

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

Locomotive Engineer Review Board

Decision Concerning
Union Pacific Railroad's
Revocation of Mr. T.W. Moore's
Locomotive Engineer Certification

FRA Docket Number EQAL 2011-19

Decision

The Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the decision of Union Pacific Railroad (UP) to revoke Mr. T.W. Moore's (Petitioner) locomotive engineer 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 stated below.

Background

On December 26, 2010, at approximately 5:45 p.m., while operating Train MPIBJ-26, Petitioner and his crew did not stop and protect a public grade crossing at milepost 155.52, as required by Form C Track Bulletin No. 83016, which was in effect.

UP charged Petitioner with a violation of 49 C.F.R. § 240.117(e)(4), "Occupying main track or a segment of main track without proper authority or permission." An investigation and hearing was held on February 17, 2011, and UP notified Petitioner of the revocation of his certification by letter dated February 24, 2011. Pet. Ex. A.

Petitioner's Assertions

By petition received on June 23, 2011, Petitioner requested FRA review of UP's decision to revoke his certification. The petition asserts that the revocation was improper for the following reasons:

- (1) Respondent's Superintendent failed to review the transcript record and failed to consider the evidence contained therein prior to the revocation of his certification. Petitioner also asserts that the revocation decision was not signed by a railroad official, as required by 49 C.F.R. §240.307(c)(10), since a third-party railroad contractor used Superintendent D.R. Witthaus' signature stamp to sign the Post-Hearing Notification of Certificate Revocation.
- (2) Petitioner was improperly denied union representation when his Brotherhood of Locomotive Engineers and Trainmen (BLET) representative, M.D. Waldemer, was removed from the investigation hearing because he is not an employee of Union Pacific.

- (3) Respondent did not specifically charge Petitioner with occupying main track without authority or any specific violation of FRA regulations in the Notice of Investigation.
- (4) Respondent failed to meet its burden of proof, set forth in 49 C.F.R. § 240.307(c)(12), that the locomotive engineer's conduct was not in compliance with the applicable railroad operating rule or practice. Petitioner asserts that Respondent's entire case was based upon unauthenticated data that had been downloaded from one of the locomotives in the consist of Petitioner's train. In addition, the Hearing Officer improperly refused to admit Respondent's Maintenance Record for the locomotive from which the event recorder download was obtained.

UP's Response

Pursuant to 49 C.F.R. § 240.405(b) and (c), a copy of the petition was sent to UP on June 22, 2011, and the railroad was afforded an opportunity to comment. UP submitted a timely response to Petitioner's assertions by letter dated September 14, 2011, as follows:

- (1) The Superintendent reviewed the transcript of the proceeding and made the material decisions in this matter. The third-party entity at issue merely assists in preparing the written transcript of recorded investigation hearings and may coordinate the mailing of certain correspondence. However, nothing is prepared by this third-party entity outside of UP's direction and control.
- (2) BLET Administrative Assistant M.D. Waldemer was excused from the investigation hearing by the Hearing Officer based upon the collective bargaining agreement between BLET and UP. The System Discipline Rule permits representation by a "BLE representative(s)," which is defined as a BLET Local Chairman or other elected BLET Officer. M.D. Waldemer is neither a Local Chairman nor an elected BLET officer. Despite M.D. Waldemer's exclusion from the investigation hearing, it should be noted that a proper union representative remained in attendance at the hearing with Petitioner.
- (3) The investigation notice was proper and adequate upon which to prepare a defense.
- (4) UP satisfied its burden of proof in concluding that Petitioner failed to stop and protect the public crossing as required by the Form C track bulletin. The hearing officer considered the testimony and evidence produced by the Manager of Operating Practices which clearly showed that Petitioner and his crew failed to stop short and protect a public grade crossing that had been identified as having disabled or malfunctioning active warning devices. Neither Petitioner nor his crew was able to refute the locomotive event recorder download, which clearly showed that Petitioner's train was operating at approximately 37 miles per hour at Milepost 155.52, the location of the public grade crossing which was subject to the Form C track bulletin.

Analysis of the Petition

When considering procedural issues, the Board's standard for review will be to 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.

With respect to Petitioner's first assertion that the Superintendent's signature was stamped on the Post-Hearing Notification of Certificate Revocation by a third-party entity, the Board finds insufficient evidence to support the allegation that the Superintendent failed to review the transcript or consider the evidence contained therein prior to the revoking Petitioner's certification.

While Petitioner's second assertion related to his rights under the applicable collective bargaining agreement is beyond the purview of the Board, the Board finds that the exclusion of BLET Administrative Assistant M.D. Waldemer did not cause Petitioner substantial harm or affect the ability of Petitioner or Petitioner's representative to cross-examine witnesses or provide probative evidence.

With respect to Petitioner's third assertion, the Board notes that the Notice of Investigation did not contain a citation to the specific provision in 49 CFR Part 240 that Petitioner allegedly violated. However, the Board finds that the Notice of Investigation contained a sufficient description of the facts underlying the charge to allow Petitioner and his representative to prepare a defense. In making this finding, the Board notes that the transcribed testimony and exhibits contain no evidence that Petitioner was caused substantial harm or that the ability of Petitioner or Petitioner's representative to cross-examine witnesses or provide probative evidence was impaired.

When considering factual issues, the Board will determine whether there is substantial evidence to support the railroad's decision and a negative decision is grounds for reversal. After consideration of Petitioner's fourth assertion, the Board finds substantial evidence in the transcript testimony and exhibits that UP met its burden of proof that Petitioner's conduct was not in compliance with applicable UP operating rules and practice. In making this finding, the Board notes that the locomotive event recorder download, AEI and GPS data (while conflicting) indicate train movement at the location of the public grade crossing, despite the directive contained in the Form C Track Bulletin to stop and protect the crossing.

Conclusion

Based on the findings noted above, the Board hereby denies Engineer Moore's petition for review in accordance with the provisions of 49 C.F.R. Part 240.

Issued in Chicago, IL on FEB 21 2012


Richard M. McCord
Chairman,

Locomotive Engineer Review Board

SERVICE LIST EQAL 2011-19

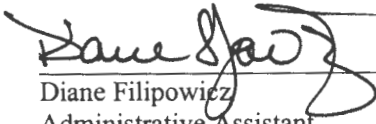
A copy of the Locomotive Engineer Review Board decision in this matter has been sent by certified mail and return receipt requested to each person shown below.

SENT CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. T.W. Moore
1107 Meadow Lane
Salem, IL 62881

Mr. Charles R. Rightnowar
General Chairman BLET
Union Pacific – Central Region
320 Brookes Drive, Suite 115
Hazelwood, MO 63042

Ms. Christine Hampton
Director, Training and Quality Assurance
Union Pacific Railroad Company
1400 Douglas St., Mail Stop 1030
Omaha, NE 68179



Diane Filipowicz
Administrative Assistant

FEB 21 2012

Date

cc: FRA DOCKET EQAL 2011-19

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. T.W. Moore
 1107 Meadow Lane
 Salem, IL 62881

EQAL 2011-19

2. Article Number
(Transfer from service label)

7008 3230 0002 3925 8099

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

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent
 Addressee

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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 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

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- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Mr. Charles R. Rightnowar
 General Chairman BLET
 Union Pacific – Central Region
 320 Brookes Drive, Suite 115
 Hazelwood, MO 63042

EQAL 2011-19

2. Article Number
(Transfer from service label)

7008 3230 0002 3925 8082

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 Registered Return Receipt for Merchandise
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1. Article Addressed to:

Ms. Christine Hampton
 Director, Training and Quality Assurance
 Union Pacific Railroad Company
 1400 Douglas St., Mail Stop 1030
 Omaha, NE 68179

EQAL 2011-19

2. Article Number
(Transfer from service label)

7008 3230 0002 3925 8075

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If YES, enter delivery address below: No

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

4. Restricted Delivery? (Extra Fee) Yes