



**2024 NARR RAILROAD CONFERENCE**

**"FRA Administration: Certification"**





# THE NATIONAL ASSOCIATION OF RAILROAD REFEREES

## ABOUT NARR

The aims and purposes of the National Association of Railroad Referees are (1) to promote mutual exchange of ideas and information among its members concerning items of mutual interest; (2) to communicate with the National Mediation Board and other appropriate agencies, groups and organizations to offer aid and assistance as is deemed appropriate for the promotion of railroad arbitration; (3) to be available to the National Mediation Board and other appropriate agencies, groups and organizations to offer comments upon various suggestions and requests as they may solicit same; (4) to obtain and distribute to the membership information and documentation of interest to the professional pursuits of the members; (5) to engage in educational pursuits as may be appropriate; and (6) to take other action to promote the interests of railroad arbitration as deemed appropriate by the Association to achieve the aims and purposes of the Association.

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# SPEAKERS

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# Origin of Certification

## Engineer Certification established in 1991 – RSIA 1988

Implementing Factor:

- 1987 SSV by Conrail light power move causing 100+ mph collision with Amtrak train near Chase, Maryland, killing 14 people.
- Engineer Ricky Gates tested positive for THC, spent 4 years in prison. Investigators found cab alerter covered & cab signal light removed.
- RSIA 1988 also instituted mandatory **random** drug testing DOT wide & cab signals with positive stop on Northeast Corridor.

## Conductor Certification established in 2012 – RSIA 2008

Implementing Factor:

- 2008 SSV by Metrolink passenger train causing 84 mph (combined speed) head on collision with UP train near Chatsworth, CA, killing 25 people.
- Engineer Robert Sanchez texting with local railfan. Last message sent 22 seconds before impact, just after passing the red signal.
- RSIA 2008 also instituted mandated PTC, changes to HOS laws, EO-26 electronic device rules, C&S certification, Dispatcher Certification.

# Certification vs. Licensing

## Locomotive Engineer – 49 CFR Part 240

- Train Service Engineer
- Locomotive Servicing Engineer
- Student Engineer
- RCO Operator
- Student RCO Operator

## Conductor – 49 CFR Part 242

- Conductor
- Passenger Conductor

## Train Dispatcher – 49 CFR Part 245

## Signal Employee – 49 CFR Part 246

Beyond classes of certification specified in the regulation, railroads can create additional classes of certification based on their own needs.

Carrier certification program is operated based “submission” to FRA, which outlines how the railroad will operate its own certification program within the guidelines of the regulation.



# Certification Interface With CBAs

49 CFR § 240.5 / 242.5 / 245.5 / 246.5 Effect & Construction

(a) **FRA does not intend**, by use of the term **[title of certified craft as used in regulation]** 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 authorized by a railroad to **[perform the work of the certified craft as defined in the regulation]**.

(b) **FRA does not intend**, by issuance of these regulations 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 **[regulatory provisions governing multiple certifications]**, **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.

# Certification Submission - Training

Within each railroad's certification submission, the railroad must describe its initial certification training program as well as its ongoing program for recurrent training of existing certified employees.

## **Initial Certification Training Program:**

- Include classroom and OJT components
- Extensive and extremely detailed to meet standards outlined in 49 CFR part 243

## **Recurrent Training:**

- Outlined in submission but generally less structured and can be varied.
- Consists of several regulatory requirements such as hazardous materials and air brake training.
- Expected to address proactive and reactive trends discovered by the railroad and as discovered by review of incidents and accidents.

# Initial Certification

How does someone get Certified?

## **Initial Certification as EN, RCO or LSE begins as a STUDENT**

- Cannot move locomotive except within confines of locomotive shop or incidental movement of less than 100 feet for inspection or maintenance purpose.

## **Initial Certification as CO is a CO (no student)**

- Can work as Brakeman, Switchman or Utilityman without Certification.

## **Prior to Initial Certification:**

- Safety History Review – MVR (DUI) & Other RR Employment
- Vision & Hearing Acuity
- Knowledge Testing
- Completion of Training Program



# Remaining Certified

What are the requirements to remain certified?

## Annual Monitoring – Each Calendar Year

**Engineer** – Monitor Operation & Operating Rules Tests

- Test response to Approach, Stop, Restricted Speed, Obstruction Banner
- Test compliance for rules cited as cause of train accidents (shove, switch, etc.)

**Conductor** – Operating Rules Tests on switches, derails, shoves, equipment in clear

## General:

- Written Rules Testing
- Maintain Vision and Hearing Acuity
- Comply Drug & Alcohol Policy – (Revocation vs. Suspension Covered Later)
- Self Report DUI – Requires EAP Review – Addiction Indicator
- Maintain Medical Fitness

# Annual Monitoring vs. Re-Certification

What's the difference between an annual monitoring and a recertification ride?

