

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

Locomotive Engineer Review Board

Decision Concerning
Canadian Pacific Railway Company's
Decision to Revoke Mr. K. Breecher's
Locomotive Engineer Certification

FRA Docket Number EQAL 2011-27

Decision

The Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the decision of the Canadian Pacific Railway Company (CP) to revoke Mr. K. Breecher'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 Mr. Breecher's petition for the reasons set forth below.

Background

On June 16, 2011, at approximately 9:15 p.m., while operating Train 170-14, Petitioner allegedly failed to comply with Track Bulletin #E7506 that required Petitioner to stop the train and provide protection at a malfunctioning crossing on the Ottumwa Subdivision near milepost (MP) 298.85, before proceeding through the crossing. Pet. at 1; Tr. Ex. A, B, D. The train crew consisted of Petitioner, a conductor, and a student switchman. Pet. at 1; Tr. at 13; Tr. Ex. D.

On June 28, 2011, the Dakota, Minnesota & Eastern Railroad Corporation (DM&E), a subsidiary of CP, convened an investigation and hearing. Subsequently, by letter dated July 13, 2011, DM&E dismissed Petitioner from service for violating 49 C.F.R. §240.117(e)(1) for failing to control a train in accordance with a signal indication that requires a complete stop before passing it, and for violating General Code of Operating Rules 1.1 – Safety; 1.1.2 – Alert and Attentive; and 6.32.2 –Automatic Warning Devices. Pet. at 8. By letter dated July 18, 2011, CP notified Petitioner that his certification was revoked for a period of one year, ending on June 17, 2012, in accordance with 49 C.F.R. §240.117(g)(3)(iii). Pet. at 4.

Petitioner's Assertions

Petitioner timely filed a petition on August 28, 2011, requesting that FRA review CP's decision to revoke his certification. The petition asserts that the revocation was improper for the following reasons:

- 1) At the time of the incident, Petitioner asserts that there were no fixed signals or other visible stop warnings to alert Petitioner that a stop needed to be made. Accordingly, CP incorrectly charged Petitioner with a violation of 49 C.F.R. §240.117(e)(1) for failing to control a train in accordance with a signal indication that requires a complete stop before passing it. Pet. at 1.

- 2) Petitioner also asserts that in accordance with 49 C.F.R. §240.307(i)(1), CP should not have revoked his certification due to several intervening causes that "prevented or materially impaired" his ability to comply with railroad operating rules or practices. Petitioner identifies the intervening causes as weather conditions, damage to the track, confusion by the dispatcher, and distractions arising from the conductor's instruction of the student switchman. Pet. at 1-2; *see* 49 C.F.R. §240.307(i)(1) .

CP's Response

Pursuant to 49 C.F.R. § 240.405(b) and (c), a copy of the Petition was sent to CP on September 12, 2011, and the railroad was afforded an opportunity to comment. CP timely responded by letter received on October 31, 2011, stating that the railroad had no additional information or documentation to provide in reference to FRA Docket Number EQAL 2011-27.

Board's Determination

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

- 1) On June 16, 2011, at approximately 9:15 p.m., while operating Train 170-14, Petitioner failed to comply with Track Bulletin #E7506 that required Petitioner to stop the train and provide protection at a malfunctioning crossing on the Ottumwa Subdivision near milepost ("MP") 298.85, before proceeding through the crossing. Pet. at 1; Tr. Ex. A, B, D.

- 2) The train crew consisted of Petitioner, a conductor, and a student switchman. Pet. at 1; Tr. at 13; Tr. Ex. D.

- 3) The crew had received a train specific tabular general bulletin order ("TGBO") that stated there was an Item 1 stop restriction on the main track

at Rochester/Rutledge Street, MP 298.85 Ottumwa Subdivision, due to a crossing malfunction. Tr. at 4-6; Tr. Ex. A.

- 4) On June 16, 2011, at approximately 9:15 p.m., the Superintendent of Engineering who was working in the Rochester Road area on the Ottumwa Subdivision observed Petitioner's south bound train proceed through the Rochester Road Crossing without stopping and protecting. Tr. at 6; Tr. Ex. B.
- 5) Petitioner testified that he did not stop at the crossing. Tr. at 32.

Analysis

When considering legal issues, the Board "will provide 'de novo' review, which means that the Board will not be bound by legal interpretations reached by the railroad in making its decision." 58 Fed. Reg. 18982, 19001 (April 9, 1993).

Based on a *de novo* review, the Board finds that CP's legal interpretation of 49 C.F.R. §240.117(e)(1) is incorrect and, therefore, Petitioner's first assertion has merit. The Board concludes that CP improperly charged Petitioner with a violation of 49 C.F.R. §240.117(e)(1) for failing to control a train in accordance with a signal indication that requires a complete stop before passing it. There was no signal indication involved in this incident, but rather a TGBO stop restriction. Tr. at 4-5; Tr. Ex. A. A bulletin or general order is not considered a "signal indication," requiring a complete stop before passing it for purposes of 49 C.F.R. § 240.117(e)(1).

Having decided that Petitioner was improperly charged with a violation of 49 C.F.R. §240.117(e)(1), the Board need not address the substantive issues raised in Petitioner's second assertion.

Conclusion

Based on the above findings and conclusions, the Board finds that the decision to revoke Petitioner's Certification as a locomotive engineer was improper and hereby grants the petition in accordance with the provisions of Title 49, Part 240 of the Code of Federal Regulations.

Issued in Chicago, IL on FEB 21 2012.



Richard M. McCord
Chairman,
Locomotive Engineer Review Board

SERVICE LIST EQAL 2011-27

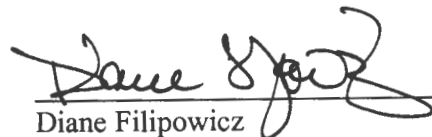
A copy of the Locomotive Engineer Review Board decision in this matter has been sent by certified mail and return receipt requested to each person shown below.

SENT CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Kim Breecher
1507 45th Street
Moline, Illinois 61265-3545

Mr. Chris Pacha
BLET Local Chairman
2300 Railroad Avenue
Davenport, IA 52802

Mr. K. E. Johnson
Manager, Operating Practices – U.S.
Canadian Pacific Railway
Metro 94 Business Center
425 Etna Street, Suite 38
St. Paul, MN 55106



Diane Filipowicz
Administrative Assistant

FEB 21 2012

Date

enc: Post LERB Memo

cc: FRA DOCKET EQAL 2011-27

SENDER: COMPLETE THIS SECTION

- 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.

1. Article Addressed to:

Mr. Kim Breecher
1507 45th Street
Moline, Illinois 61265-3545

EQAL 2011-27

2. Article Number
(Transfer from service label)

7008 3230 0002 3925 7559

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X

- Agent
 Addressee

B. Received by (Printed Name)

C. Date of Delivery

D. Is delivery address different from item 1? Yes
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 Registered Return Receipt for Merchandise
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- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Mr. Chris Pacha
BLET Local Chairman
2300 Railroad Avenue
Davenport, IA 52802

EQAL 2011-27

2. Article Number
(Transfer from service label)

7008 3230 0002 3925 7542

PS Form 3811, February 2004

Domestic Return Receipt

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Mr. K. E. Johnson, Canadian Pacific Railway
Manager, Operating Practices – U.S.
Metro 94 Business Center
425 Etna Street, Suite 38
St. Paul, MN 55106

EQAL 2011-27

2. Article Number
(Transfer from service label)

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C. Date of Delivery

D. Is delivery address different from item 1? Yes
If YES, enter delivery address below: No

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 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes