

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

Locomotive Engineer Review Board

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

FRA Docket Number EQAL-2011-21

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

Background

On March 30, 2011, on the Jewel, Clinton, and Mason City subdivisions, between Eagle Grove and Des Moines, Iowa, train MEADM-30 was being operated by Petitioner, an engineer with approximately 14 years of experience.

The train arrived at an ethanol facility, located near MP 23 on the Jewel Subdivision, at approximately 6:50 a.m., to pick-up and set out cars. The train stopped for the conductor to line the switch, remove a derail, open a gate, removed the rear-end device and protected the train showing movement into the facility. After placing the rear end device on the rear of the picked up cut of cars, the crew performed a Class 1 Initial Terminal Air Test on the cars being added to the train.

Subsequent to performing these tasks, the crew then proceeded to make a cut and set out several cars. The crew then recoupled the locomotives to the train, cut in the brake pipe air, and proceeded to depart the industrial site. The train operated onto the main track approximately 1.25 to 1.5 miles at 10 miles per hour towards, but not crossing, Highway 69, a public highway-rail crossing. At this time, starting at approximately 8:02 a.m., Petitioner asserts a Class 3 Brake Test was performed. At this location, the conductor also restored the derail and main track switch to their normal positions.

After departing, at approximately 8:47 a.m., with the conductor engaged in personal tasks while in the trailing locomotive, Petitioner quickly applied the brakes but overshot a crossing. Petitioner then moved the lead locomotive in reverse 171 feet.

In a Notice of Investigation dated April 11, 2011, UP instructed Petitioner to attend an investigation and hearing to develop the facts and place individual responsibility, if any, in connection with a failure to perform a Class 3 Air Brake Test on the subject train prior to departing. In a revised Notice of Investigation dated April 13, 2011, UP included an additional charge alleging that Petitioner made a reverse movement with the train without providing required protection.

After multiple postponements, the railroad held an investigative hearing on May 2, 2011, in Eagle Grove, Iowa. In a Discipline Notice dated May 11, 2011, UP notified Petitioner that both charges—which concerned General Code of Operation Rules (GCOR) 30.15, 30.15.1, and 30.15.2 regarding the timing and procedure for Class 3 Air Brake Tests and GCOR 6.5 regarding shoving movements—were sustained and, as a result of the investigation, he would be permanently dismissed. The attached form also indicates that Petitioner’s engineer certificate was revoked between April 7, 2011, and May 7, 2011, for violating railroad rules developed pursuant to 49 CFR § 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.”).

Petitioner timely filed a petition dated June 22, 2011. In his petition, Petitioner contends that his certification should not have been revoked since he did in fact perform a Class 3 Air Brake Test. UP, however, contends that the facts and evidence developed during the hearing validates the revocation of Petitioner's certification for failing to perform the proper air test as required. According to UP, Petitioner was required to perform a Class 3 Air Brake Test before departing the ethanol facility.

Since the petition was silent regarding the shoving movement and the sustained allegation regarding GCOR 6.5, the Board will not consider that charge.

Locomotive Engineer Review Board’s Determination

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

- (1) On March 30, 2011, Petitioner was the engineer operating train MEADM-30.
- (2) After arriving at 6:50 a.m. at an industrial site located at MP 23 on the Jewel Subdivision, Iowa, Petitioner and the conductor picked up cars and performed a Class 1 Air Brake Test.
- (3) Petitioner operated train MEADM-30 approximately 1.25 to 1.5 miles and stopped before reaching a highway-rail grade crossing. At that location, the conductor restored the derail and main track switch into their normal positions.
- (4) At 8:02 a.m., Petitioner and the conductor performed a Class 3 Air Brake Test and then continued to operate the train on the main track.

Analysis of the Petition

In reviewing petitions of revocation decisions, the Board considers four issues in determining whether decertification 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 (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).

The Board finds that UP has provided insufficient evidence to support its revocation of Petitioner's certification.

Both Petitioner and UP agree, and the evidence and testimonies support, that a Class 3 Air Brake Test was performed approximately 1.25 to 1.5 miles outside of the ethanol facility, but before the train had reached the highway-rail grade crossing. For instance, a UP Manager of Operating Practices provided a complete and concise interpretation of event recorder data in his testimony, which included a brake set and release constituting a Class 3 Air Brake Test.

According to the cited GCOR, a Class 3 Air Brake test must be conducted when a train picks up a block of previously tested cars. This is consistent with 49 CFR § 232.211, which governs Class 3 Air Brake Tests.

However, there is an exception during switching operations. According to 49 CFR §232.3(d)(6), Class 3 Air Brake Tests and all other part 232 requirements are not applicable to "Cars used exclusively in switching operations and not used in train movements within the meaning of the Federal safety appliance laws (49 U.S.C. 20301-20306)."

Until the derail and main track switch was restored to their normal positions, the Board believes that the movement of the train from the ethanol facility to the main track is considered part of the switching operation. After all switching related operations were completed, a Class 3 Air Brake Test is required and was performed prior to train movement.

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—as it relates to GCOR 30.15, 30.15.1, and 30.15.2,

and 49 CFR § 232.117(e)(3)—is not supported by substantial evidence. Based on its review of the record, the Board hereby approves the petition in accordance with the provisions of 49 C.F.R. part 240. The Board refrains from considering the charges relating to GCOR 6.5, since it was not petitioned to do so.

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 2011-21

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

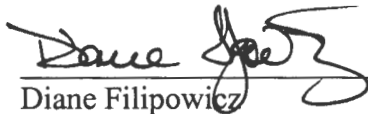
CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. J. R. Egemo
30742 Deer Drive
Huxley, Iowa 50124

Mr. E. A. Darland
Local Chairman – UTU
1916 North Wright Avenue
Eagle Grove, IA 50533

Ms. C. J. Hampton
Union Pacific Railroad Company
1400 Douglas St., Mailstop 1030
Omaha, NE 68179-1020

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



Diane Filipowicz
Administrative Assistant

FEB 21 2012

Date

cc: FRA Docket EQAL 2011-21

enc: Post LERB Memo

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. J. R. Egemo
30742 Deer Drive
Huxley, Iowa 50124

EQAL 2011-21

2. Article Number
(Transfer from service label)

7008 3230 0002 3925 8020

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

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
 If YES, enter delivery address below: No

3. Service Type

 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.
4. Restricted Delivery? (Extra Fee) Yes

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1. Article Addressed to:

Mr. E. A. Darland
Local Chairman - UTU
1916 North Wright Avenue
Eagle Grove, IA 50533

EQAL 2011-21

2. Article Number
(Transfer from service label)

7008 3230 0002 3925 8013

PS Form 3811, February 2004

Domestic Return Receipt

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 D. Is delivery address different from item 1? Yes
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3. Service Type

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 Registered Return Receipt for Merchandise
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4. Restricted Delivery? (Extra Fee) Yes

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

1. Article Addressed to:

Ms. C. J. Hampton
Union Pacific Railroad Company
1400 Douglas St., Mailstop 1030
Omaha, NE 68179-1020

EQAL 2011-21

2. Article Number
(Transfer from service label)

7008 3230 0002 3925 8006

PS Form 3811, February 2004

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

EQAL 2011-21

2. Article Number
(Transfer from service label)

7008 3230 0002 3925 7993

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A. Signature

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 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

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

4. Restricted Delivery? (Extra Fee)

 Yes