

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

Locomotive Engineer Review Board

Decision Concerning
Norfolk Southern Corporation's
Revocation of Mr. W. R. Pearson's
Locomotive Engineer Certification

FRA Docket Number EQAL 2012-05

Decision

The Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the decision of the Norfolk Southern Corporation (NS) to revoke Mr. W. R. Pearson'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 grants Mr. Pearson's petition for the reasons set forth below.

Background

On October 19, 2011, while operating train 52AG313, Petitioner entered working limits between mile post 15G and 28G near Macon, GA without permission from the employee in charge. Petitioner was notified by letter dated October 26, 2011 that his certification was suspended pending an investigative hearing, alleging a violation of a railroad operating rule involving 49 C.F.R. § 240.117(e)(4), occupying main track without proper authority. After an investigative hearing on November 4, 2011, Petitioner was notified by letter dated November 17, 2011 that his certification was revoked.

A petition was timely filed with FRA by mail on January 20, 2012 by the Brotherhood of Locomotive Engineers and Trainmen on behalf of Petitioner, requesting that FRA review NS's decision to revoke his certification. The petition asserts that revocation was improper because Petitioner's entry into the working limits was the result of the train dispatcher's failure to properly read and confirm the track warrant authority.

Pursuant to 49 C.F.R. § 240.405(b), (c), a copy of the petition was sent to NS. 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.

NS's Response

NS responded to Petitioner's assertion by arguing that Petitioner and the conductor were jointly responsible for accurately transcribing the track authority transmission from the dispatcher. NS

argues that the radios were working properly and that therefore both crew members must have been distracted or not present when the dispatcher made the transmission.

Locomotive Engineer Review Board's Determination

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

- (1) On October 19, 2011, Petitioner operated train 52AG313 into working limits between mile post 15G and 28G near Macon, GA without authority from the employee in charge. Transcript at 8, 13.
- (2) Track authority was granted to Petitioner by a mandatory directive transmitted by radio from the train dispatcher. Transcript at 9.
- (3) In the radio communication transmitting the mandatory directive, the train dispatcher initially stated the authority extended through milepost 28G and subsequently stated the authority continued to proceed only through milepost 15G. Transcript at 9 – 11.
- (4) The transcript of the radio communication transmitting the mandatory directive does not contain any acknowledgement from the train dispatcher that two different limits of authority had been transmitted. Transcript at 9 – 12.
- (5) After a mandatory directive is transmitted by radio, it must be repeated back to the train dispatcher, who is responsible for “verifying the accuracy of the repeated mandatory directive.” 49 C.F.R. § 220.61(b)(4).
- (6) The conductor serving on train 52AG313 repeated the mandatory directive as he transcribed it, extending through milepost 28G rather than the proper limit of 15G. The train dispatcher verified the incorrect directive. Hearing Exhibit “Carrier 2”; Transcript at 9 – 12.
- (7) Mr. C. L. Morris, charging officer and Assistant Superintendent of Terminals, Georgia Division, stated at the hearing that “there’s no dispute the dispatcher did not listen to what [the conductor] was reading back.” Transcript at 31.
- (8) Petitioner’s violation was the result of an intervening cause that prevented or materially impaired him from complying with the operating rule requiring him to obtain authority to enter working limits from the employee in charge.

Analysis of the Petition

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

Petitioner does not contest that he operated his train into the working limits of a maintenance-of-way crew without permission from the employee in charge, but maintains that an intervening cause prevented or materially impaired his ability to comply with the operating rule constituting a violation under 49 C.F.R. § 240.117(e)(4). Specifically, Petitioner argues that the train dispatcher’s failures in transmitting the mandatory directive granting authority impaired his ability to comply. A recording of the radio transmission, included in the hearing transcript, reveals that the dispatcher first stated that the authority extended to milepost 28G then subsequently stating the authority extended only to milepost 15G:

Dispatcher: All right. I have Track Authority 3447, 3-4-4-7, to the NS8745, 8-7-4-5, south [inaudible] at Macon, check box 2, T-W-O, proceed from Prichard to the Milepost 28, letter G, to 28, letter G, on the main track. [Inaudible] check box 2, T-W-O, [inaudible] proceed from Prichard to 15 on the G, that's 1-5, G. on the main track. This will be Track Authority 3447, line, check box 2, proceed from Prichard to the 15 letter G on main track, Dispatcher RJS, over.

Conductor: All right, Dispatcher. That's 344 7, 3-4-4-7, NS87 45, 8-7-4-5, south [inaudible] at Macon. Check box 2, T-W-O, proceed from Prichard to Milepost 28, that's 2-8, letter G, on the main. 3447, 3-4-4-7, one block 2, copied by Cox, what were those initials, over.

Dispatcher: RJS, over.

Conductor: Dispatcher RJS, copied by Cox, over.

Dispatcher: That's 3447, one item checked, box 2, showed okayed at 3:02 in the p.m., that's 3-0-2 in the p.m. Today's date 10/19/2011. Dispatcher RJS, over.

Conductor: 3447, 3-4-4-7, one block 2, okayed at 3:02, 3-0-2 in the p.m., 10/19/2011, over.

Transcript at 9, 11. The transcript does not include any statement by the dispatcher acknowledging the incorrect initial statement. Transcript at 9 – 12. The transcript also

demonstrates that the conductor accurately repeated the information on the mandatory directive as understood by the crew and recorded on Track Authority 3447. *Id.*; Hearing Exhibit “Carrier 2.” The dispatcher failed to verify the mandatory directive, and NS admits “there’s no dispute the dispatcher did not listen to what [the conductor] was reading back.” Transcript at 31.

The Board notes that the facts in this matter are distinct from a simple failure of a train crew to accurately record a clear radio transmission of a mandatory directive. Substantial evidence in the record indicates the dispatcher provided incorrect information during the transmission of the mandatory directive and did not explicitly state the error before providing the new information. Most importantly, after making the mistake during the transmission of the mandatory directive, NS concedes that the dispatcher failed to give full attention to the conductor’s repetition of the directive. The repetition of a mandatory directive is a dispatcher’s opportunity to ensure the accuracy of transmission; given the initial misstatement, listening closely to the repetition would be an exercise of ordinary care. The train crew acted reasonably in relying on the dispatcher’s verification of the mandatory directive information.

In response to the Petition, NS asserts that Petitioner and the conductor must have not been attentive during the transmission of the mandatory directive. NS notes that the radios used for the transmission were operating properly, and that the inaccurate transmission was therefore the responsibility of the train crew, despite the dispatcher’s misstatement and failure to verify the transmission. While it was not impossible for the crew to have detected the dispatcher’s inaccurate transmission, impossibility is not the relevant standard for determining whether an intervening cause exists. Rather, revocation is improper where substantial evidence shows “an intervening cause prevented or materially impaired the locomotive engineer’s ability to comply.” 49 C.F.R. § 240.307(i)(1) (emphasis added).

In adding paragraph (i)(1) to 49 C.F.R. § 240.307, FRA provided the example of “a conductor or dispatcher [relaying] incorrect information to the engineer which is relied on in making a prohibited train movement” as a type of intervening cause, and that “a person’s certificate shall not be revoked when there is substantial evidence of an intervening cause.” 63 Fed. Reg. 50626, 50647 (September 22, 1998). On the basis of the substantial evidence contained in the record, the Board concludes that Petitioner’s violation was the result of his reliance on the dispatcher’s misstatement of the limits of the authority granted and subsequent failure to verify the accuracy of the transmission, an intervening cause which prevented Petitioner’s compliance with the relevant railroad operating rule.

Conclusion

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

MAY 24 2012

Issued in Chicago, IL on _____.

A handwritten signature in black ink, appearing to read "Richard M. McCord". The signature is written in a cursive style with a large, prominent initial "R".

Richard M. McCord
Chairman,
Locomotive Engineer Review Board

SERVICE LIST EQAL 2012-05

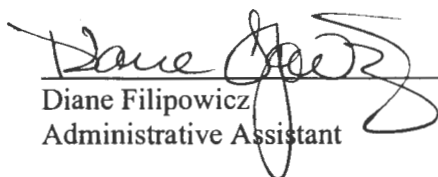
A copy of the Locomotive Engineer Review Board decision in this matter has been sent by certified mail and return receipt requested to each person shown below.

SENT CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. W. R. Pearson
117 N. Springs Court
Macon, GA 31210-1586

Mr. Cecil E. Dubberly
Local Chairman, BLE&T Division 59
1001 Ridgewood Drive
Valdosta, GA 31601

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



Diane Filipowicz
Administrative Assistant

MAY 24 2012

Date

enc: Post LERB Memo

cc: FRA DOCKET EQAL 2012-05

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. W. R. Pearson
117 N. Springs Court
Macon, GA 31210-1586

EQAL 2012-05

2. Article Number
(Transfer from service label)

7011 0470 0002 3685 8536

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

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 Yes**SENDER: COMPLETE THIS SECTION**

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

1. Article Addressed to:

Mr. Cecil E. Dubberly
Local Chairman, BLE&T Division 59
1001 Ridgewood Drive
Valdosta, GA 31601

EQAL 2012-05

2. Article Number
(Transfer from service label)

7011 0470 0002 3685 8529

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1. Article Addressed to:

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

EQAL 2012-05

2. Article Number
(Transfer from service label)

7011 0470 0002 3685 8512

PS Form 3811, February 2004

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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