

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

February 20, 2001

Locomotive Engineer Review Board

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

FRA Docket No. EQAL 00-60

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. Robert E. Stamer'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. Stamer's certification was improper pursuant to 49 C.F.R. Part 240 for the reasons set forth below.¹

Background

On May 5, 2000, at approximately 7:45 a.m., while operating Train IOAMN-04, Engineer Stamer ("Petitioner") allegedly entered a section of main track without permission. Petitioner was charged with a violation of 49 C.F.R. § 240.117(e)(4) - occupying main track without proper authority.

On September 18, 2000, a petition was filed on behalf of Petitioner asserting 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 the decertification decision. Petitioner submits that his revocation letter simply stated that he occupied the main track or segment of main track without proper authority or permission.
- (2) UP should not have decertified Petitioner because the safety implications of the incident were minimal.
- (3) Petitioner should not have been responsible for listening to every word of a radio conversation because both federal regulations and the General Code of Operating Rules ("GCOR") prohibit employees who are operating the controls of a locomotive from copying mandatory directives.

¹ Only two of the Board members participated in the disposition of this case.

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 in a letter dated November 17, 2000, 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.

Railroad's Response

UP responded to all of Petitioner's assertions. With regard to Petitioner's first assertion, UP argues that the decision letter mailed to Petitioner complies with all applicable regulations. UP based its decertification decision on the entire transcript of the hearing and the decision letter clearly states that.

With regard to Petitioner's second assertion, UP argues that any time a train enters working limits without permission from the foreman in charge, the potential for accident or injury clearly exists.

With regard to Petitioner's final assertion, UP acknowledges that the conductor is responsible for copying orders but that does not negate the engineer's ability to hear when the conductor is talking on the radio.

Board's Determination

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

- (1) On May 5, 2000, Petitioner and his crew, which consisted of a conductor and a brakeman, were operating Train IOAMN-04 in freight service from Redlands, California. The crew was heading east and the Mile Posts ("MP") are in ascending order in that direction.
- (2) The crew was in possession of a Track Bulletin Form with two lines containing the following information:

Line 1	MP 546.90 - 548.60	Foreman Hampton
Line 2	MP 556.50 - 557.10	Foreman Munoz
- (3) When approaching the first working limits, where Foreman Hampton was in charge, the conductor mistakenly contacted Foreman Munoz and received permission to enter the second working limits. Thinking they had received permission to enter the first working limits, the crew entered those limits without contacting Foreman Hampton. As a result, after stopping for the red flag, the crew entered Foreman Hampton's working limits without permission.
- (4) The conductor testified that the error occurred because the radio on his side of the locomotive was defective so he used the radio on Petitioner's side of the locomotive to contact the foremen. The Form B was on the conductor's side so he did not have it in front of him while he was using the radio. As a consequence, he received permission to enter the wrong work area. The incident was investigated and the crew was removed from service.
- (5) In the charge letter dated May 8, 2000, Petitioner was notified that his certification was suspended. On May 30, 2000, a combined railroad discipline and federal certification

hearing was conducted. By letter dated June 8, 2000, Petitioner was notified that his certification was revoked for 30 days.

Petitioner's first assertion is procedural. 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).

The Board finds that Petitioner was not substantially harmed by the alleged procedural defect. The petition indicates that Petitioner understood UP's position and proffered a competent argument to refute that position. Thus, the Board finds that, despite any alleged inadequacies in the decertification letter, Petitioner knew the basis for his decertification and prepared an adequate petition.

Petitioner's second and third claims 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 Petitioner's second assertion is without merit. While the Board recognizes that 49 C.F.R. § 240.307(i)(2) states that the railroad "may" consider whether or not the incident was minimal in nature and had no potential effect on safety, that decision, by virtue of the regulation, has been left entirely to the railroad's discretion. In the instant case, UP believed that Petitioner's actions adversely impacted safety and acted accordingly.

The Board finds Petitioner's third assertion persuasive and finds that Petitioner has presented sufficient evidence to warrant a reversal of UP's decertification decision. 49 C.F.R. § 220.61(b)(2) states that "an employee operating the controls of moving equipment shall not receive and copy mandatory directives." This requirement is echoed in UP's own operating rules. Specifically, Rule 2.14 on mandatory directives states, in pertinent part, that "an employee operating the controls of a moving engine may not copy a mandatory directive"² and implies that individuals performing those duties may be distracted and cannot be effectively relied upon to copy mandatory directives accurately.

In the instant case, although the conductor was not copying a mandatory directive, the above rationale should apply. Petitioner was operating a train with helpers and was so preoccupied with the train's operation that he could not hear the exact details of the conductor's conversation with the foreman in charge of the work area. Since engineers who are operating trains cannot be relied upon to copy orders correctly, they should not be relied upon and held responsible for the accuracy of conversations between conductors and other parties pertaining to train movements. Based on these unique facts, the Board finds that Petitioner acted properly and should not be held liable under Part 240 for entering a main track without permission.

² UP adopted GCOR Rule 2.14.

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 Washington, D.C. February 16, 2001.


John F. Megary

Chairman

Locomotive Engineer Review Board