

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

AUG - 8 2001

Locomotive Engineer Review Board

Review and Determination Concerning
The Burlington Northern and Santa Fe Railway Company's Decision to Revoke
Mr. R. W. Prevo's Locomotive Engineer Certification

FRA Docket Number EQAL-2001-01

Decision

The Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the decision of The Burlington Northern and Santa Fe Railway Company (BNSF) to revoke Mr. R. W. Prevo's (Petitioner's) 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 determines that BNSF's decision to revoke Petitioner's certification was improper pursuant to 49 C.F.R. Part 240 for the reasons set forth below.

Background

On August 16, 2000, Petitioner was assigned as engineer on Train B-PHXSD3-16A, along with a conductor and brakeman. While operating near Wittman, Arizona, the crew stopped the train to pick up 15 additional cars. Once Petitioner coupled the locomotive to the 15 cars, he set the brakes, and the ground crew walked the cars to determine if the brakes were applied on each car. Petitioner then released the brakes, and the crew determined that the brakes were released on each car. The crew then coupled the cars to the balance of the train and determined that the brakes applied and released on the rear car of the train. The train then departed.

Unknown to the crew, they were observed by an Arizona state railroad inspector and an FRA safety inspector. The inspectors determined that the crew did not perform a proper initial terminal train air brake test, as required by 49 C.F.R. 232.12(d)(1), because they did not determine that the train was properly charged before conducting the test. They did not apply a pressure gauge at the rear of the train, and therefore had no way of knowing that the air brake system was charged sufficiently to conduct the test.¹

The incident was reported to BNSF, and the crew was removed from service. Petitioner was notified that his certification was suspended on August 16, 2000. A combined railroad discipline and Federal certification investigative hearing was conducted on September 12, 2000. By letter dated October 4, 2000, Petitioner was notified that his certification was revoked for 30 days.

¹ The regulation at 49 CFR 232.12(d)(1) states in part: "After the airbrake system on a freight train is charged to within 15 pounds of the setting of the feed valve on the locomotive, but to not less than 60 pounds, as indicated by an accurate gauge at rear end of train, . . . and upon receiving the signal to apply brakes for test, a 15-pound brake pipe service reduction must be made in automatic brake operations, the brake valve lapped, and the number of pounds of brake pipe leakage per minute noted as indicated by brake pipe gauge, after which brake pipe reduction must be increased to full service."

Petitioner's Claims

FRA received a petition from Petitioner on January 2, 2001, requesting FRA to review BNSF's decision to revoke his certification.

In his petition, Petitioner claimed that:

1. He was denied due process because he was not allowed to question the eyewitnesses to the incident, namely the Arizona state inspector and the FRA inspector, who did not attend the investigative hearing.
2. He was charged with failing to perform an initial terminal air brake test when, in fact, he was performing an intermediate air brake test as required under 49 C.F.R. 232.13(c)(1).
3. He and his crew believed that they were complying with the General Code of Operating Rules (GCOR) and were performing the air brake test safely and efficiently. The crew admitted in the investigative hearing that they had misplaced their air gauge, but they believed they were abiding by GCOR Rule 101.3 (Charge Brake System) when they used the Charging Time Chart to ascertain that the brake system was fully charged.
4. The revocation of his certification for 30 days for this infraction is "overly severe and punitive."

BNSF's Response

Pursuant to 49 C.F.R. 240.405(b) and (c), a copy of the petition was sent to BNSF which elected to comment on the petition. In its response, BNSF argued that:

1. Petitioner was afforded a fair hearing pursuant to his collective bargaining agreement and Federal regulations, despite the fact that the Arizona state inspector and the FRA safety inspector were not in attendance.
2. The rules regarding air brake test requirements are clear and imbedded in past practice. The crew should have known that their use of a Charging Time Chart would not meet test requirements because the Charging Time Chart details specific minimum charging times for an empty brake system under various conditions and has nothing to do with measuring specific pressure at the rear of the train.
3. The crew's good intentions are not relevant. The only issue is whether or not they conducted the air brake test in compliance with Federal regulations.

FRA's Determination

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

1. Petitioner was not provided a fair and impartial investigative hearing because he was not afforded the opportunity to examine the two inspectors who witnessed the alleged violation.
2. Petitioner was erroneously charged with failing to perform an initial terminal air brake test when the charge should have been failure to perform a proper intermediate air brake test.

3. Both procedural errors caused Petitioner substantial harm in his ability to defend his position.

“When considering procedural issues, the Board’s standard for review will be to 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,” 58 Fed. Reg. 18982, 19001 (Apr. 9, 1993). The Board finds that the procedural errors involved in this case are sufficient grounds for reversing BNSF’s decision to revoke Petitioner’s certification. Therefore, there is no reason for the Board to judge the merits of substantive arguments presented by either party.

Based on these findings, the Board finds that BNSF improperly revoked Petitioner’s certificate and hereby grants the petition in accordance with the provisions of Title 49, Part 240 of the Code of Federal Regulations.

Issued in Washington D.C. on

August 3, 2001

James D. LeGrand

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John F. Megary
Chairman, Locomotive
Engineer Review Board