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January 27, 2009

Jo Strang  
Acting Deputy Administrator  
Federal Railroad Administration  
1200 New Jersey Ave, SE  
Washington, DC 20590

Re: FRA Docket No. EQAL 2006-38  
DOT Docket No. FRA-2007-0015  
Appeal of L.R. Smith

Dear Ms. Strang,

Please accept my appearance on behalf of L.R. Smith in the above captioned matter.

I have also attached the Response requested by Acting Administrator Clifford C. Eby to the Show Cause Order he issued on January 7, 2009.

Very truly yours,



Michael Persoon

Enc.

DEPT OF TRANSPORTATION  
FEDERAL RAILROAD ADMINISTRATION  
WASHINGTON, DC 20590

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

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**Appeal of L.R. Smith**

**(FRA—Locomotive Engineer Certification Case)**

**FRA Docket No. EQAL 2006-38**

**DOT Docket No. FRA-2007-0015**

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**RESPONSE TO SHOW CAUSE ORDER**

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**INTRODUCTION AND FACTS**

This case comes before the FRA because Union Pacific R.R. Co., in its role as a state actor constrained by the Fifth Amendment to the United States Constitution, denied L.R. Smith due process of law when it revoked his professional license without a hearing as required by 49 C.F.R. § 240.307.<sup>1</sup> (See Petition for Review of L.R. Smith, attached as Exhibit 1, p. 2.) This issue was squarely presented to the LERB. (See October 19, 2007, LERB dismissal order, attached as Exhibit 2, first paragraph.) This issue was raised along with another issue, namely whether L.R. Smith violated the conditions of the “Time Return to Service Agreement.” The issues are distinct but related.

These issues were raised in a complaint filed with the LERB on June 6, 2006. (Ex. 2, 2d paragraph). The LERB dismissed the matter on the grounds that L.R. Smith had not satisfied the procedural requirements of 49 C.F.R. § 240.403(b)(5). That section

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<sup>1</sup> It is indisputable that Union Pacific acts under color of state authority when it engages in the regulation of professional licenses of engineers as Congress delegated this power to the Secretary of Transportation, who enacted rules delegating it to rail carriers such as Union Pacific R.R. Co.

requires that petitions to the LERB “[b]e supplemented by a copy of all written documents in the petitioner’s possession that document the railroad’s decision.”

The LERB never found that the petitioner had any SAP reports in his (or his representative’s) possession, but cited the fact that he could ask for them from the SAP pursuant to 49 C.F.R. § 40.329. It apparently read into the fact that the Petitioner *could* have them in his possession as *requiring* him to ask for them and turn them over to the LERB. This despite the fact that the employer, Union Pacific R.R. Co., was required by law to have these documents in its possession pursuant to 49 C.F.R. § 40.333. The LERB placed a wholly new burden on Petitioner that not only was not required of him, but which the Respondent was better situated to satisfy.

In its dismissal, the LERB also notes that the Petitioner did not attach a copy of the agreement it claimed was violated. This has the perverse effect of putting the burden on the discharged Petitioner to show why he was discharged. The burden should have been on the employer, Union Pacific R.R. Co., to show that it dismissed Petitioner for a lawful reason. It may be that the LERB considered that as the Petitioner, L.R. Smith bore the burden to show why he was unlawfully terminated. This leads into the second point.

It may *normally* be correct to place the burden on the Petitioner to make the case that he was unlawfully discharged.<sup>2</sup> However, there would *normally* be a hearing, or some other process, e.g. under the parties’ Discipline Rule. *See, e.g.*, correspondence

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<sup>2</sup> 49 C.F.R. § 240.307(c)(12) requires that the rail carrier has the burden in revocation hearings. It states:

(12) The railroad shall have the burden of proving that the locomotive engineer’s conduct was not in compliance with the applicable railroad operating rule or practice or part 219 of this chapter.

attached to Ex. 1, labeled Ex. B-1. No such hearing was held in this matter—Respondent terminated Petitioner by a Notice of Investigation, attached to Ex. 1 (labeled A-1).

Having erroneously decided that it need not follow any procedure, and could terminate the employment of Petitioner by a letter, the Respondent similarly thought it need not have any hearing as to the question of Petitioner's license, despite the clear language of 49 C.F.R. § 240.307.

It was wrong not to provide clear and convincing evidence supporting Petitioner's termination, it was doubly wrong for it to revoke his license without offering him due process of law, and it was wrong of the LERB to create a new rule requiring Petitioner to seek and present information to the LERB which the Respondent was required by law to have in its possession.<sup>3</sup> The LERB should not have dismissed the case and Union Pacific R.R. Co. should have afforded the petitioner the hearing he is due pursuant to 49 C.F.R. § 240.307.

The FRA has chosen to treat this appeal as a 49 C.F.R. § 240.403(e) appeal, "because it does not come...from a substantive decision by the AHO." While the Show Cause Order "seeks only information that is necessary to assist [the FRA] in determining whether Petitioner had good cause for his failure to provide the requested documents to the LERB and whether the case should be remanded to the LERB (citing 49 C.F.R. § 240.403(f)," a denial of the Petitioner's appeal will be a final agency decision on all issues presented to the LERB, and as such will be ripe for appeal to an Article III Court.

