

**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. D. S. Gray
Locomotive Engineer Certification

FRA Docket Number EQAL 2012-11

Decision

The Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the decision of Union Pacific Railroad Company (UP) to revoke Mr. D. S. Gray's (Petitioner) locomotive engineer certification (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 determines that UP's decision to revoke Petitioner's certification was proper for the reasons stated below.

Background

Petitioner was subject to follow-up alcohol and drug testing after testing positive for drugs on July 3, 2007. See Resp. at 1; Tr. Ex. J, K. On April 12, 2011, while reporting for duty as an engineer, Petitioner allegedly tested positive for alcohol during a FRA follow-up drug and alcohol test. See Resp. at 2; Tr. at 14, 51; Tr. Ex. E.

UP charged Petitioner with a violation of 49 C.F.R. 240.117(e)(6) – incident of noncompliance with FRA drug and alcohol regulations as published in 49 C.F.R. 219.101 or 219.102. An investigation and hearing was held on June 16, 2011 and reconvened on October 12, 2011. UP notified Petitioner by letter dated October 19, 2011 that his certificate had been revoked.

Petitioner's Assertions

The Brotherhood of Locomotive Engineers and Trainmen (BLET) filed a petition with FRA on behalf of Petitioner, requesting that the Board review UP's decision to revoke Petitioner's certification. The petition was received on February 17, 2012 and was timely filed. The petition asserts that the revocation was improper because:

- (1) In § 40.223(b) of its workplace testing procedures (49 CFR Part 40), the Department of Transportation (DOT) requires a breath alcohol technician (BAT) to protect the security of the testing site during a DOT alcohol test by not allowing any person other than the BAT, the employee, or a DOT agency representative to

witness the testing process. See Pet. at 3. The BAT did not properly secure the testing site and, as a result, several unauthorized people witnessed Petitioner's alcohol test. See Tr. at 27.

- (2) Under § 40.223(e)(3), a BAT is "not allowed to leave the alcohol testing site while the testing process for a given employee is in progress, except to notify a supervisor or contact a designated employee representative (DER) for assistance in the case an employee or other person who obstructs, interferes with, or unnecessarily delays the testing process." During Petitioner's test, the BAT left the alcohol testing site to inform a carrier officer of a possible positive test result. See Pet. at 3. This is not a permissible reason for doing so under § 40.223(e)(3). See Pet. at 3.

UP's Response

Pursuant to 49 C.F.R. § 240.405(b) and (c), a copy of the petition was sent to UP on February 17, 2012, and the railroad was afforded an opportunity to comment. By letter dated April 13, 2012, UP responded to Petitioner's assertions, as follows:

- (1) The testimony from the hearing transcript does not support the claim that a security violation of the testing site occurred. See Resp. at 2. The BAT testified that the area where the alcohol breath test occurred was secure, and that no unauthorized persons had entered the room. See Resp. at 3; Tr. at 36-37, 50. Furthermore, even if Petitioner were able to prove that unauthorized persons had witnessed the performance of the test, this would not change the outcome of the positive test result, since allowing unauthorized persons into the collection site is not one of the fatal flaws listed in § 40.267 which would require the test to be cancelled. See Resp. at 5.
- (2) At the conclusion of the test, the BAT left the room with the Petitioner. See Tr. at 40. Following proper procedure, once the Petitioner's positive test result were confirmed, the BAT documented the results, concluded the test, and then left the room to notify the manager. See Tr. at 38-40.

Board's Determination

- (1) On July 17, 2007, Petitioner signed a Drug and Alcohol Waiver/Agreement with UP after testing positive for a controlled substance on July 3, 2007. See Tr. Ex. J, K.
- (2) Between July 17, 2007 and the alleged incident, UP administered 26 random drug and alcohol tests with negative results. See Tr. Ex. J.

- (3) On April 12, 2011, at approximately 8:00 am, Petitioner reported for duty and was instructed to report for a follow-up drug and alcohol test. See Resp. at 1; Tr. at 11; Tr. Ex. A.
- (4) The drug and alcohol testing took place in the Maintenance of Way Meeting room at 207 Avenue B, Sterling, Illinois. See Resp. at 1; Tr. at 27, 36. Petitioner's breath alcohol test was conducted in accordance with UP Railroad Drug and Alcohol Policy. See Resp. at 2; Tr. at 13-14; Tr. Ex. E, I.
- (5) Petitioner's breath alcohol test was performed by a trained and qualified BAT, who had been testing Petitioner for several years. See Pet. at 3; Resp. at 4; Tr. at 45-46; Tr. Ex. F, L. The BAT had performed external calibration checks on the testing machine in accordance with § 40.233. See Tr. at 42, 44, 53-55; Tr. Ex. G, O, P, Q.
- (6) Petitioner's initial alcohol breath test was performed at 8:16 am resulting in a reading of .045, and the confirmation test was performed 17 minutes later at 8:33 am resulting in a reading of .046. See Resp. at 2; Tr. at 14; Tr. Ex. E.
- (7) After the confirmation test was conducted, the BAT informed Petitioner and the Manager of Operating Practices (MOP) of the positive test results. See Tr. 23, 38, 40.
- (8) On April 22, 2011, Petitioner's certificate was suspended and he was removed from service pending a formal investigation. See Tr. Ex. A.

