

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

OCT 4 2001

Locomotive Engineer Review Board

**Review and Determination Concerning the  
Union Pacific Railroad Company's Decision to Revoke  
Mr. Edwin V. Brown's Locomotive Engineer Certification**

**FRA Docket Number EQAL 2000-70**

---

**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. Edwin V. Brown's (Petitioner's) 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 not proper pursuant to 49 C.F.R. Part 240 for the reasons set forth below.

**Background**

On September 3, 2000, Petitioner occupied the main track between mile post (MP) 651.6 and MP 648.5 on the Toyah Subdivision while operating ILBMN-01. The train crew consisted of Petitioner and a conductor. The crew was operating freight service between El Paso, Texas and Pecos, Texas. The method of operation over this territory was by Track Warrant Control.

General Order No. 22, dated August 25, 2000, added the Pecos station to the Pecos siding. The Pecos siding extends from MP 653.5 on the west end to MP 651.6 on the east end. The station at Pecos is designated at MP 652.5, the midpoint of the siding.

The crew was in possession of Track Warrant No. 8467, dated September 3, 2000, which authorized the crew to operate on the main track from MP 669 to "Pecos." Under the track warrant, the crew was not to operate past the east end of the Pecos siding, or MP 651.6. As Petitioner approached the west end of the Pecos siding, the location he believed to be Pecos, he began to stop the train. However, the conductor informed Petitioner that Pecos was farther east in the town of Pecos where the crew change point is located (MP 647.5). Petitioner then operated the train through the Pecos siding until he decided a second time to stop the train. The train stopped east of 651.6, beyond the authority of Track Warrant No. 8467.

The crew was removed from service. Petitioner was notified on September 3, 2000 that his certification was suspended. A combined railroad discipline and Federal certification investigative hearing was conducted on September 8, 2000. By form letter dated September 15, 2000, Petitioner was notified that his certification was revoked for 30 days.

### **Petitioner's Claims**

FRA received a petition from Petitioner on November 6, 2000, requesting FRA to review UP's decision to revoke his certification.

In his petition, Petitioner claimed that:

1. UP failed to comply with 49 C.F.R. 240.307(b)(4), which requires the railroad to explicitly state the basis for its decertification decision. Petitioner received only a form letter which advised him of UP's conclusion following the investigative hearing without providing an explanation or reasoning for the conclusion.
2. UP failed to comply with 49 C.F.R. 240.307(c)(6), which requires that all relevant and probative evidence be received in the investigative hearing unless the presiding officer determines that the evidence is repetitive or so lacking in relevancy that it would impair a prompt, orderly, and fair resolution. The hearing officer at Petitioner's investigative hearing did not allow testimony concerning slow orders and unannounced yellow flags to demonstrate the conditions under which the crew was operating just prior to the incident. In addition, the hearing officer did not allow evidence from the locomotive event recorder data to prove exactly where Petitioner actually stopped his train.
3. Petitioner operated his train under the direct instructions of the conductor, as is required by General Code of Operating Rules 1.47. Because this trip was Petitioner's first trip involving the new station "Pecos," he necessarily relied upon the instructions of the conductor about where to stop the train.

### **UP's Response**

Pursuant to 49 C.F.R. § 240.405(b) and (c), a copy of the petition was sent to UP, which elected to comment on the petition. In its response, UP argued that:

1. UP properly notified Petitioner of his certification revocation in compliance with 49 C.F.R. 240.307(b)(4). Petitioner received a letter indicating the reason for the certificate revocation, along with the post-hearing Notification of Certificate Revocation and a copy of the hearing transcript, which bears out the reason for the revocation.
2. The hearing transcript shows that the hearing officer limited some of the testimony in an effort to contain the testimony to that which was relevant to the incident and the resulting charges. The hearing officer acted properly under 49 C.F.R. 240.307(c)(6).
3. The testimony from the investigative hearing shows that Petitioner and the conductor had differing opinions about the location of Pecos, although both admitted that the train operated past MP 651.6. If Petitioner was unsure of the limits of the track warrant, he had a responsibility to stop the train until the crew could obtain a clarification about the proper location. In addition, in light of the fact that he knew he was unfamiliar with the territory, Petitioner had a responsibility to request a pilot.

## **FRA's Determination**

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

1. Petitioner's argument that UP's notification of certification revocation does not comply with 49 C.F.R. 240.307(b)(4) and is without merit. Petitioner did not show that he suffered substantial harm by UP's method of notification.<sup>1</sup>
2. Likewise, Petitioner's argument that UP failed to comply with 49 C.F.R. 240.307(c)(6) is without merit. The transcript from the investigative hearing shows that the hearing officer attempted to keep the evidence and testimony to that which was relevant and probative of the facts which led to the suspension of Petitioner's certification. Petitioner did not show that the hearing officer's actions caused him substantial harm. [See Footnote 1.]

Furthermore, any evidence that could have been provided by the locomotive's event recorder would not have changed the fact that Petitioner operated his train beyond the limits of Track Warrant No. 8467 at MP 651.6. That fact was not in dispute. Therefore, it was not necessary for the investigation to obtain event recorder data to show the exact location where Petitioner stopped the train.

3. FRA has maintained that "factual disputes could also involve whether certain equitable considerations warrant reversal of the railroad's decision on the grounds that, due to certain peculiar underlying facts, the railroad's decision would produce an unjust result not intended by FRA's rules." See 58 Fed. Reg. 18982, 19001 (April 9, 1993).

The Board notes that Petitioner operated Train ILBMN-01 over unfamiliar territory and without an engineer pilot. The regulations at 49 C.F.R. 240.231 state in part:

(a) Except as provided in paragraph (b) of this section, no locomotive engineer shall operate a locomotive over a territory unless he or she is qualified on the physical characteristics of the territory pursuant to the railroad's certification program.

(b) Except as provided in paragraph (c) of this section, if a locomotive engineer lacks qualification on the physical characteristics required by paragraph (a) of this section, he or she shall be assisted by a pilot qualified over the territory pursuant to the railroad's certification program.

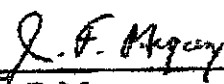
---

<sup>1</sup>When considering procedural issues, the Board's standard for review will be to determine whether substantial harm was caused by the petitioner by virtue of the failure to adhere to dictated procedures for making the railroad's decision, 58 Fed. Reg. 18982, 19001 (April 9, 1993).

The record contains no evidence that UP provided a pilot or even considered Petitioner's qualifications to operate over this territory. The record clearly shows that UP provided no job briefing or other effort to familiarize Petitioner with the territory. In its response to Petitioner's petition, UP admitted that it did not provide a pilot. Furthermore, UP's subsequent issuance of the "Pecos Blitz" [Hearing Transcript, Exhibit 6] as an explanation of General Order No. 22, indicates that the general order needed clarification for engineers unfamiliar with the territory and the exact location of the new station "Pecos." In the instant case, the Board believes that UP's own failure to comply with 49 C.F.R. 240.231 contributed to the events which led Petitioner to occupy main track without authority beyond MP 651.6. This case therefore warrants equitable consideration. The certification revocation in this case produces an unjust result not intended by FRA's rules.

Based on these findings, the Board finds that UP improperly revoked Petitioner's certificate and hereby grants the petition in accordance with the provisions of Title 49, Part 240 of the Code of Federal Regulations.

Issued in Washington D.C. on 10-3-01.

  
 \_\_\_\_\_  
 John F. Megary  
 Chairman, Locomotive  
 Engineer Review Board