

**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. R. E. Washington's  
Locomotive Engineer Certification

**FRA Docket Number EQAL 2010-34**

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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. R. E. Washington'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 grants the petition for the reasons set forth below.

**Background**

On February 19, 2010, at approximately 8:37 p.m., while working as a secondary remote control operator (RCO) on job number YPB75R-19, Petitioner allegedly failed to perform a yard transfer train air brake test, near Milepost (MP) 261, before departing for Pine Bluff Yard, on the Jonesboro Subdivision. See Pet. at 5, 7; Tr. at 118.

UP charged Petitioner with a violation of 49 C.F.R. § 240.117(e)(3) – “Failure to adhere to procedures for the safe use of train or engine brakes when the procedures are required for compliance with the initial terminal, intermediate terminal, or transfer train and yard test provisions . . . .” An investigation and hearing was held on June 15, 2010, and UP notified Petitioner of the revocation by letter dated June 23, 2010.

**Petitioner's Assertions**

The United Transportation Union (UTU) 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 August 11, 2010 and was timely filed. The petition asserts that the revocation was improper because:

- (1) Petitioner was unfamiliar with the territory and the foreman stated that “he would do all the work.” Pet. at 2.
- (2) Petitioner was denied due process during the investigation due to the absence of

the foreman and the vagueness of the investigation caption. See Pet. at 2.

- (3) Petitioner disputes the fairness of the reenactment and the veracity of the data downloaded from the locomotive event recorder. See Pet. at 2.

### **UP's Response**

Pursuant to 49 C.F.R. § 240.405(b), (c), a copy of the petition was sent to UP on August 25, 2010, and the railroad was afforded an opportunity to comment. By letter dated October 5, 2010, UP responded to Petitioner's assertion, as follows:

- (1) Petitioner's unfamiliarity with the territory and being a secondary RCO do not relieve him of following UP Rules or 49 C.F.R. Part 240 regulations. See UP Resp. at 1-2; Tr. at 58-59.
- (2) The "absence of the foreman . . . had no bearing on the outcome of the investigation in regards to the violation of 49 CFR Part 240.117." UP Resp. at 1.
- (3) The reenactment went "beyond what was required to satisfy [the crew's] questions," and verified that the locomotive event recorder properly recorded the brake setting. See UP Resp. at 2. The "fact that only one download was retrieved from the controlling locomotive, of a 2 locomotive consist, will [not] influence the data on the report." Id.

### **Board's Determinations**

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

- (1) On February 19, 2010, at approximately 8:37 p.m., the train crew on job number YPB75R-19 failed to perform a yard transfer train air brake test, near MP 261, before departing for Pine Bluff Yard, on the Jonesboro Subdivision. See Tr. at 46, 62, 89, and 118; Pet. at 5, 7; and UP Resp. at 1-2.
- (2) The train crew consisted of two RCOs. Mr. Allen served as the foreman and the primary RCO, and Petitioner served as the switchman/conductor and secondary RCO. See Tr. at 4, 23.
- (3) Mr. Allen told Petitioner to stay on the locomotive and Mr. Allen would make all of the switching movements at the port. See Tr. at 14-16 (Petitioner testified that "basically [Mr. Allen] told me that he would handle all of the work out there at the port to be performed and for me not to worry about it. It wasn't much switching to be done and that, you know if he needed me he would let me know, but for the most part he would be doing all of the work over there. And again, the download will state the exact same thing."); Tr. at 18; Tr. at 23-24; and Tr. at 26-28 ("when he told me he would handle it I really didn't, you know, I just assumed

that somewhere during the switching and him cutting in the air and all of that that he would make the brake test somewhere in there, but he never made me a part of it, but there are several different industries that we had to switch before we came back.”).

- (4) Mr. Allen commonly operated as the primary RCO, serving as the “primary controller the entire tour of duty.” See Tr. at 98-99 (Testimony of Switchman, Mr. Krisell); Tr. at 139 (Written Statement of Switchman, Mr. Thomas).
- (5) A UP supervisor performed a download of the event recorder data on the locomotive consist to which Petitioner was assigned. See Tr. at 30.
- (6) Upon review of the event recorder data for UPY1304, the supervisor noted that the crew failed to perform a yard transfer train air brake test before leaving the port after completing all of their switching duties and putting the train together. See Tr. at 31, 41-46.
- (7) The supervisor performed a reenactment to verify that the Remote Control Transmitters (RCT) and the locomotive were working properly. See Tr. at 62-63, 96.

### **Analysis of the Petition**

Petitioner’s first assertion raises two issues, one factual and one legal. Petitioner argues that UP’s decision to revoke his certification was improper because although he was called by the railroad to work as a certified locomotive engineer, he was not operating as the primary RCO for the entire tour of duty, not to mention when the alleged violation occurred. See Pet. at 2; Tr. at 16. First, the Board examined the record to determine whether there was substantial evidence to support Petitioner’s assertion that he was not the primary RCO.<sup>1</sup> Second, the Board considered whether a secondary RCO could legally be held responsible for a violation that occurred when the RCO was not operating.<sup>2</sup>

The Board finds that Petitioner’s first assertion has merit for the following reasons.

Whether Petitioner was the primary RCO at the time of the violation is a factual issue. Petitioner testified that he was merely the secondary RCO and did not have operational control of the locomotive via RCT after the initial “man down” test was performed. See Pet. at 2; Tr. at

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<sup>1</sup> When considering factual disputes, the Board will determine whether substantial evidence exists to support the railroad’s factual findings in its decision. See 58 Fed. Reg. 18982, 19001 (Apr. 9, 1993).

<sup>2</sup> When considering legal issues, the Board will determine whether the railroad’s legal interpretations are correct based on a de novo review. See 58 Fed. Reg. 18982, 19001 (Apr. 9, 1993).

13 (“from that test to the time that we sign off for the day . . . you will not see me on the download at all and the reason for that is because other than lining switches and basically helping in the switching and moving of the cars I really didn’t have much to add to the whole day’s work.”); Tr. at 23. Petitioner also testified that he was unfamiliar with the territory and the foreman stated that “he would do all the work.” See Pet. at 2-3; and Tr. at 12-13, 16, 23, and 26. Petitioner’s testimony was corroborated by the testimony of Mr. Krisell and the written statement by Mr. Thomas, who have both worked as switchmen with Mr. Allen on prior jobs, describing how Mr. Allen commonly operated as the “primary controller the entire tour of duty.” See Tr. at 98-100, 103, and 139. UP did not provide any evidence to contradict Petitioner’s assertion that he was not the primary RCO at the time of the violation,<sup>3</sup> nor does UP seem to dispute Petitioner’s assertion that he was not operating the RCT at the time of the violation. See UP Resp. at 1-2. Instead, UP’s argument appears focused on holding both RCOs equally responsible regardless of actual functions and duties – which brings us to the legal question raised by Petitioner’s assertion.

As the record reflects substantial evidence that Petitioner was the secondary RCO at the time of the violation, the Board must consider the legal issue of whether a secondary RCO can be held responsible under 49 C.F.R. Part 240. The most direct FRA pronouncement on this issue can be found on FRA’s website in a document intended to help RCOs understand their rights and responsibilities. The relevant agency statement is posed in question and answer format as follows:

Q-21. The RCL operations on my railroad involve a “pitch and catch” operation. There are two RCOs assigned to one locomotive. If for some reason a decertifiable event occurs, such as the locomotive passing a stop signal, will both assigned RCOs be subject to decertification?

A. **No.** Only the RCO operating the RCL at the time of the incident would be subject to decertification. However, if the non-operating RCO or another certified individual is functioning as a pilot or instructor, he or she could also be held responsible and subject to decertification.

See FRA Regulations & RCL Operations Q&As (revised February 2009),  
[www.fra.dot.gov/downloads/safety/RCLQAs0209.pdf](http://www.fra.dot.gov/downloads/safety/RCLQAs0209.pdf) (bolded emphasis in the original).

Similarly, the Board has noted that FRA’s regulatory exceptions and related interpretations have consistently called for revocation action when a certified locomotive engineer is operating or has some other duty to act. FRA’s focus on “operational misconduct” is highlighted by 49 C.F.R. § 240.117(c)(3), which provides an exception for engineers that are not actually performing the duties of an engineer at the time of the alleged revocable event. See 64 Fed.

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<sup>3</sup> The primary RCO was medically unavailable to attend the investigative hearing due to a debilitating stroke. See Tr. at 6-10. There is no indication that further postponement of the hearing would have helped to make the primary RCO available to testify at a later date. See Tr. at 6.

Reg. 60966, 60973, 60977 (Nov. 8, 1999) (showing that a certified engineer called to work as a conductor is not subject to revocation if the train is involved in a revocable event).<sup>4</sup> The Board recognizes that § 240.117(c)(3) does not directly apply in this situation because Petitioner was called to duty by the railroad as an RCO (a certified engineer). However, this regulation is analogous to the current circumstance because there is substantial evidence in the record to support that Petitioner spent most of the tour of duty acting more like a conductor than as an RCO. More generally, because FRA's policy seeks to deter "operational misconduct," it follows that the primary RCO operating the locomotive should be held primarily responsible for actions taken during the specific time of duty when the alleged incident occurred. See, e.g., 56 Fed. Reg. 28228, 28235, 28243 (June 19, 1991); 58 Fed. Reg. 18982, 18983, 18985-87, 18996 (Apr. 9, 1993); 63 Fed. Reg. 50626, 50627, 50634 (Sept. 22, 1998) (illustrating statements in FRA rulemakings on "Qualifications for Locomotive Engineers" that emphasize revocations are to address operational misconduct and to prevent future safety risks).

In this case, although both Petitioner and Mr. Allen were certified and called to operate the locomotive, they cannot operate the locomotive simultaneously. When an operating RCO "pitches" the operation of the locomotive to the other RCO on the crew, that pitching RCO ceases to be the locomotive engineer primarily responsible.<sup>5</sup> UP's argument that because Petitioner was initially called to duty as a RCO he is therefore responsible for any violation occurring during that job, regardless of who is the operating engineer, does not consider this specific factual situation where the secondary RCO was not involved in operating the train. In this case, the primary RCO could do the transfer brake test on his own and Petitioner had no

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<sup>4</sup> Note that the 49 C.F.R. § 240.117(c)(2) and (c)(3) exceptions were published in 1999 and not effective until January 7, 2000, which was before RCL operations began to proliferate in the United States. See 66 Fed. Reg. 10340 (Feb. 14, 2001)(publishing Safety Advisory 2001-1, in which FRA first recommended guidelines for the operation of remote control locomotives).

<sup>5</sup> However, the nuances of the specific RCT technology in use and the particular factual circumstances must be considered. There may be other situations where it is possible to argue that both RCOs are responsible for the revocable action. If, for example, the secondary RCO was watching the primary RCO perform the brake test improperly, the secondary RCO would have actual knowledge that the brake test was not performed correctly. The charging officer testified, "I've had employees come to me and tell me that other people on jobs are not doing what they're supposed to just because they can see what the other operator is doing." Tr. at 78. And while the Board would commend any employee that raises alleged noncompliance with his or her supervisor, the Board believes that a person called to duty as a secondary RCO or locomotive engineer would have a specific responsibility to ensure compliance with 49 C.F.R. Part 240. Under such circumstances, the Board would expect a secondary RCO to immediately confront the primary RCO prior to further remote control locomotive movements.

duty to confirm that the brake test was properly done<sup>6</sup> (nor had such actual knowledge at the time of the event) that should have triggered a response from Petitioner to take action.<sup>7</sup> Given these particular facts, and consistent with FRA policy, Petitioner's certificate should not be revoked for the incident at issue.

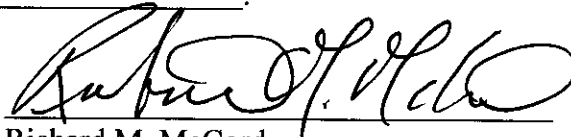
As the Board finds that the revocation was improper, the Board need not address the additional issues raised by Petitioner.

**Conclusion**

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

**MAR 03 2011**

Issued in Chicago, IL on \_\_\_\_\_



Richard M. McCord  
Chairman,  
Locomotive Engineer Review Board

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<sup>6</sup> The Board understands that the railroad's air brake rules hold all crewmembers responsible and that FRA cannot preempt or otherwise alter the authority of a railroad to initiate disciplinary sanctions against its employees. See 49 C.F.R. § 240.5(d). However, whether or not a person should be held responsible under 49 C.F.R. Part 240 is a legal issue within the Board's review.

<sup>7</sup> The Board recognizes UP's argument that Petitioner did have the ability to verify that the brake test had been completed by looking at the display on his RCT, however there was no heightened duty to watch the screen at all times to verify that this test had been performed. See Tr. at 18 (Petitioner testified that "[i]f Mr. Allen charged the brake system and I happened to be looking at the RCT at the same time that he charged it, then yes, I could attest to it."); Tr. at 59 (The charging officer testified that if Petitioner was monitoring his RCT display as a secondary RCO, "[Petitioner] could see everything that the primary operator is doing" via indicator lights on the box); Tr. at 101 (Mr. Krisell testified that as a secondary RCO, you cannot do an air test, and "basically all you could do [with the RCT] would be to put the train in emergency as far as brakes are concerned"); Tr. at 104-05 (Mr. Krisell testified that as a secondary RCO, you do not spend a lot of time watching the RCT: "you're not really paying attention to the box because you're looking other ways, looking off and protecting the job").

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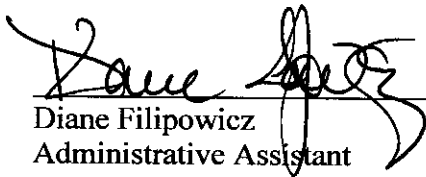
**SENT CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Mr. R. E. Washington  
1406 E. 42<sup>nd</sup> Avenue  
Pine Bluff, AR 71601

Mr. Steven R. Evans  
United Transportation Union  
1115 Bishop Street  
Little Rock, AR 72202

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 1010  
Omaha, NE 68179-1010

  
Diane Filipowicz  
Administrative Assistant

MAR 03 2011  
Date

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cc: FRA DOCKET EQAL 2010-34

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**EGAL 2010-34**

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