

# **Guidance Explaining the Federal Railroad Administration's Dispute Resolution Procedures For Locomotive Engineer and Conductor Certification Frequently Asked Questions**

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**NOTE:** This document is meant only as an aid in understanding the Federal Railroad Administration's (FRA) three levels of review for resolving disputes over a railroad's decision to deny certification, deny recertification, or revoke certification of a locomotive engineer (49 Code of Federal Regulations (C.F.R.) Part 240) or conductor (49 C.F.R. Part 242). For complete information regarding the regulatory requirements, please refer to 49 C.F.R. Parts 240 and 242 which can be found at [ecfr.gov](http://ecfr.gov).

In addition to discussing the regulatory requirements in Parts 240 and 242, this document also discusses certain best practices or recommendations that may go beyond the text of those regulations. This guidance is not legally binding and will not be relied on by the U.S. Department of Transportation (DOT) or FRA as a separate basis for affirmative enforcement action or other administrative penalty. Conformity with such guidance is voluntary, and nonconformity will not affect rights and obligations under existing statutes and regulations.

## **GENERAL QUESTIONS**

### ***What are FRA's three levels of review for railroad certification decisions?***

- Operating Crew Review Board (OCRB or Board): An individual who has been denied certification, denied recertification, or had their certification revoked as a locomotive engineer or conductor, can file a petition to have the Board review the railroad's certification decision.
- Administrative Hearing Officer (AHO): A party aggrieved by the Board's decision can file a petition for review by an AHO.
- FRA Administrator: A party aggrieved by an AHO's decision can file an appeal for review by the FRA Administrator. In addition, if the Board denied a petition finding that it was untimely or did not comply with all of the petition requirements, the aggrieved party can appeal directly to the Administrator.

Please see below for more information about filing petitions or appeals to the Board, the AHO, and the Administrator.

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

- Denial of certification refers to the situation in which a person who is not a certified

locomotive engineer or conductor receives notification from a railroad that it will not grant the person initial certification. A railroad might choose to deny a person certification if the railroad decides that the person, despite having finished a railroad-approved training program, cannot pass all of the minimum requirements. For example, the person may not have passed the skills performance or knowledge tests, or the person may not meet the minimum hearing or vision requirements. The rules provide a person with a reasonable opportunity to be provided with and respond to the negative information that forms the basis of the railroad's decision for denying certification. See 49 C.F.R. §§ 240.219 and 242.401.

- Denial of recertification refers to the situation in which a person who is a certified locomotive engineer or conductor receives notification from a railroad that it will not be recertifying the person. The regulations state that a certification cannot be for an interval of more than 36 months. 49 C.F.R. §§ 240.217(c) and 242.201(c). Like a denial of certification, a denial of recertification may be based on a person's inability to meet any of the minimum requirements and the regulations provide a person with a reasonable opportunity to be provided with and respond to the negative information that forms the basis of the railroad's decision to deny recertification. See 49 C.F.R. §§ 240.219 and 242.401.
- Certificate revocation refers to the situation in which the railroad determines that a certified locomotive engineer or conductor either: (1) has violated an operating rule or practice (as specified in 49 C.F.R. §§ 240.117(e)(1)-(5) or 242.403(e)(1)-(11)); or (2) is ineligible to hold a certificate due to a substance abuse disorder or violations of FRA's alcohol and drug regulations. See 49 C.F.R. §§ 240.117(e)(6), 240.119, 242.115, or 242.403(e)(12). Before revoking a person's certificate, the regulations require a railroad to provide the certified locomotive engineer or conductor with "the opportunity for a hearing"; however, the engineer or conductor can waive that opportunity. See 49 C.F.R. §§ 240.307 and 242.407.

### ***How can I review the applicable federal regulations myself?***

- The U.S. Government Printing Office (GPO) maintains a web site that makes reviewing applicable federal regulations accessible to anyone with internet access. It is the electronic C.F.R. website at [ecfr.gov](http://ecfr.gov). FRA's regulations are in the volume covering "Transportation" in title 49.
- FRA's web site, <https://railroads.dot.gov>, also provides access to FRA regulations and links to other web sites which maintain electronic copies of the C.F.R. FRA also publishes its guidance on its website at <https://railroads.dot.gov/guidance>.

## **QUESTIONS REGARDING FILING A PETITION WITH THE OCRB**

### ***Who are the Board Members who will make the decision on an OCRB petition?***

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

### ***Who may request Board review?***

- Any person who believes that a railroad incorrectly determined that the person failed to meet the certification requirements of 49 C.F.R. Parts 240 or 242 when the railroad decided to deny certification or recertification, or revoke certification, may petition the Board to review the railroad's decision. 49 C.F.R. §§ 240.401 and 242.501. A person who petitions the Board is referred to as the petitioner.

