

**ORDER REMANDING PETITION TO NORFOLK SOUTHERN
RAILWAY COMPANY FOR REHEARING AND NEW DECISION**

**U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION**

Washington, D.C. 20590

Locomotive Engineer Review Board

Order Concerning the Norfolk Southern Railway Company's Denial of
Mr. R. D. Roberts's Locomotive Engineer Certification

FRA Docket Number EQAL-2011-28

Background

The Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the docket seeking review of the Norfolk Southern Railway Company's (NS) decision to revoke Mr. R. D. Roberts's (Petitioner) locomotive engineer certification (certification) in accordance with the provisions of Title 49, Part 240 of the Code of Federal Regulations (C.F.R.). The Board hereby determines that Petitioner's late filing is due to excusable neglect given (1) the lengthy record produced; (2) that NS provided at least one document to Petitioner that Petitioner alleges was not part of the record produced at the hearing; and (3) that the document NS allegedly added to the record when it sent Petitioner the record a second time raises questions of whether certain records were falsified, whether witnesses that previously testified are credible, and whether there is substantial evidence to support a revocation decision. For these reasons, the Board remands the case back to NS and orders NS to reopen the hearing. The Board also orders NS to issue a new decision based on any newly presented evidence, including testimony by new witnesses or any witnesses recalled to testify regarding any newly presented evidence.

Authority

While the Board's authority is generally limited to determining "whether the denial or revocation of certification or recertification was improper under [49 C.F.R., part 240] . . . and grant[ing] or deny[ing] the petition accordingly," the Federal courts have affirmed the LERB's "power to order compliance with procedural regulations" as well as the LERB's power to return a case to a railroad for additional fact finding. 49 CFR §240.405(f) and Carpenter v. Mineta, 432 F.3d 1029, 1034 (Dec. 29, 2005).

Board's Determinations

The Board has determined the following:

1. On September 15, 2010, NS investigated a derailment and downloaded the event recorder from the lead locomotive. The locomotive was owned by the Alabama & Gulf Coast Railway (AGR). Petitioner was charged with tampering with that locomotive's event recorder based on the finding that the data was incomplete, the event recorder could be disabled by switching the breaker to the "OFF" position, and that two weeks worth of data confirmed that Petitioner had been operating the locomotive on three other dates when the engine data did not record "at different times during [Petitioner's] tours." NS Brief at 2.
2. The Board notes that it is odd to think that a locomotive engineer would periodically deactivate an event recorder during a tour of duty. It would seem more logical for a train crew member to deactivate the device near the beginning of a tour of duty and re-activate it at toward the end of the tour of duty. Or, the Board could expect to see an event recorder tampered with in order to interfere with a post-accident/incident investigation – in order to cover up the engineer's actions. However, this is not the case before us. As Petitioner points out, "a car derailed during switching [an] industry [and] [n]o charges were brought for the derailment, because the derailment was caused by the industry's defective track." Reply Brief at 6. Although the railroad is not required to prove intent or motive, the record raises the question of why Petitioner would have intermittently turned off the event recorder while performing switching operations.
3. On March 21, 2011, NS issued its revocation decision letter.
4. NS claims UPS tracking records indicate that Petitioner received the entire transcript and exhibits on March 23, 2011.
5. In order to be timely filed, the petition was due on July 19, 2011, i.e., 120 days after the revocation decision.
6. NS claims to have sent a second copy of the hearing record to Petitioner on September 13, 2011. Neither Petitioner nor NS indicated the date of Petitioner's request for a second copy.
7. On September 23, 2011, 186 days after NS issued its revocation decision, Petitioner filed a petition on his own behalf. Petitioner stated that he "did not have all the above supporting documentation [and to please accept this [petition] as a request for [an] extension of time [to file]." Petition at 4.
8. On October 11, 2011, the Board's Counsel notified Petitioner by email that the petition was not timely filed; explained that proof is needed if alleging the petition

was timely filed; requested Petitioner elaborate on a statement in the petition alleging that Petitioner was waiting to receive information from NS; and providing until November 10, 2011 (30 days) to respond.

9. On October 30, 2011, Petitioner responded on his own behalf by email. He explained that (i) the petition was not timely filed because a union representative failed to file the documents on Petitioner's behalf; and (ii) Petitioner received the record from NS on May 6, 2011, but review of those documents took months because the record was unusually large. Petitioner did not state when his review was completed, but stated that he requested "further information" and that the "final documents were not received until September 14, 2011." Petitioner noted that his attorney, Mr. Larry Mann, had reviewed Petitioner's email response and approved it.
10. On December 05, 2011, NS responded to the petition and the filing issue arguing that the LERB should deny the petition as untimely.
11. On December 16, 2011, on behalf of Petitioner, Mr. Mann hand delivered a Reply Brief to NS's Response to the Petition. This brief contained both procedural arguments regarding why the Board should hear the petition and substantive arguments regarding the facts of the incident. The brief claims that Petitioner's request for a second complete copy of the record was made "in writing, as well as in several telephone calls" but does not provide documentation supporting that position. See Petition at 2. Petitioner alleges that documents in NS's hearing record were falsified and specifically asks the Board to compare Attachment B-2 with Organization Tr. Exh. 8. Petition at 2. The brief contains other allegations of falsification. For example, Petitioner alleges that Mr. William Salter's signature was forged on a letter dated January 18, 2011 (NS Tr. Exh. 20) that was used in evidence to prove the tampering charge. Reply Brief at 8. Petitioner also submitted an inspection report signed by Mr. Salter showing that Mr. Salter "inspected the locomotive in question, and that the event recorder will operate with the breaker turned off . . . [which] clearly refutes NS's argument that the event recorder would not work unless the breaker switch was in the ON position." Reply Brief at 8-9 (citations omitted).
12. In the Petitioner's Reply Brief, Petitioner raised the question of whether an event recorder is a "safety device" that must not be tampered with under Federal regulations. The Board finds that an event recorder is clearly such a safety device. The term "safety device" is defined in 49 C.F.R. § 218.53(c), which cites to part 218, appendix B (The Board notes that the cite to appendix B is incorrect; the correct cite is to appendix C). That appendix, under the subheading "SAFETY DEVICES COVERED BY THIS RULE" states that "[t]his regulation applies to a variety of devices including equipment known as 'event recorders.'"

