

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

Locomotive Engineer Review Board

Review and Determinations Concerning  
Burlington Northern and Santa Fe Railway's  
Decision to Revoke Mr. W. Bagley's  
Locomotive Engineer Certification

FRA Docket Number EQAL 2011-23

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**Decision**

The Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the decision of the Burlington Northern and Santa Fe Railway (BNSF) to revoke the locomotive engineer certification (certification) of Mr. W. Bagley (Petitioner) in accordance with the provisions of Title 49, Part 240 of the Code of Federal Regulations. The Board hereby determines that BNSF's decision to revoke Petitioner's certification was improper for the reasons set forth below.

**Background**

On February 20, 2011, Remote Control Operator Petitioner reported for duty on yard job MEMR 271 at BNSF's Tennessee Yard Crest Tower in Memphis.

After a daily safety briefing, Petitioner was instructed to take over the control of the remote control locomotive, (RCL), from the previous crew who had just completed humping operations. Petitioner moved the RCL to a nearby location for another crew, then went into a small outbuilding near the tracks to perform a job briefing with his crew member and to begin a safety test.

During the test, Petitioner lost sight of the RCL during a radio conversation with the Yardmaster. The RCL began an unintentional move after Petitioner forgot to place the equipment back into neutral after moving the RCL for the other crew. The locomotive consists struck a train and derailed two railcars.

A hearing to revoke Petitioner's certification based on an alleged violation of 240.117(e)(2) was held on March 24, 2011, and Petitioner was notified of his decertification in a letter dated April 2, 2011. The petition was received by FRA on July 14, 2011, and is timely filed.

On July 12, 2011, Petitioner submitted a petition requesting FRA review BNSF's decision to revoke Petitioner's certification. The petition asserts that the revocation was improper for the following reasons:

- (1) BNSF failed to determine on the record of the hearing that he no longer met the qualification requirements and the basis for that determination.
- (2) Testimony at the hearing was not recorded verbatim. There are numerous segments in the transcript marked as "inaudible."
- (3) BNSF's Hearing Officer did not allow time for the submission of information.
- (4) BNSF did not make a decision containing the findings of the facts based on the information contained in the hearing. Also, the Notice of Certificate Revocation letter did not state the railroad's decision, nor contain the findings of the hearing.
- (5) Petitioner claims he did not understand the instructions on the "Notice of Certificate Suspension" letter dated February 20, 2011. It was not explained to him that he could waive his rights to a formal hearing. Petitioner also claims he thought he had to agree to consolidate this hearing with another disciplinary hearing.
- (6) Petitioner asserts the railroad wrongfully revoked his certificate. The railroad claims that an unintentional movement of a locomotive is prohibited conduct warranting a suspension and subsequent revocation. Petitioner believes the drafters of this regulation did not intend for an unintentional movement of malfunctioning equipment to be included within this criteria for certification.

Pursuant to 49 CFR 240.405(b) and (c), a copy of the petition was sent to BNSF on July 19, 2011. BNSF submitted its response to the petition in a letter dated September 16, 2011, and provided a copy of its response to Petitioner.

### **BNSF Response**

In its response to the petition, BNSF presented the following arguments in support of its decision to revoke Petitioner's certification:

- (1) A Terminal Manager stated Petitioner and his crew member admitted they were in the outbuilding and lost sight of the RCL during the Safety Timeout Test.
- (2) The inaudible entries on the transcript were "harmless and did not hinder the development of the facts and in no way negatively impacted Petitioner's right to a fair hearing."
- (3) The Hearing Officer did, in fact, allow information to be presented during the hearing.

The Hearing Officer also gave Petitioner and his representatives the opportunity to provide a closing statement.

(4) The Notice of Certificate Revocation letter contains the required information that Petitioner's certificate was revoked due to the impact collision.

(5) BNSF claims this is a moot point since he did receive a formal hearing. There is no evidence in the record indicating Petitioner protested the consolidated hearing prior to its commencement. Petitioner was notified nearly a month prior to the hearing and again in a postponement letter dated March 3, 2011.

(6) BNSF had reliable information to suspend Petitioner's certificate when the Terminal Manager confirmed the cause of the collision was due to Petitioner admitting full responsibility for the accident. Whether it was an unintentional movement or not, it still did not comply with the restricted speed rules. Also there is nothing in the record that supports the defense of malfunctioning equipment.

### **Locomotive Engineer Review Board Determination**

Based on its review of the record, the Board makes the following determinations:

(1) On February 20, 2011, Petitioner took control of an RCL at BNSF's Tennessee Yard Crest Tower in Memphis. After a daily safety briefing, Petitioner was instructed to take over the control of the remote control locomotive from the previous crew, who had just completed humping operations. Tr. at 44, 45.

(2) The procedure for taking control of a RCL is to perform a "Safety Timeout Test" on the remote control transmitter, (RCT). The test involves the reverser being placed in neutral, the speed selector being set at "coast," followed by a wait of 50 seconds for an alert sound, then moving the speed selector back to stop. Ex. 8.

(3) Before the test took place, the RCL was moved at the request of another crew in the area to allow that crew better visibility for a shove move. Petitioner moved the RCL to a nearby location, then went into a small outbuilding near the tracks to perform a job briefing with his crew member and to begin the Safety Timeout Test. Tr. at 45.

(4) During the test, Petitioner lost sight of the RCL during a radio conversation with the Yardmaster. Tr. at 48. During the Safety Timeout Test, the RCL began an unintentional move after Petitioner forgot to place the reverser on the RCT back into neutral after moving the RCL for the other crew. Tr. at 47. The locomotive consists struck a train and derailed two railcars. Petitioner Attachment 7.

## Analysis of the Petition

When reviewing 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). The Board does not find substantial evidence in the decertification hearing transcript to support BNSF’s decision to revoke Petitioner’s certification, as the mere fact that a collision occurred does not, in and of itself, justify revocation of Petitioner’s certification. The Board finds that the testimony provided at the revocation hearing was inconclusive regarding whether the RCL had stopped or had been moving slowly at the time of the collision. While it is clear a derailment occurred, it is unclear whether the RCL was under the operation of Petitioner or not at that moment; it is possible that the collision was the result of a failure to secure equipment rather than improper operation of the RCL. See e.g. 49 CFR 232.103(n)(4) (requiring each railroad to adopt and comply with a securement process or procedures for unattended locomotives, including instructions to address throttle position and the status of the reverse lever). No event recorder data was provided. Ultimately, BNSF did not provide substantial evidence that this incident was the result of an operational mistake instead of uncontrolled, unsecured equipment rolling.

Based on these findings, the Board hereby grants the petition to dismiss the revocation of Petitioner’s certification in accordance with the provisions of Title 49, Part 240 of the Code of Federal Regulations. Considering that the Board has decided to grant this petition, the Board declines to address Petitioner’s remaining assertions.

Issued in Chicago, IL on MAR 15 2012.



Richard M. McCord  
Chairman,  
Locomotive Engineer Review Board

SERVICE LIST EQAL 2011-23

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

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Mr. W.L. Bagley  
306 Massey Cove  
Atoka, TN 38004-7424

Ms. Andrea Smith  
Director, Labor Relations  
Burlington Northern Santa Fe Railway  
P.O. Box 961030  
Fort Worth, TX 76161-0030

  
Diane Filipowicz  
Administrative Specialist

**MAR 15 2012**

Date

enc: Post LERB Memo

cc: FRA DOCKET EQAL 2011-23

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1. Article Addressed to:  <p style="text-align: center;"><b>Ms. Andrea Smith</b>  <b>Director, Labor Relations</b>  <b>Burlington Northern Santa Fe Railway</b>  <b>P.O. Box 961030</b>  <b>Fort Worth, TX 76161-0030</b></p> <p style="font-size: 1.5em; margin-top: 20px;">EQAL: 2011-23</p>	B. Received by ( <i>Printed Name</i> )	C. Date of Delivery
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