

**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. A. D. Birdow's  
Locomotive Engineer Certification

**FRA Docket Number EQAL 2011-05**

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**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. A. D. Birdow'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 has determined that UP's decision to revoke Petitioner's certification was proper under 49 C.F.R. Part 240, and denies the petition for the reasons set forth below.

**Background**

On September 19, 2010, at approximately 8:00 p.m., while operating Yard Assignment YDV76X-19, Petitioner allegedly failed to stop short of an unannounced red flag during a Field Training Exercise (FTX) at Milepost (MP) 2 on Track 2, North Yard, at Denver, Colorado, on the Moffat Subdivision. See Tr. at 62, Tr. Ex. 1. Petitioner was operating the train in the yard at a speed in accordance with General Code of Operating Rule (GCOR) 6.28, which required the train crew to operate at a speed that allowed them 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. See Tr. at 55. Petitioner also was operating with dimmed headlights in accordance with GCOR 5.9.1 that governs the use of headlights in yards. See Tr. Ex. 12.

The train crew consisted of Petitioner, a switchman, and a foreman. See UP Resp. at 1. Petitioner was on the second locomotive of a two-unit consist with the locomotive facing north. See Tr. at 33-34. Petitioner was the only employee on the train at the time of the alleged incident, and the only employee on the south end or leading end of the movement. The switchman was on the north end of the yard, giving car counts and ensuring that the cut of cars was in the clear into Track 2. See Tr. at 33-34, 36. At the same time, the foreman was in the van returning from having lined back the belt main switch into public service. See Tr. at 34, 36. The crew had a job briefing prior to making the moves back from public service. See Tr. at 43.

Petitioner was charged with violating 49 C.F.R. § 240.117(e)(1) and General Code of Operating Rule (GCOR) 5.4.7, for failing to control a train in accordance with a signal indication that

requires a complete stop before passing it. Petitioner also was charged with violating UP Safety Rule 70.3 for failure to have a proper job briefing. See Pet. at 2, Tr. Ex. 6 and 7.

By letter dated September 28, 2010, Petitioner was notified that he was to attend a formal investigation relating to this incident. See Tr. Ex. 1. After a combined railroad and Federal certification hearing was conducted on October 6, 2010, UP issued a notification of certificate revocation (Revocation Notification) on October 15, 2010 that stated that Petitioner's Certification had been revoked for a period of one month. See Pet. at 3.

### **Petitioner's Assertions**

The United Transportation Union (UTU) timely filed a petition on February 8, 2011, requesting that FRA review UP's decision to revoke Petitioner's certification. The petition asserts that the revocation was improper for the following reasons:

- 1) Petitioner was told that the track was clear by the yardmaster. See Tr. at 111.
- 2) Petitioner was unaware of having passed a red flag because it was not visible to him. The UP supervisor may not have conducted the test properly because the red flag was not reflective on both sides, and there is no independent witness to verify which side of the flag was displayed towards the train. Additionally, the crew was prevented from viewing the flag until several hours after the incident occurred. See Tr. at 40-41, 54, 77, 113, 122-127.

### **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 8, 2011, and UP was afforded an opportunity to comment. UP timely responded to Petitioner's assertions by letter dated April 5, 2011, and, as required by 49 C.F.R. § 240.405(d)(2), provided Petitioner with a copy of the material submitted to FRA. UP responded to Petitioner's assertions as follows:

- 1) The transcript indicates that there was some dispute regarding who actually said the track was clear. Even if Petitioner was told the track was clear, the Manager of Yard Operations, Mr. Coleman, stated in the transcript that Petitioner would not be relieved of his obligation to stop short of a red flag between the tracks. See Tr. at 101.
- 2) The UP managers' testimony is direct and validates that Mr. Coleman conducted the red flag test properly. Petitioner ran over the flag due to his failure to provide protection on the point of his locomotive. See Tr. at 32. Petitioner states several times in the transcript that he did not see a red flag, yet the flag was on the track the entire time Petitioner was traveling down Track 2. Petitioner needed to stop when he knew that he could not see in

front, and not proceed any further until he had some kind of point protection. See Tr. at 101, 126, 133. Furthermore, the red flag remained under the car after it had been run over, and all the crew members were taken to see it. When UP Manager of Operating Practices, Mr. Eckman, testified that all crew members were taken back to view the flag, Petitioner did not ask any questions or challenge Mr. Eckman's testimony. See UP Resp. Attachment 1.

### **Board's Determination**

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

- 1) On September 19, 2010, at approximately 8:00 p.m., while on duty on the YDB76X at Denver, Colorado, Petitioner failed to stop before passing a red flag in the vicinity of MP 2 on the Moffat Subdivision, during an FTX event. See Tr. at 125-126.
- 2) The train crew consisted of Petitioner, a foreman, and a switchman. The Petitioner was operating on the second locomotive of the two-unit consist, and the locomotive was facing north. Petitioner was the only employee on the train at the time the incident occurred. See Tr. at 33.
- 3) Petitioner was operating the train within yard limits, but not on a main track, in accordance with GCOR Rule 6.28: "Movement on Other than Main Track." See UP Resp. at 1, Tr. at 55. GCOR Rule 6.28 states, that "[e]xcept when moving on a main track or on a track where a block system is in effect, trains or engines must move at a speed that allows them to stop within half the range of vision short of train, engine, railroad car, men or equipment fouling the track, stop signal, or derail or switch lined improperly." Furthermore, Petitioner was operating with headlights dimmed in accordance with GCOR 5.9.1 that governs the use of headlights in yards. See Tr. Ex. 12.
- 4) Unknown to Petitioner and the crew, UP supervisor, Mr. Coleman, was performing an operational compliance test to determine if the crew was operating according to the rules. Mr. Coleman testified that he placed a red flag, which represents a stop signal (see UP Rule 5.4.7: Signals and Their Use, Display of Red Flag or Red Light, Tr. Ex. 6, "A red flag or red light is displayed where trains must stop."), between the two rails of Track 2, using a red flag kit. See Tr. at 83. Mr. Coleman also testified that the reflective portion of the flag was facing the movement of Petitioner's train, and that he placed the flag in a manner consistent with all other red flag testing he has previously conducted. Id. Mr. Coleman also testified that he was sitting adjacent to the red flag and that when he saw the train approaching the flag the train's dim headlight was on. Id. at 84. Additionally, Mr.

