

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

Locomotive Engineer Review Board

Decision Concerning

Union Pacific Railroad Company's Revocation of
Mr. H. M. Yambra's Locomotive Engineer Certification

AUG 26 2003

FRA Docket Number EQAL 2003-07

Decision

The Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the decision of Union Pacific Railroad Company (UP) to revoke Mr. H. M. Yambra's (Petitioner) 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 disapproves UP's decision to revoke Mr. Yambra's certification for the reasons set forth below.

Background

The Brotherhood of Locomotive Engineers (BLE) on behalf of Mr. Yambra (Petitioner) filed a petition with FRA requesting FRA review of UP's decision to revoke his certification. The petition asserts that the revocation was improper because:

- (a) The paper work for empty rock trains out of Lufkin, Texas is routinely provided by the clerk at Houston, Texas and, on the day in question, the paperwork for the outbound train was not provided to the conductor of Petitioner's train. Paper work for empty rock trains was routinely not available.
- (b) The conductor for Petitioner's train did not inform Petitioner of the restricted car in the train as required by GCOR Rule 1.47, A part 2.
- (c) The relief crew at Cleveland, Texas also did not possess the required paper work for the involved train and were also operating the train in excess of 40 miles per hour (MPH).
- (d) The locomotive event recorder data from two of the locomotives in Petitioner's train consist show different mile post locations.
- (e) There were a number of procedural errors including: the railroad's failure to provide all locomotive event recorder data and the readouts from hotbox detectors; the hearing officer's failure to permit questioning of a witness concerning his ability to properly measure the wheel size to verify the speed

accuracy of event recorder data; and the hearing officer's refusal to allow the submission of evidence showing that other crews on rock trains are not provided proper paper work.

- (f) The paper work available to the crew showed that the involved train consisted of loaded cars which established that its maximum authorized speed was 50 MPH. Further, there was no willful intention by Petitioner to exceed the authorized speed and Petitioner operated the train at 51 MPH for only a brief period.

Pursuant to 49 C.F.R. 240.405(b), (c), a copy of the petition was sent to the railroad. The railroad elected to comment and was required by 49 C.F.R. 240.405(d)(2) to provide Petitioner with a copy of the materials submitted to FRA.

Railroad's Response

The railroad submits that the train's consist information was in the system at least two hours before Petitioner was ordered to work. UP also contends that while the conductor did not have this paper work, he did have train consist information showing him all car numbers and that he knew the cars were empties. Thus, the crew had sufficient information to comply with the timetable special instructions concerning speed. Moreover, the railroad asserts that the engineer is as responsible as the conductor for the safe and proper handling of the train and is required to review the paper work for the train. The railroad further contends that the actions of the proceeding crew are not relevant in this matter.

The railroad claims that Petitioner's assertions regarding conflicting event recorder information are irrelevant since both members of the crew admitted that the train was operated at 50 MPH. The railroad also submits that Petitioner was able to review all documents introduced by the railroad in advance of the hearing and that all of Petitioner's procedural assertions are either moot or without merit. The railroad also asserts that Petitioner knew that the cars in the train were empties and the fact that the train operated at a speed of 50 MPH is a decertifiable event regardless of Petitioner's intent.

Board's Determination

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

- (1) On August 13, 2002, Petitioner was operating Train RLCUI-12 from Lufkin, Texas to Houston, Texas. Petitioner was accompanied by Conductor Richardson (Conductor).
- (2) At approximately 7:00 a.m., Petitioner and Conductor began their tour of duty at Houston, Texas and deadheaded to Lufkin, Texas to operate Train RLCUI-12, an empty rock train, back to Houston. The record indicates

that although current paper work was available on this train nearly two hours prior to the crews start time, the crew did not obtain the current paper work prior to departing Houston, Texas. Based on the crew's undisputed testimony, they relied on the inbound paper work when beginning the operation of this train. Further, the record indicates that the crew received the paper work from the clerk at Houston and that this was routine practice on these types of operations.

- (3) Although UP's Timetable Special Instructions authorize trains of gondola cars to operate at 50 MPH, they also impose a 40 MPH speed restriction on trains containing any empty gondola cars in the series SP 337700 through 338099. Train RLCUI-12 contained one car in its consist subject to this speed limitation, gondola SP 338066. As the inbound paperwork involved the train while loaded it did not contain a notation of the 40 MPH speed restriction; whereas, the current paperwork on the empty train did include this notification.
- (4) While enroute between Lufkin and Houston, Texas, Petitioner operated Train RLUCI-12 at speeds up to and including 51 MPH. The testimony of both Petitioner and Conductor admit to operating the train at speeds up to and including 50 MPH. Thus, Petitioner operated his train in excess of the maximum authorized speed limit (40 MPH) by at least 10 MPH. At the train's arrival in Houston, a manager took a download off the train's locomotives, later review of that data revealed the excessive speed.
- (5) By letter dated August 22, 2002, Petitioner was notified that his certification was suspended. Petitioner was also notified by letter dated August 22, 2002, that a formal investigation would be conducted on August 28, 2002. Petitioner was later notified by letter postmarked August 26, 2002, that the investigation was postponed until September 11, 2002.
- (6) A formal investigation was held on September 11, 2002. By letter dated September 20, 2002, UP informed Petitioner that his certification was revoked for a period of one (1) month for exceeding the maximum authorized speed by more than 10 MPH in violation of 49 C.F.R. 240.117(e)(5).

