

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

Locomotive Engineer Review Board

Decision Concerning  
Union Pacific Railroad Company  
Revocation of Mr. J. S. McCasland  
Locomotive Engineer Certification

**FRA Docket Number EQAL 2012-17**

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**Decision**

The Locomotive Engineer Review Board (Board) of the Federal Railroad Administration (FRA) has reviewed the decision of Union Pacific Railroad Company (UP) to revoke Mr. J. S. McCasland'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 grants the petition for the reasons stated below.

**Background**

On January 11, 2012, Petitioner operated the lead unit UP4879 on Train MNPPC over the Pocatello Subdivision. See Tr. at 15, 26. Near Nugget, Wyoming (MP50), the Manager of Operating Practices (MOP) conducted a Field Testing Exercise (FTX) banner test. See Resp. at 1; Tr. at 15. When the MOP boarded the train to tell the crew of the test results, he noticed that a "Speed Recorder Wheel Size" sticker was attached to the alerter device's speaker. See Tr. at 15. After interviewing the crew, the MOP determined the engineer had not performed a proper inspection of the locomotive resulting in an alleged violation of General Code of Operating Rules (GCOR) 1.23.1 and System Special Instructions 1.21. See Pet. at 3; Tr. at 16.

UP charged Petitioner with a violation of 49 C.F.R. 240.117(e)(5) – tampering with locomotive mounted safety devices or knowingly operating or permitting to be operated a train with an unauthorized disabled safety device in the controlling locomotive. An investigation and hearing was held on January 26, 2012. UP notified Petitioner by letter dated February 2, 2012 that his certificate had been revoked.

**Petitioner's Assertions**

Mr. McCasland filed a petition with FRA on his own behalf, requesting that the Board review UP's decision to revoke Petitioner's certification. The petition was received on May 9, 2012 and was timely filed. The petition asserts that the revocation was improper because:

- (1) Petitioner asserts that UP never charged him with physically tampering with a locomotive safety device or knowingly operating a locomotive with an obstructed audible indicator. See Pet. at 2.
- (2) Petitioner asserts that the railroad failed to prove that Petitioner tampered with the device. See Pet. at 2. During the trip, Petitioner noted no exception to the operation of the safety alerter device indicator. See Pet. at 1-2; Tr. at 29. The safety alerter device is located in various locations on different locomotive models making it difficult to know the exact location of the devices on every locomotive. See Pet. at 3; Tr. at 35.
- (3) UP has never provided alertness device locations nor have the locations of the devices ever been labeled. See Pet. at 3; Tr. at 38.

### UP's Response

Pursuant to 49 C.F.R. § 240.405(b) and (c), a copy of the petition was sent to UP on May 9, 2012 and the railroad was afforded an opportunity to comment. UP submitted a timely response to Petitioner's assertions by letter dated March 23, 2012, as follows:

- (1) Petitioner was notified via Notice of Investigation that charged that Petitioner failed to make a visual inspection of an accessible safety device in the controlling locomotive of the train that Petitioner was operating. See Resp. at 2. The charge letter and Notification of Certificate Revocation correctly identified the GCOR and FRA regulation Petitioner was alleged to have violated. See Resp. at 2, Tr. at 8.
- (2) Crew alertness devices are mounted in an area where they are both visible and audible to the operating engineer and his conductor. See Resp. at 3. While each alerter is mounted in a slightly different area within the crew cab of each locomotive, all crew alertness devices are mounted where they can easily be seen and heard by the operating crew. See Resp. at 3. Petitioner's assertion that he was unaware of the location or that he was not able to readily discern its location does not align with his statements during the investigation. Petitioner stated that he acknowledged the alerter every time the red light flashed; demonstrating that he was aware of the alerter's location. See Tr. at 33-34, 36. Further, Petitioner is required to inspect safety devices to ensure that they are working properly and that nothing will interfere with the functioning of the devices. See Resp. at 4.
- (3) Petitioner states that his certification has been revoked based solely on a rule and regulation that he has not been properly trained to comply with. See Resp. at 4. However, Petitioner is a veteran engineer with eight years of experience and has performed daily inspections on a multitude of locomotives. See Resp. at 4. It can be assumed that Petitioner has attended periodic training and recertification instruction and is aware of the operation, location, and rules governing inspection of alertness devices.

