

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

Locomotive Engineer Review Board

Decision Concerning
Union Pacific Railroad Company's
Decision to Revoke Mr. D. D. Cox's
Locomotive Engineer Certification

FRA Docket Number EQAL-2010-29

Decision

In accordance with the provisions of Title 49, Part 240, of the Code of Federal Regulations (49 C.F.R. Part 240), the Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the petition of Mr. D. D. Cox (Petitioner) challenging the decision of the Union Pacific Railroad Company (UP) to revoke Petitioner's locomotive engineer certification (Certification). The Board hereby determines that UP's decision to revoke Petitioner's Certification was proper for the reasons set forth below.

Background

On March 31, 2010, at approximately 3:00 a.m., while operating Train MCBKC 30, Petitioner allegedly failed to stop before passing a red flag at Milepost (MP) 202.5 on the Clinton Subdivision, after having passed a restricting signal indication at MP 203 during a red flag field training exercise (FTX). The restricting signal indication required the train crew to operate at a speed that will allow the crew to stop, within half the range of vision, short of a train, engine, railroad car, men or equipment fouling the track, stop signal, or derail or switch that is lined improperly. The train crew consisted of Petitioner and a conductor. Petitioner was charged with violating 49 C.F.R. § 240.117(e)(1) and General Code of Operating Rules (GCOR) 6.27, 5.4.7, and 9.2.13 for failing to control a train in accordance with a signal indication that requires a stop before passing it.

By letter dated April 6, 2010, Petitioner was notified that he was to attend a formal investigation relating to that incident. After a combined railroad and Federal certification hearing was conducted on April 13, 2010, UP issued a notification of certificate revocation (Revocation Notification) on April 22, 2010 that stated that Petitioner's Certification had been revoked for a period of one month.

A timely filed petition dated July 20, 2010, requested that FRA review UP's decision to revoke Petitioner's Certification. The petition asserts that the revocation was improper for the following reasons:

- 1) UP analogized that the red flag could represent the end of a box car on a train. However, an 18 inch by 18 inch red flag that is suspended right above the rails does not represent a box car or other real life conditions.
- 2) The red flag was not properly displayed along the track and it did not have an independent lighting system, both of which made the flag difficult to see until the train was immediately next to it. The use of a reflectorized red flag, rather than one that self-illuminates, as well as the red flag's placement several inches above the rail, constitute an intervening cause.

Pursuant to 49 C.F.R. _ 240.405(b) and (c), a copy of the Petition was sent to UP on August 3, 2010, and UP was afforded an opportunity to comment. UP timely responded, and, as required by 49 C.F.R. _ 240.405(d)(2), provided Petitioner with a copy of the material submitted to FRA.

UP's Response

UP responded to Petitioner's assertions as follows:

- 1) The red flag test simulates a normal working condition that would require employees to be able to stop within half the range of vision, as required by GCOR. A red flag represents a stop signal, and all UP employees know that a red flag means stop. Additionally, the use of a red flag during an FTX event is a normal procedure, and Petitioner had been subject to other FTX events in the past. See Attachment 1 to UP's Response.
- 2) Petitioner could clearly view the red flag from MP 203. Manager of Operating Practices D. J. Banks testified during the hearing that he could see the red flag from MP 203. See Tr. at 69-70 Additionally, UP submitted pictures from the track image recorder (TIR) from the lead locomotive of Petitioner's train. The pictures indicate that the red flag could be seen from a considerable distance. See Attachment 2 to UP's Response. Consequently, Petitioner's statement that he could not see the red flag until he was on top of it was inaccurate.

Locomotive Engineer Review Board's Determination

Based on its review of the record, the Board makes the following determinations:

- 1) On March 31, 2010, at approximately 3:00 a.m., while operating Train MCBKC 30, Petitioner failed to stop before passing a red flag at MP 202.5 on

the Clinton Subdivision, after having passed a restricting signal indication at MP 203 during an FTX event.

- 2) The restricting signal indication required the train crew to operate at a speed that will allow the crew to stop, within half the range of vision, short of a train, engine, railroad car, men or equipment fouling the track, stop signal, or derail or switch that is lined improperly.
- 3) The train crew consisted of Petitioner and a conductor.
- 4) The red flag was suspended between the rails by a flag holder approximately eight inches above the rail. Tr. at 80. Even though the flag's placement was coming out of a right-hand curve in Petitioner's direction of travel, the flag was placed a few hundred feet from the curve. Tr. at 41. Additionally, the red flag was visible at least 15 car lengths out. Tr. at 152; Tr. at Exhibit D; see also Tr. at 69-70, 78 (testimony from UP's Manager of Operating Practices D. J. Banks that the red flag was visible from MP 203).
- 5) Petitioner admitted that he passed the red flag without stopping. Tr. at 125; Transcript at Exhibits E and E1.