## Annual Monitoring

- Each Calendar Year
- Event Recorder, Simulator or Ride Along
- Most Demanding Class of Service – Sufficient Length
- Type of train normally operated on segment and operated in the normal course of events

## Re-Certification

- Completed Within Previous 366 Days
- Simulator or Ride Along
- Most Demanding Class of Service – Sufficient Length
- Type of train normally operated on segment and operated in the normal course of events

## Failures

- Handled Identically – Cannot Operate as Engineer / RCO / LSE – Until Passing Ride

# Recertification

What are the requirements to recertify?

## **Safety History Review**

- MVR (DUI)
- Other RR Employment
- Prior Revocation/Suspension

## **Vision & Hearing Acuity Test**

## **Ride – Simulator or Ride Along**

- Engineer Only

## **Rules Test**

- Including Mandatory FRA Training
- Territory Qualification & Foreign Line Exams



# Rule G and Addiction, Part 219

Hang on tight, It's Complicated!

## **Addiction Issue? – SUSPENDED until cleared by EAP**

- DUI – Addiction Indicator – Not suspended but requires EAP evaluation

## **Non-Federal Positive Test (Company Policy, Rule G, etc.) – Suspended if Addiction Found**

- Includes .02 to .04 positive result on Federal Test

## **Federal Positive Test**

- Drug Screen without signs and symptoms – Suspended until cleared by EAP (219.102)
- Under Influence / In Possession – On Property/ On Duty – Revocation (219.101)
  - Additionally, Suspended until cleared by EAP
  - Note: Less than .02 = Federal Negative Test

# FRA Cardinal Rules

FRA DESIGNATES CARDINAL RULES FOR EACH CERTIFIED CRAFT.

A PROVEN VIOLATION OF A CARDINAL RULE RESULTS IN THE REVOCATION OF THE EMPLOYEE'S CERTIFICATION.

# Violations Leading to Revocation (Engineer)

- Passing a Stop Signal.
- 10+ mph overspeed, including conditional clause of restricted speed rules when an FRA-reportable accident/incident occurs.
- Failure to comply with requirements for brake tests.
- Occupying main track w/o proper authority or permission.
- Tampering w/locomotive mounted safety devices or allowing operation with an unauthorized disabled safety device.
- Alcohol & Drugs - Failure to comply with 49 CFR §219.101 or multiple violations of 49 CFR §219.102.



# Violations Leading to Revocation (Conductor)

- Failure to warn / prevent violation of five Engineer Cardinal Rules.
- Violations which cause reportable accidents or incidents under part 225 involving:
  - Shoving/pushing movements
  - Failure to leave equipment in the clear
  - Hand-operated switches, including crossovers
  - Hand-operated main track switches
  - Hand-operated crossovers
  - Hand-operated fixed derails
- Alcohol & Drugs – Failure to comply with 49 CFR §219.101 or multiple violations of 49 CFR §219.102.

# Violations Leading to Revocation (Dispatcher)

- Failure to properly issue/apply mandatory directive.
- Improperly authorizing entrance to out of service or blue-flag protected track.
- Granting permission for entry into RWIC limits w/o RWIC permission.
- Removal of blocking devices from RWIC limits before RWIC releasing the limits.
- Failure to properly apply blocking devices or establish protection for working limits or movements.
- Granting permission for train to enter PTC or cab signal limits with inoperative PTC or cab signal equipment.
- Alcohol & Drugs - Failure to comply with 49 CFR §219.101 or multiple violations of 49 CFR §219.102.

# Violations Leading to Revocation (C&S)

- Interfering w/normal functioning of crossing warning or signal system w/o alternate protection, if activation failure or false proceed signal results.
- Failure to comply with rules when removing from service OR placing into service, crossing warning or wayside signal devices/systems.
- Failure to perform required inspections / tests of grade crossing devices / systems.
- Failure to restore power to train detection or crossing warning device after manual interruption, if activation failure results.
- Failure to comply with validation or cutover procedures.
- Failure to comply with employee protection rules. (Parts 214/218)
- Alcohol & Drugs – Failure to comply with 49 CFR §219.101 or multiple violations of 49 CFR §219.102.



# FRA Certification Revocation Process

- When a cardinal rule is violated, certification is subject to being revoked.
- Employee has the right to waive hearing and accept revocation.
- Carrier may consolidate FRA certification hearing with CBA investigation but must issue separate findings of fact.
- Revocation affects only certified positions, does not affect employment.
- After a consolidated FRA / CBA hearing, the appeal, the employee has the option to appeal to the FRA review board and/or via the CBA.

# FRA Certification Revocation Process

- Carrier receives reliable information a Cardinal Rule violation has occurred.
  - Carrier has discretion not to revoke if a *de minimis* event is involved.
  - Carrier must not revoke if an intervening cause prevents or materially impairs rules compliance by employee.
- Immediate suspension of certification with written notice of pending revocation and advisement of rights.
- Revocation Hearing Procedures: (Unless Waived)
  - CBA – If held jointly with disciplinary hearing
  - Regulation – If held separately
- Carrier makes finding and imposes the prescribed penalty.

# FRA Certification Revocation Penalties

- With exception of certain alcohol & drug penalties, the period of revocation for a violation of other cardinal rules is standard and consistent across the four crafts.
  - 1<sup>st</sup> offense = 30 calendar days
  - 2<sup>nd</sup> offense within two years = six-months
  - 3<sup>rd</sup> offense within three years = one-year
  - 4<sup>th</sup> offense within three years = three-years
- If the revocation is for one year or less and is not a violation of §219.101, the carrier has the discretion to reduce the revocation period by half, after the employee has completed remedial training.



# FRA Certification – Alcohol & Drug Issues

- FRA has designated two types of alcohol and drug violations §219.101 and §219.102 – the distinction being the presumption of impairment.
- Positive breath alcohol tests and positive blood tests for alcohol or drugs are classified as 101 violations, as is a refusal to test.
- The revocation period for a first 101 violation is nine months.
- A first offense of §219.102, a positive urine test for drugs, does not result in revocation, but requires suspension of the certificate pending an SAP evaluation, completion of any prescribed treatment and a negative return to work drug test.

# FRA Revocation Appeal Process

## Three-Step Process:

1. **Review Board**, Available to the certified employee whose certification has been revoked. (Operating Crew Review Board - Engineers & Conductors / Certification Review Board - Dispatchers & Signal Employees)
2. **Administrative Hearing**, Available to any party who was adversely affected by the decision of the Review Board.
3. **Appeal to the Administrator**, Available to any party who is aggrieved by the decision of the Administrative Hearing Officer.

# Review Board Process

- Review Boards comprised of FRA employees selected by Administrator, with legal or subject matter expertise.
- The Petition for Review must be filed within 120 days of notice of revocation, and the case is decided on the papers. The Board, in its discretion, may permit briefing beyond the Petition for Review and the Response.
- Procedural Error must cause **substantial harm** to be sustained.
- Evidentiary burden for factual issues is whether the Carrier's factual findings are supported by **substantial evidence**.
- The Board conducts a **de novo** review of the Carrier's legal interpretations.

# Administrative Hearing Process

- Full-blown litigation presided over by an FRA Administrative Hearing Officer.
- The hearing is *de novo* as to all issues; party requesting the hearing has burden of proof by a preponderance of the evidence.
- Governed by Federal Rules of Evidence.
- Standard forms of discovery (e.g., interrogatories, requests for production and admissions, depositions, etc.).
- All testimony under oath; with witness/deponent right to counsel.
- All pleadings are deemed veracity attested to by the signatory.
- The decision must include findings of fact and conclusions of law and is not precedential.



# Appeals to the Administrator

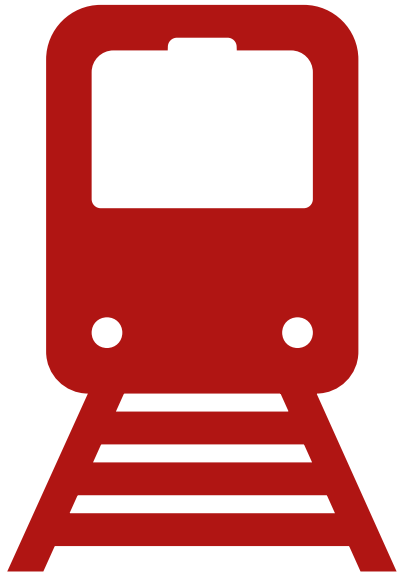
- Pleadings normally limited to the Appeal and a Reply.
- Possible, but rare, for both parties to appeal different aspects of an AHO's ruling to the Administrator.
- Administrator has sole discretion to permit oral argument.
- Administrator may remand, vacate, affirm, reverse, alter or modify the AHO's decision.
- Administrator's Decision constitutes final agency action except where its terms show that the parties' administrative remedies have not been exhausted (e.g., the case is remanded to the AHO).

# FRA Certification Labor Organizations' Role

- FRA Certification matters involving denial of certification, denial of recertification, and revocation disputes are a civil matter between the individual petitioner, the respondent carrier and the FRA.
- The regulations contemplate petitioner's right to legal representation.
- Certification matters are outside labor organizations' obligations under the Duty of Fair Representation (DFR).
- Nevertheless, unions recognize that remaining certified is essential for continued employment.
- Unions can provide specialized assistance with certification matters using authorization and release forms that indemnify and protect against malpractice.

# FRA Certification – Arbitration Takeaways

- FRA standards differ significantly from RLA § 3 standards, most notably:
  - FRA's fixed schedule of sanctions vs. just cause / progressive discipline under § 3; and
  - FRA's "substantial harm" standard for procedural / due process objections.
- Some arbitrators have weighed FRA decisions on appeals of revocation in connection with backpay considerations.
- Section 3 advocates are not always aware of post-revocation appellate handling.



# Questions