

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

Locomotive Engineer Review Board

Decision Concerning
BNSF Railway Company's
Revocation of Mr. J. R. Ditgen's
Locomotive Engineer Certification

FRA Docket Number EQAL 2012-15

Decision

The Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the decision of BNSF Railway Company (BNSF) to revoke Mr. J. R. Ditgen'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 BNSF's decision to revoke Mr. J. Ditgen's certification was proper for the reasons set forth below.

Background

On January 16, 2012, at approximately 3:45 p.m., while operating Train M-DYTCSX1-15A, Petitioner allegedly occupied main track or a segment of main track without proper authority or permission near milepost (MP) 166, West Siding Switch (WSS) at Crowley on the Lafayette Subdivision, in violation of 49 C.F.R. § 240.117(e)(4). Pet. at 5.

The train crew consisted of Petitioner and a conductor, Mr. Young. Pet. at 1. The crew was working Train M-DYTCSX1-15A from Houston, Texas, to Lafayette, Louisiana. They had a track warrant instructing them to clear the main track at the WSS at Crowley. *Id.* Petitioner and the conductor held a job briefing to discuss the move to make once they cleared into the siding. During the job briefing, Petitioner noticed that the train was approaching the siding sooner than expected, causing him to make an emergency brake application. The train passed the switch point, but stopped before the opposing signal. Tr. at 74. Petitioner then called the dispatcher to explain the situation, receiving permission to make a reverse move. *Id.* at 75.

On February 28, 2012, BNSF convened an investigation and hearing. Subsequently, by letter dated March 14, 2012, BNSF notified Petitioner that his certification was revoked for one month, in accordance with 49 C.F.R. § 240.117(e)(4). BNSF also dismissed Petitioner from service for violating BNSF's General Code of Operating Rules (GCOR) 14.1 Authority to Enter Track Warrant Control Limits, 14.2 Designated Limits, and 6.3 Main Track Authorization.

Petitioner's Assertions

The Brotherhood of Locomotive Engineers and Trainmen (BLET) timely filed a petition on April 27, 2012, requesting that FRA review BNSF's decision to revoke Petitioner's certification. The petition asserts that the revocation was improper for the following reasons:

1) The BNSF does not give their employees adequate training. In May 2011, Petitioner became a locomotive engineer and, as of the time of the incident on January 16, 2012, he had only been an engineer for approximately 8 months. Tr. at 74. Additionally, at the time of this incident, Petitioner had only made two previous trips to Lafayette when he was a student engineer and one trip to Lafayette when he was an engineer. *Id.* at 78; 86. Petitioner was not sufficiently trained. Back in 2002, BNSF used to require that student engineers complete five roundtrips to Lafayette. At the hearing, Petitioner testified that he was "not really honestly that familiar with the territory to begin with." *Id.* at 76.

The conductor, Mr. Young, was not qualified on the territory and had to rely on Petitioner for help. Tr. 114; 116. During the course of the trip, Petitioner learned that Mr. Young had never made a complete trip to Lafayette. *Id.* at 98. As a result, Petitioner had to have a job briefing with Mr. Young to instruct him on what to do at Crowley. The job briefing distracted Petitioner and caused him to pass the WSS at Crowley. Petitioner could not be expected to safely operate the train and assist Mr. Young at the same time.

2) Petitioner did not exceed the limits of his authority. Petitioner was given authority to the WSS at Crowley. Tr. Ex. 11. Although the BNSF witnesses at the hearing stated that this means the authority ends at the switch point at the WSS at Crowley, they are incorrect. Tr. at 43; 66. The limits of the authority ended at the clearance points, which both Petitioner and Mr. Young testified they did not pass. *Id.* at 79; 115.

3) The locomotive downloads are incomplete. Hearing exhibits 10B, 10C, and 10D are incomplete documents. The milepost locations and the ledger are not visible on the download exhibits so it is impossible to verify exactly where the incident occurred and to determine the measurements. Additionally, BNSF did not provide the locomotive download from the second engine. Tr. at 68. The information from the second download would have confirmed or refuted the information from the first one.

BNSF's Response

Pursuant to 49 C.F.R. § 240.405(b) and (c), a copy of the petition was sent to BNSF on April 30, 2012, and the railroad was afforded an opportunity to comment. BNSF did not respond.

Board's Determinations

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

- (1) On January 16, 2012, at approximately 3:45 p.m., Petitioner, who was serving as

engineer of eastbound Train M-DYTCSX1-15A, occupied the main track or a segment of main track without proper authority or permission near MP 166, WSS at Crowley on the Lafayette Subdivision. Tr. at 74, Tr. Ex. 11.

- (2) The train crew consisted of Petitioner and a conductor. Petitioner and the conductor were both aware that they had a track warrant instructing them to clear the WSS at Crowley. Tr. at 74; 115.
- (3) Petitioner was qualified on the territory. Tr. at 35.
- (4) The Petitioner held a job briefing with the conductor to discuss “the best move to make once [they] cleared into the siding.” Tr. at 74-75.
- (5) Petitioner testified that during the job briefing he noticed that the train was approaching the siding sooner than he had expected so he tried to slow the train down. He felt that the train was not slowing down quickly enough so he placed the train into emergency. Tr. at 74.
- (6) Petitioner and the conductor both testified that the train passed the switch point, but it stopped before the opposing signal on the main line. The Petitioner and the conductor also testified that the train did not pass the clearance point of the switch. Tr. at 74; 79; 115.
- (7) Petitioner estimated that the train passed the switch point by approximately 4 car lengths. Tr. at 79; 82. The conductor estimated that the train passed the switch point by a couple car lengths. Tr. at 115.
- (8) After passing the switch, Petitioner called up the dispatcher to inform him of the situation and asked permission to make a reverse movement to reposition the train, in order to operate the switch and occupy the siding. After permission was received, the train made a reverse movement of approximately 263 feet. Tr. at 59; 72; 75.

