

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

Locomotive Engineer Review Board

Decision Concerning
Kansas City Southern Railroad Company's
Revocation of Mr. Bryant Scallorn's
Locomotive Engineer Certification

FRA Docket Number EQAL-2011-47

Decision

The Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the decision of Kansas City Southern Railroad Company (KCS) to revoke Mr. Bryant Scallorn'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 determines that KCS's decision to revoke the Petitioner's certification was proper for the reasons set forth below.

Background

On September 13, 2011, at approximately 8:20 a.m., while operating Train No. MSHNS-12 (Train 12), Petitioner allegedly violated KCS's General Code of Operating Rules 9.5, "Where Stop Must Be Made" by failing to stop short of an absolute stop signal. Consequently, KCS asserts that Petitioner violated Federal railroad safety law 49 C.F.R. § 240.117(e)(1), failing to control a locomotive or train in accordance with a signal indication.

A petition post marked December 28, 2011, was timely filed with FRA by the Petitioner, requesting that FRA review KCS's decision to revoke Petitioner's certification. The petition asserts that the revocation was improper for the following reasons:

- (1) Procedural errors denied Petitioner his right to a fair hearing and caused him substantial harm. Specifically, KCS failed to comply with 49 C.F.R. § 240.307(c)(10) issuing its decision more than 10 days after the close of the record.
- (2) KCS failed to produce substantial evidence that Petitioner violated 49 C.F.R. §240.117(e)(2).

- (a) Petitioner and the assigned locomotive engineer for Train 12, Mr. Fonville, each testified that the signal at MP 29.5 displayed a medium approach indication (flashing yellow), which KCS failed to refute.
- (b) KCS failed to produce the video from the lead locomotive, KCS 4035, which is an essential piece of evidence in establishing the signal indication at MP 29.5.
- (c) Mr. Jones's, Director of Engineering Projects, testimony that the signal at MP 29.5 could not have displayed a medium approach is not supported by sufficient, verifiable evidence as it lacked any identifying information to confirm that the downloads were authentic.

Pursuant to 49 C.F.R. § 240.405(b) and (c), a copy of the petition was sent to KCS on January 4, 2012, and the railroad was afforded an opportunity to comment. KCS filed a timely response dated January 16, 2012, with FRA. The response asserts that the revocation was proper for the following reasons:

- (1) Petitioner did not suffer any substantial harm as a result of any procedural errors. Per 49 C.F.R. § 240.307(d), so long as the carrier complied with the collective bargaining agreement (CBA), the CBA applied and, as such, provided the carrier 15 calendar days, rather than 10, to make a decision.
- (2) KCS presented substantial evidence that the Petitioner violated the carrier's operating rules and the Federal regulations.
 - (a) Petitioner and Mr. Fonville testified that the train passed the signal at MP 27 displaying a stop indication.
 - (b) Mr. Jones testified that the signal was working properly and could not display a medium approach signal.
 - (c) Mr. Jones has many years of experience and is qualified to address the functioning of the signal.

Locomotive Engineer Review Board's Determination

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

- (1) On September 13, 2011, Petitioner was a conductor and demoted engineer. Tr. at 42.

- (2) On September 13, 2011, Petitioner was called in as the conductor on east bound Train 12, on the Vicksburg Sub-division of the KCS property. Tr. at 11.¹
- (3) At the time of the event, Petitioner was operating Train 12 as the engineer. Tr. at 34, 35, 37.
- (4) Petitioner placed the train in emergency and passed the signal at MP 27 at approximately 8:20 a.m. Carrier Ex.2, 3; Tr. at 15, 17.
- (5) The signal at MP 27 displayed a stop signal. Carrier Ex. 4, 46.
- (6) Train 12 was traveling at 38 miles an hour and came to rest approximately 1,200 feet after the emergency application was initiated. Tr. at 17.
- (7) Train 12 slowed from 39 miles per hour to 38 miles per hour prior to being placed into emergency. Carrier Ex. 5; Tr. at 21.
- (8) Petitioner recorded on the KCS Form 4751, Kansas City Southern Railway Company Conductor and Engineer Report, that the intermediate signal at MP 29.5 displayed a medium approach. Carrier Ex. 4.
- (9) Mr. Fonville testified that the intermediate signal at MP 29.5 displayed a medium approach. Tr. at 13, 39, 43.
- (10) Dispatcher log indicates that the intermediate signal at MP 29.5 displayed an approach signal when Train 12 passed it at approximately 8:13:36 a.m. Carrier Ex. 9; Tr. at 24.
- (11) Dispatcher log did not indicate that the intermediate signal at MP 29.5 had received a code for medium approach. Carrier Ex. 9; Tr. at 29.
- (12) The lead locomotive, KCS 4035, was equipped with a video camera. Tr. at 33.
- (13) The intermediate signal at MP 29.5 is not capable of displaying a medium approach. Tr. at 26.
- (14) KCS performed a field test to ensure that the intermediate signal at MP 29.5 showed approach when the signal at MP 27 showed a stop indication. Tr. at 25.
- (15) A hearing was held on September 22, 2011. Tr. at 4.

