

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

Locomotive Engineer Review Board

Decision Concerning
CSX Transportation, Inc.'s
Revocation of Mr. W. G. Ware's
Locomotive Engineer Certification

FRA Docket Number EQAL 2010-15

Decision

The Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the decision of CSX Transportation, Inc. (CSXT) to revoke Mr. W. G. Ware'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 denies Mr. Ware's petition because it was filed after the regulatory deadline set forth in 49 C.F.R. § 240.403(d).

Background

On August 12, 2009, at approximately 2:00 a.m., while operating Train Q14512, Petitioner allegedly passed a stop signal without authority in the vicinity of YYG 170.8, Circle Connection, Atlanta, GA.

An investigation and hearing was held by CSXT on August 21, 2009. CSXT revoked Petitioner's certification for violating 49 C.F.R. § 240.117(e)(1) by letter dated August 31, 2009.

Petitioner's Assertions

By petition postmarked April 15, 2010, Petitioner requested FRA review of CSXT's decision to revoke his certification. The petition asserts that the revocation was improper because:

- (1) CSXT misapplied the regulations of 49 C.F.R. § 240.117 to the facts of this case. See Pet. at 4. The "signal basically dropped in the crew's face," indicating a miscommunication between the crew and the dispatcher about which signal, the CSXT signal (Circle Connection) or the NS signal (Spring Street), was being discussed by the dispatcher. See Pet. at 5-6.
- (2) The miscommunication between the dispatcher and the crew is an intervening cause under 49 C.F.R. § 240.307(i)(1). See Pet. at 7.

- (3) Equitable considerations warrant reversal of CSXT's decision. See Pet. at 8.

CSXT's Response

Pursuant to 49 C.F.R. § 240.405(b) and (c), a copy of the petition was sent to CSXT on May 4, 2010, and the railroad was afforded an opportunity to comment. CSXT timely responded to Petitioner's assertions by letter dated June 30, 2010, as follows:

- (1) The petition was untimely filed. Petitioner's certification was revoked on August 31, 2009. See Pet. Ex. 3. "However, Petitioner did not file his petition with [the Board] until April 16, 2010 – 228 days after the revocation decision. Therefore, the petition is untimely and should be dismissed." Resp. at 3.
- (2) Even if the Board finds excusable neglect for Petitioner's untimely filing, CSXT's revocation decision should be upheld because Petitioner admitted that he operated his train past a stop signal, violating 49 C.F.R. § 240.117(e)(1). See Resp. at 4; Pet. at 3.
- (3) "The facts of this case do not support a finding that an intervening cause of the type contemplated in FRA's regulations prevented or materially impaired Petitioner's ability to understand the AD Dispatcher's instructions." Resp. at 4.
- (4) Petitioner violated CSXT Operating Rule 226-B and Rule 424. "Petitioner and his conductor took it upon themselves to interpret a direct order and were blatantly in error." Resp. at 6.

Locomotive Engineer Review Board's Determination

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

- (1) Petitioner's certificate was revoked by letter dated August 31, 2009.
- (2) Petitioner's appeal of CSXT's revocation decision was undated and postmarked April 15, 2010. FRA's Docket Clerk received the petition on April 16, 2010.
- (3) 49 C.F.R. § 240.403(d) states that "[a] petition seeking review of a railroad's decision to revoke certification in accordance with the procedures required by § 240.307 filed with FRA more than 120 days after the date of the railroad's revocation decision will be denied as untimely except that the Locomotive Engineer Review Board for cause shown may extend the petition filing period at any time in its discretion: (1) Provided the request for extension is filed before the expiration of the period provided in this paragraph (d); or (2) Provided that the failure to timely file was the result of excusable neglect."
- (4) 49 C.F.R. § 240.7 defines "file, filed, and filing" to mean "submission of a

document under this part on the date when the Docket Clerk receives it, or if sent by mail on or after September 4, 2001, the date the mailing was completed.” See 67 Fed. Reg. 22, 23 (Jan. 2, 2002). Because the petition involved in this case was mailed after September 4, 2001, it must have been mailed within 120 days of the date that Petitioner’s certification was revoked to be considered timely by the Board.


