

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

Locomotive Engineer Review Board

Decision Concerning
Union Pacific Railroad's
Revocation of Mr. K.B. Dawson's
Locomotive Engineer Certification

FRA Docket Number EQAL 2010-35

Decision

The Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the decision of the Union Pacific Railroad (UP) to revoke Mr. K.B. Dawson'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 June 14, 2010, at approximately 12 p.m., while operating Train LCF51-14, Petitioner allegedly entered a 10 MPH speed restriction at approximately 47 MPH at American Falls, ID, near (milepost) MP 239.35, on UP's Nampa Subdivision, exceeding the maximum authorized speed by more than 10 MPH. Tr. Ex. 1.

UP 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 MPH." An investigation and hearing was held on June 22, 2010, and UP notified Petitioner of the revocation by letter dated June 29, 2010. Pet. at 2. See also, Pet. Ex. 1.

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 August 16, 2010 and was timely filed. The petition asserts that the revocation was improper because:

- (1) UP failed to properly notify Petitioner of the pending revocation under the certification requirements of CFR 249.307(b)(2). The hearing notice, dated June 22, 2010, instructed Petitioner to attend a discipline hearing, and did not alert the Petitioner that a certification hearing would be held in conjunction with this hearing. Petitioner submits he was

unaware that the hearing held on June 22, 2010, was also a hearing to determine if he still met the qualifications of a locomotive engineer. Pet. at 3-4; and

- (2) The “Notification of Certificate Revocation,” sent to Petitioner by UP indicated that Petitioner’s certificate was revoked because Petitioner violated 240.117(e)(2), “Failure to adhere to limitations concerning train speed when the speed at which the train was operated exceeds the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 MPH.” Pet. Ex. 1. The Notification included an additional element of revocation under 240.117(e)(2) addressing restricted speeds. Petitioner submits there was no restricted speed in effect when the incident occurred, and that assertion is false. Pet. at 3-4.

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 4 2010, UP responded to Petitioner’s assertions as follows:

- (1) Petitioner was properly notified of his certificate suspension. The “Notification of Certificate Suspension,” was signed by Petitioner on June 14, 2010. Resp. Exhibit A. The document states that UP may consolidate the certification hearing with the discipline hearing. Resp. at 1; and
- (2) The “Notification of Certificate Revocation,” was developed after the hearing was conducted. Pet. Exhibit 1. UP acknowledges that the restricted speed box is checked on the document. However, restricted speed was not an issue in this incident and has no bearing on the issues surrounding Petitioner’s failure to comply with 49 CFR 240.117(e)(2). Resp. at 1.

Board’s Determinations

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

- (1) On June 14, 2010, at approximately 12 p.m., while operating Train LCF51-14, Petitioner entered a 10 MPH speed restriction at approximately 47 MPH at American Falls, ID, near MP 239.35, on UP’s Nampa Subdivision, exceeding the maximum authorized speed by more than 10 MPH. Tr. at 10-13. See also, Tr. at 26-27. See also, Tr. at 34. See also, Tr. at 38.
- (2) The train crew consisted of the Petitioner and a conductor. En route, the crew was given a 10 MPH speed restriction over the radio by the train dispatcher. Tr. at 26-27.
- (3) A short time later, the track foreman reported the train traveling at excessive speed through this restriction. The crew stated that they received the speed restriction and mistakenly believed the restriction was located at the switch at East Bora. However, the restriction was located at the west switch at American Falls, MP 239.35. Tr. at 10. See

also, Tr. at 38.

- (4) A UP supervisor downloaded locomotive event recorder data from Petitioner's train and determined the train was being operated at 47 MPH as it passed over the 10 MPH speed restriction. Tr. at 11.
- (5) On June 14, 2010, Petitioner signed a "Notification of Certificate Suspension" for a 240.117(e)(2) violation, "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 MPH." Resp. Ex. A.
- (6) An investigation and hearing was held on June 22, 2010, and UP notified Petitioner of the revocation by letter dated June 29, 2010. Pet. at 2. See also, Pet. Ex. 1.

Analysis of the Petition

Both of Petitioner's assertions present procedural issues. 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 any of Petitioner's procedural arguments, and finds that if any procedural errors occurred, they did not cause Petitioner substantial harm.

First, Petitioner asserts that he was denied a fair and impartial hearing because UP failed to properly notify Petitioner of the pending revocation under the certification requirements of 49 C.F.R. § 249.307(b)(2). Pet. at 3-4. The Board recognizes that the charge letter sent to Petitioner by UP did not explicitly contain a notice that the certification hearing would be combined with the discipline hearing. However, UP's "Notification of Certificate Suspension," which was signed by Petitioner on June 14, 2010, states that UP may consolidate the certification hearing with the discipline hearing. Pet. Ex. 1. See also, Response Exhibit A. This document could have put Petitioner on notice. Nevertheless, even if Petitioner had no notice that the certification hearing was to be combined with his discipline hearing on June 22, 2010, Petitioner makes no assertion that he would have conducted his defense at the hearing in any different manner than how he conducted it on June 22, 2010. Petitioner provides no evidence that his defense of the revocation charge was substantially harmed by the alleged omission by UP. Thus, the Board finds no grounds on which to provide Petitioner relief.

Second, Petitioner argues that although the "Notification of Certificate Revocation" sent to him by UP shows that Petitioner's certificate was revoked because Petitioner violated 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 MPH," the Notification wrongly includes an additional element of revocation under 240.117(e)(2), which addresses restricted speeds. Petitioner submits there was no restricted speed in effect when the incident occurred,

and that this assertion is false. Pet. Ex. 1. See also, Pet. at 3-4.

The Board finds that the inclusion of restricted speeds in Petitioner's revocation notification was inadvertent and did not have any effect on Petitioner's overall revocation. Petitioner provides no evidence that he was substantially harmed by this inclusion. Thus, the Board finds no grounds on which to provide Petitioner relief.

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

SERVICE LIST EQAL 2010-35

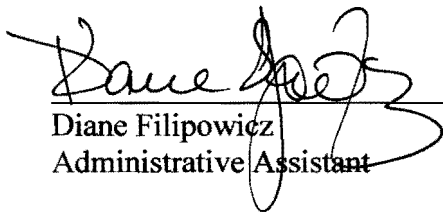
A copy of the Locomotive Engineer Review Board decision in this matter has been sent by certified mail and return receipt requested to each person shown below.

SENT CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. K.B. Dawson
5085 Arapahoe
Pocatello, ID 83201

Mr. Steven A. Leyshon
Brotherhood of Locomotive Engineers & Trainmen
1st Vice General Chairman
4380 Flowerdale Ct.
Las Vegas, NV 89103-4222

Ms. C.J. Hampton
Union Pacific Railroad
1400 Douglas St., STOP 1010
Omaha, NE 68179-1010




Diane Filipowicz
Administrative Assistant


APR 04 2011


Date

enc: Post LERB Memo

cc: FRA DOCKET EQAL 2010-35

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:	B. Received by (Printed Name)	C. Date of Delivery
 Mr. K.B. Dawson 5085 Arapahoe Pocatello, ID 83201	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 (Transfer from service label)	3. Service Type	
EQUAL 2010-35	<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? (Extra Fee) <input type="checkbox"/> Yes	
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	
1. Article Addressed to:	B. Received by (Printed Name)	C. Date of Delivery
 Mr. Steven A. Leyshon, BLE&T 1st Vice General Chairman 4380 Flowerdale Ct. Las Vegas, NV 89103-4222	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 (Transfer from service label)	3. Service Type	
EQUAL 2010-35	<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? (Extra Fee) <input type="checkbox"/> Yes	
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1. Article Addressed to:	B. Received by (Printed Name)	C. Date of Delivery
 Ms. C.J. Hampton Union Pacific Railroad 1400 Douglas St., STOP 1010 Omaha, NE 68179-1010	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 (Transfer from service label)	3. Service Type	
EQUAL 2010-35	<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? (Extra Fee) <input type="checkbox"/> Yes	
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