

**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. J. E. Posey's
Locomotive Engineer Certification

FRA Docket Number EQAL 2010-08

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. J. E. Posey'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 the petition for the reasons set forth below.

Background

On September 16, 2009, at approximately 11:30 a.m., while operating Train CWKBM-16, Petitioner allegedly entered Track Bulletin Form B No. 49279 (Form B) limits without permission from the employee in charge (EIC), near Mile Post (MP) 36, at Waukegan, IL. See Tr. at 4, 40, Tr. Ex. 4; Pet. at 2-3, 8-9; and UP Resp. at 1-2.

UP charged Petitioner with a violation of 49 C.F.R. § 240.117(e)(4) – “occupying main track or a segment of main track without proper authority or permission.” An investigation and hearing was held on October 23, 2009, and UP notified Petitioner of the revocation by letter dated November 2, 2009.

Petitioner's Assertions

The Brotherhood of Locomotive Engineers and Trainmen (BLET) filed a petition with FRA on behalf of Petitioner, requesting that the Board review UP's decision to revoke Petitioner's certification. The petition was received on February 26, 2010 and was timely filed. The petition asserts that the revocation was improper because:

- (1) UP failed to hold the hearing according to Petitioner's collective bargaining agreement (CBA). See Pet. at 2, 4; UP Resp. at 3. Petitioner's CBA requires the railroad to hold a hearing within ten days of his investigation notice. Petitioner received notice on September 18, 2009 that the hearing would be held on September 24, 2009. See Pet. at 5; Tr. Ex. 4. Petitioner submits that he was

prepared to attend the hearing on that date. See Pet. at 5. However, a United Transportation Union (UTU) representative, who represents the conductor, requested a postponement of the hearing. See id. Consequently, “[t]he investigation was held on October 23, 2009, some 35 days after the original notice was issued.” Id. Petitioner submits that he did not agree to the postponement. Therefore, the hearing was held outside the time limits of his CBA. See Pet. at 5-7.

- (2) UP should not have revoked Petitioner’s certificate because the incident was “of a *de minimis* nature” and “had no consequence or potential consequence to safety” under 49 C.F.R. § 240.307(i)(2). See Pet. at 2, 7; UP Resp. at 3. Petitioner submits that he was moving at restricted speed and was prepared to stop short of any men and equipment. See Pet. at 7. The Form B limit was occupied for less than 100 feet and the trackmen were approximately one mile away at MP 37. See id.

UP’s Response

Pursuant to 49 C.F.R. § 240.405(b), (c), a copy of the petition was sent to UP on March 4, 2010, and the railroad was afforded an opportunity to comment. UP responded to Petitioner’s assertions by letter dated April 23, 2010, as follows:

- (1) The CBA allows postponements for good cause. See UP Resp. at 6. The conductor’s UTU representative requested the postponement because he “needed additional time to prepare.” UP Resp. at 2, 6. Because Petitioner’s conductor was one of the principals in this matter, it was reasonable for UP to honor the request. See UP Resp. at 6. UP submits that it would have been unreasonable to hold a hearing for the engineer and then a hearing for the conductor. See id.
- (2) Petitioner entered the Form B limits without permission. See UP Resp. at 8. The track could have been occupied with men and equipment. See id.; Tr. at 91 and 101. UP states that “obviously there was a potential consequence to safety.” UP Resp. at 8.

Board’s Determinations

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

- (1) On September 16, 2009, at approximately 11:30 a.m., while operating Train CWKBM-16, Petitioner entered Form B limits without permission from the EIC, near MP 36, at Waukegan, IL. See Tr. at 4, 40, 70, 82, 95, 99, 105; Pet. at 2-3, 8-9; and UP Resp. at 1-2.
- (2) The train crew consisted of Petitioner and a conductor. The crew was called to operate an empty coal hopper train from Waukegan, IL to UP’s Proviso Yard in

Chicago. The crew doubled their train together at Waukegan Yard and entered Main Track No. 2, heading southward on the Kenosha Subdivision. The crew was in possession of Form B No. 49279 that established a work limit between MP 36 (southern limit) and MP 38 (northern limit) on Main Track Nos. 1 and 2 between the hours of 9:15 a.m. and 3:00 p.m. See Tr. at 56-58, Tr. Ex. 10; Pet. at 2-3; and UP Resp. at 1-2.

- (3) Evidence indicates that the crew departed Waukegan Yard and entered Main Track No. 2 through a switch that was located approximately eighty-four feet north of MP 36, barely within the Form B limits. See Tr. at 76; Pet. at 3; UP Resp. at 2. No flags were displayed at the switch to notify crews that they would be entering a Form B. See Tr. at 76. There was a stop board displayed at MP 36 for northward movements. See id. The red board would not be easily detected by Petitioner as it was displayed in the opposite direction of his southward movement. See id. However, there is no requirement to display red boards for entry and exit points of the Form B. The crew is required to be aware of the Form B limits based on milepost location. See Tr. at 85.

Analysis of the Petition

Petitioner's first assertion involves a procedural issue. Petitioner argues that because the investigative hearing was held more than ten days after the date of the incident, the hearing was held outside the time limits of his CBA. See Pet. at 2, 4. 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." 58 Fed. Reg. 18982, 19001 (Apr. 9, 1993). 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.

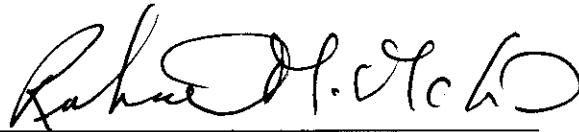
The Board finds that Petitioner's first assertion is without merit. Petitioner's CBA allows postponements for good cause. See UP Resp. at 6; Pet. at 4; and Tr. Ex. 1. The UTU local chairman, who represents the conductor, requested the postponement because he "needed additional time to prepare." UP Resp. at 6. It would have been unreasonable for UP to hold a hearing for the engineer and then a separate hearing for the conductor. Engineers have protested hearings in the past because the conductor was not present to participate. Because good cause for postponement was shown, no procedural error occurred. Additionally, even if a procedural error occurred, Petitioner has not shown how this procedural error has caused him substantial harm in his defense of the charges. See UP Resp. at 6-7.

Petitioner's second assertion is also without merit. The decision to determine if an incident is *de minimis* in nature and has had no impact on safety is at the sole discretion of the railroad. The charged engineer has no say in this process and therefore Petitioner's second assertion is not reviewable by the Board.

Conclusion

Based on its review of the record and the above findings, the Board hereby denies the petition in accordance with the provisions of 49 C.F.R. Part 240.

Issued in Chicago, IL on FEB 22 2011.

A handwritten signature in black ink, appearing to read "Richard M. McCord", written over a horizontal line.

Richard M. McCord
Chairman,
Locomotive Engineer Review Board

SERVICE LIST EQAL 2010-08

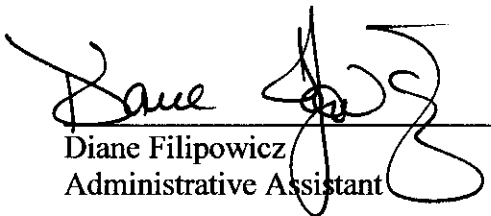
A copy of the Locomotive Engineer Review Board decision in this matter has been sent by certified mail and return receipt requested to each person shown below.

Mr. Jerome E. Posey
4537 S. Drexel Avenue Unit 501
Chicago, IL 60653

Mr. Douglas W. Davidson
BLE&T
1820 Asbury Avenue
Evanston, IL 60201-3504

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

Ms. Christine Hampton
Union Pacific Railroad Company
1400 Douglas Street, Mailstop 1080
Omaha, NE 68179



Diane Filipowicz
Administrative Assistant

FEB 22 2011

Date

enc: Post LERB Memo

cc: FRA DOCKET EQAL 2010-08

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:

Ms. Christine Hampton
 Union Pacific Railroad Company
 1400 Douglas Street, Mailstop 1080
 Omaha, NE 68179

EGAL 2010-08

2. Article Number

(Transfer from service label)

7008 3230 0002 3925 8570

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

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
 Union Pacific Railroad Company
 1400 Douglas Street, Mailstop 1010
 Omaha, NE 68179

EGAL 2010-08

2. Article Number

(Transfer from service label)

7008 3230 0002 3925 8587

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

SENDER: COMPLETE THIS SECTION

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- 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. Douglas W. Davidson
 BLE&T
 1820 Asbury Avenue
 Evanston, IL 60201-3504

EGAL 2010-08

2. Article Number

(Transfer from service label)

7008 3230 0002 3925 8594

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

COMPLETE THIS SECTION ON DELIVERY

A. Signature

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- 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

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> ■ 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. 	A. Signature <input type="checkbox"/> Agent <input type="checkbox"/> Addressee X	
1. Article Addressed to: <p style="text-align: center;">Mr. Jerome E. Posey 4537 S. Drexel Avenue Unit 501 Chicago, IL 60653</p>	B. Received by (<i>Printed Name</i>)	C. Date of Delivery
<p style="font-size: 1.2em; font-family: cursive;">EGAL 2010-08</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	
	7008 3230 0002 3925 8600	