Based on its review of the information provided, the Board finds that there was an intervening cause in this instance such that UP did not properly revoke Petitioner's certification as provided for in 49 CFR Part 240.

Analysis of the Petition

In reviewing petitions, the Board considers three issues in determining whether revocation of certification was proper under Federal regulations, see 49 C.F.R. 240.405(f). First, whether

substantial evidence exists to support the railroad's factual findings in its decision, see 58 FR 18982, 19001 (1993). Second, whether procedural irregularities committed at the railroad investigative hearing caused the petitioner substantial harm. Id. Finally, whether the railroad's legal interpretations are correct based on de novo review. Id. Factual disputes include "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." Id. In an effort to clarify the preceding factor, FRA modified 49 CFR Part 240 in 1999 by adding paragraph (i) to § 240.307, see 64 FR 60966, 60981 (November 8, 1999). Section 240.307(i) states that a railroad "...shall not revoke the person's certification... if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the locomotive engineer's ability to comply with the railroad operating rule or practice which constitutes a violation under § 240.117(e)(1) through (e)(5)..." In the preamble to the final rule, FRA provides an interpretation of what constitutes "an intervening cause," which constitutes a defense to an otherwise revocable event, to include instances where a conductor provides incorrect information to the engineer which is reasonably relied on in making a prohibited train movement, see 64 FR 60981-82.

Although the Board agrees with the basic premise that the engineer is responsible for reviewing the paperwork prior to a train's departure, the Board believes that sufficient evidence exists based on the specific facts involved in this instance to conclude that an intervening cause prevented or materially impaired Petitioner from complying with the speed restriction applicable to the train he was operating. Based on the Board's review of the record, there is no question that Petitioner exceeded the maximum authorized speed limit of 40 MPH by at least 10 MPH in violation of 240.117(e)(2). However, the Board finds that the evidence contained in the record establishes that the train crew was not provided current paperwork on the train they were required to operate and were forced to operate based on the paperwork for the train when in-bound. Although the record contains evidence that current paperwork was available to the train crew, the record contains no evidence that the paperwork was ever provided to the train crew through the routine and established practices for providing such information at the involved location. The record indicates that the usual and accepted practice, at the involved location and for the type of train involved, is for the clerk to provide the crew with the paperwork and that in many instances these trains are operated on in-bound paperwork because the current paperwork is not available. see Transcript at 77-85 and 92-93. The undisputed testimony of the train crew also establishes that attempts were made by the crew to acquire current paperwork on the train but that such efforts were unsuccessful, see Transcript at 78- 86. Furthermore, contrary to the assertions of the railroad, without the current paperwork it would be extremely difficult for the train crew in this case to determine that a speed restriction was to be placed on this train as it was based on the presence of just one car in the train consist that was not specifically identified in any discernible way in the paperwork in the crew's possession. This difficulty is evidenced by the fact that the current paperwork explicitly notes the speed restriction, see Exhibit 14.

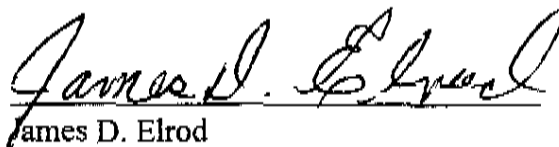
In addition to the problems related to discerning the applicability of any speed restriction based on the paperwork in possession of the train crew, the Board also finds that Petitioner properly

questioned the Conductor regarding the application of any speed restrictions and was provided inaccurate information based on the Conductor's review of the paperwork, see Transcript at 79 and 96. This is precisely the type of incident described in the preamble of the final rule discussed above. Therefore, based on the nature of the paperwork in possession of the train crew and based upon Petitioner's questioning of the Conductor regarding whether any restrictions applied to the train, the Board finds that Petitioner met his duty under the railroad's operating rule at GCOR 1.47(B)(2) (stating that the engineer's duty with regard to determining whether any cars or units in the train require special handling is to "check with the conductor,")¹ see Transcript at 92-93. Moreover, based on the combination of two factors: (i) the nature of the paperwork in possession of the train crew; and (ii) Petitioner's reasonable reliance on the inaccurate information provided to him by the Conductor regarding any speed restrictions applicable to the train, the Board finds sufficient evidence to establish that an intervening cause prevented or materially impaired Petitioner's ability to operate his train within the prescribed speed limit. Consequently, on the basis of these equitable considerations, the Board finds that the railroad's decision revoking Petitioner's certification under these specific circumstances would produce an unjust result not intended by FRA's rules.

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 Fort Worth, Texas on _____

AUG 26 2003



James D. Elrod
Acting Chairman, Locomotive
Engineer Review Board

¹ In comparison, the conductor has the following affirmative duties not required of the engineer: (1) to advise the engineer and train dispatcher of any restrictions placed on equipment being handled, and (2) to deliver the freight with any accompanying documents to its destination or terminal. See GCOR 1.47(A)(2) and (A)(4).

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

SERVICE LIST EQAL 2003-07

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

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Mr. Larry J. Brennan
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Lynn Carroll
Administrative Assistant

AUG 26 2003

Date

cc: FRA DOCKET EQAL 2003-07

To. Col. Ginn

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104 270 3124 ~~3124~~

Pages included, (over) 7

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