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

- A person has 120 days from the date of the railroad's decision to deny certification or recertification, or revoke certification, to file a petition. See 49 C.F.R. §§ 240.403(c) and 242.503(c).
  1. In computing the 120<sup>th</sup> day, do not count the date the railroad's decision was issued. Also, please be advised that the date the railroad issued its decision may be earlier than the date you received or were served with a copy of that decision.
  2. If the 120<sup>th</sup> day falls on a day that the Docket Clerk's office is closed (i.e., a Saturday, a Sunday, or a Federal holiday) you must file your request before the end of the next day in which the Docket Clerk's office is open.

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

- Late petitions will be denied as untimely. The Board, in its discretion and for cause shown, may extend the petition filing period at any time provided that:
  1. The request for extension is filed before the deadline; or
  2. The failure to timely file was the result of excusable neglect. 49 C.F.R. §§ 240.403(c) and 242.503(c).
- Thus, a person who has not missed the deadline can file a request for an extension. See 64 Fed. Reg. 60966, 60983 (Nov. 8, 1999). Such a petitioner needs to demonstrate justification for the Board to grant the extension as the regulation requires cause to be shown. Moreover, it is recommended that a petitioner specify how much additional time

will be needed to file the petition, keeping in mind that only reasonable requests will be granted.

- If the deadline has already passed, the petitioner must allege the facts constituting “excusable neglect.” The mere assertion of excusable neglect, unsupported by facts, is insufficient. Excusable neglect requires a demonstration of good faith on the part of the party seeking an extension of time and some reasonable basis for noncompliance with the time specified in the regulations. In most cases, demonstrating excusable neglect requires sending the Board evidence substantiating the reason an extension is needed along with any explanation. Absent a showing along these lines, relief will likely be denied.

### ***Where do I file my petition to the Board?***

- Petitions for review of a railroad’s decision to deny or revoke a locomotive engineer’s or conductor’s certification (or recertification) must be submitted to the Docket Clerk, U.S. Department of Transportation, Docket Operations (M-30), West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590, or electronically at [regulations.gov](http://regulations.gov). 49 C.F.R. §§ 240.403(b)(2) and 242.503(b)(2). FRA recommends filing petitions electronically at [regulations.gov](http://regulations.gov).

### ***How do I file my petition to the Board?***

- Standards and requirements for all acceptable forms for petitioning the Board are established by the Federal Docket Management System and posted on its Web site at [regulations.gov](http://regulations.gov). No matter which acceptable form you use, FRA recommends that you retain a receipt or other proof of the date you filed your request.
- Electronic submission at [regulations.gov](http://regulations.gov) is the preferred method for submitting a petition and all supporting documentation. To have a docket created, DOT’s Docket Operations and FRA have developed a procedure by which a filer may electronically submit a document to a pre-existing docket called a “shell docket.” When you go to [regulations.gov](http://regulations.gov), enter “FRA-2007-0003” where it says “Search for Rules, Proposed Rules, Notices or Supporting Documents”. Then press the “Search” button. This will take you to the shell docket where you will click on a link to a document titled “Submission Comment for Submitting Documents to FRA.” Then click on the “Comment” button, enter the required information, and upload a file or files. If the petition is in a file you uploaded, it is suggested that you type a comment in the comment box describing the files you uploaded. Finally, click on “Submit Comment” to submit your comment. You will receive an electronic receipt when submission is complete.
- Please note that it might not be possible to upload large video files or files not in a format acceptable to the docket website. In those situations, please identify any file that could not be uploaded in either the petition or a comment box and leave a description of the file. Additionally, please email Board Counsel at [OCRBcounsel@dot.gov](mailto:OCRBcounsel@dot.gov) to inquire

about alternative submission arrangements.

- If you have questions about filing your petition, please email [OCRBcounsel@dot.gov](mailto:OCRBcounsel@dot.gov).

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

- Locomotive engineer and conductor petitions must contain contact information and all available information that you think supports your belief that the railroad acted improperly. 49 C.F.R. §§ 240.403(b) and 242.503(b). That information includes the following:
  1. The petitioner's name, address, and telephone number are required, and an email address is strongly recommended, especially if you are representing yourself.
    - a. If you are represented by an attorney, it is expected that the attorney will accept service on your behalf and provide your name and the attorney's contact information.
    - b. However, if you are represented by any other person, for example, a union representative, your chosen representative should provide both your and their contact information if you want FRA to independently serve you with any written notices and the decision.
    - c. Note: If you change representatives or your contact information changes before the Board issues its decision, it is your obligation to file a submission to the docket notifying the Board and the other party of any such changes. Please keep in mind that a failure to update this information may result in the Board being unable to serve you or your representative with a copy of an order or the Board's final decision.
  2. The name and address of the railroad.
  3. The facts that you believe constitute the improper action by the railroad, specifying the locations, dates, and identities of all persons who were present or involved in the railroad's actions (to the degree known by you).
  4. An explanation of the nature of the remedial action sought.
  5. Copies of all written documents in your or your representative's possession or that are reasonably available to you that document the railroad's decision.

