



U.S. Department
of Transportation

**Federal Railroad
Administration**

1200 New Jersey Avenue, SE
Washington, DC 20590

VIA E-MAIL ONLY

Mr. Larry E. Jameson
AVP Operating Rules & Regulations
ejameson@kcsouthern.com

October 9, 2020

Dear Mr. Jameson:

This letter responds to the submission from the Kansas City Southern Railway Company (KCSR), dated and emailed on September 17, 2020, to the Federal Railroad Administration (FRA) seeking approval of material modifications to its approved Program of Certification for Locomotive Engineers and Remote Control Operators (Part 240 Program), dated October 4, 2013. As KCSR explained in its cover letter accompanying the revised program submission, for more than two years, KCSR has been certifying locomotive engineers from its commonly controlled affiliates¹ by following procedures approved by FRA in 2018, which materially modified KCSR's approved 2013 program. However, on August 28, 2020, the U.S. Court of Appeals for the District of Columbia Circuit granted a Petition for Review as to FRA's approval of KCSR's use of the modified program to train Kansas City Southern de Mexico (KCSM) engineers and vacated and remanded FRA's decision approving the 2018 material modifications of KCSR's approved Part 240 Program.² The Court directed FRA to either offer a fuller explanation of the agency's reasoning at the time of the agency action or deal with the problem afresh by taking new agency action. FRA chose the latter option, and KCSR submitted new material modifications to its approved 2013 Part 240 Program addressing the procedures KCSR would follow when certifying locomotive engineers from KCSM.

KCSR's submission states that, on September 17, 2020, the railroad provided a copy of its program modifications to Mr. Dennis R. Pierce, President of the Brotherhood of Locomotive Engineers and Trainmen (BLET), and Mr. Jeremy R. Ferguson, President of the International Association of Sheet Metal, Air, Rail, and Transportation Workers - Transportation Division (SMART-TD), by email and overnight delivery. On October 2, 2020, FRA received a jointly filed comment from BLET and SMART-TD on the program modifications.

FRA's procedures for submission and approval of programs are described in appendix B to 49 CFR part 240 (Part 240). FRA rigorously reviewed the material modifications submitted for approval, carefully considering each proposed modification, and comparing the previously approved program to the current submission. This resulted in FRA's Certification Program

¹ Texas Mexican Railway Company (Tex-Mex) and KCSM.

² *Brotherhood of Locomotive Engineers and Trainmen, et al., v. FRA, et al.*, 972 F.3d 83 (D.C. Cir. 2020).

Manager and Operating Practices Division Staff Director speaking to you about the amended Part 240 Program – to understand KCSR’s rationale for the program modifications and to discuss modifications that could strengthen the training program element’s safety procedures, which ultimately led KCSR to make additional revisions to its submission.

KCSR’s principal, material modification to its 2013 approved Part 240 Program is the addition of Section 7, which provides the procedures KCSR will follow when certifying KCSM engineers. KCSR’s purpose in certifying KCSM engineers is to allow trains to be operated between the Laredo International Rail Bridge and the Laredo Yard, approximately 9.2 miles, without switching train crews on the bridge. The track is relatively flat and operated under yard limits subject to 49 C.F.R. § 218.35, i.e., maximum speed may not exceed 20 miles per hour. KCSR clarifies in Section 7 that KCSM is an affiliate of KCSR, and that KCSM’s “transportation function” reports to KCSR’s Chief Safety Officer.

The purpose of FRA’s locomotive engineer certification regulations in Part 240 is to ensure that only qualified persons, certified by a railroad, operate a locomotive or train. FRA’s central concern is rail safety. Thus, the question that arises from the material modifications submitted by KCSR is whether any person who has not been previously certified by a U.S. railroad, but has extensive operating experience as a locomotive engineer in another country, can be certified as a locomotive engineer by a U.S. railroad through an abbreviated training program.³ FRA closely reviewed KCSR’s amended program and the comments from the unions, and determined that the amended program conforms with the requirements of Part 240 for the reasons discussed below. Accordingly, FRA approves KCSR’s revised Part 240 program.

Under FRA’s regulations, a U.S. railroad can certify a person as a locomotive engineer for operations over its railroad, even if the person works for a different railroad, and the certifying railroad is not required to be affiliated or controlled by the certifying railroad that hosts the operation.⁴ Part 240 does not limit railroads to certifying only their own employees, nor do the regulations prohibit a U.S. railroad from certifying a person from a country other than the United States. FRA understands from KCSR’s amended program and its cover letter that, for purposes of operational safety and FRA enforcement, KCSR is responsible for ensuring that KCSM trains operating in the U.S. comply with all Federal railroad safety requirements. In fact, the operation of trains by Mexican crews “shall at all times be subject to the exclusive direction and control of [KCSR].”⁵ That means that FRA will hold KCSR – the entity certifying and supervising the international crew locomotive engineers – responsible for the actions of any KCSM crewmembers operating in the United States.

³ Although Part 240 does allow a U.S. railroad to rely on determinations made by a Canadian railroad that a person meets the qualification standards issued by Transport Canada (49 C.F.R. § 240.227) as a matter of reciprocity, 56 Fed. Reg. 28228, 28250 (June 19, 1991), there is no regulatory prohibition on a U.S. railroad from certifying a person from a country other than Canada without a similar reciprocity provision. The absence of a reciprocity provision only means that a U.S. railroad must make the qualification determinations.

⁴ For example, FRA published an interpretation explaining the option for a controlling railroad to directly certify and qualify “foreign” locomotive engineers, i.e., locomotive engineers it does not employ. 73 Fed. Reg. 50883, 50884 (Aug. 29, 2008).

⁵ Interchange Agreement – Laredo, Texas, § 4(b).

Because KCSR can certify KCSM engineers, as explained above, the next question is whether KCSR can do so through an abbreviated locomotive engineer training program. This is not a novel issue. FRA addressed it in 49 C.F.R. § 240.225(a), requiring that a railroad’s certification program address how the railroad will administer the training of previously uncertified engineers with extensive operating experience or previously certified engineers whose certification expired.⁶ Although FRA regulations do not define how much experience a person must have for a railroad to accept that person into an abbreviated locomotive engineer training program, FRA finds that KCSR’s description of the prerequisites necessary to be eligible to participate in the abbreviated training program describes the type of extensive operating experience FRA would expect for such a program. *See* Modified Program at Section 7 (requiring “extensive operating experience as a KCSM engineer for a minimum of one year, operating the same type of locomotives and equipment as will be operated in the United States” and on the job training).

FRA’s approval is also based on the expectation that KCSR’s operation between the International Bridge and Laredo Yard, with KCSR-certified KCSM locomotive engineers, will maintain the same level of safety and compliance with all Federal rail safety requirements it has since July 2018. To date, no KCSM engineers were cited as the cause of any FRA reportable accident/incident, and FRA has issued no violations related to KCSM crews. As stated above, KCSR is responsible for certifying and supervising the international crew locomotive engineers and is thus responsible for the actions of any KCSM crewmembers operating in the United States.

The jointly filed comment from BLET and SMART-TD specifies four reasons why FRA should disapprove the program modifications.⁷ First, the commenters suggest that KCSR may not file a certification program on KCSM’s behalf. However, FRA finds that is not the situation; instead, as explained above, FRA finds that KCSR is submitting modifications to its Part 240 Program on its own behalf.

Second, the commenters claim that FRA lacks the authority to approve a certification program that permits KCSM locomotive engineers to be considered as having been previously certified

⁶ When this requirement became effective, FRA explained that it:

is providing a railroad with the opportunity to shorten the on-the-job training that might be required if a person is treated as having no operational experience. If a railroad’s certification program fails to specify how to train a previously certified engineer hired from another railroad, then the railroad shall require the newly hired engineer to take the hiring railroad’s entire training program. By articulating both the problem and mandating a safe solution, it is FRA’s position that this modification will save resources.

