

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

Locomotive Engineer Review Board

Decision Concerning
Burlington Northern Santa Fe Railway's
Revocation of Ms. J. Roble's
Locomotive Engineer Certification

FRA Docket Number EQAL-2011-09

Decision

The Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the decision of the Burlington Northern Santa Fe Railway (BNSF) to revoke Ms. J. Roble'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 grants Petitioner's petition for the reasons set forth below.

Background

On January 27, 2011, Petitioner and a conductor operated train Y DYT2811 (Dayton 281) over the UP Lafayette Division. The crew stopped for an absolute stop signal at Milepost (MP) 341 and, after receiving permission from the train dispatcher to proceed, the train was required to be operated at restricted speed. After proceeding, Petitioner observed the train speed increasing due to a downgrade and was in the process of applying the train brakes to reduce the train speed when Petitioner observed a banner approximately three car-lengths away on a curve at MP 342.7. Unbeknownst to Petitioner, BNSF officers had placed a banner in the curve to test Petitioner's operation under restricted speed; there was only approximately 100 yards from where the train came around the curve and where the crew would actually see it. The conductor placed the automatic train brakes into emergency prior to striking and running over the banner at a speed between 8-10 MPH. The incident occurred at approximately 7:30 p.m., and it was dark.

On January 27, 2011, Petitioner signed a Notification of Certification Revocation that stated her certification was being revoked as a result of a violation of 49 C.F.R. § 240.117(e)(1), failure to comply with a stop signal. By letter dated January 31, 2011, Petitioner was notified that her certification was suspended pending an investigation "in connection with your alleged failing to comply with restricted speed by running over a stop banner."¹ That hearing was held on February

¹ The record indicates confusion on BNSF's part as to whether the banner represented a stop signal pursuant to 49 C.F.R. § 240.117(e)(1) or whether it was an obstruction in a restricted speed test pursuant to 49 C.F.R. § 240.117(e)(2). The Board notes that the Notification of Certificate Revocation provides that BNSF revoked Petitioner's certificate for a violation of 49 C.F.R. § 240.117(e)(1). Carrier's Exhibit A. However, Petitioner's notice of investigation cited her "alleged failing to comply with restricted speed by running over a stop banner" and at the hearing, the hearing officer stated that Petitioner was under investigation for failure to comply with the restricted speed rules. Tr. at 2, 5-7. Furthermore, the terminal manager and the road foreman testified that the banner was used

9, 2011, and Petitioner's certification was revoked. A petition was timely filed with FRA on April 5, 2011, by the Brotherhood of Locomotive Engineers & Trainmen ("BLET") on behalf of Petitioner, requesting that FRA review BNSF's decision to revoke her certification. The petition asserted that:

- (1) The revocation was improper because the locomotive headlights could not have shone on the banner and therefore could not be a properly displayed stop signal; and
- (2) Petitioner had been denied additional training.

Pursuant to 49 C.F.R. § 240.405(b) and (c), a copy of the petition was sent to BNSF on April 12, 2011, and the railroad was afforded an opportunity to comment. BNSF's response was received by FRA on April 20, 2011.

BNSF responded to Petitioner's assertions by arguing that:

- (1) Whether the headlights shone on the banner is irrelevant, as the banner was being used as an obstruction, not a stop signal; and
- (2) Petitioner never actually requested more training.

Locomotive Engineer Review Board's Determination

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

- (1) Federal railroad safety law 49 C.F.R. § 240.117(e)(2) requires, *inter alia* (i.e., among other things), that a railroad shall consider violations of its operating rules and practices governing compliance with restricted speed as revocable incidents. However, a certification may only be revoked if the violation of restricted speed causes an accident or incident required to be reported to FRA under 49 C.F.R. Part 225.
- (2) On January 27, 2011, Petitioner and a conductor operated train Dayton 281 over the UP Lafayette Division. Tr. at 75.
- (3) The crew stopped for an absolute stop signal at MP 341 and, after receiving permission from the train dispatcher to proceed, the train was required to be operated at restricted speed. Tr. at 76.
- (4) After proceeding, Petitioner observed the train speed increasing due to a downgrade

to test restricted speed. Tr. at 12, 27. Yet another officer, the division trainmaster, referred to the banner as an obstruction in the context of operating at restricted speed. Tr. at 67, 70-71. BNSF's response to the petition acknowledges that Petitioner's certificate was revoked under 49 C.F.R. § 240.117(e)(1), but makes clear that it intended to revoke Petitioner's certificate for a failure to comply with restricted speed which would be a violation under 49 C.F.R. § 240.117(e)(2). Response at 3, 4, 7-10.

and was in the process of applying the train brakes to reduce the train speed when Petitioner observed a banner approximately three car-lengths away on a curve at MP 342.7. Tr. at 92.

- (5) Unbeknownst to Petitioner, BNSF officers had placed a banner in the curve to test Petitioner's operation under restricted speed. Tr. at 12, 27, 67, 70-71.
- (6) This banner consisted of a highly reflective material in a fiberglass frame. Tr. at 12.
- (7) There was only approximately 100 yards from where the train came around the curve and where the crew would actually see it. Tr. at 131.
- (8) The conductor placed the automatic train brakes into emergency prior to striking and running over the banner at a speed between of around 8-10 MPH. Tr. at 92,128.
- (9) At the time the banner was struck, it was dark. Tr. at 32.
- (10) The banner at issue represented an obstruction in a restricted speed test.
- (11) The damages involved in this incident, if any, were negligible (*i.e.*, the cost of fixing or replacing the banner). No evidence was provided that the damage reached the threshold level to require this incident to be reportable under 49 C.F.R. Part 225 (*i.e.*, \$9,400).

Analysis of the Petition

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

Even if BNSF had clearly and consistently stated that the banner represented a stop signal, it would not have been a properly displayed stop signal in this instance. FRA has stated:

"The FRA notes that, in lieu of a red light, railroads use reflectorized material for illumination purposes at night. Currently, FRA believes the newer material (highly

reflective) is sufficient for illumination. However, where reflectorized material is used, its illumination is dependent on an external light source (the locomotive headlight). If the headlight does not shine directly on the material, the illumination can be significantly diminished. Under these circumstances, the signal may not be considered a properly displayed stop signal by FRA for decertification purposes. Therefore, each test must be reviewed on a case-by-case basis.” Letter from Jo Strang to William A. Thompson (Aug. 22, 2008).

This banner consisted of a highly reflective material in a fiberglass frame. At the time the train struck the banner, the train had been coming around a curve, it was dark outside, and there were only approximately 100 yards from where the train came around the curve to where the crew would actually see it. BNSF failed to prove, under these circumstances, that the banner was sufficiently visible to be a properly displayed stop signal. Obstructions in restricted speed tests, however, do not require illumination.

Based on the record, the Board finds the banner test to be a restricted speed test and as such Petitioner could only have certification revoked if a reportable accident or incident occurred. 49 C.F.R. § 240.117(e)(2) and § 240.307(a). Since the damages caused by Petitioner running over the banner did not rise to the level required for revocation in this instance, Petitioner’s certification should not have been revoked.

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.

FEB 03 2012

Issued in Chicago, IL on _____.



Richard M. McCord
Chairman,
Locomotive Engineer Review Board

SERVICE LIST EQAL 2011-9

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

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Diane Filipowicz
Administrative Assistant

FEB 03 2012

Date

enc: Post LERB Memo

cc: FRA DOCKET EQAL 2011-9

NOTE: Copy machine unavailable. The following was sent by Certified/Return Receipt with tracking number added.

SERVICE LIST EQAL 2011-09

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