Analysis of the Petition

Petitioner’s first assertion constitutes an intervening cause argument. Accordingly, the Board must determine 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). Petitioner claims that neither he nor the conductor had the proper training by BNSF on this territory, and that their lack of familiarity with the territory contributed to the incident. The record indicates that Petitioner was qualified as an engineer on the territory, and that he had even worked trips on the territory as a conductor. Tr. at 35. There is nothing in the record to indicate that Petitioner expressed any concerns with his familiarity of the territory until after this incident occurred. Furthermore, Petitioner did not use any of the tools that were available to him for

assistance, such as a track chart. Tr. at 76. Additionally, if Petitioner needed to give the conductor a job briefing because the conductor was unfamiliar with the territory, it was Petitioner's duty to conduct the job briefing in a manner that would permit safe operation of the train and not distract from his responsibilities as the engineer. Tr. at 22. When Petitioner accepted this assignment, it was his responsibility to ensure that he was qualified on the territory and that he had the necessary tools to safely perform his duties. Any perceived lack of training or unfamiliarity with the territory on the part of Petitioner or the conductor did not prevent or materially impair Petitioner's ability to comply with railroad operating rules.

Petitioner's second assertion raises factual issues. Accordingly, "[w]hen considering factual issues, the Board will determine whether there is substantial evidence to support the railroad's decision, and a negative finding is grounds for dismissal." 58 Fed. Reg. 18982, 19001 (April 9, 1993). Petitioner asserts that he did not exceed the limits of the track warrant authority. This assertion lacks merit. Petitioner was operating an eastbound train and was required to comply with the portion of GCOR 14.2 that states "[w]hen a station name designates the last named point, authority extends to and includes the first siding switch." The rule does not permit authority beyond the first switch. Tr. Ex. 7; Ex. 14. When switches or other fixed locations are used to define the limits of authority, the authority does not extend beyond those points. In this case, Petitioner and the conductor both testified that the train passed the switch point. Tr. at 74; 79; 115. Consequently, the Board finds substantial evidence to support BNSF's decision to revoke Petitioner's certification. 49 C.F.R. § 240.117(e)(4).

Petitioner's third assertion contends that a procedural error occurred because the locomotive download exhibits were incomplete and failed to reveal exactly where the incident occurred and the distance traveled. Petitioner also claims that a download from the second locomotive was needed to confirm or refute the information from the first locomotive. 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." 58 Fed. Reg. 18982, 19001 (1993). 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.*

With respect to the download from the second locomotive, a BNSF road foreman testified that he attempted to obtain the data from the second locomotive, but it was corrupted and not available. *Id.* Despite the absence of event recorder data from a second locomotive, there is substantial evidence that Petitioner's train passed the WSS switch point at Crowley, most notably the admission by both Petitioner and the conductor that the train passed the switch, and the fact that Petitioner asked the train dispatcher for permission to make a reverse movement to reposition the train in order to operate the switch and occupy the siding. Accordingly, even if the locomotive download exhibits failed to reveal exactly how far past the switch point the train traveled, Petitioner did not suffer substantial harm due to the absence of that information.

SERVICE LIST EQAL 2012-15

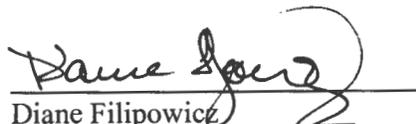
A copy of the Locomotive Engineer Review Board decision in this matter has been sent by certified mail and return receipt requested to each person shown below.

SENT CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. J. R. Ditgen
3618 Sweet Briar Dr.
Pasadena, TX 75482

Mr. Jack Sweeny
Local Chairman
BLE&T, Division 776
P.O. Box 1169
Brazoria, TX 77422

Ms. Kathy R. Conkling
Manager, Certification Administration
Burlington Northern Santa Fe Railway Company
12345 College Park Boulevard
Overland Park, KS 66210-1299



Diane Filipowicz
Administrative Assistant

AUG 28 2012

Date

enc: Post LERB Memo

cc: FRA DOCKET EQAL 2012-15

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. J. R. Ditgen
3618 Sweet Briar Dr.
Pasadena, TX 75482

2. Article Number
(Transfer from service label)

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent Addressee

X

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

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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. Jack Sweeny
Local Chairman
BLE&T, Division 776
P.O. Box 1169
Brazoria, TX 77422

2. Article Number
(Transfer from service label)

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent Addressee

X

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

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

4. Restricted Delivery? (Extra Fee) Yes

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- 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:

Ms. Kathy R. Conkling
Manager, Certification Administration
Burlington Northern Santa Fe Railway Company
12345 College Park Boulevard
Overland Park, KS 66210-1299

2. Article Number
(Transfer from service label)

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent Addressee

X

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

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