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<sup>3</sup> This position is not "substantially justified" and would expose the agency to liability under the Equal Access to Justice Act. 49 C.F.R. § 6, et seq.

On the other hand, the FRA can remand the matter to the LERB, with instructions to issue a finding in accord with the law.<sup>4</sup>

### RESPONSE TO PARTICULARS

The Petitioner is not required to submit SAP reports to the LERB. While he may request them from the SAP, the Petitioner is not required to have the SAP reports in his possession. Likewise, the LERB may not require him to produce records not in his possession as a condition precedent to hearing his appeal. This is especially true when the very documents sought are in the possession of the Respondent.<sup>5</sup> As such, the Petitioner had “good cause” not to submit SAP reports—he did not have them, is not required to seek them, and the Respondent was better positioned to provide them.

In fact, the employer may have been legally required to provide them to the LERB had it thought to ask for them. 49 C.F.R. § 40.331 reads:

(b) If you are an employer, you must, upon request of DOT agency representatives, provide the following:

(1) Access to your facilities used for this part and DOT agency drug and alcohol program functions.

(2) All written, printed, and computer-based drug and alcohol program records and reports (including copies of name-specific records or reports), files, materials, data, documents/documentation, agreements, contracts, policies, and statements that are required by this part and DOT agency regulations. You must provide this information at your principal place of business in the time required by the DOT agency.

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<sup>4</sup> In Petitioner’s opinion, this would include: (1) a retreat from the new rule that Petitioner is required to seek information from the SAP in order to proceed on his claim and (2) that Union Pacific must provide a hearing pursuant to 49 C.F.R. § 240.307 in order to revoke Petitioner’s professional license.

<sup>5</sup> Or at the very least, the Respondent is required by law to maintain the records. 49 C.F.R. § 40.333.

The Respondent, Union Pacific R.R. Co., was the employer and was required to keep the records in question. 49 C.F.R. § 40.333 makes this clear:

(a) As an employer, you must keep the following records for the following periods of time:

(1) You must keep the following records for five years:

(i) Records of alcohol test results indicating an alcohol concentration of 0.02 or greater;

(ii) Records of verified positive drug test results;

(iii) Documentation of refusals to take required alcohol and/or drug tests (including substituted or adulterated drug test results);

(iv) **SAP reports**; and

(v) All follow-up tests and schedules for follow-up tests.

Additionally, it is a gross miscarriage of justice to demand that a person who is appealing his firing on the grounds that there was no hearing and he was afforded no process must provide evidence of the reason for his termination. The burden was on the Respondent, Union Pacific R.R. Co., to show that it met the requirements of law, and that it had provided the Petitioner his due process under the parties' contracts, under federal statute, and as provided in the Fifth Amendment to the United States Constitution.

Neither the LERB nor the FRA can create a new requirement that the Petitioner must produce documents "obtainable by him" as a condition precedent to hearing his appeal—especially when the Respondent has those documents. The LERB cited to 49 C.F.R. § 240.403(b)(5) for this proposition. That section states:

(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:

(5) Be supplemented by a copy of all written documents in the petitioner's possession that document that railroad's decision

Notably absent from this section is any statement that the Petitioner must produce records which the Respondent is required by law to maintain. The regulatory scheme is clear that the employer, not the employee, must keep these records to be made available to federal agencies.

### CONCLUSION

The Petitioner did not submit the SAP reports because he was under no obligation to do so; while the Respondent would have been had the LERB merely asked it. Petitioner maintains this position. Additionally, it is not appropriate to decline to remand on the issue of the failure of Respondent to afford Petitioner a hearing on the revocation of his license as required by 49 C.F.R. § 240.307. That issue, while related to the underlying failure of Respondent to provide evidence to support its firing, is a distinct issue and in no way depends on whether Petitioner provided SAP reports to the LERB or this body.<sup>6</sup>

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<sup>6</sup> A decision to dismiss this claim would not be "substantially justified" and would expose the agency to liability under the Equal Access to Justice Act. 49 C.F.R. § 6, et seq.

**BEFORE THE  
U.S. DEPARTMENT OF TRANSPORTATION  
FEDERAL RAILROAD ADMINISTRATION  
LOCOMOTIVE ENGINEER REVIEW BOARD**

**PETITION FOR REVIEW – CERTIFICATION REVOCATION  
PURSUANT TO 49 CFR 240.403**

<b>Parties</b>	)	<b>L. R. Smith - Engineer</b>
<b>To The</b>	)	<b>1213 White Cloud Lane</b>
<b>Dispute</b>	)	<b>Pine Bluff, Arkansas 71603</b>
	)	
	)	<b>v.</b>
	)	
	)	<b>Union Pacific Railroad Company</b>
	)	<b>1400 Douglas Street</b>
	)	<b>STOP 0710</b>
	)	<b>Omaha, Nebraska 68179-0710</b>
	)	

**STATEMENT OF FACTS**

Petitioner L. R. Smith was terminated by the Respondent on February 7, 2006, by "NOTICE OF INVESTIGATION," dated February 7, 2006 (Copy attached hereto as Exhibit A), for allegedly violating the conditions of the "One - Time Return To Service - Agreement" (dated January 11, 2005), without any specific explanation as to the alleged violation, and without a Hearing.

The undersigned appealed this summary discharge, by letter dated April 4, 2006 (Copy attached hereto as Exhibit B), asking that the Carrier specifically provide the factual basis for the Respondent's action, as there is no knowledge of any violation having occurred.

The Respondent declined the claim filed by the undersigned, by letter dated May 30, 2006 (Copy attached hereto as Exhibit C), through Respondent's Assistant Director of Labor Relations, C. A. Thompson. However, though specific factual explanation was requested as to the allegations of violation, Respondent failed to provide any specific factual explanation as to

how the Petitioner allegedly violated the conditions of the Agreement, stating, instead, in conclusive and vague language, with no factual explanation:

On February 6, 2006, it was reported that Mr. Smith was non-compliant with Employee Assistance because he had violated his Personal Program signed October 10, 2005 pursuant to his January 17, 2005 Companion Agreement. Because Mr. Smith violated the terms of his Companion Agreement during his probationary period, Mr. Smith was properly returned to his former status as a dismissed employee as provided for in his Companion Agreement.

(Copy attached hereto as Exhibit C at p. 2, emphasis added)

The above quoted paragraph provides no factual basis for the Respondent's decision upon which an effective appeal can be made.

Subsequent to the summary discharge, the Petitioner heard "through the grapevine" that his Class 1 Certification had been revoked; however, the Petitioner has not received a written Notice of Revocation of Certification.

The Petitioner did not agree to the Revocation of his Class 1 Certification, and did not physically surrender his Certification card; moreover, there has been no hearing at any time as to this Revocation of Certification.

The FRA Regulation, applicable to this matter, expressly requires a hearing, prior notice to the hearing, the submission of evidence, a decision on the record, made by a Carrier Officer other than the Investigating Officer; further, the Carrier has the burden of proof in such matters:

**§ 240.307 Revocation of certification.**

- (a) Except as provided for in §240.119(e), a railroad that certifies or recertifies a person as a qualified locomotive engineer and, during the period that certification is valid, acquires information which convinces the railroad that the person no longer meets the qualification requirements of this part, shall revoke the person's certificate as a qualified locomotive engineer.
- (b) Pending a revocation determination under this section, the railroad shall:

- (1) Upon receipt of reliable information indicating the person's lack of qualification under this part, immediately suspend the person's certificate;
  - (2) Prior to or upon suspending the person's certificate, provide notice of the reason for the suspension, the pending revocation, and an opportunity for a hearing before a presiding officer other than the investigating officer. The notice may initially be given either orally or in writing. If given orally, it must be confirmed in writing and the written confirmation must be made promptly. Written confirmation which conforms to the notification provisions of an applicable collective bargaining agreement shall be deemed to satisfy the written confirmation requirements of this section. In the absence of an applicable collective bargaining agreement provision, the written confirmation must be made within 96 hours.
  - (3) Convene the hearing within the deadline prescribed by either paragraph (c)(1) of this section or the applicable collective bargaining agreement as permitted under paragraph (d) of this section;
  - (4) Determine, on the record of the hearing, whether the person no longer meets the qualification requirements of this part stating explicitly the basis for the conclusion reached;
  - (5) When appropriate, impose the pertinent period of revocation provided for in §240.117 or §240.119; and
  - (6) Retain the record of the hearing for 3 years after the date the decision is rendered.
- (c) Except as provided for in paragraphs (d), (f), (i), and (j) of this section, a hearing required by this section shall be conducted in accordance with the following procedures:
- (1) The hearing shall be convened within 10 days of the date the certification is suspended unless the locomotive engineer requests or consents to delay in the start of the hearing.
  - (2) The hearing shall be conducted by a presiding officer, who can be any qualified person authorized by the railroad other than the investigating officer.
  - (3) The presiding officer will exercise the powers necessary to regulate the conduct of the hearing for the purpose of achieving a prompt and fair determination of all material issues in controversy.

- (4) The presiding officer shall convene and preside over the hearing.
- (5) Testimony by witnesses at the hearing shall be recorded verbatim.
- (6) 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.
- (7) The presiding officer may:
  - (i) Adopt any needed procedures for the submission of evidence in written form;
  - (ii) Examine witnesses at the hearing;
  - (iii) Convene, recess, adjourn or otherwise regulate the course of the hearing; and
  - (iv) 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.
- (8) Parties may appear and be heard on their own behalf or through designated representatives. Parties may offer relevant evidence including testimony and may conduct such examination of witnesses as may be required for a full disclosure of the relevant facts.
- (9) The record in the proceeding shall be closed at the conclusion of the hearing unless the presiding officer allows additional time for the submission of information. In such instances the record shall be left open for such time as the presiding officer grants for that purpose.
- (10) No later than 10 days after the close of the record, a railroad official, *other than the investigating officer*, shall prepare and sign a written decision in the proceeding.
- (11) The decision shall:
  - (i) Contain the findings of fact as well as the basis therefor, concerning all material issues of fact presented on the record; and
  - (ii) Be served on the employee.

