

**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. K. B. Dexter's  
Locomotive Engineer Certification

**FRA Docket Number EQAL 2010-41**

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**Decision**

The Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the decision of CSX Transportation, Inc. (CSX) to revoke Mr. K. B. Dexter's (Petitioner) locomotive engineer certification (certification) for 30 days 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 grants Mr. Dexter's petition for the reasons set forth below.

**Background**

On July 1, 2010, at approximately 8:00 a.m., while working, in the vicinity of Warrior Lead JK 149.3, on the Paducah and Louisville Railroad (PLRR), Petitioner allegedly operated CSX Train V23630 into the limits of a work authority without permission. Pursuant to 49 C.F.R. § 240.307(d) and (e), a hearing was held on July 12, 2010. As a result of that hearing, CSX issued a revocation decision by letter dated August 11, 2010 in which the railroad concluded that Petitioner's train "occupied a track segment within a work authority without permission from the employee[-]in[-]charge or the dispatcher." Consequently, CSX revoked Petitioner's certification for a period of 30 days.

On September 28, 2010, the petition was filed by mail and it was received by FRA on September 30, 2010. The petition was timely filed. 49 C.F.R. § 240.403(d). Petitioner asserts that CSX's revocation decision was improper for the following reasons:

- 1) CSX did not produce proper witnesses from the foreign line railroad (PLRR) to validate the accuracy of the charges. PLRR brought forth alleged violations, not CSX.
- 2) Petitioner was operating on a mine lead, and it was other than a main track.
- 3) Petitioner was operating on PLRR. Petitioner was charged for an alleged rule violation that does not exist within CSX's operating rules. CSX uses a different method of track worker protection.

- 4) Petitioner received verbal instructions from another qualified crewmember.
- 5) CSX and PLRR failed to keep the most current and up-to-date operating rulebooks available to Petitioner. In addition, PLRR failed to notify Petitioner and CSX's local managers that newer operating rule books even existed. Petitioner was charged for a rule that had not been made available to him for review yet.
- 6) Petitioner and his co-workers did not receive any formal training on PLRR's operating rules.

### **CSX's Response**

Pursuant to 49 C.F.R. § 240.405(b) and (c), FRA sent a copy of the Petition to CSX, which was afforded an opportunity to comment. By letter dated December 20, 2010, CSX responded to the Petition by arguing that:

- 1) The failure to have a PLRR representative present at the hearing is not a fatal procedural error.
- 2) Given FRA's definition of "main track" in 49 C.F.R. Part 240, it is clear that the Warrior Lead was main track.
- 3) CSX's responsibility under 49 CFR Part 240 is not limited to its employee's rule violations that occur on CSX track; it is also responsible for addressing violations that occur on joint operations territory.
- 4) Petitioner is responsible for complying with the rules. It was incumbent upon him to ensure that he had proper permission or authority to remain in the Warrior Lead once the joint authority went into effect.
- 5) Under either version of the PLRR's operating rule, Petitioner was responsible for moving his train within the Joint Authority without first notifying either the employee-in-charge or the dispatcher. As Petitioner was aware that the crew would be restricted from being in the area for which an employee had been granted absolute work authority at 0700 hours, it was incumbent upon the crew to notify the employee-in-charge that they would not be clear of the subject area to obtain permission to remain in their location. The crew did not notify either the employee-in-charge or the dispatcher until well after the employee-in-charge had taken possession of the area. Accordingly, Petitioner was responsible for occupying the Warrior Lead without authority or permission.
- 6) It doesn't matter that Petitioner did not receive training on PLRR's current rules as Petitioner did not comply with either version of PLRR's Operating Rule 240.

