

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

Locomotive Engineer Review Board

Decision Concerning
Burlington Northern Santa Fe Railway Company's
Revocation of Mr. K. J. Cross
Locomotive Engineer Certification

FRA Docket Number EQAL 2011-36

Decision

The Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the decision of the Burlington Northern Santa Fe Railway Company (BNSF) to revoke Mr. K. J. Cross'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 denies Mr. Cross's petition for the reasons set forth below.

Background

On May 8, 2011, at approximately 11:00 p.m., Petitioner allegedly operated BNSF train HOUALTI-08 in Galveston, TX past a signal requiring a complete stop at mile post (MP) 135.8. By undated letter signed by Petitioner on May 9, 2011, Petitioner was notified that his certification was suspended pending a hearing investigating the incident. That letter stated that Petitioner was entitled to a formal hearing in compliance with 49 C.F.R. § 240.307 and that Petitioner could waive his right to the hearing. In a separate letter, dated May 8, 2011, Petitioner signed a waiver of his right to a formal hearing under 49 C.F.R. § 240.307. This letter indicated the revocation period for violations of railroad operating rules implementing 49 C.F.R. § 240.117(e)(1), prohibiting operation of a train not in accordance with a signal requiring a complete stop before passing it, would begin on May 8, 2011 and conclude on June 7, 2011.

A petition was timely filed with FRA by mail on October 31, 2011 by the Brotherhood of Locomotive Engineers and Trainmen on behalf of Petitioner, requesting that FRA review BNSF's decision to revoke his certification. The petition asserts that the revocation was improper because:

- (1) Petitioner's view of the signal was obstructed, substantially impairing his ability to comply with the operating rule,
- (2) Petitioner was never notified that he was entitled to a hearing under 49 C.F.R. Part 240.

Pursuant to 49 C.F.R. § 240.405(b), (c), a copy of the petition was sent to BNSF. The railroad elected to comment and was required by 49 C.F.R. § 240.405(d)(2) to provide Petitioner with a copy of the materials submitted to FRA.

BNSF's Response

BNSF responded to Petitioner's assertions by arguing that:

- (1) Petitioner was qualified to operate over the territory involved, and was aware of the signal at this particular crossing.
- (2) The waiver signed by Petitioner clearly states that doing so waives the right to a formal hearing under Federal regulations.

Locomotive Engineer Review Board's Determination

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

- (1) On May 8, 2011, at approximately 11:00 p.m., Petitioner operated BNSF train HOUALTI-08 in Galveston, TX.
- (2) At the same time, a BNSF manager was conducting operational tests by setting the signal at MP 135.8 to not display an aspect (dark signal). As a result, the prior signal at MP 132.9, Landes, displayed an approach indication, requiring Petitioner to approach the next signal prepared to stop. Petition at 1; BNSF at 3.
- (3) Petitioner allegedly did not operate his train in accordance with the signal at MP 135.8.
- (4) By undated letter signed by Petitioner on May 9, 2011, Petitioner was notified that his certification was suspended pending a hearing investigating the incident. This letter also stated that Petitioner was entitled to a formal hearing in compliance with 49 C.F.R. § 240.307 and that Petitioner could waive his right to the hearing. BNSF Exhibit A.
- (5) On May 8, 2011, Petitioner signed a waiver of his right to a formal hearing prior to the revocation of his certification. This waiver clearly specified that the hearing waived was under "49 CFR Part 240.307," and that in doing so, Petitioner had "knowledge and understanding of all [his] rights under 49 CFR Part 240 and voluntarily surrender them." BNSF Exhibit B.

Analysis of the Petition

In order for a waiver of a revocation of certification to be valid, the waiver must: (1) be made in writing; (2) reflect the fact that the person has knowledge and understanding of these rights and

voluntarily surrenders them; and (3) be signed by the person making the waiver. 49 C.F.R. § 240.307(f).

