

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

Locomotive Engineer Review Board

Review and Determinations Concerning
Alaska Railway Corporation
Decision to Revoke Mr. F.W. Long's
Locomotive Engineer Certification

FRA Docket Number EQAL 2011-31

Decision

The Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the decision of the Alaska Railway Corporation (ARRC) to revoke the locomotive engineer certification (certification) of Mr. F.W. Long (Petitioner) in accordance with the provisions of Title 49, Part 240 of the Code of Federal Regulations. The Board hereby denies the petition for the reasons set forth below.

Background

On April 27, 2011 Petitioner was a student locomotive engineer operating a train during a skills performance test conducted in accordance with 49 C.F.R. § 240.127 and § 240.211. Petitioner had been operating for 11 hours and 40 minutes during what the Designated Supervisor of Locomotive Engineers (DSLE) described as "a perfect trip" with no exceptions taken. Had Petitioner completed the trip without exception, he would have been awarded certification.

A track bulletin indicating the automatic warning protection at Mack Road (MP 162.27) on the Anchorage Division was disabled that required the crew to stop before entering the segment of main track and protect the railroad highway crossing at grade before entering the segment of main track. The crew members in the lead operating cab had a job briefing and the DSLE had begun retrieving the event recorder data to support Petitioner's certification candidacy when the DSLE noticed the crossing coming up and told the student to increase train braking. At a very slow speed the lead unit of the train entered the grade crossing. According to event recorder data the brake was never placed into the "Emergency" position.

A hearing to revoke Petitioner's certification based on an alleged violation of 240.117(e)(4) was held on May 19, 2011, and Petitioner was notified of his decertification in a letter dated June 7, 2011.

On October 3, 2011, Petitioner submitted a petition requesting FRA review ARRC's decision to

revoke Petitioner's certification. The petition asserts that the revocation was improper for the following reasons:

- (1) The DSLE failed to observe Petitioner in a way that might have prevented the incident. The DSLE was setting up and retrieving event recorder information from a laptop within a mile of the grade crossing involved.
- (2) The DSLE's locomotive engineer certification was not suspended as a result of this incident.
- (3) There was no violation of 49 CFR § 240.117(e)(4) because the train had authority to be on that track.

The petition was received by FRA on October 3, 2011, and is timely filed. Pursuant to 49 CFR 240.405(b) and (c), a copy of the petition was sent to BNSF on October 4, 2011. ARRC submitted its response to the petition in a letter dated December 1, 2011, and provided a copy of its response to Petitioner.

ARRC Response

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

- (1) The DSLE warned Petitioner numerous times that he had to stop before the crossing before the incident occurred.
- (2) The DSLE was conducting a test, and his responsibility was to take appropriate action to assist Petitioner in rules compliance. He did so by performing the job briefing and giving Petitioner adequate notice that a stop before the crossing was required.
- (3) A mandatory directive is an authority, and movement made in violation of a mandatory directive is a movement made without proper authority or permission.

Locomotive Engineer Review Board Determination

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

- (1) Petitioner was a student locomotive engineer operating during a skills performance test conducted in accordance with 240.127 and 240.211. Tr. at 14.
- (2) A track bulletin indicating the automatic warning protection at Mack Road on the Anchorage Division was disabled that required the crew to stop before entering the segment of main track and protect the railroad highway crossing at grade before entering the segment of main track. Tr. at 55.

(3) The crew members in the lead operating cab had a job briefing and the DSLE had begun retrieving the event recorder data to support Petitioner's certification candidacy when the DSLE noticed the crossing coming up and told the student to increase train braking. Tr. at 56, 63.

(4) The lead unit of the train entered the grade crossing, passing the stopping point by approximately 109 feet. Tr. at 17-18.

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). Under the circumstances, Petitioner was given significant notice that he needed to stop the train before the grade crossing. Petitioner was responsible for stopping the train before it entered the crossing and it did not. While the DSLE did not do everything possible to prevent Petitioner from entering the crossing¹, Petitioner ultimately had the controls and failed to meet his responsibility to stop the train in time. In doing so, he occupied main track without proper authority or permission. It is irrelevant whether the DSLE was disciplined or had certification revoked when reviewing whether it was appropriate to revoke Petitioner's certificate. The mandatory directive placed limits on the authority Petitioner had, and Petitioner violated those limits.

