

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

Locomotive Engineer Review Board

Decision Concerning
Union Pacific Railroad Company's
Revocation of Mr. S. R. McCowin Jr's
Locomotive Engineer Certification

FRA Docket Number EQAL 2011-38

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

Background

On June 15, 2011, Petitioner was operating Train ZMQLC- 14 on the Gila Subdivision when he allegedly failed a Field Test Exercise (FTX) resulting in the train exceeding the maximum authorized speed by 14 miles per hour (MPH). FRA regulations require a railroad to consider a violation of its operating rules and practices that involve the "[f]ailure to adhere to limitations concerning train speed when the speed which the train was operated exceeds the maximum authorized limit by at least 10 miles per hour." 49 C.F.R. § 240.117(e)(2). That same day, Petitioner received notification that his certification was suspended. After a Federal certification hearing was held by UP on June 30, 2011, Petitioner received written notification, dated July 8, 2011, that his certification had been revoked.

The Brotherhood of Locomotive Engineers and Trainmen filed a petition on Petitioner's behalf, requesting that FRA review UP's decision to revoke Petitioner's certification.¹ The petition contains several arguments asserting that the revocation was improper because the FTX test was unfair. Petitioner argues that "this test was established to create an atmosphere where failure was inevitable." Petition at 4.

UP's Response

Pursuant to 49 C.F.R. § 240.405(b) and (c), a copy of the petition was sent to UP. The railroad elected to comment and was required by 49 C.F.R. § 240.405(d)(2) to provide Petitioner with a copy of the materials submitted to FRA.

¹ The Board notes that the Petition did not contain a daytime telephone number nor an e-mail address in accordance with § 240.403(b)(3)(iii) and (b)(3)(iv).

UP responded to Petitioner's assertions by arguing that:

- 1) UP acted in good faith and with due diligence.
- 2) UP's test is essential to ensure rule compliance in critical environments.
- 3) The crew performed a job briefing on the unannounced yellow board but failed to take the proper action to achieve compliance.

Locomotive Engineer Review Board's Determination

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

- 1) On June 15, 2011, Petitioner was operating Train ZMQLC- 14 on the Gila Subdivision when he allegedly failed a FTX resulting in the train exceeding the maximum authorized speed by 14 miles per hour. The crew consisted of Petitioner, a trainman, and a conductor.
- 2) Two supervisors conducted the FTX test to determine whether the crew would comply with railroad operating rule GCOR 5.4.2B, "Restriction Is Not Specified in Writing." Petition at Ex. 5 and Tr. at 21. That rule requires that "[w]hen a yellow flag is displayed and the restriction is not specified by a track bulletin, track warrant or general order, once the train is 2 miles beyond the yellow flag, crew members must . . . [c]ontinue moving the train but at a speed not exceeding 10 MPH." The Manager's Guide for UP's FTX Program (Petition at Ex. 8) did not list a test for GCOR 5.4.2B, although it listed an operational test for GCOR 5.4.2A. Petition at Ex. 8-J.
- 3) The yellow flag not specified in writing was placed at MP 912.75. Tr. at 38. Thus, Petitioner was required to reduce speed to 10 MPH by the time his train reached MP 910.75.²

² Additional facts in the record appear to support Petitioner's assertion that the test was designed to be unusually difficult considering there were overlapping restrictions to comply with. For example, the yellow flag placed by the supervisors at MP 912.75 was placed exactly one mile prior to a yellow flag at MP 911.75 that was specified in writing in accordance with a track warrant. Tr. at 141 and 159-161; and, Petition at Ex. 10. The supervisors also placed a green flag at MP 910.75, which was two miles from the yellow flag they had placed but only one mile past the yellow flag that was specified in writing at MP 911.75. Tr. at 100, Ex. 10C. A second green flag was placed in accordance with the restriction specified in writing, although the record does not clarify the location of that second green flag. Tr. at 199-201. According to GCOR 5.4.2B, Petitioner would have been allowed to resume speed after the rear of the train passed the green flag – but that rule does not take into account the separate restriction made in writing. UP's witnesses failed to explain what the train crew should have done to comply with all the operating rules and restrictions that were in effect.

