

**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. M. E. Taylor's
Locomotive Engineer Certification

FRA Docket Number EQAL-2011-08

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. M. E. Taylor (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 June 17, 2010, at approximately 0255 hours, Petitioner was operating a KEY train, MDMPR-16, from Clinton, Iowa to Proviso, Illinois. See Pet. at 2 and UP Resp. at 1. After passing over a hot box detector near milepost (MP) 95 of the Geneva Subdivision and failing to receive an exit message, Petitioner did not begin to stop his train until MP 88.28, approximately six miles after he had passed over the hot box detector. See UP Resp. at 5, Attach. 1 and 2.

Under UP's System Special Instructions (SSI) Item 13.7.2 (Detector Failure – Action Table), a crew of a KEY train that does not receive an exit message from a hot box detector must: “Stop the train at once and inspect train on both sides for defects. For Hot Box Detectors (13.2) immediately reduce speed using train handling techniques to minimize in-train forces. Stop the train once the train has cleared the detector.” See UP Resp. Attach. 3. This requirement also applies if the crew does not understand the exit message and no defect message or tone was received. See SSI Item 13.7.1 (Failed Detector Situation Table).

UP charged Petitioner with violating 49 C.F.R. § 240.117(e)(2) – “failure to adhere to limitations concerning train speed when the speed at which the train was operated exceeds the maximum authorized limit by at least 10 miles per hour.” See Tr. Ex. 1-A. UP notified Petitioner that his certification was suspended on June 17, 2010. See Tr. Ex. 10-A. On October 20, 2010,

November 9, 2010, and December 7, 2010, a combined Federal decertification and railroad discipline hearing was conducted. By letter dated December 16, 2010, Petitioner was notified that his certification was revoked for a period of 30 days. See Pet. at 7.

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 March 30, 2011 and was timely filed. The petition asserts that revocation of Petitioner's certification was improper for the following reasons:

- (1) UP failed to prove that Petitioner's conduct did not comply with the applicable railroad operating rule or practice, thereby failing meet its burden of proof requirement under 49 C.F.R. § 240.307(c)(12). See Pet. at 2-3. The dispatcher was giving an order on the radio while the train was moving over the hot box detector, which can cause a delay in the broadcast message for a detector. See Pet. at 3. Taking into account this possible broadcast delay and the time it took to hold a job briefing and look up the applicable rule, Petitioner set the air brakes in order to stop with good train handling techniques at approximately MP 89. See id. Petitioner was in the process of stopping the train when he was contacted by the UP supervisors. See id.
- (2) UP failed to consider whether the event was of a *de minimis* nature. See Pet. at 2. As set forth in 49 C.F.R. § 240.307(i)(2), the incident "was of a minimal nature and had no direct or potential effect on safety." See Pet. at 3. Petitioner was in the process of stopping the train when he was contacted and instructed to take the train to MP 84. See Pet. at 2-3. This was a structured Field Testing Exercise (FTX) test and there was no direct or potential effect on safety. 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 March 31, 2011, and the railroad was afforded an opportunity to comment. UP timely responded to Petitioner's assertions by letter dated May 27, 2011 as follows:

- (1) The facts presented during the hearing prove that Petitioner failed to comply with SSI Item 13.7.2. See UP Resp. at 3. Petitioner's certification was revoked because, once his train had completely passed over the hot box detector and no exit message was received, he should have started to reduce his speed and prepare to stop. See UP Resp. at 4. Instead, Petitioner cleared the hot box detector at 32 mph and continued to move eastward, increasing his speed to as much as 45 mph at MP 88.75. See UP Resp. at 5. Petitioner travelled 6 miles and 3,864 ft before setting the air at MP 88.28. See id.

While Petitioner stated that the dispatcher was on the radio and he could not hear whether there was an exit message, SSI Item 13.7.1(e) is very clear that Petitioner

was required to stop his train if he did not understand the exit message from the hot box detector and no defect message or tone was received. See UP Resp. at 4. Petitioner also stated that he kept looking in the rule book to find the appropriate rule. SSI Item 13.7.2 is not in the rule book, however, but is found in the “System Special Instructions.” It is assumed that Petitioner knows the difference. See UP Resp. at 4-5.