64 FR 60966, 60979-60980 (Nov. 8, 1999).

⁷ In addition, the commenters made two requests that go beyond this program approval process. First, the commenters request that FRA order that crew translators are train employees within the meaning of the law and, therefore, are subject to FRA’s Hours of Service requirements. However, even if FRA could issue such an order, FRA is not presented with enough facts to make a specific determination; the application of the Hours of Service laws would depend on the nature of the work, if any, performed by the translators. Second, the commenters request that FRA conduct a public hearing on KCSR’s submission. FRA declines to hold a public hearing; none are provided for by the certification program approval process established by Part 240. Further, FRA does not agree with the commenters that the program raises significant safety concerns that would benefit from additional public comment.

based on their Mexican service. The commenters' concern appears to arise from references in Section 7 of the amended program that contain references to Sections 3 and 4, which apply to training, testing, and evaluating persons previously certified as locomotive engineers. FRA personnel discussed this issue with KCSR and understands that KCSR intends the references to Sections 3 and 4 to illustrate the types of procedures KCSR will use when certifying engineer candidates with extensive operating experience for its international operations. FRA further understands that KCSR did not intend to identify Mexican engineers as previously certified. With this understanding, FRA finds that this issue is adequately addressed in the approved version of the amended program.

Third, the commenters raise a concern that, under 49 C.F.R. § 240.127, the skills performance test (also known as a "check ride") for initially certifying a KCSM student engineer as a KCSR engineer is inferior and inadequate, as the program requires only a two-hour check ride, while the program requires a four-hour check ride for initially certifying non-KCSM student engineers considered for promotion to train service engineers and yard service engineers. However, the commenters fail to mention that KCSR's amended program only requires a two-hour check ride for initially certifying non-KCSM train service engineers and yard service engineers with extensive operating experience. Accordingly, FRA concludes that the two-hour check ride length for KCSM student engineers with extensive operating experience is appropriate, as it equals the amount of time KCSR's Part 240 program requires for initially certifying non-KCSM train service engineers and yard service engineers with extensive operating experience.

Fourth, the commenters believe the amended program fails to contain a requirement that a KCSM engineer certified by KCSR be operationally fluent in English, and that the "Crew Kit"⁸ is flawed. However, it is apparent that KCSR has already considered the matter of ensuring adequate communications, by providing for the use of translators, which the commenters noted in their submission. Also, KCSM is under a contractual obligation to "arrange for at least one [Mexican crewmember operating in the United States] ... to engage in radio communication with KCSR in English and Spanish."⁹ FRA does not require the use of translators by regulation. Instead, FRA finds that KCSR is required to abide by all Federal rail safety requirements, including proper radio and dispatching procedures. Compliance with railroad radio communications is an issue FRA regulates in 49 C.F.R. part 220, and is not addressed by this Part 240 program review. Further, although the Crew Kit was submitted with the amended program, KCSR made it clear that it was not part of the amended program and, thus, FRA did not consider it part of the amended program submission and did not approve it.

⁸ KCSR submitted with its amended program a 107-page document titled "International Crew Phase 1 Crew Kit," dated October 2018. The Crew Kit states that:

the purpose of Phase 1 is to test the operation of trains by the International Crew in Laredo and Nuevo Laredo interchange based on compliance with all United States government regulations and KCS Company policies. The goal for the International Crew project is to create a new operational model at the Laredo International Rail Bridge that eliminates crew changes to allow trains to move in transit from Mexico to the U.S., and vice versa, reducing border congestion and increasing throughput at each location. This includes creating and testing the processes and procedures that the International Crew will use during the Phase 1 testing timeframe.

Crew Kit at 3.

⁹ See Interchange Agreement – Laredo, Texas, § 4(e).

Based on FRA's analysis and railroad safety expertise, FRA finds that KCSR's amendments, revised as of October 6, 2020, to its Part 240 program are consistent with safe operations and are hereby approved. Further, the safety record of operations since July 2018, discussed above, gives FRA the confidence that KCSR can implement the training program in a manner that will result in safe operations. However, if this level of safety or compliance with Federal rail safety requirements changes, FRA reserves the right to reopen consideration of FRA's approval of KCSR's program.

I request that, upon receipt of this letter, you provide a copy of the approved version of the amended program, to Messrs. Pierce and Ferguson. Should you have any questions regarding this letter, please contact Mr. Kevin Lewis, FRA's Certification Program Manager at (918) 557-0651 or FRAOPCERTPROG@dot.gov.

Sincerely,

Carolyn Hayward-Williams
Director, Railroad Systems, Technology, & Automation

cc: Mr. Dennis R. Pierce, President-BLET; pierce@ble-t.org
Mr. Jeremy R. Ferguson, President-SMART-TD; jferguson@smart-union.org