

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

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Locomotive Engineer Review Board

Review and Determinations Concerning the  
Union Pacific Railroad Company's  
Decision to Revoke Mr. R. L. Ocker's  
Locomotive Engineer Certification

FRA Docket No. EQAL 02-23

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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. R. L. Ocker'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. 240"). The Board hereby determines that UP's decision to revoke Mr. Ocker's certification was improper pursuant to 49 C.F.R. Part 240 for the reasons set forth below.

**Background**

On February 26, 2002, at approximately 12:05 a.m., while operating Train ILBEW-25, Engineer Ocker ("Petitioner") allegedly failed to stop before passing a signal that displayed a stop and proceed indication at Mile Post ("MP") 762.2.

A petition was filed with FRA on May 9, 2002, on behalf of Petitioner, requesting that FRA review UP's decision to revoke his certification. The petition asserts that the revocation was improper because:

- (1) UP failed to present substantial evidence that the signal at MP 760.2 was displaying a yellow aspect instead of the green aspect alleged by the crew.
- (2) UP's signal supervisor did not submit any inspection records into the record but instead offered only verbal testimony at the hearing as to the effectiveness of the signal in question. Two pieces of evidence - the signal supervisor's narrative statement of events and the signal testing reports - were entered into evidence after the hearing was concluded.
- (3) The signal testing reports show evidence of tampering. Specifically, certain blocks of information indicate that erasures and changes were made after the tests were completed.
- (4) The biased conduct of the hearing officer tainted the hearing record.

Pursuant to 49 C.F.R. 240.405(b) and (c), a copy of the petition was sent to UP, and the railroad was afforded an opportunity to comment. UP responded timely and, as required by 49 C.F.R. 240.405(d)(2), provided Petitioner's representative with a copy of the material submitted to FRA.

### **UP's Response**

UP responded to all of Petitioner's assertions. With regard to Petitioner's first assertion, UP argued that it presented substantial evidence to support the decertification decision. At the hearing, UP's Manager of Signal Maintenance ("MSM") testified that when a train stops in the circuit as Petitioner's train did, the relay switches retain their last positions. When the relays governing the signal at issue in this case were checked, they showed that the signal last displayed a yellow aspect, which means Petitioner should have proceeded prepared to stop at the next signal. UP also introduced test results that showed that the signal system was functioning properly. Finally, UP noted that, on February 28, FRA also tested the signal and noted that it was functioning properly.

With regard to Petitioner's second assertion, UP argued that the reports in question were mandatory Department of Transportation testing reports that were discussed by UP's MSM at the hearing and, therefore, were fully supported by oral testimony at the hearing. UP argued, therefore, that including the records as exhibits did not taint the hearing.

With regard to Petitioner's third assertion, UP argued that the information that was allegedly altered on the testing documents would not exonerate Petitioner as UP's MSM testified that, when he investigated the incident, the relay switches were in the yellow position and the tests he conducted showed the signal to be yellow. With the visual inspections, UP argued that the testing forms are merely secondary evidence.

With regard to Petitioner's final assertion, UP argued that the hearing officer was not biased and Petitioner is merely taking a few questions out of context. UP believes that the transcript, read as a whole, indicates no fault in the hearing officer's conduct.

### **Board's Determination**

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

- (1) On February 26, 2002, Petitioner and a conductor were operating Train ILBEW-25 in freight service from Yuma to Tucson, Arizona.
- (2) Shortly after midnight, Petitioner was operating in the vicinity of Dome, Arizona, when he passed a signal located at MP 760.2. Both Petitioner and his conductor testified that the signal was displaying a clear, or green, indication, meaning Petitioner was clear to proceed.
- (3) The next signal at MP 762.2 was displaying a red, or stop, indication. The crew immediately stopped the train, which eventually stopped beyond the signal and 657 feet from the rear of another train. UP investigated the incident and removed the crew from service.

- (4) UP's investigation determined that the signal at MP 760.2 was displaying an approach, or yellow, indication, which gave the crew notice that the next signal may be displaying a stop. As a result of the investigation, UP suspended Petitioner's certification. On March 1, 2002, a combined railroad discipline and federal certification hearing was conducted. By letter dated March 8, 2002, Petitioner was notified that his certification was revoked.

