

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

JUN 4 2002

Locomotive Engineer Review Board

Review and Determinations Concerning the
Union Pacific Railroad Company's
Decision to Revoke Mr. Dudley D. Thibodeaux'
Locomotive Engineer Certification

FRA Docket No. EQAL 01-82

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. Dudley D. Thibodeaux' 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 Mr. Thibodeaux' certification was improper pursuant to 49 C.F.R. Part 240 for the reasons set forth below.

Background

On May 25, 2001, at approximately 1:35 a.m., while operating Train 2INOLB6-26, Engineer Thibodeaux ("Petitioner") allegedly operated passed a stop signal set up as part of an operating rules compliance test. Petitioner was charged with a violation of 49 C.F.R. Part 240.117(e)(1) - passing an absolute stop signal.

A petition was filed with FRA on November 11, 2001, 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) The test in question was not a fair test because Petitioner had never before seen the type of light used in the test. It is used only in operating rules tests and not under any actual operating conditions.
- (2) Petitioner's defense was substantially harmed because the conductor on his train was never called as a witness and his testimony was crucial to Petitioner's defense.
- (3) UP officers have opined that this particular test is unfair.
- (4) There are factors that mitigate Petitioner's actions. Specifically, the locomotive headlight and ditch lights were so bright as to wash out the illumination provided by the light used in the test.
- (5) The test light was difficult to see because the battery in the light allegedly was weak.

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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 December 11, 2001, 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 and third assertions, UP noted that the light used in this particular test is standard issue and has been used for many years and that the opinion of one UP official does not render the test invalid.

With regard to Petitioner's second assertion, UP noted that the conductor opted for UP's voluntary discipline program and, therefore, was not required to be present at the hearing. In addition, when the hearing officer offered to postpone the hearing until the conductor could be present, Petitioner's representative declined the offer.

With regard to Petitioner's fourth assertion, UP noted that the same test was performed on another train crew operating in the same area just prior to the test performed on Petitioner and that crew did not experience washout of the red light.

With regard to Petitioner's final assertion, UP argued that there was no evidence introduced at the hearing that the battery in the red light was defective. That particular light had been used earlier that evening for another test without problems. At the hearing, Petitioner stated that he saw the light at approximately 250 feet, indicating that it was functioning as intended.

Board's Determination

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

- (1) On May 25, 2001, Petitioner and a conductor were called to operate Train 2INOLB6-26 from Avondale Yard to Lafayette, LA. At the time of the incident, the crew was departing the yard on main track and on a clear signal indication. They were still within yard limits and, according to the applicable operating rules, required to operate at restricted speed; in this case, a speed that would allow Petitioner to stop the train within half the range of vision.
- (2) Unknown to the crew, two UP supervisors were conducting an operating rules efficiency test to determine the crew's compliance with the restricted speed requirement. This particular test consisted of the supervisors positioning a red light between the rails of the track on which Petitioner's train was operating.
- (3) According to General Code of Operating Rules, Rule 5.4.7 - Display of Red Flag or Red Light - "when approaching a red flag or red light the train must stop short of the red flag or red light and not proceed unless the employee in charge gives verbal permission . . ."
- (4) Petitioner testified that he did not see the light until the train was approximately 250 feet away from it and, as a result, he was unable to stop the train until the locomotive and six cars had passed the light. The crew was immediately removed from service.

- (5) Petitioner's certification was suspended on the day of the incident. On July 10, 2001, a combined railroad discipline/federal certification hearing was held. By letter dated July 18, 2001, Petitioner was notified that his certification was revoked for one month.

The Board will address Petitioner's second assertion first. Petitioner's second assertion is based on an alleged procedural violation and 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 harmed by the alleged procedural error. Petitioner did not request the conductor be present at the hearing until the hearing was already underway. In addition, when the hearing officer offered to recess the hearing until the conductor could appear, Petitioner's representative declined. As Petitioner did not deem it necessary to have the conductor at the hearing, the Board finds that he was not substantially harmed by the conductor's absence.


Petitioner's other 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 Petitioner's first assertion has merit. Under 49 C.F.R. Part 217, FRA requires railroads to establish a program of operational tests and inspections to be conducted on their employees to ensure that the employees are following all applicable operating rules. In order for a program to be acceptable, it must provide for operational testing and inspection under the various operating conditions on the railroad, describe each type of test and inspection (including the means used to carry it out), and state the purpose of each test as well as the frequency with which it will be conducted, see 49 C.F.R. Part 217.9.

The Board finds that this particular test did not comport with the requirement that tests be conducted "under the various operating conditions on the railroad," see 49 C.F.R. Part 217.9(b)(1). UP's operating rules explain that this particular type of light *could* simulate a car or a stop signal, but in fact, these lights are used exclusively in operating rules tests. As such, they are not part of the "operating conditions on the railroad." This fact was noted by a UP official at the hearing. See Hearing Transcript at 42-43. Therefore, the Board finds that the test was invalid and the results of the test should be discarded for Part 240 purposes. As a result, it is not necessary for the Board to address Petitioner's other factual assertions.

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. JUN 4 2002.



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 requested to each person shown below.

SERVICE LIST EQAL 01-82

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

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for 
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Railroad Safety Specialist

cc: FRA Docket EQAL 01-82

JUN 4 2002

Date