

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

Locomotive Engineer Review Board

Decision Concerning  
Union Pacific Railroad Company's  
Denial of Mr. A. L. Anderson's  
Locomotive Engineer Certification

**FRA Docket Number EQAL-2011-16**

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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 deny Mr. A. L. Anderson'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 improper for the reasons set forth below.

**Background**

On March 30, 2011, Petitioner was given a performance skills test in connection with certification as a remote control operator.<sup>1</sup> According to a UP "Notification of Unsatisfactory Performance" dated that same day, Petitioner did not achieve a passing score on that test and was "in jeopardy of failing the Union Pacific engine service/RCO training program."

Petitioner was given a second performance skills test on April 21, 2011. By "Notification of Certificate Pending Denial" dated that same day, UP notified Petitioner that a basis for denying certification existed because of Petitioner's failure to achieve a passing score on his second skills performance test. The Notification also noted that in compliance with 49 C.F.R. § 240.219(a), Petitioner was "entitled to a reasonable opportunity to explain or rebut, in writing, the adverse information prior to denial of certification." According to UP, Petitioner was terminated from employment with UP on April 21, 2011.

By letter dated April 25, 2011, Petitioner wrote to Monty Whatley, whom the Board understands to be a UP supervisor, "to exercise my right to rebut a RCO Certification denial." In that letter, Petitioner requested that he be allowed to continue with his RCO training and be given a third skills performance test. Petitioner did not receive a response to that letter.

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<sup>1</sup> Although the Board generally indicates the source of information referenced in this decision, it is unable to provide specific citations to the relevant documents because none of the parties' submissions contain page numbers or exhibit numbers.

On June 2, 2011, Petitioner filed a petition for review (Petition) with FRA asserting that UP denied his certification without following the procedures provided in 49 C.F.R. § 240.219. According to the Petition, UP did not provide Petitioner with “a score to dispute or any final finding Title 49 Sec. 240.219(a)” or follow the requirements of 49 C.F.R. § 240.219(c).

Pursuant to 49 C.F.R. §§ 240.405(b) and (c), FRA sent a copy of the Petition to UP, which was afforded an opportunity to comment. UP responded to the Petition by letter dated September 12, 2011 (Response). In its Response, UP argued that Petitioner “failed to meet the requirements of a locomotive engineer as required by 49CFR240.127” and therefore, was properly denied certification. The Response did not reference compliance with the requirements of 49 C.F.R. § 240.219.

On November 29, 2011, Counsel to the Board emailed Petitioner and UP indicating that the parties’ submissions did not contain the final, signed and dated, notification forms denying certification. Counsel requested that the parties provide the Board with the following fully executed documents:

- ‘Notification of Unsatisfactory Performance’ for an event occurring on 3/30/11.
- ‘Notification of Certificate Pending Denial’ which is dated 4/21/11.
- The final denial of certification decision, including the response to Petitioner’s letter to Mr. Monty Whatley dated 4/25/11.
- A copy of any scoring sheet or explanation of scoring produced in accordance with the railroad’s scoring system required by 240.127(f).

By email dated December 6, 2011, Petitioner responded to Counsel’s request by stating that he never received the requested documents and thus he would not be able to provide a copy to Counsel. UP also responded by email that same day stating that, with the possible exception of the scorecards prepared in connection with the 3/30/11 and 4/21/11 skills performance tests, “[t]o my knowledge, additional documentation relating to Mr. Anderson’s certification process does not exist for the reason that the process was not completed because Mr. Anderson’s employment was terminated before the denial process was completed.”

### **Board’s Determinations**

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

1. On March 30, 2011, Petitioner was given a performance skills test in connection with certification as a remote control operator.
2. A UP “Notification of Unsatisfactory Performance” dated March 30, 2011, stated that Petitioner did not achieve a passing score on the test and was “in jeopardy of failing the Union Pacific engine service/RCO training program.”

3. On April 21, 2011, Petitioner was given a second performance skills test in connection with certification as a remote control operator.
4. By “Notification of Certificate Pending Denial” dated April 21, 2011, UP notified Petitioner that a basis for denying certification existed because of Petitioner’s failure to achieve a passing score on his second skills performance test. The Notification also noted that in compliance with 49 C.F.R. § 240.219(a), Petitioner was “entitled to a reasonable opportunity to explain or rebut, in writing, the adverse information prior to denial of certification.”
5. Petitioner was terminated from employment with UP on April 21, 2011.

### **Board’s Analysis**

The Petition raises a procedural issue. Petitioner argues that UP failed to comply with the requirements of 49 C.F.R. § 240.219 governing the denial of certification. When considering procedural issues, 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.” 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.*

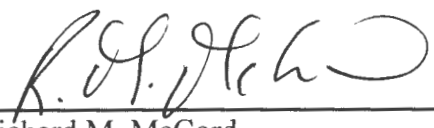
The Board finds that Petitioner’s assertion has merit. UP’s decision to terminate Petitioner’s employment is a separate matter from the certification process. Despite being terminated, Petitioner had been a candidate for certification who received two performance skills tests. As such, UP was required to comply with the requirements for denying certification pursuant to 49 C.F.R. § 240.219.

UP failed to notify Petitioner how the railroad scored the performance skills tests that UP claimed he did not pass. Such information should be the “information known to the railroad that forms the basis for denying the person certification” in this instance. 49 C.F.R. § 240.219(a). Without that information, it is impossible for Petitioner to have “a reasonable opportunity to explain or rebut that adverse information in writing prior to denying certification.” *Id.* Moreover, the skills test provisions in 49 C.F.R. § 240.127(f), effective February 22, 2010, require the railroad to identify a scoring system to be used in evaluating a candidate’s performance on a skills test. The March 30 and April 21, 2011 Notifications do not reference the scoring system used for the skills tests or indicate how the tests were scored. Further, UP did not notify Petitioner of its decision to deny certification and the basis for its decision in violation of 49 C.F.R. § 240.219(c). Thus, the Board grants the Petition due to a procedural error that caused Petitioner substantial harm in his ability to rebut the railroad’s denial of his certification as a locomotive engineer.

**Conclusion**

Based on the above findings, the Board hereby GRANTS the Petition in accordance with the provisions of Title 49, Part 240 of the Code of Federal Regulations.

Issued in Chicago, IL on                     FEB 07 2012                    .

  
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Richard M. McCord  
Chairman,  
Locomotive Engineer Review Board

**SERVICE LIST EQAL 2011-16**

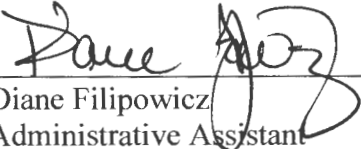
A copy of the Locomotive Engineer Review Board decision in this matter has been sent by certified mail, return receipt requested to each person shown below.

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

Mr. A. L. Anderson  
1522 Parham Pointe Dr. 21K  
Little Rock, AR 72204

Ms. Christine J. Hampton  
Union Pacific Railroad Company  
1400 Douglas St. mailstop 1010  
Omaha, Nebraska 68179-1010

Ms. Patricia O. Kiscoan  
Union Pacific Railroad Company  
1400 Douglas St. mailstop 1580  
Omaha, Nebraska 68179-1580

  
\_\_\_\_\_  
Diane Filipowicz  
Administrative Assistant

FEB 07 2012  
\_\_\_\_\_  
Date

enc: Post LERB Memo

cc: FRA Docket EQAL 2011-16

**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. A. L. Anderson  
1522 Parham Pointe Dr. 21K  
Little Rock, AR 72204

2. Article Number  
(Transfer from service label)

PS Form 3811, February 2004 Domestic Return Receipt

**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  No  
If YES, enter delivery address below:

3. Service Type  
 Certified Mail  Express Mail  
 Registered  Return Receipt for Merchandise  
 Insured Mail  C.O.D.

4. Restricted Delivery? (Extra Fee)  Yes

**EQAL 2011-10**

7008 3230 0002 3925 8167

102595-02-M-1540

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- 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:

Ms. Christine J. Hampton  
Union Pacific Railroad Company  
1400 Douglas St. mailstop 1010  
Omaha, Nebraska 68179-1010

2. Article Number  
(Transfer from service label)

PS Form 3811, February 2004 Domestic Return Receipt

**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  No  
If YES, enter delivery address below:

3. Service Type  
 Certified Mail  Express Mail  
 Registered  Return Receipt for Merchandise  
 Insured Mail  C.O.D.

4. Restricted Delivery? (Extra Fee)  Yes

**EQAL 2011-10**

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102595-02-M-1540

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- 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:

Ms. Patricia O. Kiscoan  
Union Pacific Railroad Company  
1400 Douglas St. mailstop 1580  
Omaha, Nebraska 68179-1580

2. Article Number  
(Transfer from service label)

PS Form 3811, February 2004 Domestic Return Receipt

**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  No  
If YES, enter delivery address below:

3. Service Type  
 Certified Mail  Express Mail  
 Registered  Return Receipt for Merchandise  
 Insured Mail  C.O.D.

4. Restricted Delivery? (Extra Fee)  Yes

**EQAL 2011-10**

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