

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

Locomotive Engineer Review Board

DEC 12 2001

Review and Determinations Concerning the
Union Pacific Railroad Company's Decision To
Revoke Mr. Dennis Lenell Smith's
Locomotive Engineer Certification

FRA Docket Number EQAL 2001-53

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. Dennis Lenell Smith 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 disapproves UP's decision to revoke Mr. Smith's certification for the reasons set forth below.

Background

A petition was filed with FRA, on behalf of Mr. Smith ("Petitioner" or "Engineer Smith"), requesting that FRA review UP's decision to revoke his certification. The petition asserts that the revocation was improper because:

- (1) Petitioner was not given a fair and impartial hearing because UP denied his request to examine and review all of the evidence to be presented at the hearing. Specifically, Petitioner stresses that UP failed to provide the red light used during the efficiency test so that it could be independently evaluated at the union's expense to establish the device's illumination;
- (2) The type of test used as the efficiency test does not represent any real-life situation that the crew would ever face. In addition, although the two train crewmembers had 54 years of combined railroad experience, *neither one had ever been tested by this type of device*, and had never even seen such a light before the day of the incident. Moreover, no one at the hearing could state how or why the red light would ever be used in real life by any of the railroad's departments;
- (3) The red light was not readily identifiable because the light's illumination was washed out or diminished by the locomotive headlights and ditch lights. Petitioner states that while there are Federal standards for minimum candela ratings of required lights, no such standards exist for red test lights; and

- (4) UP failed to provide an accurate distance account in the locomotive event recorder data. In this regard, Petitioner asserts that since no exact distance was ever provided showing the distance traveled after the train brakes were applied, the record is unclear.

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 by the operative required date in a letter dated July 23, 2001, and was required by 49 C.F.R. § 240.405(d)(2) to provide Petitioner with a copy of the material submitted to FRA.

UP argues that Petitioner was provided a fair and impartial hearing in accordance with both 49 C.F.R. Part 240 and the collective bargaining agreement. UP stresses that it offered to allow Petitioner the right to review the evidence that was to be presented at the hearing, but Petitioner refused the offer (Hearing Transcript at pages 22-24).

Contrary to Petitioner's objections to the size of the red lantern and the fact that it was placed on a curve, UP submits that it conducts hundreds of operating rule efficiency tests under the same conditions as this test using the same red light. Further, UP notes that its efficiency tests have a low failure rate.

UP also observed that a red light set on a tie in the rail in restricted speed territory is a reasonable test; the red light is used every day on its railroad and all red lights are stop signals; and testing on a curve in the flat territory involved in the subject case was reasonable. In addition, in storm situations where trees are brought down across tracks, trains are struck by lighting, or rail traffic is halted, small red lights and fusees are the types of signals that would be used between the rails to halt oncoming traffic.

Finally, UP argues that when Engineer Smith and the conductor first saw the red light they should have initiated braking procedures, since when the light came into view they were operating under restricted speed rules and should have been prepared to stop in half the distance. Although the crewmembers had the opportunity to stop the train, they chose not to apply the brakes and otherwise control the speed of their train.

Board's Determination

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

- (1) On December 14, 2000, at approximately 7:22 p.m., while operating Train LLL46-14, Engineer Smith allegedly operated past a stop signal (red light) without authority at Milepost (MP) 76 on the Livonia Subdivision during an operating rules efficiency test. At the time of the incident, the train crew consisted of Engineer Smith and Conductor Marco D. Macera.

- (2) The crew was operating in freight service in a southerly direction from Livonia to Donaldsonville, Louisiana when the incident occurred. In the vicinity of MP 76, three UP supervisors were conducting an operating rules efficiency test to determine the crew's compliance with restricted speed. Unbeknownst to the crew, the supervisors had placed a red light on the track as Petitioner's train approached while operating at restricted speed. The red light was placed on the right side of the track in the direction of travel, which was on the engineer's side of the train.
- (3) Under the circumstances of the test, Petitioner was required to operate according to the General Code of Operating Rules (GCOR)(Fourth Edition, effective April 2, 2000), GCOR Rule 6.27. This rule requires Petitioner to operate prepared to stop within half the range of vision short of, among other things, a stop signal. Under GCOR Rule 5.4.7, entitled "Display of Red Flag or Red Light," trains are required to stop where a red flag or red light is displayed. Accordingly, the red light represented a stop signal.
- (4) The crewmembers testified that they observed what appeared to be a reflection off a coke can near the track as they approached the red light. Petitioner stated that he then dimmed his locomotive head lights to verify that the obstacle was reflecting light, and immediately determined that the object was a red light. By the time Petitioner reacted and stopped the train, he had passed the red light by approximately 17 feet. The crewmembers were removed from service and the incident was investigated.
- (5) In a document dated December 14, 2000, entitled "NOTIFICATION OF CERTIFICATE SUSPENSION," Engineer Smith was notified that his certificate had been suspended as a result of the alleged incident that occurred on December 14, 2000. Specifically, the notice stated that he was in violation of 49 C.F.R. §240.117(e)(1) because he "failed to control [his] train in accordance with signal indication and passing red light indication without proper authority near milepost 76 on the Livonia Subdivision at approximately 19:22 hours while working on Job LLL46-14." He was notified that he could request a formal hearing in compliance with 49 C.F.R. § 240.307.
- (6) Petitioner then requested a hearing, and was told to report on December 28, 2000, for a formal investigation to determine his responsibility, if any, "in connection with allegedly passing a red indication without proper authority near Mile Post 76 on the Livonia Sub." The notice also stated that the hearing would be conducted under the terms of the applicable collective bargaining agreement, and that Engineer Smith was entitled to representation and witnesses at the hearing.
- (7) After two postponements, a combined railroad disciplinary and Federal certification investigative hearing was finally held on February 15, 2001.
- (8) By letter dated February 22, 2001, Petitioner was notified that his certification was revoked for 30 days.

