

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

Locomotive Engineer Review Board

Review and Determination Concerning  
Union Pacific Railroad Company's  
Decision to Revoke Mr. K. B. Ashley's  
Locomotive Engineer Certification

**FRA Docket Number EQAL-2010-10**

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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 the locomotive engineer certification (certification) of Mr. K. B. Ashley (Petitioner) in accordance with the provisions of Title 49, Part 240 of the Code of Federal Regulations. The Board hereby determines that UP's decision to revoke Petitioner's certification was proper for the reasons set forth below.

**Background**

On May 12, 2009, Petitioner tested positive for marijuana metabolites (THC) on a Federal random drug test. See Tr. Ex. 38. On July 16, 2009, Petitioner again tested positive for THC on a Federal return-to-duty drug test.<sup>1</sup> See Tr. Ex. 19 and Ex. 20. This was Petitioner's first Federal drug test since his May 12, 2009 positive random drug test result. Petitioner was evaluated by UP's Medical Review Officer (MRO) on July 20, 2009, and the MRO verified that there was no legitimate medical explanation for Petitioner's second positive test result. See Tr. Ex. 21 and Ex. 23.

By letters dated July 27, 2009, UP informed Petitioner that it had been notified of his positive return-to-duty test and that his certification was suspended. See Tr. Ex. 2 and Tr. Ex. 4. Pursuant to the provisions of 49 C.F.R. § 219.104, an FRA hearing was held on October 7, 2009, but was recessed and reconvened on November 19, 2009. See Tr. Ex. 35. By letter dated November 25, 2009, UP notified Petitioner that his certification was revoked for a period of two years because he had two instances of non-compliance with 49 C.F.R. § 219.102, which prohibits a covered employee from using a controlled substance at any time. See Pet. Ex. A-1. Under 49 C.F.R. § 240.119(c)(4)(i), a person who has "two violations of § 219.102 ... shall be ineligible to hold a certificate for a period of two years." UP provided Petitioner with a Post-

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<sup>1</sup> Petitioner's split specimen – which was tested at his request according to the provisions of 49 C.F.R. Part 40, Subpart H – also tested positive for THC. See Tr. Ex. 22 and Ex. 25.

Hearing Notification of Certificate Revocation form and explanatory letter, both dated December 1, 2009. See Pet. Ex. B-1 and B-2.

The Brotherhood of Locomotive Engineers and Trainmen (BLET) filed a petition with the FRA on behalf of Petitioner, requesting that the Board review UP's decision to revoke Petitioner's certification. The petition was received on March 23, 2010 and was timely filed. The petition asserted that the decision to revoke Petitioner's certification was improper for the following reasons:

1. Petitioner did not use or ingest marijuana at any time during his rehabilitation process. Rather, Petitioner's second positive result for THC was caused by Petitioner's original drug use. The THC remained in Petitioner's system due to the slowness of the metabolism of marijuana, as affected by Petitioner's prescribed use of the medication Paxil, his chronic hepatitis, his age, and his sedentary lifestyle. The use of THC itself also affected Petitioner's hepatitis and further slowed his metabolism and excretion processes. In support of his argument, Petitioner submitted an analysis performed by Marcus Iszard, Ph.D., Associate Professor, Division of Pharmacology/Toxicology, School of Pharmacy – University of Missouri at Kansas City.
2. Revoking Petitioner's certification as a result of his second positive THC results is akin to double jeopardy.

Pursuant to 49 C.F.R. § 240.405(b) and (c), a copy of the petition was sent to UP on May 3, 2010, and the railroad was afforded an opportunity to comment. UP timely responded to Petitioner's assertions on June 28, 2010, as follows:

1. UP's MRO was the only individual qualified to evaluate Petitioner.
  - a. The MRO considered and eventually rejected the argument that Petitioner's second positive result was caused by his Hepatitis C and his use of Paxil.<sup>2</sup> The MRO properly concluded that there was no legitimate medical explanation for Petitioner's second positive Federal drug test and that the test indicated that he was using a controlled substance.
  - b. Petitioner's witness, Dr. Iszard, does not have the necessary medical credentials to make MRO determinations.
2. Double jeopardy does not attach in this case because the second test was a valid indication that Petitioner used a controlled substance after his original positive on May 12, 2009.

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<sup>2</sup> Petitioner did not inform the MRO at the time of his evaluation that he had Hepatitis C. Nevertheless, the MRO was informed of this condition during the hearing and indicated that Hepatitis C could not have caused Petitioner's second positive. See Resp. at 5.

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

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

1. Petitioner tested positive for THC on a Federal random drug test on May 12, 2009. See Tr. Ex. 38. Petitioner's test found a marijuana metabolite concentration of 232 ng/mL. Id.
2. Petitioner subsequently tested positive for THC on his Federal return-to-duty test, conducted on July 16, 2009. See Tr. Ex. 19 and Ex. 20. This was sixty-three days after his original May 12, 2009 positive. Petitioner's follow-up test found a marijuana metabolite concentration of 57 ng/mL. Id.
3. Petitioner was evaluated by UP's MRO on July 20, 2009. See Tr. Ex. 23. The MRO verified Petitioner's second positive THC result, finding that there was no legitimate medical explanation for the positive result. See Tr. Ex. 21.

### **Analysis of the Petition**

Petitioner's first argument involves a substantive issue. Petitioner argues that he did not violate Federal regulations because he did not use or ingest marijuana during the rehabilitation process. Rather, he asserts that his return-to-duty positive test was caused by his original drug use. "When considering factual issues, the Board will determine whether there is substantial evidence to support the railroad's decision, and a negative finding is grounds for reversal." 58 Fed. Reg. 18982, 19001 (Apr. 9, 1993).

The Board finds that Petitioner's first assertion is without merit. The 57 ng/mL result on his confirmatory test was significantly above the confirmatory cutoff for marijuana metabolite, 15 ng/mL. See 49 C.F.R. § 40.87(a). The MRO then determined that Petitioner's prescribed use of Paxil (paroxetine) and his various medical conditions did not constitute a legitimate medical explanation for this significant positive test result. Under 49 C.F.R. § 40.149(c), the MRO is the "sole authority ... to make medical determinations leading to a verified test." Petitioner has failed to introduce any evidence that the MRO did not comply with the requirements of 49 C.F.R. Part 40 when making this determination. UP has stated its MRO was qualified, and Petitioner has never disputed that assertion. See Resp. at 3.

In comparison, Petitioner's witness Dr. Iszard does not meet the Federal requirements necessary to make medical determinations under Part 40. While Dr. Iszard has a Ph.D. in pharmacology/toxicology, he is not a licensed physician and has not had the specialized training required for MRO qualification under 49 CFR § 40.121. As such, Dr. Iszard is not legally authorized to determine whether there was a legitimate medical explanation for Petitioner's second positive result.

Furthermore, as a substantive matter, Dr. Iszard's testimony and formal report on Petitioner did not provide specific evidence that a qualified MRO could have used as a basis for determining that Petitioner's second positive test result was the consequence of use prior to the Federal random test result sixty-three days earlier. For example, Dr. Iszard's arguments that paroxetine can significantly delay marijuana excretion in humans appeared to be theoretical, and he failed to offer any peer-reviewed research report specifically affirming his hypothesis. He also offered no evidence or data quantifying such a potential effect. When answering a question about whether paroxetine could have affected Petitioner's metabolism, he replied:

I would also say that it [Paxil] would cause the THC elimination to be slower—slower than usual. To what degree I can't really answer, but following the general principal of whether or not the metabolism of THC would be inhibited, yes. I just can't qualify an answer as to how much or quantitate an answer as to how much.

Tr. at 207. As such, while Dr. Iszard generally asserted that paroxetine could have delayed Petitioner's excretion of THC, he offered no evidence specifically demonstrating that its use (combined with Petitioner's other medical conditions) caused Petitioner to have a positive test result of 57 ng/mL sixty-three days after his original positive. Dr. Iszard also failed to offer any citation or evidence supporting his assertion that the metabolic half-life<sup>3</sup> of THC was generally thirty days.<sup>4</sup> See Ex. 28. Such generalized and unsupported assertions do not support Petitioner's argument that his second positive was the result of his original marijuana use.

