Article

The Dilemma of Locomotive Engineer Certification Regulations Vis-à-vis Contractual Due Process in Discipline Cases

John LaRocco and Richard Radek[1]

The advent of the federal government's locomotive engineer certification program[2] created a dilemma, if not an outright conflict, between the certification appellate scheme and the contractual (collective bargaining agreement) due process procedures governing engineers. The dilemma pervades not only due process, but raises difficult problems in discipline cases involving certified engineers with respect to remedies.[3] This article will delve into these problems in detail. Before we discuss the nature of the problems, we will provide some background information that will lend perspective and facilitate understanding of those problems. Last, we will suggest a solution.

As a consequence of the January 4, 1987, collision between an Amtrak passenger train and a Conrail multi-unit locomotive on Amtrak's high speed corridor in Maryland,[4] Congress determined a need to en-

1. John LaRocco is a Professor of Law at California State University, Sacramento, College of Business Administration and a labor arbitrator, mediator, and fact finder. Rick Radek is an expert in railway labor relations and an experienced labor arbitrator, mediator, and fact finder.

2. 49 C.F.R § 240.1 (2013).

3. 49 C.F.R. § 240.117.

4. The responsibility for the accident and its multiple fatalities was attributed to a Conrail

hance public safety through regulations pertaining to the qualifications of locomotive engineers.[5] In 1988, Congress enacted the Rail Safety Improvement Act (RSIA), which delegated the task of formulating and enforcing a certification program for locomotive engineers to the Federal Railroad Administration (FRA).[6]

Previously, the FRA did not directly regulate the qualifications of locomotive engineers other than by enforcing railroad operating and safety rules against railroads and their operating employees.[7] Following the required Notice of Proposed Rulemaking, consideration of comments submitted by the public, and a period of study and discussions,[8] the FRA promulgated regulations pertaining to the "Qualification and Certification of Locomotive Engineers," effective September 17, 1991, for the purpose "[of] ensur[ing] that only qualified persons operate a locomotive or train."[9]

The FRA regulations provide for railroads to develop and submit programs to the FRA for certifying and enforcing the qualifications of their locomotive engineers. The FRA did not write such programs for the railroads, but retained authority to review and approve programs submitted by the railroads.[10] If, in the railroad's determination, an individual

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employee who improperly moved a locomotive beyond a red signal, restricting movement from the siding where the locomotive was situated, to the main line. Once on the main line, the locomotive was quickly overtaken by an express train, running at maximum authorized speed on the same track. The passenger train plowed into the rear of the locomotive causing a substantial number of passenger fatalities and injuries. The operator of the Conrail locomotive was not a locomotive engineer, but rather, a trainman who was hostling the locomotive between terminals. Ironically, the progeny of the federal locomotive engineer regulations is in an accident for which no locomotive engineer had responsibility. Justin J. Marks, Note, *No Free Ride: Limiting Freight Railroad Liability When Granting Right-of-Way to Passenger Rail Carriers*, 36 TRANSP. L.J. 313, 316, 329 (2009).

5. 49 U.S.C. § 20135 (2013).

6. *Rail Safety Improvement Act of 2008 (RISA)*, FED. RAILROAD ADMIN. (Nov. 11, 2013), http://www.fra.dot.gov/Page/P0395; 49 U.S.C. § 20301 *et, seq.*

7. The railroad operating employees consist of engineers, conductors, trainmen, and brakemen. Andy Sperandeo & Kevin P. Keefe, *ABC's of Railroading: The People Who Work on Trains*, TRAINS: *THE* Magazine of Railroading (May 1, 2006), http://trn.trains.com/en/Railroad%20Reference/ABCs%20of%20Railroading/2006/05/The%20people%20who%20work%20on%20trains.aspx. *See also* 1-5 Transp. Safety and Ins. Law § 5.06 (2013).

