

January 1, 2009

All Local Chairmen
General Committee of Adjustment
Brotherhood of Locomotive Engineers and Trainmen
Union Pacific Railroad Company/Eastern District

Dear Brothers and Sisters:

This is in regards to the issue of the FRA Decertification proceedings permitted to an individual when an Engineer's federal license is revoked. Such revocations are required by law in accordance with Part 240 of the Code of Federal Regulations (CFR) concerning Locomotive Engineer Certification.

As you know, Part 240 of the CFR provides for a process whereby an individual Engineer may appeal their decertification to the FRA's Locomotive Engineer's Review Board (LERB). The LERB process is only designed to review the merits of the incident and will not examine procedural issues. This process, as well as other Federal Regulations, are not governed by the Railway Labor Act (RLA) or the controlling Collective Bargaining Agreement (CBA). The responsibility for the FRA appeal rests solely with the individual Locomotive Engineer.

It is important to note that there has been a constant history on this issue, in that Engineer discipline cases handled on the property are sustained, or denied, at Section 3 RLA arbitration, depending on the result of the LERB decision. Some of you have had direct experience on this issue with some individual cases.

It has been the consistent position of this office that we have a responsibility to inform our members who are involved in a decertifiable incident of their rights under the law. In order to comply with this, I strongly encourage each of you to provide a copy of the attached letter dated February 18, 1997, which you were previously provided, concerning BLET's Certification/Decertification Policy to any Engineer who is decertified. You should then explain to the individual their rights to appeal their case to the LERB.

If an Engineer decides that they would like to appeal their case to the LERB they may call the BLET Certification Hotline at 1-800-393-2716. The BLET ND Arbitration Department Staff will answer questions and advise the individual about the revocation

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All BLET Local Chairmen

procedures and their rights. The ND Arbitration Department will also provide the individual with a sample LERB appeal that they may use to assist themselves when preparing their case.

Your assistance and cooperation to inform our members on this issue will be greatly appreciated.

As always, I remain,
Fraternally yours,

Michael Young

Michael Young
General Chairman, BLET
UP/Eastern District

cc: All ST's UP/ED
Attachments (2)

SUBPART E - DISPUTE RESOLUTION PROCEDURES

§ 240.401 Review board established.

(a) Any person who has been denied certification, denied recertification, or has had his or her certification revoked, and believes that a railroad incorrectly determined that he or she failed to meet the qualification requirements of this regulation when making the decision to deny or revoke certification, may petition the Federal Railroad Administrator to review the railroad's decision.

(b) The Federal Railroad Administrator has delegated initial responsibility for adjudicating such disputes to the Locomotive Engineer Review Board.

(c) The Locomotive Engineer Review Board shall be composed of at least three employees of the Federal Railroad Administration selected by the Administrator.

§ 240.403 Petition requirements.

(a) To obtain review of a railroad's decision to deny certification, deny recertification, or revoke certification, a person shall file a petition for review that complies with this section.

(b) Each petition shall:

(1) Be in writing;

(2) Be submitted in triplicate to the Docket Clerk, Federal Railroad Administration, 400 Seventh Street SW, Washington, DC 20590;

(3) Contain all available information that the person thinks supports the person's belief that the railroad acted improperly, including:

(i) The petitioner's full name;

(ii) The petitioner's current mailing address;

(iii) The petitioner's daytime telephone number;

(iv) The name and address of the railroad; and

(v) The facts that the petitioner believes constitute the improper action by the railroad, specifying the locations, dates, and identities of all persons who were present or involved in the railroad's actions (to the degree known by the petitioner);

(4) Explain the nature of the remedial action sought;

(5) Be supplemented by a copy of all written documents in the petitioner's

possession that document that railroad's decision; and

(6) Be filed in a timely manner.

(c) A petition seeking review of a railroad's decision to deny certification or recertification filed with FRA more than 180 days after the date of the railroad's denial decision will be denied as untimely.

(d) A petition seeking review of a railroad's decision to revoke certification in accordance with the procedures required by §240.307 filed with FRA more than 180 days after the date of the railroad's revocation decision will be denied as untimely.

§ 240.405 Processing qualification review petitions.

(a) Each petition shall be acknowledged in writing by FRA and the acknowledgment shall contain the docket number assigned to the petition.

(b) Upon receipt of the petition, FRA will notify the railroad that it has received the petition and provide the railroad with a copy of the petition.

