

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

Locomotive Engineer Review Board

Review and Determinations Concerning
Kansas City Southern Ry. Co.'s
Decision to Revoke Mr. T. L. Pearson's
Locomotive Engineer Certification

FRA Docket No. EQAL 2010-33

Decision

The Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the decision of Kansas City Southern Ry. Co. (KCS) to revoke Mr. T. L. 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 has determined that KCS's decision to revoke Petitioner's certification was improper under 49 C.F.R. Part 240, and therefore grants the petition for the reasons set forth below.

Background

By letter dated July 12, 2010, Petitioner was notified to attend a formal investigation on July 16, 2010, to develop the facts and determine his responsibility, if any, for his "alleged failure to stop short of an unattended burning fusee placed between the rails of Main Track Hollywood #2 at the North end of Harriet Street Yard." The letter explained that this alleged incident occurred while he was working on Train MJASH-07 at approximately 9:15 a.m. on July 8, 2010, near Shreveport, LA, mile post 557, and that he had been removed from service that day pending the results of a formal investigation. By separate letter dated July 14, 2010, Petitioner was also notified that his certification had been suspended in accordance with 49 C.F.R. § 240.117(e)(1), and that the investigation scheduled for July 16, 2010, would serve as a consolidated hearing to make a determination as to his locomotive engineer qualifications.

A hearing was held on July 16, 2010, and by letter dated July 19, 2010, Petitioner was notified that he had been found to have violated KCS's General Code of Operating Rules (GCOR) 6.27 – Movement at Restricted Speed – and 5.4¹ – Flags for Temporary Track Conditions. The letter stated that, for his violation of these rules and in consideration of his prior discipline history, he was assessed a 60-day suspension—a 30-day actual suspension, and a 30-day record suspension.

¹The record indicates that the reference to GCOR Rule 5.4 was a typographical error and should have been to Rule 5.6 – Unattended Fusee.

The letter also informed Petitioner that for a period of one month, retroactive from July 9, 2010, his certification as a train service engineer was revoked in accordance with 49 C.F.R. § 240.117(e)(1).

On August 9, 2010, a petition was timely filed on behalf of Petitioner requesting that FRA review KCS's decision to revoke Petitioner's certification. The petition asserts that the revocation was improper for several reasons. In particular, the petition asserts that KCS's decision to revoke Petitioner's certification was improper because:

KCS conducted an improper operational test. KCS's Program of Operational Testing explicitly provides that when conducting tests with a stationary fusee, the tests must be performed at night only. Here, KCS conducted a test with a stationary fusee during the daytime. Holding an operational test that is not conducted in compliance with the railroad's operational testing program under 49 C.F.R. § 217.9 cannot be considered a legitimate test for purposes of revoking Petitioner's certification, as provided in 49 C.F.R. § 240.117(f)(3).

Pursuant to 49 C.F.R. § 240.405(b) and (c), a copy of the petition was sent to KCS and the railroad was afforded an opportunity to comment. KCS responded as follows:

KCS does not dispute what its operational testing program provides for conducting tests with stationary fusees. However, this program was written for all operating officers, including those who do not have an abundant amount of tenure, or exposure to operational testing, ensuring operational tests are not compromised by a less experienced officer. Furthermore, such operational testing guidelines are provided to carrier officers for the purpose of determining the knowledge and skill level of employees, and not vice-versa. The operational test in question was performed by a group of seasoned officers, and KCS believes that the test was performed in a fair manner with no malice intended. Operational tests are designed to mimic potential circumstances, and flag protection under GCOR Rule 6.19 does not specify a time period in which fusees may be used. KCS contends that reasonable sight distance was provided for the burning fusee, and emphasizes that this occurred in restricted speed territory.

Board's Determinations

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

- (1) On July 8, 2010, Petitioner was the engineer of Train MJASH-07, operating together with a conductor in freight service between Jackson, MS, and Shreveport, LA;
- (2) While heading into Shreveport Terminal, Petitioner's train approached three KCS supervisors at the north end of Harriet Street who were conducting operational tests. At approximately 9:10 a.m, one of the supervisors placed a lighted fusee between the rails of the

main track on which Petitioner was operating. Tr. at 12;

(3) At approximately 9:15 a.m., Petitioner's train passed the fusee. The head end of Petitioner's locomotive stopped approximately 60 feet from where the fusee had been placed. Tr. At 13;

