

**U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION
Washington, DC 20590**

Locomotive Engineer Review Board

Decision Concerning
UP Corporation's
Revocation of Mr. H. E. Bacon's
Locomotive Engineer Certification

FRA Docket Number EQAL 2010-03

Decision

The Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the decision of the Union Pacific Railroad Company (UP), to revoke Mr. H. E. Bacon's (Petitioner) locomotive engineer certification (certification) in accordance with the provisions of Title 49, Part 240 of the Code of Federal Regulations (49 C.F.R. Part 240). The Board hereby denies Mr. Bacon's Petition because it was filed after the regulatory deadline set forth in 49 C.F.R. § 240.403(d).

Background

On August 27, 2009, at approximately 9:42 a.m., while operating Train ZSCCS-26, Petitioner allegedly passed a red flag and entered Form B #35192, near MP 116.7, on UP's Clinton Subdivision. UP held a formal hearing on September 9, 2009. The purpose of the hearing was to investigate whether discipline, including a 60-day suspension, was necessary and to determine whether Petitioner's certification should be revoked.

During the hearing, there was conflicting testimony about whether Train ZSCCS-26 stopped within the Form B. The crew testified that they stopped at approximately MP 116.8 and received permission before entering the Form B limits based on their understanding of the mile post location of a resume speed sign that identified the location a permanent speed restriction. Tr. 174, 177. However, the track foreman testified that the train stopped between the 8th Avenue highway-rail grade crossing (MP 116.42) and the 7th Avenue highway-rail grade crossing (MP 116.50), which was within the Form B limits. Tr. 145. Additionally, the event recorder data was interpreted as showing that the train stopped at MP 116.50, two tenths of a mile within the Form B limits. Tr. 51-52.

UP revoked Petitioner's certificate based on the finding that Petitioner had violated 49 C.F.R. § 240.117(e)(4) by "occupying main track or a segment of main track without proper authority or permission." UP's letter notifying Petitioner of its decertification decision was sent by certified mail to Petitioner and his union representative on September 18, 2009.

Petitioner's Petition for Review was dated February 2, 2010. However, an inspection of the postmarked date of the envelope containing the Petition revealed that it was not mailed until February 6, 2010. The total amount of time between the September 18, 2009, revocation decision and the February 6, 2010, mailing of the Petition was 141 days. Petitioner does not address the delay in filing his Petition for Review and does not provide a reason for the delay.

Pursuant to 49 C.F.R. §§ 240.405(b) and (c), a copy of the Petition was sent to UP, and the railroad was afforded an opportunity to comment. UP responded to the Petition in a letter dated May 4, 2010. UP's response contends, among other things, that the Petition for Review is untimely.

Board's Determination

Based on its review of all of the information submitted, the Board has determined that:

- (1) Petitioner's certificate was revoked by certified letter that was sent to Petitioner on September 18, 2009.
- (2) Petitioner's appeal of UP's revocation decision was dated February 2, 2010, but was postmarked February 6, 2010.
- (3) 49 C.F.R. § 240.403(d) states that "[a] petition seeking review of a railroad's decision to revoke certification in accordance with the procedures required by § 240.307 filed with FRA more than 120 days after the date of the railroad's revocation decision will be denied as untimely except that the Locomotive Engineer Review Board for cause shown may extend the petition filing period at any time in its discretion: (1) Provided the request for extension is filed before the expiration of the period provided in this paragraph (d); or (2) Provided that the failure to timely file was the result of excusable neglect."
- (4) 49 C.F.R. § 240.7 defines "file, filed, and filing" to mean "submission of a document under this part on the date when the Docket Clerk receives it, or if sent by mail on or after September 4, 2001, the date the mailing was completed." See 67 FR 22 (January 2, 2002). Because the Petition involved in this case was mailed after September 4, 2001, it must have been mailed within 120 days of the date that Petitioner's certification was revoked in order to be considered timely by the Board.
- (5) The clock for gauging the timely filing of the Petition for Review began on September 18, 2009, the date UP mailed the revocation decision. Therefore, the Petition had to be postmarked no later than January 18, 2010 to satisfy the requirement that it is filed not more than 120 days from September 18, 2009.
- (6) The Petition was postmarked February 6, 2010, which is 141 days after the date of the railroad's revocation decision and 21 days beyond what the regulation allows.

- (7) Petitioner has not offered any explanation for the delay in filing his Petition.
- (8) Therefore, the Board finds that the Petition was untimely filed.

Analysis

Section 240.403(d) requires a petitioner seeking review of a railroad's revocation decision to file a petition for review no more than 120 days after the date of the railroad's revocation decision or the petition will be denied as untimely. If a petitioner fails to file the petition or request an extension within the 120-day time period, the time period for filing may be extended only upon a showing that the failure to file in a timely manner was the result of excusable neglect. See 49 C.F.R. § 240.403(d)(1). Given that Petitioner in the present action failed to request an extension, there must be a showing of excusable neglect in the record for the Board to exercise jurisdiction over Petitioner's claim.

Section 240.7 states that "the computation of time provisions in Rule 6 of the Federal Rules of Civil Procedure (FRCP) as amended are also applicable in this part." The FRA cited to FRCP Rule 6, because its "intent is [for the Board] to apply the FRCP rules in effect at the time a proceeding under this rule occurs." 64 Fed. Reg. 60966, 60976 (Nov. 8, 1999). The FRA has treated the term "excusable neglect" as a term of art having a specific meaning based upon the specific legal context provided by FRCP Rule 6. Therefore, it is incumbent upon the Board to follow controlling Federal case law (*i.e.*, precedent) on the meaning of "excusable neglect" as used in FRCP Rule 6.

