

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

Locomotive Engineer Review Board

Review and Determination Concerning
UP Railroad's
Decision to Revoke Mr. G. E. Kelly's
Locomotive Engineer Certification

FRA Docket Number EQAL-2011-33

Decision

The Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the decision of the Union Pacific Railroad (UP) to deny the locomotive engineer certification (certification) of Mr. G. E. Kelly (Petitioner) in accordance with the provisions of title 49, part 240 of the Code of Federal Regulations. The Board hereby denies Mr. Kelly's petition for the reasons set forth below.

Background

The Petitioner—initially hired as a trainman on January 23, 2006—was promoted to the position of conductor and entered Fireman in Training (FIT)-Student Locomotive Engineer training on July 11, 2010. Petitioner failed to pass a train handling skill performance evaluation administered on June 2, 2011. After being provided with 27 days of additional training, Petitioner was retested on June 29, 2011, yet again failed.

In a notice dated July 22, 2011, UP advised Petitioner that his "Certification for Locomotive Engineer is Pending Denial," due to Petitioner's inability to pass the aforementioned skill performance examinations required under 49 C.F.R. § 240.211. The notice also provided Petitioner with 10 days to submit a written rebuttal to the General Superintendent.

In a letter dated July 25, 2011, Petitioner's representative, the United Transportation Union (UTU), asserted that UP had violated the National FIT Training Agreement for not notifying or consulting with the UTU prior to UP's decision to deny Petitioner's engineer certification and requested a meeting to discuss the issue and the delivery of copies of UP's records retaining to Petitioner's training.

UP responded on August 29, 2011, indicating that no document, including the UTU's letter, was timely received rebutting any of the adverse information provided. UP's response also included additional information, including a copy of the denial form dated August 29, 2011, the letters UP

provided Petitioner, a list of the subject rides, and Engineer Quality Management System (EQMS) events.

Locomotive Engineer Review Board's Determination

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

- (1) On June 2, 2011, Petitioner failed to pass a train handling skill performance evaluation.
- (2) On June 29, 2011, Petitioner again failed to pass a train handling skill performance evaluation.

Analysis of the Petition

In reviewing petitions of revocation decisions, the Board considers four issues in determining whether decertification was proper under FRA's 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 Fed. Reg. 18982, 19001 (1993). Second, when considering procedural disputes, the Board will "determine whether substantial harm was caused the petitioner by virtue of the 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." *Id.* To establish grounds upon which the Board may grant relief, Petitioner must show: (1) that procedural error occurred, and (2) the procedural error caused substantial harm. *Id.* Third, whether the railroad's legal interpretations are correct based on a de novo review. *Id.* Finally, whether "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) of this part." 49 C.F.R. § 240.307(i)(1).

The Board finds that the underlying proceeding included no procedural errors causing substantial harm and that UP has provided sufficient evidence to support its denial of Petitioner's certification.

According to Petitioner, "Union Pacific failed to uphold its requirements under the collective bargaining agreements to meet with the Organization and Petitioner in an attempt to define any problems encountered by Petitioner and seek a remedy prior to its denial of engineer certification." UP did not respond to this assertion.

The Board believes that this assertion lacks merit, since collective bargaining agreements for locomotive engineer training programs are not addressed by, and are not do not controlled by under, 49 C.F.R. Part 240. Any failure to comply with a collective bargaining agreement does not constitute non-compliance with § 240.219.

Petitioner asserts that his ability to provide comments or rebut adverse information under § 240.219(b) was impaired by UP's failure to provide information regarding the scoring and point system used to determine Petitioner's alleged ride failure. More specifically, Petitioner contends that UP failed to provide upon request any explanation for the manner in which the

certification rides are graded, copies of engine downloads pertaining to the rides, or scoring outlines delineating the point system used.

UP contends that Petitioner was provided with a copy of the details for both evaluations, evidenced by his signature at the end of each document.

The Board believes that this claim lacks merit. Although Petitioner requested certain detailed information, UP's failure to provide this information does not itself create a substantial harm sufficient to find a procedural error here. The carrier is under an obligation to provide Petitioner with the basis of its decision. In the instant case, UP fulfilled this obligation when it provided Petitioner written and oral explanations for his failure. While Petitioner requested additional technical and scoring mechanism information, it does not appear that the additional information was the basis for UP's decision.

Petitioner asserts Union Pacific has failed to provide any proof of its allegations. UP, however, asserts that Petitioner was not unfairly treated and that the carrier went above and beyond the normal training parameters with his training, affording him an additional five months to strengthen his skill set in an effort to become a certified class one engineer.

