of this section requires certified dispatchers and candidates seeking dispatcher certification to notify their certifying railroad⁷⁰ of any drug or alcohol related motor vehicle incidents described in paragraph (m) of this section within 48 hours of conviction or completed state action to cancel, revoke, suspend, or deny a motor vehicle driver's license for operating a motor vehicle while under the influence of, or impaired by, alcohol or a controlled substance or refusal to undergo such testing. Paragraph (k) also provides that, for purposes of dispatcher certification, a railroad cannot have a more restrictive company rule requiring a dispatcher to report a conviction or completed state action to cancel, revoke, or deny a motor vehicle driver's license in less than 48 hours.

AAR and ASLRRA criticized this provision for precluding railroads from having more restrictive company rules requiring dispatchers to report a conviction or completed State action to cancel, revoke, or deny a motor vehicle driver's license in less than 48 hours. AAR and ASLRRA asserted that, as a practical matter, railroads should be able to request notification in less than 48 hours as a matter of company policy if they determine notification is in the safety interest of the railroad. The associations further asserted that they could easily envision a scenario where safety would be decreased because a person takes advantage of the 48-hour grace period after being convicted to delay notification. After considering these concerns from AAR and ASLRRA, FRA is declining to adopt this requested change. By keeping this requirement in paragraph (k), a railroad cannot revoke, deny, or otherwise make a person ineligible for certification until that person has received due process from the state agency taking the action against their motor vehicle license. This aligns with a central tenet of the U.S. judicial system that a person is considered innocent until proven guilty. Furthermore, this restriction only applies to

⁷⁰ In the NPRM, paragraph (k) of this section said certified dispatchers and candidates seeking certification must notify their "employing railroad" of any motor vehicle incident described in paragraph (m) of this section. However, because not all dispatchers are employed by a railroad, FRA is revising paragraph (k) in this final rule so that such incidents must be reported to the "certifying railroad."

actions taken against a person's certificate and has no effect on a person's right to be employed by a railroad. Also, by keeping this language, this paragraph maintains its consistency with 49 CFR 240.111(h) and 242.111(l).⁷¹

Paragraph (l) of this section prohibits railroads from considering motor vehicle driving incidents that occurred prior to the effective date of this rule or more than three years before the date of the railroad's certification decision. AAR and ASLRRRA commented that there is no safety reason for these restrictions as they make it difficult to establish a pattern of safety abuses. However, the three-year limit on motor vehicle driving records that can be reviewed for purposes of this rule is based on practical considerations. The three-year limit in paragraph (l) is intended to be consistent with minimum record retention practices of state driver licensing agencies. The three-year limit is also consistent with 49 CFR parts 240 and 242.

With respect to FRA's decision not to allow railroads to consider safety conduct that occurred prior to the effective date of this rule, FRA is guided both by fairness and by the law. While retroactive effects are not completely prohibited by the Administrative Procedure Act, the U.S. Supreme Court has stated that "[r]etroactivity is not favored in the law."⁷² Moreover, even if there were a substantial justification for the retroactive application of a rulemaking, "courts should be reluctant to find such authority absent an express statutory grant."⁷³ Given that there is no such express statutory grant of authority for this rule to have retroactive effects, FRA has decided not to allow railroads to consider safety conduct that occurred prior to the effective date of this rule.

Section 245.115 Substance Abuse Disorders and Alcohol Drug Rules Compliance.

⁷¹ This issue was also addressed and discussed 25 years ago when FRA was amending its locomotive engineer certification rule. See 63 FR 50626, 50639 (Sept. 22, 1998).

⁷² *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208 (1988).

⁷³ *Bowen*, 488 U.S. at 208-09.

This section addresses active substance abuse disorders and specific alcohol/drug regulatory violations. FRA is making a minor revision to paragraph (f) of this section from what appeared in the proposed rule. FRA is removing the reference to 49 CFR 219.1003(j) because that provision only applies to locomotive engineers and conductors.

Section 245.117 Visual Acuity.

This section contains the requirements for visual acuity testing that a railroad must incorporate into its dispatcher certification program. As an initial matter, in the NPRM, FRA used the terms “visual acuity” and “vision acuity.” In the interest of consistency, FRA is using the term “visual acuity” throughout this final rule including changing the name of this section’s title to “visual acuity.”⁷⁴

FRA solicited comments in the NPRM on whether visual acuity standards are necessary for dispatchers and if so, whether they should be as stringent as the existing standards for locomotive engineers and conductors. FRA received comments in support and opposition to the proposed rule’s visual acuity standards. Some commenters also suggested revisions to the proposed standards.

NRC supported this section and contended that vision is critical to a dispatcher’s job performance. In contrast, an individual commenter opposed this section, stating that over the course of his railroad career, he was not aware of any accident being caused by poor vision. APTA, ATDA, and IBEW also recommended removing the visual acuity requirements from this rule. These commenters felt that visual acuity requirements are unnecessary based on a dispatcher’s job duties and the office setting they work in, where they primarily interact with computer screens, books, and other written materials.

⁷⁴ “Visual acuity” appears to be the term used in the medical field. See Visual Acuity, American Optometric Association, found at <https://www.aoa.org/healthy-eyes/vision-and-vision-correction/visual-acuity?sso=y>.

Specifically, APTA argued that the distance and color vision tests described in paragraphs (c)(1) and (3) of this section are unnecessary and that the “[a]llowance provided by the proposed [§] 245.117(d)(3) should be maintained if dispatchers are able to reliably distinguish the different indications presented on the computer-aided dispatch system or other control systems used by their railroad.”⁷⁵ APTA also noted that dispatchers who are nearsighted, but not farsighted, may prefer not to use their corrective lenses when they are reading a computer screen or written materials up close. However, such action would render them non-compliant with paragraph (f) of this section. Thus, APTA is suggested that paragraph (f) be revised, so that dispatchers are only required to have their corrective lenses available, instead of in use, while on duty.

In its opposition to this section, IBEW noted that vision impairment can be corrected with corrective lenses or by adjusting computer monitors. IBEW also expressed concern that this section gives too much discretion to railroad medical examiners.

ATDA suggested that if FRA does not remove this requirement altogether, it should revise paragraph (c)(1) “to measure intermediate vision acuity – measured at approximately 24 to 40 inches, or the typical distance between a user and a computer monitor – of 20/40 in at least one eye, with or without corrective lenses.”⁷⁶ TTD agreed with ATDA’s suggestion that visual acuity be measured at a distance of 24 to 40 inches, to ensure that no person is excluded by “a vision requirement that is not necessary to perform the associated job duties.”⁷⁷

AAR and ASLRRRA did not state any opposition to FRA’s inclusion of visual acuity requirements in this rule, but they criticized FRA’s use of the same visual acuity

⁷⁵ FRA-2022-0019-0036.

⁷⁶ FRA-2022-0019-0038.

⁷⁷ FRA-2022-0019-0037.

standards found in parts 240 and 242. They noted that dispatchers have different responsibilities, perform different tasks, and work in a different environment than engineers and conductors. Thus, FRA should not “pluck” the visual acuity requirements from parts 240 and 242 and place them into this rule. Instead, “FRA needs to analyze the components of a dispatcher’s duties,” address how visual acuity impacts a dispatcher’s ability to safely perform their job, and then specifically tailor the vision requirements in part 245 to the work performed by dispatchers.⁷⁸

The Southeastern Pennsylvania Transportation Authority (SEPTA) agreed with AAR and ASLRRRA that the visual acuity requirements in this rule should not be identical to the standards in parts 240 and 242, due to the nature of a dispatcher’s work being different than that of an operating crew member. In particular, SEPTA noted that vision issues due to digital eye strain or prolonged computer use are more relevant to determining whether a person can perform the job of a dispatcher than distance vision.

In response to these comments, FRA closely reviewed the tasks performed by dispatchers and determined that a dispatcher’s visual acuity is a critical component of a dispatcher’s roles and responsibilities. In recent years, CAD systems have evolved significantly, and are heavily reliant on visual cues and prompts presented to the dispatcher requiring acknowledgement or action.

Historically, dispatchers utilized manual techniques such as paper train sheets with handwritten entries, time, distance, and communications to determine the status of and monitor trains, equipment, and employees in their purview. Dispatchers were required to interpret timetables, manuals, railroad standards, and basic track circuitry in their centers with minimal color variations on the older boards. Current systems provide visual alarms, electronic logging and status updates of equipment, track, and safety

⁷⁸ FRA-2022-0019-0041.

appliances. The visual references range from computer text in pop-ups to a plethora of color indications with sometimes minute variations and visual cues requiring immediate action or acknowledgement. Therefore, it is critical that today's dispatchers meet certain visual acuity standards and can distinguish between any variation of colors and text prompts presented.

After closely reviewing the safety-sensitive tasks performed by dispatchers, FRA has decided to retain the visual acuity standards proposed in the NPRM. Such visual acuity standards are consistent with requirements for other modal professionals throughout the transportation industry. In fact, air traffic controllers, who perform a similar function in the air travel industry that train dispatchers perform in the railroad industry, have even more strict visual acuity requirements than are included in this rule.⁷⁹

With respect to APTA's concern that dispatchers who are nearsighted may prefer not to wear corrective lenses while reading written materials or a computer screen up close but would be prevented from doing so under paragraph (f), this concern is misplaced, as dispatchers in such a scenario have an available remedy. These dispatchers can seek an opinion from the railroad's medical examiner, as provided for by paragraph (f), stating they can safely perform the work of a dispatcher without corrective lenses.

FRA disagrees with IBEW's comment that this section provides too much discretion to railroad medical examiners. First, since whether an individual has the proper visual acuity to safely perform as a dispatcher is a medical determination, it is appropriate for the decision to be made by a medical professional. Second, a medical examiner only exercises discretion if a person does not satisfy the objective vision criteria in paragraph (c) of this section. Finally, railroad medical examiners have been handling these issues for over 30 years for locomotive engineer certification and for over 10 years

⁷⁹ See Federal Aviation Administration, Order 3930.3C, *available at* https://www.faa.gov/documentLibrary/media/Order/Order_3930.3C_withCHG1.pdf.

for conductor certification. To date, FRA is unaware of any significant problems involving their exercise of this discretion.

Section 245.118 Hearing Acuity.

FRA received two comments in support of the hearing acuity requirements in the proposed rule, two comments opposing these requirements, and one comment suggesting the hearing acuity requirements should be revised. SEPTA and NRC both voiced their support for this section. SEPTA described the hearing requirements in the proposed rule as “sufficient”⁸⁰ while NRC stated it agreed with this section as it appeared in the NPRM and noted that hearing is critical to the job of a dispatcher and the standards should be identical to those in parts 240 and 242.⁸¹

In contrast, IBEW expressed its opposition to part 245 containing any hearing acuity requirements. The labor organization felt such requirements were unnecessary as a dispatcher’s hearing could be corrected with hearing aids and/or volume controls. IBEW also stated it was concerned this section gave too much discretion to a railroad’s medical examiner.⁸² An individual commenter also opposed these requirements claiming that in his 18 years of railroading, he was not aware of any accident caused by poor hearing. He said this section imposes an unnecessary burden on dispatchers and railroads.⁸³ Lastly, AAR and ASLRRA’s comments on revising § 245.117 also apply to this section.

In response to these comments, FRA closely reviewed the tasks performed by dispatchers and determined that a dispatcher’s hearing acuity is critical to their job of protecting the safety of the railroad and its employees. A dispatcher must be able to communicate clearly with peer dispatchers and field personnel to ensure on-track safety

⁸⁰ FRA-2022-0019-0025.

⁸¹ FRA-2022-0019-0033.

⁸² FRA-2022-0019-0039.

⁸³ FRA-2022-0019-0020.

has been properly established, making a dispatcher's ability to hear a vital part of these clear and concise communications. Dispatchers rely heavily on communications from field employees in the performance of their tasks and often have to discern between relevant information and distracting background noises.

Dispatchers communicate safety sensitive instructions to countless entities in their day-to-day functions. As an example, providing protection for field employees often requires listening to read backs and repeats of instructions. The accuracy and proper understanding of these communications is vital to railroad safety, and thus, FRA concludes that dispatchers should have to satisfy certain hearing acuity standards.

Furthermore, removing the hearing acuity requirements would introduce several potential issues. First, a person may need a hearing aid to safely work as a dispatcher, but without a regulation requiring them to wear such hearing aid, they could choose not to wear one for various reasons. Second, a hearing aid amplifies all sounds; however, if a person has lost the ability to discern sounds at certain frequencies, no hearing aid, no matter how sophisticated, can restore that ability. Thus, it would be possible for a dispatcher to miss critical information that was conveyed at a frequency that they had lost the ability to hear. Third, railroad radios are notoriously noisy making it difficult to detect critical information and ignore other sounds such as radio feedback.

Therefore, after close review of the safety-sensitive tasks performed by dispatchers, FRA decided to retain the hearing acuity standards proposed in the NPRM. For the reasons explained in the Section-by-Section Analysis for § 245.117 above, FRA does not share IBEW's concern that this section gives too much discretion to a railroad medical examiner.

Section 245.119 Training Requirements.

This section requires railroads to provide initial and periodic training to dispatchers. As an initial matter, FRA deleted paragraph (b) of this section in the NPRM.

In the NPRM, paragraph (b) noted that a railroad's certification program must state whether the railroad elects to obtain authority for initially certifying a person as a dispatcher or to only recertify those persons who have been previously certified by other railroads. FRA removed this language from this section as it is duplicative of what is already required under § 245.107(b)(1)(i).

Several commenters requested that FRA incorporate more specific details into the requirements for this section. For example, ATDA and TTD submitted similar comments requesting FRA more clearly define a minimum standard training curriculum to include classroom instruction and training with field personnel. These labor organizations feel such training should entail time spent with roadway workers from signal and maintenance of way departments, train crews, and terminal personnel such as yardmasters and car inspectors, for prospective dispatchers to gain a proper understanding of the duties and responsibilities of these workers.

ATDA, IBEW, TTD, and SMART-TD all commented that FRA should require, in paragraph (c)(2) of this section in the final rule (paragraph (d)(2) in the proposed rule), a minimum of 160 hours of OJT for all candidates seeking initial certification. TTD, ATDA, and IBEW also contended that OJT should include requiring dispatchers to perform a physical, in-person review of a territory before they can become qualified on the territory. Their rationale is that an in-person review provides dispatchers with a better understanding of the territory that they will be dispatching over that cannot be achieved by other means such as maps, videos, and simulators. TTD and ATDA also believe physical reviews should be required once every two years for a dispatcher to maintain their qualification on a territory. An individual commenter made a similar suggestion, that a person should have a mandatory week of "road days" before they can qualify on a

new territory, and they should have five road days per year to maintain their qualification on the territory.⁸⁴

After reviewing these comments, FRA acknowledges the commenters' concerns and suggestions and is taking this opportunity to clarify the requirements of this section. FRA agrees that recent industry trends have resulted in declining quality and/or quantity of training and testing, a concern FRA has voiced to the industry on multiple occasions including recent disapproval of conductor certification programs. These instances reveal that some railroads have misinterpreted the discretion provided to them in parts 240 and 242 as permission to submit certification programs that are sparse on details. Such railroads are mistaken as to what is required under parts 240 and 242, and FRA audits have highlighted the significant issues with these programs and underscored the critical need for railroads to provide detailed and comprehensive submissions.

While FRA believes that railroads should be provided some flexibility in their program design to address their specific operational risks and unique needs, FRA's review and approval process outlined in § 245.103 is meant to ensure that railroads do not abuse this discretion with respect to their dispatcher certification programs. This rule requires a railroad to document the details of its training and testing program, including a determination as to how the program will ensure that prospective dispatchers are able to safely perform their assigned duties. Specifically, § 245.107 mandates that each railroad submission include sufficient detail for FRA evaluation. FRA will disapprove programs that are vague or insufficiently detailed, in accordance with § 245.103(f)(2).

In addition, this section codifies rigorous training requirements for dispatchers to ensure safe operations. Railroads must develop programs that include comprehensive

⁸⁴ FRA-2022-0019-0020.

training and continuous education, with detailed documentation of the methods of dispatcher training, the level of proficiency, and the frequency of refresher training.

While every railroad is different and the training needed to be a dispatcher for a Class I railroad may vary significantly from what is needed to dispatch for a short line railroad, FRA will review each railroad's program and determine on a case-by-case basis whether the program contains sufficient OJT. Thus, in accordance with § 245.107(b)(4) and paragraph (c) of this section, the burden will be on the railroad to state how many hours of OJT is required in its training program and to justify why that amount of OJT is sufficient to certify that their dispatchers are adequately trained to safely perform their dispatching duties. Pursuant to § 245.103, FRA will then determine whether the railroad has provided enough detail and support for its position on how much OJT it will require. Likewise, with respect to in-person territory reviews, some railroads may have territories where such in-person reviews would be greatly beneficial to the trainee while other railroads have territories where such reviews would be superfluous. Regardless, railroads will have to provide enough detail in their programs to show that the training they are requiring satisfies the requirements of this part and will ensure that their certified dispatchers are sufficiently trained.

Paragraph (b) of this section (paragraph (c) in the proposed rule) allows for third parties to conduct a training program on behalf of the certifying railroad. NRC requested that this rule require any third party instructor to be certified and to "have met the same certification standards as the railroad for which he or she is delivering training."⁸⁵ If a third party is overseeing the OJT portion of a railroad's training program, then any person the third party provides as a qualified instructor would have to be a certified dispatcher as required by § 245.7. However, FRA does not see a need to expand the certification

⁸⁵ FRA-2022-0019-0033.

requirement beyond qualified instructors, such as to classroom instructors. Furthermore, since NRC did not provide a supporting rationale for its position, FRA is unpersuaded to make any such change.

NRC also commented that it agrees with the approach FRA took to the training requirements in paragraph (c) of this section (paragraph (d) in the proposed rule), and it recommends that FRA issue a circular or appendix that assists the industry with meeting these minimum standards. FRA does not plan to issue a separate circular or appendix at this time because § 245.107 addresses NRC's concern. Section 245.107, which is derived from Appendix B to part 240 and Appendix B to part 242, provides railroads with more information on how to design and structure their programs. This includes a description of what information should be included in each section of the program. FRA has found through its experience with locomotive engineer and conductor certification that issuing a separate circular or appendix is unnecessary as railroads can instead look to the appendices in parts 240 and 242 for guidance on how to satisfy the requirements of those rules. Thus, FRA does not see a need for issuing a separate circular or appendix with respect to dispatcher certification. However, FRA is revising paragraph (c)(2)(i) of this section to change the reference to an "employee" in the NPRM to a "person" in this final rule since not all dispatchers are employees of the certifying railroad.

FRA received several comments on paragraph (e)(2) (paragraph (f)(2) in the NPRM) which provided that a certification candidate who is demonstrating OJT proficiency may perform such tasks under the supervision of a person with at least one year of experience as a dispatcher. Some commenters, such as TTD, ATDA, IBEW, NRC, and SMART-TD, stated this requirement should be increased to two years of experience. NRC added that the person providing the supervision should have no safety-related incidents in the previous two years. In contrast, APTA and SEPTA think FRA should remove the "one year of experience" requirement altogether. They argue that it

should be left to the railroad to determine the minimum requirements for a dispatcher to perform the supervision described in this paragraph, since each railroad is unique and has different dynamics within its workforce. SEPTA also noted that “[m]ost railroads are in transition and may have inexperienced dispatchers that may not have the railroad experience to sufficiently train a student on OJT.”⁸⁶

FRA has decided to revise this paragraph so that certification candidates may only perform OJT tasks under the direct onsite supervision of a qualified instructor. This also represents a change from the analogous provision in 49 CFR 242.119(e)(2) which allows candidates for conductor certification to perform OJT tasks under the supervision of a person with “the necessary operating experience.” In this rule, FRA wanted to provide railroads with more guidance about what would constitute “necessary dispatching experience” as the agency was concerned that the vagueness of such term could have negative safety implications. Thus, the proposed rule included a one year of experience requirement. However, after further consideration, FRA determined that the safety purposes of this rule would be best served if only qualified instructors were allowed to supervise OJT tasks. While a qualified instructor is not required to have two years of experience, many qualified instructors will have at least two years of experience and even those who do not, still must have demonstrated adequate knowledge and the necessary dispatching experience to effectively instruct in the field. Likewise, while FRA is not adopting NRC’s suggestion that a person performing this supervision must not have any safety-related incidents in the previous two years, FRA believes that requiring that OJT tasks be supervised by a qualified instructor addresses NRC’s concern about the safety record of the person doing the supervision. FRA disagrees with APTA and SEPTA that this requirement should be removed altogether. FRA thinks it is important to place

⁸⁶ FRA-2022-0019-0025.

restrictions on who can supervise certification candidates performing their OJT.

Otherwise, a railroad could allow a dispatcher with very little experience (for example, two weeks on the job or even less) to supervise a dispatcher candidate during OJT. This would present a significant safety concern.

Finally, with respect to paragraph (h) of this section (paragraph (i) in the proposed rule) which addresses transfers of railroad ownership, NRC suggests that instead of saying that the acquiring company's dispatchers "may receive familiarization training" from the selling company, the rule should say they "will receive training from the selling company."⁸⁷ Whether a selling company will provide familiarization training to the acquiring company's dispatchers is a decision that should be made between the two parties. If FRA were to make the permissive language in this paragraph mandatory, it would essentially be entangling itself in the contract negotiations between the two parties which is not FRA's role. FRA's main concern with respect to this issue is that the training is performed properly, not who performs the training. FRA does not see a compelling reason for mandating that the selling company provide this training and since NRC did not provide a rationale for this requested change, FRA is not adopting this suggestion.

NRC also contends paragraph (h) should apply when there is a change in the private operator of a commuter railroad. Since NRC did not provide a rationale for why such a change would be necessary or beneficial, FRA does not see a justification for making such change to the final rule. However, FRA notes that in situations involving a change in the operator of a commuter railroad, there is nothing in part 245 that would prohibit the prior operator from providing familiarization training to the new operator.

Section 245.120 Requirements for Territorial Qualification.

⁸⁷ FRA-2022-0019-0033.

This section explains the requirements for territorial qualifications. TTD and ATDA requested that this section be revised to require that a dispatcher have 80 hours of OJT on a territory before they can become qualified on that territory. The provided rationale for this proposal is that OJT is essential to ensuring dispatchers are properly trained on their territories. TTD, ATDA, and IBEW also commented that FRA should revise paragraph (c) of this section, which stated that to retain their qualification on a territory, a dispatcher could not be absent from that territory for more than 12 months. The unions believe this should be reduced to six months, as they contend that absences of six months or more lead to a “loss of familiarity with the specifics of a territory such as locations of crossing, wayside defect detectors, and emergency response access points.”⁸⁸ Additionally, these labor organizations requested that FRA set minimum OJT requirements for requalification on a territory, of at least 16 hours of OJT if a dispatcher is absent from a territory for 6-12 months; at least 24 hours of OJT if a dispatcher is absent from a territory for 12-24 months; and if a dispatcher is absent from a territory for 24 months or more, he or she should have to go through the same process as a dispatcher seeking their initial qualification on the territory.

FRA is declining to adopt the suggested change by the labor organizations to require a minimum of 80 hours of OJT to become qualified on a territory for reasons similar to its decision not to add more specific requirements to § 245.119. Just as every railroad is different, every territory is different, and railroads, not FRA, are in the best position to determine what requirements must be met to become qualified on a particular territory. In certain situations, requiring 80 hours of OJT on a particular territory may be unnecessary. For example, some territories may be relatively small or uncomplex so requiring 80 hours of OJT would be excessive, especially for an experienced dispatcher.

⁸⁸ FRA-2022-0019-0038.