(c) The railroad will be given a period of not to exceed 30 days to submit to FRA any information that the railroad considers pertinent to the petition.

(d) A railroad that submits such information shall:

(1) Identify the petitioner by name and the docket number of the review proceeding;

(2) Provide a copy of the information being submitted to FRA to the petitioner.

(e) Each petition will then be referred to the Locomotive Engineer Review Board for a decision.

(f) The Board will determine whether the denial or revocation of certification or recertification was improper under this regulation (*i.e.*, based on an incorrect determination that the person failed to meet the qualification requirements of this regulation) and grant or deny the petition accordingly. The Board will not otherwise consider the propriety of a railroad's decision, *i.e.*, it will not consider whether the railroad properly applied its own more stringent requirements.

(g) Notice of that decision will be provided in writing to both the petitioner and the railroad. The decision will include findings of fact on which it is based.

§ 240.407 Request for a hearing.

(a) If adversely affected by the Locomotive Engineer Review Board decision, either the petitioner before the Board or the railroad involved shall have a right to an

administrative proceeding as prescribed by § 240.409.

(b) To exercise that right, the adversely affected party shall file with the Docket Clerk a written request within 20 days of service of the Board's decision on that party.

(c) The result of a failure to request a hearing within the period provided in paragraph (b) of this section is that the Locomotive Engineer Review Board's decision will constitute final agency action.

(d) If a party elects to request a hearing, that person shall submit a written request to the Docket Clerk containing the following:

(1) The name, address, and telephone number of the respondent and the requesting party's designated representative, if any;

(2) The specific factual issues, industry rules, regulations, or laws that the requesting party alleges need to be examined in connection with the certification decision in question; and

(3) The signature of the requesting party or the requesting party's representative, if any.

(e) Upon receipt of a hearing request complying with paragraph (d) of this section, FRA shall arrange for the appointment of a presiding officer who shall schedule the hearing for the earliest practicable date.

§ 240.409 Hearings.

(a) An administrative hearing for a locomotive engineer qualification petition shall be conducted by a presiding officer, who can be any person authorized by the Administrator, including an administrative law Judge.

(b) The presiding officer may exercise the powers of the Administrator to regulate the conduct of the hearing for the purpose of achieving a prompt and fair determination of all material issues in controversy.

(c) The presiding officer shall convene and preside over the hearing. The hearing shall be a *de novo* hearing to find the relevant facts and determine the correct application of this part to those facts. The presiding officer may determine that there is no genuine issue covering some or all material facts and limit evidentiary proceedings to any issues of material fact as to which there is a genuine dispute.

(d) The presiding officer may authorize discovery of the types and quantities which in the presiding officer's discretion will contribute to a fair hearing without unduly burdening the parties. The presiding officer may impose appropriate non-monetary sanctions, including limitations as to the presentation of evidence and issues, for any party's willful

failure or refusal to comply with approved discovery requests.

(e) Every petition, motion, response, or other authorized or required document shall be signed by the party filing the same, or by a duly authorized officer or representative of record, or by any other person. If signed by such other person, the reason therefore must be stated and the power of attorney or other authority authorizing such other person to subscribe the document must be filed with the document. The signature of the person subscribing any document constitutes a certification that he or she has read the document; that to the best of his or her knowledge, information and belief every statement contained in the document is true and no such statements are misleading; and that it is not interposed for delay or to be vexatious.

(f) After the request for a hearing is filed, all documents filed or served upon one party must be served upon all parties. Each party may designate a person upon whom service is to be made when not specified by law, regulation, or directive of the presiding officer. If a party does not designate a person upon whom service is to be made, then service may be made upon any person having subscribed to a submission of the party being served, unless otherwise specified by law, regulation or directive of the presiding officer. Proof of service shall accompany all documents when they are tendered for filing.

(g) If any document initiating, filed, or served in, a proceeding is not in substantial compliance with the applicable law, regulation, or directive of the presiding officer, the presiding officer may strike or dismiss all or part of such document, or require its amendment.

(h) Any party to a proceeding may appear and be heard in person or by an authorized representative.

(i) Any person testifying at a hearing or deposition may be accompanied, represented, and advised by an attorney or other representative, and may be examined by that person.

(j) Any party may request to consolidate or separate the hearing of two or more petitions by motion to the presiding officer, when they arise from the same or similar facts or when the matters are for any reason deemed more efficiently heard together.