Although Petitioner presents arguments relating to the underlying violation, the Board cannot hear these arguments if it finds that the waiver document is valid. Petitioner asserts that he would not have waived his right to a hearing had he understood that “the hearing was coupled with a LERB hearing.” However, the Notice of Certificate Revocation, signed by Petitioner on May 8, 2011, demonstrates that Petitioner was properly informed of his rights under 49 C.F.R. Part 240 and that he in fact waived his right to an on-the-property hearing for the purposes of certificate revocation.

The document states: “Sign at the end of this paragraph if you accept certificate revocation and waive your right to a formal hearing under 49 CFR Part 240.307. By doing so, you indicate that you have knowledge and understanding of all your rights under 49 CFR Part 240 and voluntarily surrender them.” BNSF Exhibit B. This paragraph is immediately followed by Petitioner’s signature. The document also indicates that Petitioner’s certification was to be revoked from May 8, 2011 to June 7, 2011, further providing information that the document related to 49 C.F.R. Part 240 and not only to railroad discipline. Accordingly, the Board finds that the language contained in the waiver signed by Petitioner was sufficient to the extent that Petitioner should have reasonably been expected to have knowledge and understanding of his rights and voluntarily surrendered them on the date that he signed the waiver document. If a person does not understand a citation to 49 CFR Part 240.307 or 49 C.F.R. Part 240, or any other aspect of a waiver, the person should not sign the waiver. Petitioner’s allegation that he didn’t understand what he was signing cannot override the clear language in the written waiver that he voluntarily admits to signing. Petitioner does not deny that he signed the waiver, nor does Petitioner allege that the waiver was signed under duress. Petition at 2. Thus, the Board finds that the waiver met the requirements set forth in 49 CFR § 240.307(f).

By waiving his right to a certification hearing, Petitioner has precluded the creation of a record of a formal investigation. Without such a record, a proper analysis of the facts cannot be accomplished. The petition must therefore be denied in accordance with the provisions of 49 C.F.R. Part 240.

Issued in Chicago, IL on MAR 08 2012



Richard M. McCord
Chairman,
Locomotive Engineer Review Board

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.

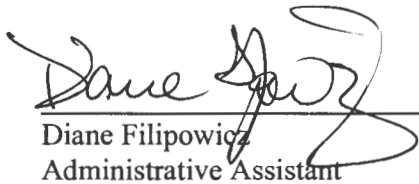
SERVICE LIST EQAL 2011-36

SENT CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. K. J. Cross
19251 Sandelford Dr.
Katy, TX 77449

Mr. Jack Sweeny
Local Chairman Division 776
Brotherhood of Locomotive Engineers and Trainmen
P.O. Box 1169
Brazoria, TX 17422-1169

Ms. Kathy R. Conkling
Manager, Certificate Administration
Burlington Northern Santa Fe Railway Company
12345 College Park Boulevard
Overland Park, KS 66210-1299



Diane Filipowicz
Administrative Assistant

MAR 08 2012

Date

enc: Post LERB Memo

cc: FRA DOCKET EQAL 2011-36

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. K. J. Cross
19251 Sandelford Dr.
Katy, TX 77449

EQAL 2011-36

2. Article Number

(Transfer from service label)

7008 3230 0002 3925 9409

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

If YES, enter delivery address below: No

3. Service Type

Certified Mail

Express Mail

Registered

Return Receipt for Merchandise

Insured Mail

C.O.D.

4. Restricted Delivery? (Extra Fee)

Yes

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. Jack Sweeny
Local Chairman Division 776
Brotherhood of Locomotive Engineers and Trainmen
P.O. Box 1169
Brazoria, TX 17422-1169

EQAL 2011-36

2. Article Number

(Transfer from service label)

7008 3230 0002 3925 9416

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

If YES, enter delivery address below: No

3. Service Type

Certified Mail

Express Mail

Registered

Return Receipt for Merchandise

Insured Mail

C.O.D.

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Yes

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- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Ms. Kathy R. Conkling
Manager, Certificate Administration
Burlington Northern Santa Fe Railway Company
12345 College Park Boulevard
Overland Park, KS 66210-1299

EQAL 2011-36

2. Article Number

(Transfer from service label)

7008 3230 0002 3925 9423

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

If YES, enter delivery address below: No

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Yes