Analysis of the Petition

In reviewing petitions of revocation decisions, the Board considers whether substantial evidence exists to support the railroad's factual findings in its decision for revocation under FRA's regulations. See Fed. Reg. 18982, 19001 (Apr. 9, 1993).

Based on Petitioner's first assertion, the Board finds that the Petitioner's claim is without merit. There is no evidence in the transcribed record to support that any violation of non-compliance of 49 C.F.R. 40.223(b) occurred. However, testimony from the BAT shows that he strongly believes that the testing site was secure. See Tr. at 36-37, 50. Additionally, Petitioner's representative made no attempt during the three month hearing recess to request the employees who allegedly witnessed the Petitioner's drug and alcohol test. See Tr. at 38. The Petitioner cites 49 C.F.R. 40.223, "What steps must be taken to protect the security of the alcohol testing site?" and requests that the Board overturn the revocation. See Pet. at 3, Resp. at 5. However, Petitioner did not present proof that the testing site was not secure. Petitioner tested positive for alcohol, which was reaffirmed by an accuracy test. See Resp. at 2; Tr. at 13-14; Tr. Ex. E, I. The Board has no choice but to look at the positive test as a violation under 49 C.F.R. 219.101.

The Board finds that Petitioner's second assertion, also lacks merit. 49 C.F.R. 40.223(e)(3) states that "[y]ou are not allowed to leave the alcohol testing site while the testing process for a

given employee is in progress.” The BAT left the testing site after the test had been completed. See Resp. at 5; Tr. at 40. The BAT followed the proper procedures when he administered the test, documented the positive results, completed the test, and notified the manager. See Tr. at 23, 40.

Conclusion

Based on its review of the record and the above findings, the Board hereby denies the petition in accordance with the provisions of 49 C.F.R. Part 240.

Issued in Chicago, IL on JUL 18 2012.

A handwritten signature in black ink, appearing to read "Richard M. McCord". The signature is written in a cursive style with a large, prominent "Q" at the end.

Richard M. McCord
Chairman,
Locomotive Engineer Review Board

SERVICE LIST EQAL 2012-11

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.

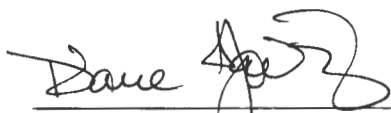
SENT CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. D. S. Gray
511 6th Aves
Clinton, IA 52732

Mr. R.E. Crow
Local Chairman
BLET Division 404
501 N 2nd Street, STE 2
Clinton, IA 52732

Ms. Rebecca Hernandez
Manager, Certification & Licensing
Union Pacific Railroad
1400 Douglas St, MS 1080
Omaha, NE 68179

Mr. Cecil Copeland
General Director, Operating Practices
Union Pacific Railroad
1400 Douglas St, MS 1080
Omaha, NE 68179



Diane Filipowicz
Administrative Assistant

JUL 18 2012

Date

enc: Post LERB Memo
cc: FRA DOCKET EQAL 2012-11

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. D. S. Gray
511 6th Aves
Clinton, IA 52732

2. Article Number
(Transfer from service label) EQAL 2012-11 7011 0470 0002 3685 8826

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
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3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
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SENDER: COMPLETE THIS SECTION

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1. Article Addressed to:

Mr. R.E. Crow
Local Chairman
BLET Division 404
501 N 2nd Street, STE 2
Clinton, IA 52732

2. Article Number
(Transfer from service label) EQAL 2012-11 7011 0470 0002 3685 9298

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

4. Restricted Delivery? (Extra Fee) Yes

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1. Article Addressed to:

Ms. Rebecca Hernandez
Manager, Certification & Licensing
Union Pacific Railroad
1400 Douglas St, MS 1080
Omaha, NE 68179

2. Article Number
(Transfer from service label) EQAL 2012-11 7011 0470 0002 3685 9304

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

1. Article Addressed to:

Mr. Cecil Copeland
General Director, Operating Practices
Union Pacific Railroad
1400 Douglas St, MS 1080
Omaha, NE 68179

EQUAL 2012-11

2. Article Number

(Transfer from service label)

7011 0470 0002 3685 9311

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