8. The Union representing locomotive engineers on the vast majority of organized railroads in the United States, the Brotherhood of Locomotive Engineers (BLE), did not formally participate or comment upon the construction of the regulations due to political and other sentiments held by the Union's top administrators at the time. This policy of non-participation was reversed at the time the regulations were revised in 1998-2000 when the Union became fully immersed in the process. Today, the BLE is affiliated with the International Brotherhood of Teamsters, and its name has changed to BLE-T (Brotherhood of Locomotive Engineers and Trainmen). *BLET Div. Five: History*, BLET5 (Nov. 11, 2013) *available at* http://blet5.com/history-of-the-ble/ (last visited December 26, 2013).

9. 49 C.F.R. § 240.1(a).

10. 49 C.F.R. § 240.103.

met the engineer training and qualification requirements of its program, it certifies to the FRA that the individual passed. The railroad issues the engineer a certification card, commonly called a "license." Paradoxically, the railroad, and not the government agency, issues the license.

After an individual has met the qualification requirements, the regulations require the railroads to monitor performance of its engineers for compliance with certain cardinal operating rules, adhesion to regulations prohibiting the use of alcohol or illegal drugs by employees subject to duty, and for meeting standards for vision and hearing acuity.[11] If an individual violates a cardinal rule or the prohibition against the use of drugs or alcohol, the railroad conducts a hearing; if the offense is proven, the railroad must suspend the individual's locomotive engineer certification for a prescribed period.[12]

This initial hearing is not a due process hearing. The regulations provide that an initial revocation hearing may be combined with a hearing conducted pursuant to an applicable collective bargaining agreement (CBA), since a hearing under the CBA is sufficient for certification revocation purposes.[13] On unorganized railroads, the regulations require a railroad to hold an initial hearing within 10 days of the date of certification suspension to be conducted in much the same manner as the typical investigatory proceeding under a CBA, including the production of a record containing testimony and evidence.[14] Notably, the regulations neither provide for discovery nor can witnesses be subpoenaed.

Following the initial hearing; the railroad, not the FRA, determines whether the individual's license should be revoked.[15] On organized railroads, this decision is usually made concurrent with a disciplinary decision.[16] A locomotive engineer who has been found culpable for a cardinal rule violation, and disagrees with such decision, may appeal.[17]

On organized railroads, an appeal of the disciplinary penalty may be, and usually is, instituted by the Union pursuant to the CBA.[18] With re-

11. 49 C.F.R. § 219.101 (2013); 49 C.F.R. § 240.207 (2013).

12. 49 C.F.R. § 240.117 (2013).

13. 49 C.F.R. § 240.307 (2013).

14. A railroad official presides over this hearing. The engineer, charged with the offense, is usually represented by a local or system union officer. Witnesses are subject to examination by the presiding railroad officer and cross examination by the union representative. The hearing is recorded and then transcribed. Since the presiding hearing officer is a railroad official (rather than a neutral party), the fairness (or lack thereof) of the hearing is often an issue on appeal. The neutral party or arbitrator presides over the appellate hearing. 49 C.F.R. § 240.307(c)-(d).

15. 49 C.F.R. § 240.307(a).

16. *See, e.g.*, 49 C.F.R. § 240.307(e).

17. 49 C.F.R. § 240.411(a) (2013).

18. *See generally Daniels v. Union Pac. R.R.*, 480 F. Supp. 2d 191, 194 (D.D.C. 2007) (Daniel's union, the Brotherhood of Locomotive Engineers and Trainmen, was also a named plaintiff on appeal).

spect to the individual's certification revocation, an appeal must be made to the FRA within 180 days of the railroad's decision to revoke.[19] For both appeals, the record produced at the company-level hearing comprises the appellate record.[20] Thus, the same incident, and the same record, which led to both the disciplinary and revocation decisions, is appealed to two distinct tribunals. The disciplinary appeal, after grievance handling, ends up in arbitration pursuant to the Railway Labor Act, as amended (RLA).[21] The revocation decision is appealed to the Locomotive Engineer Review Board (LERB).[22] It is at this point a dilemma takes root.

The LERB is a panel of three FRA employees who meet at irregular intervals to consider the revocation appeals filed with the FRA.[23] It does not always handle appeals in the order they were received nor do the regulations stipulate a time limit in which the LERB must issue a decision in any particular case.[24] As a result, some appeals may be decided in a relatively timely fashion, within months of their submission, while others are not decided until years after they were filed.

On the CBA side, railroad cases are notorious for taking a lengthy time to appeal and then additional time to reach arbitration.[25] Time elapses while the disputes progress though several successive levels of the contractual grievance procedure.[26] Then, prior to filing for arbitration,

19. 49 C.F.R. 240.403(c).

20. 49 C.F.R. § 240.307(c)(9); 49 C.F.R. § 240.411(a).

21. 45 U.S.C. § 153 (2013) (providing for the resolution of minor disputes - grievances - between an employees or group of employees and a carrier or carriers). Employee discipline is always a minor dispute. Under the RLA, railroads are designated "carriers" as the term is understood in the Interstate Commerce Act, but railroads are designated "railroads" within the engineer certification regulations. The authors use the term "carrier" in the context of the RLA and "railroad" in the context of the certification regulations in this article.

22.]49 C.F.R. § 240.401(a)-(b) (2013).

23. 49 C.F.R. § 240.401(c).

24. 49 C.F.R. § 240.405(a) (2013) (stating that it is FRA's "intention" that decisions be rendered within 180 days, but does not create a mandatory deadline).

25. Studies by the National Mediation Board in 2004-2005 and prior years indicated railroad cases were requiring between two to five years for final adjudication. Delays can be attributed to the parties' allowing grievances to languish and to limitation of government funding for arbitration which slows the decision-making machinery. There are exceptions, of course, where CBA provisions require expedited handling of grievances and/or the parties have instituted procedures to hasten the process. *See Ann. Performance and Accountability Report*, NAT'L MEDIATION BD., 38 (2010) *available at* http://www.nmb.gov/documents/2010annual-report/04_PDF/PDFs/NMB2010_full.pdf (responding to systemic backlog problems by reviewing and resolving cases over 5 years old).

26. *See Expedited Mediation Project*, NAT'L MEDIATION BD., 1-2 (2010), http://www.nmb.gov/mediation/ExpeditedMediationPilotProject_12-08-10.pdf (describing reforms to promote expediency by describing the multi-step process for entering and completing mediation).

the parties are required to conference the dispute.[27]

Once a case is ready for adjudication, it may be filed with the National Railroad Adjustment Board (NRAB) pursuant to 45 U.S.C. § 153. When it is subject to further administrative handling, an arbitrator is selected or appointed, and the case is scheduled for hearing.[28] Alternatively, the parties may agree to establish a Public Law Board (PLB)[29] pursuant to 45 U.S.C. § 153.

Whether cases move more quickly to arbitration before PLB's depends upon the expedition (or lack of it) exercised by the parties. Because of the uncertainty of protracted time lines, an arbitrator of a locomotive engineer's case may or may not be asked to take notice of a corresponding LERB decision depending upon (usually) whether it yet exists. Another problem is that the LERB, although working from virtually the same record relied upon in arbitration, applies a different standard of review, especially with respect to aspects of contractual due process. The LERB often dismisses contractual procedural defects to reach merits issues, arguing that the over-arching intent of the regulations, that non-qualified engineers should not operate locomotives or trains, represents a clear and dominant public policy not to be frustrated by provisions of a CBA.[30]

It is important to remember that the LERB decision was not the result of a full due process hearing. The regulations do not provide for due process until the next appeal step, a *de novo* hearing before an administrative law judge (or other such person as the FRA designates to preside over the hearing) which is conducted under the Federal Rules of Civil Procedure.[31] Either party to the LERB appeal, the individual loco-

27. 29 C.F.R. § 1203.1; *Collective Bargaining Process under the Railway Labor Act (RLA)*, NAT'L MEDIATION BD. (2010), http://www.nmb.gov/publicinfo/collbarg2.pdf.

28. The NRAB, which sits in Chicago, is composed of 17 carrier members and 17 labor members, which is divided into four Divisions. When the NRAB members deadlock on a case (which occurs about 95% of the time), they select an arbitrator to sit with the NRAB to decide the case. 45 U.S.C. § 153.

29. Public Law Boards derive their name from Public Law 89-456 which created them as an alternative to the NRAB in 1968. They are administrated ad hoc by the National Mediation Board. A PLB consists of two partisan (labor and management) members and the neutral chair (the arbitrator). Railway Claims Resolution Act, Pub. L. No. 89-456, 80 Stat. 208 (1966) (codified as amended at 45 U.S.C. § 153 (2013)).

30. *See W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber,* 461 U.S. 757, 766 (1983).

31. 49 C.F.R. § 240.409 (2013). Appeals of certification revocations to FRA are proceedings at law. On the organized carriers, local union representatives are not attorneys, thus raising a serious legal complication for union representatives willing to write appeals, the potential for a malpractice action. The National Division of the BLE-T counsels its local representatives handling revocation appeals to obtain a plenary release from the involved locomotive engineer before undertaking any appeal.

motive engineer or the railroad, may petition for this hearing.[32] Generally, it is two to three years, sometimes longer, after the railroad's revocation decision issued that this stage of the process is reached and the process exhausted. Accordingly, discovery at this stage is made difficult by the passage of time; witnesses' memories fade, or they have moved on and cannot be found. Records and data, such as downloads of locomotive performance or interlocking recorders, may not have been preserved. By the time the *de novo* hearing is conducted, it is difficult at best to build a record in many instances.

Finally, regulations provide for a further appeal from the decision resulting from the *de novo* hearing.[33] This appeal is made to the FRA Administrator, and the Administrator's decision constitutes the final agency action in the matter.

Now that we're all clothed in a working knowledge, at least, of the Federal Regulation's decertification appeal provisions, we might wonder how well those clothes fit. The regulations appeal provisions are convoluted and cumbersome. The parties must muddle through an appeal that puts the due process, evidentiary hearing at almost the end of the process.

The arbitrator encounters a different problem - deciding and fashioning a remedy in a case that is also progressing to another forum. If the FRA decision has been issued, the arbitrator attempts to harmonize the remedy in a manner consistent with the Agency's decision, when appropriate to do so.[34] There are layers of onion to peel here. The dilemma may best be understood within the context of an example involving the cardinal rules.[35]

Suppose that an engineer runs three engine lengths beyond a red signal. The controversy concerns whether a mechanical defect in the braking system prevented the engineer from stopping the train prior to the signal or whether the engineer did not exercise proper control of the train by reducing its speed in time to stop before passing the red aspect. The railroad convenes an investigation under the CBA and 49 CFR § 240 to determine whether the engineer was guilty of the rule infraction. Let us assume that the railroad violated the disciplinary rules of the CBA by failing to convene the investigation within the time prescribed by the rule,

32. 49 C.F.R. § 240.407(a) (2013).

33. 49 C.F.R. § 240.411.

34. 45 U.S.C. § 153.

35. 49 C.F.R. § 240.117(e). Summarized: (1) Failure to control a locomotive or train in accordance with a signal indication requiring a complete stop before passing it; hand signals or radio signal indications of a switch are excluded. (2) Speeding more than 10 mph above the prescribed limit, or certain violations of the restricted speed rule. (3) Failure to perform certain required brake tests. (4) Occupying a main track or segment of main track without proper authority. (5) Tampering with mounted locomotive safety devices or knowingly operating a train or engine with a disabled safety device in the operating cab.

and when it finally held the investigation, the railroad arbitrarily refused to call as witnesses the machinists who examined the brakes on the locomotive following the incident.[36] The railroad dismisses the engineer following the investigation and suspends his locomotive engineer certification for one year.

After grievance handling, the Union appeals the engineer's dismissal to the NRAB seeking reinstatement and pay for all time lost, the Board hearing taking place 24 months after the engineer's dismissal. In the meantime, the engineer or someone acting on his behalf appeals the railroad's revocation decision to the LERB. The LERB rules in favor of the railroad, upholding its decision to revoke the engineer's certification. The NRAB is asked to take notice of the LERB decision at the arbitration hearing. Eventually the NRAB rules the carrier's breach of the investigation time limit rule violated the CBA and orders the claim sustained without consideration of its merits.[37]

Now a problem in the remedy arises. Should the carrier pay the engineer for time lost during the period of the revocation? An engineer cannot operate a locomotive with a suspended or revoked license, and would not have been able to earn compensation during that time. Should the Carrier reinstate the engineer but be allowed an offset of earnings during the time of revocation? Such would seem reasonable. However it is not so simple.