Coleman testified that he was able to see the red flag as the train approached it and that the flag was highly visible. Id.

- 5) The hearing testimony from UP managers Mr. Coleman and Mr. Eckman, as well as the photograph taken by UP after the incident, which shows the reflective red flag still laying under the train car, indicate that the FTX test was conducted properly. The flag was facing the movement of the train and was made of a highly reflective material that allowed it to be visible by Petitioner. See Tr. at 83-84, 88, 90, 103, UP Attachment 1.
- 6) The yardmaster informed the crew that Track 2 was clear just after they had pulled out of the track with the load. See Tr. at 111. However, approximately two hours lapsed from the time that Petitioner pulled out of Track 2 and then pulled back into it. See Tr. at 119. It was during this two-hour period that Mr. Coleman set up the FTX red flag test.

### Analysis

Petitioner's first assertion involves an intervening cause. In determining whether revocation was proper under FRA's regulations, the Board considers 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).

Petitioner argues that mitigating circumstances render UP's decision to revoke his certificate improper. Petitioner asserts that the yardmaster instructed him that the track was clear, and implies that this somehow relieves him of his duty to respond to a stop signal. Yet, there was a two-hour time lapse between the time that Petitioner was told the track was clear and he was pulling back into Track 2. See Tr. at 111, 119. Furthermore, in the hearing testimony, Petitioner admitted that having been told the track was clear did not relinquish him of his responsibility to stop short of anything, including a red flag. See Tr. at 128. UP's Manager of Yard Operations, Mr. Coleman, also testified that even if Petitioner was told the track was clear he would not be relieved of his obligation to stop short of a red flag. Id. at 101. Mr. Coleman also testified that multiple moves and power consists go through that track area every day. See Tr. at 79.

The Board finds that this assertion is without merit. The fact that Petitioner was told two-hours prior to the incident that the track was clear does not absolve him of his duty to remain watchful. Moreover, it appears that Petitioner failed to adequately protect his shoving movement, which resulted in a blind-spot in front of the direction of his movement.

Petitioner's second assertion involves a substantive factual issue. Petitioner argues that UP may not have conducted the red flag test properly and, therefore, should not have revoked his certification. "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

dismissal.” 58 Fed. Reg. 18982, 19001 (April 9, 1993). The Board finds that UP’s decision was supported by substantial evidence.

Petitioner argues that he should not be held responsible for the alleged violation considering that the red flag was only reflective on one side and there are no witnesses as to whether the flag was displayed properly towards the train. See Pet. at 1. Yet, Petitioner testified that after approximately three hours following the alleged incident, he and the other members of the crew were shown the red flag. See Tr. at 133. Furthermore, UP’s Manager of Yard Operations, Mr. Coleman, testified that he had placed the red flag between the two rails of Track 2 and that the reflective portion of the flag faced the train’s movement. See Tr. at 83. Mr. Coleman also testified that he sat adjacent to the red flag and that the red flag was highly visible as the train approached it, and the train’s dim light was on. Mr. Coleman confirmed that he conducted this test in a manner consistent with all previous red flag testing that he had conducted. Id at 83-84.

Petitioner did not object at the time he was taken to see the flag, and Mr. Coleman’s testimony, along with UP’s photograph of the reflectorized flag provide substantial evidence that the flag was reflective and properly placed facing the movement of the train.

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 **NOV 17 2011**.



Richard M. McCord  
Chairman,  
Locomotive Engineer Review Board

**SERVICE LIST EQAL 2011-05**

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. A. D. Birdow  
1290 Cavan Street  
Boulder, CO 80303

Mr. Ralph Olivas  
UTU, SVLC  
603 Stampede Drive  
Lochbuie, CO 80603

Ms. Christine Hampton  
Director Training & Quality Assurance  
Union Pacific Railroad Company  
1400 Douglas Street, Mailstop 1030  
Omaha, NE 69179

  
\_\_\_\_\_  
Diane Filipowicz  
Administrative Assistant

**NOV 17 2011**

\_\_\_\_\_  
Date

enc: Post LERB Memo

cc: FRA Docket EQAL 2011-05

**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. A. D. Birdow  
1290 Cavan Street  
Boulder, CO 80303

EQAL 2011-05

2. Article Number  
(Transfer from service label)

7008 3230 0002 3925 8877

PS Form 3811, February 2004

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature  Agent  
 Addressee

B. Received by (Printed Name) C. Date of Delivery

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Domestic Return Receipt 102595-02-M-1540

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1. Article Addressed to:

Mr. Ralph Olivas  
UTU, SVLC  
603 Stampede Drive  
Lochbuie, CO 80603

EQAL 2011-05

2. Article Number  
(Transfer from service label)

7008 3230 0002 3925 8884

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1. Article Addressed to:

Ms. Christine Hampton  
Director Training & Quality Assurance  
Union Pacific Railroad Company  
1400 Douglas Street, Mailstop 1030  
Omaha, NE 69179

EQAL 2011-05

2. Article Number  
(Transfer from service label)

7008 3230 0002 3925 8891

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 Insured Mail  C.O.D.

4. Restricted Delivery? (Extra Fee)  Yes

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