The Board believes that this assertion lacks merit. As noted above, UP provided Petitioner with substantial written and oral explanations for his failure. Thus, UP's decision is supported by substantial evidence showing that Petitioner failed the required evaluations required by law and that UP was justified in its decision to deny Petitioner locomotive engineer certification.

Petitioner, however, continues to claim that the tests were graded incorrectly and unfairly. Petitioner asserts that both certification rides were deficient in many areas. According to Petitioner, there were no point deductions shown for each exception taken and the evaluations ended with scores of 77% and 67%, respectively, with no indication of the point system used by UP to determine the scores. Moreover, asserts Petitioner, UP's certification rides data indicates that for the certification rides, a skills performance checklist, rather than a certification checklist, was utilized. According to Petitioner, 49 C.F.R. Part 240 sets forth specific areas of proficiency that must be observed. Petitioner also asserts that UP's decision to deny certification was based on retribution. According to Petitioner, he failed two certification rides, even after passing all evaluations prior to a discipline event.

UP states that Petitioner's points were deducted using a model based on Appendix E of 49 C.F.R. Part 240, to which FRA has not taken exception to in previous appeal cases. According to UP, the territory covered by Petitioner's rides fall within Petitioner's expected territorial knowledge base, as denoted by his FIT Training Summary. The record shows the Petitioner had made 17 trips over the territory prior to his first certification ride. *See* Petition Exhibit 3. UP also asserts that it does not have a separate scoring system for FITs and Engineers and that each craft is scored using the same criteria. According to UP, five FITs were evaluated and promoted to class one engineers using this scoring system. UP did not respond to Petitioner's assertion that his failure was retributive.

The Board believes that Petitioner's assertions lacks merit. Appendix E to 49 C.F.R. Part 240 provides recommended procedures for conducting skill performance testing and evaluations under both § 240.211 (initial certification) and § 240.127 (recertification). Moreover, § 240.127 requires that each railroad's program indicate the types of actions the railroad will take in the event that a person fails an initial examination or a reexamination of his or her performance skills and describe the scoring system—including the skills to be tested and the weight or possible score that each skill will be given—used by the railroad during a skills test.

In the model used by UP, 100 points may be earned over 21 graded observation categories, whereas full points will be deducted for a failure per category. While Petitioner may disagree with the adequacy of the scoring system, the Board believes that the system comports with the applicable regulations and that it has been consistently applied by UP here. Petitioner's assertion here does not obviate the Board's finding that substantial evidence exists here.

While Petitioner's assertion regarding retribution may have merit, Petitioner failed to support it with any evidence. It is common practice that, as student engineers progress through the on-the-job training, the performance expectations and evaluation of proficiency becomes less concessionary and more stringent.

Conclusion

For the foregoing reasons, the Board finds that UP's decision to deny Petitioner's certification is supported by substantial evidence and that Petitioner was not substantially harmed by any procedural error. Based on its review of the record, the Board hereby denies the petition in accordance with the provisions of 49 C.F.R. Part 240.

Issued in Chicago, IL on APR 13 2012.



Richard M. McCord
Chairman,
Locomotive Engineer Review Board

SERVICE LIST EQAL 2011-33

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

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

George E. Kelly
8300 FM 1960 E
Apartment 9254
Humble, Texas 77346

J. Scott Chellete
Vice General Chairman
United Transportation Union
4411 Old Bullard Rd.
Suite 600
Tyler, TX 75703-1215

Mr. Lawrence Brennan, Jr.
Manager, Engineering Certification & Licensing
Union Pacific Railroad Company
1400 Douglas St., Mailstop 1010
Omaha, NE 68179



Diane Filipowicz
Administrative Assistant

APR 13 2012

Date

cc: FRA Docket EQAL 2011-33

enc: Post LERB Memo

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

George E. Kelly
 8300 FM 1960 E
 Apartment 9254
 Humble, Texas 77346

EQAL 2011-33

2. Article Number
(Transfer from service label)

7011 0470 0002 3685 7577

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X Agent
 Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? Yes
 If YES, enter delivery address below: No

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

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1. Article Addressed to:

J. Scott Chellete
 Vice General Chairman
 United Transportation Union
 4411 Old Bullard Rd., Suite 600
 Tyler, TX 75703-1215

EQAL 2011-33

2. Article Number
(Transfer from service label)

7011 0470 0002 3685 7584

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X Agent
 Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? Yes
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 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

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- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Mr. Lawrence Brennan, Jr.
 Manager, Engineering Certification & Licensing
 Union Pacific Railroad Company
 1400 Douglas St., Mailstop 1010
 Omaha, NE 68179

EQAL 2011-33

2. Article Number
(Transfer from service label)

7011 0470 0002 3685 7591

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X Agent
 Addressee

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3. Service Type
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 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes