

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

Locomotive Engineer Review Board

Review and Determination Concerning
Canadian National Railway Company's
Decision to Revoke Mr. C. A. Cook's
Locomotive Engineer Certification

FRA Docket Number EQAL-2010-49

Decision

The Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the decision of the Canadian National Railway Company (CN) to revoke the locomotive engineer certification (certification) of Mr. C. A. Cook (Petitioner) in accordance with the provisions of Title 49, Part 240 of the Code of Federal Regulations. The Board hereby denies Mr. Cook's petition for the reasons set forth below.

Background

On August 16, 2010, at approximately 1:33 p.m., Petitioner and a conductor were operating Train G8847-1 at milepost (MP) 823.7 on the McComb Subdivision, when they allegedly occupied the main track without authority.

A combined railroad discipline and Federal certification hearing was held on August 21, 2010. By letter dated September 8, 2010, Petitioner was notified that his certification was revoked.

The Brotherhood of Locomotive Engineers & Trainmen (BLET) filed a petition with the FRA on behalf of Petitioner, requesting that the Board review CN's decision to revoke Petitioner's certification. The petition was mailed on November 10, 2010 and was timely filed. The petition asserted that the decision to revoke Petitioner's certification was improper for the following reasons:

Petitioner asserts that he was caused substantial harm in his defense of the charges because CN failed to provide a timely decision at the close of the combined railroad hearing. Petitioner submits that according to 49 C.F.R. §§ 240.307(d) and (e), the provisions of Petitioner's collective bargaining agreement (CBA) applied to the hearing. The CBA states that an engineer will be notified within 15 days after the investigation (Article 29, Paragraph D). The hearing was first conducted on August 21, and ended on August 23, 2010. Petitioner received his

revocation notice in a letter dated September 8, 2010. This is 17 days after the hearing in violation of the 15-day limit in the CBA.

Petitioner submits there exist many Public Law Board awards overturning discipline because railroads failed to comply with the CBA. Petitioner also submits the decisions in EQAL 93-47 and EQAL 94-36 support his position.

According to Petitioner, the Board has denied petitions as untimely when petitioners failed to submit them within the time limits in the regulation. If railroads fail to meet the applicable time limits, the revocations should also be eliminated. There should not be a double standard.

Pursuant to 49 C.F.R. §§ 240.405(b) and (c), a copy of the petition was provided to CN, and the railroad was afforded an opportunity to comment. CN responded to Petitioner's assertions in a letter dated December 16, 2010 as follows:

CN concedes that the time limits for the notification of certificate revocation were exceeded, but asserts that this procedural error did not cause Petitioner substantial harm in his defense of the charges. CN submits Petitioner did not argue the merits of the case.

Locomotive Engineer Review Board's Determination

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

- (1) On August 16, 2010, at approximately 1:33 p.m., while operating Train G8847-1, Petitioner occupied the main track without authority, at MP 823.7 on the McComb Subdivision.
- (2) The train crew consisted of Petitioner and a conductor. The crew was in possession of a mandatory directive in the form of a bulletin order that instructed the crew to stop and flag a crossing at MP 823.7. Tr. at 44. Both crewmember statements indicate they missed the stop and protect order. Tr. at 45, 50, Ex. 8, Ex. 9.
- (3) Occupying the segment of main track on the crossing without providing flag protection constitutes occupying a segment of main track without authority under 49 CFR 240.117(e)(4).

Analysis of the Petition

Petitioner's assertion raises a procedural issue. 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 (April 9, 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.

Petitioner has shown, and CN has conceded, that Petitioner was notified of the revocation of his certificate 17 days after the disciplinary hearing. The hearing was concluded on August 23, 2010, and the Notification of Certificate Revocation was issued on September 8, 2010. This is in excess of the 15 days required by the collective bargaining agreement and 49 C.F.R. §§ 240.307(d) and (e). There is no question that a procedural error, in the form of a missed deadline, did occur.

However, Petitioner has not shown that the procedural error caused him substantial harm. Petitioner merely asserts that because the deadline was missed, the railroad's decision should be reversed. His petition does not allege or describe any harm suffered by Petitioner as a result of the missed deadline. Therefore, there is no basis for reversing the railroad's decision.

Conclusion

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

Issued in Chicago, IL on JUN 21 2011.



Richard M. McCord
Chairman,
Locomotive Engineer Review Board

SERVICE LIST EQAL 2010-49

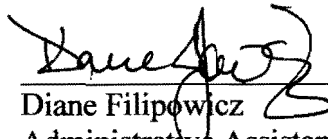
A copy of the Locomotive Engineer Review Board decision in this matter has been sent by certified mail to each person shown below.

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. C. A. Cook
312 Long Meadow Court North
Ridgeland, MS 38157

Mr. Kevin Brockman
Senior Supervisor of Locomotive Engineers
Canadian National Railway Company
17641 S. Ashland Ave.
Homewood, IL 60430

Mr. J. R. Koonce
General Chairman
Brotherhood of Locomotive Engineers and Trainmen
General Committee of Adjustment
5909 Shelby Oaks Drive, Suite #139
Memphis, TN 38134-7318



Diane Filipowicz
Administrative Assistant

JUN 21 2011

Date

cc: FRA Docket EQAL 2010-49

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:		B. Received by (Printed Name)	C. Date of Delivery
Mr. C. A. Cook 312 Long Meadow Court North Ridgeland, MS 38157		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 (Transfer from service label)		3. Service Type	
EQAL 2010-49		<input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input checked="" type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
7008 3230 0002 3925 7900		4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	
PS Form 3811, February 2004		Domestic Return Receipt 102595-02-M-1540	

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1. Article Addressed to:		B. Received by (Printed Name)	C. Date of Delivery
Mr. Kevin Brockman Senior Supervisor of Locomotive Engineers Canadian National Railway Company 17641 S. Ashland Ave. Homewood, IL 60430		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 (Transfer from service label)		3. Service Type	
EQAL 2010-49		<input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input checked="" type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
7008 3230 0002 3925 7894		4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	
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1. Article Addressed to:		B. Received by (Printed Name)	C. Date of Delivery
Mr. J. R. Koonce General Chairman, BLE&T General Committee of Adjustment 5909 Shelby Oaks Drive, Suite #139 Memphis, TN 38134-7318		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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EQAL 2010-49		<input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input checked="" type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
7008 3230 0002 3925 7887		4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	
PS Form 3811, February 2004		Domestic Return Receipt 102595-02-M-1540	