

**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. K. L. Porter's  
Locomotive Engineer Certification

**FRA Docket Number EQAL 2010-07**

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**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. K. L. Porter'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. Porter's petition for the reasons set forth below.

**Background**

On December 15, 2009, while operating train MKCCBB-15, Petitioner entered working limits at Oreapolis, Nebraska, near Milepost 465 (MP 465) documented by a Track Bulletin Form B (Form B) without permission from the employee in charge. Petitioner was notified by letter dated December 18, 2009 that his certification was suspended pending an investigative hearing, alleging a violation of a railroad operating rule involving 49 C.F.R. § 240.117(e)(4), occupying main track without proper authority. After an investigative hearing on January 4, 2010, Petitioner was notified by letter dated January 14, 2010 that his certification was revoked.

A petition was timely filed with FRA by mail on February 22, 2010 by the United Transportation Union on behalf of Petitioner, requesting that FRA review UP's decision to revoke his certification. The petition asserts that the revocation was improper because severe winter weather caused the working limits not to be protected by properly displayed flags.

Pursuant to 49 C.F.R. § 240.405(b), (c), a copy of the petition was sent to UP. The railroad elected to comment and was required by 49 C.F.R. § 240.405(d)(2) to provide Petitioner with a copy of the materials submitted to FRA.

**UP's Response**

UP responded to Petitioner's assertion by arguing that even if a flag is not protecting Form B working limits, train crews are nonetheless responsible for obeying the track bulletins they were issued.

### **Locomotive Engineer Review Board's Determination**

Based on its review of the record, the Board has determined that:

- (1) On December 15, 2009, Petitioner operated train MKCCBB-15 into Form B working limits in Oreapolis, Nebraska near MP 465 without authority from the employee in charge. Transcript at 58.
- (2) Petitioner was made aware of the Form B limits by a track bulletin in his possession. Hearing Exhibit 6.
- (3) UP operating rule 15.2 requires that the Form B limits be protected by flags. Hearing Exhibit 8, Hearing Exhibit 12.
- (4) At the time of the incident, there was a severe winter storm which prevented the flags from being displayed. Transcript at 38 – 40.
- (5) Petitioner's violation was not the result of an intervening cause that prevented or materially impaired him from complying with the operating rule requiring him to obtain authority to enter working limits from the employee in charge.

### **Analysis of the Petition**

In reviewing petitions of revocation decisions, the Board considers four issues in determining whether decertification was proper under FRA's regulations. See 49 C.F.R. § 240.405(f). First, whether substantial evidence exists to support the railroad's factual findings in its decision. See 58 Fed. Reg. 18982, 19001 (April 9, 1993). Second, when considering procedural disputes, the Board will "determine whether substantial harm was caused the petitioner by virtue of the failure to adhere to the dictated procedures for making the railroad's decision. A finding of substantial harm is grounds for reversing the railroad's decision." *Id.* To establish grounds upon which the Board may grant relief, Petitioner must show: (1) that procedural error occurred, and (2) the procedural error caused substantial harm. *Id.* Third, whether the railroad's legal interpretations are correct based on a de novo review. *Id.* Finally, whether "an intervening cause prevented or materially impaired the locomotive engineer's ability to comply with the railroad operating rule or practice which constitutes a violation under §§ 240.117(e)(1) through (e)(5) of this part." 49 C.F.R. § 240.307(i)(1).

Petitioner admits he operated his train into the working limits established by a Form B in his possession, Transcript at 58, but asserts that his noncompliance was the result of an intervening cause. Because of a severe winter storm, the Form B limits were not protected by flags, which Petitioner claims materially impaired his ability to comply with the operating rule requiring him to receive authority from the employee in charge of the working limits before entering that territory. However, another employee's alleged failure to protect the limits with a flag did not relieve Petitioner of his obligation to seek authority before entering the limits.

The employee in charge of the working limits at issue testified that he had not placed flags to protect the working limits. Transcript at 38 – 40. The Board notes with concern that this does not appear to be in compliance with UP operating rule 15.2 or associated special system instructions. Hearing Exhibit 8, Hearing Exhibit 12. The lack of flags protecting the Form B limits meant there was no warning along the track of the impending Form B working limits. Regardless, Petitioner possessed track bulletins making him aware of the working limits for which he was required to obtain authority before entering. Hearing Exhibit 6. Redundant warnings of working limits and other restrictions on train operation exist to ensure safety even if one warning fails or, as in this case, is not present. Accordingly, the Board declines to rule that the absence of the flags protecting working limits was an intervening cause which materially impaired Petitioner's compliance in this case with UP operating rule 15.2.

**Conclusion**

For the foregoing reasons, the Board finds that UP's decision to revoke Petitioner's certification under the provisions of 49 C.F.R. Part 240 is supported by substantial evidence. The record shows Petitioner's unauthorized entrance into Form B working limits was not the result of an intervening cause. Based on its review of the record, the Board hereby denies the petition in accordance with the provisions of 49 C.F.R. Part 240.

Issued in Chicago, IL on SEP 09 2010.



Richard M. McCord  
Chairman,  
Locomotive Engineer Review Board

**SERVICE LIST EQAL 2010-07**

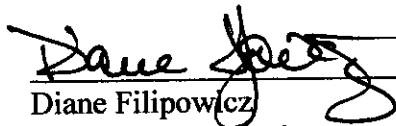
A copy of the Locomotive Engineer Review Board decision in this matter has been sent by certified mail and return receipt requested to each person shown below.

Mr. K. L. Porter  
8413 North Wayland Avenue  
Kansas City, MO 64153

Mr. Ken Menges  
State Director, Missouri State Legislative Board, UTU  
222 A Madison  
Jefferson City, MO 65101

Mr. Lawrence Brennan, Jr.  
Manager, Engineering Certification & Licensing  
Union 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

**SEP 09 2010**

\_\_\_\_\_  
Date

enc: Post LERB Memo

cc: FRA DOCKET EQAL 2010-07

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| 1. Article Addressed to:<br><br>Mr. W. Scott Hinckley<br>Union Pacific Railroad Company<br>1400 Douglas Street, Mailstop 1180<br>Omaha, NE 68179<br><br><b>EQAL 2010-07</b>  | B. Received by (Printed Name)  | C. Date of Delivery |
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| 1. Article Addressed to:<br><br>Mr. Lawrence Brennan, Jr.<br>Manager, Engineering Certification & Licensing<br>Union Pacific Railroad Company<br>1400 Douglas Street, Mailstop 1010<br>Omaha, NE 68179<br><br><b>EQAL 2010-07</b>  | B. Received by (Printed Name)  | C. Date of Delivery |
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8413 North Wayland Avenue  
Kansas City, MO 64153

**EQAL 2010-07**

2. Article Number  
(Transfer from service label)

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature

**X**

Agent

Addressee

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D. Is delivery address different from item 1?  Yes  
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