

**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. D. Grigalunas's Locomotive Engineer Certification

FRA Docket Number EQAL-2011-29

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. D. Grigalunas (Petitioner) in accordance with the provisions of Title 49, Part 240 of the Code of Federal Regulations. The Board hereby determines that UP's decision to revoke Petitioner's certification was improper for the reasons set forth below.

Background

On December 6, 2010, Petitioner was serving as a pilot engineer for YPR77-05, a consist of three light locomotives. See Pet. at 1 and UP Resp. at 1. The crew of YPR77-05 consisted of Petitioner, another engineer, and a conductor. Id. Due to a frozen switch, the crew was instructed to operate southbound on Main Track 1 of the Milwaukee Subdivision. See Pet. at 1 and UP Resp. at 2. Because Main Track 1 is a northbound track, UP Operating Rules 6.3 and 9.15 required the crew to obtain a track permit from the Deval Tower Operator before entering the territory and proceeding southbound against the normal current of traffic. See Tr. Exs. 21, 23, and 24. After receiving a restricting signal, the crew proceeded through an interlocking and entered track permit limits on Main Track 1. See Pet. at 1 and UP Resp. at 2. Petitioner allegedly did not receive the necessary track permit, however, until YPR77-05 was already within the track permit limits. See Tr. Ex. 25.

UP charged Petitioner with violating 49 C.F.R. § 240.117(e)(4), "occupying main track or a segment of main track without proper authority or permission." See UP Resp. Ex. 2. UP notified Petitioner that his certification was suspended on December 6, 2010. Id. A combined Federal decertification and railroad discipline hearing was originally scheduled for December 22, 2010. See Tr. Ex. 1. This proceeding was supposed to combine the hearings for the various crew members of the YPR77-05 into one hearing. While Petitioner was ready to proceed with the hearing on that date, it was either postponed or recessed several times until it was finally concluded on July 7, 2011, more than seven months after the hearing was originally scheduled. See Tr. Exs. 1, 6, 11, 15, 26, 28, and 30. The various reasons for this delay included requests

from the conductor's representative (the United Transportation Union (UTU)) and the absence of the Deval Tower Operator as a witness for UP. See id. and Tr. Ex. 32 at 81-82. Petitioner neither requested nor concurred with any of these postponements or recesses. See Pet. Rep. at 2.

By letter dated July 15, 2011, UP notified Petitioner that his certification was revoked for a period of 30 days. See Pet. Ex. 2.

Petitioner's Assertions

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 his certification. The petition was received by the FRA on September 28, 2011 and was timely filed. The petition asserted that revocation of Petitioner's certification was improper for the following reasons:

- (1) UP improperly revoked Petitioner's certification under § 240.117(e)(4) because it failed to prove that Petitioner violated Rule 6.3 and Rule 9.15 by occupying a segment of main track without proper authority or permission. UP failed to produce the Deval Tower Operator as a key witness for questioning by Petitioner.

Petitioner had secured a permit prior to entering the main track. The Deval Tower Operator granted this permission via a track permit and a restricted signal indication that permitted Petitioner to proceed through the interlocking. The crew of the YPR77-05 all testified that the Deval Tower Operator issued a track permit with an OK time and had to give a second OK time 11 minutes later.

- (2) UP unilaterally postponed Petitioner's hearing without his consent for over 200 days, violating 49 CFR § 240.307(c)(1).

UP's Response

Pursuant to 49 C.F.R. § 240.405(b) and (c), a copy of the petition was sent to UP on September 30, 2011, and the railroad was afforded an opportunity to comment. UP timely responded to Petitioner's assertions by letter dated November 21, 2011 as follows:

- (1) Petitioner failed to obtain the track permit required by Rule 9.15 before occupying main track. The crew had a restricting signal to proceed through the interlocking and was then stopped by the Deval Tower Operator to copy a track permit. Once the crew started the move through the interlocking, however, they could not stop before entering track permit territory.

Petitioner did not provide evidence supporting his claim that the track permit was secured before entering the limits of Main Track 1, as required by Rule 9.15 and Rule 6.3. Although there was a restricting signal displayed, the Deval Tower Operator was in violation of Rule 9.15 by displaying a restricting signal for the crew.

- (2) Section 5 of the BLE System Discipline Agreement provides that “Unless postponed for good cause, the investigation will be held not later than ten days after the date of notice.” The hearing was postponed a number of times at the request of the UTU and due to witnesses not being able to attend. These reasons constituted good cause for postponing the hearing.

UP’s response also included two attachments that had not been introduced as evidence during the hearing: a CAD log readout of the incident and a CAD screen shot showing the tracks designation of the location where the incident took place. See UP Resp. at 5, UP Resp. Ex. 1, and UP Resp. Ex. 2.

Petitioner’s Reply to UP’s Response

Petitioner submitted a reply to UP’s response by letter dated December 5, 2011, asserting that:

- (1) Because the two additional attachments included in UP’s Response were not presented during the hearing for Petitioner to address, this could cause Petitioner substantial harm without due process. See Pet. Rep. at 1.
- (2) UP took its rules out of context when it argues that Petitioner was at fault because he did not notice that the Deval Tower Operator violated Rule 9.15 by displaying a restricting signal at the manual interlocking. See Id. at 2.
- (3) Petitioner never requested a postponement of his hearing and no other labor organization has the right to postpone Petitioner’s due process without his consent. It was the railroad’s decision to hold Petitioner’s decertification hearing at the same time as the disciplinary hearing for the other crew members and the railroad’s inability to obtain the Deval Tower Operator as a witness that resulted in the delay of the hearing. Id.

Board’s Determination

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

- (1) On December 6, 2012, Petitioner was serving as a pilot engineer for YPR77-05 when he allegedly entered Main Track 1 of the Milwaukee Subdivision without a track permit. See Pet. at 1 and UP Resp. at 1. Because YPR77-05 was operating southbound on a northbound track, UP Operating Rules 6.3 and 9.15 required Petitioner to obtain a permit before entering main track territory. See Ex. 21 and Ex. 23. Requirements for the issuance of track permits are found in Rule 9.15.1.
- (2) Petitioner testified during the hearing that he had received a restricting signal permitting YPR77-05 to proceed through the interlocking. See Tr. at 116-117. While the YPR77-05 was within the control points of the interlocking, the Deval Tower Operator contacted the crew and requested that they stop between the

control points. Because the crew was nearly through the interlocking, however, they were not able to stop until they had entered main track territory. See Tr. at 77.

- (3) The conductor of the YPR77-05 testified that the crew had obtained a track permit with an OK time of 6:17 pm, which was subsequently crossed out and replaced with an OK time of 6:28 pm, allegedly because the Deval Tower Operator was having difficulties entering the permit into the computer system. See Tr. Ex. 25 and Tr. at 76-77.
- (4) The crew of YPR77-05 was then permitted to proceed south to Bryn Mawr, where UP removed them from service pending an investigation of the incident. See Tr. at 78-79 and 120.
- (5) UP charged Petitioner under § 240.117(e)(4), “occupying main track or a segment of main track without proper authority or permission.” See UP Resp. Ex. 2.
- (6) A combined railroad discipline and Federal certification hearing was originally scheduled for December 6, 2010, but was not completely held until July 7, 2011. See Tr. Exs. 1, 6, 11, 15, 26, 28, and 30. The various reasons for this delay included requests from the UTU (representing the conductor of the YPR77-05) and the absence of the Deval Tower Operator as a witness for UP. See id. and Tr. Ex. 32 at 81-82. Petitioner neither requested nor concurred with any of these postponements or recesses.
- (7) During the hearings, UP was not able to produce the Deval Tower Operator as a witness because he was no longer a UP employee. See Tr. at 103.
- (8) UP notified Petitioner that his certification was revoked by letter dated July 15, 2011. See Pet. Ex. 2.

Analysis of the Petition

- I. The Board will not consider the additional CAD documents that were included in UP’s response, but not introduced as evidence during the hearing.

As an initial matter, the Board will address the additional information that UP included in its response: the CAD log readout of the incident and a CAD screen shot showing the tracks designation of the location where the incident took place. See UP Resp. at 5, UP Resp. Ex. 1, and UP Resp. Ex. 2. Because these documents were not entered into evidence during the hearing, Petitioner argues that their consideration by the Board would cause Petitioner substantial harm. See Pet. Rep. at 1.

The Board finds that Petitioner’s assertion has merit. Petitioner did not have an opportunity during the hearing to either review or rebut the information contained in the CAD documents. The documents, therefore, cannot be considered part of the transcribed testimony and evidence

presented during the hearing, and will not be considered by the Board in rendering its decision.

II. UP failed to provide substantive evidence that Petitioner occupied main track without a track permit.

Petitioner's second assertion involves a factual issue. Petitioner argues that UP failed to prove that Petitioner violated Rule 6.3 and Rule 9.15 by occupying a segment of main track without proper authority or permission. When considering such factual issues, "the Board will determine whether there is substantive evidence to support the railroad's decision, and a negative finding is grounds for reversal." See 58 Fed. Reg. 18982, 19001 (April 9, 1993).

The Board finds that Petitioner's second assertion has merit. Both Petitioner and the conductor of the YPR77-05 testified during the hearing that they had received the necessary authority from the Deval Tower Operator prior to entering main track territory. See Tr. at 76-77 and 118-119. Specifically, Petitioner testified that, before he entered main track territory, he heard the Deval Tower Operator verbally grant the conductor of the YPR77-05 a track permit to enter Main Track 1. See Tr. at 124. Petitioner also testified that he heard the conductor acknowledge receiving this track permit. Id. The conductor also testified during the hearing that he had discussed the move with the Deval Tower Operator and had obtained the track permit prior to entering main track territory. See id. at 75 and 78.

The Board finds that UP did not present sufficient substantive evidence to rebut this testimony, let alone prove that Petitioner entered main track authority without the required authority or permission. The Deval Tower Operator was the UP employee responsible both for issuing YPR77-05 the necessary track permit and for maintaining a written record of that authority. See Rule 9.15.1. As stated by the UP hearing officer, "[the Deval Tower Operator] may have some significant information that will be pertinent to this investigation." Tr. at 82. During the hearing, however, UP failed to either produce the Deval Tower Operator as a witness or to present into evidence the record that the control operator was required to maintain of the granted authority. Without this testimony or evidence, the Board finds that UP did not provide substantive evidence that Petitioner violated Rule 6.3 and Rule 9.15 by entering main track territory without the required track permit.¹

III. Because the Board finds that UP did not provide substantive evidence that Petitioner occupied main track without a track permit, the Board need not address the procedural issue raised by Petitioner.

Petitioner's second assertion involves a procedural issue. Petitioner argues that UP violated § 240.307(c)(1) when it unilaterally postponed his hearing without his consent for over 200 days. 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." 58 Fed. Reg. 18982, 19001 (April 9, 2003). To establish grounds upon which the Board may grant relief, Petitioner must show: (1) that procedural error occurred, and

¹ The Board would also like to note that while UP argued in its response that Petitioner failed to present evidence that he had obtained the track permit as required, the burden in the hearing rested on UP to prove that Petitioner's conduct was not in compliance with the applicable rules. See 49 C.F.R. § 240.307(c)(12).

(2) the procedural error caused substantial harm.

Because the Board finds that UP did not present substantive evidence that Petitioner violated Rule 6.3 and Rule 9.15, the Board does not need to address Petitioner's second assertion and declines to do so..

Conclusion

Based on its review of the information provided, the Board finds that UP's revocation of Petitioner's certification was improper. Therefore, the Board grants the petition in accordance with the provisions of 49 C.F.R. Part 240.

Issued in Washington, D.C. on MAR 22 2012.



Richard M. McCord
Chairman
Locomotive Engineer Review Board

SERVICE LIST EQAL-2011-29

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. D. Grigalunas
633 Yoakum
Oswego, IL 60543

Mr. Kenneth J. Cummins
Division Chairman
19604 Tower Road
Rochelle, IL 61068

Ms. Rebecca Hernandez
Union Pacific Railroad Company
1400 Douglas Street
Omaha, NE 68179

Mr. W. Scott Hinckley
Union Pacific Railroad Company
1400 Douglas Street, Mailstop 1180
Omaha, NE 68179


for Diane Filipowicz
Administrative Assistant

MAR 22 2012

Date

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| 1. Article Addressed to: <div style="text-align: center;"> Mr. D. Grigalunas 633 Yoakum Oswego, IL 60543 </div> | B. Received by (Printed Name) | C. Date of Delivery |
| | D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No | |
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| PS Form 3811, August 2001 | Domestic Return Receipt | 102595-02-M-1540 |

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| 1. Article Addressed to: <div style="text-align: center;"> Mr. Kenneth J. Cummins Division Chairman 19604 Tower Road Rochelle, IL 61068 </div> | B. Received by (Printed Name) | C. Date of Delivery |
| | D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No | |
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| 1. Article Addressed to: <div style="text-align: center;"> Mr. W. Scott Hinckley Union Pacific Railroad Company 1400 Douglas Street, Mailstop 1180 Omaha, NE 68179 </div> | B. Received by (Printed Name) | C. Date of Delivery |
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| | 4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes | |
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