Petitioner’s certification was revoked on the premise that Petitioner should have been traveling zero mph, but he was traveling thirty-two mph when he cleared the hot box detector and continued to increase his speed up to forty-five mph. See UP Resp. at 5. All speeds greater than ten mph over authorized speed (which was zero mph for Petitioner) would constitute a violation that could be considered for revocation purposes under § 240.117(e)(2)

- (2) UP’s position has always been that any failed FTX test that involves violation of an operating rule that can be considered for certification revocation purposes under § 240.117(e)(1)-(5) will be handled as the regulations require. See UP Resp. at 16. It is Union Pacific’s decision to determine if an incident is *de minimis* in nature and has no impact on safety. See id. Petitioner’s willingness to continue moving after having cleared the hot box detector and not hearing an exit message is egregious. See id. There was no attempt to slow down the train as Petitioner claims. See id. Petitioner testified that he went over the hot box detector at MP 95 and had begun to start stopping at MP 89 or MP 88.5 (six miles after clearing the hot box detector) when the manager called. See id. The event recorder, however, indicates that no air was set until MP 88.28. See id.

Locomotive Engineer Review Board’s Determination

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

- (1) On June 17, 2010, at approximately 0255 hours, Petitioner was operating Train MDMPR-16 from Clinton, Iowa to Proviso, Illinois. See Pet. at 2 and UP Resp. at 1. Petitioner was aware that Train MDMPR-16 was a KEY train subject to certain restrictions. See Tr. at 80.
- (2) As Train MDMPR-16 passed over a hot box detector at MP 95 of the Geneva Subdivision, two UP supervisors pushed a switch that prevented the detector from transmitting to the field. See UP Resp. at 2. This constituted an FTX test designed to simulate a detector failing to give an audible exit message. See id. Under SSI Item 13.7.2, if the crew of Train MDMPR-16 did not hear or understand an exit message from a hot box detector, they were required to “[s]top the train at once and inspect train on both sides for defects. For Hot Box detectors (13.2) immediately reduce speed using train handling techniques to minimize in-train forces. Stop the train once the train has cleared the detector.”
- (3) Petitioner’s train completely passed over the hot box detector at a speed of thirty-

two mph. See UP Resp. Attach. 1 and 2. Despite not receiving an exit message from the hot box detector, Petitioner's train continued to proceed at an increasing speed. See id. From MP 88.80 to MP 88.75, the train was traveling forty-five MPH. See id. The UP supervisors contacted Petitioner and the conductor at approximately MP 89 and instructed them to proceed with the train to MP 84. See Pet. at 3. The event recorder for locomotive UP 8159 shows that the brakes for Train MDMPR-16 were not set until MP 88.28, approximately six miles after the train had completely passed over the hot box detector. See UP Resp. Attach. 2.

Analysis of the Petition

The Board finds that UP improperly revoked Petitioner's certification because, as a matter of law, Petitioner's alleged failure to comply with SSI Item 13.7.1 and SSI Item 13.7.2 was not a violation of a railroad operating rule or practice that could be considered for revocation purposes under § 240.117(e). The Board provides "de novo" review of legal issues involving interpretation of regulations and statutes administered by the FRA, and is not bound by legal interpretation reached by the railroad in making its decision. See 58 Fed. Reg. 18982, 19001 (Apr. 9, 1993).

I. Petitioner's alleged violation of SSI Item 13.7.1 and SSI Item 13.7.2 was not a "failure to adhere to limitations concerning train speed" under § 240.117(e)(2).

UP revoked Petitioner's certification under § 240.117(e)(2), which authorizes a railroad to revoke a certification for a violation involving "failure to adhere to limitations concerning train speed when the speed at which the train was operated exceeds the maximum authorized limit by at least 10 miles per hour." See Tr. Ex. 1-A. UP claims that Petitioner was speeding because he was travelling thirty-two mph when he should have been stopped (i.e., travelling zero mph) under SSI Item 13.7.1 and SSI Item 13.7.2. See UP Resp. at 5. According to UP, any speed more than ten mph over Petitioner's authorized speed of zero mph was an operating rule violation that could be considered for revocation purposes under § 240.117(e)(2). See id.

The Board finds that UP improperly considered Petitioner's alleged violation as a failure to comply with a speed limitation under § 240.117(e)(2). SSI Item 13.7.1 and SSI Item 13.7.2 (emphasis added) required Petitioner to "[s]top the train" if he did not receive or understand the exit message. As a practical matter, Petitioner was therefore subject to a rule governing the stopping of the train, which is distinct from a rule imposing a limitation concerning train speed. Because Petitioner did not violate a limitation concerning speed, his certification could not be revoked under § 240.117(e)(2).

II. Petitioner's alleged violation of SSI Item 13.7.1 and SSI Item 13.7.2 also was not a revocable event under § 240.117(e)(1).

The Board also finds that UP would not have been able to revoke Petitioner's certification under § 240.117(e)(1), which authorizes UP to consider violations involving a "[f]ailure to control a locomotive or train in accordance with a signal indication, excluding a hand or a radio signal

indication or a switch, that requires a complete stop before passing it.” (emphasis added) While SSI Item 13.7.1 and SSI Item 13.7.2 required Petitioner to stop his train if he did not receive or understand an exit message from a hot box detector, that exit message would constitute the type of “radio signal indication” that is specifically excluded from § 240.117(e)(1).

III. Because Petitioner’s alleged violation was not a revocable event under § 240.117(e), the issues raised by Petitioner are moot.

Because the Board finds, as a matter of law, that Petitioner’s alleged violation of SSI Item 13.7.1 and SSI Item 13.7.2 was not a violation that could be considered for revocation purposes under § 240.117(e), the other issues raised by Petitioner and UP regarding whether or not Petitioner violated SSI Item 13.7.1 and SSI Item 13.7.2 are moot and need not be decided by the Board.

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 Chicago, IL on JAN 30 2012.



Richard M. McCord
Chairman,
Locomotive Engineer Review Board

SERVICE LIST EQAL-2011-08

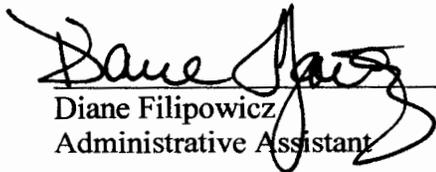
A copy of the Locomotive Engineer Review Board decision in this matter has been sent by certified mail to each person shown below.

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. M. E. Taylor
12129 S Laflin Street
Chicago, IL 60643-5449

Mr. R. E. Crow
Local Chairman
BLET Division 404
3120 Riverbirch Dr. Apt. 207
Aurora, IL 60502

Ms. Christine Hampton
Director Training & Quality Assurance
Union Pacific Railroad Company
1400 Douglas Street, Mailstop 1030
Omaha, NE 68179


Diane Filipowicz
Administrative Assistant

JAN 30 2012

Date

enc: Post LERB Memo

cc: FRA Docket EQAL 2011-8

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. M. E. Taylor
 12129 S Laflin Street
 Chicago, IL 60643-5449

EQAL 2011-08

2. Article Number
(Transfer from service label)

7008 3230 0002 3925 7474

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

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

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. R. E. Crow
 Local Chairman
 BLET Division 404
 3120 Riverbirch Dr. Apt. 207
 Aurora, IL 60502

EQAL 2011-08

2. Article Number
(Transfer from service label)

7008 3230 0002 3925 7481

PS Form 3811, February 2004

Domestic Return Receipt

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- Agent
 Addressee

B. Received by (Printed Name)

C. Date of Delivery

D. Is delivery address different from item 1? Yes
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- 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:

Ms. Christine Hampton
 Director Training & Quality Assurance
 Union Pacific Railroad Company
 1400 Douglas Street, Mailstop 1030
 Omaha, NE 68179

EQAL 2011-08

2. Article Number
(Transfer from service label)

7008 3230 0002 3925 7498

PS Form 3811, February 2004

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 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