13. The Board finds the record in this case unusually large. The record appears to be at least three times the size of the average petition received.
14. NS has a duty to ensure that its certification decisions are not based on falsified documents or false statements. Petitioner has produced documentation that raises questions about the veracity of certain documents and witnesses presented at the hearing. Typically, a petitioner would have an opportunity to address these questions at the hearing provided by the railroad. However, Petitioner claims that when he requested a copy of the record from NS the second time, he received the additional evidence that has now raised the question of the credibility of the evidence NS relied on in making its decision. Thus, rather than perpetuate a revocation based on potentially falsified evidence, the Board has decided to remand the case back to NS so that Petitioner may fully present his case alleging that statements or documents previously presented are false or lack credibility.
15. The Board acknowledges NS's argument no. 7 that AGR "was not inclined to release" Mr. Salter to participate in NS's hearing. However, considering that Mr. Salter's signature appears significantly different when comparing exhibits attributed to him, it may not be reasonable for NS to rely on any documentation purported to have been signed by Mr. Salter if NS cannot determine on the record which documents are authentic.

For these reasons, the Board orders NS to re-open the hearing for the presentation of evidence alleging the falsification of records or to challenge the credibility of any witness. Because additional evidence will be presented, the Board orders NS to review the entire record and formulate a new decision. Additionally, to maintain the integrity of the revocation hearing process, the Board orders NS to directly address any issues of falsification of records or false testimony in detail within any new decision that concludes that revocation is proper. Of course, nothing in this order precludes NS from reversing its previous revocation decision.

As NS will need to issue a new decision regarding Petitioner's certification, Petitioner may file a new petition requesting the Board's review pursuant to 49 CFR § 240.403 (Petition requirements) if NS decides to revoke Petitioner's certification for the September 15, 2010 incident. Petitioner should be mindful to file any potential petition within 120 days of the date of the railroad's decision as this Board will be unlikely to tolerate a second untimely filed petition. If another petition is filed, it should reference the FRA Docket EQAL 2011-28, but should

specifically request a new docket number. Documents previously filed in this proceeding will not need to be refiled, but the entire, newly-formed record must be filed with any potential future petition.

Issued in Chicago, IL on MAR 22 2012

A handwritten signature in black ink, appearing to read "Richard M. McCord". The signature is written in a cursive style with a large, prominent loop at the end.

Richard M. McCord
Chairman, Locomotive Engineer Review Board

A copy of the Locomotive Engineer Review Board's Order No.1 in this matter has been sent by certified mail, return receipt requested to each person shown below.


SERVICE LIST EQAL 2011-28

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Lawrence M. Mann
Alper & Mann, P.C.
9205 Redwood Ave.
Bethesda, MD 20817

Mr. Roger Roberts
388 Valleyview Dr.
Valley Grande, AL 36703

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


for Diane Filipowicz
Administrative Assistant

MAR 22 2012
Date

cc: FRA Docket EQAL 2011-28

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<p>1. Article Addressed to:</p> <p style="text-align: center;">Mr. Roger Roberts 388 Valleyview Dr. Valley Grande, AL 36703</p> <p>EQAL: 2011-28</p>	<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p> <p>3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input checked="" type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p> <p>4. Restricted Delivery? (<i>Extra Fee</i>) <input type="checkbox"/> Yes</p>
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<p>1. Article Addressed to:</p> <p style="text-align: center;">Mr. Lawrence M. Mann Alper & Mann, P.C. 9205 Redwood Ave. Bethesda, MD 20817</p> <p>EQAL: 2011-28</p>	<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p> <p>3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input checked="" type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p> <p>4. Restricted Delivery? (<i>Extra Fee</i>) <input type="checkbox"/> Yes</p>
<p>2. Article Number (<i>Transfer from service label</i>) 7001 1940 0006 5609 9841</p> <p>PS Form 3811, August 2001 Domestic Return Receipt 102595-02-M-1540</p>	

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<p>1. Article Addressed to:</p> <p style="text-align: center;">Mr. Jeremy D. Moore Director of Labor Relations Norfolk Southern Corp. 223 East City Hall Ave. Norfolk, VA 23510-1728</p> <p>EQAL: 2011-28</p>	<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p> <p>3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input checked="" type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p> <p>4. Restricted Delivery? (<i>Extra Fee</i>) <input type="checkbox"/> Yes</p>
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