

**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. R. S. Avery's
Locomotive Engineer Certification

FRA Docket Number EQAL-2010-09

Decision

The Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the decision of Norfolk Southern Corporation's (NS) to revoke Mr. R S. Avery'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's decision to revoke Petitioner's certification was improper for the reasons set forth below.

Background

By letter dated October 6, 2009, NS instructed Petitioner to attend a formal investigation on October 13, 2009, to determine his responsibility, if any, for occupying main track without authority in the vicinity of milepost (MP) SP 194 and for failing to perform his duties when the associated track warrant was cancelled on October 5, 2009. The letter does not cite an applicable operating rule of the railroad, but it alleges that Petitioner violated "49 C.F.R. 240.117(c)(e)(4)." The letter also notified Petitioner that his certification had been suspended pending the outcome of the hearing.

After a postponement, a hearing was held on October 22, 2009. By letter dated October 30, 2009, NS revoked Petitioner's certification for violating "FRA Regulation 49 C.F.R. 240.117(c)(e)(4)."¹ On March 1, 2010, the FRA Docket Clerk received Petitioner's petition. NS filed its response in a letter dated April 16, 2010.

¹While there is no 49 C.F.R. 240.117(c)(e)(4), the language accompanying the citation persuades the Board that NS' intent was to cite 49 C.F.R. 240.117(e)(4) as support for its own applicable operating rule 171.

Board's Determinations

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

- (1) On October 5, 2009, Train L89LO05 departed Frankfort, Indiana.
- (2) The train used two locomotives, one on each end of the train.
- (3) The train crew included Petitioner operating the west locomotive, Engineer Howell operating the east locomotive, and a conductor.
- (4) While at MP SP209, at 2:23 pm, the conductor copied track warrant (TW) No. 753, which provided the train authority to operate eastward from MP SP212 to MP SP190.
- (5) With the conductor on his locomotive, Engineer Howell operated the train and stopped in Alexandria, Indiana at MP SP193.4 to clear road crossings.
- (6) The conductor then transferred to Petitioner's locomotive.
- (7) Petitioner and the conductor engaged in a job briefing, which only included a discussion of the "work-between" track authority from MP SP190 to MP SP187. Petitioner did not tell or expect the conductor to void TW No. 753. The conductor did not communicate to Petitioner that he was going to void TW No. 753.
- (8) At 3:19 pm, while the train was still at MP SP193.4, the conductor contacted the dispatcher and copied TW No. 755, which voided TW No. 753 and provided authority for work between MP SP187 and MP SP193. Petitioner did not hear any element of this conversation.
- (9) After the conductor finished communicating with the dispatcher, Engineer Howell informed the conductor and Petitioner, via radio, that they could not accept the new track authority. This was when Petitioner first learned about the voided TW No. 753.

Analysis of the Petition

Petitioner asserts that the voidance of TW 753 and the conductor's failure to notify Petitioner of the voidance constituted an intervening cause. According to 49 C.F.R. 240.307(i)(1), a railroad "[s]hall not determine that the person failed to meet the qualification requirements of [part 240] and shall not revoke the person's certification as provided for in [49 C.F.R. 240.307(a)] if sufficient evidence exists to establish that 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 [49 C.F.R. 240.117(e)(1) through (e)(5)]."

Petitioner asserts that he was not aware that the conductor would void TW No. 753 and that the conductor did not mention this during their job briefing. Petitioner claims that he was busy with other duties when the conductor subsequently communicated with the train dispatcher and that he did not hear the conductor release the train's main track authority. According to Petitioner, he should not be held responsible for catching the conductor's mistake.

NS submits that while the conductor provided the dispatcher with the incorrect location, Petitioner was not relieved from his responsibility to positively ascertain the train's authority limits. If Petitioner had been paying attention to the conversation between the conductor and dispatcher and properly secured his copy of the track authority, NS asserts that Petitioner could have easily fulfilled his responsibility.

NS refers to LERB decision EQAL-04-16, which indicates the engineer was at fault for not obtaining his copy of the track warrant when he relied solely on the conductor's verbal communication. NS believes Petitioner should have had a copy of the TW and failed in his responsibility to know the TW limits.

The Board believes that Petitioners' assertion has merit. According to Petitioner's testimony, he believed that the original track warrant would remain in effect while receiving the new track warrant to continue. Petitioner stated that it was routine to clear the original track warrant's authority when the train would depart its limits. See Tr. p. 29. It is not an engineer's responsibility to verify every word that is spoken between a conductor and train dispatcher. In fact, in many instances, the engineer may not be present during this conversation. Neither the federal regulations nor the railroad's rules require Petitioner to listen to every conversation a conductor has with the train dispatcher involving track warrants.

While NS notes that Petitioner made no effort to ascertain the new limits by either asking the conductor or by looking at the new TW No. 755, Petitioner testified that he did not receive from the conductor a copy of TW No. 755 until after the conductor finished the conversation with the dispatcher voiding the authority of TW No. 753. See Tr. p. 28. Petitioner could not have received his copy of TW No. 755 any sooner.

To support its decision, NS cites an earlier Board decision in FRA Docket Number EQAL-04-16, where the Board found that a locomotive engineer's decertification was warranted. In that case, the locomotive engineer chose to rely on the word of the conductor, who provided the engineer with conflicting and wrong information regarding the limits of a track warrant. Here, however, Petitioner was not afforded that opportunity; the conductor voided the existing track warrant without providing any prior notice to Petitioner that he would do so. Petitioner was provided with no opportunity to acquire TW No. 755 to avoid the violation.

Although Petitioner was occupying main track without authority once the conductor voided TW 753, the Board finds that the conductor's actions constituted an intervening cause preventing or materially impairing Petitioner from complying with the subject rules. Because this is a

sufficient basis for granting the petition, the Board declines to reach Petitioner's assertion of procedural error.

Conclusion

Based on the above findings and conclusions, the Board hereby GRANTS the petition in accordance with the provisions of Title 49, Part 240 of the Code of Federal Regulations.

Issued in Chicago, IL on NOV 10 2010.

A handwritten signature in black ink, appearing to read "Richard M. McCord", written over a horizontal line.

Richard M. McCord
Chairman,
Locomotive Engineer Review Board

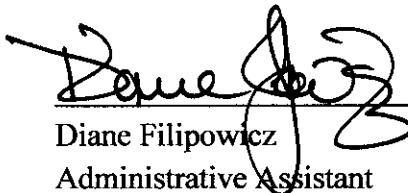
SERVICE LIST EQAL 2010-09

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

Mr. Rick S. Avery
1530 South Williams Road
Frankfort, IN 46041

Mr. Carlos A. Lizarraga III
BLE&T, Division 106
P.O. Box 35564
Canton, OH 44735

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



Diane Filipowicz
Administrative Assistant

NOV 10 2010

Date

cc: FRA Docket EQAL 2010-09

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