***Do I need to provide anyone else with a copy of my petition?***

- No. FRA will notify the railroad that it has received the petition and where the petition may be accessed. 49 C.F.R. §§ 240.405(b) and 242.505(b).

***What happens after I file a petition to the Board?***

- FRA will acknowledge each petition and notify the railroad of the petition. The consolidated acknowledgment and notice shall contain the docket number assigned to the petition and a statement of FRA's intention that the Board will attempt to render a decision on the petition within a certain timeframe.
- Because the railroad is typically instructed that it will be given a period of 60 days to submit to FRA any information that the railroad considers pertinent to the petition, as specified in the regulation, FRA's intention is that the Board will render a decision on the petition within 180 days from the date that the railroad's response is received or from the date upon which the railroad's response period lapsed. See 49 C.F.R. §§ 240.405(a) and 242.505(a). In other words, FRA's intention is that the Board will attempt to render a decision within 240 days from the date that FRA acknowledges the petition.
- The Board has discretion to consider a late railroad response as long as it is practicable to do so. 49 C.F.R. §§ 240.405(c) and 242.505(c).
- The railroad is required to send the petitioner and petitioner's representative, if any, a copy of the information being submitted to FRA. 49 C.F.R. §§ 240.405(d) and 242.505(d).
- After the railroad's response is received, or upon expiration of the railroad's response period, the petition will then be referred to the Board for a decision. 49 C.F.R. §§ 240.405(e) and 242.505(e).
- Notice of the Board's decision will be provided to all the parties by email or phone, and access to the written decision will be available at the public docket. 49 C.F.R. §§ 240.405(l) and 242.505(l).

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

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

***On what grounds will the Board grant a petition?***

The Board will grant a petition if the petitioner proves one of the following:

1. That the railroad: (1) committed a procedural error and (2) that error caused the petitioner substantial harm. When considering procedural disputes, the Board will determine whether the petitioner suffered substantial harm that was caused by the failure to adhere to the dictated procedures for making the railroad's decision. A finding of substantial harm is grounds for reversing the railroad's decision. 49 C.F.R. §§ 240.405(i) and 242.505(i).
2. That the railroad's decision is not supported by substantial evidence in the record. When considering factual issues, the Board will determine whether there is substantial evidence to support the railroad's decision, and a negative finding is grounds for granting the petition. See 49 C.F.R. §§ 240.405(h) and 242.505(h).
3. That the railroad's decision is based on an incorrect legal interpretation. As to legal issues, the Board will provide *de novo* review, which means that the Board will not be bound by legal interpretations reached by the railroad in making its decision. See 49 C.F.R. §§ 240.405(j) and 242.505(j).
4. That an intervening cause prevented or materially impaired petitioner's ability to comply with the relevant railroad operating rule or practice. "A railroad shall not revoke the person's certification . . . if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the [locomotive engineer or conductor's] ability to comply with the railroad operating rule or practice which constitutes a violation [under 49 C.F.R. §§ 240.117(e)(1) through (e)(5) or 242.403(e)(1) through (e)(11)]." 49 C.F.R. §§ 240.307(i)(1) and 242.407(i)(1).

### ***What relief can the Board grant?***

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

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

- Please contact the attorneys assigned as Counsel to the OCRB via email at [OCRBcounsel@dot.gov](mailto:OCRBcounsel@dot.gov).

## **QUESTIONS FOR FILING A PETITION TO THE AHO**

### ***Who may request further FRA review from a Board decision?***

- A party adversely affected by a Board decision has the right to request that FRA provide an administrative hearing. Thus, if the Board finds in favor of the railroad, the locomotive engineer or conductor has the right to request a hearing. If the Board finds in favor of the engineer or conductor, the railroad may request a hearing. 49 C.F.R. §§ 240.407(a) or 242.507(a).
- If the Board denies a petition as untimely or not in compliance with the petition requirements, the aggrieved party may file an appeal directly with FRA's Administrator in accordance with 49 C.F.R. §§ 240.403(d) and 240.411, or 49 C.F.R. §§ 242.503(d) and 242.511. Where a party files an appeal from a Board decision pursuant to §§ 240.403(d) or 242.503(d), 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. 49 C.F.R. §§ 240.411(c) and (f), or 242.511(c) and (f). *Note: The section offering guidance for filing an appeal to the Administrator is described in this document after the section offering guidance for filing a request for an administrative hearing.*

### ***How much time do I have to file a request for an administrative hearing?***

- The adversely affected party has 20 days from the date of service of the Board's decision on that party to file a request for a hearing. 49 C.F.R. §§ 240.407(b) and 242.507(b).