### **Board's Determination**

- (1) On January 11, 2012, Petitioner served as the locomotive engineer of Train MNPPC-10, UP4879 over the Pocatello Subdivision. See Pet. at 1; Tr. at 7.
- (2) Upon boarding the train, Petitioner completed a visual inspection of the lead locomotive, UP 4879, verifying that the required daily inspections had been completed. See Pet. at 2; Resp. at 1, Tr. at 29.
- (3) As the Petitioner's train reached the Nugget, Wyoming vicinity at MP 50, the MOP on duty performed a FTX banner test. See Tr. at 15, 28. The crew complied and passed the test. See Tr. at 15.
- (4) At approximately 12:30 p.m., the MOP who had performed the FTX banner test boarded the train to discuss the test results with the crew. See Resp. at 1; Tr. 15, 28. The MOP noticed a "Speed Recorder Wheel Size" sticker affixed to the alerter's speaker. See Pet. at 1; Resp. at 1; Tr. at 15, 28.
- (5) The MOP interviewed the crew and determined that Petitioner had not performed a proper inspection of the locomotive. See Tr. at 16, 20, 29, Ex. 7.
- (6) Although the "Speed Recorder Wheel Size" sticker was affixed to the alerter speaker, Petitioner was able to acknowledge the alerter and prevent the train from going in to a penalty application. See Pet. at 1, Tr. at 36.
- (7) The MOP notified Petitioner of the alleged violation and removed the crew from service pending a formal investigative hearing, which was held on January 26, 2012. See Ex. 1.

### **Analysis of the Petition**

Petitioner's second assertion involves three substantive factual issues. In reviewing a petition of revocation, the Board will consider whether substantial evidence exists to support the railroad's factual findings in its decision for revocation under FRA's regulations. See 49 C.F.R. § 240.405(f), 58 Fed. Reg. 18982, 19001 (Apr. 9, 1993). The Board finds the particular factual circumstances in this case do not support the type of tampering violation that should be taken against an individual engineer when considering FRA's published enforcement policy.

First, the record supports the contention that the crew did not place the sticker on the speaker and thus Petitioner was "a subsequent operator of a train with a disabled device." See Pet. at 3; Tr. at 15, 29 – 30, 33, 35, 38; 49 C.F.R. Part 218, app. C ("Statement of Agency Enforcement Policy on Tampering" – "Subsequent Operators of Trains with Disabled Devices").<sup>1</sup> Second, the Board

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<sup>1</sup> The Board notes that it only received black and white photocopies of the photographs of the sticker, which were not very good copies and diminished the strength of UP's case, failing to show that this was a clearly visible instance of tampering.

finds that the record does not support UP's contention that the sticker impaired the functionality of the sound coming from the alerter speaker. Petitioner's train did not have any penalty applications of the brake system throughout the entire time he was operating the train. See Pet. at 2; Tr. at 36. Third, although the sticker was in plain sight, because the sticker was an official UP "Speed Recorder Wheel Size" sticker and many of these types of stickers are placed in a locomotive cab, it may not have been obvious to the crew that the sticker was improperly placed. See Tr. at 29. The fact that the location of safety alerter devices varies depending upon the locomotive shows that placement of an official UP sticker on an alerter could cause confusion for an engineer. This is especially true since the alerter's flashing red light was visible and the sound was not diminished to the extent that Petitioner did not recognize that a sticker was placed upon the alerter and was able to operate the train without going into penalty.

