

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

Locomotive Engineer Review Board

Decision Concerning
Kansas City Southern Railway's
Revocation of Mr. S. E. Lott's
Locomotive Engineer Certification

FRA Docket Number EQAL 2010-28

Decision

The Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the decision of the Kansas City Southern Railway (KCS) to revoke Mr. S.E. Lott'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 KCS'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 June 28, 2010, at approximately 8:53 a.m., Petitioner was operating Train M-SHCN-28 on KCS's Vicksburg Subdivision. Petitioner was operating the train near Milepost (MP) 27.7 when the train allegedly passed a yellow flag placed next to the track as part of an operating test being performed by KCS officers. Pet. at 3. After passing the yellow flag, Petitioner allegedly failed to slow his train to 10 miles per hour (MPH) as required, and was still traveling approximately 40 MPH, 2.1 miles later. Tr. at 11. Petitioner was then removed from service.

KCS charged Petitioner with a violation of 49 C.F.R. § 240.117(e)(2), "failure to adhere to limitations concerning train speed when the speed at which the train was operated exceeds the maximum authorized limit by at least 10 miles per hour." Pet. at 3. An investigation and hearing was held on July 6, 2010, and KCS notified Petitioner of the decertification by letter dated July 14, 2010. Pet. Ex. 2.

Petitioner's Assertions

Petitioner filed a petition with FRA requesting that the Board review KSC's decision to revoke his certification. The petition was received on July 26, 2010 and was timely filed.

The petition asserted the revocation was improper for the following reasons:

- 1) Petitioner should not have been decertified because the operations test was conducted improperly. Operating rule 5.4.4 provides that an unannounced yellow flag can only be used on track with an operating speed of 40 MPH or less. Pet. at 3-7;
- 2) The test was also not conducted properly because the yellow flag was improperly placed. The yellow flag was put just at the end of a curve which only allowed a 10-15 second window for Petitioner to observe the flag. At this point, Petitioner was focused on a block signal, while also sounding the horn for a highway-rail grade crossing. These circumstances took his focus away from the flag. Pet. at 9;
- 3) The testing officers lack credibility based on inconsistencies in their testimony. Pet. at 9-10; and
- 4) KCS failed to prove that Petitioner violated any rule at MP 25.7. Pet. at 10-11. In the Notice of Investigation letter, Petitioner was accused of failing to comply with a yellow flag placed at MP 25.7. However, at the hearing on July 6, 2010, railroad supervisors changed the place where the violation occurred as stated in the Notice of Investigation letter from MP 25.7 to MP 27.7. Pet. at 11.

KCS Response

Pursuant to 49 C.F.R. § 240.405(b), (c), a copy of the petition was sent to KCS, and the railroad was afforded an opportunity to comment. KCS responded to Petitioner's assertions by letter dated August 18, 2010, as follows:

- 1) The operating test was conducted according to operating rule 5.4.2, and was conducted properly. Operating rule 5.4.4., introduced by Petitioner, is not relevant because it is not used on any of the KCS subdivisions. Resp. at 1;
- 2) While the duties of an engineer may be demanding, it is reasonable to expect that an engineer will comply with all operating rules. The flag was placed in the same proximity of a signal and a crossing, so it seems logical that the crew would be looking out for those things and also notice the yellow flag simultaneously. Resp. at 1;
- 3) The KCS officers who conducted the operations test used no unethical tactics. The charges regarding the conduct of its officers by Petitioner are "unwarranted and absurd." Resp. at 2; and
- 4) The event recorder data is reliable, however due to the FIRE software installed on EMD locomotives, the wheel size cannot be adjusted, resulting in a slight inconsistency in speed. If the times are compared, rather than the distance, the speed variance remains at 1 MPH. In addition, the MP discrepancy was merely a typographical error, which was not discovered until the investigation commenced.

The error is inconsequential because the Notice of Investigation letter states that the violation occurred “at or near” MP 25.7. Resp. at 1-2.

Board’s Determination

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

- 1) On June 28, 2010, at approximately 8:53 a.m., Petitioner was operating Train M-SHCN-28 on the Vicksburg Subdivision near MP 27.7. Pet. at 3;
- 2) Petitioner passed a yellow flag at approximately MP 27.7. Pet. at 3. The yellow flag was displayed as part of an operating test being conducted by KCS officers. Tr. at 11. The yellow flag required Petitioner to slow his train to 10 MPH within a distance of two miles, per operating rule 5.4.2B. Tr. at KCS Ex. 8;
- 3) Approximately two miles after passing the yellow flag, Petitioner had not slowed his train and was still traveling at approximately 40 MPH. Tr. at 11; and
- 4) The KCS officers who conducted the operations test went back to the point where the yellow flag was placed after the test and confirmed that it was still present. Tr. at 11. See also, Tr. at 27. The officers also downloaded the locomotive’s event recorder after the incident, information from which confirmed Petitioner did not slow his train to 10 MPH as required after passing a yellow flag. Tr. at Ex. 6 and 7.

Analysis

Petitioner’s first, third and fourth assertions raise factual issues. “When considering factual issues, the Board will determine whether there is substantial evidence to support the railroad’s decision, and a negative finding is grounds for dismissal.” 58 Fed. Reg. 18982, 19001 (April 9, 1993). The Board finds that KCS’s decision was supported by substantial evidence.

First, Petitioner asserts that the unannounced yellow flag test should not have been conducted on this territory according to GCOR Operating Rule 5.4.4. Pet. at 3-7. Rule 5.4.4 states:

5.4.4 Authorized Protection by Yellow or Yellow-Red Flag

On subdivisions where the maximum speed does not exceed 40 MPH, and it is authorized by special instructions, yellow or yellow-red flags may be displayed without the use of track bulletins, track warrants or flagman. Yellow or yellow-red flags must be displayed 2 miles before the restricted area. Protection will begin at a point 2 miles beyond the yellow or yellow-red flag and continue for 2 more miles, as outlined in Rule 5.4.2 (Display of Yellow Flag) and Rule 5.4.3 (Display of Yellow-Red Flag). Tr. Ex. B.L.E.-2.