Petitioner's second argument involves a procedural issue. Petitioner argues that revoking his certification as a result of his second positive is akin to double jeopardy. The Double Jeopardy Clause states that no "person [shall] be subject for the same offense to be twice put in jeopardy of life and limb." U.S. Const. amend. V. The Clause, however, only protects an individual from the imposition of multiple criminal penalties for the same offense. See Hudson v. U.S., 522 U.S. 93, 99 (1997). As such, the Double Jeopardy Clause does not apply to the revocation of Petitioner's certification, which is a civil sanction. Nevertheless, the Board understands that the thrust of Petitioner's argument is that UP improperly revoked his certification twice for a single § 219.102 offense. 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 (April 9, 2003). To establish

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<sup>3</sup> The half-life of a drug is the period of time required for half the amount of the substance "in or introduced into a living system or ecosystem to be eliminated or disintegrated by natural processes." Merriam-Webster, Half-life, <http://www.merriam-webster.com/dictionary/half-life?show=0&t=1294693762> (last visited Jan. 10, 2011).

<sup>4</sup> The metabolic half-life of THC appears to be much shorter than the thirty days suggested by Dr. Iszard. For example, peer-reviewed research describes an average THC metabolic half-life of three days for heavy smokers of marijuana, with a range running from approximately one to ten days. See Randell C. Baselt, Disposition of Toxic Drugs and Chemicals in Man 1514 (8th ed. 2008) (citing E. Johansson and M. M. Halldon, Urinary Excretion Half-life of Delta 1-Tetrahydrocannabinol-7-oic Acid in Heavy Marijuana Users After Smoking, 13 Journal of Analytical Toxicology 4, 218-223 (1989)).

grounds upon which the Board may grant relief, Petitioner must show: (1) that procedural error occurred, and (2) the procedural error caused substantial harm.

The Board finds that this assertion is also without merit. For the reasons discussed above, the Board has already determined that Petitioner's positive return-to-duty test was substantial evidence of a second § 219.102 violation. No procedural error occurred, therefore, because Petitioner has failed to show that his certification was revoked twice for a single offense.

**Conclusion**

Based on its review of the information provided, the Board finds that UP's revocation of Petitioner's certification was proper. Therefore, the Board denies the petition in accordance with the provisions of 49 C.F.R. Part 240.

Issued in Washington, D.C. on MAR 03 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 2010-10**

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

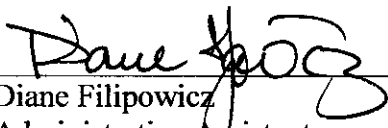
**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Mr. Kenneth B. Ashley  
10512 N. Oak Trfway  
Kansas City, MO 64155-1616

Mr. Charles Rightnowar  
General Chairman  
General Committee of Adjustment, BLE&T UPR CE Region  
320 Brookes Drive  
Suite 115  
Hazelwood, MO 63042

Mr. Lawrence Brennan Jr.  
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

MAR 03 2011  
\_\_\_\_\_  
Date

cc: FRA Docket EQAL 2010-10

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

EGAL 2010-10

2. Article Number  
(Transfer from service label)

7008 3230 0002 3925 8532

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

4. Restricted Delivery? (Extra Fee)  Yes

## SENDER: COMPLETE THIS SECTION

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1. Article Addressed to:

Mr. Lawrence Brennan Jr.  
Union Pacific Railroad Company  
1400 Douglas Street, Mailstop 1010  
Omaha, NE 68179

EGAL 2010-10

2. Article Number  
(Transfer from service label)

7008 3230 0002 3925 8549

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

## COMPLETE THIS SECTION ON DELIVERY

A. Signature

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- Agent
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- 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

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Mr. Charles Rightnowar, General Chairman  
General Committee of Adjustment, BLE&T UPR CE Region  
320 Brookes Drive  
Suite 115  
Hazelwood, MO 63042

EGAL 2010-10

2. Article Number  
(Transfer from service label)

7008 3230 0002 3925 8556

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

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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
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- Express Mail
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- Registered
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- Return Receipt for Merchandise
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- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Mr. Kenneth B. Ashley  
10512 N. Oak Trfway  
Kansas City, MO 64155-1616

EGAL 2010-10

2. Article Number  
*(Transfer from service label)*

**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

7008 3230 0002 3925 8563