## **Board's Determinations**

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

- 1) By letter dated July 7, 2010, CSX notified Petitioner that his certification was suspended and a hearing would be conducted to determine his responsibility for an incident that occurred on July 1, 2010. The notice of suspension alleges that “at approximately 0800 hours, while working V23630, in the vicinity of Warrior Lead JK 149.3, [Peticioner] occupied a track segment within a work authority without permission from the employee-in-charge or the dispatcher.”
- 2) Although not accurately quoted, CSX clearly intended to charge Petitioner with a violation of 49 C.F.R. § 240.117(e)(4). Paragraph (e) of that section requires that “[a] railroad shall only consider violations of its operating rules and practices that involve: . . . (4) Occupying main track or a segment of main track without proper authority or permission.” (underlined emphasis added). The notice of suspension did not address whether the track segment Petitioner allegedly occupied without authority or permission was main track or a segment of main track.
- 3) Mr. A. W. Willoughby, a CSX employee for 33 years, and a Road Foreman of Engines for 12 ½ years, testified that the milepost JK 149.3 “was the main line milepost that was being used [as] there [was] no actual milepost for the Warrior Lead.” Tr. at 26.
- 4) Mr. J. R. Davis, a CSX employee for 4 years, and a Trainmaster for 10 months, was examined regarding whether the Warrior Lead was a main track and stated that “I wouldn’t think so, no.” Tr. at 35. When Mr. Davis was read 49 C.F.R. § 240.117(e)(4), although he claimed unfamiliarity with the entirety of 49 C.F.R. Part 240, Mr. Davis agreed with Petitioner’s representative that Petitioner did not violate that subsection.
- 5) CSX claims in its response to the petition that given FRA’s definition of “main track” in 49 C.F.R. Part 240, it is clear that the Warrior Lead was main track. According to the applicable Federal regulation, main track “means a track upon which the operation of trains is governed by one or more of the following methods of operation: timetable; mandatory directive; signal indication; or any form of absolute or manual block system.” 49 C.F.R. § 240.7. However, CSX failed to establish in the hearing record what the method of operation was on the Warrior Lead.
- 6) Federal regulations require that “[a] railroad: . . . (1) Shall not determine that the person failed to meet the qualification requirements of this part and shall not revoke the person's certification as provided for in paragraph (a) of this section 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 § 240.117(e)(1) through (e)(5) of this part.” 49 C.F.R. § 240.307(i)(1).

- 7) Mr. Davis also admitted that PLRR failed to provide CSX employees with an up-to-date operating rules book. Tr. at 38. When Mr. Davis was read 49 C.F.R. § 240.307(i)(1), Mr. Davis agreed with Petitioner's representative that, in his opinion, having an out-of-date foreign line operating rule book could be considered an intervening cause.
- 8) Mr. T. E. Traylor, Petitioner's Conductor for the July 1, 2010 incident, testified that he has been a conductor off and on for 8 years and that during that 8 year period he has operated over the Warrior Lead between 50 and 60 times. Based on his experience, Mr. Traylor concluded that the Warrior Lead is not considered a main track. Tr. at 44 and 48.
- 9) Petitioner estimated that he had operated over the Warrior Lead during approximately 100 trips to the mine. Tr. at 55. He also testified that the Warrior Lead is "considered a lead track to the Warrior Mine," and not a main track. Id.
- 10) Petitioner testified that the version of the PLRR's Operating Rule Book that he was supplied with was 3 years and 5 months out-of-date. He did not discover that the book was out-of-date until this incident. Tr. at 57-58.
- 11) CSX's revocation decision letter dated August, 11, 2010 concludes that Petitioner "occupied a track segment within a work authority," but does not conclude that the track segment Petitioner allegedly occupied without authority or permission was on main track or a segment of main track.

### **Analysis of the Petition**

In reviewing petitions of revocation decisions, the Board considers four issues in determining whether revocation 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).

As a threshold issue, the Board must find that a railroad's revocation decision for an alleged operating rule or procedure failure was improper if the alleged failure could not be a violation of one of the operating rules violations described in the Federal regulations at 49 C.F.R. § 240.117(e). 49 C.F.R. § 240.307(a). One of Petitioner's assertions alleges that Petitioner was operating on a mine lead and not on main track. Considering the evidence and arguments put

forth by the parties, the Board agrees with Petitioner that CSX failed to establish that the Warrior Lead was a main track.

For purposes of Federal certification, whether Petitioner violated PLRR's Operating Rule 240 is immaterial if Petitioner's alleged failure occurred on other than main track. As previously cited in the Board's Determinations, CSX's witnesses both testified that the Warrior Lead was a lead track, not a main track with mileposts. Petitioner and his conductor both had substantial experience operating on the Warrior Lead and testified that it was not main track. CSX failed to establish in the hearing record what the method of operation was on the Warrior Lead on the day of the incident. CSX's notice of suspension and notice of revocation failed to allege and conclude that Petitioner operated on main track. For these reasons, we are surprised that CSX did not reverse itself earlier.

The only suggestion in the record that the Warrior Lead was a main track, and not just a lead track, was the lackluster argument put forth in CSX's response to the petition. Response at 4. CSX quoted the Federal regulation's definition of "main track" and cites to section-by-section analysis language FRA used when promulgating a definition of "main track." Then, without additional argument or citations to the record, CSX forms its conclusion that "clearly" the Warrior Lead meets the FRA's definition of "main track."

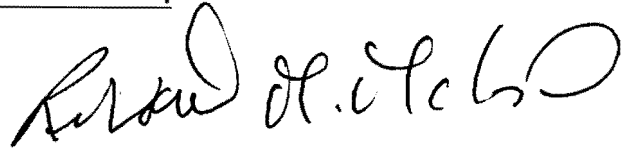
CSX's argument appears to be that FRA developed this definition to focus on the safety of track operations where there is direct supervisory control of train movements. However, CSX completely misses the point of the regulatory change. In 1993, FRA was concerned that its 2 year old locomotive engineer certification rule did "not clearly distinguish serious [operating rule violations] from negligible offenses." 58 Fed. Reg., 18982, 18987 (Apr. 9, 1993). In an effort to eliminate the negligible offenses, FRA made several amendments that limited the type of operational rule violations that could trigger revocation. Among the changes made was the addition of the words "main track" to 49 C.F.R. § 240.117(e)(4) so that it would no longer be a revocable event to occupy any track that was not a main track without authority or permission. Thus, proving that the alleged violation occurred on main track is an essential element of proving the violation. CSX's failure to do so cannot be overlooked.

Considering that the Board is granting the petition, the Board declines to address Petitioner's other assertions. However, the Board notes its concern that CSX failed to ensure that Petitioner and his conductor had PLRR's most current operating rule book and were trained on PLRR's rules.

**Conclusion**

For the foregoing reasons, the Board finds that CSX's decision to revoke Petitioner's certification under the provisions of 49 C.F.R. Part 240 is improper. Based on its review of the record, the Board hereby grants the petition in accordance with the provisions of 49 C.F.R. Part 240.

Issued in Chicago, IL on MAY 24 2011



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Richard M. McCord  
Chairman,  
Locomotive Engineer Review Board

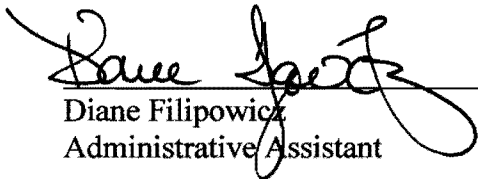
**SERVICE LIST EQAL 2010-41**

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.B. Dexter  
1650 Shake Rag Rd.  
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Mr. Kevin S. Peyton  
Local Chairman  
BLE&T, Division 742  
P.O. Box 175  
Hanson, KY 42413

Ms. Sarah E. Hall  
Associate General Counsel  
CSX Transportation, Inc.  
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\_\_\_\_\_  
Diane Filipowicz  
Administrative Assistant

**MAY 24 2011**  
\_\_\_\_\_  
Date

enc: Post LERB Memo

cc: FRA DOCKET EQAL 2010-41

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<p style="text-align:center">Mr. W.B. Dexter 1650 Shake Rag Rd. Hanson, KY 42413</p>		D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
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1. Article Addressed to:		B. Received by (Printed Name)	C. Date of Delivery
<p style="text-align:center">Mr. Kevin S. Peyton Local Chairman BLE&amp;T, Division 742 P.O. Box 175 Hanson, KY 42413</p>		D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
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1. Article Addressed to:		B. Received by (Printed Name)	C. Date of Delivery
<p style="text-align:center">Ms. Sarah E. Hall Associate General Counsel CSX Transportation, Inc. 500 Water Street Jacksonville, FL 32022</p>		D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
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