The maximum speed for the Vicksburg Subdivision is 55 MPH. Tr. at 15. Petitioner argues that since this rule only allows yellow flag use in territories where the maximum speed is 40 MPH, the railroad was not allowed to use a yellow flag in this territory and the test is void.

However, this argument is misguided. Since the maximum authorized train speed on the Vicksburg Subdivision exceeds 40 MPH, operating rule 5.4.4 does not apply to the Vicksburg Subdivision at all. Rule 5.4.4. only applies to subdivisions where the maximum speed is less than 40 MPH and when it is specified by certain timetables. Since the maximum speed for the Vicksburg subdivision is 55 MPH, Rule 5.4.4. does not control. Instead, Petitioner is charged with violating operating rule 5.4.2B, which does apply to the Vicksburg subdivision, and allows for a yellow flag to be used in this instance. See Tr. KCS Ex. 8, and Pet. at 4. Thus, the Board rejects Petitioner's argument and finds there is substantial evidence for KCS revocation.

Petitioner also argues that the testing officers lack credibility because their testimony contains inconsistencies. Petitioner believes that their testimony should not supersede the credibility of his own testimony. Pet. at 9-10. The Board does not find Petitioner's argument persuasive. Minor discrepancies in testimony are not unusual, and the record does not support a finding that the supervisors fabricated their testimony at the hearing. None of Petitioner's suggested "inconsistencies" have any real substantive effect on whether or not Petitioner passed the yellow flag at a speed exceeding 10 MPH. Thus, the Board rejects Petitioner's argument.

Next, the Petitioner argues that KCS failed to prove that Petitioner violated any rule at MP 25.7. Pet. at 10-11. In the Notice of Investigation letter KCS sent to Petitioner, Petitioner was accused of failing to comply with a yellow flag placed at MP 25.7. However, at the hearing on July 6, 2010, railroad supervisors changed the place where the violation occurred as stated in the Notice of Investigation letter from MP 25.7 to MP 27.7. Pet. at 11. The Board finds that the Petitioner has failed to show how this typographical error caused him substantial harm as the overall charge applied to the same alleged violation.

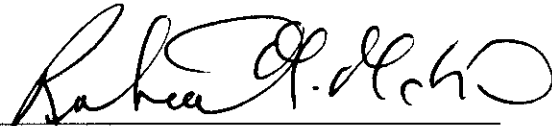
Petitioner's final assertion involves an intervening cause. In determining whether revocation was proper under FRA's regulations, the Board considers whether "an intervening cause prevented or materially impaired the locomotive engineer's ability to comply with the railroad operating rule or practice which constitutes a violation under §§ 240.117(e)(1) through (e)(5) of this part." 49 C.F.R. § 240.307(i)(1). Petitioner argues that he should not be held responsible for the alleged violation considering that the yellow flag was improperly placed. Petitioner states that the yellow flag was put just at the end of a curve which only allowed a 10-15 second window for Petitioner to observe the flag. At this point, Petitioner was focused on a block signal, while also sounding the horn for a highway-rail grade crossing. Petitioner argues that these circumstances took his focus away from the flag. Pet. at 9.

The Board finds this assertion without merit. KCS supervisors testified that they placed the flag in the proper location at the track bed and walked back to determine that the flag was not obstructed. Tr. at 13 and 14. While the Board recognizes the demanding nature of Petitioner's job, the Board does not believe that the presence of a signal or a crossing in the same proximity of a flag should have hindered Petitioner's ability to observe and comply with it.

Conclusion

Based on its review of the record and the above findings, the Board hereby denies the petition in accordance with the provisions of 49 C.F.R. Part 240.

Issued in Chicago, IL on JAN 19 2011.



Richard M. McCord
Chairman,
Locomotive Engineer Review Board

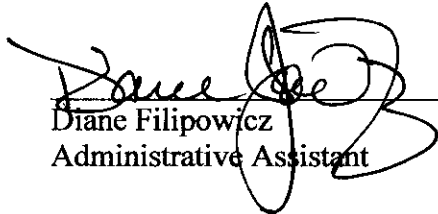
SERVICE LIST EQAL 2010-28

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

Mr. S.E. Lott
368 Fontaine Circle
Shreveport, LA 71105

Mr. J. R. Koonce
General Chairman
General Committee of Adjustment, BLE&T
5909 Shelby Oaks Dr., Suite 139
Memphis, TN 38134-7318

Mr. L.E. Jamerson, Jr.
General Director, Standardization and Training
Kansas City Southern Railway
4601 Shreveport-Blanchard Highway
Shreveport, LA 71107


Diane Filipowicz
Administrative Assistant

JAN 19 2011

Date

enc: Post LERB Memo

cc: FRA Docket EQAL 2010-28

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1. Article Addressed to:

Mr. S.E. Lott
368 Fontaine Circle
Shreveport, LA 71105

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2. Article Number
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1. Article Addressed to:

Mr. J. R. Koonce
General Chairman
General Committee of Adjustment, BLE&T
5909 Shelby Oaks Dr., Suite 139
Memphis, TN 38134-7318

EGAL 2010-28

2. Article Number
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1. Article Addressed to:

Mr. L.E. Jamerson, Jr.
General Director, Standardization and Training
Kansas City Southern Railway
4601 Shreveport-Blanchard Highway
Shreveport, LA 71107

EGAL 2010-28

2. Article Number
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4. Restricted Delivery? (Extra Fee) Yes