

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

Locomotive Engineer Review Board

Decision Concerning
National Railroad Passenger Corporation's
Revocation of Mr. V. Mercuri's
Locomotive Engineer Certification

FRA Docket Number EQAL 2011-11

Decision

The Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the decision of National Railroad Passenger Corporation (Amtrak) to revoke Mr. V. Mercuri'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 Amtrak's decision to revoke Petitioner's certification was improper for the reasons set forth below.

Background

On February 7, 2011, while operating Amtrak Train 2158 on Track 1, Petitioner allegedly passed a stop signal aspect displayed on the 850E signal at the Harold Interlocking located on Metropolitan Transportation Authority of the State of New York (MTA) Long Island Railroad (LIRR) property. The incident occurred in cab signal territory and the signal displayed on the cab signal aspect display unit (ADU) was restricting. The Petitioner was operating the ACELA train set alone from the operator's control compartment and moving at a restricted speed. The Petitioner noticed the crossover switch points were gapped about two inches and initiated an emergency brake application. Petitioner's train split the facing switch points causing the lead power car to derail. The crew was immediately removed from service pending an investigation of the incident.

Amtrak charged Petitioner with a violation of 49 C.F.R. § 240.117(e)(1), for "[f]ailure to control a locomotive or train in accordance with a signal indication, excluding a hand or a radio signal indication or a switch, that requires a complete stop before passing it."¹

¹ The Notice of Investigation dated February 10, 2011 charged Mr. Mercuri with three violations: (1) A violation of NORAC Operating Rule 292, Stop Signal, (2) Violation of NORAC Operating Rule 80, Movement at Restricted Speed, and (3) Violation of NORAC Rule 956, Observing Signals; Moving Engine. *See* Amtrak Ex. A.

A combined railroad discipline and Federal certification hearing was conducted on March 18, 2011, and Petitioner was notified that his certificate was revoked by letter dated March 28, 2011. By petition and letter dated April 29, 2011, and received by FRA on May 2, 2011, Petitioner requested that FRA review Amtrak's decision to revoke his certification. The Petitioner asserts that the revocation was improper for the following reasons:

- 1) Amtrak failed to provide substantial evidence that the signal he passed was displaying a stop indication. Petitioner asserts that the only evidence provided by Amtrak at the hearing was the Harold event recorder download and the D-Log which were both downloaded from the dispatchers' Penn Station Control Center (PSCC) console in Penn Station. Petitioner argues that this evidence was not the vital logic from the signal system in the field and, without the vital logic, there was not substantial evidence that the signal displayed a "stop" indication.
- 2) There were a multitude of procedural errors at the hearing. Petitioner asserts that he was charged with NORAC rule violations when the railroad he was operating on (LIRR) is not a member of NORAC, a key witness was not made available to attend the hearing, no LIRR employees were present to testify at the hearing, full discovery of pertinent documents was not allowed, and the LIRR signal investigation report was not allowed to be entered as evidence.

Pursuant to 49 C.F.R. § 240.405(b) and (c), a copy of the petition was sent to Amtrak. Amtrak elected to comment and was required by 49 C.F.R. § 240.405(d)(2) to provide Petitioner with a copy of the materials submitted to FRA.

Amtrak's Response

Amtrak responded to Petitioner's assertions as follows:

- 1) Amtrak submits that the evidentiary record establishes that the Petitioner failed to control the movement of his train past the 850E Signal displaying stop at Harold interlocking. Amtrak argues that the Deputy Division Engineer, Lester DeLago, testified that the 850E signal displayed a stop signal at the time the Petitioner allegedly operated his train past the signal. Mr. DeLago testified that the signal event recorder data for the vital signal system shows that the 850E signal at the Harold Interlocking displayed a stop beginning at 12:02:33 and no other aspect until after the Petitioner passed the signal. Mr. DeLago also testified that the download of the signal event recorder shows that the Petitioner operated his train past the 850E signal displaying a stop at 12:25:03. Amtrak submits that given the state of the 845 switch, that it was not in normal or reverse, the only aspect that could be displayed on the 850E signal was stop. Amtrak challenges the Petitioner's contention that the event recorder was downloaded from PSCC and not from the signal hut at the Harold Interlocking. Mr. DeLago testified that the download was from the signal hut at the Harold Interlocking, the download event signal recorder states the

download is Harold Interlocking, and the MP is 1.6, which is Harold Interlocking. Further, the download of the track circuit indications and signal indications from PSCC was part of the hearing record.