(k) Except as provided in § 240.407(c) of this part and paragraph (u)(4) of this section, whenever a party has the right or is required to take action within a period prescribed by this part, or by law, regulation, or directive of the presiding officer, the presiding officer may extend such period, with or without notice, for good cause, provided another party is not substantially prejudiced by such extension. A request to extend a period which has already expired may be denied as untimely.

(l) An application to the presiding officer for an order or ruling not otherwise specifically provided for in this part shall be by motion. The motion shall be filed with the presiding

officer and, if written, served upon all parties. All motions, unless made during the hearing, shall be written. Motions made during hearings may be made orally on the record, except that the presiding officer may direct that any oral motion be reduced to writing. Any motion shall state with particularity the grounds therefore and the relief or order sought, and shall be accompanied by any affidavits or other evidence desired to be relied upon which is not already part of the record. Any matter submitted in response to a written motion must be filed and served within fourteen (14) days of the motion, or within such other period as directed by the presiding officer.

(m) Testimony by witnesses at the hearing shall be given under oath and the hearing shall be recorded verbatim. The presiding shall give the parties to the proceeding adequate opportunity during the course of the hearing for the presentation of arguments in support of or in opposition to motions, and objections and exceptions to rulings of the presiding officer. The presiding officer may permit oral argument on any issues for which the presiding officer deems it appropriate and beneficial. Any evidence or argument received or proffered orally shall be transcribed and made a part of the record. Any physical evidence or written argument received or proffered shall be made a part of the record, except that the presiding officer may authorize the substitution of copies, photographs, or descriptions, when deemed to be appropriate.

(n) The presiding officer shall employ the Federal Rules of Evidence for United States Courts and Magistrates as general guidelines for the introduction of evidence. Notwithstanding paragraph (m) of this section, all relevant and probative evidence shall be received unless the presiding officer determines the evidence to be unduly repetitive or so extensive and lacking in relevancy that its admission would impair the prompt, orderly, and fair resolution of the proceeding.

(o) The presiding officer may:

- (1) Administer oaths and affirmations;
- (2) Issue subpoenas as provided for in § 209.7 of part 209 in this chapter;
- (3) Adopt any needed procedures for the submission of evidence in written form;
- (4) Examine witnesses at the hearing;
- (5) Convene, recess, adjourn or otherwise regulate the course of the hearing; and
- (6) Take any other action authorized by or consistent with the provisions of this part and permitted by law that may expedite the hearing or aid in the disposition of the proceeding.

(p) The petitioner before the Locomotive Engineer Review Board, the railroad involved in taking the certification action, and FRA shall be parties at the hearing. All parties may participate in the hearing and may appear and be heard on their own behalf or through

designated representatives. All parties may offer relevant evidence, including testimony, and may conduct such cross-examination of witnesses as may be required to make a record of the relevant facts.

(q) The party requesting the administrative hearing shall be the "hearing petitioner." The hearing petitioner shall have the burden of proving its case by a preponderance of the evidence. Hence, if the hearing petitioner is the railroad involved in taking the certification action, that railroad will have the burden of proving that its decision to deny certification, deny recertification, or revoke certification was correct. Conversely, if the petitioner before the Locomotive Engineer Review Board is the hearing petitioner, that person will have the burden of proving that the railroad's decision to deny certification, deny recertification, or revoke certification was incorrect. Between the petitioner before the Locomotive Engineer Review Board and the railroad involved in taking the certification action, the party who is not the hearing petitioner will be a respondent.

(r) FRA will be a mandatory party to the administrative hearing. At the start of each proceeding, FRA will be a respondent.

(s) The record in the proceeding shall be closed at the conclusion of the evidentiary hearing unless the presiding officer allows additional time for the submission of additional evidence. In such instances the record shall be left open for such time as the presiding officer grants for that purpose.

(t) At the close of the record, the presiding officer shall prepare a written decision in the proceeding.

(u) The decision:

(1) Shall contain the findings of fact and conclusions of law, as well as the basis for each concerning all material issues of fact or law presented on the record:

(2) Shall be served on the hearing petitioner and all other parties to the proceeding;

(3) Shall not become final for 35 days after issuance;

(4) Constitutes final agency action unless an aggrieved party files an appeal within 35 days after issuance; and

(5) Is not precedential.

February 18, 1997

ALL LOCAL CHAIRMEN - U.S.
ALL GENERAL CHAIRMEN - U.S.

