

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

Locomotive Engineer Review Board

Decision Concerning the
Northeast Illinois Regional Commuter Railroad Corporation's Revocation of
Mr. D. E. Kopman's Locomotive Engineer Certification
FRA Docket Number EQAL 2010-20

Decision

The Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the decision of the Northeast Illinois Regional Commuter Railroad Corporation (Metra) to revoke the locomotive engineer certification (certification) of Mr. D. E. Kopman (Petitioner) in accordance with the provisions of Title 49, Part 240 of the Code of Federal Regulations (Part 240). The Board hereby denies the petition for the reasons set forth below.

Background

On March 1, 2010, at approximately 11:25 a.m., while operating Commuter Train 2213, Petitioner allegedly exceeded the maximum authorized speed by 10 miles per hour (mph) or more when he failed to operate his train at 10 mph two miles from an unannounced yellow flag, on Metra's Elgin Subdivision. See Pet. Exhibit 11; Resp. at 1.

Metra charged Petitioner with a violation of 49 C.F.R. § 240.117(e)(2) – “failure to adhere to limitations concerning train speed when the speed at which the train was operated exceeds the maximum authorized limit by at least 10 miles per hour.” Pet. Exhibit 4. An investigation and hearing was held on March 15, 2010, and Metra notified Petitioner of the revocation by letter dated March 19, 2010.

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 Metra's decision to revoke Petitioner's certification. The petition was received on May 11, 2010 and was timely filed. The petition asserts that the revocation was improper because:

1. Metra employees did not place the yellow flag in a location “clearly visible to an approaching train.” See Pet. at 4-5, 12. Petitioner did not see the yellow flag (12 inches wide and 30 inches high) because it was obscured by being placed in close proximity with other yellow objects including a 721 foot-long, 2 foot-wide yellow tactile running the length of the Roselle Station platform, a yellow Emergency Order No. 20 sign, and a yellow car marker sign. See id. at Pet. at 5-6, 9, 11, 12.

2. Petitioner did not see the yellow flag because as Petitioner pulled into Roselle Station Petitioner was obligated to lookout for pedestrians running in front of the train. See id. at 7. As Petitioner neared the end of the platform, Petitioner was focused in his gauges and on spotting the rear of the train in the mirror in order to stop the train along the platform in a position safe for disembarking passengers. See id. at 7-8, 10-11, 12. The locomotive traveled past the west end of the platform and stopped with the yellow flag directly below the front of Petitioner's engine, making it impossible for Petitioner to see before or after departing. See id. at 8, 12.
3. Petitioner did not see the yellow flag because major physical changes occurring at the Roselle Station caused Petitioner's focus to be diverted away from the direction of the yellow flag. See id. at 9-10.
4. When Metra conducted the efficiency test, Petitioner had been an Engineer for 11 months, working most of his career on Metra's Milwaukee North Line (Fox Lake board). See id. at 6-7. Petitioner was on the Elgin extra board for eight days out of his eleven-month career as a locomotive engineer. See id. at 7.
5. Metra denied evidence to Petitioner that would have proven his case. See id. at 12. Petitioner requested four color still screenshots taken from the camera mounted to the locomotive of Train 2213 as it moved down the Roselle Station platform. These photos demonstrate that the yellow flag was placed directly in line with the similarly colored platform tactile. See id.

Metra's Response

Pursuant to 49 C.F.R. § 240.405(b) and (c), a copy of the petition was sent to Metra, which was afforded an opportunity to comment. On July 16, 2010, Metra filed a response to Petitioner's assertions, arguing that:

1. Petitioner admits to not looking in the direction of the yellow flag. See Metra Resp. at 2. The video taken from the locomotive shows that the yellow flag was clearly visible to an approaching train. See id.
2. Petitioner overlooked the yellow flag placed at Milepost (MP) 24 because, as Petitioner testified, Petitioner was not paying attention to the direction of travel when spotting his train. See id. at 3. Petitioner was in the process of spotting the train with the mirror and was looking at the gauges. See id. at 2.
3. Physical characteristic changes at Roselle station involved the removal of absolute signals and crossovers and resulted in fewer distractions to engineers at the station. See id. Petitioner was working as a locomotive engineer on that line segment when the changes took effect. See id.

