

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

Locomotive Engineer Review Board

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

FRA Docket No. EQAL 2011-49

Decision

The Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the decision of the Alaska Railroad Corporation (ARR) to revoke Mr. W.F. McCormick'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 has determined that ARR's decision to revoke Petitioner's certification was proper under 49 C.F.R. Part 240, and therefore denies the petition for the reasons set forth below.

Background

On August 13, 2011, at approximately 11:13 a.m., Petitioner was performing duty as the locomotive engineer on ARR train 239¹ at Talkeetna, Alaska. The fireman on Petitioner's train crew allegedly released main track authority governing the Direct Train Control² (DTC) block that Petitioner's train was occupying while it stood stationary at the Talkeetna Depot. Petitioner was later removed from service.

Petitioner's certification was suspended on August 13, 2011, for occupying main track without authority in violation of 49 C.F.R. § 240.117(e)(4).³ A Federal certification hearing was held by ARR on September 1, 2011. On September 13, 2011, Petitioner was notified that his certification had been revoked. Petitioner timely filed a petition dated January 3, 2012, requesting FRA review of ARR's decision. The petition asserted that the revocation was improper for the following reasons:

¹ The record alternately refers to Petitioner's train as the "230N" and the "239". For the purposes of this proceeding, the Board will refer to it as train 239.

² DTC is also commonly referred to as Direct Traffic Control.

³ The record indicates the ARR mistakenly cited 49 C.F.R. § 240.305(a)(4) in suspending, and later revoking, Petitioner's certification for allegedly occupying main track without authority.

- 1) ARR violated 49 C.F.R. § 240.307(c)(1) when it held Petitioner's decertification hearing more than 10 days after suspending his certificate.
- 2) In accordance with 49 C.F.R. § 240.307(i)(2), this alleged violation was of a minimal nature and had no direct or potential effect on rail safety. At the time of the alleged violation, Petitioner's train was standing stationary at the Talkeetna Depot and no other trains were located within many miles. The crew immediately corrected the mistake, and was permitted to continue operating the train for approximately four hours after the alleged violation occurred before being relieved by the ARR.
- 3) The only nearby ARR train could *not* have entered the main track to the north as asserted by ARR during the hearing because Petitioner's train never released its main track authority to the north.⁴

Pursuant to 49 C.F.R. §§ 240.405(b) and (c), a copy of the petition was sent to ARR on January 5, 2012, and ARR was afforded an opportunity to comment. ARR did not timely respond to the petition, but provided a late response which the Board was not able to consider prior to making its determination. Federal Express records indicate that on January 10, 2012, ARR signed for the petition sent by FRA. Section 240.405(c) permits a railroad 60-days from receipt of the petition to respond. ARR's response letter was both dated and postmarked March 13, 2012, or 63 days after ARR received the petition.

Board's Determinations

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

- 1) On August 13, 2011, Petitioner was performing duty as the locomotive engineer on ARR train 239. Transcript at 7-10.
- 2) The crew of Petitioner's train was issued a mandatory directive at 10:26 a.m., giving the train authority to occupy 13 DTC blocks between the Deception and Billion blocks. Petition at 1; Transcript at 7-10, 49-52. The Twister block is located within the limits between Deception and Billion. Id.
- 3) At 11:13 a.m., the dispatcher contacted the train's crew and requested a partial release of the train's mandatory directive block authority. Id. At that time, the train was standing stationary at Talkeetna Depot in the Twister block. Id.
- 4) The fireman on Petitioner's crew tried to raise the train's conductor on the radio to release the blocks from the train's authority. Id. The fireman was unable to raise the conductor, and then released authority via radio to the dispatcher at 11:14 a.m. Id.

⁴ The petition also made a fourth assertion not relevant to this review, but to EQAL 2011-50. EQAL 2011-50 involved the decertification of the fireman on Petitioner's crew. The petition filed for both cases made identical assertions.

- 5) The fireman released authority from blocks Deception through Twister, which was the block that the train was actually occupying. Id.
- 6) The train's brakeman relayed to the conductor that the fireman had released the train's authority. With the train still standing stationary at Talkeetna Depot, at 11:17 a.m., the train's conductor then contacted the dispatcher via telephone and confirmed which blocks had been released and alerted the crew to copy new mandatory directive authority. Id.
- 7) At 11:19 a.m., a new authority was issued for the crew to occupy the Twister block. Id.
- 8) Petitioner's certification was suspended for occupying main track without authority in violation of 49 C.F.R. § 240.117(e)(4).
- 9) A Federal certification hearing was held on September 1, 2012. Petitioner was notified his certification was revoked on September 13, 2012.
- 10) Petitioner timely filed a petition appealing ARR's revocation decision, asserting the above argument.

Analysis

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, the Board considers whether substantial evidence exists to support the railroad's factual findings in its decision. See 58 Fed. Reg. 18982, 19001 (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, the Board considers whether the railroad's legal interpretations are correct based on a de novo review. Id. Finally, the Board considers 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).

Petitioner's first assertion alleges a procedural error occurred when the revocation hearing was held nine days after the time allotted by § 240.307(c)(1). However, the petition does not allege, and the Board does not find, that Petitioner was substantially harmed by the alleged delay in this instance. Next, Petitioner's second and third assertions both relate to the argument that the alleged main track authority violation was minimal in nature and had no effect on rail safety under § 240.307(i)(2). However, § 240.307(i)(2) leaves that decision to the railroad's discretion, as that section states that a railroad "may" determine such. Thus, the Board cannot grant the petition based on these assertions.

The Board also does not find that an intervening cause under § 240.307(i)(1) existed that prevented or materially impaired Petitioner's ability to comply with the relevant railroad operating rules. An ARR PowerPoint presentation that accompanied the petition included

excerpts from both Petitioner's and the fireman's written statements that were made after the alleged violation occurred. The written statements both indicate that Petitioner and his fireman jointly made the decision to release their train's authority "through Twister", or the block that Petitioner's train was actually occupying. Thus, the Board finds that Petitioner was involved in the decision to improperly release his train's main track authority.

Conclusion

Based on the above determinations, the Board finds ARR presented substantial evidence to support its decertification decision. The petition is denied in accordance with the provisions of Title 49, Part 240 of the Code of Federal Regulations.

Issued in Chicago, IL on MAY 10 2012 .



Richard M. McCord
Chairman,
Locomotive Engineer Review Board

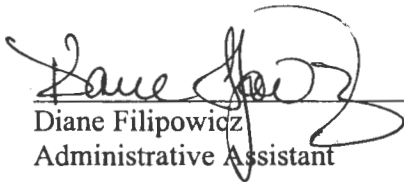
SERVICE LIST EQAL 2011-49

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

Mr. W.F. McCormick
645 G Street
#100-644
Anchorage, AK 99501-3443

Mr. Brett Brown
UTU Local 1626
570 Derbyshire Drive
Fairbanks, AK 99709

Ms. C. Ann Courtney
Deputy General Counsel
Alaska Railroad Corporation
P.O. Box 107500
Anchorage, AK 99510-7500


Diane Filipowicz
Administrative Assistant

MAY 10 2012

Date

cc: FRA Docket EQAL 2011-49

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1. Article Addressed to:

Mr. W.F. McCormick
 645 G Street
 #100-644
 Anchorage, AK 99501-3443

EQAL 2011-49

2. Article Number

(Transfer from service label)

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1. Article Addressed to:

Mr. Brett Brown
 UTU Local 1626
 570 Derbyshire Drive
 Fairbanks, AK 99709

EQAL 2011-49

2. Article Number

(Transfer from service label)

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1. Article Addressed to:

Ms. C. Ann Courtney
 Deputy General Counsel
 Alaska Railroad Corporation
 P.O. Box 107500
 Anchorage, AK 99510-7500

EQAL 2011-49

2. Article Number

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