Based on its review of the information in the record, the Board has decided to grant this petition on procedural grounds. When considering a procedural issue, the Board will determine “whether substantial harm was caused the petitioner by virtue of the failure to adhere to the dictated procedures... [and a] finding of substantial harm is grounds for reversing the railroad’s decision,” 58 Fed. Reg. 18982, 19001 (April 9, 1993). The Board is granting this petition, because the hearing officer failed to properly consider all of Petitioner’s potentially exculpatory evidence.

Analysis of the Petition

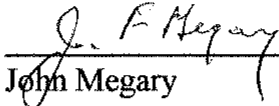
In granting the petition, the Board finds that procedural errors caused Petitioner substantial harm. One error was that Engineer Smith was not permitted to inspect the red light. A second error was that he was not allowed to present expert testimony at the hearing as to whether it was reasonable for him to have seen the light given the brightness of the locomotive ditch lights. When viewed together, these procedural errors caused Petitioner to suffer substantial harm.

The Board finds that requesting to inspect the red light is a reasonable request that may have led to exculpatory evidence. This request originated in a letter from Dale Guillot, Brotherhood of Locomotive Engineers (BLE) Local Chairman, to Willie Reynolds, UP Superintendent, dated January 3, 2001; this letter requested (among other things) access to the light used in the test so that the BLE could arrange to have the light tested by a laboratory at the union’s expense, See Hearing Transcript at pages 18-24. In Mr. Reynolds’ letter of January 10, 2001, he denied this request. As justification, Mr. Reynolds stated that “all involved management witnesses would be available for the investigation,” and indicated that Mr. Guillot could “contact the hearing manager or conference contact manager to only review evidence (no copies) to be presented in [the] investigation, as per the collective bargaining agreement,” See Hearing Transcript at pages 21-22. While the presiding officer certainly has discretion to regulate the hearing, fundamental fairness requires that Petitioner be allowed to present evidence regarding “all material issues in controversy,” See e.g., § 240.307(c)(3). When weighing the evidence in a petition for review, the Board will not allow fundamental fairness to be waived regardless of what has been agreed to in a CBA.

The Board takes no position on the actual merits of Petitioner’s argument that the red light was not readily identifiable because the light’s illumination was washed out or diminished by the locomotive headlights and ditch lights. However, the Board finds that if the hearing officer had properly considered all of Petitioner’s potentially exculpatory evidence, the deciding railroad officer’s final decision may have differed.

As an aside, the Board rejects Petitioner’s argument that UP caused him harm by failing to provide an accurate distance account in the locomotive event recorder data. The event recorder data is irrelevant based upon the facts of this case. Regardless of distance, all parties, including Petitioner, testified at the hearing that train LLL46-14 passed the red light before stopping.

Based on the above findings, the Board hereby disapproves UP's decision to revoke Petitioner's certification as a locomotive engineer in accordance with the provisions of 49 C.F.R. Part 240. Issued in Washington, D.C. on 12-10-2001.



John Megary
Chairman, Locomotive
Engineer Review Board

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

SERVICE LIST EQAL 2001-53

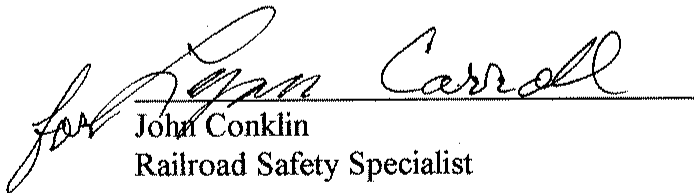
CERTIFIED MAIL
RETURN RECEIPT REQUESTED

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John Conklin
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12-12-2001
Date

cc: FRA Docket EQAL 2001-53