In part 218, app. C, the statement of agency policy, FRA rejected the application of a negligence standard for enforcement purposes noting that "[w]e have seen no evidence of an employee's negligent failure to detect another employee's tampering having caused a safety problem." Instead, FRA explained that the agency "can effectively attack the known dimensions of the tampering problem" by limiting enforcement actions "to situations where individuals clearly had actual knowledge of the disabled device and intentionally operated the train notwithstanding that knowledge." Intentional operation may be actual, subjective knowledge where it can be shown "objectively that the alleged violator must have known the facts based on reasonable inferences drawn from the circumstances. For example, it is reasonable to infer that a person knows about something plainly in sight on the locomotive he is operating." Thus, despite that this sticker was in plain sight, the Board concludes that in this particular occurrence, it may not have been plainly obvious that the sticker was improperly placed on the alerter speaker.

The Board has the authority to consider "whether certain equitable considerations warrant reversal of the railroad's decision on the grounds that, due to certain peculiar underlying facts, the railroad's decision would produce an unjust result not intended by FRA's rules." 58 FR 18982, 19001 (Apr. 9, 1993). In this case, the Board focused on the mitigating factors previously stated and that the allegedly disabled device was not obviously disabled. The reason UP finds that the device was disabled was because an official railroad sticker was placed on the device's speaker. Clearly, a distinction can be drawn from this alleged disablement and more obvious forms of disablement such as the application of duct tape, paper, cardboard, putty, plastic, or even a non-railroad sticker. The fact that the supervisor found it shortly after entering the cab does not diminish the fact that it could have been easily overlooked by others. This is especially true when the sound quality is not diminished either, and the record does not reflect that UP proved that the sound was substantially diminished.

The Board declines to address Petitioner's other assertions, as it has already granted the petition based on the second assertion.



**SERVICE LIST EQAL 2012-17**

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

**SENT CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Mr. Jeremy S. McCasland  
931 Homerun  
Chubbuck, ID 83202-1667

Mr. Lonny Schow  
UTU Local Chairman  
554 South 5400 West  
Malad, ID 83252

Ms. Rebecca Hernandez  
Manager, Engineering Certification & Licensing  
Union Pacific Railroad Company  
1400 Douglas Street, Mailstop 1010  
Omaha, NE 68179

Mr. Cecil Copeland  
General Director, Operating Practices  
Union Pacific Railroad  
1400 Douglas St, MS 1080  
Omaha, NE 68179

  
\_\_\_\_\_  
Diane Filipowicz  
Administrative Assistant

**AUG 16 2012**  
\_\_\_\_\_  
Date

enc: Post LERB Memo  
cc: FRA DOCKET EQAL 2012-17

**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:

Mr. Jeremy S. McCasland  
931 Homerun  
Chubuck, ID 83202-1667

2. Article Number  
(Transfer from service label) EQIAL 2012-17 7011 0470 0002 3685 9328

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

**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  
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4. Restricted Delivery? (Extra Fee)  Yes

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1. Article Addressed to:

Mr. Lonny Schow  
UTU Local Chairman  
554 South 5400 West  
Malad, ID 83252

2. Article Number  
(Transfer from service label) EQIAL 2012-17 7011 0470 0002 3685 9335

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 Insured Mail  C.O.D.

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1. Article Addressed to:

Ms. Rebecca Hernandez  
Manager, Engineering Certification & Licensing  
Union Pacific Railroad Company  
1400 Douglas Street, Mailstop 1010  
Omaha, NE 68179

2. Article Number  
(Transfer from service label) EQIAL 2012-17 7011 0470 0002 3685 9342

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If YES, enter delivery address below:  No

3. Service Type  
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 Registered  Return Receipt for Merchandise  
 Insured Mail  C.O.D.

4. Restricted Delivery? (Extra Fee)  Yes

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- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Mr. Cecil Copeland  
 General Director, Operating Practices  
 Union Pacific Railroad  
 1400 Douglas St, MS 1080  
 Omaha, NE 68179

EQIAL 2012-17

2. Article Number  
(Transfer from service label)

7011 0470 0002 3685 9359

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

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X

 Agent Addressee

B. Received by (Printed Name)

C. Date of Delivery

D. Is delivery address different from item 1?  YesIf 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