Petitioner's first and third assertions are based on factual issues and "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. 19001 (April 9, 1993).

The Board finds that UP did not prove by substantial evidence that the signal located at MP 760.2 displayed an approach indication. While the Board recognizes that UP did present both witness testimony from the MSM who investigated the incident as well as the reports generated as a result of that investigation, the Board is not convinced that all the proper tests were conducted. For example, the testing records indicate that the testing required under 49 C.F.R. §§ 236.102 was performed, but there is no indication that the insulation resistance testing of the signal cable required under § 236.108 was conducted. In addition, under § 236.102, this particular type of relay must be inspected at least every six months to ensure that the mechanisms inside the signal housing are moving freely. There is no indication in either the hearing transcript or the testing records that these inspections had been performed, although FRA does not require records of these inspections to be kept.<sup>1</sup> Most importantly, UP failed to test the signal at MP 762.2 which sends the color aspects back to the signal at MP 760.2.

In addition, as UP noted in its response, FRA conducted an investigation of this incident two days after it occurred. FRA found brush in one line wire and another line wire not attached to an insulator. These conditions could cause a wire to "slap" together and change the polarity and voltage enough to move the position of the polar contact to something other than the yellow indication that was reported by UP's signal department as being the last signal displayed at that location. While not dispositive of the issue, FRA's findings indicate that the signal at MP 760.2 could have displayed the aspect Petitioner and his conductor claim to have seen.

Petitioner's remaining two assertions are based on alleged procedural violations. When reviewing procedural issues, "the Board's standard of review will be to determine whether substantial harm was caused the petitioner by virtue of the [railroad's] failure to adhere to the dictated procedures for making the railroad's decision. A finding of substantial harm is grounds for reversing the railroad's decision," 58 Fed. Reg. 18982, 19001 (April 9, 1993).

Because the Board finds that UP did not meet its burden of proof, there is no need to consider Petitioner's procedural assertions. However, we would like to comment on Petitioner's second assertion that the transcript does not contain any reference to Exhibits H (a narrative of the incident prepared by UP's MSM) and I (signal testing records) being specifically entered into evidence. This apparent omission supports Petitioner's assertion that UP attached the Exhibits to the transcript *after the hearing*, thereby denying Petitioner a chance to challenge the records *at the hearing*. While the Board does not

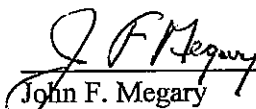
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<sup>1</sup> The Board is aware of a rare problem with this type of searchlight signal that could result in the relay mechanism "sticking" and the signal malfunctioning. The inspection and testing requirements of § 236.102 are specifically intended to ensure that the mechanism is functioning properly.

need to consider the question of whether such an oversight would result in substantial harm and therefore constitute reversible error, we believe it clearly constitutes procedural error. Of course, whether such an error caused a particular petitioner substantial harm would depend on the facts of the individual case. The Board finds it irrelevant that the reports were mentioned during the hearing. In order to guarantee a fair hearing, locomotive engineers must have the opportunity to review and challenge the credibility of all evidence at the hearing.

Based on its review of the information provided, 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 this day in Fort Worth, TX JAN 13 2003

  
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John F. Megary  
Chairman, Locomotive  
Engineer Review Board

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

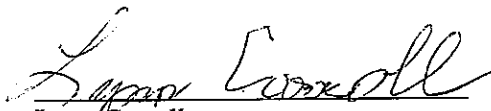
**SERVICE LIST EOAL 02-23**

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Mr. R. L. Ocker  
10827 N. Pomegranate Dr.  
Oro Valley, AZ 85737

Mr. William E. Hill  
Vice General Chairman  
Brotherhood of Locomotive Engineers  
1911 Apache Dr.  
Dalhart, TX 79022

Mr. Larry Brennan  
Manager - Engineering Certification & Licensing  
SLCC - Science & Industry Bldg.  
Mail Stop - Union Pacific Railroad Company  
4600 South Redwood Road  
Salt Lake City, UT 84130



Lynn Carroll  
Administrative Assistant

JAN 13 2003

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Date

cc: FRA Docket EQAL 02-23