(4) The operation of Petitioner's train was subject to GCOR Rule 5.6, Unattended Fusee (Sixth Edition, April 7, 2010). GCOR Rule 5.6 states, in part: "If a train approaches an unattended fusee burning on or near its track, the train must stop consistent with good train handling." Tr. at KCS Exhibit #6;

(5) KCS revoked Petitioner's certification under the provisions of § 240.117(e)(1), which concerns operating rule violations involving the failure to control a locomotive or train in accordance with a signal indication that requires a complete stop before passing it;

(6) Section 240.117(f)(3) provides:

An operational test that is not conducted in compliance with this part [49 C.F.R. Part 240], a railroad's operating rules, or a railroad's program under § 217.9 of this chapter [II], will not be considered a legitimate test of operational skill or knowledge, and will not be considered for certification, recertification or revocation purposes;

(7) KCS's Program of Operational Testing, effective January 1, 2010, contains a section on general testing instructions and responsibilities. One of the enumerated provisions explicitly states: "When conducting tests with stationary fusee [,] test must be performed at night only." See Section 6, Paragraph L. Tr. at BLE Exhibit #4;

(8) KCS's Program of Operational Testing is required by FRA regulation at § 217.9; and

(9) The unattended fusee test administered to Petitioner was not conducted at night. The test was conducted at 9:15 a.m. on an early July day.

Analysis of the Petition

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

Here, the salient facts are not in dispute. KCS supervisory personnel conducted an unattended fusee test involving the placement of a fusee between the rails on the track ahead of Petitioner’s train, and Petitioner operated his train past the fusee before stopping. However, the issue before the Board is not whether Petitioner should have stopped his train before passing the fusee. The fundamental issue is whether Petitioner’s conduct constituted an operating rule violation that KCS could properly consider for purposes of revoking his certification under the provisions of Part 240. The Board finds that it did not.

The evidence in the record plainly shows that the operational test administered to Petitioner was not conducted in accordance with the railroad’s own program of operational testing under § 217.9. KCS’s program explicitly provides that unattended fusee tests must be conducted at night only. There is no ambiguity in this provision, nor is there any contention in the record that the fusee test administered here was conducted at night.

Because the operational test administered to Petitioner was not conducted in accordance with the railroad’s operational testing program under § 217.9, the test may not be considered a legitimate test of operational skill or knowledge, and may not be considered for certification, recertification or revocation purposes, pursuant to § 240.117(f)(3). There is no need for the Board to go any further into the allegations and arguments raised in this matter.

Conclusion

For the foregoing reasons, the Board finds that KCS’s decision to revoke Petitioner’s certification under the provisions of 49 C.F.R. Part 240 is not supported by substantial evidence. The record does not establish that Petitioner’s conduct during an operational test resulted in an operating rule violation that may be considered for purposes of 49 C.F.R. § 240.117. Based on its review of the record, the Board hereby grants the petition in accordance with the provisions of 49 C.F.R. Part 240.

Issued in Chicago, Illinois on APR 12 2011.



Richard M. McCord
Chairman,
Locomotive Engineer Review Board

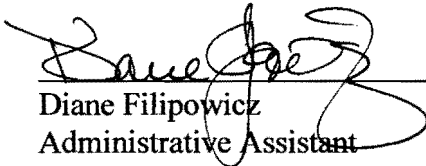
SERVICE LIST EQAL 2010-33

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

Mr. Torrish L. Pearson
P.O. Box 715
Gibbsland, LA 71028

Mr. J. R. Koonce
General Chairman
Brotherhood of Locomotive Engineers
and Trainmen
5909 Shelby Oaks Dr. – Suite #139
Memphis, TN 38134-7318

Mr. L. E. Jasmeson Jr.
Gen. Dir. Standardization and Training
Kansas City Southern Ry. Co.
4601 Shreveport-Blanchard Highway
Shreveport, LA 71107-5797



Diane Filipowicz
Administrative Assistant

APR 12 2011

Date

enc: Post LERB Memo

cc: FRA DOCKET NO. EQAL 2010-33

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1. Article Addressed to:

Mr. Torrish L. Pearson
P.O. Box 715
Gibsland, LA 71028

EQUAL 2010-33

2. Article Number

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PS Form 3811, February 2004

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

EQUAL 2010-33

2. Article Number

(Transfer from service label)

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Mr. L. E. Jasmeson Jr.
Gen. Dir. Standardization and Training
Kansas City Southern Ry. Co.
4601 Shreveport-Blanchard Highway
Shreveport, LA 71107-5797

EQUAL 2010-33

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