4. Most of Petitioner's time as a locomotive engineer was on the Fox Lake Subdivision. See id. Petitioner is qualified to perform service on each line protected by the Chicago Union Station Districts. See id. With the exception of the North Central Service, Elgin and Fox Lake Districts operate under Canadian Pacific rules. See id. The same testing procedures are performed on the Fox Lake and Elgin Subdivisions. See id.
5. Petitioner was able to view the on-board Locomotive Camera Download from the locomotive from the day of the incident. See id. This video was added into the record at Petitioner's hearing. See id. The video shows that the yellow flag was clearly visible to an approaching train. See id.

Board's Determinations

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

1. On March 1, 2010, at approximately 11:25 a.m., while operating Commuter Train 2213, Petitioner exceeded the maximum authorized speed by 10 mph or more when he failed to operate his train at 10 mph two miles from an unannounced yellow flag, on Metra's Elgin Subdivision. See Pet. Exhibit 11; Tr. at 31, 107, 158, 160.
2. Unknown to Petitioner, Metra employees were conducting an efficiency test by placing an unannounced yellow flag along the right side of the westbound Main Track No. 1 just before MP 24 that is located beyond Roselle Station's westbound platform, followed by a green flag at MP 26.2. See Resp. at 1; Tr. at 40, 100-02.
3. Petitioner was traveling westbound on Main Track No. 1 approaching MP 24 when the incident occurred. Petitioner was making a station stop at Roselle and failed to notice a yellow flag that was located approximately 200 feet from the end of the station platform. See Pet. at 3, 12.
4. Metra rules required Petitioner to operate Train 2213 at a speed not exceeding 10 mph once two miles beyond the yellow flag. See Pet. Exhibit 7.
5. At approximately 11:25 am, Train 2213 maintained a speed of 66 mph through the restricted area. See Pet. Exhibit 12; Tr. at 103-06, 152-53.

Analysis of Petition

In reviewing petitions of revocation decisions, the Board considers four issues in determining whether revocation 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 (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).

There is no factual dispute that Petitioner failed to abide by the speed limitation imposed by the display of the yellow flag. Instead, Petitioner’s first four assertions raise questions of whether the test was fair and whether an intervening cause prevented or materially impaired Petitioner’s ability to comply with the railroad operating rule or practice which constituted the speeding violation. Petitioner’s final assertion raises a procedural question of whether his defense was substantially harmed by Metra’s alleged failure to produce four color still screenshots taken from the camera mounted to the locomotive of Train 2213 as it moved down the Roselle Station platform.

Regarding the first assertion, Petitioner argues that the yellow flag was not placed in a location “clearly visible to an approaching train” and the Board considered whether the flag was displayed in accordance with the railroad’s operating rules and testing program under 49 C.F.R. § 217.9. See 49 C.F.R. § 240.117(f)(3). Metra’s Operational Testing Manual instructs those conducting the “Display of Yellow Flag – Restriction Is Not Specified In Writing” test to “[p]lace [the] yellow flag to the right or left of the track, as appropriate, where it is clearly visible to an approaching train.” See Pet. Exhibit 6. The video recording, introduced into the record by Metra (see Tr. at 47), shows that Metra properly conducted the efficiency test because the yellow flag placed just before MP 24 to the right of the westbound track on which Train 2213 was traveling was clearly visible from the locomotive while approaching the flag. Although, the video recording also shows a yellow tactile strip running the length of the Roselle platform and yellow signs in the proximity of the yellow flag, Petitioner’s argument that these objects obscured his view of the yellow flag does not warrant a reversal of the railroad’s determination. The record reflects that the yellow flag was clearly visible and the Board finds that Petitioner’s alleged distractions were not substantial enough to amount to an intervening cause.

Petitioner’s second assertion alleges that he could not have seen the yellow flag because as Train 2213 approached the flag, he was obligated to lookout for pedestrians running in front of the train and concentrate on his gauges and in his rearview mirror in order to stop the train in a safe location for disembarking passengers. Petitioner further asserts that after the train came to a stop at the platform, the yellow flag was directly below the front of his engine, making it impossible to see before or after departing. Although the Board does not question Petitioner’s obligation to focus on particular aspects of public safety, that obligation did not relieve Petitioner of the additional obligation to be observant of flags and signals that are ahead of his movement. Accordingly, Petitioner’s second assertion is without merit because it was not the placement of the flag that prevented Petitioner from following Metra’s operating rules; rather, Petitioner missed the flag because he was not paying attention to the clearly visible yellow flag located approximately 200 feet beyond the west end of the platform.

With regard to Petitioner’s third assertion that major physical changes at the Roselle Station distracted him from seeing the yellow flag, the Board finds that this assertion lacks merit because

Petitioner was certified to operate over Metra's Elgin Subdivision. Consequently, Petitioner was required to be familiar with the existing physical characteristics of the Roselle Station and the surrounding areas where he operated. See 49 C.F.R. § 240.231(a). Thus, it was not the physical changes at Roselle Station that materially impaired Petitioner's ability to follow Metra's rules.

Petitioner's fourth assertion is that Metra conducted the efficiency test on Petitioner while he was operating on the Elgin Subdivision, not his normal position, materially impairing his ability to obey the speed restriction indicated by the yellow flag. This assertion lacks merit because efficiency tests are intended to "[t]est engineer compliance with one or more provisions of the railroad's operating rules, timetable or other mandatory directives that require affirmative response by the locomotive engineer to less favorable conditions than that which existed prior to initiation of the test." 49 C.F.R. § 240.303(d)(2). Moreover, Petitioner was certified to operate on both Metra's Elgin and Fox Lake Subdivisions and he was on both the Fox Lake and Elgin extra boards. See Tr. at 156-57. Petitioner's testimony reflects that he had operated over both within the 11 months prior to the efficiency test. See *id.* at 164-5. Thus, it was in the normal course of events that Petitioner would be required to operate over the Elgin Subdivision and it was proper for Metra to test Petitioner accordingly.

Petitioner's final assertion involves a procedural issue. Petitioner argues that Metra denied him evidence that would have proven his case when Metra declined to produce the four color still screenshots from the video recording that would allegedly show that the flag was placed directly in line with the yellow tactile. Considering that the Board found the yellow flag clearly visible, we do not find that Metra committed procedural error by failing to provide certain screen shots from the video.

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 APR 04 2011.



Richard M. McCord
Chairman, Locomotive Engineer Review Board

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.

SERVICE LIST EQAL 2010-20

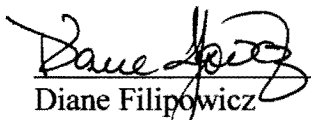
SENT CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Darryl E. Kopman
924 Long Meadow Drive
Schaumburg, IL 60193

Mr. Richard M. Wu
Local Chairman
BLE&T, Division 575
P.O. Box 377
Spring Grove, IL 60081

Mr. Marty Fitts
Northeast Illinois Regional Commuter Railroad Corp. (METRA)
547 W. Jackson Blvd.
Chicago, IL 60661

Mr. Andre Hunt
Director of Training and Certification
Northeast Illinois Regional Commuter Railroad Corp. (METRA)
Training & Certification Department
14th Floor West
Chicago, IL. 60661-5717




Diane Filipowicz
Administrative Specialist


APR 04 2011


Date

enc: Post LERB Memo

cc: FRA DOCKET EQAL 2010-20

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	
	B. Received by (<i>Printed Name</i>)	C. Date of Delivery
D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No		
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		
1. Article Addressed to: <div style="text-align: center;">  Mr. Darryl E. Kopman 924 Long Meadow Drive Shaumburg, IL 60193 </div> EQAL 2010-20		
2. Article Number <i>(Transfer from service label)</i> 7008 3230 0002 3925 4480		
PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540		

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	
	B. Received by (<i>Printed Name</i>)	C. Date of Delivery
D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No		
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		
1. Article Addressed to: <div style="text-align: center;">  Mr. Richard M. Wu Local Chairman, BLE&T, Division 575 P.O. Box 377 Spring Grove, IL 60081 </div> EQAL 2010-20		
2. Article Number <i>(Transfer from service label)</i> 7008 3230 0002 3925 4497		
PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540		

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	
	B. Received by (<i>Printed Name</i>)	C. Date of Delivery
D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No		
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		
1. Article Addressed to: <div style="text-align: center;">  Mr. Marty Fitts METRA 547 W. Jackson Blvd. Chicago, IL 60661 </div> EQAL 2010-20		
2. Article Number <i>(Transfer from service label)</i> 7008 3230 0002 3925 4503		
PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540		

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:

COMPLETE THIS SECTION ON DELIVERY

A. Signature X		<input type="checkbox"/> Agent <input type="checkbox"/> Addressee
B. Received by (<i>Printed Name</i>)	C. Date of Delivery	
D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No		



Mr. Andre Hunt
 Director of Training & Certification, METRA
 547 W. Jackson Blvd., 14th Floor West
 Chicago, IL 60661-5717

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.

EQAL 2010-20

4. Restricted Delivery? (*Extra Fee*) Yes

2. Article Number **7008 3230 0002 3925 4510**
(Transfer from service label)