

To: All Local Chairpersons

From: John Hancock

Subject: Conductor Certification

Attached is a summary of conductor certification that will be implemented on January 1, 2012. This summary was prepared by Steve Young, UTU Designated Legal Counsel.

The current conductor certification language has not been published as final. In the meantime, this is an excellent overview of changes to come.

I am sure that our International will prepare a full report of the requirements of the "LAW" as implementation date becomes closer.

Please make this information available to the Membership

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January 22, 2011

Conductor certification is a reality. The Federal Railroad Administration has proposed a final rule with an implementation date of January 1, 2012. As proposed, anyone working as a conductor on a Class I or Class II railroad as of January 1, 2012 will automatically be certified as is and will receive a certificate. However, those individuals will have to recertify before June 15, 2015. In order to do so, will have to pass the required background driver's license scrutiny for DUI and related violations; pass the required and expanded rules test; pass the required vision and hearing acuity tests; and be cleared by a substance abuse professional to be free of any active substance abuse disorder.

As part of my lifelong commitment to educate and inform union members, I have tried to simplify the long, complicated regulation by addressing the pertinent parts in a question and answer format. This paper is the only effort by anyone to set forth an explanation of the conductor certification process by questions and answers. The questions and answers are written to primarily address those currently working on Class I and Class II railroads. For example, I did not address those hired between January 1, 2012 and June 1, 2012 or those hired after June 1, 2012. Those individuals have a different timetable for implementation and some different certification requirements. However, for those working as a conductor on January 1, 2012 on a Class I or Class II railroad these questions and answers are a great summary explanation of the regulation.

1. **Q. When will conductor certification actually become effective?**

A. As it stands today the final rule will become effective January 1, 2012.

2. **Q. How will certification initially be done?**

A. If you are authorized by the railroad to perform the duties of a conductor as of January 1, 2012, you are automatically certified. The railroad will issue a certificate to such employees by March 1, 2012. No later than June 1, 2015 (Class I and Class II railroads) every conductor initially certified must pass the required tests and meet the physical requirements and other qualifications set forth in the regulations. 49 CFR 242.105

3. **Q. Will I be issued a certificate and if so, what must it include?**

A. Yes. All certified conductors must be issued a certificate by the employing railroad that identifies the railroad or parent company; the person to whom the certificate is being issued, including the person's name, employee I.D., and either the DOB or photograph of the person; any limitations, including the type of service certified for (conductor and/or passenger conductor) and any limitations such as vision or hearing (glasses, hearing aid requirements); the effective date of the certification; and it shall be signed by an individual designated by the railroad. The certificate shall be sufficiently small to permit being carried in a pocket wallet.

**4. Q. Do I have to carry the certificate with me at work?**

A. Yes. One must have the certificate in his/her possession while on duty and display the certificate upon request to a representative of the FRA or a State inspector, an officer of the issuing railroad or an officer of another railroad when serving as a conductor in joint operations.

**5. Q. What if I am called to perform conductor's service that I am not qualified for?**

A. Any conductor who is notified or called for service which would cause the conductor to exceed his/her certificate limitations, such as not being qualified on the territory for which called, shall immediately notify the railroad that he/she is not authorized to perform the service AND IT SHALL BE UNLAWFUL FOR THE RAILROAD TO REQUIRE SUCH SERVICE.

- a. The railroad can provide a certified conductor to provide assistance where the operation is on the main track.
- b. On other than main track the railroad will provide certified assistance when practical. If not practical then a job aid will be provided.

**6. Q. What if I lose my certificate?**

A. The railroad is required to have a system for prompt replacement of lost, stolen or mutilated certificates at no cost to conductors. Temporary replacement certificates may be delivered electronically and are valid for no more than 30 days.

**7. Q. If I plan to retire in the near future, do I still have to be certified?**

A. If you retire by June 1, 2015 you can make a written request with the railroad to not recertify before retirement. However, it is totally up to the railroad to grant or deny the request, but if any request is granted, it must grant all requests to the fullest extent possible. 49 CFR 242.105(c)

**8. Q. What are the fitness requirements for certification?**

A. There are only two fitness requirements, vision and hearing. Both are very similar to the requirements for engineers. One must have 20/40 vision (corrected or uncorrected), field vision of at least 70 degrees in the horizontal meridian; and the ability to recognize and distinguish between the colors of railroad signals. One must not have an average hearing loss in the better ear greater than 40 decibels with or without the use of a hearing aid. 49 CFR 242.117

**9. Q. What if I fail the vision or hearing test?**

A. A person is entitled to one retest without any showing of a change in his/her condition. A person is entitled to a second retest if sufficient evidence is provided substantiating that circumstances have changed since the last test to the extent that the person could safely perform the duties. 49 CFR 242.117

**10. Q. Can I wear chromatic lenses during an initial test for the ability to recognize and distinguish among the colors used as railroad signals?**

A. No. The Regulations strictly prohibit the use of chromatic lenses during initial testing for color perception. Appendix D to Part 242 of the Regulations provides specific guidelines and testing protocol for color perception. 49 CFR 242.117

**11. Q. What kind of background check is required?**

A. Initially, for those authorized as conductors as of January 1, 2012 there are no background checks. However, after June 1, 2012 (Class I and Class II railroads) for those certifying or re-certifying he/she must request from the proper state authority that their driving record be provided to the railroad. The railroad will review the record for a 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 for refusing to undergo such testing. The railroad shall not consider driving incidents that occurred prior to January 1, 2012 nor for incidents that occurred more than 36 months prior to the month of making the certification decision. If such an incident is identified the information and any other information regarding the person's service record with the railroad will be sent to the railroad's SAP (Substance Abuse Professional) for evaluation. If the person is determined to have an active substance abuse problem he/she cannot continue to be certified. However, if the person is determined not to have an active substance abuse disorder, the person can be certified, but may be required to participate in any needed aftercare and/or follow up testing for drugs or alcohol. 49 CFR 242.111

**12. Q. How does the use of drugs and alcohol affect certification?**

A. The use of drugs and alcohol are extensively addressed in the regulations. One who has an active substance abuse disorder cannot be certified. A 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. An active substance abuse disorder means the person is currently using alcohol or drugs, except under medical supervision, or has failed to successfully complete primary treatment or successfully participate in aftercare as directed by SAP (Substance Abuse Professional). The railroad must determine that every conductor that is to be recertified (or certified) does not have an active substance abuse disorder and have on file written documentation from an SAP to that effect.

13. Q. **What is the period of ineligibility for use of a controlled substance (49 CFR 219.102)?**

A. For a single violation, the person shall be ineligible to hold a certificate during evaluation and any required primary treatment. In the case of two violations the person shall be ineligible to hold a certificate for a period of two years. In the case of more than two violations, the person shall be ineligible for five years.

14. Q. **What is the period of ineligibility for use or possession of alcohol or a controlled substance or reporting for duty or being under the influence of alcohol or a controlled substance while on duty (49 CFR 219.101)?**

A. For a single violation the period of ineligibility is nine months, unless the identification of the violation was through a co-worker report, in which case the certificate shall be deemed suspended during evaluation and primary treatment. For two or more violations, the person shall be ineligible to hold a certificate for five years.

15. Q. **What is a co-worker report and what rights do I have if reported by a co-worker?**

A. A co-worker report is covered by 49 CFR 219.405. Under this provision a co-worker may report another for being unsafe to work with or for a violation of the drug or alcohol rules. If so reported as a first offense the railroad may immediately remove the person from service and thereafter the person may elect to waive his/her right to an investigation and contact the SAP for assistance. The SAP must interview the individual and recommend a treatment plan within 20 days. If the employee enters the treatment plan the railroad must grant the employee a leave of absence for not less than 45 days to begin treatment. When the SAP determines the employee has control over the substance abuse problem, the railroad must promptly return the person to service. The person may be required to participate in a follow up treatment program of not more than 60 months. If the SAP determines that the employee is not affected by an identifiable mental or physical disorder, the employee must be returned to service within 5 days after completion of the evaluation. In either case the railroad may conduct return to service and follow up testing.