Despite the obvious complexities any locomotive engineer would have to comply with this operational monitoring test, the Board declines to decide this case on fairness grounds because it has based its decision to grant the petition on other grounds.

- 4) The maximum track speed for freight trains at this location was 70 MPH. Tr. at 105 and 151. Petitioner was operating a "Z Train" and thus the maximum authorized speed of his train was 65 MPH. Tr. at 203-204.
- 5) According to the Manager's Guide for UP's FTX Program (Petition at Ex. 8), the supervisors were required to "[d]etermine speed of train by use of radar or time check evaluation" to prove a violation of GCOR 5.4.2A. Ex. 8-J. The supervisors certainly did not determine the train's speed by radar as the radar gun was not working. Tr. at 65, 68 and 90. The Board believes it understands what is meant by "a time check evaluation" but finds that UP failed to introduce any evidence defining what that term means or suggesting that a time check evaluation was completed. Thus, the evidence does not support that the operational test complied with UP's FTX program.
- 6) The supervisors obtained an event recorder download from lead locomotive UP 7431. Tr. at 39-41. However, the event recorder wheel size was not verified (Tr. at 88-89) which calls into question the reliability of the event recorder data in determining the exact location that the train was allegedly speeding. The record also failed to support that the event recorder was properly calibrated, serviced, and in good working order.

Conclusion

Considering that UP's operational test did not conform to its program for testing, Federal regulations require that the test will not be considered for revocation purposes. § 240.117(f)(3). The record does not support that UP's operational testing program contains a type of test for GCOR 5.4.2B. Even if the Board were to consider the test legitimate under the conditions specified for GCOR 5.4.2A, the Board finds that the speed determination was not made in accordance with the "means and procedures for conducting such a test." Petition at Ex. 8-J. Furthermore, the event recorder evidence was not credible given UP's failure to provide supporting evidence showing that the event recorder was properly calibrated, serviced, and in good working order. The Board need not address Petitioner's assertions of test unfairness as it has decided to grant this petition based on other grounds.

Therefore, 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 JUN 07 2012.



Richard M. McCord
Chairman
Locomotive Engineer Review Board

SERVICE LIST EQAL 2011-38

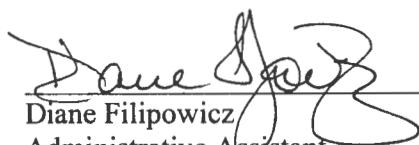
A copy of the Locomotive Engineer Review Board decision in this matter has been sent by certified mail and return receipt requested to each person shown below.

SENT CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. S. R. McCowin, Jr.
9555 East Shiloh St., Apt. #11101
Tucson, AZ 85748

Mr. Vince G. Verna
Local Chairman (BLET)
4400 East Broadway Blvd., Suite 600K
Tucson, AZ 85711

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



Diane Filipowicz
Administrative Assistant

JUN 07 2012

Date

enc: Post LERB Memo

cc: FRA DOCKET EQAL 2011-38

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> 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. 	A. Signature <input type="checkbox"/> Agent <input type="checkbox"/> Addressee X	
1. Article Addressed to:	B. Received by (Printed Name)	C. Date of Delivery
Mr. S. R. McCowin, Jr. 9555 East Shiloh St., Apt. #11101 Tucson, AZ 85748	D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
2. Article Number (Transfer from service label)	3. Service Type	
EQUAL 2011-38	<input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input checked="" type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
7011 0470 0002 1248 1468	4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	
PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540		

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1. Article Addressed to:	B. Received by (Printed Name)	C. Date of Delivery
Mr. Vince G. Verna Local Chairman (BLET) 4400 East Broadway Blvd., Suite 600K Tucson, AZ 85711	D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
2. Article Number (Transfer from service label)	3. Service Type	
EQUAL 2011-38	<input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input checked="" type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
7011 0470 0002 1248 1451	4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	
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1. Article Addressed to:	B. Received by (Printed Name)	C. Date of Delivery
Mr. W. S. Hinckley Union Pacific Railroad Company 1400 Douglas St., Mailstop 1180 Omaha, NE 68179	D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
2. Article Number (Transfer from service label)	3. Service Type	
EQUAL 2011-38	<input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input checked="" type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
7011 0470 0002 1248 1444	4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	
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