Re: I.D. Engineer Certification/Decertification Assistance Policy

Dear Brothers and Sisters:

Recently the I.D. Arbitration Department has received a few investigation transcripts accompanying requests that petitions be prepared for the Locomotive Engineer Review Board pursuant to 49 CFR Part 240.403. In following up these requests it has become apparent there may be misunderstanding among some Local or General Chairmen as to the level of participation to which this Administration has committed itself with respect to engineer certification revocations. This letter is intended to clear up possible, lingering misunderstanding and set guidelines for assistance that the I.D. will provide BLE Members and their representatives in decertification-related proceedings.

As you know, the previous Administration's position concerning decertification was based upon the premise that engineer certification is a statutory and/or regulatory relationship between individual locomotive engineers and the Department of Transportation (Federal Railroad Administration). Because this relationship is separate and distinct from the contractual (collective bargaining agreement) relationship, and the Organization's duty of representation falls within the purview of the collective bargaining agreement, the I.D. was not obligated to handle regulatory (decertification) proceedings. The I.D. left issues regarding the handling of decertification proceedings to the discretion of the General Committees of Adjustment. Therefore, the I.D. did not, in the previous administration, offer direct assistance to Members facing possible decertification, with the exception of designating BLE Vice President Paul Sorrow to act nominally in engineer certification related matters.

A pledge I made to the delegates to the Sixth Quinquennial Convention was that I would move to elevate the level of assistance the I.D. would offer our Members and their representatives in certification revocation proceedings. Immediately after my election as your President, in keeping with my promise, I announced an 800 number Helpline for Members and their representatives to call for early assistance when possible decertification events have occurred, and I designated BLE Vice President Richard Radek to advise callers about the revocation procedures and their rights. I further instructed Brother Radek to assist Members and their representatives in preparing the best possible defense for the initial hearing (investigation) of decertification event cases. To date, Brother Radek has fielded hundreds of calls to the Helpline, and *has* assisted many Members and Local Chairmen become better prepared to defend against decertification charges.

Another commitment I made to the delegates was to provide representation to Members whose Locomotive Engineer Review Board (LERB) certification revocation decisions reach a Part 240.409 level hearing, should the Member request such representation. Such representation

would be handled by Brother Radek who could dedicate the resources of the newly augmented I.D. Arbitration Department to that particular task. In such cases Brother Radek will review the case to make certain that there is a reasonable chance for success. For instance, frivolous cases will generally not be accepted. Cases in which the LERB has ruled in an engineers favor and the Carrier petitions for a *de novo* trial will ordinarily be accepted. A Member will, of course, always retain the right to handle his or her own case, or through counsel, as the Member desires. Pursuant to this commitment, Brother Radek has handled the I.D.'s first such representation to a successful conclusion, and others are pending.

In addition to the things I pledged to do during the Convention which are described above, I have acted upon the observations, advice and recommendations of many Officers and Members of this Organization to increase the participation of the I.D. in the .FRA certification regulatory environment. You are probably already aware from our publications that I appointed a task force to examine the entire area of the engineer certification regulations and to make recommendations for solving the problems which have become attendant to them. Recently, four BLE'rs, Vice President Radek, St. Louis Southwestern Railway General Chairman Gene Thompson, California State Legislative Board Chairman Paul Morrison and Bob Harvey of the Washington, D.C. Office staff, were named to an engineer certification working group under the auspices of the Railroad Safety Advisory Committee (RSAC). These Brothers have begun efforts to obtain favorable changes in the certification regulations, including the decertification process, penalty system, etc. I am hopeful that their work will prove beneficial for our Membership.

Finally, I have asked Brother Radek, in conjunction with Vice President Bill Walpert and the Education and Training Department, to design and distribute materials to assist Members and their Representatives prepare petitions appealing certification revocations to the LERB.

I know very well that the Part 240 Regulations, and the Dispute Resolution Procedures in particular, have created additional responsibilities and burdens for our Members and Officers. This Administration is working on many levels to respond to concerns and alleviate problems concerning them. I believe we have already done a lot to assist our Members with certification problems. Maybe what we have at this point is not yet a model of perfection. However, despite limited resources, we have built significant structure in support of certification/decertification assistance, where little had been previously offered, and we plan to continue to work hard to make further improvements.

Fraternally,

A handwritten signature in black ink, appearing to read "C. V. Morrison". The signature is fluid and cursive, with a long horizontal stroke at the end.

President

cc: Advisory Board - U.S.
Special Representatives - U.S.