

**SUPPORTING JUSTIFICATION
DISQUALIFICATION PROCEEDINGS
OMB No. 2130-0529**

Summary

- This submission is a request for an extension without change of the last approval granted by OMB on **March 23, 2010**, and which expires **March 31, 2013**.
- FRA published the required 60-day **Federal Register** Notice on November 15, 2012. See 77 FR 68204.
- The total burden previously approved for this information collection amounted to **five (5) hours**.
- The total burden requested for this information collection submission is **five (5) hours**.
- Thus, there is no change in burden, and there are no **program changes** or **adjustments**.
- Total number of responses previously approved for this information collection amounted to **three (3)**.
- Total number of **responses** requested for this submission is **three (3)**.
- ****The answer to question number 12** itemizes the hourly burden associated with each requirement of this rule (See pp. 5-10).

1. Circumstances that make collection of the information necessary.

Background

Section 3(a)(4) of the Rail Safety Improvement Act of 1988 (RSIA), Pub. L. 100-342, dated June 22, 1988, authorizes the Federal Railroad Administration (FRA) to issue orders disqualifying railroad employees, including supervisors, managers, and other agents from performing safety-sensitive functions in the rail industry for violations of rail safety rules, regulations, standards or orders that evidence unfitness to perform safety-sensitive functions. Congress' purpose in giving FRA authority to bar an individual from safety-sensitive functions was to remove the risk unfit individuals pose to their co-workers and the public.

FRA's regulation (49 CFR 209, Subpart D) seeks to set out the procedures regarding

proposed disqualifications. Specifically, Subpart D spells out the responsibilities of the Federal Railroad Administration, and the rights and responsibilities of railroads and railroad employees. Furthermore, Subpart D aims to enforce disqualification orders by requiring: (1) a railroad employing or formerly employing a disqualified individual to disclose the terms and conditions of the order to the individual's new or prospective employer railroad; (2) a railroad considering hiring an individual in a safety-sensitive position to inquire from the individual's prior employer railroad whether the individual is serving under a disqualification order; and (3) a disqualified individual to inform his employer of the disqualification order and provide a copy of it to the employer and to inform a prospective employer railroad of the disqualification order and provide a copy thereto. Additionally, the regulation prohibits a railroad from employing a person serving under a disqualification order in a safety-sensitive position, and prohibits such a person from working in such a position.

2. How, by whom, and for what purpose the information is to be used.

FRA uses the information to promote and maintain rail safety by ensuring that disqualified individuals do not serve in safety-sensitive positions, most notably as locomotive engineers. Employees who demonstrate unfitness may be disqualified temporarily or permanently from performing safety-sensitive functions. FRA, through its Chief Counsel's Office, begins a disqualification by serving notice of the proposed disqualification on the individual charging him/her with having violated one or more rules, regulations, orders, or standards promulgated by FRA which render the individual unfit to perform safety-sensitive functions.

FRA also uses the information to ensure that railroad employees' rights are fully protected so that safety-sensitive workers are not disqualified without sufficient cause and due process. Employees can only be disqualified under specified terms and conditions. Individuals facing disqualification have several options. They can stipulate to the charges and consent to the imposition of the disqualification order under the conditions set forth in the notice. They can also make an informal response and submit to FRA's Chief Counsel's Office such written explanations, information, affidavits, or other materials as he/she may desire in answer to the charges or in mitigation of the proposed disqualification.

Individuals facing disqualification may include in the informal written response a request for a conference. Written explanations, information, or materials submitted by individuals facing disqualification and relevant information presented during any conference held in response to such an individual's request are used by FRA's Chief Counsel's Office in reviewing the notice of proposed disqualification, including the question of the individual's fitness and the conditions of any disqualification which may be imposed. After careful consideration of the informal response, FRA's Chief Counsel's Office will take one of the following actions: (1) It will dismiss all the charges and terminate the notice of proposed disqualification; (2) It will dismiss some of the charges

and mitigate the proposed disqualification; (3) It will mitigate the proposed disqualification; or (4) It will sustain the charges and proposed disqualification. Individuals facing disqualification who make an informal response do not waive their right to a hearing.

Railroads also use the information to prevent individuals serving under a disqualification order from retaining and obtaining employment in a safety-sensitive position in the rail industry. Individuals subject to a disqualification order must inform their employer of the order and provide a copy within five (5) days after receipt of the order. Such an individual must likewise inform any prospective employer who is considering hiring the individual to perform safety sensitive functions of the order and provide a copy within five (5) days after receipt of the order or upon application for the position, whichever occurs first.

In sum, FRA uses the information collected to enforce compliance with its regulations, and applicable Federal laws, particularly the Rail Safety Improvement Act. The agency uses the information to make sure that the highest possible levels of safety are maintained on the nation's rail system by ensuring that only qualified personnel perform safety-sensitive functions. FRA uses the information to make warranted determinations concerning disqualifications of railroad workers performing safety-sensitive functions.

3. Extent of automated information collection.

FRA strongly encourages and highly endorses the use of advanced information technology, wherever possible, to reduce burden on respondents. However, the use of advanced information technology is not really practicable concerning this collection of information because the burden is so extremely minimal.

4. Efforts to identify duplication.

To our knowledge, this information is not duplicated anywhere.

Similar data are not available from any other source.

5. Efforts to minimize the burden on small businesses.

Since FRA believes that there will be very few disqualification proceedings in any given year, the burden is extremely minimal. Consequently, the collection of information has no impact on small businesses.

6. Impact of less frequent collection of information.

If this information were not collected or collected less frequently, rail safety might be seriously jeopardized. Specifically, if this information were not collected, unsuitable or unqualified individuals might perform safety-sensitive jobs or might continue to serve in these positions, especially as locomotive engineers. By not performing safety-sensitive functions capably, there could be an increase in the number and severity of accident/incidents, notably derailments and collisions, which could lead to significant increases in the number of injuries and possibly fatalities to members of the traveling public, train crews, and other rail workers. Without this information collection, railroads would not have necessary data to determine the qualifications of current employees or prospective employees to be placed in very important safety-sensitive positions, especially as locomotive engineers. Without this collection of information, railroad workers might unfairly or erroneously be disqualified from safety-sensitive positions and earning their livelihood without full due process. Finally, without this collection of information, FRA would not have another tool for monitoring and enforcing Federal safety regulations and applicable Federal laws.

In sum, this collection of information aids FRA in its primary mission, which is to promote and maintain rail safety throughout the United States.

7. Special circumstances.

All information collection requirements are in compliance with this section.

8. Compliance with 5 CFR 1320.8.

As required by the Paperwork Reduction Act of 1995, FRA published a notice in the Federal Register on November 15, 2012, soliciting comment on this particular information collection. *77FR 68204*. FRA received no comments in response to this notice.

Background

On December 9, 1988, FRA published in the Federal Register a Notice of Proposed Rulemaking (NPRM) to amend 49 CFR 209, entitled "Railroad Safety Enforcement Procedures," by revising Subpart A (General) and adding a new Subpart D (Disqualification Procedures) prescribing procedures for disqualifying railroad employees, including managers, supervisors, and other agents from performing safety-sensitive functions in the rail industry (53 FR 49695). A public hearing was held in Washington, D.C., on January 5, 1989, at which seven organizations were represented: three railroads, one organization representing railroads, and three organizations representing railroad employees. In addition, written comments were received from one individual, one labor union, and six other railroads.

Two commenters suggested that FRA retain a listing of disqualified employees. One

stated that it should include only disqualification orders in effect. The other recommended that it include all disqualification orders imposed, both current and expired. Neither proposal proved acceptable to FRA. The latter confused the sections 209.327-.331 in the Final Rule, which aimed to enforce disqualification orders in force, not to serve as a repository for previous actions. The former proposal raised some unresolved Privacy Act issues, and it would have imposed an additional administrative burden on FRA. FRA argued that the disqualification order enforcement procedure, as proposed and adopted, imposed no hardship on the railroads or the employees involved.

9. Payments or gifts to respondents.

There are no monetary payments or gifts made to respondents associated with the information collection requirements contained in this regulation.

10. Assurance of confidentiality.

Information collected is not of a confidential nature, and FRA pledges no confidentiality. Further, it should be noted that disqualification hearings are public proceedings. (See 49 CFR 209.321(a)).

11. Justification for any questions of a sensitive nature.

No sensitive information or information of a private nature is requested.

12. Estimate of burden hours for information collected.

Note: FRA has consulted with the agency attorney (Assistant Chief Counsel) responsible for Part 209 compliance to determine that there are no changes in burden estimates from the last approved information collection submission.

§ 209.307- Reply

- a. Within 30 days after receipt of the notice of proposed disqualification issued under § 209.335, the respondent shall reply in writing to the charges. The respondent may furnish affidavits and any other documentary evidence in support of the reply. Further, the respondent may elect to (1) stipulate to the charges and consent to the imposition of the disqualification order under the conditions set forth in the notice; (2) make an informal response as provided in § 209.309; or (3) request a hearing as provided in § 209.311.

FRA estimates that there will be approximately one (1) disqualification order each year. FRA estimates that the respondent will furnish affidavits and other documentary evidence in support of his/her reply to the disqualification order. It is estimated that it will take three (3) hours to assemble, and send this material to

FRA. Total annual burden for this requirement is three (3) hours.

Respondent Universe:

40,000
locomotive
engineers

Burden time per response:

3 hours

Frequency of Response:

On
occasion

Annual number of Responses:

1 documented reply

Annual Burden:

3 hours

Calculation: 1 documented reply x 3 hrs. = 3 hours

- b. The Chief Counsel may extend the reply period for good cause shown, provided the request for extension is served before the expiration of the period provided in paragraph (a) of this section.

FRA estimates that it will receive zero (0) requests for extension of the reply period under the above provision. Consequently, there is no burden associated with this requirement.

Total annual burden for this entire requirement is three (3) hours.

§ 209.309 - Informal Response

- a. If the respondent elects to make an informal response to a notice of proposed disqualification, he or she shall submit to the Chief Counsel such written explanations, information, or other materials as respondent may desire in answer to the charges or in mitigation of the proposed disqualification. The respondent may include in an informal written response a request for a conference. Upon receipt of such a request, the Chief Counsel shall arrange for a conference at a time and place designated by the Chief Counsel.

FRA estimates that it will receive one (1) informal response with a request for a

conference. It is estimated that it will take one (1) hour to compose the informal response and make a request for a conference. Total annual burden for this requirement is one (1) hour.

Respondent Universe:

40,000
locomotive
engineers

Burden time per response:

1 hour

Frequency of Response:

On
occasion

Annual number of Responses: 1 informal response
Annual Burden:

1 hour

Calculation: 1 informal response x 1 hr. = 1 hour

- b. By electing to make an informal response to a notice of proposed disqualification, the respondent does not waive the right to a hearing. However, the respondent must submit the hearing request required by § 209.311(a) within 10 days after receipt of the notice of termination of settlement negotiations from the Chief Counsel. Failure to submit such a request constitutes a waiver of the respondent’s right to appear and contest the charges or the proposed disqualification. (Note: *The burden for this requirement is covered under that of § 209.311(a) below.*)

The Chief Counsel may extend the period for requesting a hearing for good cause shown, provided the request for extension is served before the expiration of the period provided in paragraph (g) of this section.

FRA estimates that it will receive zero (0) requests for extending the period for

requesting a hearing under the above provision. Consequently, there is no burden associated with this requirement.

Total annual burden for this entire requirement is one (1) hour.

§ 209.311- Request for Hearing

- a. If the respondent elects to request a hearing, he or she must submit a written request within periods specified in § 209.307(a) or § 209.309(g) to the Chief Counsel referring to the case number that appears on the notice of proposed disqualification. The request must contain the following information: (1) The name, address, and telephone number of the respondent and the respondent's designated representative, if any; (2) A specific response admitting, denying, or explaining each allegation of the notice of disqualification order; (3) A description of the claims and defenses to be raised by the respondent at the hearing; and (4) The signature of the respondent or the representative, if any.

FRA does not anticipate any requests for hearings. FRA believes that the issues involved in any disqualification order would be resolved either before or soon after the requested conference takes place. Consequently, there is no burden associated with this requirement.

§ 209.327 - Appeal

- a. Any party aggrieved by an initial decision under § 209.323 may file an appeal. The appeal must be filed within 35 days of issuance of the initial decision with the Federal Railroad Administration, 1200 New Jersey Ave., S.E., Washington, D.C. 20590. A copy of the appeal must be served on each party. The appeal shall set forth objections to the initial decision, supported by reference to applicable laws and regulations, and with specific reference to the record.

Historically, disqualification proceedings have not reached the hearing and appeal stages. FRA does not anticipate an appeal in the one disqualification order that will occur each year. Consequently, there is no burden associated with this requirement.

- b. A party may file a reply to an appeal within 25 days of service of the appeal. If the party relies on evidence contained in the record for the reply, the party shall specifically refer to the pertinent evidence in the record.

Since FRA does not anticipate any appeals, there will be no reason to file a reply to an appeal. Consequently, there is no burden associated with this requirement.

- c. The Administrator may extend the period for filing an appeal or a response for

good cause shown, provided the written request for extension is served before the expiration of the applicable period provided in paragraph (c) or (d) of this section.

FRA estimates that it will receive zero (0) written requests for extension of the period for filing an appeal or response under the above provision. Consequently, there is no burden associated with this requirement.

209.331 - Enforcement of Disqualification Order

- a. A railroad that employs or formerly employed an individual serving under a disqualification order shall inform prospective or actual employers of the terms and conditions of the order upon receiving notice that the disqualified employee is being considered for employment with or employed by another railroad to perform any of the safety-sensitive functions described in § 209.303.