¹ Petitioner testified, as did Mr. Fonville, that the Petitioner was acting as the engineer at the time of the incident. The Board, however, notes that the record is unclear as to why, and at what time, the Petitioner took over this role from Mr. Fonville, the assigned engineer.

(16) **49 C.F.R. § 240.307(d)**

A hearing required by this section which is conducted in a manner that conforms procedurally to the applicable collective bargaining agreement shall be deemed to satisfy the procedural requirements of this section.

(17) **Rule 34: Section D. Hearing Decision**

If the formal hearing results in assessment of discipline, such decision shall be rendered within fifteen (15) calendar days from the date the hearing is concluded, and the employee shall be notified in writing of the reason therefore by certified or registered U.S. Mail with additional copy provided for the employee representatives. BLET Ex. 1.

(18) KCS sent Petitioner a letter dated October 7, 2011, notifying him of the decision to revoke Petitioner's certification. Petitioner Ex. 1.

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 (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).

Based on its review of the information provided, the Board finds that there is substantial evidence to support KCS's decision, that any procedural errors did not cause the Petitioner substantial harm, and that an intervening cause did not prevent or impair the Petitioner's ability to comply with the railroad operating rules and practices. With regards to the claim of procedural error, the Board concluded that KCS conducted the hearing in a manner that was consistent with the CBA by issuing the decision within 15 days and, as such, the procedural requirements of 49 C.F.R. § 240.307 were satisfied with regard to issuing a decision within the required time period. Moreover, Petitioner failed to demonstrate how the any procedural error(s) caused him substantial harm.

The Board also concluded that KCS presented substantial evidence that the intermediate signal at MP 27.5 displayed an approach indication and, as such, Petitioner failed to control Train 12 in a manner that would allow him to comply with the stop signal at MP 27. To support its determination that Petitioner received an approach signal at MP 29.5, KCS relied upon (1) the dispatcher log indicating that the intermediate signal displayed an approach signal, (2) Mr. Jones's testimony that the intermediate signal could not display a medium approach signal and (3) the result of its field test confirming that the intermediate signal displayed an approach signal when the signal at MP 27 displayed a stop signal. Finally, both Petitioner and Mr. Fonville testified that they failed to stop Train 12 from passing the stop signal at MP 27. Consequently, the Board hereby denies the petition in accordance with the provisions of 49 C.F.R. Part 240.

Issued this day in Chicago, IL JUN 19 2012.



Richard M. McCord
Chairman,
Locomotive Engineer Review Board

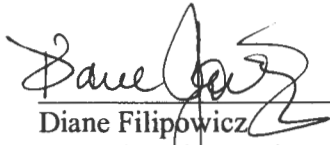
SERVICE LIST EQAL-2011-47

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

James P. Herndon
General Chairman, GO 436
United Transportation Union
260 Regency Centre
Collinsville, IL 62234

Bryant Scallorn
239 Easy Street
Braxton, MS 39044

L.E. Jameson Jr.
General Director Standardization and Training
Kansas City Southern Railway Company
4601 Shreveport Blanchard Highway
Shreveport, Louisiana 71107-5797



Diane Filipowicz
Administrative Assistant

JUN 19 2012

Date

enc: Post LERB Memo

cc: FRA Docket EQAL-2011-47

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:

James P. Herndon
 General Chairman, GO 436
 United Transportation Union
 260 Regency Centre
 Collinsville, IL 62234

EQAL 2011-47

2. Article Number
 (Transfer from service label) 7011 0470 0002 1248 1321

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
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

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- 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:

Bryant Scallorn
 239 Easy Street
 Braxton, MS 39044

EQAL 2011-47

2. Article Number
 (Transfer from service label) 7011 0470 0002 1248 1314

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
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

SENDER: COMPLETE THIS SECTION

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1. Article Addressed to:

L.E. Jameson Jr.
 General Director Standardization and Training
 Kansas City Southern Railway Company
 4601 Shreveport Blanchard Highway
 Shreveport, LA 71107-5797

EQAL 2011-47

2. Article Number
 (Transfer from service label) 7011 0470 0002 1248 1307

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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
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes