

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

Locomotive Engineer Review Board

Review and Determination Concerning
Union Pacific Railroad Company's
Decision to Revoke Mr. R.J. Cole's
Locomotive Engineer Certification

FRA Docket Number EQAL-2011-20

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 the locomotive engineer certification (certification) of Mr. R.J. Cole (Petitioner) in accordance with the provisions of Title 49, Part 240 of the Code of Federal Regulations. The Board hereby grants Mr. Cole's petition for the reasons set forth below.

Background

On February 8, 2011, at approximately 10:10 p.m., Petitioner and a conductor were operating Train MPBEW on the Shreveport Subdivision, when they allegedly released track warrant number 9396 with limits 390.3 to Alden Bridge, and occupied the main track without authority at Alden Bridge at or near milepost (MP) 432.

A combined railroad discipline and Federal certification hearing was held on March 1, 2011. By a letter dated March 9, 2011, Petitioner was notified that his certification was revoked.

The Brotherhood of Locomotive Engineers & Trainmen (BLET) filed a petition with the FRA on behalf of Petitioner, requesting that the Board review UP's decision to revoke Petitioner's certification. The petition was received by FRA on July 6, 2011, and was timely filed. The petition asserted that the decision to revoke Petitioner's certification was improper for the following reasons:

- (1) Petitioner was substantially harmed by UP Superintendent's failure to review the transcript record and consider the evidence therein. Someone else used the Superintendent's signature stamp who was not a railroad official and was not qualified to review the record, or consider the evidence. This violates the Petitioner's right to due process.

- (2) Petitioner was substantially harmed because UP failed to produce the train dispatcher as a witness at the hearing. The dispatcher was an active participant in the incident giving rise to the charges and was a relevant and essential witness to ensure the full, fair and impartial development of the facts at the hearing.
- (3) Petitioner had no forewarning or ability to stop the conductor from the erroneous communication regarding the release of the track warrant. Petitioner was operating the train and preparing to stop; within the "red zone" he was focused on his duties. The conductor's actions could not be predicted by the Petitioner and materially impaired the ability of Petitioner to comply with the railroad operating rule.

Pursuant to 49 C.F.R. §§ 240.405(b) and (c), a copy of the petition was provided to UP, and the railroad was afforded an opportunity to comment. UP responded to Petitioner's assertions in a letter dated September 14, 2011 as follows:

- (1) The signature on the Post-Hearing Notification of Certificate Revocation and subsequent issuance of the decision to revoke Petitioner's certification did not make void Petitioner's violation of Main Track Authority, 49 CFR § 240.117(e)(4) and GCOR 6.3. The fact that the letter was sent from Spring, TX makes clear due process internal to UP was followed, as UP allows the regional Director of Operating Practices to review the transcript and letter of revocation before it is mailed to the employee.
- (2) Petitioner was not substantially harmed by not having the train dispatcher present at the hearing. The recording between the crew and dispatcher was used in lieu of the dispatcher being present. The recorded conversation was entered into the record as Carrier's Exhibit number 6; the conversation was also transcribed into the record. Tr. at 30, lines 04-24 and at 31, lines 1-14.
- (3) The track warrant was not issued to Petitioner, but to the crew on board the locomotive that was being controlled by Petitioner at the time of the incident. It is the responsibility of both crewmembers, as outlined in GCOR 14.7 Reporting Clear of Limits. The engineer and conductor are held jointly responsible for ascertaining and agreeing on the exact location their train has passed before clearing track warrant limits. Petitioner, along with his conductor, did in fact release track warrant number 9396. If Petitioner was indeed in a cab red zone, he would have been prepared to stop short of the west siding switch, as it was stated in the track warrant that the switch was lined for siding. Petitioner is attempting to deflect his responsibility and diminish his culpability; both Petitioner and conductor are jointly responsible for operation of their train in both good and bad situations.

Locomotive Engineer Review Board's Determination

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

- (1) On February 8, 2011, at approximately 10:10 p.m., Petitioner was operating train MPBEW-08 on the main track at or near MP 432 on the Shreveport Subdivision.
- (2) The train crew consisted of Petitioner and a conductor.
- (3) The crew was moving the train under the authority of Track Warrant No. 9396, which gave them authority to operate between MP 390.3 and Alden Bridge, the last named point on the Shreveport Subdivision. Tr. Ex. 6.
- (4) The train was approaching Alden Bridge, where the crew knew the west switch was lined for the siding, and lined against their train. Petitioner had passed a restricted proceed signal and was therefore operating in a "Cab Red Zone" and preparing to bring his train to a stop before reaching the west switch at Alden Bridge. When an engineer is operating in a "Cab Red Zone," his attention must be solely devoted to the operation of the train and stopping it at the proper point; the engineer is prohibited from talking on the radio while in a "Cab Red Zone." Tr. at 64, 88, 91.
- (5) Simultaneous with Petitioner operating the train in a "Cab Red Zone" and preparing to stop the train, the conductor called the dispatcher on the radio to release Track Warrant No. 9396 as the conductor believed the train was clear of the track warrant limits. The conductor did not speak to Petitioner before calling the dispatcher. Tr. at 28, 92.
- (6) Petitioner heard the conductor speaking to the dispatcher on the radio, realizing that the conductor was in the process of releasing Track Warrant No. 9396 and that the train was not, in fact, clear of the track warrant limits. Petitioner immediately said "abort, abort, abort" to the conductor in order to stop him from releasing the track warrant. Tr. at 29, 92. Petitioner had no knowledge prior to the radio call that the conductor was going to release the track warrant. Tr. at 92.
- (7) At this time, the conductor was still on the radio with the dispatcher, and immediately stated that he wanted to stop the release of the track warrant as the train was not clear of the limits. Tr. at 30-31, 100.

Analysis of the 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 (April 9, 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).]

Petitioner's third assertion is that the conductor's actions in releasing the track warrant constituted an intervening cause that prevented or materially impaired Petitioner's ability to comply with the railroad operating rule or practice at issue. The Board finds that this assertion has merit. At the moment that the conductor called the dispatcher to release the track warrant, Petitioner was performing his duties exactly as required. He was in a "Cab Red Zone" and was fully concentrating on bringing his train to a stop before the west switch at Alden Bridge. The locomotive event recorder downloads and witness testimony show that there were no exceptions to Petitioner's operation of the train. At the instant that Petitioner realized what the conductor was doing, he immediately cried "abort, abort, abort" and did all that he possibly could to prevent the track warrant from being released. The conductor immediately attempted to correct his error with the dispatcher. Petitioner had no warning of the conductor's actions, and could have done nothing else to prevent the conductor's actions.

It is also not clear whether the track warrant was, in fact, released by the dispatcher. It is evident that, at most, there was an extremely short time (perhaps one minute) where the train may have been technically operating without authority. This is subject to interpretation, since the dispatcher was not available to answer questions and because it is not clear whether the track warrant was indeed released by the dispatcher. However, the Board declines to address this issue and Petitioner's procedural issues as we have granted the petition based on Petitioner's third assertion.

Conclusion

For the foregoing reasons, the Board finds that UP's decision to revoke Petitioner's certification under the provisions of 49 C.F.R. Part 240 is not supported by substantial evidence, and that there was an intervening cause that prevented Petitioner from complying with the applicable

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

Issued in Chicago, IL on **FEB 21 2012** _____.

A handwritten signature in blue ink, appearing to read "Richard M. McCord", written over a horizontal line.

Richard M. McCord
Chairman,
Locomotive Engineer Review Board

SERVICE LIST EQAL 2011-20

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


CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. R.J. Cole
P.O. Box 712
Sheridan, AR 72510-0712

Ms. Christine Hampton
Union Pacific Railroad Company
1400 Douglas Street, Mailstop 1030
Omaha, NE 68179

Mr. Lawrence Brennan, Jr.
Manager, Engineer Certification & Licensing
Union Pacific Railroad Company
1400 Douglas Street, Mailstop 1010
Omaha, NE 68179

Mr. Charles Rightnowar
General Chairman BLET
Union Pacific – Central Region
Hazelwood, MO 63042



Diane Filipowicz
Administrative Assistant

FEB 21 2012

Date

cc: FRA Docket EQAL 2011-20

enc: Post LERB Memo

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- Print your name and address on the reverse so that we can return the card to you.
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1. Article Addressed to:

Mr. R.J. Cole
 P.O. Box 712
 Sheridan, AR 72510-0712

EQAL 2011-20

2. Article Number
(Transfer from service label)

7008 3230 0002 3925 8068

PS Form 3811, February 2004

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1. Article Addressed to:

Ms. Christine Hampton
 Union Pacific Railroad Company
 1400 Douglas Street, Mailstop 1030
 Omaha, NE 68179

EQAL 2011-20

2. Article Number
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7008 3230 0002 3925 8044

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1. Article Addressed to:

Mr. Lawrence Brennan, Jr.
 Manager, Engineer Certification & Licensing
 Union Pacific Railroad Company
 1400 Douglas Street, Mailstop 1010
 Omaha, NE 68179

EQAL 2011-20

2. Article Number
(Transfer from service label)

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1. Article Addressed to:

Mr. Charles Rightnowar
 General Chairman BLET
 Union Pacific – Central Region
 Hazelwood, MO 63042

EQAL 2011-20

2. Article Number

(Transfer from service label)

7008 3230 0002 3925 8037

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