

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

Locomotive Engineer Review Board

Decision Concerning
Norfolk Southern Corporation's
Revocation of Mr. B. R. Kalinoski's
Locomotive Engineer Certification

FRA Docket Number EQAL 2011-42

Decision

The Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the decision of Norfolk Southern Corporation (NS) to revoke Mr. B. R. Kalinoski's (Petitioner) locomotive engineer certification (certification) in accordance with the provisions of Title 49, Part 240 of the Code of Federal Regulations (49 C.F.R. Part 240). The Board hereby determines that NS' decision to revoke Petitioner's certification was improper for the reasons set forth below.

Background

On July 11, 2011, at approximately 11:10 a.m., while working as a locomotive engineer trainee¹ operating Train C8KC211, Petitioner allegedly passed a conditional stop sign without permission or authority on Main Track No. 2 in violation of 49 C.F.R. § 240.117(e)(4),² "[o]ccupying main track or a segment of main track without proper authority or permission." See Tr. at 3, 12; Tr. Exs. A, D. Petitioner's engineer instructor (Mr. T. W. Treaster) had requested permission to pass the conditional stop sign located on Main Track No. 2; however, the Maintenance-of-Way (M&W) foreman (Mr. Gehring) failed to correct the engineer instructor's error in repeating back the permission granted, resulting in Petitioner's train entering the work limits of an M&W crew on Main Track No. 2, instead of Main Track No. 1. See Tr. at 13, 15. Petitioner was removed from service pending an investigation of the incident. See *id.* at 3-4; Tr. Ex. A.

¹ Petitioner was assigned to work as the locomotive engineer trainee under the direct supervision of qualified and certified engineer instructor (engineer instructor). See Tr. at 12, Tr. Ex. D; see also FRA Docket Number EQAL 2011-43.

² The July 19, 2011, notice of investigation letter references § 240.117(c)(e)(4), which is not a proper citation and may cause confusion as to whether the railroad intended to cite to paragraph (c), paragraph (e)(4), or some other paragraph of § 240.117. However, it appears that NS may have intended to cite to both paragraphs (c) and (e)(4), and the Board believes there was no harm in this citation error as paragraph (c) cross-references paragraph (e), and paragraph (e)(4) was the appropriate paragraph to cite under these circumstances.

A combined railroad discipline and Federal certification hearing was conducted on July 29, 2011, and Petitioner was notified that his certificate was revoked by letter dated August 11, 2011. *See* Tr. at 1-3; Pet. at 15.³ By petition postmarked December 12, 2011, and received by FRA on December 15, 2011, Petitioner requested that FRA review NS' decision to revoke his certification. The petition asserts that the revocation was improper for the following reasons:

- (1) NS failed to provide sufficient credible evidence to support the revocation and denied Petitioner due process by failing to provide all of the necessary evidence, namely an unfiltered copy of the radio tapes and the written statement from Foreman Gehring. *See* Pet. at 2.
- (2) NS Operating Rule 142 requires the M&W Foreman to verify the accuracy of the information Petitioner's engineer instructor repeated back to him, thus Petitioner should not be decertified as a result of Foreman Gehring's error. *See id.* at 3.

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

NS' Response

NS submits that it has proven by substantial and credible evidence that Petitioner violated the Carrier's Operating Rules and Federal Regulations, and thus his certification was properly revoked, when the train he was operating passed the conditional stop sign and occupied Main Track No. 2 without authority. *See* NS Resp. at 4, 6-7. The record from the formal investigation revealed that Engineer Treaster asked for permission to pass the conditional stop sign on Main Track No. 2, but was given permission to pass the conditional stop sign on Main Track No. 1. *See id.* at 4. Petitioner occupied a main track without authority because he was not paying attention to Foreman Gehring and failed to ascertain the limits of his track authority in accordance with the Carrier's operating rules and procedures for obtaining such authority. *See id.* at 6-7.