- (12) The railroad shall have the burden of proving that the locomotive engineer's conduct was not in compliance with the applicable railroad operating rule or practice or part 219 of this chapter.

None of the above-quoted requirements of the FRA Regulation were provided to the Petitioner, resulting in a complete failure of due process, fundamentally flawing the Respondent's untimely action.

### ARGUMENT

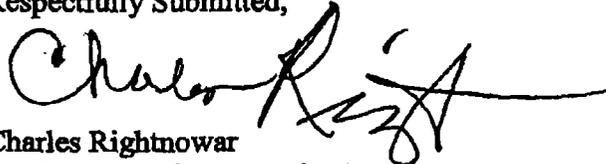
The right to hold a specific private employment, and to follow a chosen profession, free from unreasonable government interference, comes within the "liberty" and "property" concept of the Fifth Amendment to the U.S. Constitution. Green v. McElroy, 360 U.S. 474, 492, 79 S.Ct. 1400, 141 (1959). When this "liberty" / "property" right in continued employment is threatened by governmental action, or, as here, an interplay of governmental and private action, due process requirements, both procedural and substantive, attach. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 1493 (1985). The right to notice and a meaningful opportunity to be heard in one's own defense, are at the core of the due process requirements. Id. The Due Process Clause requires provision of a hearing "at a meaningful time." 470 U.S. at 547, 105 S.Ct. at 1496. In the instant case, where the Respondent acted under color of governmental authority, the due process rights, guaranteed to the Petitioner, were completely denied.

To permit the deprivation of Petitioner's "liberty" / "property" rights to continued employment without due process protection, would be to empower Respondent's agents to act under color of law in an arbitrary, capricious, invidious, discriminatory manner. Such a holding by this Board would call into question of the constitutionality of 49 CFR §240A03 (c).

**REMEDY**

Without waiver of his claim under the Labor Act, Petitioner requests that this Board reverse the Respondent's decision to revoke his Certification, and to expunge his personal record of any reference to or implication of the decertification. Petitioner further requests that any records maintained by FRA also be expunged of any reference to or implication of the decertification.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Charles Rightnowar", with a long horizontal flourish extending to the right.

Charles Rightnowar  
Brotherhood of Locomotive Engineers  
General Chairman  
320 Brookes Drive  
Suite 115  
Hazelwood, MO 63042  
Phone: (314) 895-5858  
Fax: (314) 895-0104

ORGANIZATION EXHIBIT

A



1000 West 4<sup>th</sup> Street  
North Little Rock, Arkansas 72114  
Phone: 501/373-2139  
Fax: 501/373-2433

**NOTICE OF INVESTIGATION**

February 7, 2006

Certified Mail # 7005 2570 0001 2809 7168  
Return Receipt Requested

L. R. Smith, Engineer  
SS# 431-90-5417  
1213 White Cloud Lane  
Pine Bluff, AR 71603

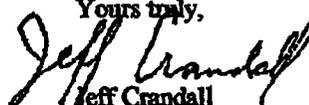
I have been notified by the Employee Assistance Program Manager, in correspondence dated February 6, 2006, that you are in violation of the "Conditions for Return to Service and Remaining in Service" of the "One - Time Return To Service --- Agreement " dated January 11, 2005, that you and your union representative signed on January 17, 2005. This agreement was the result of your testing positive on a FRA Random drug and alcohol test on January 9, 2005 while you were working as a Engineer

Per this agreement, wherein it states Conditions for Return to Service and remaining in Service Items:

1. You must become drug or alcohol free by successfully completing any education, counseling or treatment determined to be necessary by the Company's Employee Assistance Program.
2. You must continue in any further program of counseling, treatment and follow-up deemed necessary by Employee Assistance.
3. You must adhere to all agreements in your personal plan with your Employee Assistance Manager.

The agreement further states: "Failure to comply with these instructions and/or the terms and conditions of your 'Agreement' during the 12- month probationary period will result in your immediate return to dismissed status without benefit of a formal hearing."

You have violated the terms of your return-to-service agreement during your probationary period. Therefore, you are being returned to your former status as a dismissed employee, as provided for in the above agreement. You are instructed to quickly return all railroad property to this office.