As stated in § 209.307 above, FRA estimates that there will be approximately one (1) disqualification order each year and thus one (1) employing or prospective employer railroad will send a written notice to the railroad that employs or formerly employed the individual serving under a disqualification order and one railroad that employs this individual will need to send a written letter notifying a prospective or actual employer of the terms and conditions of its employee's or former employee's disqualification order. It is estimated that it will take approximately 15 minutes to complete and send each letter. Total annual burden for this requirement is .50 hour.

Respondent Universe:

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Burden time per response: 15 minutes

Frequency of Response: On occasion

Annual number of Responses: 1 notification letter + 1 informational letter

Annual Burden:
Calculation:

.50 hour

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hr. = .50 hour

- b. A railroad that is considering hiring an individual to perform the safety-sensitive functions described in § 209.303 shall ascertain from the individual's previous employer, if such employer was a railroad, whether the individual is subject to a disqualification order.

It is usual and customary for railroads to do routine personnel checks on individuals who they are planning on hiring. Consequently, there is no burden associated with this requirement.

- c. An individual subject to a disqualification order shall inform his or her employer of the order and provide a copy thereof within five (5) days after receipt of the order.

FRA estimates that approximately one (1) disqualification order will be issued each year. It is estimated that it will take the individual approximately 30 minutes to notify orally and/or in writing, and provide a copy of the order to the employer that he/she has been disqualified to function in a safety-sensitive position. Total annual burden for this requirement is .5 hour.

Respondent Universe:

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Burden time per response: 30
minutes

Frequency of Response: On
Occasion

Annual number of Responses: 1 disqualification notification + 1
disqualification order copy

Annual Burden: 5 hour .

Calculation: 1 disqualification notification + 1 disqualification order
copy x .5 hour = .5 hour

- d. Such an individual shall likewise inform any prospective employer who is considering hiring the individual to perform any of the safety-sensitive functions described in § 209.303 of the disqualification order against him/her and provide a copy thereof within five (5) days after receipt of the order or upon application for the position, whichever first occurs.

FRA believes that the issues involved in a disqualification order would be resolved well before the point that a locomotive engineer would apply to another railroad for employment. However, any burden associated with this requirement is already accounted for under OMB No. 2130-0533 (see section 240.113. This section requires locomotive engineers to furnish data on prior safety conduct as an employee of a different railroad). Consequently, there is no additional burden associated with this requirement.

Total annual burden for this entire requirement is one (1) hour (.50 hour + .50 hour).

Total annual burden for this entire information collection requirement is five (5) hours (3 + 1 + 1).

13. Estimate of total annual costs to respondents.

There are no additional costs outside of the burden hour costs.

14. Estimate of Cost to Federal Government.

The cost to the Federal Government for the information collection requirements contained in FRA's regulation (49 CFR 209, Subpart D) is approximately \$343.00 which includes a total of 3.5 hours of attorneys' time (the hourly wage for a GS-14 is \$98 with 75% overhead added) to review both the locomotive engineer's reply to the disqualification order, and to review the locomotive engineer's request for a conference.

15. Explanation of program changes and adjustments.

There are **no changes** in the information collection requirements for this submission and there are **no changes** in burden estimates as well. Thus, there are **no program changes or adjustments** at this time, and there is **no change** in total burden hours from the last

approved information collection submission.

Additionally, there is **no change** in burden costs to respondents from the last approved submission.

16. Publication of results of data collection.

There are no plans for publication involving these information collection requirements.

17. Approval for not displaying the expiration date for OMB approval.

Once OMB approval is received, FRA will publish the approval number for these information collection requirements in the Federal Register.

18. Exception to certification statement.

No exceptions are taken at this time.

Meeting Department of Transportation (DOT) Strategic Goals

This information collection supports the top DOT strategic goal, namely transportation safety. Without this collection of information, rail safety in the United States would be jeopardized. Specifically, unsuitable individuals might be hired or might continue to serve as locomotive engineers. Such individuals might not perform this safety-critical position capably. This could put the safety of the traveling public and train crews at great risk (since locomotive engineers control the operation of the train), and could result in increased numbers of accidents/incidents, such as derailments or collisions, where both railroad passengers and train crews are seriously injured and possibly killed. Also, there could be significant damage to train property and cargo. Thus, the collection of information promotes safety by serving as a screening mechanism so that unfit individuals do not function as locomotive engineers. Moreover, this collection of information promotes safety by providing FRA another tool for monitoring and enforcing its safety regulations and applicable Federal laws.

In this information collection, as in all its information collection activities, FRA seeks to do its utmost to fulfill DOT Strategic Goals and to be an integral part of One DOT.