NS also submits that there are no procedural issues or mitigating circumstances that would make Petitioner's revocation inappropriate. *See id.* at 7. NS complied with its duty to bring forth those witnesses and other evidence necessary to develop the facts. *See id.* As noted above, the evidence presented at the hearing clearly proved the charges, and Petitioner was not deprived of a fair hearing since nothing in the record supported that those who were not summoned were material to the final determination of the Hearing Officer. *See id.*

Petitioner alleges that the transcript of the radio tapes was incomplete and inaccurate. *See id.* NS submits that the testimony of the charging officer indicates that the radio tapes were not altered in any way, and further notes that there were no gaps or omissions of testimonial evidence, and that the occasional inaudible word does not materially affect the ability of the Carrier to determine

³ The petition did not formally mark the attachments to the petition with exhibit numbers. This revocation letter was included as the 6th (and final) attachment to the petition.

Petitioner's responsibility. *See id.* at 7-8. Based upon the Carrier's efforts to provide a true and accurate transcript of the radio tapes in this case, there was no violation of Petitioner's due process. *See id.* at 8. Petitioner chose not to pay attention to Foreman Gehring, and there are no mitigating circumstances to excuse Petitioner from his responsibility. *See id.* at 8-9.

Board's Determination

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

- (1) On July 11, 2011, at approximately 11:10 a.m., while working as an engineer trainee operating Train C8KC211 in the vicinity of CP Wing (MP PT 340) on the Pittsburgh Division, Petitioner allegedly passed a conditional stop sign without permission or authority on Main Track No. 2 in violation of 49 C.F.R. § 240.117(e)(4), "[o]ccupying main track or a segment of main track without proper authority or permission." *See Tr.* at 3, 12; *Tr. Exs.* A, D.
- (2) The crew consisted of Petitioner, an engineer instructor, a conductor and a conductor trainee. *See Tr.* at 12; *Tr. Ex.* D.
- (3) An M&W crew was working with Form Y limits established between MP PT 340 and MP PT 339 during the hours of 0930 to 1400, with conditional stop signs located on Main Track Nos. 1 and 2. *See Tr.* at 30; *Ex.* G.
- (4) At approximately 1105 Hours, Petitioner's engineer instructor contacted the Roadway Worker in Charge of the Form Y limits (M&W Foreman Gehring) and requested permission to pass the conditional stop sign on Main Track No. 2 to enter the work area limits. *See Tr.* at 13, 15. Foreman Gehring granted permission to Engineer Treaster to pass the conditional stop on Main Track No. 1, but then agreed with Engineer Treaster's repetition of the permission granted, which indicated that Petitioner had permission to enter the working limits on Main Track No. 2. *See id.*
- (5) NS Operating Rule 142, section f, item 3 states that "[t]he Engineer must repeat the permission to the employee in charge who must verify the repetition for accuracy." *See Pet.* at 6;⁴ *Tr.* at 20, 42.
- (6) Petitioner was removed from service pending an investigation of the incident. *See Tr.* at 3-4; *Tr. Ex.* A.
- (7) A combined railroad discipline and Federal certification hearing was conducted on July 29, 2011, and Petitioner was notified that his certificate was revoked by letter dated August 11, 2011. *See Tr.* at 1-3; *Pet.* at 14.

⁴ This operating rule was provided as the first unnumbered attachment to the petition. The relevant language is included on the second page provided (page 66).

Analysis of the Petition

In reviewing petitions of revocation decisions, the Board considers four issues in determining whether decertification was proper under FRA's regulations. *See* 49 C.F.R.

§ 240.405(f). First, whether substantial evidence exists to support the railroad's factual findings in its decision. *See* 58 Fed. Reg. 18982, 19001 (1993). Second, when considering procedural disputes, the Board will “determine whether substantial harm was caused the petitioner by virtue of the failure to adhere to the dictated procedures for making the railroad’s decision. A finding of substantial harm is grounds for reversing the railroad’s decision.” *Id.* To establish grounds upon which the Board may grant relief, Petitioner must show: (1) that procedural error occurred, and (2) the procedural error caused substantial harm. *Id.* Third, whether the railroad’s legal interpretations are correct based on a *de novo* review. *Id.* Finally, whether “an intervening cause prevented or materially impaired the locomotive engineer's ability to comply with the railroad operating rule or practice which constitutes a violation under §§ 240.117(e)(1) through (e)(5) of this part.” 49 C.F.R. § 240.307(i)(1).

