

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

Locomotive Engineer Review Board

Decision Concerning
Norfolk Southern Railway's
Revocation of Mr. B. R. Pidgeon's
Locomotive Engineer Certification

FRA Docket Number EQAL 2011-12

Decision

The Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the decision of the Norfolk Southern Railway (NS) to revoke Mr. B. R. Pidgeon'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. Pidgeon's petition for the reasons set forth below.

Background

On February 21, 2011, at approximately 11:35 p.m., Petitioner operated NS train 233L320 near Control Point Flat Rock (CP Flat Rock) in Bellevue, OH past a signal requiring a complete stop. By letter dated February 23, 2011, Petitioner was notified that his certification was suspended pending a hearing investigating the incident, initially scheduled for March 2, 2011. After the investigative hearing was postponed and subsequently held on March 17, 2011, Petitioner was notified by letter dated March 28, 2011 that his certification had been revoked for violations of railroad operating rules implementing 49 C.F.R. § 240.117(e)(1), prohibiting operation of a train not in accordance with a signal requiring a complete stop before passing it.

A petition was timely filed with FRA by mail on May 9, 2011 by the Brotherhood of Locomotive Engineers and Trainmen on behalf of Petitioner, requesting that FRA review NS's decision to revoke his certification. The petition asserts that the revocation was improper because:

- (1) NS's action in suspending Petitioner's certification pending the investigative hearing indicates that NS had predetermined Petitioner's guilt and denied him a fair and impartial hearing.
- (2) Petitioner's failure to stop before passing the signal at CP Flat Rock was the result of intervening causes, including equipment defects, severe winter weather, and circuit problems with the signal.
- (3) The transcript from the investigation included several moments of inaudible

content, indicating that NS failed in its obligation to provide accurate transcripts of the hearing.

Pursuant to 49 C.F.R. § 240.405(b), (c), a copy of the petition was sent to NS. The railroad 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.

NS's Response

NS responded to Petitioner's assertions by arguing that:

- (1) Suspending Petitioner's certification and holding him out of service pending the investigative hearing was in accordance with the collective bargaining agreement and NS's discipline policy regarding the handling of major offenses.
- (2) No exception was taken to the condition of any of the equipment on Petitioner's train immediately after the incident, and there is no evidence that the snow and ice had any effect on the train's braking ability. The signal system did not detect Petitioner's train as a result of the volume of sand on the rail from Petitioner's emergency brake application.
- (3) The transcript is sufficiently reliable to allow a reviewing body to make a determination of Petitioner's responsibility for passing the signal without authority.

Locomotive Engineer Review Board's Determination

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

- (1) On February 21, 2011, at approximately 11:35 p.m., Petitioner was operating NS train 233L320 near CP Flat Rock in Bellevue, OH.
- (2) Petitioner operated his train not in accordance with the signal at CP Flat Rock by passing the signal by at least 10 feet. Hearing Exhibits CE-5, CE-6, CE-10 – CE-13; Transcript at 20-23, 28.
- (3) The track circuit did not detect the lead locomotive of Petitioner's train beyond CP Flat Rock as a result of sand applied to the rail during Petitioner's emergency brake application insulating the locomotive's leading wheels from the track circuit. Transcript at 14.
- (4) No substantial evidence exists to demonstrate that Petitioner's violation was the result of brake defects or the winter weather. Hearing Exhibits CE-7.

- (5) Neither NS's actions in holding Petitioner out of service pending an investigative hearing nor the occasional reflection of inaudible content in the hearing transcript indicate the hearing was marred by procedural defects that caused Petitioner substantial harm. See 49 C.F.R. § 240.307(b)(1).

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 (April 9, 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).

The Board understands Petitioner's primary argument to be that intervening causes, including unspecified braking issues, the winter weather, and the failure of the track circuit to detect Petitioner's train, prevented Petitioner from controlling the train in accordance with the stop signal at CP Flat Rock in violation of NS Rule 236 and 49 C.F.R. § 240.117(e)(1). It is clear that Petitioner's train passed the signal while it displayed an indication requiring a complete stop, as demonstrated by Petitioner's own communication with the dispatcher after doing so, as well as pictures of the locomotive and event recorder downloads. Hearing Exhibits CE-5, CE-6, CE-10 – CE-13; Transcript at 20-23, 28. The Board does not find the track circuit's failure to detect Petitioner's presence beyond CP Flat Rock in any way prevented or materially impaired his ability to stop prior to the signal.