Therefore, FRA thinks it would be unwise to add such a requirement to this rule, especially since the labor organizations have not provided any data or analysis to support their position that a minimum of 80 hours of OJT is necessary to become qualified on a territory. Likewise, FRA is also not adopting the suggestion from the labor organizations that the rule set minimum amounts of OJT for a dispatcher to get requalified on a territory. FRA thinks these decisions should be left with the railroads and that this dispatcher certification system will work best if FRA creates the regulatory framework and the railroads have the discretion to determine how its dispatchers can become qualified on a territory within that framework. In addition, railroads are required to submit their dispatcher certification programs to FRA for approval. Therefore, FRA will evaluate railroad plans to provide OJT as part of their dispatcher certification programs on a railroad-by-railroad basis. This rule also requires railroads to provide a copy of the programs and the request for FRA approval to the president of each labor organization that represents the railroad's dispatchers and to all of the railroad's dispatchers that are subject to this part. Therefore, impacted labor unions and dispatchers who are not represented by a labor union will also have the opportunity to comment on the program.

FRA also received a comment from an individual requesting that this rule include restrictions on territory size and traffic. According to the commenter, technological advances have led railroads to “consolidate and expand territory sizes beyond what is manageable.”⁸⁹ The commenter expressed concern about more mistakes occurring on these large and busy territories especially among new, inexperienced dispatchers. Setting restrictions on the size of, and traffic on, a railroad's territories is beyond the scope of this rulemaking. Whether current railroad territory size and traffic is posing a significant safety threat is a subject that would require substantial review and analysis by FRA

⁸⁹ FRA-2022-0019-0020.

before proceeding with a rulemaking. Such analysis has not taken place, and thus, it would be improper for FRA to include any such restrictions in this rule.

Section 245.121 Knowledge Testing.

This section requires railroads to provide for the initial and periodic testing of dispatchers. Paragraph (b)(4) of this section lists the subjects that a railroad's test must cover to determine whether an individual has the requisite knowledge to be a certified dispatcher. Both TTD and ATDA recommended revising the language in proposed paragraph (b)(4)(iv) as they alleged it would allow railroads to test dispatchers and dispatcher candidates on the physical characteristics of territories that they have not received training on and have no familiarity with. In this final rule, FRA has removed the reference to territories the person "will be" working on and instead states the test must cover the physical characteristics of the territory or territories that the person is currently working on or is receiving training to become qualified on, to address the organizations' concern. FRA also added "or territories" to this paragraph to acknowledge that a test may cover more than one territory.

AAR and ASLRRA recommended that FRA revise paragraph (b)(6) of this section to allow for greater use of open reference books and other materials. The associations noted that "[r]ailroads currently train, teach, and encourage their employees to use reference materials in their daily activities. Railroad safety would be better served if FRA adopted the same approach for knowledge testing."⁹⁰ FRA agrees that reference materials play an important role in the work dispatchers perform, however, no changes to this paragraph are needed to address the issue. The regulation allows for the use of reference materials if a person is being tested on their ability to use such materials. Whether a test question is testing a person's ability to use reference materials is a

⁹⁰ FRA-2022-0019-0041.

determination made by the railroad, and the railroad is given some flexibility on this issue. For example, if a test question involves a scenario where a dispatcher may consult with reference materials if faced with the situation in the field, paragraph (b)(6) gives the railroad the discretion to allow the person seeking certification to use reference materials. Therefore, a railroad could make a substantial portion of its test “open book.” However, FRA thinks some dispatching principles and concepts are so essential that they should be memorized by the dispatcher and not require reference materials. Thus, FRA sees a benefit to having at least a portion of these knowledge tests be “closed book.”

FRA also received comments requesting that the agency establish minimum passing scores for tests given in association with a railroad’s training program. ATDA and IBEW recommended that FRA set 80% as a passing score. NRC suggested that 100% be the passing score for the physical characteristics portion of the exam and 90% be the passing score for the rest of the exam. TTD did not opine on what a passing score should be, but stated FRA should set a standard passing score so there are not many instances where a person’s test score would constitute a passing grade for one railroad, but a failing grade for another railroad.

Despite these comments, FRA declines to set a minimum passing score for knowledge testing. The railroads are in the best position to determine what is an appropriate passing score for the tests they administer since they are more familiar with their dispatching operations, operating rules, and the physical characteristics of their territories. Furthermore, it is unclear what safety benefit would derive from FRA setting a minimum passing score for railroads. If a railroad felt the passing score FRA set was too high, it could make easier test questions to increase the likelihood that individuals will pass. This could have a negative safety effect if railroads make their knowledge tests too easy because they could certify individuals who do not have sufficient knowledge to safely perform the job. Thus, FRA’s position is that the decisions about what constitutes

a passing score are best left to the railroads. FRA also finds that the concern expressed by some commenters that a standard passing score is needed because railroads can rely on the determinations of other railroads is also misplaced. Under § 245.125(b)(3), when a railroad relies on certification determinations made by another railroad, it is still responsible for determining that the dispatcher has “demonstrated the necessary knowledge concerning the railroad’s operating rules, territory, dispatch systems and technology.” Therefore, in most cases, the certifying railroad will have to give the dispatcher its own knowledge test.

NRC also commented that FRA should regulate how many times a person is allowed to take a knowledge test and suggested that it be no more than two attempts, with a third attempt at the manager’s discretion.⁹¹ FRA is deferring to the railroads on whether they wish to impose a limit on the number of times a person may take a knowledge test. The purpose of this section is to ensure all dispatchers have the requisite knowledge to safely perform their duties, not whether they demonstrate that knowledge on the first attempt or the fifth attempt. FRA can also envision a scenario where an FRA-imposed limit on the number of test attempts could have a deleterious effect on safety. A railroad could purposely make its knowledge tests easier out of fear that some dispatcher candidates would not otherwise be able to pass the test on the first two attempts and would be prohibited from becoming certified, resulting in a waste of the railroad’s time and resources spent on training such individuals. Easier knowledge tests could lead to railroads certifying dispatchers who lack the requisite knowledge to safely perform their duties.

Lastly, ATDA and IBEW were both concerned that the proposed rule did not explicitly mention individuals with disabilities who may require special accommodations

⁹¹ FRA-2022-0019-0033.

in testing situations. These labor organizations requested that FRA add language to the final rule to state that all persons subject to knowledge tests under part 245 are “covered by all applicable facets of the Americans with Disabilities Act (ADA).”⁹² In this subpart, FRA is establishing general parameters for the testing that must be conducted to determine whether candidates for certification have the skills and knowledge necessary to perform the tasks that are assigned to certified dispatchers by the certifying railroad. However, FRA is not creating or administering the tests required by this part. Railroads continue to have the flexibility to determine how to develop and administer testing in accordance with Federal anti-discrimination laws, including Title I of the ADA. FRA finds it unnecessary to include language in this final rule to remind railroads that they need to comply with Federal anti-discrimination laws.

Section 245.123 Monitoring Operational Performance.

This section requires railroads to provide each certified dispatcher with at least one unannounced compliance test each year. In response to this requirement, NRC requested that FRA define the parameters of an unannounced compliance test in a competency management plan. FRA is opting not to add more specific requirements to what constitutes an unannounced compliance test. As stated in the rule, this test shall cover railroad and Federal rules as well as territorial and dispatch systems. Beyond those basic requisites, FRA finds that the railroads are best positioned to determine the specific details about the contents of the test and how the test is administered. Since railroads are required under § 245.107(b)(5) to discuss their processes for unannounced compliance tests in their certification programs, these processes are subject to FRA review and approval under § 245.103. This system allows FRA to ensure that railroads are

⁹² FRA-2022-0019-0038; FRA-2022-0019-0039.

establishing sufficient processes for these tests without having to impose the more stringent guidelines requested by NRC.

FRA received several comments from labor unions requesting that language be added to this section prohibiting railroads from taking any disciplinary action against dispatchers for deficiencies noted during an unannounced compliance test unless such deficiency was related to a revocable event described in § 245.303(e). The unions suggested that railroads should instead address such deficiencies through coaching, counseling, and additional training. The purpose of this rule, as stated in § 245.1, is to establish minimum Federal safety standards for dispatchers and to ensure that only those persons who meet such standards work as dispatchers. Moreover, § 245.5(b) states that it is not FRA's intention to alter a railroad's authority to initiate disciplinary sanctions against its employees. Adding the language requested by the unions would be unrelated to this rule's purpose and would contravene § 245.5(b). Like the engineer and conductor certification rules, the only "discipline" this rule regulates pertains to a railroad's denial or revocation of a person's dispatcher certification. As was stated in the NPRM,⁹³ FRA believes it is up to each railroad to decide the appropriate action to take in such circumstances in light of various factors, including collective bargaining agreements.

To avoid restricting the options available to the railroads and employee representatives to develop processes for handling test failures, FRA designed this rule to be flexible. There are a variety of actions and approaches that a railroad could take, such as developing and providing formal remedial training for dispatchers who fail tests or have deficiencies in their performance. Each railroad could also consider implementing a formal procedure whereby a dispatcher is given the opportunity to explain, in writing, the factors that they believe caused their test failure or performance deficiencies. This

⁹³ 88 FR 35574, 35591 (May 31, 2023).

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 be considered and evaluated by railroads and their dispatchers, and FRA does not want to unnecessarily limit a railroad's ability to adopt an approach that is best for its organization. While FRA encourages the railroads and unions to work together to resolve these issues, such matters are best addressed in collective bargaining agreements and a railroad's internal discipline system, not in this rule.

Paragraph (c) of this section creates an exception where a railroad does not have to give a certified dispatcher an unannounced compliance test if that person is not performing service that requires certification. However, if a certified dispatcher returns to service requiring certification, the railroad will need to perform an unannounced compliance test within 30 days of the dispatcher's return to service. In this final rule, FRA is adding language to paragraph (c) to clarify when railroads are required to give a dispatcher an unannounced compliance test within 30 days of their return to service. Specifically, FRA is adding language that states the requirements in paragraph (c) apply if the person is returning to dispatcher service "after not being given an unannounced compliance test in a calendar year."

This distinction is best illustrated through an example. A dispatcher performs service requiring certification from January 2025 to June 2025 and during that time, they do not receive their unannounced compliance test for calendar year 2025. Starting on July 1, 2025, the dispatcher moves into a position that does not require certification and works in that position for the rest the year. On January 1, 2026, the dispatcher returns to service requiring certification. Under paragraph (c), the railroad would have to give the dispatcher an unannounced compliance test by January 31, 2026 (within 30 days of their return to service), because they were not given a test in calendar year 2025.

Alternatively, if the railroad had given the dispatcher an unannounced compliance test during the first six months of 2025, paragraph (c) would not apply because the dispatcher would not have missed their unannounced compliance test for calendar year 2025. Thus, upon the dispatcher's return to service requiring certification, the railroad would not need to give the dispatcher an unannounced compliance test within 30 days.

ATDA and IBEW both expressed concerns that paragraph (c) would allow a railroad to test a dispatcher immediately upon their return to service, which could be unfair to the dispatcher. ATDA requested that FRA add language to the final rule stating that such test can only be conducted after the dispatcher received any necessary retraining or familiarization required by §§ 245.119, 245.120, and 245.121. IBEW stated that FRA should not allow these unannounced compliance tests to occur until at least 15 days after the dispatcher has returned to service requiring certification.

FRA is declining to make these requested changes. Regarding ATDA's comment, FRA finds that adding language referencing §§ 245.119, 245.120, and 245.121 is unnecessary. As discussed in § 245.107(b)(2)(i), a railroad's certification program must contain a continuing education component and the railroad is obligated to abide by the requirements in its program. Therefore, if any retraining is required under the railroad's program upon a dispatcher's return to service requiring certification, then the railroad is already obligated to provide such training, without FRA adding any such language to paragraph (c). With respect to refamiliarization, if a dispatcher has been away from a territory long enough that they are no longer qualified, they would be unable to dispatch over that territory without the assistance of a Dispatcher Pilot until they were refamiliarized as required by § 245.120(a)(2). Thus, it logically follows that even without revising paragraph (c) of this section, a railroad would not provide a returning dispatcher with an unannounced compliance test until any necessary refamiliarization

training was performed, as the dispatcher would not perform such test on a territory where they were unqualified.

In response to IBEW's comment, FRA does not see a safety benefit to prohibiting railroads from giving an unannounced compliance test within 15 days after a dispatcher has returned to service requiring certification. To the contrary, if a person has been away from dispatching for so long that they did not receive an unannounced compliance test in a calendar year, it would behoove the railroad to give such a test as soon as possible. If a person is a certified dispatcher, they are expected to perform their job functions safely, regardless of whether they last dispatched two days ago or two years ago. Part 245 does not include a moratorium that prohibits a railroad from revoking a dispatcher's certification for any events that occur within the first 15 days of their return to service. Likewise, FRA does not see a reason to institute such a moratorium on giving an unannounced compliance test during this period. Lastly, this paragraph was modeled after §§ 240.129(b)(1) and 242.123(b)(1) which allow for an unannounced compliance test to occur at any point within a locomotive engineer or conductor's first 30 days returning to service requiring certification. FRA is not aware of any issues that have arisen in locomotive engineer or conductor certification as a result of these requirements. Thus, FRA does not see an adequate rationale for changing this requirement in dispatcher certification.

Section 245.125 Certification Determinations Made by Other Railroads.

In this final rule, FRA has moved what was paragraph (b) of this section in the proposed rule to § 245.107(b)(2)(vi) and (b)(4)(iv). FRA determined that it was more appropriate to put proposed paragraph (b) in the section of this rule that contained the specific requirements for a railroad's certification program.

Section 245.201 Time Limitations for Certification.

This section contains various time constraints to preclude railroads from relying on stale information when evaluating candidates for certification or recertification. Paragraph (a)(3) in the NPRM stated that railroads could not rely on knowledge tests there were conducted more than one year before the date of the railroad's certification decision and paragraph (a)(4) stated that the knowledge test must be within two years prior to the certification decision if the railroad administers knowledge tests at intervals that do not exceed two years. For the final rule, FRA decided to combine these two paragraphs into paragraph (a)(3).

Section 245.205 List of Certified Dispatchers and Recordkeeping.

This section requires railroads to maintain a list of its certified dispatchers. Several labor organizations, including TTD, ATDA, and IBEW, requested that this section be revised to compel railroads to provide their list of certified dispatchers to their dispatcher employees and the relevant labor organization presidents. TTD and ATDA also stated the rule should include a 60-day period for unions and employees to review and confirm the accuracy of the list. While FRA has no opposition to railroads providing these lists to their dispatchers and labor organization presidents, FRA declines to impose this requirement because sharing such lists is an internal matter that should be resolved between the railroads and the labor organizations and FRA does not see a compelling safety reason to mandate a particular approach.

Section 245.207 Certificate Requirements.

This section contains the requirements for the certificate that railroads will be required to issue to each certified dispatcher. FRA is making a minor change to paragraph (a)(1) in the proposed rule, by allowing the certificate to identify the parent company that is issuing the certificate. This change acknowledges that in some cases, a parent company may have a single certification program for all of the railroads under its control. This change also brings this paragraph into conformity with parts 240 and 242.

AAR and ASLRRA commented that railroads should not be required to include a dispatcher's year of birth on a dispatcher's certificate. After consideration of this comment, FRA agrees that including the year of birth on the dispatcher certificate is unnecessary and is removing this requirement in the final rule. The purpose of the requirements in paragraph (a)(3) is to identify an individual dispatcher, and, as AAR and ASLRRA stated, the birth year provides little to no assistance in confirming a person's identity, and there are other ways, such as a physical description or photograph of the dispatcher, which is already included in paragraph (a)(3), that better serve this goal. They added that instead of the birth year, FRA could require a person's hire date on the certificate. However, the hire date provides even less relevant information than the birth year in terms of identification. Thus, FRA sees no reason to require the hire date on a dispatcher's certificate.

APTA recommended that the requirement in paragraph (a)(6) of this section that the certificate include the expiration date be removed in the final rule, because it is not required in parts 240 and 242, and "because there are other annual requirements that an expiration date greater than annually could cause confusion."⁹⁴ FRA concedes that an expiration date is not currently required on a locomotive engineer or conductor certificate,⁹⁵ however, FRA is unclear why such a requirement would cause confusion. Also, a certificate can last for up to three years under § 245.201(c), so the expiration date would not be "greater than annual" as APTA suggests. Thus, FRA is unpersuaded by APTA's argument. FRA sees no basis for removing this requirement, as the expiration date provides a key piece of information that is equal in importance to the effective date of the certificate, as it tells when a certificate is no longer valid.

⁹⁴ FRA-2022-0019-0036.

⁹⁵ 49 CFR 240.223(a) and 242.207(a).

FRA is making a stylistic change to paragraph (a)(6) in this final rule. In the NPRM, paragraph (a)(6) referenced paragraph (b) of this section, which stated that if a person was designated as a dispatcher under § 245.105(c) or (d), then their certificate did not need to include an expiration date.⁹⁶ The rationale for this exception is that the expiration date of a designated dispatcher's certificate is three years after FRA approves the railroad's certification program.⁹⁷ Thus, the expiration date of a designated dispatcher's certificate will not be known until FRA approves the railroad's certification program. In this final rule, FRA deleted proposed paragraph (b) and instead incorporated this exception directly into paragraph (a)(6), by stating that a certificate must include the expiration date "unless the certificate was issued pursuant to § 245.105(c) or (d)."

Section 245.213 Multiple Certifications.

This section addresses various issues involving persons who have, or are seeking to obtain, multiple certifications. In this final rule, FRA added a standalone paragraph (c) to this section which states that paragraphs (c)(1) through (3) apply to persons who are currently certified dispatchers for multiple railroads or are seeking to become certified dispatchers for multiple railroads.

Paragraph (d) discusses how the revocation of a dispatcher's certification would affect an individual's ability to work in another railroad craft that requires certification, and vice versa. The general rule articulated in paragraph (d) is that if a dispatcher's certification is revoked for an alcohol or drug violation, they may not work in another certified craft during the period of revocation, and vice versa. However, if a dispatcher's certification is revoked for a violation that does not involve alcohol or drugs, the person may work in another certified craft during the revocation period, and vice versa.

⁹⁶ 88 FR 35623.

⁹⁷ See 49 CFR 245.105(f).

NRC commented that it agreed with this approach. In contrast, AAR and ASLRRA expressed their view that if a dispatcher's certificate is revoked for *any* reason, that person should not be allowed to work in another certified craft during the period of revocation, and vice versa. Their explanation is that if a person commits a safety violation in one craft, that shows "a disregard for process, and there should not be an assumption that the employee's disregard is function or craft specific."⁹⁸ The associations also contend that 49 CFR 240.308(f) and 242.213(h) do not allow a decertified conductor to work as a locomotive engineer or vice versa.

As an initial matter, the assertion by AAR and ASLRRA that parts 240 and 242 do not allow a decertified conductor to work as a locomotive engineer is not accurate. Under 49 CFR 240.308(f) and 242.213(h), if a person's conductor certification is revoked for a violation described in 49 CFR 242.403(e)(6) through (11), they may still work as a locomotive engineer during the revocation period. FRA's rationale for this distinction is that 49 CFR 242.403(e)(6) through (11) involve violations of 49 CFR part 218, subpart F, and since locomotive engineers cannot have their certifications revoked for such violations, "it would be unfair to prohibit a person from working as an engineer for a violation that currently would not result in the revocation of his or her engineer certificate."⁹⁹ For similar reasons, FRA finds that it would be unfair to prohibit a person from working as a dispatcher because they passed a stop signal while working as a locomotive engineer, or because they committed some other violation that would not otherwise result in the revocation of their dispatcher certificate. However, AAR and ASLRRA's proposal would lead to such unfair treatment between persons with a single certification and persons who are certified in multiple crafts. AAR and ASLRRA requested that FRA adopt the same approach in part 245 that it did in parts 240 and 242.

⁹⁸ FRA-2022-0019-0041.

⁹⁹ 76 FR 69802, 69825 (Nov. 9, 2011).

For the reasons stated above, FRA believes that the proposed rule did adopt the same approach taken in parts 240 and 242 and does not see a reason to make any changes to this section in the final rule.

Furthermore, as noted in the NPRM,¹⁰⁰ the tasks performed by a dispatcher are so inherently different from the tasks performed by persons in other certified crafts that it does not automatically follow that a person's revocable event as a dispatcher indicates they are more likely to have a revocable event while performing another certified craft, and vice versa. Therefore, under this final rule, a dispatcher may continue to work as a dispatcher if their certification is revoked for any of the violations described in 49 CFR 240.117(e) or 242.403(e) that do not involve use of alcohol or drugs. Similarly, a person can continue to work in another certified craft if their dispatcher certification has been revoked for a violation described in § 245.303(e)(1) through (6).

Section 245.215 Railroad Oversight Responsibilities.

This section requires each Class I railroad (including the National Railroad Passenger Corporation), each railroad providing commuter service, and each Class II railroad to conduct an annual review and analysis of its program for responding to detected instances of poor safety conduct by certified dispatchers. Both TTD and ATDA requested that FRA mandate that a railroad provide the data obtained through this annual review and analysis of its certification programs to the president of each labor organization that represents the railroad's dispatchers. The labor organizations contend this would benefit railroad safety as railroads and unions could work together to address potential deficiencies and safety issues. It would also promote collaboration between the two parties. FRA agrees that sharing this information should benefit railroad safety by promoting communication and collaboration between the railroads and the labor unions.

¹⁰⁰ 88 FR 35594.

Thus, FRA has revised paragraph (d) of this section to allow the president of a labor organization representing the railroad's dispatchers to request that the railroad provide a report of the findings and conclusions reached during the railroad's annual review and analysis required under this section. FRA is also allowing the railroad's certified dispatchers who are not represented by a labor organization to make such a request.

FRA made some revisions to paragraph (e) from what appeared in the NPRM due to changes to the list of revocable events found in § 245.303(e). The reasoning behind these changes is explained in the Section-by-Section Analysis for § 245.303.

Section 245.303 Criteria for Revoking Certification.

This section describes the circumstances under which a dispatcher's certification may be revoked. APTA requested that FRA revise paragraph (c) of this section, which requires railroads to revoke the certificate of a dispatcher who is monitoring, piloting, or instructing a dispatcher if they fail to take appropriate action to prevent a violation described in paragraph (e) of this section.¹⁰¹ APTA is concerned that this could be construed to apply to higher levels of managers and supervisors within a control center who are providing high level oversight but are not closely monitoring the dispatcher in question. FRA agrees with APTA that the intent of this paragraph is not to apply to persons providing high level oversight. To clarify this intent, FRA is adopting APTA's suggestion by explicitly stating that paragraph (c) applies to the person assigned to monitor, pilot, or instruct the dispatcher.

Paragraph (e) of this section provides a specific list of events which would require a railroad to revoke a dispatcher's certification. NRC disagrees with FRA's decision to give examples in this paragraph as it "runs the risk of over-specification."¹⁰² Instead,

¹⁰¹ Paragraph (e) of this section lists the seven types of violations that warrant revocation of a dispatcher's certification.

¹⁰² FRA-2022-0019-0033.

NRC suggests that “[r]evocation should be considered based on violation of any applicable rules and standards.”¹⁰³ FRA respectfully disagrees with NRC’s position. While it is important to provide railroads with a certain degree of flexibility in many aspects of this rule, the issue of what constitutes a revocable event is an area where uniformity is vital. If Railroad A considered a particular action or inaction revocable, but Railroad B did not, it would lead to disparate treatment of dispatchers. Also, if NRC is suggesting that any rules violation should lead to a revocation, FRA disagrees as some rule violations are more serious than others. Not all rule violations warrant a 30-day (or longer) revocation which is why FRA created the list in paragraph (e), which it determined are the most serious rule violations a dispatcher can commit.

Paragraph (e)(1) in the proposed rule listed “[f]ailure to provide proper protection of a reported inoperable or malfunctioning highway-rail grade crossing” as the first revocable event. ATDA recommended that this paragraph be deleted, since proposed paragraph (e)(6) stated revocation was warranted for a failure to properly issue or apply mandatory directives. Since grade crossing protection is a type of mandatory directive, ATDA thought proposed paragraph (e)(1) was redundant. FRA agrees with ATDA’s comment and has removed proposed paragraph (e)(1) from the final rule. Instead of renumbering all of paragraph (e), FRA is moving proposed paragraph (e)(6) to paragraph (e)(1) in this final rule. Additionally, proposed paragraph (e)(7) is now paragraph (e)(6) in the final rule and proposed paragraph (e)(8) is now paragraph (e)(7) in the final rule.