Although Petitioner raised two assertions, the first of which alleges a failure to provide sufficient credible evidence and denial of due process by failing to provide all of the necessary evidence, there is no need for the Board to discuss both assertions, as it has decided the case on the grounds raised in the second assertion. Petitioner’s instructor engineer asked for permission to proceed through the work limits on Main Track No. 2, and stated his belief that he had permission to proceed on Main Track No. 2 in his repetition back of the permission granted to him by Foreman Gehring. *See* Tr. at 13, 15. Foreman Gehring failed to verify⁵ that Engineer Treaster’s repetition of the permission he granted was accurate in accordance with NS Operating Rule 142. *See id.* Accordingly, the Board finds that Foreman Gehring’s failure to verify that Engineer Treaster’s repetition was accurate was an intervening cause that prevented or materially impaired Petitioner’s ability to comply with the railroad operating rule that required permission or authority be granted prior to passing a conditional stop sign.

Conclusion

Based on its review of the record and the above findings and conclusions, the Board hereby grants the petition in accordance with the provisions of 49 C.F.R. Part 240.

Issued in Chicago, IL on JUN 13 2012.



Richard M. McCord
Chairman,
Locomotive Engineer Review Board

⁵ Petitioner notes that it is quite possible that Foreman Gehring may have been confused by a simultaneous conversation between the train dispatcher and R. W. O’Donnell on the Turtle Creek Branch wherein the Dispatcher was giving authority to Mr. O’Donnell on Track 1. *See* Pet. at 2.

SERVICE LIST EOAL 2011-42

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

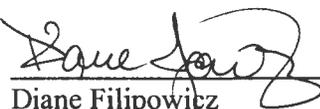
SENT CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. B. R. Kalinoski
829 Popish Road
Portage, PA 15946-7603

Mr. William A. Thompson
Vice General Chairman
Brotherhood of Locomotive Engineers and Trainmen
513 Route 30, Suite C
Imperial, PA 15126-1173

Mr. Jeremy D. Moore
Director of Labor Relations
Norfolk Southern Corporation
223 East City Hall Avenue
Norfolk, VA 23510-1728

Mr. Donald R. Craine
Division Superintendent
Norfolk Southern Corporation
425 Holiday Drive
Pittsburgh, PA 15220



Diane Filipowicz
Administrative Assistant

JUN 13 2012

Date

enc: Post LERB Memo

cc: FRA DOCKET EQAL 2011-42

SENDER: COMPLETE THIS SECTION

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

1. Article Addressed to:

Mr. B. R. Kalinoski
829 Popish Road
Portage, PA 15946-7603

EQUAL 2011-42

2. Article Number

(Transfer from service label)

7011 0470 0002 1248 1437

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X

Agent

Addressee

B. Received by (Printed Name)

C. Date of Delivery

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

3. Service Type

Certified Mail

Express Mail

Registered

Return Receipt for Merchandise

Insured Mail

C.O.D.

4. Restricted Delivery? (Extra Fee)

Yes

SENDER: COMPLETE THIS SECTION

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- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Mr. William A. Thompson
Vice General Chairman, BLE&T
513 Route 30, Suite C
Imperial, PA 15126-1173

EQUAL 2011-42

2. Article Number

(Transfer from service label)

7011 0470 0002 1248 1420

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

COMPLETE THIS SECTION ON DELIVERY

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Addressee

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C. Date of Delivery

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

3. Service Type

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Return Receipt for Merchandise

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C.O.D.

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

1. Article Addressed to:

Mr. Jeremy D. Moore
Director of Labor Relations
Norfolk Southern Corporation
223 East City Hall Avenue
Norfolk, VA 23510-1728

EQUAL 2011-42

2. Article Number

(Transfer from service label)

7011 0470 0002 1248 1413

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X

Agent

Addressee

B. Received by (Printed Name)

C. Date of Delivery

D. Is delivery address different from item 1? Yes
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- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Mr. Donald R. Craine
 Division Superintendent
 Norfolk Southern Corporation
 425 Holiday Drive
 Pittsburgh, PA 15220

EQUAL 2011-42

2. Article Number

(Transfer from service label)

7011 0470 0002 1248 1406

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X

 Agent Addressee

B. Received by (Printed Name)

C. Date of Delivery

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

3. Service Type

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

4. Restricted Delivery? (Extra Fee)

 Yes