The basis for Petitioner's assertion that the winter weather prevented his compliance is the Petitioner's assertion that only ice on the wheels can account for Petitioner's failure to stop. Petition at 5. However, NS provided substantial evidence to show that Petitioner was operating his train more than twice the speed discussed in the Petition. *Id.* Petitioner's assertion of the weather impairing his ability to stop is not a necessary conclusion of the evidence, and is in fact explicitly countered by the evidence of Petitioner's speed. Seeking to support his argument, Petitioner claims that the train was not "reacting as expected." Transcript at 50. A post-incident examination of the train found no brake defects that could have constituted an intervening cause. Hearing Exhibit CE-7. The record does not provide any evidence to support Petitioner's claims that these purported intervening causes prevented or materially impaired him from stopping his train before passing the signal at CP Flat Rock.

Petitioner also raises two procedural claims. First, he argues that NS's act of removing him from

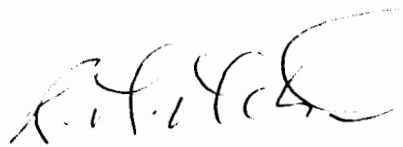
service indicates that NS had predetermined his guilt and that he was therefore denied a fair and impartial hearing. In making this argument, Petitioner fails to account for NS's obligation, under 49 C.F.R. § 240.307(b)(1), to "[u]pon receipt of reliable information indicating the person's lack of qualification under this part, immediately suspend the person's certificate," which obligated NS to suspend Petitioner upon notice that he had not operated his train in accordance with the signal indication requiring a complete stop at CP Flat Rock. Such a suspension is not a procedural error, and therefore is not grounds for reversal.

Finally, Petitioner argues that numerous statements in the transcript of the on-the-property hearing are inaudible thereby rendering the transcript so incomplete as to require the reversal of the hearing. While Petitioner asserts that the questioning of Mr. Hopewell, a witness for NS, is missing from the transcript on page 28, the record submitted by Petitioner includes a page 28 with Mr. Hopewell responding to questions. Petitioner does not provide any instance where an inaudible word or phrase prevents the reader from determining what was said during the hearing, and therefore the Board declines to find that the inaudible portions of the transcript constitute a procedural error that caused Petitioner substantial harm.

Conclusion

For the foregoing reasons, the Board finds that NS's decision to revoke Petitioner's certification under the provisions of 49 C.F.R. Part 240 is supported by substantial evidence. The record shows that Petitioner operated his train beyond a signal requiring a complete stop. Petitioner has failed to show that his noncompliance was the result of an intervening cause, and no procedural error exists which caused Petitioner substantial harm. 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 NOV 17 2011.



Richard M. McCord
Chairman,
Locomotive Engineer Review Board

SERVICE LIST EQAL 2011-12

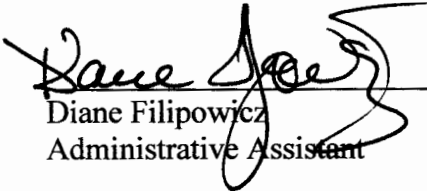
A copy of the Locomotive Engineer Review Board decision in this matter has been sent by certified mail and return receipt requested to each person shown below.

SENT CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. B. R. Pidgeon
2311 Florida Dr.
Fort Wayne, IN 46805

Mr. Rick Munoz
Vice Local Chairman Division 537
Brotherhood of Locomotive Engineers and Trainmen
8736 Maravilla Dr.
Fort Wayne, IN 46815

Mr. Jeremy D. Moore
Director of Labor Relations
Norfolk Southern Corporation
223 East City Hall Avenue
Norfolk, VA 23510-1728



Diane Filipowicz
Administrative Assistant

NOV 17 2011

Date

enc: Post LERB Memo

cc: FRA DOCKET EQAL 2011-12

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Mr. B. R. Pidgeon
2311 Florida Dr.
Fort Wayne, IN 46805

EQAL 2011-12

2. Article Number
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1. Article Addressed to:

Mr. Rick Munoz
Vice Local Chairman Division 537
BLE&T
8736 Maravilla Dr.
Fort Wayne, IN 46815

EQAL 2011-12

2. Article Number
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1. Article Addressed to:

Mr. Jeremy D. Moore
Director of Labor Relations
Norfolk Southern Corporation
223 East City Hall Avenue
Norfolk, VA 23510-1728

EQAL 2011-12

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