

**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 2012-02

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 October 10, 2011, Petitioner was operating BNSF train E-MONBTM0-38 as the assigned locomotive engineer. The train stopped for an Absolute Stop Signal displayed at CP EB044. Petitioner received the stop indication because Switch #7 was out of correspondence and the train dispatcher could not line that switch. The train dispatcher gave the crew permission to operate pass the Stop Signal, hand operate the #7 dual-control switch, and then proceed Main Track 2 to Main Track 2. Tr. at 16-17. The crew re-lined the #7 switch from Main Track 2 and diverted over the crossover towards and then onto Main Track 1. The dispatcher stopped train movement because Petitioner did not have authority to occupy Main Track 1. Petition at 1; BNSF at 3.

A petition was timely filed with FRA by mail on January 10, 2012, 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 was not disciplined as a result of this investigation/hearing;
- (2) The dispatcher did not give clear instructions; and
- (3) The hearing transcript does not contain a complete transcript of the dispatcher's instructions to the crew.

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 waived his rights to a hearing when he signed the Notification of Certificate of Revocation. BNSF Ex. B. A hearing was held to determine discipline under BNSF's discipline policy. Petitioner did not receive discipline because it was not issued by BSNF in a timely manner as determined by Petitioner's collective bargaining agreement. BNSF at 4.
- (2) Petitioner was not confused when he crossed onto Main Track 1 and he is now merely shifting blame to the dispatcher. Petitioner was qualified to operate over the territory. BNSF at 5-6.
- (3) Petitioner and his representative were present at the hearing and heard the audio recordings of the dispatcher during the hearing. There was no exception taken with the dispatcher's instructions at the time of the hearing. Additionally, when Petitioner's representative received the transcript of the hearing, he could have worked with the hearing officer to fix this issue at that time. BNSF at 6-7.

Locomotive Engineer Review Board's Determination

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

- (1) On October 10, 2011, Petitioner was operating BNSF train E-MONBTM0-38 in Houston, TX.
- (2) The train stopped for an Absolute Stop Signal displayed at CP EB044. Petitioner received the stop indication because Switch #7 was out of correspondence and the train dispatcher could not line that switch. The train dispatcher gave the crew permission to operate past the Stop Signal, hand operate the #7 dual-control switch, and then proceed Main Track 2 to Main Track 2. Tr. at 16 and 17. The crew re-lined the #7 switch from Main Track 2 and diverted over the crossover towards and then onto Main Track 1. The dispatcher stopped train movement because Petitioner did not have authority to occupy Main Track 1. Petition at 1; BNSF at 3.
- (3) On October 10, 2011, Petitioner's certification was suspended. BNSF Ex. A.
- (4) By two undated documents signed by Petitioner on October 10, 2011, Petitioner was notified that his certification was suspended pending a hearing investigating the incident. This document 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 Exhibits A and B.

- (5) On October 10, 2011, Petitioner signed a waiver of his right to a formal hearing prior to the revocation of his certification.

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. The Notice of Certificate Revocation, signed by Petitioner on October 10, 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. 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. There has been no argument made that Petitioner did not sign 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).

Conclusion

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 MAY 10 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.

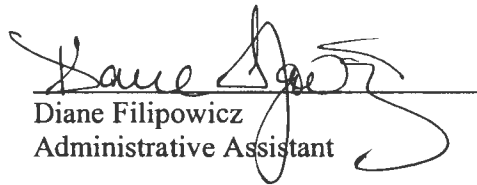
SERVICE LIST EQAL 2012-02

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

MAY 10 2012

Date

enc: Post LERB Memo

cc: FRA DOCKET EQAL 2012-02

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

EQUAL 2012-02

2. Article Number

(Transfer from service label)

7011 0470 0002 3685 8604

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? YesIf 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

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- 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

EQUAL 2012-02

2. Article Number

(Transfer from service label)

7011 0470 0002 3685 8598

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

COMPLETE THIS SECTION ON DELIVERY

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 Agent Addressee

B. Received by (Printed Name)

C. Date of Delivery

D. Is delivery address different from item 1? YesIf YES, enter delivery address below: No

3. Service Type

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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

EQUAL 2012-02

2. Article Number

(Transfer from service label)

7011 0470 0002 3685 8581

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? YesIf 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