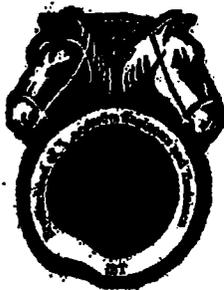
Yours truly,  
  
Jeff Crandall  
General Superintendent

Cc: Sandie Blackburn, Mgr Drug Testing - Omaha  
Jan Curtis - EAP - Ft. Worth, TX  
G. W. Bell, Local Chairman - BLE

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ORGANIZATION EXHIBIT

B



**Brotherhood of Locomotive Engineers and Trainmen**  
**A Division of the Rail Conference-International Brotherhood of Teamsters**  
**General Committee of Adjustment**  
**Union Pacific Railroad-Central Region**

320 Brookes Drive-Suite 115  
Hazelwood, MO 63042  
Phone (314) 895-5858 Fax (314) 895-0104  
Email - cr9007@aol.com

C.F. Rightower  
GENERAL-CHAIRMAN  
R.E. Rhodes  
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R.L. Law  
2ND VICE-CHAIRMAN  
D.W. Grimes  
3RD VICE-CHAIRMAN  
W.D. Gaddy  
SECRETARY-TREASURER

April 4, 2006

Ms. C. A. Thompson  
c/o Nancy Penke  
Union Pacific Railroad Company  
1400 Douglas Street - STOP 0710  
Omaha, Nebraska 68179-0710

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED  
# 7002 0860 0003 2375 2311

**Re: Discipline Appeal: Engineer L. R. Smith**  
**SSN: 431-90-5417**

Dear Ms. Thompson:

Without waiver of the Organization objection to the Carrier's complete failure to comply with the provisions of the System Agreement - Discipline Rule, discussed below, this to appeal the decision of someone improperly using Superintendent Jeff Crandall's signature stamp to assess Permanent Dismissal against Engineer L. R. Smith, pursuant to the "Notice of Investigation," dated February 7, 2006, requesting immediate reinstatement, vacation and seniority rights unimpaired, claiming full back pay (including time attending investigation), fringe benefits, and the clearing of this notation of discipline from Engineer Smith's record. The Superintendent is required to make all discipline decisions, not his secretary.

Without waiver of the above, the Carrier violated Engineer Smith's right to due process, completely abrogating all rights under the System Agreement - Discipline Rule, and violating all time limits contained therein, requiring that the instant claim be sustained without reaching the merits, pursuant to on-property authority:

Claimant was charged with insubordination and assessed a sixty day suspension for failing to attend a mandatory meeting at which job protection issues on the St. Louis Division were to be reviewed. The discipline was appealed to this Board on both procedural and substantive grounds. One of the procedural defects alleged is that the requirements of Article 44, Discipline Appeal and Representation, were breached when Carrier did not furnish Claimant's representative with a copy of the Investigation transcript within ten days following completion of the Hearing. Carrier acknowledges that Claimant's

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representative was not given a transcript within the prescribed time (it was mailed to the wrong individual), but maintains that this was merely a technical violation of the Rule, and in the circumstances present was not prejudicial because a timely appeal was perfected in any event.

The third sentence of Paragraph 3 of Article 44 reads:

"A decision shall be rendered within ten (10) days following completion of the investigation."

The first sentence of Paragraph 5 of Article 44 provides:

"The investigation proceeding will be recorded, transcribed and a copy of the record will be furnished to the representative and the charged employee at the time discipline is issued."

These two sentences are clear and unambiguous. Together they express an intent that a copy of the record was to be furnished the charged employee's representative within ten days of the completion of the investigation or at the time the discipline was issued. This expression of intent is not conditioned upon only those instances in which "harmless error" or lack of "prejudice" is argued to be missing. *It is, instead, a "statute of limitation" the parties openly developed for their continued conduct. A failure to comply with either of the above-cited Agreement sentences flaws the discipline.* Accordingly, we will order that the discipline assessed be rescinded. Having reached a decision on the procedural defect, *it is unnecessary to address the merits.*

Award No. 24180, NRAB (1<sup>st</sup> Div. Fletcher) (emphasis added)

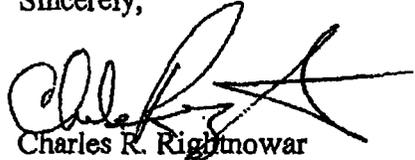
Additional on-property authority is in accord: Award No. 25, Public Law Board No. 5943 (Benn, 1998); Award No. 16, Public Law Board No. 6198 (Fletcher, 2000); Award No. 25990, NRAB (1<sup>st</sup> Div. Kenis); Award No. 25935, NRAB (1<sup>st</sup> Div. Kenis).

Without waiver of the above, the Carrier has failed to provide any evidence whatsoever to justify its permanent dismissal of Engineer L. R. Smith, as referenced in the "Notice of Investigation," dated February 7, 2006; both the Organization and Engineer L. R. Smith are without any specific information as to any allegations of any wrongdoing, or any alleged violations of the Agreement signed by Engineer Smith and Local Chairman G. W. Bell, dated January 17, 2005. As such, with no information provided as to the specific allegations of wrongdoing, an effective appeal cannot be fashioned. However, without waiver of the foregoing, and regardless of the Agreement signed January 17, 2005, or any vague allegations related thereto, *it remains the Carrier's burden to indicate specifically the alleged wrongdoing, and to provide clear and convincing evidence of same.* The Carrier has utterly failed to make any effort to comport with its burden of proof.