### ***Where do I file my petition for an administrative hearing?***

- A written request for an administrative hearing should be filed in the same docket (on regulations.gov) used for the petition before the Board. Alternatively, the request can be mailed to Docket Clerk, U.S. Department of Transportation, Docket Operations (M-30), West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590. 49 C.F.R. §§ 240.407(d) or 242.507(d).
- As the docket will be available electronically to the public, FRA recommends that each party be careful to redact Social Security numbers, employee identification numbers that may be the same as a Social Security number, or any other information that is private in nature and should not be shared with the general public.

### ***What information do I need to provide in my written request for an administrative hearing?***

- Only a few items of information are required in a written request for an administrative hearing. 49 C.F.R. §§ 240.407(d) or 242.507(d):

1. The name, address, telephone number, and email address (if available) for yourself and for your representative, if any. In addition, you must also provide this same basic information for the person representing the opposing party (the respondent).
2. The specific factual issues, industry rules, regulations, or laws that the requesting party alleges need to be examined in connection with the certification decision in question.
  - Note: This proceeding provides an aggrieved party a *de novo* hearing at which the relevant facts can be adduced and the correct application of Parts 240 or 242 can be applied. This proceeding is not an appellate review of the Board's decision or the railroad's hearing. Thus, the administrative proceeding will not cover alleged procedural errors which may have occurred at those earlier proceedings.
  - Note: The party requesting the hearing has the burden of proving their case by a preponderance of the evidence. See 49 C.F.R. §§ 240.409(q) or 242.509(q).
3. Your signature or your representative's signature.

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

- FRA's regulations do not require that you serve anybody else with a copy of your request. However, as a courtesy, it is recommended that you serve each party listed on the "service list" attached to the Board's decision letter.

***What happens if I file a late request for an administrative hearing or decide not to file such a request at all?***

- Failure to file a timely request for a hearing or the decision not to file any request at all, means that the Board's decision constitutes final agency action in the matter. 49 C.F.R. §§ 240.407(c) or 242.507(c).
- If you believe that the FRA Hearing Officer has incorrectly decided that your request was untimely filed, you may appeal that decision to the FRA Administrator. See 49 C.F.R. §§ 240.411 or 242.511.

**QUESTIONS FOR FILING AN APPEAL TO THE ADMINISTRATOR**

***Under what circumstances can someone appeal to the Administrator?***

- Any party aggrieved by the FRA Hearing Officer's decision may file an appeal to the Administrator. 49 C.F.R. §§ 240.411(a) or 242.511(a).
- Also, if the Board denies a petition as untimely or not in compliance with the petition requirements, the aggrieved party may file an appeal directly with the FRA Administrator in accordance with 49 C.F.R. §§ 240.411(f) or 242.511(f). See 49 C.F.R. §§ 240.403(d) or 242.503(d).

***How much time do I have to file an appeal to the FRA Administrator?***

- An appeal must be filed within 35 days of the issuance of the adverse decision.
- The Administrator may extend the period for filing an appeal for good cause shown, provided that the written request for extension is filed before expiration of the 35-day period in which to appeal. 49 C.F.R. §§ 240.411(c) or 242.511(c).

***Where do I file the appeal to the FRA Administrator?***

- An appeal to the Administrator must be filed in the same docket used for the petition before the Board and/or the FRA Hearing Officer.

***What information must be included in the appeal to the FRA Administrator?***

- 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. 49 C.F.R. §§ 240.411(a) or 242.511(a).
- A party challenging a Board decision to deny a petition as untimely or not in compliance with the petition requirements should include all information and argument supporting the position that the Board made an improper decision with respect to the untimeliness of the petition's filing or the petition requirements that the Board found were not satisfied.
- A copy of the appeal must be served on each party.

***Do I have an opportunity to respond if another party files an appeal to the FRA Administrator?***

- Yes. You may file a reply to the appeal in the docket within 25 days of service of the appeal.

***Please be advised that, unless an Administrator's decision shows that the parties' administrative remedies have not been exhausted (e.g. remands a case to a presiding officer or the Board), the Administrator's decision constitutes final agency action and would mark the end of FRA's dispute resolution process.***