

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

Locomotive Engineer Review Board

Decision Concerning  
Union Pacific Railroad Company's  
Revocation of Mr. D. E. Botchek's  
Locomotive Engineer Certification

**FRA Docket Number EQAL 2010-05**

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**Decision**

The Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the decision of Union Pacific Railroad Company (UP) to revoke Mr. D. E. Botchek's 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. Botchek's petition because it was filed after the regulatory deadline set forth in 49 C.F.R. § 240.403(d).

**Background**

On September 6, 2009, while operating Train INPDV-06, Petitioner allegedly passed a stop signal without authority at CPW 511, on Main Track No. 3, on the Laramie Subdivision, near Cheyenne, Wyoming in violation of 49 C.F.R. § 240.117(e)(1). A hearing was held by UP on September 23, 2009 and the railroad revoked Petitioner's certification by letter dated October 2, 2009.

By petition dated February 7, 2010, Petitioner requested that FRA review UP's decision to revoke his certification. The petition asserts that the revocation was improper because of certain mitigating factors such "as the ACS [i.e., Automated Cab Signal] test loop with the cab signals going off that did not give [Petitioner] a true cab signal . . . and the close proximity of the signals combined with the curvature of the track."

Pursuant to 49 C.F.R. § 240.405(b) and ©, a copy of the petition was sent to UP on March 4, 2010, and UP was afforded an opportunity to comment. A timely response was filed by UP on April 22, 2010.

## **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- (1) Petitioner's certificate was revoked by letter dated October 2, 2009.
- (2) As indicated by the postmark on the envelope, the petition was mailed on February 8, 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 Fed. Reg. 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 to be considered timely by the Board.
- (5) Petitioner's certification was revoked on October 2, 2009; therefore, the petition had to be mailed no later than January 30, 2010, which is 120 days after the date of revocation. Instead, the petition was mailed on February 8, 2010, which is 129 days after the date of the railroad's revocation decision and nine days longer than the regulation allows. As noted above, § 240.403(d) allows for an extension of the time period if Petitioner shows good cause for the extension. Petitioner has not offered any explanation for the delay in filing his petition; therefore, the Board finds that the petition was untimely filed.

**Conclusion**

Based on the findings noted above, the Board hereby denies as untimely Mr. Botchek's petition for review in accordance with the provisions of 49 C.F.R. Part 240.<sup>1</sup> As the Board finds that this petition must be denied as untimely, the Board need not address the other issues raised by Petitioner.

**AUG 02 2010**

Issued in Chicago, IL on \_\_\_\_\_.



Richard M. McCord  
Chairman,  
Locomotive Engineer Review Board

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<sup>1</sup> 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, S.E., 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 2010-05**

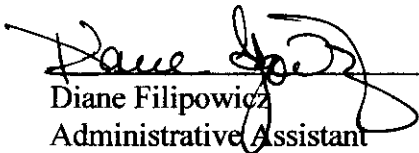
A copy of the Locomotive Engineer Review Board decision in this matter has been sent by certified mail and return receipt requested to each person shown below.

Mr. D. E. Botcheck  
19058 West 61<sup>st</sup> Avenue  
Golden, CO 80403

Mr. Cullen Kemper  
Local Chairman  
Local 202, UTU  
25 S. Marshall Street  
Lakewood, CO 80226

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

Mr. W. Scott Hinckley  
Union Pacific Railroad Company  
1400 Douglas Street, Mailstop 1180  
Omaha, NE 68179

  
\_\_\_\_\_  
Diane Filipowicz  
Administrative Assistant

**AUG 02 2010**  
\_\_\_\_\_  
Date

enc: Post LERB Memo

cc: FRA Docket EQAL 2010-05

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> <li>Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</li> <li>Print your name and address on the reverse so that we can return the card to you.</li> <li>Attach this card to the back of the mailpiece, or on the front if space permits.</li> </ul>	A. Signature <span style="float: right;"><input type="checkbox"/> Agent <input type="checkbox"/> Addressee</span> <b>X</b>	
	B. Received by (Printed Name)	C. Date of Delivery
1. Article Addressed to:	D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
Mr. D. E. Botcheck 19058 West 61st Avenue Golden, CO 80403	3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input checked="" type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
<b>EQAL 2010-05</b>	4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	
2. Article Number (Transfer from service label)	7008 3230 0002 3925 3971	
PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540		

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	B. Received by (Printed Name)	C. Date of Delivery
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Mr. Cullen Kemper Local Chairman Local 202, UTU 25 S. Marshall Street Lakewood, CO 80226	3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input checked="" type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
<b>EQAL 2010-05</b>	4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	
2. Article Number (Transfer from service label)	7008 3230 0002 3925 3964	
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	B. Received by (Printed Name)	C. Date of Delivery
1. Article Addressed to:	D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
Mr. Lawrence Brennan, Jr. Manager, Engineering Certification & Licensing United Pacific Railroad Company 1400 Douglas Street, Mailstop 1010 Omaha, NE 68179	3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input checked="" type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
<b>EQAL 2010-05</b>	4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	
2. Article Number (Transfer from service label)	7008 3230 0002 3925 3957	
PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540		

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1. Article Addressed to:  <p style="text-align: center;">Mr. W. Scott Hinckley Union Pacific Railroad Company 1400 Douglas Street, Mailstop 1180 Omaha, NE 68179</p>	B. Received by ( <i>Printed Name</i> )	C. Date of Delivery
<p style="font-size: 1.5em; margin-top: 20px;">EQAL 2010-05</p>	D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
2. Article Number <i>(Transfer from service label)</i>	3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input checked="" type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D. 4. Restricted Delivery? ( <i>Extra Fee</i> ) <input type="checkbox"/> Yes	
PS Form 3811, February 2004	7008 3230 0002 3925 8716 Domestic Return Receipt <span style="float: right;">102595-02-M-1540</span>	