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Please advise.

Sincerely,

A handwritten signature in black ink, appearing to read 'Charles R. Rightnowar', with a long horizontal stroke extending to the right.

Charles R. Rightnowar  
General Chairman - BLET  
Union Pacific - Central Region

ORGANIZATION EXHIBIT

C

# UNION PACIFIC RAILROAD COMPANY

C. A. THOMPSON  
ASST. DIRECTOR  
LABOR RELATIONS

1400 DOUGLAS STREET  
STOP 0710  
OMAHA NE 68179  
OFFICE 402-544-8638



May 30, 2006  
1442536  
1.5

Mr. C. R. Rightnowar  
General Chairman BLE-T  
320 Brookes Dr., Suite 115  
Hazelwood, MO 63042

Dear Sir:

This is in reference to your appeal dated April 4, 2006 requesting immediate reinstatement of Engineer L. R. Smith (EID#0169578) who was dismissed February 7, 2006 for violation of GCOR Rule 1.5 - Union Pacific Railroad Drug and Alcohol Policy.

On January 9, 2005 Mr. Smith was administered a FRA Random Drug and Alcohol test at Pine Bluff, AR while working as an engineer. Mr. Smith had measurable alcohol in his system as evidenced by his positive test results at both 1245 hours and again at 1303 hours. Mr. Smith waived formal investigation and accepted dismissal in connection with his illegal or unauthorized alcohol use in violation of Rule 1.5 and Union Pacific Railroad Drug and Alcohol Policy. On January 17, 2005 Mr. Smith and Mr. G. W. Bell, BLET Local Chairman, signed a Companion Agreement, which granted Mr. Smith a one-time return to service on a probationary basis subject to enumerated terms and conditions, which included:

1. Mr. Smith must become drug or alcohol free by successfully completing any education, counseling or treatment determined to be necessary by the Company's Employee Assistance Program.
2. Mr. Smith must continue in any further program counseling, treatment and follow-up deemed necessary by Employee Assistance.
3. Mr. Smith must adhere to all agreements in his personal plan with his Employee Assistance Manager.

Mr. Smith's Companion Agreement further states "*Failure to comply with these instruction and/or the terms and conditions of your 'Agreement' during*

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*the 12-month probationary period will result in your immediate return to dismissed status without benefit of a formal hearing."*

On February 6, 2006, it was reported that Mr. Smith was non-compliant with Employee Assistance because he had violated his Personal Program signed October 10, 2005 pursuant to his January 17, 2005 Companion Agreement. Because Mr. Smith violated the terms of his Companion Agreement during his probationary period, Mr. Smith was properly returned to his former status as a dismissed employee as provided for in his Companion Agreement.

As is the usual manner, the Organization has raised several procedural errors that are completely without merit.

First, the Organization alleges that someone "improperly" used Superintendent Crandall's signature stamp on the February 7, 2006 Notice of Investigation. The Organization also took the position the use of a signature stamp in the course of preparing letters is an admission by the Carrier that the superintendent did not make the discipline decision in this case. In addition, you attempt to infer that the use of a signature stamp creates a fatal procedural defect.

Your position regarding the use of a signature stamp is ludicrous. Mr. Smith was never sent a February 7, 2006 investigation notice, nor was Mr. Smith disciplined. Mr. Smith was sent a letter dated February 7, 2006 that informed him he was in violation of this Companion Agreement and that he had immediately returned to a dismissed status without benefit of a formal hearing based upon his agreement. In addition, there is no language that prohibits the use of a signature stamp. You have failed to demonstrate any logical nexus between the use of a signature stamp and your above-identified allegations.

Not foregoing the above, in the past General Chairman Rightnowar has recognized that administrative office help is a fact of life in business and such help does not indicate that the author of a document had no involvement in the work product. Clearly, the Organization's allegations regarding this point are baseless.

Second, the Carrier has fully complied with all agreement provisions and Mr. Smith was afforded all of his due process rights. As your office is fully aware, The information regarding education, counseling, treatment, follow-up, and Mr. Smith's Personal Plan is privileged and confidential. Mr. Smith is fully aware of the details and requirement of each of the above referenced items as well as why he was found to be non-compliant.

Mr. Smith violated the terms of his Companion Agreement during the probationary period. Therefore, Mr. Smith was properly returned to his former status as a permanently dismissed employee.