Analysis

Petitioner's assertions are factual in nature. "When considering factual issues, the Board will determine whether there is substantial evidence to support the railroad's decision, and a negative finding is grounds for reversal." 58 Fed. Reg. 18982, 19001 (Apr. 9, 1993).

In this case, there is no factual issue as to whether Petitioner operated his train past the red flag; Petitioner admitted that he did so. See Tr. at 125; Transcript at Exhibits E and E1. In short, Petitioner's two assertions are that UP administered an unfair FTX event because the test was not conducted under normal operating conditions and the red flag was not visible to him until he was right on top of it. Petitioner therefore concludes that it was unfair to revoke his Certification. This argument could provide a defense if the Board agreed that UP's actions were an intervening cause. Federal regulations state that a railroad shall not revoke an engineer's certification if "sufficient evidence exists to establish that 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." 49 C.F.R. § 240.307(i)(1).

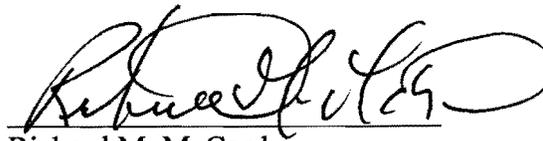
The Board finds that there is no intervening cause because there is evidence in the record that the FTX event had been properly conducted; the red flag, which represents a stop signal, had been visible to the train crew from a distance. During the hearing, UP's Manager of Operating Practices, D. J. Banks, testified that the red flag was visible from MP 203. Tr. at 69-70, 78. Moreover, the conductor testified that he first observed the red flag when the train was approximately 15 car lengths from it. See Tr. at 152. At that time, the conductor called

out the red flag to Petitioner. See id.; see also Transcript at Exhibit E. Petitioner did not dispute the conductor's testimony during the hearing. Consequently, after considering Petitioner's actions and given the absence of evidence to the contrary, the Board finds substantial evidence to support UP's decision to revoke Petitioner's Certification.

Conclusion

Based on the above findings and conclusions, the Board finds that the decision to revoke Petitioner's Certification as a locomotive engineer was proper and hereby denies the petition in accordance with the provisions of Title 49, Part 240 of the Code of Federal Regulations.

Issued in Chicago, IL on APR 04 2011.



Richard M. McCord
Chairman,
Locomotive Engineer Review Board

SERVICE LIST EQAL 2010-29

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

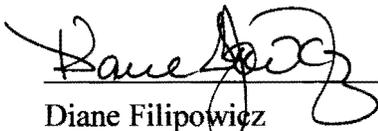
CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. D. D. Cox
909 ½ 8th Street
Boone, IA 50036

Mr. Steven M. Fye
Local Chairman
BLE&T, Division 125
119 Riverview Heights Drive
LeClaire, IA 52753-9516

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

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



Diane Filipowicz
Administrative Assistant

APR 04 2011

Date

enc: Post LERB Memo

cc: FRA Docket EQAL 2010-29

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1. Article Addressed to:


 Mr. D. D. Cox
 909 1/2 8th Street
 Boone, IA 50036

EQUAL 2010-29

2. Article Number
(Transfer from service label)

7008 3230 0002 3925 4527

PS Form 3811, February 2004

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1. Article Addressed to:


 Mr. Steven M. Fye, Local Chairman
 BLE&T, Division 125
 119 Riverview Heights Drive
 LeClaire, IA 52753-9516

EQUAL 2010-29

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(Transfer from service label)

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1. Article Addressed to:


 Mr. Lawrence Brennan, Jr., UP
 Manager, Engineering Certification & Licensing
 1400 Douglas Street, Mailstop 1010
 Omaha, NE 68179

EQUAL 2010-29

2. Article Number
(Transfer from service label)

7008 3230 0002 3925 4541

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102595-02-M-1540

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1. Article Addressed to:



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

EQAL 2010-29

2. Article Number
(Transfer from service label)

7008 3230 0002 3925 4558

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Agent

Addressee

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