

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

Locomotive Engineer Review Board

Review and Determination Concerning
Norfolk Southern Railway Company's
Decision to Revoke Mr. S. A. Jurovcik's
Locomotive Engineer Certification

FRA Docket Number EQAL-2011-34

Decision

The Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the decision of the Norfolk Southern Railway Company (NS) to revoke the locomotive engineer certification (certification) of Mr. S.A. Jurovcik (Petitioner) in accordance with the provisions of Title 49, Part 240 of the Code of Federal Regulations. The Board hereby grants Mr. Jurovcik's petition for the reasons set forth below.

Background

On July 5, 2011, Petitioner was assigned as a Remote Control Operator (RCO) in Bellevue, Ohio, on yard assignment LB 98. Petitioner was working a bowl assignment at approximately 6:30 a.m. He was throwing a point switch when he was approached by an NS Road Foreman and Trainmaster, who took exception to the RCO vest that he was wearing. The Trainmaster alleged that the RCO vest was worn in a way that disabled the tilt time out feature and that the vest was improperly fitted, which constituted tampering with a safety device in violation of 49 C.F.R. § 240.117(e)(5).

A combined railroad discipline and Federal certification hearing was held on July 28, 2011. By a letter dated August 5, 2011, Petitioner was notified that his certification was revoked.

By a letter dated October 14, 2011, the United Transportation Union (UTU) filed a petition with the FRA on behalf of Petitioner, requesting that the Board review NS's decision to revoke Petitioner's certification. The petition asserted that the decision to revoke Petitioner's certification was improper for the following reasons:

- (1) NS failed to have the remote control unit and vest inspected by the manufacturer to see whether it was operating as intended.
- (2) The NS charging officer took Petitioner's statements regarding how he wore the vest out of context, errantly leading to the conclusion that Petitioner intentionally tampered with the safety features of the remote control device and vest.

- (3) NS officers allowed Petitioner to continue to work after confronting him, proving that his service was neither dangerous to himself or to fellow employees.

Pursuant to 49 C.F.R. §§ 240.405(b) and (c), a copy of the petition was provided to NS, and the railroad was afforded an opportunity to comment. NS responded to Petitioner's assertions in a letter dated December 23, 2011 as follows:

- (1) There was no need to have the remote control unit and vest tested by the manufacturer. The NS Road Foreman and Trainmaster both provided testimony that they tested the unit on site, by having Petitioner lean over to a 90-degree angle. The unit worked as intended at that time. Tr. at 6, 35.
- (2) The focus of the investigation was the fit of the vest and the manner in which Petitioner wore it. Petitioner's statements were not taken out of context, and made it clear that he wore the vest loosely so that the tilt feature did not function.
- (3) The NS officials had Petitioner adjust the fit of the vest so that the tilt feature was working correctly before they allowed him to perform 15 minutes of service immediately following the violation. The decision to allow the Petitioner to perform service for those 15 minutes does not nullify his responsibility for violating Federal regulations concerning tampering with safety devices.

Locomotive Engineer Review Board's Determination

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

- (1) Petitioner was working as a RCO in a yard in Bellevue, Ohio on July 5, 2011. At the time of the alleged violation, Petitioner was working a bowl assignment and performing switching operations.
- (2) Petitioner was wearing a vest which had the remote control unit attached to it. The unit and vest are designed to be worn so that if the body of the RCO tilts at a 45-degree angle or greater the remote control unit will activate a safety feature. The unit will first sound an alarm, and if the RCO does not respond, the unit will make an emergency application of the locomotive brakes.
- (3) Petitioner testified that the vest straps were loose, that the unit would sound an alarm every time he bent over to throw a switch, and that he found the beeping of the alarm bothersome. Tr. at 60-61.
- (4) Federal regulations permit a person to disable a safety device (such as the RCO vest/unit) when the controlling locomotive is performing switching operations. 49 C.F.R. § 218.61.

Analysis of the Petition

In reviewing petitions of revocation decisions, the Board considers four issues in determining whether revocation 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).]

Federal regulations permit a person to disable a safety device (such as the RCO vest/unit) when the controlling locomotive is performing switching operations. 49 C.F.R. § 218.61. Since the RCO vest/transmitter was being used to control a locomotive in switching operations, Federal regulations did not prohibit Petitioner from disabling it. Because Petitioner was not prohibited under Federal regulations from altering the operation of the tilt function on the RCO vest/unit, and that was the basis for the revocation, the Board finds, as a matter of law, that the railroad's decision is not legally sustainable.

The Board does not come to this decision easily as we recognize the safety concerns of disabling the man-down tilt feature and that FRA recommended in Safety Advisory 2001-1 that each remote control transmitter (RCT) should have that feature. See 66 FR 10340, 10343 (February 14, 2011). We also take note that FRA warns RCOs in a document on its website that the man-down tilt feature located on the RCT is a safety device that is covered by FRA's tampering regulations found at 49 C.F.R. 218.57. See FRA Regulations & RCL Operations Q&As (revised February 2009) at Q-22, and at <http://www.fra.dot.gov/downloads/safety/RCLQAs0811.pdf>. This document warns that tampering with this device can be a revocable event, and offers a suggestion to RCOs that "[w]hen in doubt about beltpack securement issues, contact the railroad for guidance." This recommendation is important for RCOs to follow because even if disabling the man-down tilt feature during switching operations is permitted by FRA regulations, it may still be prohibited by the railroad's rules and Part 240 does not alter the authority of a railroad to initiate disciplinary sanctions against its employees in the normal and customary manner. 240.5(d).

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 not legally sustainable, and that based on its review of the record, the Board hereby grants the petition in accordance with the provisions of 49 C.F.R. Part 240.

Issued in Chicago, IL on MAY 02 2012.

A handwritten signature in black ink, appearing to read "Richard M. McCord", written over a horizontal line.

Richard M. McCord
Chairman,
Locomotive Engineer Review Board

SERVICE LIST EQAL 2011-34


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

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. S.A. Jurovcik
839 N. Ohio Ave.
Fremont, OH 43420

Mr. Andrew J. Frederick
Local Chairman
United Transportation Union
11007 Potter Road
Bellevue, OH 44811

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



Diane Filipowicz
Administrative Assistant

MAY 02 2012

Date

cc: FRA Docket EQAL 2011-34

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Mr. S.A. Jurovcik
839 N. Ohio Ave.
Fremont, OH 43420

EQUAL 2011-34

2. Article Number

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1. Article Addressed to:

Mr. Andrew J. Frederick
Local Chairman
United Transportation Union
11007 Potter Road
Bellevue, OH 44811

EQUAL 2011-34

2. Article Number

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1. Article Addressed to:

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

EQUAL 2011-34

2. Article Number

(Transfer from service label)

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