The arbitration (NRAB decision) is, of course, final and binding on the parties.[38] The LERB decision, however, is not.[39] It will most likely be appealed, and may already be under appeal at the time of the arbitration hearing. Whether the engineer would have his certification restored for the period the railroad revoked his license will be determined in the future by the FRA. Thus, the back pay remedy awarded in arbitration should provide for both potential outcomes; the license is, or is not, restored. Back pay would include wages the engineer would have earned during the period of revocation should the FRA ultimately rule the revocation was improper, but it should not include such pay if the revocation is upheld.[40] This is not, of course, an uncommon way to fashion a remedy

36. Most CBA require the carrier to convene a hearing within 10 to 20 days after the occurrence. The carrier may withhold an engineer from service pending the hearing for serious infractions like this one. Thus, the tight CBA time limit is designed to minimize the time an innocent engineer is held out of service and to promptly conduct a hearing while the event is fresh in the minds of the witnesses. 49 C.F.R. § 240.307.

37. A sustained claim means the engineer is entitled to reinstatement to service with full back pay. *See Gunther v. San Diego & Ariz. E. Ry. Co.*, 382 U.S. 257, 259, 264 (1965) (upholding the Adjustment Board's award of back pay for a sustained claim).

38. 49 C.F.R. § 240.411(f).

39. 49 C.F.R. § 240.409(u)(4).

40. *See, e.g., Cole v. Erie Lackawanna Ry.*, 396 F. Supp. 65, 66, 69 (N.D. Ohio 1975) (up-

in circumstances where an employee, for one reason or another, would have been unable to perform his job during a period of a disciplinary suspension.[41] There is more onion, though, to peel.

As a result of collective bargaining, the craft of locomotive firemen was incrementally reduced during the late 1960's and early 1970's, and finally completely eliminated in 1985.[42] The firemen's craft had been the source of supply for locomotive engineers.[43] Because this would no longer be possible, the parties agreed that the trainmen's craft would become the source of supply.[44] Just as employees formerly shuttled back and forth (ebb and flow) between the Engineers' and Firemen's craft, now they would move between the Engineers' and Trainmen's craft.[45] Engineers retain their train service seniority after promotion.[46] The same 1985 Agreement that eliminated firemen also provides that an engineer who is unable to hold an engineer's position can exercise his train service seniority and work a train service position.[47] Accordingly, if an unlicensed engineer with seniority, who cannot hold a position as an engineer, must be able to work train service after a period of disciplinary suspension.

Let us apply this to the remedy in our hypothetical case. The remedy awarded pay for all time lost. Whether that pay will be made at the appropriate engineer's rate will turn on the FRA's eventual certification revocation decision. In the meantime, provided the engineer holds train service seniority, the NRAB's order should provide the engineer pay for time lost at the appropriate train service rate from the time of his discharge until the end of the period of revocation, at which time his license would have been reinstated, allowing him to work once more as a locomotive engineer and be paid accordingly.[48]

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holding award of Public Law Board for "back pay for the time from the end of the disciplinary lay-off to the date of restoration to duty.")

41. *See* 38 U.S.C. § 7462(d)(1) (2013) ("Pursuant to the board's decision, the Secretary may order reinstatement, award back pay."); 5 U.S.C. § 5596(b)(1) (2013) (an employee found to have been affected by unjustified personnel action is entitled to back pay); 42 U.S.C. § 2000e-5(e)(3)(B) (2013) ("an aggrieved person may obtain relief. . .including recovery of back pay").

42. *Agreement between Nat. Carriers' Conference Comm. and United Transp. Union*, 22 (Oct. 31, 1985), *available at* http://www.utubo.com/utudownloads/1985%20National%20Agreement.pdf.

43. *Id.*

44. *Id.*

45. *Id.* at 28.

46. *Id.* at 29.

47. *Id.*

48. On the majority of the nation's railroads, engineers who possess train service seniority are required to "markup" as trainmen during any period of certification suspension that exceeds disciplinary suspension. Whether decertification, as opposed to business-driven surpluses of engineers, made an engineer unable to hold a position and, thus, permit exercise of his train service seniority became a matter of controversy on certain carriers. The controversy was resolved by

As a preview to another problem, suppose in our hypothetical case that the carrier complied with all contractual procedural due process rules, but at the company-level hearing, the engineer and Union present clear and convincing evidence of a mechanical (braking) malfunction. As a result, the NRAB sustains the discharge appeal on its merits. The LERB sustains the railroad's positions on the merits. Now two decisions, albeit predicated on the same record, are directly contradictory. Will the NRAB's Award be enforced? Before enforcement proceedings can be initiated, will administrative remedies involving the FRA need to be exhausted? How will the two-year statute of limitations for initiating judicial review or enforcement of the NRAB Award play into the mix where the *de novo* hearing and even a potential subsequent appeal are pending for substantially longer? Perhaps the answer to all this is, yes; it is conceivable the Award will be enforced to the extent that it pertains to reinstatement and the time lost after the expiration of the revocation period. What is fairly certain, however, is that this process would cost a significant expenditure in agency hours, attorneys' billable hours, and the court's time.

How can some of these problems he avoided or solved? It would not be necessary to reconcile two decisions were there but one in the first place. The LERB should be eliminated since it is the forum that creates the dilemmas. Amending the federal regulations to empower the arbitrator to render the revocation decision along with the corresponding (RLA) Section 3 grievance decision might be a good first step. The RSIA could construct a process similar to the National Labor Relations Board's policy to defer certain unfair labor practice complaints to arbitration under CBA's as provided in Section 10118 of the NLRB Casehandling Manual under the standards prescribed in *Collyer Insulated Wire v. Local Union 1098.*[49] The NLRB reviews the arbitrator's decision to guarantee that the award fairly adjudicated the unfair practice and that the decision conforms with the policies of the National Labor Relations Act and the standards articulated in *Spielberg Mfg. Co.*[50]

This may not be necessary under RSIA. The arbitrator can reach the merits of the alleged violation as well as deciding agreement procedural

several arbitrations, each holding that decertification makes an engineer unable to hold an engineer's position within the meaning of the 1985 Arbitration Agreement. *See, e.g., Burlington Northern & Santa Fe Ry. Co. v. Brotherhood of Locomotive Engineers*, 367 F.3d 675, 677-80 (7th Cir. 2004) (discussing assigning remote control operator positions to non-locomotive engineers represented by the UTU).

49. 192 N.L.R.B. 837, 842 (1971).

50. 112 N.L.R.B. 1080, 1082 (1955); *see Nat'l Radio Co.*, 198 N.L.R.B. 527, 531 (1972); *see also Olin Corp.*, 268 N.L.R.B. 573, 573-74 (1984); *see also The Motor Convoy, Inc.*, 303 N.L.R.B. 135, 135-36 (1991).

matters to fully adjudicate all the issues.[51] The arbitrator will have full panoply of remedies that would fully and finally resolve the dispute.[52] (The new process would necessarily provide a forum for reviewing revocation decisions involving engineers on non-organized railroads where CBA discipline rules do not exist). The Engineer Certification Regulations require that FRA participates as a party to revocation appeals, so in the relatively rare instance where the FRA believed an arbitrator's decision with respect to a carrier's denial of process frustrated public policy, the agency could raise that issue at the *de novo* stage.[53] Knowing this, arbitrators will likely carefully and deliberately consider the public policy when deciding cases.

In conclusion, arbitrators, who are familiar with railway labor relations, can best decide both certification and disciplinary issues inasmuch as the record compiled at the initial hearing is the same. Decisions on an engineer's future would be quicker and unconditional. There would be no need for an arbitrator to construct a series of conditional remedies based on what the LERB or FRA might eventually decide. The new process would be much more efficient and could result in substantial savings for the parties and the government in both time and money.

51. *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).
52. *Id.* at 597.
53. 49 C.F.R. § 240.409(c).