Paragraph (e)(2) in the proposed rule stated that a dispatcher’s certification shall be revoked for “[g]ranting permission for a train or on-track equipment to enter into an out-of-service or blue flag protected track.” TTD, ATDA, and IBEW requested that FRA change “granting permission for” to “improperly authorizing” in this paragraph. The

¹⁰³ FRA-2022-0019-0033.

labor organizations' rationale for this change is that sometimes it is necessary and permissible to authorize on-track equipment to occupy out-of-service track. FRA agrees that such permission might be appropriate, and a dispatcher should not have their certification revoked in such circumstances. Therefore, FRA is adopting the unions' suggested change to paragraph (e)(2).

Paragraph (e)(4) calls for a dispatcher's certification to be revoked for the removal of blocking devices or established protection of Roadway Worker In Charge (RWIC) working limits prior to the RWIC releasing the limits. TTD, ATDA, and IBEW all submitted comments requesting that FRA add language to this paragraph so that such actions would only warrant revocation if they resulted in workers occupying limits without proper protection. Their rationale for this position is that if this action does not result in workers being left unprotected, then it should not be a revocable event because it did not present a safety hazard to anyone. FRA strongly disagrees with the labor organizations' position on this issue. Removing a blocking device or other established protection of RWIC working limits prior to the RWIC releasing such limits constitutes a serious offense that warrants revocation regardless of whether any workers were left unprotected. Under the labor organizations' proposal, if a dispatcher removed a blocking device or other protection before the RWIC released the limits, whether the dispatcher's certification got revoked would essentially come down to a question of luck. If there was no one in the working limits, then one dispatcher's certification would not be revoked. However, another dispatcher would have their certification revoked because someone was in the working limits. In FRA's opinion, the two dispatchers in these scenarios should be treated consistently under this rule and therefore FRA declines to adopt the union's proposal.

While FRA disagrees with this suggestion from the labor organizations, it concedes that it would not be unprecedented for the agency to make an event only

revocable under certain circumstances. For example, in both parts 240 and 242, a violation of the conditional clause of restricted speed rules is only considered a revocable offense if it results in an accident or incident that must be reported to FRA under 49 CFR part 225 (part 225).¹⁰⁴ Likewise, the list of revocable events for conductors includes several violations related to 49 CFR part 218, subpart F which are only considered revocable if they result in a reportable accident under part 225.¹⁰⁵ These types of rule violations can vary significantly in their severity. Some of these violations can be relatively minor, which is why in parts 240 and 242, FRA attached the additional condition that they must cause a reportable accident to be a revocable event. The rationale behind this distinction is that if a reportable accident occurred as a result of such violation, that indicates that the crew member committed a more severe violation. In contrast, FRA thinks that a dispatcher removing a blocking device or established protection of RWIC working limits prior to the RWIC releasing the limits is such a severe violation that FRA does not need to attach any additional conditions to make the event revocable. It stands by itself as a serious offense, similar to the way passing a stop signal, occupying main track without authority, and operating at 10 or more miles per hour (mph) above the maximum authorized speed do not require any additional conditions to be revocable for operating crew members. Thus, FRA is not making any changes to paragraph (e)(4) of this section.

Like the comments on paragraph (e)(4), TTD, ATDA, and IBEW requested that FRA place conditions on the revocable events found in paragraphs (e)(1) (listed as paragraph (e)(6) in the NPRM) and (e)(5). Paragraph (e)(1) requires revocation for a failure to properly issue or apply mandatory directives when warranted. ATDA requested that the following language be added to the end of this paragraph: “resulting in

¹⁰⁴ 49 CFR 240.117(e)(2) and 242.403(e)(2).

¹⁰⁵ 49 CFR 242.403(e)(6) through (11).

roadway worker, train, or on[-]track equipment occupying limits without proper protection or trains or on-track equipment exceeding maximum authorized speed by greater than 10 miles per hour.”¹⁰⁶ ATDA alleges that if FRA does not add this language, a dispatcher could have their certification revoked for a “simple improper issuance of an authority number” but that does not in any way change the protection that is provided.¹⁰⁷ TTD and IBEW advocated for similar language to that proposed by ATDA. As for paragraph (e)(5), which calls for revocation for failure to properly apply blocking devices or establish proper protection for specified working limits or movements of trains or on-track equipment, the unions said this should only be a revocable event if it results in trains or on-track equipment occupying limits without proper protection. FRA is declining to adopt the unions’ proposed changes to paragraphs (e)(1) and (5) in the final rule for the same reason that it did not adopt the unions’ proposed changes to paragraph (e)(4). In other words, FRA finds that the events, as described in paragraphs (e)(1) and (e)(5), warrant revocation on their own without attaching any additional conditions.

In this final rule, the term “proper protection” is used in paragraph (e)(5). APTA requested that FRA clarify whether the standard for “proper protection” is defined by Federal regulations or the railroad’s operating rules. Paragraph (e) answers this question by noting that for an event to warrant revocation, it must involve a violation of the railroad’s operating rules or practices. Thus, in making the determination as to whether a revocable event described in paragraph (e)(5) occurred, the railroad must determine whether the dispatcher failed to establish proper protection (as defined by the railroad’s operating rules or practices) for specified working limits or movements of trains or on-track equipment.

¹⁰⁶ FRA-2022-0019-0038.

¹⁰⁷ FRA-2022-0019-0038.

FRA also received several comments on what is paragraph (e)(6) in the final rule (which was paragraph (e)(7) in the proposed rule). This paragraph states that a dispatcher’s certification shall be revoked for granting permission, without prior approval, for a train to enter PTC or Cab Signal limits with inoperative or malfunctioning PTC or Cab Signal equipment. APTA commented that this paragraph should explain where the “prior approval” comes from or be revised to account for the particulars of each railroad. APTA proposed the following revision: “granting permission for a train to enter PTC or CSS limits with inoperative or malfunctioning PTC or CSS equipment in a manner not in accordance with applicable railroad operating rules[.]”¹⁰⁸ FRA agrees with APTA’s revision and is adopting this proposed language except for the reference to “applicable railroad operating rules” as such reference would be redundant since paragraph (e), which precedes the list of revocable events found in paragraphs (e)(1) through (7), already refers to violations of the railroad’s operating rules or practices.

ATDA recommended that paragraph (e)(6) be revised to say the following action constitutes a revocable event: “[f]ailure to establish proper protection for a train to enter Positive Train Control (PTC) or Cab Signal limits with inoperative or malfunctioning PTC or Cab Signal equipment which results in the train occupying PTC or Cab Signal limits without proper protection.”¹⁰⁹ ATDA believes its suggested revisions more properly address the intent of the provision. FRA is not adopting this revision because it thinks APTA’s proposed revision best conveys the agency’s intent while also addressing ATDA’s concerns regarding the language in the NPRM. FRA disagrees with ATDA condition that the events described in this paragraph should only be revocable if they result in a train occupying PTC or Cab Signal limits without proper protection. FRA is rejecting this proposed language for the same reason that it rejected the labor

¹⁰⁸ FRA-2022-0019-0036.

¹⁰⁹ FRA-2022-0019-0038.

organizations' proposed conditions to paragraphs (e)(1), (e)(4), and (e)(5) discussed above, as FRA thinks the event described in paragraph (e)(6) warrants revocation without attaching any additional conditions.

TTD commented that for any incident involving a dispatcher's failure to issue a speed restriction, including with respect to paragraph (e)(6) in the final rule, FRA should adopt "the same criteria in excess of 10 mph" referencing 49 CFR 240.305(a) and 242.403(e).¹¹⁰ While it is not entirely clear what TTD means by this comment, FRA infers that TTD thinks an event should only warrant revocation if the dispatcher should have issued a speed restriction that is at least 10 mph below the normal authorized speed. As an initial matter, FRA finds that a failure to issue a speed restriction by itself warrants revocation without attaching any additional conditions. Further, from a practical matter, speed restrictions are rarely issued for less than 10 mph below the normal operating speed, thus, TTD's proposed change would apply to a very small number of cases. Therefore, FRA is not adopting TTD's proposed change.

NRC questioned the relevance of including paragraph (e)(6) in the final rule as a revocable event as such failure should be covered by operating rules. However, if an action is not listed in paragraph (e) of this section, then a railroad cannot revoke a dispatcher's certification for such action, even if it constitutes a violation of an operating rule. Since FRA thinks the action described in paragraph (e)(6) warrants revocation, it must be included in this final rule.

One individual commenter criticized FRA's list of revocable events in paragraph (e) stating that under the structure of this rule, FRA runs the risk of having every dispatcher in the country out of service. Instead, the commenter said FRA should perform a study to determine what are the most common dispatching errors. The

¹¹⁰ FRA-2022-0019-0037.

commenter also stated that FRA should make sure retaliation is not a factor in revocation, and that the revocable offenses constitute serious safety issues.¹¹¹ FRA does not share this commenter's concerns about this list of revocable events. In drafting this list, FRA sought to compile the most serious violations a dispatcher could commit. The agency sought input on this list from the public and based on that feedback, has composed this list for the final rule. The listed violations involve serious errors that should rarely occur in the field. Thus, it is unclear how FRA is running the risk of having every dispatcher out of service. Furthermore, in drafting this list, FRA attempted to draw a bright line as to whether an event warranted revocation. This significantly limits the discretion a railroad has in its decision to revoke which reduces the likelihood that retaliation could factor into a railroad's decision.

APTA and the Metropolitan Transportation Authority (MTA) each commented on the potential interaction between part 245 and the Confidential Close Call Reporting System (C³RS), an FRA-sponsored program that allows railroad employees reporting close calls to receive certain protections, which currently include protection from decertification for locomotive engineers and conductors. Each C³RS program is established through an implementing memorandum of understanding (IMOU) signed by FRA and the participating railroad and labor organization(s). Under the current process, the participating railroad then submits to FRA a petition to waive specific part 240 and/or part 242 requirements necessary to implement the IMOU's decertification protections. A waiver granted by FRA then incorporates the IMOU's protections by reference. APTA and MTA request that FRA add language to this regulation which would state that those railroads with existing C³RS programs with part 240 and 242 waivers do not have to similarly apply for a waiver of part 245, as their C³RS protections should automatically

¹¹¹ FRA-2022-0019-0016.

be applied to part 245 revocable events. APTA and MTA also request that FRA identify in the rule whether any revocable events for dispatchers will not be afforded C³RS protections.

While FRA appreciates the commenters' desire for a more streamlined C³RS process, their request is beyond the scope of this rule and risks introducing inconsistency and confusion into the C³RS implementation process. Specifically, addressing C³RS in this rule would treat dispatchers differently than locomotive engineers and conductors, who receive C³RS decertification protection only pursuant to part 240 and 242 waivers. The proposed approach would also treat dispatchers at new C³RS programs differently, as railroads joining C³RS after the publication of the rule would still have to file a part 245 waiver petition. This inconsistency could create confusion and lead to dispatchers at C³RS-participating railroads being uncertain about whether they were protected by the terms of a waiver or by C³RS-related provisions in part 245 (particularly dispatchers hired after the date of this final rule who would not necessarily know when their railroad implemented C³RS for dispatchers). Such confusion would be compounded if this rule specified which revocable events were not afforded C³RS protections, as any such regulatory provision could differ substantively from the provisions of an applicable IMOU and waiver.

Confusion is further risked because only some existing C³RS IMOU's cover dispatchers, not all. Using part 245 to provide C³RS decertification protection to dispatchers at railroads with "existing" C³RS programs could therefore be particularly confusing for dispatchers at railroads with existing C³RS programs that do not currently include dispatchers. Such dispatchers may mistakenly believe that they are covered by C³RS simply through the action of part 245, not realizing that they lack protection due to the absence of an IMOU that applies to them.

Overall, FRA believes that to promote dispatcher confidence in C³RS reporting, dispatchers must be absolutely certain about the decertification protection they will receive. Such confidence is best promoted by a clear understanding that all dispatchers may only report pursuant to an IMOU and waiver that specifically apply to their railroad, rather than having some dispatchers protected by separate provisions in part 245, depending on whether they were covered by a C³RS program at the time the final rule is published.

However, RSAC has established a C³RS Working Group tasked, in part, with examining how C³RS could be expanded industry-wide without a separate waiver being required for each participating railroad.¹¹² Instead of addressing C³RS in this rule, FRA finds it preferable to allow the RSAC C³RS Working Group to perform its work and to apply any RSAC-recommended improvements consistently to locomotive engineers, conductors, dispatchers, and any other certified craft through a future rulemaking or some other means. In the meantime, any railroad that already has a C³RS program that applies to dispatchers will need to file a request to modify its waiver if the railroad would like the program's decertification protections to apply to its dispatchers. Likewise, a railroad that is not currently participating in C³RS (or a railroad that has a C³RS program, but one that does not apply to its dispatchers) will need to file a petition for relief if the railroad decides to implement a C³RS program covering dispatchers.

Finally, paragraph (i) of this section prohibits a railroad from revoking a dispatcher's certification if the revocable event occurred during an operational test that was not conducted in conformance with part 245, the railroad's operating rules, or the railroad's program under 49 CFR 217.9. AAR and ASLRRA commented that FRA should take into consideration the type of error that occurred and whether it harmed the

¹¹² See Task No. 2022-03.

dispatcher. If the error was a minor procedural error that did not cause substantial harm to the dispatcher, the associations contend there is no safety basis to preclude railroads from revoking the dispatcher's certification if a dispatcher committed a revocable offense during such test. FRA disagrees. When railroads perform such operational tests, they have a duty to ensure the tests are done properly under both Federal law and the railroad's own rules. Keeping paragraph (i) in its current form will incentivize railroads to fulfill this duty. If FRA adopted the associations' suggestion, it would create a gray area where one did not previously exist. It would also complicate the job of the Certification Review Board (CRB) as some dispatchers would presumably raise this issue in their petitions to the CRB. The CRB would then have to determine whether an error on an operational test caused the dispatcher substantial harm. FRA finds that with respect to this issue, a bright-line rule is preferable. It should not be a heavy burden for railroads to properly perform these operational tests, thus, FRA is not making any changes to this paragraph from the proposed rule.

Section 245.305 Periods of Ineligibility.

In this section, FRA provides details on how a railroad shall determine a person's period of ineligibility if they have their dispatcher certification revoked. FRA received several comments from individual commenters who were critical of the discipline structure in this section. One commenter described the discipline structure in this rule as "insane" and argued that this rule is about job cuts and not railroad safety. This commenter also stated that a majority of the dispatchers they have questioned are not in favor of certification.¹¹³ Another individual commented that this rule will make it easier for railroads to retaliate against employees and hold them out of service for "minute

¹¹³ FRA-2022-0019-0024.

clerk error[s]” and to circumvent litigation brought under the Federal Railroad Safety Act for unjust retaliation.¹¹⁴

FRA disagrees with these commenters, as it finds the discipline structure in this rule to be reasonable. The revocable offenses described in § 245.303(e) constitute serious violations, not minute clerical errors. Given the seriousness of these offenses, if a dispatcher is found to have committed such a violation, that person should be held out of service for the prescribed period. This discipline structure mirrors what has been in place for locomotive engineers and conductors for years. Since FRA did not receive any comments that provided a rationale for why dispatchers should be treated differently, FRA sees no reason to make any changes to this section. Because the revocable events and the periods of ineligibility provide very little discretion to the railroads, this limits the likelihood of a dispatcher being subject to unjust retaliation by the railroad.

Paragraph (b) of this section provides the revocation periods based on the number of revocable violations a dispatcher has committed over a certain period. AAR requested that FRA “clarify that the 36-month period is on a rolling basis, such that each new revocation has the potential to extend the 36-month clock.”¹¹⁵ The 36-month period in paragraphs (b)(3) and (4) is a lookback period from the most recent violation. For example, if a certified dispatcher committed a violation described in § 245.303(e)(1) through (7) on January 1, 2028, the railroad would have to determine how many revocable violations the dispatcher committed from January 1, 2025, to January 1, 2028. If the dispatcher had two additional revocable events during this time period (making the violation on January 1, 2028 the third such violation), then paragraph (b)(3) would apply, and the railroad would have to revoke the dispatcher’s certification for one year.

¹¹⁴ FRA-2022-0019-0015.

¹¹⁵ FRA-2022-0019-0041.

In their joint comment, AAR and ASLRRA also criticize the periods of ineligibility in this section for being too lenient and recommend that FRA revise paragraph (b)(4) so that if a dispatcher has four revocable events in a 36-month period, they are no longer eligible to be certified. As an initial matter, this section only addresses how long a person is ineligible to work as a dispatcher following an incident described in § 245.303(e). This section does not limit the discipline a railroad can issue in response to a revocable event, other than limiting the amount of time the railroad can revoke the dispatcher's certification. For example, if a certified dispatcher commits a violation described in § 245.303(e)(1), and the dispatcher has no prior history of committing a revocable event, paragraph (b)(1) of this section prohibits the railroad from revoking the dispatcher's certification for more than 30 days. However, the railroad can choose to hold the dispatcher out of service for longer than 30 days, or can terminate the dispatcher, if it thinks such discipline is warranted.

FRA is declining to adopt the associations' proposal to revise paragraph (b)(4) so that four revocable events in a 36-month period would render a person permanently ineligible to hold certification. FRA thinks a three-year revocation period is a reasonable penalty, and it aligns with the discipline structure found in parts 240 and 242. Furthermore, FRA already has an established process in place for disqualifying persons from performing safety-sensitive work on either a temporary or permanent basis. If a railroad finds a dispatcher's actions are so egregious that they warrant disqualification, the railroad can refer the case to FRA, and the agency can determine whether to initiate the disqualification procedures proscribed in 49 CFR part 209, subpart D. FRA believes the process outlined in part 209 is preferable to creating a blanket requirement in this rule that would permanently disqualify a person from working as a dispatcher.

Paragraph (d) of this section provides a list of conditions that would allow a railroad to shorten a dispatcher's revocation period. ATDA requested that this paragraph

be revised to require that railroads offer dispatchers training in exchange for a reduction in their revocation period. ATDA contended this change would be beneficial because all revocable events should lead to “some form of retraining to ensure that the individual has a proper understanding of the events which occurred and to help ensure compliance in the future.”¹¹⁶ ATDA’s proposal would also make the process of reducing a dispatcher’s revocation period more objective as all dispatchers would be provided with an equal opportunity to receive training to reduce their revocation period. While FRA appreciates ATDA’s position, it is not adopting this proposal. FRA thinks railroads should have discretion in determining whether to reduce a dispatcher’s revocation period. A railroad may deem certain violations so egregious that they don’t warrant a reduction in the revocation period. Therefore, FRA finds that it would be inappropriate to mandate that railroads reduce the revocation period for such incidents as long as the dispatcher participated in the retraining that the railroad was required to provide.

Lastly, NRC requested that FRA more clearly define what is meant by “adequate remedial training” in paragraph (d)(3). NRC also recommended deleting paragraph (d)(5) which requires that dispatchers serve at least one half of their period of ineligibility before their certification can be reinstated to obviate potential staffing issues. FRA is not adopting these proposed changes in the final rule. Whether a dispatcher has received “adequate remedial training” is a determination that is specific to the facts of each particular case. Railroads should be given latitude to make such determinations, and thus, they should not be constrained by a more specific definition. With respect to paragraph (d)(5), FRA takes the position that if a dispatcher commits a violation serious enough to warrant revocation, that person should have to serve at least one-half of the prescribed revocation period. FRA does not find NRC’s reasoning convincing as

¹¹⁶ FRA-2022-0019-0038.

railroads should not be sacrificing safety to alleviate staffing concerns. Furthermore, parts 240 and 242 have similar provisions to paragraph (d)(5)¹¹⁷ and FRA is unaware of these provisions causing staffing issues for railroads with respect to locomotive engineers and conductors, thus, it seems unlikely that this would lead to staffing issues for dispatchers.

Section 245.307 Process for Revoking Certification.

This section covers the procedures railroads must follow to revoke a dispatcher's certification. SEPTA expressed concerns that this section could put dispatchers in uncomfortable situations, as they could be intimidated or worry about retaliation for cross-examining a senior level manager. If a dispatcher is concerned about being put in such a scenario, they are welcome to have a designated representative, as provided for in paragraph (d)(5) of this section. This designated representative can, but does not have to, be a labor union representative, or an attorney. Also, it is unclear what SEPTA would propose as an alternative as FRA cannot prohibit dispatchers from cross-examining the railroad's witnesses. Such a process would be fundamentally unfair to dispatchers and is untenable. Thus, FRA does not see a need to change this section based on SEPTA's comment.

Paragraph (b)(4) of this section in the NPRM provided that no later than the start of the hearing, the railroad shall provide the dispatcher with a copy of the written information and a list of witnesses the railroad will present at the hearing. TTD and ATDA submitted similar comments criticizing this paragraph, contending it does not allow for sufficient time for a dispatcher and their representative to prepare a defense. TTD requested that the language be revised so that the dispatcher and their labor representative, if applicable, "receive a copy of all information and a list of witnesses

¹¹⁷ 49 CFR 240.117(i)(5) and 242.405(c)(5).

sufficiently in advance of the hearing in order to properly develop a defense.”¹¹⁸ ATDA requested that this information be provided to the dispatcher no later than 96 hours before the hearing.

After considering these comments, FRA is amending paragraph (b)(4) to require railroads to provide dispatchers with a copy of the written information and the list of witnesses it will present at the hearing at least 72 hours before the start of the hearing. FRA thinks this will provide the dispatcher and their representative with sufficient time to prepare a proper defense. However, if an applicable collective bargaining agreement allows for railroads to provide this information less than 72 hours before the start of the hearing, the railroad will be in compliance with this requirement as long as it satisfies the requirements of the applicable collective bargaining agreement.

Paragraph (b)(4) in the NPRM also stated that if an employee of the railroad provided information that will be presented at the hearing, the railroad must make that employee available for examination at the hearing. TTD and ATDA stated that any person that the railroad was relying upon to support its allegations against the dispatcher should be present at the hearing. While the labor organizations may want this language to cover not just employees, but all persons, FRA recognizes that railroads are limited in their ability to compel a non-employee to testify at such hearings and is declining to make this change.

FRA is adding language to note that this sentence applies “notwithstanding the terms of an applicable collective bargaining agreement.” FRA wanted to make it clear in the rule text that all railroads must make employees available for examination at the hearing if those employees provided information that will be used by the railroad at the

¹¹⁸ FRA-2022-0019-0037.

hearing, regardless of whether an applicable collective bargaining agreement addresses this issue.

FRA is also making some other changes to this section, from what appeared in the proposed rule, to align with parts 240 and 242. Paragraph (b)(5) of this section states that after the hearing, the railroad must determine, based on the hearing record, whether certificate revocation is warranted. FRA is adding language from 49 CFR 240.307(b)(5) and 242.407(b)(5) to this paragraph noting that the railroad must also state the basis for its decision which is discussed in more detail in paragraph (e). Similarly, FRA added language to paragraph (d)(8) stating that while a railroad can consolidate a revocation hearing with a disciplinary hearing, it must still make a separate finding regarding revocation, and it must ensure that the railroad official making that determination is not the investigating officer. This new language, found in 49 CFR 240.307(e) and 242.407(e), clarifies for railroads that the requirements in paragraph (d)(1) of this section still apply when the revocation hearing is consolidated with a disciplinary hearing.

Next, FRA is revising paragraph (e)(2)(iv) of this section to change the references to an “employee” in the NPRM to a “dispatcher” in this final rule since not all dispatchers are employees of the certifying railroad.

Paragraph (g) of this section requires a railroad to revoke a dispatcher’s certification if it discovers that another railroad has revoked that person’s dispatcher certification. The revocation period shall coincide with the revocation period of the railroad that initially revoked the dispatcher’s certification. NRC commented that enforcing this provision may be difficult for FRA as it will depend largely on individual collective bargaining agreements. However, NRC’s comment is misguided as collective bargaining agreements do not supersede FRA regulations with respect to this issue. If Railroad A revokes a dispatcher’s certification, Railroad B would be required to revoke the dispatcher’s certification upon learning of Railroad A’s revocation and Railroad B

would not need to provide the dispatcher with a hearing since one was already provided by Railroad A.¹¹⁹ Under this paragraph, there is nothing in a collective bargaining agreement that could prevent Railroad B from taking these actions.

Finally, FRA added language that was not in the NPRM to clarify what is required under paragraph (j) of this section. Paragraph (j) requires railroads to keep records of evidence that leads the railroad to not revoke a dispatcher's certification in accordance with paragraph (h) or (i). In this final rule, FRA is acknowledging that this requirement does not just apply if this information comes to light during a revocation hearing. Railroads must also retain this evidence if it becomes available before the railroad suspends the dispatcher or before the revocation hearing is convened. The language FRA added to this final rule mirrors language found in 49 CFR 240.307(j) and 242.407(j). Additionally, FRA changed the "and" at the end of paragraph (j)(1) in the NPRM to an "or" since only paragraph (j)(1) *or* (j)(2) will apply to each individual railroad.

Section 245.403 Petition Requirements.

This section states the requirements a dispatcher must satisfy to submit a petition to the CRB. Paragraph (b)(7) of this section notes that a petition must include all written documents in the dispatcher's possession or reasonably available to the dispatcher that document the railroad's decision to revoke certification. IBEW commented that FRA should add language to this section requiring railroads to produce all records requested by the dispatcher. FRA does not think such a change is necessary because IBEW's concern is already addressed by § 245.405(b) which requires a railroad to supplement the record with any relevant documents, in its possession, that were not provided by the dispatcher.

¹¹⁹ Under § 245.213(c)(1), once a dispatcher's certification is suspended or revoked by one railroad, they must immediately notify all other railroads with which they have a dispatcher certificate.

This ensures that the CRB will have a complete record when the case is ready for their review.

Section 245.407 Request for a Hearing.

This section discusses the process for requesting an administrative hearing after a party has been adversely affected by a CRB decision. Paragraph (b) provides that an adversely affected party must file their request for a hearing within 20 days of service of the CRB's decision. TTD, ATDA, and IBEW asked FRA to increase this filing period from 20 days to 60 days. Their rationale for this position is that 20 days is inadequate for the aggrieved party to confer with their representative, determine the best course of action, and then compile the information required in paragraph (c) to complete a request. FRA disagrees with the labor organizations that 20 days is inadequate. The requirements in paragraph (c) to make a valid hearing request are minimal and are similar to the requirements found in § 245.403(b) for filing a petition with the CRB. Thus, if the dispatcher is the aggrieved party, most of the information they need for their hearing request can be found in their CRB petition that they already drafted. FRA does not see any major hindrance that would prevent a dispatcher or railroad from being able to complete this request within the 20 days currently allotted. Moreover, this 20-day deadline has been in effect for over a decade for conductors and for over 30 years for locomotive engineers. FRA is unaware of any major issues parties have had with meeting this deadline and does not see a justification for changing this deadline for dispatchers.

Appendices

FRA made minor revisions to Appendix A from what appeared in the proposed rule. Appendix A discusses the procedures that a person seeking certification or recertification should follow to furnish a railroad with their motor vehicle driving records. In paragraph (2), FRA added language noting that the information in a

candidate's motor vehicle driving records that the railroad should consider is described in § 245.111(m). FRA also added language to paragraph (4) to clarify that under § 245.301, a railroad is only required to provide a certification candidate with a copy of their motor vehicle driving records if the records contain information that could be the basis for denying certification. If no such adverse information exists, then the railroad does not have to provide the certification candidate with a copy of these records.

V. Regulatory Impact and Notices

A. Executive Order 12866 as Amended by Executive Order 14094

This final rule is not a significant regulatory action within the meaning of Executive Order 12866 as amended by Executive Order 14094, Modernizing Regulatory Review. Details on the estimated costs of this final rule can be found in the RIA, which FRA has prepared and placed in the docket (FRA-2022-0019).

FRA is issuing regulations establishing a formal certification process for railroad dispatchers. As part of that process, railroads will be required to develop a program for training current and prospective dispatchers, documenting and verifying that the holder of the certificate has achieved certain training and proficiency, and creating a record of safety compliance infractions that other railroads can review when considering individuals for certification. This final rule will ensure that dispatchers are properly trained, are qualified to perform their duties, and meet Federal safety standards. Additionally, this regulation is expected to improve railroad safety by reducing the rate of accidents/incidents.

The RIA presents estimates of the costs likely to occur over the first 10 years of the final rule. The analysis includes estimates of costs associated with development of certification programs, initial and periodic training, knowledge testing, and monitoring of operational performance. Additionally, costs are estimated for vision and hearing tests,

review of certification determinations made by other railroads, and Government administrative costs.

FRA estimated 10-year costs of \$5.4 million discounted at 7 percent. The annualized cost will be approximately \$0.8 million discounted at 7 percent. The following table shows the estimated 10-year costs of the final rule.

Total 10-Year Discounted Costs (2020 Dollars)

Category	Present Value 7% (\$)	Present Value 3% (\$)	Annualized 7% (\$)	Annualized 3% (\$)
Development of Certification Program	982,914	1,010,875	139,945	118,505
Certification Eligibility Requirements	55,345	61,945	7,880	7,262
Recertification Eligibility Requirements	65,831	83,877	9,373	9,833
Training	707,334	812,820	100,708	95,287
Knowledge Testing	233,988	281,581	33,315	33,010
Vision and Hearing	1,586,913	1,909,692	225,941	223,874
Monitoring Operational Performance	256,017	305,956	36,451	35,867
Railroad Oversight Responsibilities	267,530	326,714	38,090	38,301
Certification Card	26,832	32,289	3,820	3,785
Petitions and Hearings	38,667	46,209	5,505	5,417
Government Administrative Cost	1,192,651	1,342,668	169,807	157,402
Total	5,414,022	6,214,626	770,835	728,544

The primary benefit of this final rule is that it will ensure that railroads properly train and monitor dispatcher performance to reduce the risk of accidents caused by dispatcher error. This rule will allow railroads to revoke certification of dispatchers who make serious safety-related violations. This includes failure to properly issue or apply a mandatory directive or improperly authorizing a train or on-track equipment to proceed through a protected track segment.

This rule is expected to reduce the likelihood of an accident occurring due to dispatcher error. FRA has analyzed accidents over the past five years to categorize those where dispatcher training and certification would have impacted the accident. FRA

estimated that this rule will prevent 30 percent of accidents that were caused or likely caused by the dispatcher. FRA estimated that this rule will prevent 10 percent of accidents where a dispatcher may have contributed to the accident.

The following table shows the estimated 10-year benefits of the proposed rule. The total 10-year estimated benefits would be \$0.6 million (PV, 7 percent) and annualized benefits would be \$0.1 million (PV, 7 percent).

Total 10-Year Discounted Benefits (2020 Dollars)

Present Value 7% (\$)	Present Value 3% (\$)	Annualized 7% (\$)	Annualized 3% (\$)
620,283	725,177	88,314	85,013

FRA has quantified the monetary impact from accidents reported on FRA accident forms. However, some accident costs are not required to be reported on FRA accident forms (e.g., environmental impact). For example, the cost of property damage represents a portion of the total cost of train accidents, such as, the cost of direct labor and damage to on-track equipment, track, track structures, and roadbed. Other direct accident costs, such as accident clean up, third party property damage, lost lading, environmental damage, loss of economic activity to the community, and train delays are not included in FRA’s accident/incident reportable damages from the railroads. That impact may account for additional benefits not quantified in this analysis. If these costs not covered by FRA data were realized, accidents affected by this rulemaking could have much greater economic impact than the quantitative benefit estimates provided here.

In addition, the hiring and transfer of dispatchers will be more efficient with this rule. When dispatchers transfer between railroads, the common regulatory elements between programs will make the hiring process more seamless. When railroads certify a dispatcher that has been certified by a previous railroad, the certifying railroad will be able to verify components and dates of certification requirements. This will allow them

to certify dispatchers on their own railroad using information from the previous railroad, as well as specific requirements for their railroad.

B. Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act of 1980¹²⁰ and Executive Order 13272¹²¹ require agency review of proposed and final rules to assess their impacts on small entities. FRA prepared this Final Regulatory Flexible Analysis to evaluate the impact of the final rule on small entities and describe the effort to minimize the adverse impact. The estimated cost on small entities is not significant, as it represents less than one percent of average annual revenue of affected entities. Accordingly, the FRA Administrator hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

1. Statement of the Need for, and Objectives of, the Rule

FRA perceives the potential for dispatcher error to cause accidents, and an existing lack of means to evaluate and address this risk. Railroads' dispatcher training programs may not currently be covering all aspects of a dispatcher's job responsibility. Additionally, railroads may not be testing dispatchers and ensuring that their knowledge is maintained continuously.

DOT's general authority states, in relevant part, that the Secretary "as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970."¹²² The Secretary delegated this authority to the Federal Railroad Administrator.¹²³ The RSIA required the Secretary to submit a report to Congress addressing whether certification of certain crafts or classes of railroad employees or contractors was necessary to reduce the number and

¹²⁰ 5 U.S.C. 601 *et seq.*

¹²¹ 67 FR 53461 (Aug. 16, 2002).

¹²² 49 U.S.C. 20103.

¹²³ 49 CFR 1.89(a).

rate of accidents and incidents or to improve railroad safety. If the Secretary determined certification of certain crafts or classes was necessary to meet these goals, Congress also authorized the Secretary to promulgate regulations requiring certification. In the report to Congress, the Secretary noted that dispatchers, along with signal repair employees, were the most viable candidates for certification.

This final rule will require railroads to develop a dispatcher certification program and will ensure that railroads examine railroad safety with respect to dispatchers. Specifically, railroads will be required to ensure that the dispatchers they certify have the requisite knowledge, skills, safety record, and abilities to safely perform as a dispatcher. In addition, this rule requires railroads to have formal processes for revoking a dispatcher's certification if the dispatcher commits certain safety violations. If FRA did not issue this final rule, railroads would be free to hire and train dispatchers as they see fit and they would not be required to have a formal mechanism for removing dispatchers who commit safety violations from service.

2. Significant Issues Raised by Public Comments

FRA received several comments related to the costs of the proposed rule. ASLRRA and AAR submitted comments related to the proposed rule. Comments were received from ASLRRA relating to the cost estimates for developing the certification programs, petitions and hearings, and annual monitoring. FRA has revised costs for developing certification programs, estimating 550 hours for ASLRRA to develop a model or template program, as suggested by ASLRRA in their comment. Additionally, FRA has increased the time for individual railroads to develop their plan based on the template. The estimated time per railroad has been increased to 15 hours (from 8 hours in the RIA for the proposed rule).

Further, FRA has revised the cost for petitions and hearings, adding additional job categories and slightly increasing the time estimated per petition and hearing.

3. Response to Comments filed by the Chief Counsel for Advocacy of the Small Business Administration

FRA did not receive any comments from the Small Business Administration.

4. Description and Estimate of the Number of Small Entities to which the Rule will Apply

The Regulatory Flexibility Act of 1980 requires a review of proposed and final rules to assess their impact on small entities, unless the Secretary certifies that the rule would not have a significant economic impact on a substantial number of small entities. “Small entity” is defined in 5 U.S.C. 601 as a small business concern that is independently owned and operated and is not dominant in its field of operation. The U.S. Small Business Administration (SBA) has authority to regulate issues related to small businesses, and stipulates in its size standards that a “small entity” in the railroad industry is a for profit “line-haul railroad” that has fewer than 1,500 employees, a “short line railroad” with fewer than 1,500 employees, a “commuter rail system” with annual receipts of less than \$47.0 million dollars, or a contractor that performs support activities for railroads with annual receipts of less than \$34.0 million.¹²⁴

Federal agencies may adopt their own size standards for small entities in consultation with SBA and in conjunction with public comment. Under that authority, FRA has published a proposed statement of agency policy that formally establishes “small entities” or “small businesses” as railroads, contractors, and hazardous materials shippers that meet the revenue requirements of a Class III railroad as set forth in 49 CFR part 1201, General Instruction 1-1, which is \$20 million or less in inflation-adjusted

¹²⁴ U.S. Small Business Administration, “Table of Small Business Size Standards Matched to North American Industry Classification System Codes, March 27, 2023. https://www.sba.gov/sites/sbagov/files/2023-06/Table%20of%20Size%20Standards_Effective%20March%2017%2C%202023%20%282%29.pdf.

annual revenues,¹²⁵ and commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less.¹²⁶ FRA is using this definition for the final rule.

When shaping the rule, FRA considered the impact that the rule would have on small entities. FRA has provided additional time for Class III railroads to comply with the final rule as compared to Class I railroads.

The final rule is applicable to all railroads, although only railroads with a dispatching function will be affected. FRA estimates there are 768 Class III railroads, of which 734 operate on the general system. These railroads are of varying size, with approximately 250 Class III railroads belonging to larger holding companies. FRA estimates that 140 Class III railroads have a dispatching function and therefore will be affected by this final rule.

5. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule

The final rule requires Class III railroads to develop and implement a dispatcher certification program. This includes certifying and recertifying dispatchers, vision and hearing tests, training, knowledge testing, and monitoring operational performance.

The following table shows the annualized costs for all provisions of the final rule. The total annualized cost for all Class III railroads is \$143,612 (PV, 7 percent).

Annualized Costs for Class III Railroads

Category	Annualized 7% (\$)
Development of Certification Program	37,864
Certification Eligibility Requirements	1,970
Recertification Eligibility Requirements	2,343
Training	25,177
Knowledge Testing	8,329
Vision and Hearing	56,485
Monitoring Operational Performance	9,113

¹²⁵ The Class III railroad revenue threshold is \$46.3 million or less, for 2022. <https://www.ecfr.gov/current/title-49/subtitle-B/chapter-X/subchapter-C/part-1201>.

¹²⁶ See 68 FR 24891 (May 9, 2003) (codified at appendix C to 49 CFR part 209).

Certification Card	955
Petitions and Hearings	1,376
Total	143,612

The industry trade organization representing small railroads, ASLRRRA, reports the average freight revenue per Class III railroad is \$4.75 million.¹²⁷ The following table summarizes the average annual cost and revenue for Class III railroads.

Annual Class III Railroads' Cost and Revenue

Total Costs for All Class III Railroads, Annualized 7 percent (\$)	Number of Class III Railroads Impacted by Final Rule	Average Annual Cost per Class III Railroad (\$)	Average Class III Railroad Annual Revenue (\$)	Average Annual Cost as Percent of Revenue
A	b	c = a ÷ b	D	e = c ÷ d
143,612	140	1,026	4,750,000	0.02%

The estimated average annual cost for a Class III railroad is \$1,026. This represents a small percentage (0.02 percent) of the average annual revenue for a Class III railroad.

6. A Description of the Steps the Agency has Taken to Minimize the Economic Impact on Small Entities

This final rule requires railroads to develop a dispatcher certification program. Small railroads may use a template of a certification program developed by ALSRRA to comply with the final rule. Also, if a holding company owns several small railroads, it can submit a single certification program that covers all of the small railroads it owns. Therefore, the burden on small entities is mostly for certifying dispatchers. Many small railroads contract dispatching service to a third party. Dispatchers will be required to be certified by each railroad that they dispatch trains for, but the contractor may be involved in the process which would lessen the burden on individual short line railroads.

¹²⁷ American Short Line and Regional Railroad Association, *Short Line and Regional Railroad Facts and Figures*, p. 10 (2017 pamphlet).

FRA has allowed Class III railroads additional time to develop their certification programs. Class III railroads will have 480 days after the effective date of the final rule to submit a certification program, whereas Class I railroads must submit a plan within 240 days. FRA will also not require Class III railroads to conduct annual reporting as required by § 245.215 Railroad Oversight Responsibilities.

C. Paperwork Reduction Act

The information collection requirements for part 245 are being submitted for approval to the Office of Management and Budget for review and approval in accordance with the Paperwork Reduction Act of 1995.¹²⁸ This submission reflects adjustments in response to comments on program development costs discussed above. These changes impacted the paperwork burden under §§ 245.101 and 245.103. The adjustments increased the burden from 3,819 hours to 3,996 hours since the NPRM publication. This table contains new information collection requirements, and the estimated time to fulfill each requirement is as follows:

CFR Section	Respondent universe	Total annual responses (A)	Average time per responses (B)	Total annual burden hours (C) = A * B	Wage rate (D) ¹	Total cost equivalent (E) = C * D
245.9—Waivers—Petitions	203 railroads	.33 petitions	3 hours	1.00 hour	\$77.44	\$77.44
245.101/.103—Certification program required and FRA review of certification program—Development of certification program in accordance with this Part and procedures contained under § 245.107 — Railroads with Current Dispatching	203 railroads + ASLRRRA and holding companies	66 plans (14 Class I and commuter railroads plans + 0.33 generic program developed by ASLRRRA and holding companies plans + 51.67 Class II and III railroads plans)	120 hours + 550 hours + 15 hours	2,636.55 hours	\$115.24	\$303,836.02

¹²⁸ 44 U.S.C. 3501 *et seq.*

Operations and New Dispatching Railroads (Note: Each certification program includes procedure requirements under § 245.111 through § 245.121.)						
245.103(d)(1) Dispatcher certification submission—Copies of the program provided to the president of each rail labor organization (RLO) that represents the railroad's dispatchers and to all of the railroad's dispatchers that are subject to this part	203 railroads	3 copies	15 minutes	.75 hours	\$77.44	\$58.08
—(d)(2) Affirmative statements that the railroad has provided a copy of the program to RLOs and the railroad's dispatchers	203 railroads	3 affirmative statements	15 minutes	.75 hours	\$77.44	\$58.08
—(e) Comment Period—Comments on a railroad's program by any designated representative of dispatchers subject to this part or any directly affected person who does not have a designated representative	203 railroads	12 comments	4 hours	48.00 hours	\$77.44	\$3,717.12
—(g) Material Modifications of FRA-approved program—Railroad to submit a description of how it intends to modify the program and a copy of the modified program to FRA	The paperwork burden for this requirement is outside the scope of the 3-year PRA review period.					
—(h) Resubmission—Railroad can resubmit its program or material	203 railroads	3.67 revised plans (Class I and commuter railroads)	20 hours	73.40 hours	\$77.44	\$5,684.10

<p>modification after addressing all of the deficiencies noted by FRA and the resubmission must conform with the procedures and requirements contained in § 245.107</p>						
<p>—(i) Rescinding Prior Approval of Program—Railroad to resubmit its certification program and the program must conform with the procedures and requirements contained in § 245.107</p>	<p>The paperwork burden for this requirement is outside the scope of the 3-year PRA review period.</p>					
<p>245.105(c)(1) and (d)(1)— Implementation schedule for certification programs— Designation of certified dispatcher</p>	<p>203 railroads</p>	<p>522 designated dispatchers</p>	<p>5 minutes</p>	<p>43.50 hours</p>	<p>\$77.44</p>	<p>\$3,368.64</p>
<p>—(c)(2) and (d)(2) Issue a certificate that complies with § 245.207 to each person that it designates</p>	<p>203 railroads</p>	<p>522 issued certificate cards</p>	<p>3 minutes</p>	<p>26.10 hours</p>	<p>\$77.44</p>	<p>\$2,021.18</p>
<p>—(f) Written requests for delayed certification— Railroad may wait to recertify the person making the request until the end of the three-year period after FRA has approved the railroad's certification program</p>	<p>FRA anticipates zero submissions.</p>					
<p>—(g) Testing and evaluation— Railroad shall only certify or recertify a person as a dispatcher if that person has been tested and evaluated in accordance with procedures that comply with</p>	<p>The paperwork burden for testing and evaluation is included in the economic burden and the burden for certificates is included under § 245.105.</p>					

subpart B of this part						
245.107— Requirements for Certification Programs— Procedures for Obtaining and Evaluating Motor Vehicle Driving Record Data	The paperwork requirements described in this section are accounted for throughout this table.					
245.109(a)— Determinations required for certification and recertification— Eligibility requirements	The paperwork burden for this requirement is covered under § 245.111 through § 245.121 and § 245.303.					
—(b) Person entering into an agreement that results in a railroad obtaining the information needed for compliance with this subpart in a different manner than that prescribed in § 245.111 or § 245.113	As a condition of employment, dispatchers will sign an agreement upon being hired. There is no paperwork burden since this is the usual and customary procedure.					
245.111(a) through (c)—Prior safety conduct as motor vehicle operator— Eligibility requirements of this section involving prior conduct as a motor vehicle operator	203 railroads	522 motor vehicle records	5 minutes	43.50 hours	\$77.44	\$3,368.64
—(e) If driver information is not obtained as required pursuant to paragraph (g) of this section, that person or the railroad certifying or recertifying that person may petition for a waiver in accordance with the provisions of part 211 of this chapter	203 railroads	2 waivers	2 hours	4.00 hours	\$77.44	\$309.76

—(f) Individual's duty—Consent to make information concerning driving record available to that railroad	This is usual and customary procedure. The consent form is signed at the time of hiring to make driving information available to the railroad.					
—(g) and (h) Request to obtain driver's license information from licensing agency	203 railroads	522 written requests	5 minutes	43.50 hours	\$59.00	\$2,566.50
—(i) Requests for additional information from licensing agency	The paperwork burden for this requirement is included under § 242.111(g) and (h).					
—(j) Notification to railroad by persons of never having a license	203 railroads	2 notices	10 minutes	.33 hours	\$77.44	\$25.56
—(k) Report of motor vehicle incidents described in paragraphs (m)(1) and (2) of this section to the certifying railroad within 48 hours	203 railroads	10 self-reports	10 minutes	1.67 hours	\$77.44	\$129.32
—(l) and (m) Evaluation of person's driving record by railroad	203 railroads	522 motor vehicle record evaluations	5 minutes	43.50 hours	\$71.89	\$3,127.22
—(n)(1) DAC referral by railroad after report of driving drug/alcohol incident	203 railroads	9 DAC referrals	5 minutes	.75 hours	\$115.24	\$86.43
—(n)(2) DAC request and supply by persons of prior counseling or treatment	203 railroads	1 request and supplied record	30 minutes	.50 hours	\$115.24	\$57.62
—(n)(3) Conditional certifications recommended by DAC	203 railroads	3 conditional certification recommendations	4 hours	12.00 hours	\$115.24	\$1,382.88
245.113(b)—Prior safety conduct with other railroads— Certification candidate has not been employed or certified by any other railroad in the previous five years, they do not have to submit a request in accordance with paragraph (c) of this section, but they must notify	This is usual and customary procedure and, therefore, there is no paperwork burden.					

the railroad of this fact in accordance with procedures established by the railroad in its certification program						
—(c) Person seeking certification or recertification under this part shall submit a written request to each railroad that employed or certified the person within the previous five years	203 railroads	3.33 requests	15 minutes	.83 hours	\$77.44	\$64.28
—(e) and (g) Railroad shall provide the information requested to the railroad designated in the written request	203 railroads	3.33 records	15 minutes	.83 hours	\$77.44	\$64.28
—(f) An explanation shall state why the railroad cannot provide the information within the requested time frame or cannot provide the requested information	FRA anticipates zero submissions.					
245.115(a)— Substance abuse disorders and alcohol drug rules compliance— Determination that person meets eligibility requirements	203 railroads	459 determinations	2 minutes	15.30 hours	\$77.40	\$1,184.22
—(b) Written documents from DAC that person is not affected by a substance abuse disorder	203 railroads	20 filed documents	30 minutes	10.00 hours	\$115.24	\$1,152.40
—(c)(3) Fitness requirement— Voluntary self-referral by dispatcher for substance abuse counseling or treatment under the policy required by	203 railroads	1 self-referral	10 minutes	.17 hours	\$115.24	\$19.59

§ 219.1001(b)(1) of this chapter						
—(d)(1) and (2) Prior alcohol/drug conduct; Federal rule compliance	203 railroads	522 certification reviews	10 minutes	87.00 hours	\$115.24	\$10,025.88
—(d)(3)(i) Written determination that most recent incident has occurred	203 railroads	8 written determinations	1 hour	8.00 hours	\$115.24	\$921.92
—(d)(3)(ii) Notification to person that recertification has been denied	203 railroads	8 notifications	30 minutes	4.00 hours	\$77.44	\$309.76
—(d)(4) Persons/dispatchers waiving investigation/de-certifications	203 railroads	5 waived investigations	10 minutes	.83 hours	\$77.44	\$64.28
245.117(a) through (c)—Visual acuity—Determination vision standards met	203 railroads	522 records	2 minutes	17.40 hours	\$71.89	\$1,250.89
—(d)(1) Request for retest and another medical evaluation	203 railroads	5 records	2 minutes	.17 hours	\$71.89	\$12.22
—(d)(2) Railroad to provide a copy of this part to medical examiner	203 railroads	522 copies	5 minutes	43.50 hours	\$71.89	\$3,127.22
—(d)(3) Consultations by medical examiners with railroad officer and issue of conditional certification	203 railroads	5 consultations + conditional certifications	30 minutes + 10 minutes	3.33 hours	\$71.89	\$239.39
—(g) Notification by certified dispatcher of deterioration of vision	203 railroads	1 notification	10 minutes	.17 hours	\$71.89	\$12.22
245.118(a) through (c)—Hearing acuity—Determination hearing standards met	203 railroads	522 medical records	2 minutes	17.40 hours	\$71.89	\$1,250.89
—(d)(1) Request for retest and another medical evaluation	203 railroads	5 records	2 minutes	.17 hours	\$71.89	\$12.22
—(d)(2) Railroad to provide a copy	203 railroads	522 copies	5 minutes	43.50 hours	\$71.89	\$3,127.22

of this part to medical examiner						
—(d)(3) Consultations by medical examiners with railroad officer and issue of conditional certification	203 railroads	5 consultations + conditional certifications	30 minutes + 10 minutes	3.33 hours	\$71.89	\$239.39
—(g) Notification by certified dispatcher of deterioration of hearing	203 railroads	1 notification	10 minutes	.17 hours	\$71.89	\$12.22
245.119(b)— Training requirements—A railroad’s election for the training of dispatchers shall be stated in its certification program	The paperwork burden for this requirement is covered under §§ 245.101 and 245.103.					
—(c) Initial training program for persons not previously certified as dispatchers	203 railroads	71 training programs	3 hours	213.00 hours	\$115.24	\$24,546.12
—(c)(3) Modification to training program when new safety-related railroad laws, regulations, etc. are introduced into the workplace	The paperwork burden for this requirement is outside the scope of the 3-year PRA review period.					
—(d) Relevant information or materials on safety or other rules made available to certification candidates	The paperwork burden for this requirement is covered under §§ 245.101 and 245.103.					
—(e) and (f) Completion of initial training program by a person being certified as a dispatcher— Written documentation showing completed training program that complies with paragraph (c) of this section	203 railroads	67 written documents or records	10 minutes	11.17 hours	\$77.44	\$865.00

—(e)(3) Employee consultation with qualified supervisory employee if given written test to demonstrate knowledge of physical characteristics of any assigned territory	The paperwork burden for this requirement is covered under § 245.119.					
—(g) Certification program is submitted in accordance with the procedures and requirements described in § 245.107	The paperwork burden for this requirement is covered under §§ 245.101 and 245.103.					
—(h) Familiarization training for dispatcher of acquiring railroad from selling company/railroad prior to commencement of new operation	FRA anticipates zero submissions.					
—(i) Continuing education of certified dispatchers	203 railroads	522 training records	15 minutes	130.50 hours	\$71.89	\$9,381.65
245.120— Requirements for territorial qualification — Determining eligibility	The paperwork burden for this requirement is covered under § 245.119.					
—(b) Notification by persons who do not meet territorial qualification	The paperwork burden for this requirement is covered under § 245.119.					
245.121(a) through (c)—Knowledge testing— Determining eligibility	203 railroads	522 test records	5 minutes	43.50 hours	\$77.44	\$3,368.64
—(d) Reexamination of the failed test	203 railroads	2 examination records	5 minutes	.17 hours	\$77.44	\$13.16
245.123(c)— Monitoring operational performance— Unannounced compliance tests— Retention of a written record	203 railroads	1,822 records	2 minutes	60.73 hours	\$77.44	\$4,702.93

245.125— Certification determinations made by other railroads	203 railroads	3.33 determinations	30 minutes	1.67 hours	\$77.44	\$129.32
245.203(b)— Retaining information supporting determination— Records	203 railroads	522 record retentions	15 minutes	130.50 hours	\$77.44	\$10,105.92
—(g) Amended electronic records	203 railroads	1 amended record	15 minutes	.25 hours	\$77.44	\$19.36
245.205—List of certified dispatchers and recordkeeping.	The paperwork requirement for this burden is covered under § 245.105(c)(1) and (d)(1).					
245.207(a) through (e)—Certificate requirements	The paperwork requirement for this burden is covered under § 245.105(c)(2) and (d)(2).					
—(f) and (g) Replacement of certificates	203 railroads	15 replacement certificates	5 minutes	1.25 hours	\$77.44	\$96.80
—(h) Notification by dispatchers that railroad request to serve exceeds certification	203 railroads	30 notifications	30 seconds	.25 hours	\$71.89	\$17.97
245.213(a) through (h)—Multiple Certificates— Notification of denial, suspension, or revocation of certification by individuals holding multiple certifications	203 railroads	3 notifications	10 minutes	.50 hours	\$77.44	\$38.72
—(i) In lieu of issuing multiple certificates, a railroad may issue one certificate to a person who is certified in multiple crafts	The paperwork requirement for this burden is covered under § 245.105.					
245.215—Railroad oversight responsibilities— Review and analysis of administration of certification program	203 railroads	17.33 annual reviews and analyses	8 hours	138.64 hours	\$115.24	\$15,976.87

—(d) Report of findings and conclusions reached during annual review by railroad (if requested in writing by FRA, RLO president, or certified dispatcher not represented by labor organization) review and analysis effort.	203 railroads	2 reports	4 hours	8.00 hours	\$115.24	\$921.92
245.301(a)— Denial of certification— Notification to candidate of information that forms basis for denying certification and candidate response	203 railroads	2 notices + 1 response	1 hour	3.00 hours	\$77.44	\$232.32
—(b) Denial Decision Requirements— Written notification of denial of certification by railroad to candidate	203 railroads	2 notifications	1 hour	2.00 hours	\$77.44	\$154.88
245.307(b)(1) through (4)— Process for revoking certification— Immediate suspension of dispatcher’s certification	203 railroads	5 suspended certification letters and documentations	30 minutes	2.50 hours	\$77.44	\$193.60
—(b)(5) and (6) Determinations based on the record of the hearing, whether revocation of the certification is warranted	The paperwork requirement for this burden is covered under § 245.307(e).					
—(b)(7) Retention of record of the hearing for three years after the date the decision is rendered	203 railroads	5 records	15 minutes	1.25 hours	\$77.44	\$96.80
—(d)(9) Hearing Procedures— Written waiver of right to hearing	203 railroads	1 written waiver	10 minutes	.17 hours	\$59.00	\$10.03

—(e) Revocation Decision Requirements— Written decisions by railroad official	203 railroads	5 written decisions and service of decisions	2 hours	10.00 hours	\$115.24	\$1,152.40
—(g) Revocation of certification based on information that another railroad has done so	203 railroads	1 revoked certification	10 minutes	.17 hours	\$115.24	\$19.59
—(j) Placing relevant information in record if sufficient evidence meeting the criteria in paragraph (h) or (i) of this section becomes available	The paperwork requirement for this burden is covered under § 245.307(b)(7).					
—(k) Good faith determination	203 railroads	1 good faith determination	1 hour	1.00 hour	\$77.44	\$77.44
Subpart E— Dispute Resolution Procedures—§ 245.401 through § 245.411	The requirements under these provisions are exempted from the PRA under 5 CFR 1320.4(a)(2). Since these provisions pertain to an administrative action or investigation, there is no PRA burden associated with these requirements.					
Appendix A to Part 245 – Procedures for Obtaining and Evaluating Motor Vehicle Driving Record Data	The paperwork requirements described in this appendix are accounted for throughout this table.					
Appendix B to Part 245 – Medical Standards Guidelines	The paperwork requirements described in this appendix are accounted for throughout this table.					
Totals ²	203 railroads + ASLRRRA and holding companies	9,487 responses	N/A	3,996 hours	N/A	\$425,087

¹ Throughout the tables in this document, the dollar equivalent cost is derived from the 2020 Surface Transportation Board’s Full Year Wage A&B data series using the appropriate employee group hourly wage rate that includes 75-percent overhead charges.

² Totals may not add due to rounding.

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 Ms. Arlette Mussington, Information Collection Clearance Officer, at email: arlette.mussington@dot.gov or telephone: 571-609-1285, or Ms. Joanne Swafford,

Information Collection Clearance Officer, at email: joanne.swafford@dot.gov or telephone: at 757-897-9908.

OMB is required to decide 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 of this document. FRA is not authorized to impose a penalty on persons for violating information collection requirements that do not display a current OMB control number, if required. The current OMB control number for this rule is 2130-0637.

D. Federalism Implications

Executive Order 13132, Federalism,¹²⁹ 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, to the extent practicable and permitted by law, 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. National action limiting the policymaking discretion of the States shall be taken only where there is constitutional and statutory

¹²⁹ 64 FR 43255 (Aug. 10, 1999).

authority for the action and the national activity is appropriate in light of the presence of a problem of national significance. Where there are significant uncertainties as to whether national action is authorized or appropriate, agencies shall consult with appropriate State and local officials to determine whether Federal objectives can be attained by other means.

FRA has analyzed this final rule in accordance with the principles and criteria contained in Executive Order 13132. FRA has determined that this final rule has no federalism implications, other than the possible preemption of State laws under 49 U.S.C. 20106. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply, and preparation of a federalism summary impact statement for the rule is not required.

E. International Trade Impact Assessment

The Trade Agreements Act of 1979¹³⁰ 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 final 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.

F. Environmental Assessment

FRA has evaluated this final rule consistent with the National Environmental Policy Act¹³¹ (NEPA), the Council of Environmental Quality's NEPA implementing regulations,¹³² and FRA's NEPA implementing regulations¹³³ and determined that it is

¹³⁰ 19 U.S.C. Ch. 13.

¹³¹ 42 U.S.C. 4321 *et seq.*

¹³² 40 CFR parts 1500 through 1508.

¹³³ 23 CFR part 771.

categorically excluded from environmental review and therefore does not require the preparation of an environmental assessment (EA) or environmental impact statement (EIS). Categorical exclusions (CEs) are actions identified in an agency's NEPA implementing regulations that do not normally have a significant impact on the environment and therefore do not require either an EA or EIS.¹³⁴ Specifically, FRA has determined that this rule is categorically excluded from detailed environmental review.¹³⁵

The main purpose of this rulemaking is to establish certification requirements for train dispatchers. This final rule would not directly or indirectly impact any environmental resources and would not result in significantly increased emissions of air or water pollutants or noise. In analyzing the applicability of a CE, FRA must also consider whether unusual circumstances are present that would warrant a more detailed environmental review.¹³⁶ FRA has concluded that no such unusual circumstances exist with respect to this regulation and the final rule meets the requirements for categorical exclusion.¹³⁷

Pursuant to Section 106 of the National Historic Preservation Act and its implementing regulations, FRA has determined this undertaking has no potential to affect historic properties.¹³⁸ FRA has also determined that this rulemaking does not approve a project resulting in a use of a resource protected by Section 4(f).¹³⁹ Further, FRA reviewed this rule and found it consistent with Executive Order 14008, "Tackling the Climate Crisis at Home and Abroad."

G. Environmental Justice

¹³⁴ 40 CFR 1508.4.

¹³⁵ See 23 CFR 771.116(c)(15) (categorically excluding "[p]romulgation of rules, the issuance of policy statements, the waiver or modification of existing regulatory requirements, or discretionary approvals that do not result in significantly increased emissions of air or water pollutants or noise").

¹³⁶ 23 CFR 771.116(b).

¹³⁷ 23 CFR 771.116(c)(15).

¹³⁸ See 54 U.S.C. 306108.

¹³⁹ See DOT Act of 1966, as amended (Pub. L. 89-670, 80 Stat. 931); 49 U.S.C. 303.

Executive Order 14096, “Revitalizing Our Nation's Commitment to Environmental Justice for All,” which expands on Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” requires U.S. Department of Transportation (DOT) agencies to achieve environmental justice as part of their mission by identifying and addressing, as appropriate, disproportionate and adverse human health or environmental effects, including those related to climate change and cumulative impacts of environmental and other burdens on communities with environmental justice concerns. DOT Order 5610.2C (“U.S. Department of Transportation Actions to Address Environmental Justice in Minority Populations and Low-Income Populations”) instructs DOT agencies to address compliance with Executive Order 12898 and requirements within the DOT Order 5610.2C in rulemaking activities, as appropriate, and also requires consideration of the benefits of transportation programs, policies, and other activities where minority populations and low-income populations benefit, at a minimum, to the same level as the general population as a whole when determining impacts on minority and low-income populations.¹⁴⁰ FRA has evaluated this final rule under Executive Orders 14096 and 12898 and DOT Order 5610.2C and has determined it will not cause disproportionate and adverse human health and environmental effects on communities with environmental justice concerns.

H. Unfunded Mandates Reform Act of 1995

Under section 201 of the Unfunded Mandates Reform Act of 1995,¹⁴¹ 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

¹⁴⁰ Executive Order 14096 is not currently referenced in DOT Order 5610.2C.

¹⁴¹ Public Law 104-4, 2 U.S.C. 1531.

law).” Section 202 of the Act¹⁴² further requires that “before promulgating any general notice of proposed rulemaking that is likely to result in promulgation of any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any 1 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 \$100,000,000 or more (as adjusted annually for inflation) in any one year, and thus preparation of such a statement is not required.

I. Energy Impact

Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,” requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.”¹⁴³ FRA evaluated this final rule under Executive Order 13211 and determined that this regulatory action is not a “significant energy action” within the meaning of Executive Order 13211.

J. Executive Order 13175 (Tribal Consultation)

FRA has evaluated this rule in accordance with the principles and criteria contained in Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, dated November 6, 2000. This rule would not have a substantial direct effect on one or more Indian Tribes, would not impose substantial direct compliance costs on Indian Tribal governments, and would not preempt Tribal laws. Therefore, the funding and consultation requirements of Executive Order 13175 do not apply, and a Tribal summary impact statement is not required.

¹⁴² 2 U.S.C. 1532.

¹⁴³ 66 FR 28355 (May 22, 2001).

List of Subjects in 49 CFR Part 245

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

The Rule

For the reasons discussed in the preamble, FRA amends chapter II, subtitle B of title 49 of the Code of Federal Regulations, by adding part 245 to read as follows:

PART 245—Qualification and Certification of Dispatchers

Sec.

Subpart A—General

- 245.1 Purpose and scope.
- 245.3 Application and responsibility for compliance.
- 245.5 Effect and construction.
- 245.7 Definitions.
- 245.9 Waivers.
- 245.11 Penalties and consequences for noncompliance.

Subpart B—Program and Eligibility Requirements

- 245.101 Certification program required.
- 245.103 FRA review of certification programs.
- 245.105 Implementation schedule for certification programs.
- 245.107 Requirements for certification programs.
- 245.109 Determinations required for certification and recertification.
- 245.111 Prior safety conduct as motor vehicle operator.
- 245.113 Prior safety conduct with other railroads.
- 245.115 Substance abuse disorders and alcohol drug rules compliance.
- 245.117 Visual acuity.
- 245.118 Hearing acuity.
- 245.119 Training requirements.
- 245.120 Requirements for territorial qualification.
- 245.121 Knowledge testing.
- 245.123 Monitoring operational performance.
- 245.125 Certification determinations made by other railroads.

Subpart C—Administration of the Certification Program

- 245.201 Time limitations for certification.
- 245.203 Retaining information supporting determinations.
- 245.205 List of certified dispatchers and recordkeeping.
- 245.207 Certificate requirements.

- 245.213 Multiple certifications.
- 245.215 Railroad oversight responsibilities.

Subpart D— Denial and Revocation of Certification

- 245.301 Process for denying certification.
- 245.303 Criteria for revoking certification.
- 245.305 Periods of ineligibility.
- 245.307 Process for revoking certification.

Subpart E— Dispute Resolution Procedures

- 245.401 Review board established.
- 245.403 Petition requirements.
- 245.405 Processing certification review petitions.
- 245.407 Request for a hearing.
- 245.409 Hearings.
- 245.411 Appeals.

Appendix A to Part 245—Procedures for Obtaining and Evaluating Motor Vehicle Driving Record Data

Appendix B to Part 245—Medical Standards Guidelines

Authority: 49 U.S.C. 20103, 20107, 20162, 21301, 21304, 21311; 28 U.S.C. 2461 note; 49 CFR 1.89; and Pub. L. 110-432, sec. 402, 122 Stat. 4884.

Subpart A—General

§ 245.1 Purpose and scope.

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

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

(c) The dispatcher certification requirements prescribed in this part apply to any person who meets the definition of dispatcher contained in § 245.7, regardless of the fact that the person may have a job classification title other than that of dispatcher.

§ 245.3 Application and responsibility for compliance.

(a) This part applies to all railroads except:

(1) Railroads that do not have any dispatch (as defined in § 245.7) tasks performed either by dispatchers employed by the railroad or employed by a contractor or subcontractor;

(2) Railroads that operate only on track inside an installation that is not part of the general railroad system of transportation (*i.e.*, plant railroads, as defined in § 245.7);

(3) Tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation as defined in § 245.7; or

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

(b) Although the duties imposed by this part are generally stated in terms of the duty of a railroad, each person, as defined in § 245.7, who performs any function required by this part must perform that function in accordance with this part.

§ 245.5 Effect and construction.

(a) FRA does not intend, by use of the term dispatcher in this part, to alter the terms, conditions, or interpretation of existing collective bargaining agreements that employ other job classification titles when identifying a person who dispatches a train.

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

(c) Except as provided in § 245.213, nothing in this part shall be construed to create or prohibit an eligibility or entitlement to employment in other service for the railroad as a result of denial, suspension, or revocation of certification under this part.

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

§ 245.7 Definitions.

As used in this part:

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

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

Blocking device means a method of control that either prohibits the operation of a switch or signal or restricts access to a section of track.

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

Dispatch means:

(1) To perform a function that would be classified as a duty of a “dispatching service employee,” as that term is defined by the hours of service laws at 49 U.S.C. 21101(2), if the function were to be performed in the United States. The term dispatch includes, but is not limited to, by the use of an electrical or mechanical device:

(i) Controlling the movement of a train or other on-track equipment by the issuance of a written or verbal authority or permission affecting a railroad operation, or by establishing a route through the use of a railroad signal or train control system but not merely by aligning or realigning a switch; or

(ii) Controlling the occupancy of a track by a roadway worker or stationary on-track equipment, or both; or

(iii) Issuing a mandatory directive, including, but not limited to, speed restrictions, highway-rail grade crossing protections, or those which establish working limits for roadway workers.

(2) The term *dispatch* does not include the actions of personnel in the field:

(i) Effecting implementation of a written or verbal authority or permission for a railroad operation, including an authority for working limits to a roadway worker (*e.g.*, initiating an interlocking timing device, authorizing a train to enter working limits); or

(ii) Operating a function of a signal system designed for use by those personnel;
or

(iii) Sorting and grouping rail cars inside a railroad yard to assemble or disassemble a train.

Dispatcher means any individual who dispatches.

Dispatcher Pilot means a dispatcher qualified on assigned territory, tasked with overseeing a non-qualified employee who has not successfully completed all instruction, training and examination programs for the physical characteristics of the territory or position.

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

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

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

FRA means the Federal Railroad Administration.

FRA representative means the FRA Associate Administrator for Railroad Safety/Chief Safety Officer and the Associate Administrator's delegate, including any safety inspector employed by the Federal Railroad Administration and any qualified State railroad safety inspector acting under part 212 of this chapter.

Ineligible or ineligibility means that a person is legally disqualified from serving as a certified dispatcher. The term covers a number of circumstances in which a person may not serve as a certified dispatcher. Revocation of certification pursuant to § 245.307 and denial of certification pursuant to § 245.301 are two examples in which a person would be ineligible to serve as a dispatcher. A period of ineligibility may end when a condition or conditions are met, such as when a person meets the conditions to serve as a dispatcher following an alcohol or drug violation pursuant to § 245.115.

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

Main track means a track upon which the operation of trains is governed by one or more of the following methods of operation: Timetable; mandatory directive; signal indication; or any form of absolute or manual block system.

Mandatory directive means any movement authority or speed restriction that affects a railroad operation.

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

examiner owes a duty to make an honest and fully informed evaluation of the condition of an individual.

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

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

Physical characteristics means the actual track profile of and physical location for points within a specific yard or route that affect the movement of a locomotive or train. Physical characteristics includes *main track physical characteristics* (see definition of “main track” in this section) and other than main track physical characteristics.

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

Qualified means a person who has successfully completed all instruction, training and examination programs required by the employer, and the applicable parts of this

chapter and that the person therefore may reasonably be expected to be proficient on all safety related tasks the person is assigned to perform.

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

(1) Is a certified dispatcher under this part; and

(2) Has been selected as such by a designated railroad officer, in concurrence with the designated employee representative, where present; or

(3) In absence of concurrence provided in paragraph (2) of this definition, has a minimum of one year of service working as a dispatcher.

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

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

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

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

Railroad officer means any supervisory employee of a railroad.

Roadway worker in charge (RWIC) means a roadway worker who is qualified under § 214.353 of this chapter to establish on-track safety for roadway work groups, and

lone workers qualified under § 214.347 of this chapter to establish on-track safety for themselves.

Serve or service, in the context of serving documents, has the meaning given in Rule 5 of the Federal Rules of Civil Procedure as amended. Similarly, the computation of time provisions in Rule 6 of the Federal Rules of Civil Procedure as amended are also applicable in this part. *See also* the definition of “filing” in this section.

Substance abuse disorder refers to a psychological or physical dependence on alcohol or a drug, or another identifiable and treatable mental or physical disorder involving the abuse of alcohol or drugs as a primary manifestation. A substance abuse disorder is “active” within the meaning of this part if the person is currently using alcohol or other drugs, except under medical supervision consistent with the restrictions described in § 219.103 of this chapter or has failed to successfully complete primary treatment or successfully participate in aftercare as directed by a DAC or SAP.

Substance Abuse Professional (SAP) means a person who meets the qualifications of a substance abuse professional, as provided in 49 CFR part 40.

Territorial qualifications means possessing the necessary knowledge concerning a railroad's operating rules and timetable special instructions including familiarity with applicable *main track* and other than *main track physical characteristics* of the territory over which the locomotive or train movement will occur as well as the characteristics of the position to include, and not limited to, the operation and capabilities of dispatch control systems.

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

§ 245.9 Waivers.

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

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

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

§ 245.11 Penalties and consequences for noncompliance.

(a) Any person (including a railroad; any manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any employee of such owner, manufacturer, lessor, or lessee; or any independent contractor or subcontractor of a railroad) who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least the minimum civil monetary penalty and not more than the ordinary maximum civil monetary penalty per violation. However, penalties may be assessed against individuals only for willful violations, and a penalty not to exceed the aggravated maximum civil monetary penalty per violation may be assessed, where:

(1) A grossly negligent violation, or a pattern of repeated violations, has created an imminent hazard of death or injury to persons; or

(2) A death or injury has occurred. *See* 49 CFR part 209, appendix A.

(b) Each day a violation continues constitutes a separate offense.

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

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

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

(f) FRA's website at <https://railroads.dot.gov/> contains a schedule of civil penalty amounts used in connection with this part.

Subpart B—Program and Eligibility Requirements

§ 245.101 Certification program required.

(a) Each railroad subject to this part shall have a written dispatcher certification program.

(b) Each certification program shall include all of the following:

(1) A procedure for evaluating prior safety conduct as a motor vehicle operator that complies with the criteria established in § 245.111.