Arbitration precedent has denied claims for reinstatement of employees who have reverted to a permanent dismissed status without a hearing pursuant to the provisions of a leniency reinstatement agreement. In PLB 2766 Award No. 215 (IBEW vs. UP), Neutral Dennis denied a similar claim stating:

*"This Board has reviewed the record and each argument presented in Claimant's defense. As a result of the review, the Board has concluded that Claimant was fully aware of the implications of signing the October 15, 1999, Return-to-Work Agreement. It is also persuaded that Claimant was a cocaine user prior to October 15, 1999, and used cocaine after he returned to work. He was covered by the terms of the agreement he signed wherein it was stated that he must remain permanently drug free.*

*Claimant in this instance has no one to blame but himself. He accepted a return-to-work arrangement after testing positive for cocaine under the condition he never used illegal drugs again. He apparently could not live up to that condition. By using drugs, he violated the agreement he signed with Carrier. His failure to uphold his end of the bargain has resulted in his permanent dismissal from service. Carrier's actions in this instance are in conformance with the terms of the Return-to-Work Agreement. The Board has no authority to modify Carrier's actions in any manner."*

Based upon the record, Mr. Smith's return to a dismissed status was proper for the violation involved therefore your request for his return to service and pay for all time lost is respectfully declined in its entirety. I await your request for conference.

Sincerely,

*C. A. Thompson*

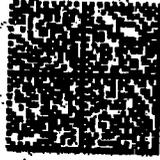
C. A. Thompson  
Asst. Director - Labor Relations

C-3



LABOR RELATIONS  
 UNION PACIFIC RAILROAD  
 1400 DOUGLAS ST. STOP 0710  
 OMAHA, NEBRASKA 68179-0710

PRESORTED  
 FIRST CLASS



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 MAILED FROM ZIP CODE 68179

Mr. C. R. Rightnowar  
 General Chairman BLE-T  
 320 Brookes Dr., Suite 115  
 Hazelwood, MO 63042

0-BRIDGM 63042



C-4



**FEDERAL RAILROAD ADMINISTRATION**  
**Office of Chief Counsel**  
**1120 Vermont Avenue, N.W., Suite 7000**  
**Mail Stop 10**  
**Washington, DC 20590**

U.S. Department  
of Transportation

OCT 19 2007

**SENT CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Mr. Charles R Rightnowar  
General Chairman, BLE&T  
General Comm. of Adjustment  
Union Pacific Railroad - Central Region  
320 Brookes Drive, Suite 115  
Hazelwood, MO 63042

Re: EQAL-2006-38

Dear Mr. Rightnowar:

This letter is in reference to the Federal Railroad Administration's (FRA) Docket EQAL-2006-38 regarding the Union Pacific Railroad Company's (UP) alleged denial or revocation of Mr. L. R. Smith's (Petitioner's) locomotive engineer certification. The petition alleges that Mr. Smith did not violate the conditions of a "One - Time Return to Service - Agreement" dated January 11, 2005 and that the UP did not comply with the Federal regulatory requirements in denying or revoking Mr. Smith's certification. You are on record as Mr. Smith's representative in this proceeding.

By petition dated June 6, 2006, you filed a petition on behalf of Mr. Smith requesting review by the FRA's Locomotive Engineer Review Board. On November 16, 2006, I spoke with you by telephone and provided you with advance notice that FRA would be requesting a copy of all the reports produced by the substance abuse professional (SAP). The SAP reports are required because each petition is required to "[b]e supplemented by a copy of all written documents in the petitioner's possession that document that railroad's decision." See 49 C.F.R. § 240.403(b)(5). As I explained to you by phone, Mr. Smith has a right to request the SAP's reports and the SAP is required to provide the reports to the employee. See 49 C.F.R. §§ 40.329. Additionally, I explained that FRA would be following up my phone call with a written request, but that the purpose of the call was to alert you to FRA's request so that you might have a few additional days, over the 30 days allotted in the letter, to obtain the requested documents. As promised, on November 22, 2006, Ms. Michelle Silva, FRA's Docket Clerk, sent Mr. Smith a letter providing an opportunity to provide additional information and documentation, specifically requesting "a copy of all SAP reports." Several months went by and I asked Ms. Silva to call you to find out the status of FRA's request as FRA did not have a response from you or Mr. Smith in the docket.

It was not until April 9, 2007, that Ms. Silva notified me that neither you nor Mr. Smith had responded to FRA's request. After reviewing Ms. Silva's letter of November 22, 2006, I realized that the letter

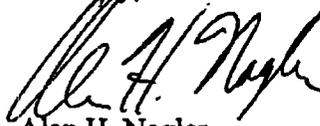
was sent only to Mr. Smith and that FRA did not mail the letter in a manner in which we had retained proof of service. As we have contacted each other before by e-mail on other matters, I sent you an e-mail message in an attempt to quickly find out the status of the previous request and again attempt to procure the previously requested SAP reports. To my knowledge, you did not respond.

In order to try and bring some finality to FRA's requests, on May 23, 2007, Ms. Silva sent a letter to you requesting that you provide copies of "all SAP reports." This letter was sent by certified mail and delivered to your address on May 29, 2007. It provided you with 30 days from the date of the letter to submit the requested documentation. As of today, FRA has still not received any documentation or response to this request.

The petition you filed on behalf of Mr. Smith did not contain a copy of the agreement that was allegedly violated nor all of the SAP's reports that would shed light on whether the agreement was violated and proper procedures were followed. According to FRA's procedures, if a petition is not properly filed or fails to contain sufficient information upon which to proceed, the Counsel to the Board shall recommend dismissal and, if approved by the Board, the Counsel shall notify the petitioner of that dismissal. I have followed these procedures and the Board has asked me to dismiss this petition.

Accordingly, the Locomotive Engineer Review Board has approved dismissal of this proceeding with prejudice.

Sincerely,



Alan H. Nagler

Counsel, Locomotive Engineer Review Board

Enclosures

cc: FRA Docket EQAL-06-38  
RRS-10  
RCC-10

Mr. L. R. Smith  
1213 White Cloud Lane  
Pine Bluff, Arkansas 71603

Mr. W. Scott Hinckley  
1400 Douglas St., mailstop 1180  
Union Pacific Railroad Company  
Omaha, Nebraska 69179

**Nagler, Alan <FRA>**

---

**From:** Nagler, Alan <FRA>  
**Sent:** Monday, April 09, 2007 3:18 PM  
**To:** 'cr9007@aol.com'  
**Subject:** FRA LERB Docket EQAL-06-38: SAP Reports not received.  
**Attachments:** EQ-06-38 Request112206.wpd.pdf

Dear Mr. Rightnowar:

As you may recall, on November 16, we spoke by phone regarding a petition you filed on behalf of Mr. L. R. Smith which was docketed as EQAL-06-38. During that conversation, I explained that I wanted to give you a heads-up that FRA would be requesting a copy of all of SAP reports and I was hoping that by speaking to you by phone before the written request was received that you would be able to jump start the process of requesting the reports. See 49 CFR 40.329(c)(requiring that a SAP must make available a copy of all SAP reports (see 40.311) to an employee upon request). The following week, Ms. Michelle Silva, FRA's Docket Clerk, sent your client the request. (See attached .pdf document).

To date, FRA has not received either the SAP reports or an explanation for why you or your client could not produce the SAP reports. Ms. Silva has told me that she has phoned your office twice to request the status of this request and has spoken with your assistant, but has not received any substantive answer to the request. Failure to respond has obviously increased the delay in the Board's ability to issue a timely decision.

We are eager to proceed with this case and therefore request that you contact me ASAP regarding the status of FRA's request. Your anticipated action on this matter is appreciated.

Sincerely,

Alan Nagler  
FRA Attorney and  
Counsel to the Locomotive Engineer Review Board  
202-493-6049 direct line  
202-493-6068 fax

4/9/2007



- (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 are 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 (including any notification of suspension, denial of certification or recertification, and any hearing transcript); and
- \*\*\*Please provide copies of all SAP reports in triplicate.\*\*\*
- (6) be filed in a timely manner.

FRA appreciates your anticipated compliance with these procedures. Please be sure to reference the FRA Docket Number EQAL-2006-38 when submitting any supplemental information or documentation, and to provide the documentation in triplicate. If you have any questions, please contact the Locomotive Engineer Review Board's Counsel, Mr. Alan Nagler at 202-493-6049.

Sincerely,



Michelle Silva  
Docket Clerk

cc: FRA Docket No. EQAL-2006-38  
RRS-10, RCC-10

**CERTIFICATE OF SERVICE**

**FRA Docket No. EQAL 2006-38  
DOT Docket No. FRA-2007-0015**

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The undersigned hereby certifies that he caused to be served the foregoing document, Petitioner's Response to Show Cause Order, has been served to all parties named below:

**VIA PRIVATE CARRIER**

Ms. Jo Strang  
Acting Administrator  
Federal Railroad Administration  
1200 New Jersey Ave, SE  
Washington, D.C. 20590

DOT Docket Clerk  
Central Docket Management System  
Docket Operations, M-30  
West building Ground Floor, W12-140  
U.S. Dept. of Transportation  
1200 New Jersey Ave, SE  
Washington, D.C. 20590

**VIA FIRST CLASS MAIL**

Mr. L.R. Smith  
1213 White Cloud Lane  
Pine Bluff, AR 71603

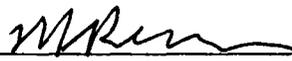
Mr. Charles Rightnowar  
Brotherhood of Locomotive Engineers  
320 Brooks Dr., Suite 115  
Hazelwood, MO 63042

Mr. Richard K. Radek  
Brotherhood of Locomotive Engineers  
1370 Ontario St.  
Cleveland, OH 44113

Mr. Lawrence Brennan, Jr.  
Union Pacific R.R. Com.  
1400 Douglas St., Mail Stop 1010  
Omaha, NE 68179

Mr. Alan Nagler  
Federal Railroad Administration  
1200 New Jersey Ave, SE  
Washington, D.C. 20590

Ms. Linda Martin  
Federal Railroad Administration  
1200 New Jersey Ave., SE  
Washington, D.C. 20590

  
\_\_\_\_\_  
Michael Persoon

1 / 27 / 09  
Date