**16. Q. If I have a drug or alcohol problem, can I voluntarily refer myself for counseling without losing my certificate?**

A. Yes. Voluntary self referrals are governed by 49 CFR 219. This regulation requires the railroad to establish a self referral policy for one who has a drug or alcohol problem. The self referral must be made before the employee is charged; the matter is treated as confidential unless the employee refuses to cooperate with the recommended course of counseling or treatment; the railroad will grant a leave of absence of not less than 45 days for primary treatment; and the employee will be promptly returned to service on the recommendation of the SAP. If the program is satisfactorily completed after self referring, the person's conductor's certificate shall not be adversely affected. This typically applies to a first time referral or co-worker report, but it is up to the discretion of the railroad as to whether it is applicable to second or additional referrals.

**17. Q. What is the period of ineligibility for a violation of the controlled substance regulation (49 CFR 219.102) and the use of alcohol and drugs regulation (49 CFR 219.101)?**

A. In the case of one violation of 49 CFR 219.102 (controlled substance) and one violation of 49 CFR 219.101 (alcohol) the person shall be ineligible to hold a certificate for 3 years.

**18. Q. What is the period of ineligibility for refusing to provide a breath or bodily fluid sample?**

A. A refusal to provide a breath or body fluid sample for testing when instructed to do so by a railroad representative shall be treated as a violation of the controlled substance regulation in the case of a refusal to provide a urine sample or in the case of alcohol (drugs) the failure to provide a breath sample or blood specimen for mandatory post accident toxicological testing. The period of ineligibility for a refusal is the same as a positive sample.

**19. Q. How do I get recertified if my license is revoked for alcohol or drug use/abuse or a refusal to take a drug or alcohol screen?**

A. One must be evaluated by an SAP to determine if the person has an active substance abuse disorder; successfully complete ANY program of counseling or treatment determined to be necessary by the SAP before returning; present a urine sample for testing; and after returning to service, continue in any program of counseling or treatment deemed necessary by the SAP and follow up drug and alcohol testing without prior notice for a period of not more than 60 months. Follow up tests shall include not fewer than 6 alcohol tests and 6 drug tests during the first 12 months after returning to service. This 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 conductor. Further, this does not restrict any discretion available to the railroad to take disciplinary action. 49 CFR 242.115(f)

**20. Q. What kind of test will I be required to take to become recertified?**

A. The railroad is required to develop an objective test in a written or electronic format that covers the safety and operating rules, timetable instructions, compliance with all applicable Federal regulations, physical characteristics of the territory on which the person will work, use of any job aid and conducted without open reference books or material. Those certified as of January 1, 2012 will have to take and pass the test by June 1, 2015. 49 CFR 212.121

**21. Q. Is there a limit to the number of questions on the test or what is considered a passing score?**

A. No. The regulation does not address the issue of how many questions may be on the test, nor what constitutes a passing score. In fact, the regulation does not address how many times the test may be taken. However, the regulation does require that the railroad submit the proposed test to the FRA for approval and thus FRA will be in a position to monitor those issues.

**22. Q. Will the railroad be required to provide training before I am required to take the test?**

A. Yes. The regulations require that the railroad design a training program and each conductor must complete the training program before testing. The curriculum shall include training whereby a conductor will know how to comply with Federal railroad safety laws, regulations, orders and railroad rules and procedures. Since the conductor must be familiar with the physical characteristics of the territory where they work, the program must allow for one to become familiar with the territory by making student trips as determined by the railroad. The training program shall set forth the time period in which a conductor must be absent from a territory or yard, before requalification on physical characteristics is required. The railroad must also provide initial instructional briefings to ensure that each conductor has knowledge of the Federal railroad safety laws that relate to the safety-related tasks the employees are assigned to perform. The idea is to make sure that conductors have familiarity with the many safety regulations regarding their work that FRA has enacted.

**23. Q. Do the regulations require that my work be monitored by the railroad?**

A. Yes. The regulations require that the railroad shall have a program to monitor the conduct of its certified conductors by performing unannounced operating rules compliance tests. At a minimum, a compliance test must be conducted within 30 days of a return to conductor service and at least once annually for all conductors. 49 CFR 242.123

**24. Q. What are the penalties for rule infractions?**

A. The regulation provides eleven categories of rule violations for conductors with varying penalties as follows:

1. Failure to take appropriate action to prevent the locomotive engineer for the train the conductor is assigned to from failing to control a locomotive or train in accordance with a signal indication, excluding a hand or a radio signal indication or a switch, that require a complete stop before passing it, when the conductor is located in the operating car, or otherwise has knowledge of the signal indication. Appropriate action does not mean that a conductor must prevent a violation from occurring at all costs; the duty may be met by warning the engineer of a potential or foreseeable violation.
2. Failure to take appropriate action to prevent the locomotive engineer of the train the conductor is assigned to from failing to adhere to limitations concerning trains speed:
  - a. When the conductor is located in the operating cab and the speed at which the train was operated exceeds the maximum authorized limit by at least 10 MPH. Where restricted speed is in effect, railroads shall consider only those violations of the conditional clause of restricted speed rules (i.e. the clause that requires stopping within one half of the locomotive engineer's range of vision) which causes a reportable accident. Appropriate action does not mean that a conductor must prevent a violation from occurring at all costs; the duty may be met by warning an engineer of a potential or foreseeable violation.
  - b. When not in the operating cab, the conductor is deemed to have taken the appropriate action when in compliance with all applicable railroad operating rules and special instructions.
3. Failure to perform or have knowledge that a required brake test was performed pursuant to the Class I, Class IA, Class II, Class III, or transfer train brake test.
4. Occupying main track or segment of the main track without proper authority or permission.
5. Failure to comply with prohibitions against tampering with locomotive mounted safety devices; knowingly failing to take appropriate action to prevent the locomotive engineer of the train to comply with prohibitions against tampering with locomotive mounted safety devices; or knowingly failing to take appropriate action to prevent the locomotive engineer of the train from operating or permitting to be operated a train with an unauthorized disabled safety device in the controlling locomotive.
6. Failure to comply with the provision of §218.99 (shoving or pushing movements). Railroad shall only consider those violations of §218.99 which cause reportable accident or incidents.



7. Failure to comply with provisions of §218.101 (Leaving rolling and on track equipment in the clear). Railroad shall only consider those violations of §218.101 which cause reportable accidents or incidents.
8. Failure to comply with the provisions of §218.103 (hand-operated switches, including cross over switches). Railroads shall only consider those violations of §218.103 which cause reportable accident or incidents.
9. Failure to comply with the provisions §218.105 (additional operational requirements for hand operated main track switches). Railroads should only consider those violations of §218.105 which cause reportable accidents or incidents.
10. Failure to comply with the provisions of §218.107 (additional operational requirements for hand-operated crossover switches). Railroads should only consider those violations of §218.107 which cause reportable accidents or incidents.
11. Failure to comply with the provisions of §218.109 (hand operated fixed derails). Railroad should only consider those violations of §218.109 which cause reportable accidents or incidents.

B. Periods of ineligibility:

- a. On other than main track where restricted speed is in effect, the period of revocation for a violation of items 6-8, 10 or 11 above shall be reduced by one half provided that another revocable event has not occurred within the previous 12 months.
- b. In the case of a single incident involving violation of one or more of the operating rules or practices described in items 1-11 above the person shall have his certificate revoked for a period of 30 calendar days.
  - i. In the case of two separate incidents involving a violation of one or more of the operating rules or practices described in items 1-11 that occur within a 24 month period, the person shall have his license revoked for 6 months.
  - ii. In the case of three separate violations of one or more of the operating rules or practices described in items 1-11 that occur within a 36 month period of each other, the person shall have his license revoked for a period of one year.
  - iii. In the case of four separate incidents involving violations of one or more of the operating rules or practices described in items 1-11 that occur within a 36 month period the person shall have his/her license revoked for a period of 3 years.

- c. Any or all periods of revocation 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:
  - i. The revocation or denial is one year or less;
  - ii. Certification is not revoked or denied due to drugs or alcohol;
  - iii. The person is evaluated by a railroad officer and determined to have received adequate remedial training;
  - iv. The person completes any mandatory program of training or retraining as determined necessary by the railroad; and
  - v. The person has served at least one half of the period of ineligibility.

**25. Q. What is the procedural process for revocation a conductor's license?**

- A. If the railroad acquires reliable information that a conductor has violated §242.403(e) (one of the 11 enumerated items listed in question 24) or the provisions regarding drug and alcohol use/abuse the railroad shall suspend the conductor's certificate and provide notice of an investigation.
  - a. The investigation is to be convened within 10 days of the suspension, unless the charged conductor requests a postponement.
  - b. The charged conductor will be provided with a copy of the written information and list of witnesses the railroad will present at the hearing. If the information is not provided until the time of the hearing the investigation may be recessed at the beginning to give the charged time to review the information.
  - c. If the information was provided through statements of an employee of the convening railroad, the railroad will make that employee available for examination during the hearing.
  - d. Examination may be telephonic where it is impractical to provide the witness at the hearing.
  - e. The hearing shall be conducted by a presiding officer, who can be any proficient person authorized by the railroad other than the investigating officer.
  - f. The presiding officer will 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 controversy.
  - g. Testimony by witness shall be recorded verbatim.
  - h. 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.

- i. Parties may appear 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.
  - j. 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 information. In such instances the record shall be left open for such time as the presiding officer grants for that purpose.
  - k. Not later than 10 days after close of the record, a railroad official, other than the investigating officer, shall prepare and sign a written decision containing the findings of fact as well as the basis therefore, concerning all material issues of fact presented on the record.
  - l. The railroad will have the burden of proving that the conductor's conduct was not in compliance.
  - m. The period of certificate suspension prior to the commencement of a hearing shall be credited towards satisfying any applicable revocation period.
  - n. A railroad shall not revoke the certification if sufficient evidence exist to establish that an intervening cause prevented or materially impaired the conductor's ability to comply with the railroad operating rule.
  - o. The railroad may decide not to revoke one's license if sufficient evidence exists to establish that the violation was of a minimal nature and had no direct or potential effect on rail safety.
- B. Waiver:
- a. A person may waive the right to a hearing in writing. The waiver must reflect the fact that the person has knowledge and understanding of his/her rights and acknowledges that the rights are being voluntarily surrendered.

**26. Q. Is there an appeal process if my license is wrongfully revoked?**

- A. Yes. The regulation establishes a Operating Crew Review Board which is administered by the FRA. The petition for review must be filed with the board within 120 days of the decision to revoke or deny certification. A decision will be made based on the written record. A decision of the Operating Crew Review Board may be appealed for an administrative hearing, so long as a written request is made within 20 days of the Board's decision. This is a full administrative hearing, where the parties can appear and be heard. An adverse decision can be appealed to the Federal Railroad Administrator if a written appeal is made within 35 days of the decision.

**27. Q. I have a license as an engineer, but it is revoked. Can I work as a conductor while my engineer's license is revoked?**

- A. No. The Regulations clearly provide that an engineer who has a license in good standing as a conductor cannot work as a conductor while his/her engineer's license is revoked. However, if the railroad permits a decertified engineer may work as a brakeman, yardman, passenger train assistant conductor or another non-certified position. 49 CFR 242.5

28. Q. **I have a license as a conductor, but it is revoked. Can I work as an engineer while my conductor's license is revoked?**
- A. No. The Regulations provide that one who has his/her conductor's license revoked cannot work as an engineer while the conductor's license is revoked. However, if the railroad permits a decertified engineer may work as a brakeman, yardman, passenger train assistant conductor or another non-certified position. 49 CFR 242.5. There is an exception to this rule. If a conductor is decertified for a violation of 49 CFR 218 (safety regulations – such as a violation of a shoving rule or blue flag protection) he/she may work as an engineer while decertified as a conductor, pursuant to the applicable labor agreements.
29. Q. **If my license as a conductor and engineer is revoked; may I work as an assistant conductor, brakeman, yard helper, switchman, utility man, switch tender or flagman?**
- A. Conductor certification does not apply to assistant conductor, brakeman, yard helper, switchman, utility man, switch tender or flagman. In fact, conductor certification does not apply to positions to any position that is not considered as one in charge of the train. However, if one's certification is revoked, the issue of marking up on one of these non conductor assignments depends on the labor agreement and disciplinary action taken by the carrier in connection with the decertification.
30. Q. **Does conductor certification mean that all trains must have a certified conductor?**
- A. Yes. However, the regulation does not state that all trains must have an engineer and conductor. In fact, the regulation is crew consist neutral. The regulation does require a certified conductor on every train, but this requirement could be satisfied by an engineer who is certified as a conductor and engineer.

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