(2) A procedure for evaluating prior safety conduct as an employee or certified dispatcher with other railroads that complies with the criteria established in § 245.113.

(3) A procedure for evaluating potential substance abuse disorders and compliance with railroad alcohol and drug rules that complies with the criteria established in § 245.115.

(4) A procedure for evaluating visual and hearing acuity that complies with the criteria established in §§ 245.117 and 245.118.

(5) A procedure for training that complies with the criteria established in § 245.119.

(6) A procedure for knowledge testing that complies with the criteria established in § 245.121.

(7) A procedure for monitoring operational performance that complies with the criteria established in § 245.123.

§ 245.103 FRA review of certification programs.

(a) *Certification program submission schedule for railroads with current dispatching operations.* Each railroad with current dispatching operations, as of **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, shall submit its dispatcher certification program to FRA, in accordance with the procedures and requirements contained in § 245.107, according to the following schedule:

(1) All Class I railroads (including the National Railroad Passenger Corporation) and railroads providing commuter service shall submit their programs to FRA no later than **[INSERT DATE 300 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

(2) All Class II railroads and Class III railroads (including a switching and terminal or other railroad not otherwise classified) shall submit their programs to FRA no later than **[INSERT DATE 540 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

(b) *Certification program submission for new dispatching railroads.* For each railroad that commences dispatching operations after **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, the railroad shall submit its written dispatcher certification program to, and obtain approval from, FRA in accordance with the procedures and requirements contained in § 245.107, prior to commencing dispatching operations.

(c) *Method for submitting certification programs to FRA.* Railroads must submit their written certification programs and their requests for approval (described in § 245.107(a)) by emailing the documents to FRADISPATHCERTPROG@dot.gov.

(d) *Notification requirements.* Each railroad that submits a program to FRA must:

(1) Simultaneously with its submission, provide a copy of the program and the request for approval (as described in § 245.107(a)) to the president of each labor organization that represents the railroad's dispatchers and to all of the railroad's dispatchers that are subject to this part; and

(2) Include in its submission to FRA, a statement affirming that the railroad has provided a copy of the program and the request for approval to the president of each labor organization that represents the railroad's dispatchers and to all of the railroad's dispatchers that are subject to this part, along with a list of the names and email addresses of each president of a labor organization who was provided a copy of the program.

(e) *Comment period.* Any designated representative of dispatchers subject to this part or any directly affected person who does not have a designated representative may comment on a railroad's program provided that:

(1) The comment is submitted no later than 60 days after the date the program was submitted to FRA;

(2) The comment includes a concise statement of the commenter's interest in the matter;

(3) The commenter affirms that a copy of the comment was provided to the railroad; and

(4) The comment was emailed to FRADISPATCHCERTPROG@dot.gov.

(f) *FRA review period.* Upon receipt of a program, FRA will commence a thorough review of the program to ensure that it satisfies all of the requirements under this part.

(1) If FRA determines that the program satisfies all of the requirements under this part, FRA will issue a letter notifying the railroad that its program has been approved.

Such letter will typically be issued within 120 days of the date the program was submitted to FRA.

(2) If FRA determines that the program does not satisfy all of the requirements under this part, FRA will issue a letter notifying the railroad that its program has been disapproved. Such letter will typically be issued within 120 days of the date the program was submitted to FRA and will identify the deficiencies found in the program that must be corrected before the program can be approved. After addressing these deficiencies, railroads can resubmit their programs in accordance with paragraph (h) of this section.

(3) If a railroad does not receive an approval or disapproval letter from FRA within 120 days of the date the program was submitted to FRA, FRA's decision on the program will remain pending until such time that FRA issues a letter either approving or disapproving the program. A certification program is not approved until FRA issues a letter approving the program.

(g) *Material modifications.* A railroad that intends to make one or more material modifications to its FRA-approved program must submit a request for approval (as described in § 245.107(a)(3)) of how it intends to modify the program and a copy of the modified program.

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

(2) The description of the modification and the modified program shall conform with the procedures and requirements contained in § 245.107.

(3) The process for submission and review of material modifications shall conform with paragraphs (c) through (f) of this section.

(4) A railroad shall not implement a material modification to its program until FRA issues its approval of the material modification in accordance with paragraph (f)(1) of this section.

(h) *Resubmissions*. If FRA disapproves a railroad's program or material modification, as described in paragraph (f)(2) of this section, the railroad can resubmit its program or material modification after addressing all of the deficiencies noted by FRA.

(1) The resubmission must conform with the procedures and requirements contained in § 245.107.

(2) The process for submission and review of resubmitted programs and resubmitted material modifications shall conform with paragraphs (c) through (f) of this section.

(3) The following deadlines apply to railroads that have their programs or material modifications disapproved by FRA:

(i) For a railroad that submitted its program pursuant to paragraph (a) of this section, the railroad must resubmit its program within 30 days of the date that FRA notified the railroad of the deficiencies in its program. If a railroad fails to resubmit its program within this timeframe and it continues its dispatching operations, FRA may consider such actions to be a failure to implement a program.

(ii) For a railroad that submitted its program pursuant to paragraph (b) of this section, there is no FRA-imposed deadline for resubmitting its program. However, pursuant to § 245.105(b), the railroad cannot begin dispatching operations until its program has been approved by FRA.

(iii) For a railroad that submitted a material modification to its FRA-approved program, there is no FRA-imposed deadline for resubmitting the material modification. However, pursuant to paragraph (g)(4) of this section, the railroad cannot implement the material modification until it has been approved by FRA.

(i) *Rescinding prior approval of program*. FRA reserves the right to revisit its prior approval of a railroad's program at any time.

(1) If upon such review, FRA discovers deficiencies in the program such that the program does not comply with subpart B of this part, FRA shall issue the railroad a letter rescinding its prior approval of the program and notifying the railroad of the deficiencies in its program that must be addressed.

(2) Within 30 days of FRA notifying the railroad of the deficiencies in its program, the railroad must address these deficiencies and resubmit its program to FRA. The resubmitted program must conform with the procedures and requirements contained in § 245.107.

(3) The process for submission and review of resubmitted programs under this paragraph (i) shall conform with paragraphs (c) through (f) of this section.

(4) If a railroad fails to resubmit its program to FRA within the timeframe prescribed in paragraph (i)(2) of this section and the railroad continues its dispatching operations, FRA may consider such actions to be a failure to implement a program.

(5) If FRA issues a letter disapproving the railroad's resubmitted program, the railroad shall continue to resubmit its program in accordance with this paragraph (i).

(6) A program that has its approval rescinded under paragraph (i)(1) of this section may remain in effect until whichever of the following happens first:

- (i) FRA approves the railroad's resubmitted program; or
- (ii) FRA disapproves the railroad's second attempt at resubmitting its program.

(7) If FRA disapproves a railroad's second attempt at resubmitting its program under this paragraph (i) and the railroad continues its dispatching operations, FRA may consider such actions to be a failure to implement a program.

(j) *Availability of certification program documents.* The following documents will be available on FRA's website (railroads.dot.gov):

(1) A railroad's originally submitted program, a resubmission of its program, or a material modification of its program;

(2) Any comments, submitted in accordance with paragraph (e) of this section, to a railroad's originally submitted program, a resubmission of its program, or a material modification of its program; and

(3) Any approval or disapproval letter issued by FRA in response to a railroad's originally submitted program, a resubmission of its program, or a material modification of its program.

§ 245.105 Implementation schedule for certification programs.

(a) Each railroad that submits its dispatcher certification program to FRA in accordance with § 245.103(a), may continue dispatching operations while it awaits approval of its program by FRA. However, if FRA disapproves a railroad's program on two occasions and the railroad continues dispatching operations, FRA may consider such actions to be a failure to implement a program.

(b) Each railroad that submits its dispatcher certification program to FRA in accordance with § 245.103(b), must have its program approved by FRA prior to commencing dispatching operations. If such railroad commences dispatching operations before its program is approved by FRA, FRA may consider such actions to be a failure to implement a program.

(c) By **[INSERT DATE 300 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, each railroad shall:

(1) In writing, designate as certified dispatchers all persons authorized by the railroad to perform the duties of a dispatcher as of **[INSERT DATE 300 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**; and

(2) Issue a certificate that complies with § 245.207 to each person that it designates.

(d) Between **[INSERT DATE 300 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]** and the date FRA approves the railroad's certification program, each railroad shall:

(1) In writing, designate as a certified dispatcher any person who has been authorized by the railroad to perform the duties of a dispatcher between **[INSERT DATE 300 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]** and the date FRA approves the railroad's certification program; and

(2) Issue a certificate that complies with § 245.207 to each person that it designates.

(e) After **[INSERT DATE 300 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, no railroad shall permit or require a person to perform service as a dispatcher unless that person is a certified dispatcher.

(f) No railroad shall permit or require a person, designated as a certified dispatcher under the provisions of paragraph (c) or (d) of this section, to perform service as a certified dispatcher for more than three years after the date FRA approves the railroad's certification program unless that person has been tested and evaluated in accordance with procedures that comply with subpart B of this part.

(1) Except as provided in paragraph (f)(3) of this section, a person who has been designated as a certified dispatcher under the provisions of paragraph (c) or (d) of this section and who is eligible to receive a retirement pension in accordance with the terms of an applicable agreement or in accordance with the terms of the Railroad Retirement Act (45 U.S.C. 231) within three years from the date the certifying railroad's program is approved by FRA, may request in writing, that a railroad not recertify that person, pursuant to subpart B of this part, until three years from the date the certifying railroad's program is approved.

(2) Upon receipt of a written request pursuant to paragraph (f)(1) of this section, a railroad may wait to recertify the person making the request until the end of the three-year period after FRA has approved the railroad's certification program. If a railroad grants any request, it must grant the request of all eligible persons to every extent possible.

(3) A person who is subject to recertification under part 240 or 242 of this chapter may not make a request pursuant to paragraph (f)(1) of this section.

(g) After a railroad's certification program has been approved by FRA, the railroad shall only certify or recertify a person as a dispatcher if that person has been tested and evaluated in accordance with procedures that comply with subpart B of this part.

§ 245.107 Requirements for certification programs.

(a) *Railroad's certification program submission.* (1) A railroad's certification program submission must include a copy of the certification program and a request for approval. If a railroad is submitting a material modification to its program, the copy of the certification program must incorporate all of the material modifications the railroad would like to make.

(2) For a railroad's initial certification program submission, the request for approval can be in letter or narrative format and shall include a statement that the railroad is seeking approval of its program by FRA.

(3) If a railroad is making a material modification to a program that has been previously approved by FRA, the request for approval can be in letter or narrative format and shall include an explanation of all of the material modifications that the railroad is making to its program.

(4) A railroad will receive approval or disapproval notices from FRA by email.

(5) FRA may electronically store any materials required by this part.

(b) *Organization of the certification program.* Each program must be organized to present the required information in paragraphs (b)(1) through (6) of this section. Each section of the certification program must begin by giving the name, title, telephone number, and email address of the person to be contacted concerning the matters addressed by that section. If a person is identified in a prior section, it is sufficient to merely repeat the person's name in a subsequent section.

(1) *Section 1 of the program: general information and elections.* (i) The first section of the certification program must contain the name of the railroad, the person to be contacted concerning the request for approval (including the person's name, title, telephone number, and email address) and a statement electing either to accept responsibility for training persons not previously certified as dispatchers or to not accept this responsibility.

(ii) If a railroad elects not to provide initial dispatcher training, the railroad will be limited to recertifying persons initially certified by another railroad. A railroad can change its election by obtaining FRA approval of a material modification to its program in accordance with § 245.103(g).

(iii) If a railroad elects to accept responsibility for training persons not previously certified as dispatchers, the railroad must submit information on how such persons will be trained but is not required to actually perform such training. A railroad that elects to accept responsibility for the training of such persons may authorize another railroad or a non-railroad entity to perform the actual training effort. The electing railroad remains responsible for ensuring that such other training providers adhere to the training program the railroad submits.

(2) *Section 2 of the program: training persons previously certified.* The second section of the certification program must contain information about the railroad's

program for training previously certified dispatchers, including all of the following information:

(i) As provided for in § 245.119(i), each railroad must have a program for the ongoing education of its dispatchers to ensure that they maintain the necessary knowledge concerning relevant Federal safety regulations, operating rules and practices, familiarity with physical characteristics of the territory, and the dispatching systems and technology. The railroad must describe in this section how it will ensure that its dispatchers remain knowledgeable concerning the safe discharge of their responsibilities so as to comply with the standard set forth in § 245.119(i).

(ii) In accordance with the requirements in § 245.119(i), this section must contain sufficient detail to permit effective evaluation of the railroad's training program in terms of the subject matters covered, the frequency and duration of the training sessions (including the interval between attendance at such trainings), the training environment employed (for example, use of classroom, use of computer-based training, use of film or slide presentations, and use of on-the-job training), and which aspects of the program are voluntary or mandatory.

(iii) How the training will address a certified dispatcher's loss of knowledge over time.

(iv) How the training will address changed circumstances over time such as the introduction of new or modified technology including software modifications to dispatch systems and related signal and train control systems, new operating rule books, or significant changes in operations including alteration in the territory dispatchers are authorized to work over.

(v) A plan for familiarization training that addresses how long a person can be absent from dispatching on a territory before needing to be requalified on that territory (a

time period that cannot exceed 12 months), and once that threshold is reached, how the person will acquire the needed familiarization training.

(vi) How the railroad will administer the training of previously certified dispatchers who have had their certification expire. If a railroad's certification program fails to specify how it will train these dispatchers, then the railroad shall require these dispatchers to successfully complete the railroad's entire training program.

(3) *Section 3 of the program: testing and evaluating persons previously certified.*

The third section of the certification program must contain information about the railroad's program for testing and evaluating previously certified dispatchers including all of the following information:

(i) The railroad must describe in this section how it will ensure that its dispatchers demonstrate their knowledge concerning the safe discharge of their responsibilities so as to comply with the standards set forth in § 245.121.

(ii) The railroad must describe in this section how it will have ongoing testing and evaluation to ensure that its dispatchers have the necessary visual and hearing acuity as provided for in §§ 245.117 and 245.118. This section must also address how the railroad will ensure that its medical examiners have sufficient information concerning the railroad's operations, as well as the dispatcher's safety-related tasks, to effectively form appropriate conclusions about the ability of a particular individual to safely perform as a dispatcher.

(4) *Section 4 of the program: training, testing, and evaluating persons not previously certified.* Unless a railroad has made an election not to accept responsibility for conducting the initial training of dispatchers, the fourth section of the certification program must contain information about the railroad's program for educating, testing, and evaluating persons not previously certified as dispatchers including all of the following information:

(i) As provided for in § 245.119(c), a railroad that is issuing an initial dispatcher certification to a person must have a program for the training, testing, and evaluation of its dispatchers to ensure that they acquire the necessary knowledge and skills. A railroad must describe in this section how it will ensure that its dispatchers will acquire sufficient knowledge and skills and demonstrate their knowledge and skills concerning the safe discharge of their responsibilities.

(ii) This section must contain the same level of detail about the initial training program and the testing and evaluation of previously uncertified persons as is required for previously certified dispatchers in paragraphs (b)(2) and (3) of this section (Sections 2 and 3 of the program).

(iii) Railroads that elect to rely on other entities to conduct training away from the railroad's own territory and dispatching systems and technology must indicate how the student will be provided with the required training on the physical characteristics of the railroad's territory and the railroad's dispatching systems and technology.

(iv) How the railroad will administer the training of previously uncertified persons with extensive dispatching experience. If a railroad's certification program fails to specify how it will train these dispatchers, then the railroad shall require these dispatchers to successfully complete the railroad's entire training program.

(5) *Section 5 of the program: monitoring operational performance by certified dispatchers.* The fifth section of the certification program must contain information about the railroad's program for monitoring the operational performance of its certified dispatchers including all of the following information:

(i) Section 245.123 requires that a railroad perform ongoing monitoring of its dispatchers and that each dispatcher has an annual unannounced compliance test. A railroad must describe in this section how it will ensure that the railroad is monitoring

that its dispatchers demonstrate their skills concerning the safe discharge of their responsibilities.

(ii) A railroad must 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 § 245.123.

(6) *Section 6 of the program: procedures for routine administration of the dispatcher certification program.* The final section of the certification program must contain a summary of how the railroad's program and procedures will implement the various aspects of the regulatory provisions in this part that relate to routine administration of its certification program for dispatchers. Specifically, this section must address the procedural aspects of the following provisions and must describe the manner in which the railroad will implement its program so as to comply with all of the following provisions:

(i) Section 245.301 which provides that each railroad must have procedures for review and comment on adverse information.

(ii) Sections 245.111, 245.113, 245.115, and 245.303 which require a railroad to have procedures for evaluating data concerning prior safety conduct as a motor vehicle operator and as a railroad worker.

(iii) Sections 245.109, 245.201, and 245.301 which place a duty on the railroad to make a series of determinations. When describing how it will implement its program to comply with these sections, a railroad must describe: the procedures it will utilize to ensure that all of the necessary determinations have been made in a timely fashion; who will be authorized to conclude that a person will or will be not certified; and how the railroad will communicate adverse decisions.

(iv) Sections 245.109, 245.117, 245.118, 245.119, and 245.121 which place a duty on the railroad to make a series of determinations. When describing how it will

implement its program to comply with these sections, a railroad must describe how it will document the factual basis the railroad relied on in making determinations under these sections.

(v) Section 245.125 which permits reliance on certification determinations made by other railroads.

(vi) Sections 245.207 and 245.307 which contain the requirements for replacing lost certificates and the conduct of certification revocation proceedings.

§ 245.109 Determinations required for certification and recertification.

(a) After FRA has approved a railroad's dispatcher certification program, the railroad, prior to initially certifying or recertifying any person as a dispatcher, shall, in accordance with its FRA-approved program, determine in writing that:

(1) The individual meets the prior safety conduct eligibility requirements of §§ 245.111 and 245.113;

(2) The individual meets the eligibility requirements of §§ 245.115 and 245.303;

(3) The individual meets the visual and hearing acuity standards of §§ 245.117 and 245.118;

(4) The individual has the necessary knowledge, as demonstrated by successfully completing a test that meets the requirements of § 245.121; and

(5) If applicable, the individual has completed a training program that meets the requirements of § 245.119.

(b) Nothing in this section, § 245.111, or § 245.113 shall be construed to prevent persons subject to this part from entering into an agreement that results in a railroad obtaining the information needed for compliance with this subpart in a different manner than that prescribed in § 245.111 or § 245.113.

§ 245.111 Prior safety conduct as motor vehicle operator.

(a) Except as provided in paragraphs (b) through (e) of this section, after FRA has approved a railroad's dispatcher certification program, the railroad, prior to initially certifying or recertifying any person as a dispatcher, shall determine that the person meets the eligibility requirements of this section involving prior conduct as a motor vehicle operator.

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

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

(2) Otherwise meets the eligibility requirements provided in § 245.109(a)(1) through (5).

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

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

(2) Otherwise meets the eligibility requirements provided in § 245.109(a)(1) through (5).

(d) Except as provided in paragraph (e) of this section, if a railroad who certified or recertified a person for 60 days pursuant to paragraph (b) or (c) of this section does not obtain and evaluate the information requested pursuant to paragraph (g) of this section within those 60 days, that person will be ineligible to perform as a dispatcher until the information can be evaluated by the railroad.

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

recertify a person during the pendency of the waiver request if the person otherwise meets the eligibility requirements provided in § 245.109(a)(1) through (5).

(f) Except for persons designated as dispatchers under § 245.105(c) or (d) or for persons covered by paragraph (j) of this section, each person seeking certification or recertification under this part shall, no more than one year prior to the date of the railroad's decision on certification or recertification:

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

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

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

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

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

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

(i) If advised by the railroad that a driver licensing agency has informed the railroad that additional information concerning that person's driving history may exist in

the files of a State agency or foreign country not previously contacted in accordance with this section, such person shall:

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

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

(j) Any person who has never obtained a motor vehicle driver's license is not required to comply with the provisions of paragraph (g) of this section but shall notify the railroad of that fact in accordance with procedures established by the railroad in its certification program.

(k) Each certified dispatcher or person seeking initial certification shall report motor vehicle incidents described in paragraphs (m)(1) and (2) of this section to the certifying railroad within 48 hours of being convicted for, or completed State action to cancel, revoke, suspend, or deny a motor vehicle driver's license for, such violations. For purposes of this paragraph (k) and paragraph (m) of this section, "State action" means action of the jurisdiction that has issued the motor vehicle driver's license, including a foreign country. For purposes of dispatcher certification, no railroad shall require reporting earlier than 48 hours after the conviction, or completed State action to cancel, revoke, suspend, or deny a motor vehicle driver's license.

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

(1) Prior to **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**;

(2) More than three years before the date of the railroad's certification decision;

or

(3) At a time other than that specifically provided for in § 245.111, § 245.113, § 245.115, or § 245.303.

(m) When evaluating a person's motor vehicle driving record, a railroad shall only consider information concerning the following types of motor vehicle incidents:

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

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

(n) If such an incident, described in paragraph (m) of this section, is identified:

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

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

(3) If the person is evaluated as not currently affected by an active substance abuse disorder, the subject data shall not be considered further with respect to certification. However, the railroad shall, on recommendation of the DAC, condition certification upon participation in any needed aftercare and/or follow-up testing for alcohol or drugs deemed necessary by the DAC consistent with the technical standards specified in 49 CFR part 219, subpart H, as well as 49 CFR part 40.

(4) If the person is evaluated as currently affected by an active substance abuse disorder, the provisions of § 245.115(c) will apply.

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

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

§ 245.113 Prior safety conduct with other railroads.

(a) After FRA has approved a railroad's dispatcher certification program, the railroad shall determine, prior to issuing any person a dispatcher certificate, that the certification candidate meets the eligibility requirements of this section.

(b) If the certification candidate has not been employed or certified by any other railroad in the previous five years, they do not have to submit a request in accordance with paragraph (c) of this section, but they must notify the railroad of this fact in accordance with procedures established by the railroad in its certification program.

(c) Except as provided for in paragraph (b) of this section, each person seeking certification or recertification under this part shall submit a written request to each railroad that employed or certified the person within the previous five years to provide the following information to the railroad that is considering whether to certify or recertify that person as a dispatcher:

(1) Information about that person's compliance with § 245.111 within the three years preceding the date of the request;

(2) Information about that person's compliance with § 245.115 within the five years preceding the date of the request; and

(3) Information about that person's compliance with § 245.303 within the five years preceding the date of the request.

(d) Each person submitting a written request required by paragraph (c) of this section shall:

(1) Submit the request no more than one year before the date of the railroad's decision on certification or recertification; and

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

(e) Within 30 days after receipt of a written request that complies with paragraph (c) of this section, a railroad shall provide the information requested to the railroad designated in the written request.

(f) If a railroad is unable to provide the information requested within 30 days after receipt of a written request that complies with paragraph (c) of this section, the railroad shall provide an explanation, in writing, of why it cannot provide the information within the requested time frame. If the railroad will ultimately be able to provide the requested information, the explanation shall state approximately how much more time the railroad needs to supply the requested information. If the railroad will not be able to provide the requested information, the explanation shall provide an adequate explanation for why it cannot provide this information. Copies of this explanation shall be provided to the railroad designated in the written request and to the person who submitted the written request for information.

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

(1) Prior to **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**; or

(2) At a time other than that specifically provided for in § 245.111, § 245.113, § 245.115, or § 245.303.

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

§ 245.115 Substance abuse disorders and alcohol drug rules compliance.

(a) *Eligibility determination.* After FRA has approved a railroad's dispatcher certification program, the railroad shall determine, prior to issuing any person a dispatcher certificate, that the person meets the eligibility requirements of this section.

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

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

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

(3) In the case of a current employee of a railroad evaluated as having an active substance abuse disorder (including a person identified under the procedures of § 245.111), the employee may, if otherwise eligible, voluntarily self-refer for substance abuse counseling or treatment under the policy required by § 219.1001(b)(1) of this

chapter; and the railroad shall then treat the substance abuse evaluation as confidential except with respect to ineligibility for certification.