The U.S. Supreme Court addressed the issue of "excusable neglect" in Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership, 507 U.S. 380 (1993). In Pioneer Investment, the Court set out a number of threshold issues, as well as equitable factors to be weighed in a balancing test:

- (1) The danger of prejudice to the non-moving party;
- (2) The length of delay and the potential impact of the delay on the proceedings;
- (3) The reason for the delay, including whether it was in the reasonable control of the movant; and
- (4) Whether good faith exists on the part of the movant.

507 U.S. at 395. While each of these factors guide the determination of whether excusable neglect exists, under most circumstances, the reason for the delay will be the most important factor. See Davis v. Kanawha County Bd. of Educ., 517 F. Supp. 2d 822, 824 (S.D. W.Va. 2007); Hospital del Maestro v. N.L.R.B., 263 F.3d 173, 174 (1st Cir. 2001).

Danger of Prejudice

There does not appear to be any danger of prejudice to UP that was caused by Petitioner's untimely filing. While the issue of the Petition's timeliness was not briefed by Petitioner, it

seems apparent that Petitioner's delayed filing did not preclude UP from gathering the necessary evidence to present an effective case before the Board.

Length of Delay and Impact on the Proceedings

Petitioner missed the deadline for filing his Petition by 21 days. While this is not a de minimis delay, it is unlikely that the delay significantly impacted the proceedings for Petitioner and UP.

Reason for Delay

As noted above, the reason for delay is usually the most important factor in determining whether excusable neglect exists such that the petition for review should be deemed timely filed. Petitioner has not addressed the reason for his delayed filing and no reason is readily discernable from the evidence presented to the Board. In the absence of an explanation for his delayed filing, the Board cannot find that the cause of Petitioner's delay was reasonable.

Existence of Good Faith on the Part of the Movant

Petitioner has not provided an explanation for his delay. As a result, there is simply no evidence that would support a finding that there is a good faith cause for the delayed filing.

Conclusion

Based on the above determinations, the Board finds that the Petition was untimely filed and hereby denies the Petition in accordance with the provisions of 49 CFR Part 240.¹ As the Board finds that the Petition was untimely filed, we do not consider the validity of Petitioner's assertions.

Issued in Chicago, IL on SEP 30 2010



Richard M. McCord
Chairman,
Locomotive Engineer Review Board

¹ Please be advised that a party aggrieved by a Board decision to deny a Petition as untimely has the option to file an appeal with the Administrator in accordance with 49 C.F.R. § 240.411. The appeal must be filed with the Federal Railroad Administrator, 1200 New Jersey Avenue, SE, Washington, DC 20590 within 35 days of issuance of the Board's decision. As there are a number of requirements to file such an appeal, the Board has attached a copy of the relevant regulation for your consideration.

SERVICE LIST EQAL 2010-03

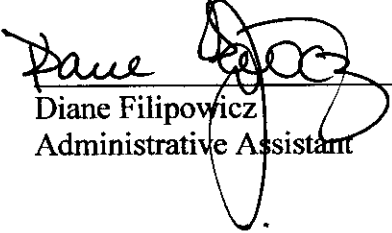
A copy of the Locomotive Engineer Review Board decision in this matter has been sent by certified mail to each person shown below.

Mr. H.E. (Gene) Bacon
4647 164th Street
Clinton, IA 52753

Mr. Stephen M. Frye
Local Chairman
Division #125, Brotherhood of Locomotive Engineers and Trainmen
119 Riverview Heights Drive
LeClaire, IA 52753-9516

Ms. Christine Hampton
Union Pacific Railroad Company
1400 Douglas Street, Mailstop 1030
Omaha, NE 68179

Mr. Lawrence Brennan, Jr.
Manager, Engineering Certification & Licensing
United Pacific Railroad Company
1400 Douglas Street, Mailstop 1010
Omaha, NE 68179



Diane Filipowicz
Administrative Assistant

SEP 30 2010

Date

enc: Post LERB Memo

cc: FRA DOCKET EQAL 2010-03

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Mr. Lawrence Brennan, Jr.
 Manager, Engineering Certification & Licensing
 United Pacific Railroad Company
 1400 Douglas Street, Mailstop 1010
 Omaha, NE 68179

EQAL 2010-03

2. Article Number
(Transfer from service label)

7008 3230 0002 3925 3339

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X

 Agent Addressee

B. Received by (Printed Name)

C. Date of Delivery

D. Is delivery address different from item 1? Yes
If YES, enter delivery address below: No

3. Service Type

 Certified Mail Express Mail Registered Return Receipt for Merchandise Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee)

 Yes

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1. Article Addressed to:

Ms. Christine Hampton
 Union Pacific Railroad Company
 1400 Douglas Street, Mailstop 1030
 Omaha, NE 68179

EQAL 2010-03

2. Article Number
(Transfer from service label)

7008 3230 0002 3925 3346

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X

 Agent Addressee

B. Received by (Printed Name)

C. Date of Delivery

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1. Article Addressed to:

Mr. Stephen M. Frye
 Local Chairman
 Division #125, BLE&T
 119 Riverview Heights Drive
 LeClaire, IA 52753-9516

EQAL 2010-03

2. Article Number
(Transfer from service label)

7008 3230 0002 3925 3353

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X

 Agent Addressee

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 Addressee

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C. Date of Delivery

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If YES, enter delivery address below: No

3. Service Type

- Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee)

- Yes

7008 3230 0002 3925 3360