

**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. M. Caprari's  
Locomotive Engineer Certification

**FRA Docket Number EQAL-2010-19**

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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's (UP) to revoke Mr. M. Caprari'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 determines that UP's decision to revoke Petitioner's certification was proper for the reasons set forth below.

**Background**

On December 13, 2009, at approximately 10:00 p.m, while operating Train ZDLSK5-11, Petitioner allegedly exceeded the maximum authorized speed by more than 10 miles per hour (mph) between milepost (MP) 678 and MP 669, near Rawlins, WY, on the Laramie Subdivision.

On December 31, 2009, Mr. Timothy Hamilton, Manager of Operating Practices (MOP), ran a wireless download from the event data recorder of the ZDLSK5-11 and discovered that Petitioner operated the train at up to speeds of 71 mph during his December 13, 2009 trip. Tr. at 33-40. The maximum allowable speed for the ZDLSK5-11 was 50 mph. *Id.* at 40-42.

By letter dated January 4, 2010, Petitioner received via certified mail a written notice of certificate suspension from UP. Tr. Ex. 1. Petitioner's revocation hearing was held on January 14, 2010. Tr. at 4.

By letter dated January 22, 2010, UP revoked Petitioner's certification for exceeding the maximum authorized speed for his train by more than 10 mph. UP Response's at 2.

On May 7, 2010, Petitioner filed a petition with FRA. Petitioner asserts that the revocation was improper because:

- (1) UP failed to comply with 49 CFR § 240.307 because the January 14, 2010 hearing did not conform procedurally to the applicable collective bargaining agreement. The hearing did not comply in the following ways:
  - a. Petitioner was not sent a written notice of a hearing “within 10 days of when the appropriate company officer knew or should have known of an alleged offense as required by the System Agreement – Discipline Rule agreement” between the Petitioner and UP. Petition at 3-4. Petitioner’s alleged violation occurred on December 13, 2009, but Petitioner argues that he did not receive a hearing notice until after January 4, 2010 (the date on UP’s letter to Petitioner), which is 24 days later or 14 days beyond UP’s required deadline. *Id.* Additionally, Petitioner asserts that his rights were violated because UP downloaded a report that it knew was already beyond the 10 day window UP had to send Petitioner a written notice of violation. In other words, UP needed to run the download and send Petitioner his notice by December 23, 2010, in order to meet the 10 day notification requirement of the System Agreement- Discipline Rule agreement. *Id.*; and
  - b. UP issued no written notice of charges against Petitioner. Petition at 4.
- (2) UP violated 49 CFR § 240.307(c)(12), by failing to prove that Petitioner violated an applicable railroad operating rule. Petitioner operated his train “in compliance with all speed restrictions based upon the information given to him by the conductor in charge of the train after the Petitioner specifically asked about any speed restrictions, and based upon the train consist produced by the Respondent. . . .The Petitioner acted in good faith upon the briefing with his conductor and knowledge he had pertaining to his train and ran in accordance with that information. Immediately upon the information changing he slowed the train down and ran in accordance with the updated information.” *Id.*

Pursuant to 49 CFR § 240.405(b) and (c), a copy of the petition was sent to UP, which was afforded an opportunity to comment. On August 9, 2010, UP responded to Petitioner’s assertions, arguing that:

- (1) UP complied with 49 CFR § 240.307(d) because the hearing conformed procedurally to the applicable collective bargaining agreement:
  - a. Petitioner was sent a written notice of the hearing on January 5, 2010, four days after the violation was discovered by the MOP on December 31, 2009. The notice, sent by certified mail, “was accepted by the United States Post Office on January 5, 2010 and was left for the Petitioner to pick up on January 7, 2010,” well within the 10 day requirement. UP’s Response at 10.

Petitioner asserts that UP “should have known” about the violation on December

13, 2009, the date the violation occurred, which would have required UP to have issued a notice by December 23, 2009. However, the type of download produced by the MOP was “not automatically system generated due to a triggering event such as excessive speed. This database is maintained for the purpose of evaluating a particular engineer’s performance not for identifying suspect Rule violations.” Id. Thus, the download had to be specifically requested by the MOP in order to have been run. The MOP was required to evaluate four of Petitioner’s trips per year and chose to run a report on December 31, 2009. Thus, the violation was discovered on that date and the railroad was obligated to send Petitioner a written notice of the hearing ten days from that date, which they did.

- b. UP did not specifically address Petitioner’s allegation that it did not issue a written notice of charges against Petitioner. However, UP does note that “Petitioner was issued a Notice of Hearing (NoH) on January 5, 2010 for the purpose of determining whether Petitioner and the Conductor jointly failed to control their train such that they ultimately permitted the ZDLSK5-11 to exceed the maximum permitted train speed by more than 10 mph[,] an FRA decertifiable event.” Id. at 2.

- (2) UP asserts that “it met its burden of proof” in Petitioner’s case. Id. At the hearing, the MOP “presented detailed testimony and evidence concerning the joint failure of Petitioner and crew in which they improperly operated the ZDLSK5-11.” Id. The MOP initiated a wireless download report pertaining to Petitioner’s trip on December 13, 2009. The MOP established that the ZDLSK5-11 reached a maximum speed of 71 mph at MP 671.82 and that due to the Tons Per Operative Brake (“TPOB”) restriction on the train, the ZDLSK5-11 was restricted to a maximum speed of 50 mph. Thus, Petitioner operated the train 21 mph over the permitted speed, and violated 49 CFR § 240.307. Id. at 2-3.

UP also argues, “. . . [D]espite having been given the information regarding the TPOB restriction, [Petitioner and crew] operated their train twenty-one (21) mph above the maximum authorized speed. This was not a case in which the conditions suddenly changed beyond their control, but rather Petitioner and crew failed to properly determine the maximum permitted speed prior to leaving. The fact that they realized their violation and eventually slowed down does not in any way negate the fact that they violated very serious Carrier and Federal rules for nearly fourteen (14) miles. The Petitioner and crew admitted that they were aware of the TPOB restriction ([which was] recorded within the Conductor’s log), yet did not conduct themselves in compliance with that restriction.” Id. at 14.

## **Board's Determinations**

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

- (1) On December 13, 2009, Petitioner operated Train ZDLSK5-11 from Rawlins, WY to Cheyenne, WY. Petition at 3. Due to the TPOB restriction, the maximum allowable speed of the train was 50 mph. Petition at 3. See also, Tr. Ex. 11.
- (2) Prior to departure, Petitioner and a conductor performed the required job briefing where they reviewed all of “the paperwork, train list, [and] the orders.” Tr. at 75. The job briefing was “thorough and complete.” Tr. at 78. Petitioner and Conductor discussed the train speed, which was confirmed as 70 mph. Id.
- (3) At approximately 10:00 p.m, on December 13, 2009, Petitioner operated Train ZDLSK5-11, at speeds above 50 mph and up to 71 mph between MP 678 and MP 669, near Rawlins, WY, on the Laramie Subdivision. Tr. Ex. 9. See also, Petition at 3.
- (4) At around MP 665.76, after the conductor reviewed the train restrictions for a second time, both crew members realized that the train was exceeding its speed limit and Petitioner reduced the train’s speed back to 50 mph. Tr. at 39. See also, Tr. at 79-81. See also, Petition at 3. See also, Tr. Ex. 10.
- (5) On December 31, 2009, the MOP ran a wireless download of the event data recorder of the ZDLSK5-11 and discovered that Petitioner operated the train at up to speeds of 71 mph during his December 13, 2009 trip. Tr. at 33-40. The MOP ascertained that the maximum speed allotted for the ZDLSK5-11 was 50 mph. Id. at 40-42.
- (6) By letter dated January 4, 2010, which Petitioner received via certified mail, UP suspended Petitioner’s certification for exceeding the maximum authorized speed by more than 10 mph. Tr. Ex. 1. Petitioner’s revocation hearing was held on January 14, 2010. Tr. at 4.
- (7) On January 22, 2010, UP notified Petitioner of its revocation decision. UP found that the Petitioner exceeded the maximum authorized speed by more than 10 mph and Petitioner’s certification was revoked for 30 days. UP Response to Petitioner at 2.

## **Analysis of the Petition**

Petitioner raises several procedural issues in his petition. Pursuant to its reviewing role, 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.” See Fed. Reg. 18982, 19001 (April 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 is not persuaded by Petitioner's procedural arguments and finds that Petitioner was not caused substantial harm by any of UP's alleged failures to adhere to dictated procedures. First, the Board finds that UP complied with 49 CFR § 240.307 and the applicable collective bargaining agreement when it sent Petitioner the written notice of a hearing dated January 4, 2010. UP discovered Petitioner's violation on December 31, 2009, and it issued Petitioner the notice well within the 10-day time frame required under the collective bargaining agreement between UP and Petitioner. Thus, the Board finds that UP did not commit procedural error with respect to the notice of hearing.

Second, the Board finds no procedural error with respect to the notice of suspension. Petitioner argues that his rights were violated because UP downloaded evidence of Petitioner's misconduct too late because the railroad only had 10 days from Petitioner's violation to discover the violation and issue him a notice of suspension. However, the 10-day window does not preclude a railroad from uncovering prohibited conduct under 49 CFR § 240.117 by its engineers at a later time. Rather, the time limit on issuing a notice of hearing starts once the railroad obtains reliable information that a violation has occurred, not on the day of the alleged incident. Therefore, the Board finds no procedural error.

Third, the Board finds no merit in Petitioner's argument that UP failed to issue a written notice of charges. UP sent Petitioner a "Notice of Investigation" dated January 4, 2010, which directs Petitioner to appear for a hearing on January 14, 2010 and states:

The purpose of this investigation is to develop the facts and determine responsibility, if any, with the charge that, "While you were employed as an Engineer, on Train ZDLSK5-11, at Rawlins, between Milepost 678 and 669, on the Laramie Subdivision, at approximately 2200 hours, December 13<sup>th</sup> [sic], 2009, you allegedly failed to control your train speed which resulted in your train exceeding the maximum train speed in excess of 10 mph. This was discovered on a random download on December 31, 2009."

Tr. Ex. 1. In his testimony, Petitioner admits to receiving the notice from UP. Tr. at 10. It is not clear to the Board, what additional information Petitioner required regarding his charges, since the only charge in question was the violation stated in the January 4, 2010 document sent to the Petitioner.

Petitioner's final argument in his petition involves an intervening cause argument. Petitioner asserts that UP did not prove that Petitioner violated an applicable railroad operating rule because Petitioner was operating his train when he exceeded the train's maximum speed based upon information given to him by the conductor. In determining whether revocation was proper under FRA's regulations, the Board considers 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).

The Board finds that Petitioner's assertion is without merit. The maximum speed for freight

trains over 120 Tons Per Operative Brake(TPOB) is 50 mph, as defined under UP's Speed Restriction Rules, Item 2-G: Maximum Speeds: Tons Per Operative Brake (TPOB), Table A-Freight Trains. Tr. Ex. 11. In the instant case, the train was determined to have 123 TPOB. Tr. Ex. 8. Thus, the train was required to operate at 50 mph. Tr. at 41. Additionally, under UP Operating Rule 6.31: Maximum Authorized Speed, "[c]onductors and engineers are jointly responsible for knowing and not exceeding the maximum authorized speed for their train." Tr. Ex. 12. Petitioner testified that he knew that both he and his crew should have figured out the speed properly. Tr. at 84. Petitioner presented no evidence to show why he should have solely relied on the conductor to calculate the trains speed. Rather, Petitioner testified that he had a job briefing before departure with the conductor and that the briefing was "thorough and complete," Id. at 78, and it appears as though Petitioner and crew miscalculated the speed and then had to readjust mid-trip. Thus, the Board rejects Petitioner's intervening cause argument that the conductor caused him to operate his train at excessive speeds and commit the instant violation.

### **Conclusion**

Based on the above findings and conclusions, the Board hereby DENIES the petition in accordance with the provisions of Title 49, Part 240 of the Code of Federal Regulations.

Issued in Chicago, IL on JAN 19 2011.



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Richard M. McCord  
Chairman,  
Locomotive Engineer Review Board

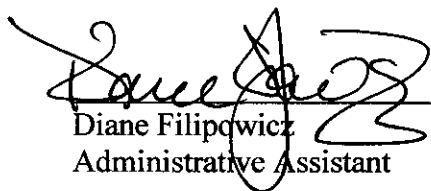
SERVICE LIST EQAL 2010-19

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. M. Caprari  
1220 Affirmed Road  
Cheyenne, WY 82009

Ms. C. Hampton  
Union Pacific Railroad Company  
1400 Douglas St. MS 1020  
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

JAN 19 2011

Date

enc: Post LERB Memo

cc: FRA DOCKET EQAL-2010-19

**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. M. Caprani  
1220 Affirmed Road  
Cheyenne, WY 82009

EGAL 2010-19

2. Article Number  
(Transfer from service label)

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature  Agent  
 Addressee  
X

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

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

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1400 Douglas St. MS 1020  
Omaha, NE 68179

EGAL 2010-19

2. Article Number  
(Transfer from service label)

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature  Agent  
 Addressee  
X

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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Manager, Engineering Certification & Licensing  
United Pacific Railroad Company  
1400 Douglas Street, Mailstop 1010  
Omaha, NE 68179

EGAL 2010-19

2. Article Number  
(Transfer from service label)

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature  Agent  
 Addressee  
X

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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