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

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

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

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

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

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

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

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

(iii) In the case of one violation of § 219.101 of this chapter, the person shall be ineligible to hold a certificate for a period of nine months (unless identification of the violation was through a qualifying referral program described in § 219.1001 of this chapter and the dispatcher waives investigation, in which case the certificate shall be deemed suspended during evaluation and any required primary treatment as described in paragraph (e) of this section). In the case of two or more violations of § 219.101 of this chapter, the person shall be ineligible to hold a certificate for a period of five years.

(iv) If a person refuses to provide a breath or body fluid sample for testing under the requirements of part 219 of this chapter when instructed to do so by a railroad representative, the person shall be ineligible to hold a certificate for a period of nine months.

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

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

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

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

(iii) In accordance with the testing procedures of 49 CFR part 219, subpart H, has had a return-to-duty alcohol test with an alcohol concentration of less than .02 and a return-to-duty body fluid sample that tested negative for controlled substances.

(2) A dispatcher placed in service or returned to service under the conditions described in paragraph (e)(1) of this section shall continue in any program of counseling or treatment deemed necessary by the SAP and shall be subject to a reasonable program of follow-up alcohol and drug testing without prior notice for a period of not more than five years following return to service. Follow-up tests shall include not fewer than six alcohol tests and six drug tests during the first year following return to service.

(3) Return-to-duty and follow-up alcohol and drug tests shall be performed consistent with the requirements of 49 CFR part 219, subpart H.

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

(f) *Confidentiality protected.* Nothing in this part shall affect the responsibility of the railroad under § 219.1003(f) of this chapter to treat qualified referrals for substance abuse counseling and treatment as confidential; and the certification status of a dispatcher who is successfully assisted under the procedures of that section shall not be adversely affected. However, the railroad shall include in its referral policy a provision that, at least with respect to a certified dispatcher or a candidate for certification, the policy of confidentiality is waived (to the extent that the railroad shall receive from the SAP or DAC official notice of the substance abuse disorder and shall suspend or revoke the certification, as appropriate) if the person at any time refuses to cooperate in a recommended course of counseling or treatment.

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

§ 245.117 Visual acuity.

(a) After FRA has approved a railroad's dispatcher certification program, the railroad shall determine, prior to issuing any person a dispatcher certificate, that the person meets the standards for visual acuity prescribed in this section and appendix B to this part.

(b) Any examination required under this section shall be performed by or under the supervision of a medical examiner or a licensed physician's assistant.

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

(1) For distant viewing, either:

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

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

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

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

(d) A person not meeting the thresholds in paragraph (c) of this section shall, upon request of the certification candidate, be subject to further medical evaluation by a

railroad's medical examiner to determine that person's ability to safely perform as a dispatcher. In such cases, the following procedures will apply:

(1) In accordance with the guidance prescribed in appendix B to this part, a person is entitled to:

(i) One retest without making any showing; and

(ii) An additional retest if the person provides evidence that circumstances have changed since the last test to the extent that the person may now be able to safely perform as a dispatcher.

(2) The railroad shall provide its medical examiner with a copy of this part, including all appendices.

(3) If, after consultation with a railroad officer, the medical examiner concludes that, despite not meeting the threshold(s) in paragraph (c) of this section, the person has the ability to safely perform as a dispatcher, the railroad may conclude that the person satisfies the visual acuity requirements of this section to be a certified dispatcher. Such certification will be conditioned on any special restrictions the medical examiner determines in writing to be necessary.

(e) To make the determination required under paragraph (a) of this section, a railroad shall have on file the following for each certification candidate:

(1) A medical examiner's certificate that the candidate has been medically examined and either does or does not meet the visual acuity standards prescribed in paragraph (c) of this section.

(2) If needed under paragraph (d) of this section, a medical examiner's written professional opinion which states the basis for their determination that:

(i) The candidate can be certified, under certain conditions if necessary, even though the candidate does not meet the visual acuity standards prescribed in paragraph (c) of this section; or

(ii) The candidate's visual acuity prevents the candidate from being able to safely perform as a dispatcher.

(f) If the examination required under this section shows that the person needs corrective lenses to meet the standards for visual acuity prescribed in this section and appendix B to this part, that person shall use corrective lenses at all times while performing as a dispatcher unless the railroad's medical examiner subsequently determines in writing that the person can safely perform as a dispatcher without corrective lenses.

(g) When a certified dispatcher becomes aware that their vision has deteriorated, they shall notify the railroad's medical department or other appropriate railroad official of the deterioration. Such notification must occur prior to performing any subsequent service as a dispatcher. The individual cannot return to service as a dispatcher until they are reexamined and determined by the railroad's medical examiner to satisfy the visual acuity standards prescribed in this section and appendix B to this part.

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

§ 245.118 Hearing acuity.

(a) After FRA has approved a railroad's dispatcher certification program, the railroad shall determine, prior to issuing any person a dispatcher certificate, that the person meets the standards for hearing acuity prescribed in this section and appendix B to this part.

(b) Any examination required under this section shall be performed by or under the supervision of a medical examiner or a licensed physician's assistant.

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

(1) As required in 29 CFR 1910.95(h) (Occupational Safety and Health Administration);

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

(3) Conducted using an audiometer that meets the specifications of, and is maintained and used in accordance with, a formal industry standard such as American National Standards Institute (ANSI) S3.6, "Specifications for Audiometers."

(d) A person not meeting the thresholds in paragraph (c) of this section shall, upon request of the certification candidate, be subject to further medical evaluation by a railroad's medical examiner to determine that person's ability to safely perform as a dispatcher. In such cases, the following procedures will apply:

(1) In accordance with the guidance prescribed in appendix B to this part, a person is entitled to:

(i) One retest without making any showing; and

(ii) An additional retest if the person provides evidence that circumstances have changed since the last test to the extent that the person may now be able to safely perform as a dispatcher.

(2) The railroad shall provide its medical examiner with a copy of this part, including all appendices.

(3) If, after consultation with a railroad officer, the medical examiner concludes that, despite not meeting the threshold(s) in paragraph (c) of this section, the person has

the ability to safely perform as a dispatcher, the railroad may conclude that the person satisfies the hearing acuity requirements of this section to be a certified dispatcher. Such certification will be conditioned on any special restrictions the medical examiner determines in writing to be necessary.

(e) To make the determination required under paragraph (a) of this section, a railroad shall have on file the following for each certification candidate:

(1) A medical examiner's certificate that the candidate has been medically examined and either does or does not meet the hearing acuity standards prescribed in paragraph (c) of this section.

(2) If needed under paragraph (d) of this section, a medical examiner's written professional opinion which states the basis for their determination that:

(i) The candidate can be certified, under certain conditions if necessary, even though the candidate does not meet the hearing acuity standards prescribed in paragraph (c) of this section; or

(ii) The candidate's hearing acuity prevents the candidate from being able to safely perform as a dispatcher.

(f) If the examination required under this section shows that the person needs a hearing aid to meet the standards for hearing acuity prescribed in this section and appendix B to this part, that person shall use a hearing aid at all times while performing as a dispatcher unless the railroad's medical examiner subsequently determines in writing that the person can safely perform as a dispatcher without a hearing aid.

(g) When a certified dispatcher becomes aware that their hearing has deteriorated, they shall notify the railroad's medical department or other appropriate railroad official of the deterioration. Such notification must occur prior to performing any subsequent service as a dispatcher. The individual cannot return to service as a dispatcher until they are reexamined and determined by the railroad's medical examiner

to satisfy the hearing acuity standards prescribed in this section and appendix B to this part.

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

§ 245.119 Training requirements.

(a) After FRA has approved a railroad's certification program, the railroad shall determine, prior to issuing any person a dispatcher certificate, that the person has successfully completed the training, in accordance with the requirements of this section.

(b) A railroad that elects to accept responsibility to provide initial dispatcher training to persons who have not been previously certified as dispatchers shall state in its certification program whether it will conduct the training program or employ a training program conducted by some other entity on its behalf but adopted and ratified by the railroad.

(c) A railroad that elects to train persons not previously certified as dispatchers shall develop an initial training program which, at a minimum, includes the following:

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

with, Federal railroad safety laws, regulations, and orders, as well as railroad rules and procedures.

(2) An on-the-job training component which shall include the following:

(i) A syllabus describing content, required tasks, and related steps the person learning the job shall be able to perform within a specified timeframe;

(ii) A statement of the conditions (e.g., prerequisites, dispatch and related dispatch support systems, documentation, briefings, demonstrations, and practice) necessary for learning transfer; and

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

(3) A description of the processes to review and modify its training program when new safety-related railroad laws, regulations, orders, technologies, procedures, software, or equipment are introduced into the workplace, including how it is determined if additional or refresher training is needed.

(d) Prior to beginning the initial dispatching related tasks associated with on-the-job exercises discussed in paragraph (c)(2) of this section, each railroad shall make any relevant information or materials, such as operating rules, safety rules, or other rules, available for referencing by certification candidates.

(e) Prior to a person, not previously certified as a dispatcher, being certified as a dispatcher, a railroad shall require the person to:

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

(2) Perform on-the-job training and demonstrate on-the-job proficiency, with input from a qualified instructor, by successfully completing the tasks and using the dispatching systems and technology necessary to be a dispatcher. A certification

candidate may only perform such tasks under the direct onsite supervision of a qualified instructor; and

(3) Demonstrate knowledge of the physical characteristics of any assigned territory. If the railroad uses a written test to fulfill this requirement, the railroad must provide the certification candidate with an opportunity to consult with a supervisory employee who possesses territorial qualifications for the territory to explain a question.

(f) In making the determination required under paragraph (a) of this section, a railroad shall have written documentation showing that:

(1) The person completed a training program that complies with paragraph (c) of this section (if the person has not been previously certified as a dispatcher);

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

(3) The person achieved a passing score on the physical characteristics exam associated with the territories, or its pertinent segments, over which the person will be performing dispatching service.

(g) The certification program, required under this part and submitted in accordance with the procedures and requirements described in § 245.107, shall include:

(1) The methods that a person may acquire familiarity with the physical characteristics of a territory;

(2) The procedures used to qualify and requalify a dispatcher on a territory; and

(3) The maximum time period in which a dispatcher can be absent from a territory before requalification is required. In accordance with § 245.120(c), this time period cannot exceed 12 months.

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

(i) A railroad shall provide for the continuing education of its certified dispatchers to ensure that each dispatcher maintains the necessary knowledge concerning:

(1) Railroad safety and operating rules;

(2) Physical territory;

(3) Dispatching systems and technology; and

(4) Compliance with all applicable Federal regulations including, but not limited to, hazardous materials, passenger train emergency preparedness, emergency response procedures, and physical characteristics of a territory.

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

§ 245.120 Requirements for territorial qualification.

(a) After FRA has approved a railroad's certification program, a railroad shall not permit or require a person to serve as a dispatcher on a particular territory unless that railroad determines that:

(1) The person is a certified dispatcher; and

(2) The person either:

(i) Possesses the necessary territorial qualifications for the applicable territory pursuant to § 245.119; or

(ii) Is assisted by a Dispatcher Pilot who is qualified on the territory.

(b) If a person is called to serve on a territory that they are not qualified on, the person must immediately notify the railroad that they are not qualified on the assigned territory.

(c) A person shall no longer be considered qualified on a territory if they have not worked on that territory as a dispatcher in the previous 12 months.

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

§ 245.121 Knowledge testing.

(a) After FRA has approved a railroad's dispatcher certification program, the railroad shall determine, prior to issuing any person a dispatcher certificate and in accordance with the requirements of this section, that the person has demonstrated sufficient knowledge of the railroad's rules and practices for the safe movement of trains.

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

(1) Designed to examine a person's knowledge of the railroad's operating rules and practices for the safe movement of trains;

(2) Objective in nature;

(3) In written or electronic form;

(4) Covering the following subjects:

(i) Safety and operating rules;

(ii) Timetable instructions;

(iii) Compliance with all applicable Federal regulations;

(iv) Physical characteristics of the territory or territories on which a person is currently working or training to qualify as a dispatcher; and

(v) Dispatching systems and technology.

(5) Sufficient to accurately measure the person's knowledge of the covered subjects; and

(6) Conducted without open reference books or other materials except to the degree the person is being tested on their ability to use such reference books or materials.

(c) The railroad shall provide the certification candidate with an opportunity to consult with a supervisory employee who possesses territorial qualifications for the territory to explain a test question.

(d) If a person fails the test, no railroad shall permit or require that person to work as a dispatcher prior to that person's achieving a passing score during a reexamination of the test.

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

§ 245.123 Monitoring operational performance.

(a) Each railroad's certification program shall describe how it will monitor the operational performance of its certified dispatchers by including procedures for:

(1) Giving each certified dispatcher at least one unannounced railroad and Federal rules, territorial and dispatch systems compliance test each calendar year, except as provided for in paragraph (c) of this section;

(2) Giving unannounced compliance tests to certified dispatchers who return to dispatcher service after performing service that does not require certification pursuant to this part, as described in paragraph (c) of this section; and

(3) What actions the railroad will take if it finds deficiencies in a dispatcher's performance during an unannounced compliance test.

(b) An unannounced compliance test shall:

(1) Test certified dispatchers for compliance with one or more operational tests in accordance with the provisions of § 217.9 of this chapter;

(2) Be performed by a railroad officer who meets the requirements of § 217.9(b)(1) of this chapter; and

(3) Be given to each certified dispatcher at least once each calendar year, except as provided for in paragraph (c) of this section.

(c) A certified dispatcher who is not performing service that requires certification pursuant to this part does not need to be given an unannounced compliance test.

However, when the certified dispatcher returns to service that requires certification pursuant to this part after not being given an unannounced compliance test in a calendar year, the railroad shall:

(1) Give the certified dispatcher an unannounced compliance test within 30 days of their return to dispatcher service; and

(2) Retain a written record that includes the following information:

(i) The date the dispatcher stopped performing service that required certification pursuant to this part;

(ii) The date the dispatcher returned to service that required certification pursuant to this part; and

(iii) The date and the result of the unannounced compliance test that was performed following the dispatcher's return to service requiring certification.

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

§ 245.125 Certification determinations made by other railroads.

(a) A railroad that is considering certification of a person as a dispatcher may rely on certain determinations made by another railroad concerning that person's certification.

(b) A railroad relying on certification determinations made by another railroad shall still be responsible for determining that:

(1) The prior certification is still valid in accordance with the provisions of §§ 245.201 and 245.307;

(2) The person has received training on the physical characteristics of the new territory in accordance with § 245.119; and

(3) The person has demonstrated the necessary knowledge concerning the railroad's operating rules, territory, dispatch systems and technology in accordance with § 245.121.

Subpart C—Administration of the Certification Program

§ 245.201 Time limitations for certification.

(a) After FRA approves a railroad's dispatcher certification program, that railroad shall not certify or recertify a person as a dispatcher if the railroad is making:

(1) A determination concerning eligibility under §§ 245.111, 245.113, 245.115, and 245.303 and the eligibility data being relied on was furnished more than one year before the date of the railroad's certification decision;

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

(3) A determination concerning demonstrated knowledge and the knowledge examination being relied on was conducted more than one year before the date of the railroad's certification decision, or more than two years before the date of the railroad's

certification decision if the railroad administers a knowledge testing program pursuant to § 245.121 at intervals that do not exceed two years.

(b) The time limitations of paragraph (a) of this section do not apply to a railroad that is making a certification decision in reliance on determinations made by another railroad in accordance with § 245.125.

(c) Except if a person is designated as a certified dispatcher under § 245.105(c) or (d), no railroad shall certify a person as a dispatcher for an interval of more than three years.

(d) Each railroad shall issue each certified dispatcher a certificate that complies with § 245.207 no later than 30 days from the date of its decision to certify or recertify that person.

§ 245.203 Retaining information supporting determinations.

(a) After FRA approves a railroad's dispatcher certification program, any time the railroad issues, denies, or revokes a certificate after making the determinations required under § 245.109, it shall maintain a record for each certified dispatcher and certification candidate. Each record shall contain the information, described in paragraph (b) of this section, that the railroad relied on in making the determinations required under § 245.109.

(b) A railroad shall retain the following information:

(1) Relevant data from the railroad's records concerning the person's prior safety conduct and eligibility;

(2) Relevant data furnished by another railroad;

(3) Relevant data furnished by a governmental agency concerning the person's motor vehicle driving record;

(4) Relevant data furnished by the person seeking certification concerning their eligibility;

(5) The relevant test results data concerning visual and hearing acuity;

(6) If applicable, the relevant data concerning the professional opinion of the railroad's medical examiner on the adequacy of the person's visual or hearing acuity;

(7) Relevant data from the railroad's records concerning the person's success or failure on knowledge test(s) under § 245.121;

(8) A sample copy of the written knowledge test or tests administered; and

(9) The relevant data from the railroad's records concerning the person's success or failure on unannounced tests the railroad performed to monitor the dispatcher's performance in accordance with § 245.123.

(c) If a railroad is relying on successful completion of an approved training program conducted by another entity, the relying railroad shall maintain a record for each certification candidate that contains the relevant data furnished by the training entity concerning the person's demonstration of knowledge and relied on by the railroad in making its determinations.

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

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

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

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

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

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

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

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

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

(ii) A record cannot be deleted or altered by any individual after the record is certified by the employee who created the record;

(3) Any amendment to a record is either:

(i) Electronically stored apart from the record that it amends; or

(ii) Electronically attached to the record as information without changing the original record;

(4) Each amendment to a record uniquely identifies the person making the amendment; and

(5) The system employed by the railroad for data storage permits reasonable access and retrieval of the information which can be easily produced in an electronic or printed format that can be:

(i) Provided to FRA representatives in a timely manner; and

(ii) Authenticated by a designated representative of the railroad as a true and accurate copy of the railroad's records if requested to do so by an FRA representative.

§ 245.205 List of certified dispatchers and recordkeeping.

(a) After a railroad's certification program has received its initial approval from FRA, pursuant to § 245.103(f)(1), the railroad must maintain a list of each person who is currently certified as a dispatcher by the railroad. The list must include the date of the railroad's certification decision and the date the person's certification expires.

(b) The list shall:

(1) Be updated at least annually;

(2) Be made available, upon request, to FRA representatives in a timely manner;

and

(3) Be available either:

(i) In electronic format pursuant to paragraph (c) of this section; or

(ii) At the divisional or regional headquarters of the railroad.

(c) If a railroad elects to maintain its list in an electronic format, it must:

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

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

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

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

(3) Have any amendment to the list either:

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

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

(4) Ensure that each amendment to the list uniquely identifies the person making the amendment; and

(5) Ensure that the system employed for data storage permits reasonable access and retrieval of the information which can be easily produced in an electronic or printed format that can be:

(i) Provided to FRA representatives in a timely manner; and

(ii) Authenticated by a designated representative of the railroad as a true and accurate copy of the railroad's records if requested to do so by an FRA representative.

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

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

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

§ 245.207 Certificate requirements.

(a) Each person who becomes a certified dispatcher in accordance with this part shall be issued a paper or electronic certificate that must:

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

(2) Indicate that it is a dispatcher certificate;

(3) Provide the following information about the certified person:

(i) Name;

(ii) Employee identification number; and

(iii) Either a physical description or photograph of the person;

(4) Identify any conditions or limitations, including conditions to ameliorate visual or hearing acuity deficiencies, that restrict, limit, or alter the person's abilities to work as a dispatcher;

(5) Show the effective date of the certification;

(6) Show the expiration date of the certification unless the certificate was issued pursuant to § 245.105(c) or (d);

(7) Be signed by an individual designated in accordance with paragraph (b) of this section; and

(8) Be electronic or be of sufficiently small size to permit being carried in an ordinary pocket wallet.

(b) Each railroad shall designate in writing any person it authorizes to sign the certificates described in this section. The designation shall identify such persons by name or job title.

(c) Nothing in this section shall prohibit any railroad from including additional information on the certificate or supplementing the certificate through other documents.

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

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

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

(e) Except as provided for in paragraph (g) of this section, each certified dispatcher shall:

(1) Have their certificate in their possession while on duty as a dispatcher; and

(2) Display their certificate upon a request from:

(i) An FRA representative;

(ii) A state inspector authorized under part 212 of this chapter;

(iii) An officer of the issuing railroad; or

(iv) An officer of the dispatcher's employer if the dispatcher is not employed by the issuing railroad.

(f) If a dispatcher's certificate is lost, stolen, or mutilated, the railroad shall promptly replace the certificate at no cost to the dispatcher.

(g) A certified dispatcher is exempt from the requirements of paragraph (e) of this section if:

(1) The railroad made its certification or recertification decision within the last 30 days and the dispatcher has not yet received their certificate; or

(2) The dispatcher's certificate was lost, stolen, or mutilated, and the railroad has not yet issued a replacement certificate to the dispatcher.

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

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

§ 245.213 Multiple certifications.

(a) A person who holds a dispatcher certificate may also be certified in other crafts, such as a locomotive engineer or conductor.

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

(c) Paragraphs (c)(1) through (3) of this section apply to persons who are currently certified as a dispatcher for multiple railroads or are seeking to become certified dispatchers for multiple railroads.

(1) A person who holds a current dispatcher certificate from more than one railroad shall immediately notify the other certifying railroad(s) if they are denied dispatcher certification or recertification under § 245.301 by another railroad or has their dispatcher certification suspended or revoked under § 245.307 by another railroad.

(2) If a person has their dispatcher certification suspended or revoked by a railroad under § 245.307, they may not work as a dispatcher for any other railroad during the period that their certification is suspended or revoked.

(3) If a person has their dispatcher certification suspended or revoked by a railroad under § 245.307, they must notify any railroad that they are seeking dispatcher certification from that their dispatcher certification is currently suspended or revoked by another railroad.

(d) Paragraphs (d)(1) through (4) of this section apply to persons who are currently certified as a dispatcher and also currently certified in another craft, such as a locomotive engineer or conductor.

(1) If a person's dispatcher certification is revoked under § 245.307 for a violation of § 245.303(e)(7), they may not work in another certified craft, such as a locomotive engineer or conductor, for any railroad during the period of revocation.

(2) If a person's dispatcher certification is revoked under § 245.307 for a violation of § 245.303(e)(1) through (6), they may work in another certified craft, such as a locomotive engineer or conductor, during the period of revocation.

(3) If any of a person's non-dispatcher certifications are revoked for failure to comply with § 219.101 of this chapter, they may not work as a dispatcher for any railroad during the period of revocation.

(4) If any of a person's non-dispatcher certifications are revoked for any reason other than a failure to comply with § 219.101 of this chapter, they may work as a dispatcher during the period of revocation.

(e) A person who has had their dispatcher certification revoked for failure to comply with § 219.101 of this chapter may not obtain any other certification pursuant to this chapter from any railroad during the period of revocation.

(f) A person who has had any of their non-dispatcher certifications revoked for failure to comply with § 219.101 of this chapter, may not obtain a dispatcher certification pursuant to this part from any railroad during the period of revocation.

(g) A railroad that denies a person dispatcher certification or recertification under § 245.301 shall not, solely on the basis of that denial, deny or revoke that person's non-dispatcher certifications or recertifications.

(h) A railroad that denies a person any non-dispatcher certification or recertification pursuant to this chapter shall not, solely on the basis of that denial, deny or revoke that person's dispatcher certification or recertification.

(i) In lieu of issuing multiple certificates, a railroad may issue one certificate to a person who is certified in multiple crafts as long as the single certificate complies with all of the certificate requirements for those crafts.

(j) A person who is certified in multiple crafts and who is involved in a revocable event, as described in this chapter, may only have one certificate revoked for that event. The determination by the railroad as to which certificate to revoke must be based on the work the person was performing at the time the revocable event occurred.

§ 245.215 Railroad oversight responsibilities.

(a) No later than March 31 of each year (beginning in calendar year 2027), each Class I railroad (including the National Railroad Passenger Corporation), each railroad providing commuter service, and each Class II railroad shall conduct a formal annual review and analysis concerning the administration of its program for responding to detected instances of poor safety conduct by certified dispatchers during the prior calendar year.