- 2) Amtrak submits that it was proper to charge Petitioner with violations of NORAC rules because the Harold Interlocking is governed by NORAC rules, trains operate under the control of PSCC dispatchers governed by NORAC rules, and NORAC rules were in effect as established by Amtrak Special Instructions 900(H)(1).

Board's Determination

Based on its review of all of the information submitted, the Board has determined that:

- (1) On February 7, 2011, while operating Amtrak Train 2158 on Track 1, Petitioner allegedly passed a stop signal aspect displayed on the 850E signal at the Harold Interlocking located on LIRR property. The Petitioner was operating the ACELA train set alone from the operator's control compartment and moving at a restricted speed. The Petitioner noticed the crossover switch points were gapped about two inches and initiated an emergency brake application. Petitioner's train split the facing switch points causing the lead power car to derail. The crew was immediately removed from service pending an investigation of the incident.
- (2) Amtrak charged Petitioner with a violation of 49 C.F.R. § 240.117(e)(1), for "[f]ailure to control a locomotive or train in accordance with a signal indication, excluding a hand or a radio signal indication or a switch, that requires a complete stop before passing it."
- (3) "When considering factual issues, the Board will determine whether there is substantial evidence to support the railroad's decision, and a negative finding is grounds for reversal." 58 Fed. Reg. 18982, 19001 (Apr. 9, 1993).
- (4) "When considering procedural issues, the Board's standard for review will be to determine whether substantial harm was caused the petitioner by virtue of the failure to adhere to 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 (Apr. 9, 1993).
- (5) The Board will first consider the factual issues raised by the Petitioner. The Board finds that there was not substantial evidence to support Amtrak's decision to revoke Petitioner's certification. The event recorder and the track circuit indicators downloaded from the PSCC console in Penn Station provided by Amtrak at the hearing was non-vital evidence. The evidence presented by Amtrak was an exit "picture" of the Control Point and is not representative of the actual

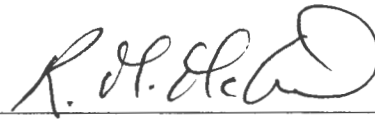
control relay conditions (failure/arcng/freezing). Evidence that would be considered vital evidence would be the readings taken at the Harold Locking regarding the functioning of all vital devices. Without this vital evidence, the Board finds that there was not substantial evidence to support the railroad's decision.

- (6) Amtrak did provide vital logic evidence; however, they provided the evidence as part of their response to the Petition and not part of the combined railroad discipline and Federal certification hearing conducted on March 18, 2011. Amtrak tried to introduce the vital logic evidence during the hearing; however, the hearing officer refused to allow introduction of this evidence because a qualified employee from Long Island Railroad was not present at the hearing to authenticate the evidence. In order to provide a locomotive engineer with a fair opportunity to respond to the charges against the engineer, a railroad's decision is required to be made based on substantial evidence in the record. In this instance, Amtrak's response made it clear that it relied on evidence that was neither part nor permitted to be made a part of the record.
- (7) Since the Board finds that there was not substantial evidence to support Amtrak's decision to revoke the Petitioner's certificate, it is not necessary to address the procedural issues raised by the Petitioner.

Conclusion

Based on its review of the record and the above findings and conclusions, the Board hereby grants the petition in accordance with the provisions of 49 C.F.R. Part 240.

Issued in Chicago, IL on FEB 03 2012.



Richard M. McCord
Chairman,
Locomotive Engineer Review Board

SERVICE LIST EQAL 2011-11

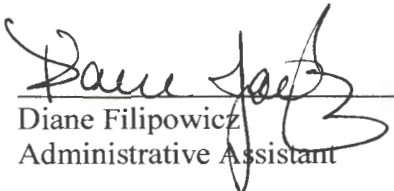
A copy of the Locomotive Engineer Review Board decision in this matter has been sent by certified mail and return receipt requested to each person shown below.

SENT CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Vincent Mercuri
189 Boston Post Road
Sudbury, MA 01776

Mr. Randall Zeppenfeld
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Mr. Donald H. Savidge
Assistant System General Road Foreman
National Railroad Passenger Corporation (AMTRAK)
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15 S. Poplar Street
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Diane Filipowicz
Administrative Assistant

FEB 03 2012

Date

enc: Post LERB Memo

cc: FRA DOCKET EQAL 2011-11

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

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CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Vincent Mercuri
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