- (5) Petitioner’s certification was revoked on August 31, 2009; therefore, the petition had to be postmarked by December 29, 2009, which is 120 days after the date of revocation. Instead, the petition was postmarked April 15, 2010, which is 227 days after the date of the railroad’s revocation decision and 107 days longer than the regulation allows.
- (6) As noted above, § 240.403(d) allows for an extension of the time period if Petitioner shows good cause for the extension. Petitioner has not offered any explanation for the delay in filing his petition; therefore, the Board finds that the petition was untimely filed.

Conclusion

Based on the findings noted above, the Board hereby denies as untimely Engineer Ware’s petition for review in accordance with the provisions of 49 C.F.R. Part 240.¹ As the Board finds that this petition must be denied as untimely, the Board need not address the issues raised by Petitioner.

NOV 10 2010

Issued in Chicago, IL on _____.



Richard M. McCord
Chairman,
Locomotive Engineer Review Board

¹ Please be advised that a party aggrieved by a Board decision to deny a petition as untimely has the option to file an appeal with the Administrator in accordance with 49 C.F.R. § 240.411. The appeal must be filed with the Federal Railroad Administrator, 1200 New Jersey Avenue, SE, Washington, DC 20590 within 35 days of issuance of the Board’s decision. As there are a number of requirements to file such an appeal, the Board has attached a copy of the relevant regulation for your consideration.

SERVICE LIST EQAL 2010-15

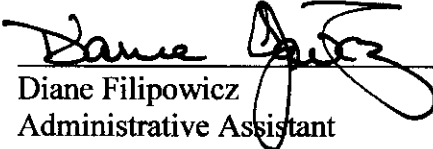
A copy of the Locomotive Engineer Review Board decision in this matter has been sent by certified mail and return receipt requested to each person shown below.

Mr. W. G. Ware
12920 Lee Road 379
Valley, AL 36854-7011

Ms. Cynthia J. Peterman
Local Chairperson
IBT/BLE&T
2255 County Road 57
Prattville, AL 36067

Mr. Dean R. Menefee
System Road Foreman
CSX Transportation, Inc.
500 Water Street, J260, 10th Floor
Jacksonville, FL 32202

Mr. Myron Becker
Director, Labor Relations
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202



Diane Filipowicz
Administrative Assistant

NOV 10 2010

Date

enc: Post LERB Memo

cc: FRA DOCKET EQAL 2010-15

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> 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. 	A. Signature <input type="checkbox"/> Agent <input type="checkbox"/> Addressee X	
1. Article Addressed to: Mr. Myron Becker Director, Labor Relations CSX Transportation, Inc. 500 Water Street Jacksonville, FL 32202 EQAL 2010-15	B. Received by (Printed Name)	C. Date of Delivery
	D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
2. Article Number <i>(Transfer from service label)</i>	7008 3230 0002 3925 3742	
	PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540	

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1. Article Addressed to: Mr. Dean R. Menefee System Road Foreman CSX Transportation, Inc. 500 Water Street, J260, 10th Floor Jacksonville, FL 32202 EQAL 2010-15	B. Received by (Printed Name)	C. Date of Delivery
	D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
2. Article Number <i>(Transfer from service label)</i>	7008 3230 0002 3925 3759	
	PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540	

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1. Article Addressed to: Ms. Cynthia J. Peterman Local Chairperson IBT/BLE&T 2255 County Road 57 Prattville, AL 36067 EQAL 2010-15	B. Received by (Printed Name)	C. Date of Delivery
	D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
2. Article Number <i>(Transfer from service label)</i>	7008 3230 0002 3925 3766	
	PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540	

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1. Article Addressed to:

Mr. W. G. Ware
12920 Lee Road 379
Valley, AL 36854-7011

EGAL 2010-15

2. Article Number

(Transfer from service label)

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? YesIf 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

7008 3230 0002 3925 8723