(b) Each review and analysis shall involve:

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

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

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

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

(d) If requested in writing by FRA, by the president of a labor organization that represents the railroad's dispatchers, or by a railroad's certified dispatcher that is not represented by a labor organization, the railroad shall provide a report of the findings and conclusions reached during such annual review and analysis effort.

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

(1) Incidents involving failure to properly issue or apply mandatory directives when warranted.

(2) Incidents involving improperly authorizing a train or on-track equipment to enter into an out-of-service or blue flag protected track.

(3) Incidents involving granting permission for a train or on-track equipment to enter into established RWIC limits without authority or permission from the RWIC.

(4) Incidents involving removal of blocking devices or established protection of RWIC working limits prior to the RWIC releasing the limits.

(5) Incidents involving failure to properly apply blocking devices or failure to establish proper protection for specified working limits or movements of trains or on-track equipment.

(6) Incidents involving granting permission for a train to enter Positive Train Control (PTC) or Cab Signal limits with inoperative or malfunctioning PTC or Cab Signal equipment.

(7) Incidents involving noncompliance with part 219 of this chapter.

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

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

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

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

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

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

(i) Imposition of informal discipline;

(ii) Imposition of formal discipline;

(iii) Provision of informal training; or

(iv) Provision of formal training; and

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

(i) The person was withheld from service;

(ii) The person was dismissed from employment; or

(iii) The person was issued demerits. If more than one form of punishment was imposed, only the punishment deemed the most severe shall be shown.

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

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

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

(i) For reporting purposes, an instance of poor safety conduct involving a person who is a certified dispatcher and is certified in another craft, such as a locomotive engineer or conductor, need only be reported once (e.g., either under this section or § 240.309 or § 242.215 of this chapter). The determination as to where to report the instance of poor safety conduct should be based on the work the person was performing at the time the conduct occurred.

Subpart D—Denial and Revocation of Certification

§ 245.301 Process for denying certification.

(a) A railroad shall notify a candidate for certification or recertification of information known to the railroad that forms the basis for denying the person certification

and provide the person a reasonable opportunity to explain or rebut that adverse information in writing prior to denying certification. A railroad shall provide the dispatcher candidate with any documents or records, including written statements, related to failure to meet a requirement of this part which support its pending denial decision.

(b) If a railroad denies a person certification or recertification, it shall issue a decision that complies with all of the following requirements:

(1) It must be in writing.

(2) It must explain the basis for the railroad's denial decision.

(3) It must address any explanation or rebuttal information that the certification candidate provided pursuant to paragraph (a) of this section.

(4) It must include the date of the railroad's decision.

(5) It must be served on the candidate no later than 10 days after the railroad's decision.

(c) A railroad shall not deny the person's certification for failing to comply with a railroad operating rule or practice which constitutes a violation under § 245.303(e)(1) through (6) if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the dispatcher's ability to comply with that railroad operating rule or practice.

§ 245.303 Criteria for revoking certification.

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

(b) A certified dispatcher who fails to comply with a railroad rule or practice described in paragraph (e) of this section shall have their certification revoked.

(c) A certified dispatcher who is assigned to monitor, pilot, or instruct a dispatcher and fails to take appropriate action to prevent a violation of a railroad rule or practice described in paragraph (e) of this section shall have their certification revoked.

Appropriate action does not mean that a supervisor, pilot, or instructor must prevent a violation from occurring at all costs; the duty may be met by warning the dispatcher of a potential or foreseeable violation.

(d) A certified dispatcher who is called by a railroad to perform a duty other than that of a dispatcher shall not have their dispatcher certification revoked based on actions taken or not taken while performing that duty except for violations described in paragraph (e)(7) of this section.

(e) When determining whether to revoke a dispatcher's certification, a railroad shall only consider violations of its operating rules or practices that involve:

(1) Failure to properly issue or apply a mandatory directive when warranted.

(2) Improperly authorizing a train or on-track equipment to enter into an out-of-service or blue flag protected track.

(3) Granting permission for a train or on-track equipment to enter into established RWIC limits without authority or permission from the RWIC.

(4) Removal of blocking devices or established protection of RWIC working limits prior to the RWIC releasing the limits.

(5) Failure to properly apply blocking devices or establish proper protection for specified working limits or movements of trains or on-track equipment.

(6) Granting permission for a train to enter PTC or Cab Signal limits with inoperative or malfunctioning PTC or Cab Signal equipment.

(7) Failure to comply with § 219.101 of this chapter. However, such incidents shall be considered as a violation only for the purposes of § 245.305(a)(2) and (b).

(f) In making the determination as to whether to revoke a dispatcher's certification, a railroad shall only consider conduct described in paragraphs (e)(1) through (6) of this section that occurred within the three years prior to the determination.

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

(h) A violation of one or more operating rules or practices described in paragraphs (e)(1) through (6) of this section that occurs during a properly conducted operational compliance test subject to the provisions of this chapter shall be counted in determining the periods of ineligibility described in § 245.305.

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

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

§ 245.305 Periods of ineligibility.

(a) The starting date for a period of ineligibility described in this section shall be:

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

(2) For a person currently certified, the date of the railroad's notification to the person that recertification has been denied or certification has been suspended.

(b) A period of ineligibility shall be determined according to the following standards:

(1) In the case of a single incident involving a violation of one or more of the operating rules or practices described in § 245.303(e)(1) through (6), the person shall have their certificate revoked for a period of 30 calendar days.

(2) In the case of two separate incidents involving a violation of one or more of the operating rules or practices described in § 245.303(e)(1) through (6), that occurred within 24 months of each other, the person shall have their certificate revoked for a period of six months.

(3) In the case of three separate incidents involving violations of one or more of the operating rules or practices, described in § 245.303(e)(1) through (7), that occurred within 36 months of each other, the person shall have their certificate revoked for a period of one year.

(4) In the case of four separate incidents involving violations of one or more of the operating rules or practices, described in § 245.303(e)(1) through (7), that occurred within 36 months of each other, the person shall have their certificate revoked for a period of three years.

(5) Where, based on the occurrence of violations described in § 245.303(e)(7), different periods of ineligibility may result under the provisions of this section and § 245.115, the longest period of revocation shall control.

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

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

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

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

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

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

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

§ 245.307 Process for revoking certification.

(a) If a railroad determines that a dispatcher, who is currently certified by the railroad, has violated a railroad operating rule or practice described in § 245.303(e), the railroad shall revoke the dispatcher's certification in accordance with the procedures and requirements of this section.

(b) Except as provided for in § 245.115(f), if a railroad acquires reliable information that a dispatcher, who is currently certified by the railroad, has violated a railroad operating rule or practice described in § 245.303(e) or § 245.115(d), the railroad shall undertake the following process to determine whether revocation of the dispatcher's certification is warranted:

(1) The dispatcher's certification shall be suspended immediately.

(2) Prior to or upon suspending the dispatcher's certification, the railroad shall provide the dispatcher with notice of: the reason for the suspension; the pending revocation; and an opportunity for a hearing before a presiding officer other than the investigating officer. This notice may initially be given either orally or in writing. If given orally, the notice must be subsequently confirmed in writing in a manner that conforms with the notification provisions of the applicable collective bargaining

agreement. If there is no applicable collective bargaining agreement notification provision, the written notice must be made within four days of the date the certification was suspended.

(3) The railroad must convene the hearing within the time frame required under the applicable collective bargaining agreement. If there is no applicable collective bargaining agreement or the applicable collective bargaining agreement does not include such a requirement, the hearing shall be convened within ten days of the date the certification is suspended unless the dispatcher requests or consents to a delay to the start of the hearing.

(4) Except as provided for in paragraph (c) of this section, the railroad shall provide the dispatcher with a copy of the written information and a list of witnesses the railroad will present at the hearing at least 72 hours before the start of the hearing. If this information was provided by an employee of the railroad, the railroad shall make that employee available for examination during the hearing notwithstanding the terms of an applicable collective bargaining agreement.

(5) Following the hearing, the railroad must determine, based on the record of the hearing, whether revocation of the certification is warranted and state explicitly the basis for the conclusion reached. The railroad shall have the burden of proving that revocation of the dispatcher's certification is warranted under § 245.303.

(6) If the railroad determines that revocation of the dispatcher's certification is warranted, the railroad shall impose the proper period of revocation provided for in § 245.305 or § 245.115.

(7) The railroad shall retain the record of the hearing for three years after the date the decision is rendered.

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

(d) Except as provided for in paragraph (c) of this section, a hearing required under this section shall be conducted in accordance with the following procedures:

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

(2) The presiding officer shall convene and preside over the hearing and exercise the powers necessary to regulate the conduct of the hearing for the purpose of achieving a prompt and fair determination of all material issues in dispute.

(3) The presiding officer may:

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

(ii) Examine witnesses at the hearing; and

(iii) Take any other action authorized by or consistent with the provisions of this part and permitted by law that may assist in achieving a prompt and fair determination of all material issues in dispute.

(4) All relevant and probative evidence shall be received into the record unless the presiding officer determines the evidence to be unduly repetitive or have such minimal relevance that its admission would impair the prompt, orderly, and fair resolution of the proceeding.

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

(6) Testimony by witnesses at the hearing shall be recorded verbatim. Witnesses can testify in person, over the phone, or virtually.

(7) The record in the proceeding shall be closed at the conclusion of the hearing unless the presiding officer allows additional time for the submission of evidence.

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

(9) A person may waive their right to a hearing. That waiver shall:

(i) Be made in writing;

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

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

(e) Except as provided for in paragraph (c) of this section, a decision, required by this section, on whether to revoke a dispatcher's certification shall comply with the following requirements:

(1) No later than ten days after the close of the record, a railroad official, other than the investigating officer, shall prepare and sign a written decision as to whether the railroad is revoking the dispatcher's certification.

(2) The decision shall:

(i) Contain the findings of fact on all material issues as well as an explanation for those findings with citations to all applicable railroad operating rules and practices;

(ii) State whether the railroad official found that the dispatcher's certification should be revoked;

(iii) State the period of revocation under § 245.305 (if the railroad official concludes that the dispatcher's certification should be revoked); and

(iv) Be served on the dispatcher and the dispatcher's representative, if any, with the railroad retaining proof of service for three years after the date the decision is rendered.

(f) The period that a dispatcher's certification is suspended in accordance with paragraph (b)(1) of this section shall be credited towards any period of revocation that the railroad assesses in accordance with § 245.305.

(g) A railroad shall revoke a dispatcher's certification if, during the period that certification is valid, the railroad acquires information which convinces it that another railroad has revoked the person's dispatcher certification in accordance with the provisions of this section. Such revocation shall run concurrently with the period of revocation imposed by the railroad that initially revoked the person's certification. The requirement to provide a hearing under this section is satisfied when any single railroad holds a hearing. No additional hearing is required prior to a revocation by more than one railroad arising from the same facts.

(h) A railroad shall not revoke a dispatcher's certification if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the dispatcher's ability to comply with the railroad operating rule or practice which constitutes a violation under § 245.303.

(i) A railroad may decide not to revoke a dispatcher's certification if sufficient evidence exists to establish that the violation of the railroad operating rule or practice described in § 245.303(e) was of a minimal nature and had no direct or potential effect on rail safety.

(j) If sufficient evidence meeting the criteria in paragraph (h) or (i) of this section becomes available, including prior to a railroad's action to suspend the certificate as provided for in paragraph (b)(1) of this section or prior to the convening of the hearing

provided for in this section, the railroad shall place the relevant information in the records maintained in compliance with:

(1) Section 245.215 for Class I railroads (including the National Railroad Passenger Corporation), railroads providing commuter service, and Class II railroads; or

(2) Section 245.203 for Class III railroads.

(k) If a railroad makes a good faith determination, after performing a reasonable inquiry, that the course of conduct provided for in paragraph (h) or (i) of this section is warranted, the railroad will not be in violation of paragraph (b)(1) of this section if it decides not to suspend the dispatcher's certification.

Subpart E—Dispute Resolution Procedures

§ 245.401 Review board established.

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

(b) The Administrator has delegated initial responsibility for adjudicating such disputes to the Certification Review Board (Board). The Board shall be composed of FRA employees.

§ 245.403 Petition requirements.

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

(b) Each petition shall:

(1) Be in writing;

(2) Be filed no more than 120 days after the date the railroad's denial or revocation decision was served on the petitioner, except as provided for in paragraph (d) of this section;

(3) Be filed on *<https://www.regulations.gov>*.

(4) Include the following contact information for the petitioner and petitioner's representative (if petitioner is represented):

(i) Full name;

(ii) Daytime telephone number; and

(iii) Email address;

(5) Include the name of the railroad;

(6) Contain the facts that the petitioner believes constitute the improper action by the railroad and the arguments in support of the petition; and

(7) Include all written documents in the petitioner's possession or reasonably available to the petitioner that document the railroad's decision.

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

(d) The Board may extend the petition filing period in its discretion provided that the petitioner provides good cause for the extension and:

(1) The request for an extension is filed before the expiration of the period provided for in paragraph (b)(2) of this section; or

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

(e) A party aggrieved by a Board decision to deny a petition as untimely or not in compliance with the requirements of this section may file an appeal with the Administrator in accordance with § 245.411.

§ 245.405 Processing certification review petitions.

(a) Each petition shall be acknowledged in writing by FRA. The acknowledgment shall be sent to the petitioner (if an email address is provided), petitioner's representative (if any), and the railroad. The acknowledgment shall contain the docket number assigned to the petition and will notify the parties where the petition can be accessed.

(b) Within 60 days from the date of the acknowledgment provided in paragraph (a) of this section, the railroad may submit to FRA any information that the railroad considers pertinent to the petition and shall supplement the record with any relevant documents in its possession, such as hearing transcripts and exhibits, that were not submitted by the petitioner. Late filings will only be considered to the extent practicable. A railroad that submits such information shall:

- (1) Identify the petitioner by name and the docket number for the petition;
- (2) Provide the railroad's email address;
- (3) Serve a copy of the information being submitted to the petitioner and petitioner's representative, if any; and
- (4) File such information on <https://www.regulations.gov>.

(c) The petition will be referred to the Board for a decision after a railroad's response is received or 60 days from the date of the acknowledgment provided in paragraph (a) of this section, whichever is earlier. Based on the record, the Board shall have the authority to grant, deny, dismiss, or remand the petition. If the Board finds that there is insufficient basis for granting or denying the petition, the Board may issue an

order affording the parties an opportunity to provide additional information or argument consistent with its findings.

(d) When considering procedural issues, the Board will grant the petition if the petitioner shows:

- (1) That a procedural error occurred; and
- (2) The procedural error caused substantial harm to the petitioner.

(e) When considering factual issues, the Board will grant the petition if the petitioner shows that the railroad did not provide substantial evidence to support its decision.

(f) When considering legal issues, the Board will determine whether the railroad's legal interpretations are correct based on a *de novo* review.

(g) The Board will only consider whether the denial or revocation of certification or recertification was improper under this part and will grant or deny the petition accordingly. The Board will not otherwise consider the propriety of a railroad's decision. For example, the Board will not consider whether the railroad properly applied its own more stringent requirements.

(h) The Board's written decision shall be served on the petitioner and/or petitioner's representative (if any) and the railroad.

§ 245.407 Request for a hearing.

(a) If adversely affected by the Board's decision, either the petitioner before the Board or the railroad involved shall have a right to an administrative proceeding as prescribed by § 245.409.

(b) To exercise that right, the adversely affected party shall file a written request for a hearing within 20 days of service of the Board's decision on that party. The request must be filed in the docket on <https://www.regulations.gov> that was used when the case was before the Board.

(c) A written request for a hearing must contain the following:

- (1) The name, telephone number, and email address of the requesting party and the requesting party's designated representative (if any);
- (2) The name, telephone number, and email address of the respondent;
- (3) The docket number for the case while it was before the Board;
- (4) The specific factual issues, industry rules, regulations, or laws that the requesting party alleges need to be examined in connection with the certification decision in question; and
- (5) The signature of the requesting party or the requesting party's representative (if any).

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

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

§ 245.409 Hearings.

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

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

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

(d) The presiding officer may authorize discovery of the types and quantities which in the presiding officer's discretion will contribute to a fair hearing without unduly burdening the parties. The presiding officer may impose appropriate non-monetary sanctions, including limitations as to the presentation of evidence and issues, for any party's willful failure or refusal to comply with approved discovery requests.

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

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

(g) If any document initiating, filed in, or served in, a proceeding is not in substantial compliance with the applicable law, regulation, or directive of the presiding officer, the presiding officer may strike or dismiss all or part of such document, or require its amendment.

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

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

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

(k) Except as provided in § 245.407(e) and paragraph (s)(4) of this section, whenever a party has the right or is required to take action within a period prescribed by this part, or by law, regulation, or directive of the presiding officer, the presiding officer may extend such period, with or without notice, for good cause, provided another party is not substantially prejudiced by such extension. A request to extend a period which has already expired may be denied as untimely.

(l) An application to the presiding officer for an order or ruling not otherwise specifically provided for in this part shall be by motion. The motion shall be filed with the presiding officer and, if written, served upon all parties. All motions, unless made during the hearing, shall be written. Motions made during hearings may be made orally on the record, except that the presiding officer may direct that any oral motion be reduced to writing. Any motion shall state with particularity the grounds therefor and the relief or order sought and shall be accompanied by any affidavits or other evidence desired to be relied upon which is not already part of the record. Any matter submitted in response to a written motion must be filed and served within 14 days of the motion, or within such other period as directed by the presiding officer.

(m) Testimony by witnesses at the hearing shall be given under oath and the hearing shall be recorded verbatim. The presiding officer shall give the parties to the

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

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

(o) The presiding officer may:

(1) Administer oaths and affirmations;

(2) Issue subpoenas as provided for in § 209.7 of this chapter;

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

(4) Examine witnesses at the hearing;

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

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

(p) The petitioner before the Board, the railroad involved in taking the certification action, and FRA shall be parties at the hearing. All parties may participate in the hearing and may appear and be heard on their own behalf or through designated

representatives. All parties may offer relevant evidence, including testimony, and may conduct such cross-examination of witnesses as may be required to make a record of the relevant facts.

(q) The party requesting the administrative hearing shall be the “hearing petitioner.” The party that the Board issued its decision in favor of will be a respondent. At the start of each proceeding, FRA will be a respondent as well. The hearing petitioner shall have the burden of proving its case by a preponderance of the evidence.

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

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

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

(2) Shall be served on all parties to the proceeding;

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

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

(5) Is not precedential.

§ 245.411 Appeals.

(a) Any party aggrieved by the presiding officer's decision may file an appeal in the presiding officer's docket. The appeal must be filed within 35 days of issuance of the decision. A copy of the appeal shall be served on each party. The appeal shall set forth objections to the presiding officer's decision, supported by reference to applicable laws

and regulations and with specific reference to the record. If no appeal is timely filed, the presiding officer's decision constitutes final agency action.

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

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

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

(e) The Administrator may remand, vacate, affirm, reverse, alter, or modify the decision of the presiding officer and the Administrator's decision constitutes final agency action except where the terms of the Administrator's decision (for example, remanding a case to the presiding officer) show that the parties' administrative remedies have not been exhausted.

(f) An appeal from a Board decision pursuant to § 245.403(e) must be filed in the Board's docket within 35 days of issuance of the decision. A copy of the appeal shall be served on each party. The Administrator may affirm or vacate the Board's decision, and may remand the petition to the Board for further proceedings. An Administrator's decision to affirm the Board's decision constitutes final agency action.

Appendix A to Part 245 – Procedures for Obtaining and Evaluating Motor Vehicle Driving Record Data

(1) The purpose of this appendix is to outline the procedures available to individuals and railroads for complying with the requirements of § 245.111 of this

chapter. This provision requires that railroads consider the motor vehicle driving record of each person prior to issuing them certification or recertification as a dispatcher.

(2) To fulfill that obligation, a railroad is required to review a certification candidate's recent motor vehicle driving record for information described in § 245.111(m). Generally, that will be a single record on file with the state agency that issued the candidate's current motor vehicle driver's license. However, a motor vehicle driving record can include multiple documents if the candidate has been issued a motor vehicle driver's license by more than one state agency or a foreign country.

(3) The right of railroad workers, their employers, or prospective employers to have access to a state motor vehicle licensing agency's data concerning an individual's driving record is controlled by state law. Although many states have mechanisms through which employers and prospective employers, such as railroads, can obtain such data, there are some states where privacy concerns make such access very difficult or impossible. Since individuals are generally entitled to obtain access to their driving record data that will be relied on by a state motor vehicle licensing agency when that agency is taking action concerning their driving privileges, FRA places the responsibility on individuals who want to serve as dispatchers to request that their current state motor vehicle licensing agency (or agencies) furnish such data directly to the railroad that is considering certification (or recertification) of the individual as a dispatcher. Depending on the procedures established by the state motor vehicle licensing agency, the individual may be asked to send the state agency a brief letter requesting such action or to execute a state agency form that accomplishes the same effect. Requests for an individual's motor vehicle driving record normally involve payment of a nominal fee established by the state agency as well. In rare instances, when a certification (or recertification) candidate has been issued multiple licenses, an individual may be required to submit multiple requests.

(4) Once the railroad has obtained the individual's motor vehicle driving record(s), the railroad is required to afford the certification (or recertification) candidate an opportunity to review and comment on the record(s) in writing pursuant to § 245.301 if the motor vehicle driving records contain information that could form the basis for denying the person certification. This opportunity to review and comment must occur before the railroad renders a certification decision based on information in the record(s). The railroad is required to evaluate the information in the certification (or recertification) candidate's motor vehicle driving record(s) pursuant to the provisions of this part.

Appendix B to Part 245 – Medical Standards Guidelines

(1) The purpose of this appendix is to provide greater guidance on the procedures that should be employed in administering the vision and hearing requirements of §§ 245.117 and 245.118.

(2) For any examination performed to determine whether a person meets the visual acuity requirements in § 245.117, it is recommended that such examination be performed by a licensed optometrist or a technician who reports to a licensed optometrist. It is also recommended that any test conducted pursuant to § 245.117 be performed according to any directions supplied by the test's manufacturer and any ANSI standards that are applicable.

(3) For any examination performed to determine whether a person meets the hearing acuity requirements in § 245.118, it is recommended that such examination be performed by a licensed or certified audiologist or a technician who reports to a licensed or certified audiologist. It is also recommended that any test conducted pursuant to § 245.118 be performed according to any directions supplied by the test's manufacturer and any ANSI standards that are applicable.

(4) In determining whether a person has the visual acuity that meets or exceeds the requirements of this part, the following testing protocols are deemed acceptable

testing methods for determining whether a person has the ability to recognize and distinguish among the colors used as signals in the railroad industry. The acceptable test methods are shown in the left hand column and the criteria that should be employed to determine whether a person has failed the particular testing protocol are shown in the right hand column.

Table 1 to Appendix B to Part 245

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

(5) In administering any of these protocols, the person conducting the examination should be aware that railroad signals do not always occur in the same sequence and that “yellow signals” do not always appear to be the same. It is not acceptable to use “yarn” or other materials to conduct a simple test to determine whether the certification candidate has the requisite vision. No person shall be allowed to wear chromatic lenses during an initial test of the person's color vision; the initial test is one conducted in accordance with one of the accepted tests in the chart and § 245.117(c)(3).

(6) An examinee who fails to meet the criteria in the chart may be further evaluated as determined by the railroad's medical examiner. Ophthalmologic referral, field testing, or other practical color testing may be utilized depending on the experience

of the examinee. The railroad's medical examiner will review all pertinent information and, under some circumstances, may restrict an examinee who does not meet the criteria for serving as a dispatcher. The intent of §§ 245.117(d) and 245.118(d) is not to provide an examinee with the right to make an infinite number of requests for further evaluation, but to provide an examinee with at least one opportunity to prove that a hearing or vision test failure does not mean the examinee cannot safely perform as a dispatcher.

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

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

Issued in Washington, DC.

Amitabha Bose,
Administrator.

[FR Doc. 2024-09957 Filed: 5/20/2024 8:45 am; Publication Date: 5/21/2024]