¹ ARRC relies on the premise that it could not revoke the DSLE's certification in this instance because this was a test. This is reading 49 C.F.R. § 240.117(c)(2) too broadly: the exemption applies to operational monitoring, a.k.a. efficiency tests, not skills performance testing. In the section-by-section analysis of the 1998 NPRM, FRA stated that: "In clarifying when a supervisor's conduct will be considered a revocable event, the FRA believes that a supervisor who is conducting an unannounced operating rules compliance test, which is also known as an efficiency test, should not be held culpable for the operating locomotive engineer's actions." 63 FR 50640 (Sept. 22, 1998)." In that rulemaking, FRA made the distinction that an efficiency test is conducted under a controlled environment "so that the supervisor can test the engineer's skills without fear of causing an accident/incident." *Id.* FRA contrasted the efficiency test situation with a skills performance test which is conducted under uncontrolled actual operating conditions and thus, ARRC should not have ruled out the possibility that the DSLE could have had his certification revoked. However, ARRC may have reached the same conclusion that the DSLE took "appropriate action to prevent a violation." *See* § 240.117(c)(2).

Furthermore, a finding that the DSLE failed to take appropriate action would not be an intervening cause that would exempt Petitioner from having his certification revoked. *See* § 240.307(i)(1). The Board concluded that considering Petitioner had completed his locomotive engineer training and was firmly in control of the train during a skills performance test, that ARRC's decision to revoke certification was appropriate.

Conclusion

Based on the findings, the Board hereby denies the petition in accordance with the provisions of Title 49, Part 240 of the Code of Federal Regulations.

Issued in Chicago, IL on MAY 02 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 "R" at the beginning and a circular flourish at the end.

Richard M. McCord
Chairman,
Locomotive Engineer Review Board

SERVICE LIST EQAL 2011-31

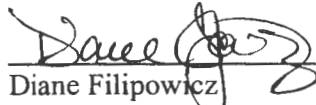
A copy of the Locomotive Engineer Review Board decision in this case has been sent by certified mail, return receipt requested, to each person listed below.

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. F.W. Long
P.O. Box 70893
Chugiak, AK 99567-0893

Mr. Michael Weatherall
General Chairman
UTU Local 1626
619 E. Ship Creek Avenue #323
Anchorage, AK 99507

Ms. C. Ann Courtney
Alaska Railroad Corporation
Office of the General Counsel
327 Ship Creek Avenue
Anchorage, AK 99501



Diane Filipowicz
Administrative Assistant

MAY 02 2012

Date

enc: Post LERB Memo

cc: FRA DOCKET EQAL 2011-31

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> 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. 		A. Signature X <input type="checkbox"/> Agent <input type="checkbox"/> Addressee	
		B. Received by (Printed Name)	C. Date of Delivery
1. Article Addressed to:		D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
Mr. F.W. Long P.O. Box 70893 Chugiak, AK 99567-0893		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.	
2. Article Number (Transfer from service label) <u>EQAL 2011-31</u>		4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	
PS Form 3811, February 2004		Domestic Return Receipt	
		102595-02-M-1540	

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> 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. 		A. Signature X <input type="checkbox"/> Agent <input type="checkbox"/> Addressee	
		B. Received by (Printed Name)	C. Date of Delivery
1. Article Addressed to:		D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
Mr. Michael Weatherall General Chairman UTU Local 1626 619 E. Ship Creek Avenue #323 Anchorage, AK 99507		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.	
2. Article Number (Transfer from service label) <u>EQAL 2011-31</u>		4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	
PS Form 3811, February 2004		Domestic Return Receipt	
		102595-02-M-1540	

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> 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. 		A. Signature X <input type="checkbox"/> Agent <input type="checkbox"/> Addressee	
		B. Received by (Printed Name)	C. Date of Delivery
1. Article Addressed to:		D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
Ms. C. Ann Courtney Alaska Railroad Corporation Office of the General Counsel 327 Ship Creek Avenue Anchorage, AK 99501		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.	
2. Article Number (Transfer from service label) <u>EQAL 2011-31</u>		4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	
PS Form 3811, February 2004		Domestic Return Receipt	
		102595-02-M-1540	