

Brotherhood of Locomotive Engineers and Trainmen

Washington State Legislative Board

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November 19, 2004

Carole J. Washburn, Commission Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive, S.W., P.O. Box 47250
Olympia, WA. 98504-7250

Re: Docket No. TR-040151

Sent VIA Electronic Transfer Format

Dear Commissioners:

Thank you for the opportunity to provide information regarding the authority of the Washington Utilities and Transportation Commission to regulate railroad point protection as proposed in the CR-102 filing in TR-040151. Below are comments responding to concerns outlined by Commission Staff.

WUTC Authority to Adopt Point Protection Regulations

Submitted November 19, 2004

on behalf of the

Washington State Legislative Board of the Brotherhood of Locomotive Engineers and
Trainmen

by Mark K. Ricci, Ph.D., Chairman

Introduction

The railroads argue in their submission of August 11, 2004, that the "WUTC is without authority to promulgate the proposed rules." The railroads note that RCW 80.01.040 and RCW 81.04.160 fail to specifically authorize the commission to regulate "railroad operating rules, point protection, remote control operations, *or anything even close.*"

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(Emphasis added) In as much as the technology of remote control operations could not have been envisioned at the writing of these codes in the 1980's, 1960's, 1940's even to the early 1900's, it is not significant that those railroad terms were not used in the construction of the WUTC's authority. What is significant to this proceeding is the question "Does the WUTC have the authority as delegated by the legislature of the State of Washington to impose rules and regulations, specifically point protection regulations, that ensure the safety of employees, property, passengers and the public from railroad operations?"

The argument below answers this question not by identifying permission granted to the WUTC from the legislature, but with a mandate imposed upon the WUTC from the legislature as an uncompromised duty to provide regulation of point protection for the safety of railroad passengers, employees, shipments and the public. First, questions posed by the WUTC staff are answered directly from the Revised Code of Washington. The argument concludes with a discussion of the issues framed not by the self interest of the railroads or the legal technicalities as outlined by WUTC staff, but by the common sense experience of Washington citizens.

Commission Staff asks: Do the Statutes RCW 80.01.040 and RCW 81.04.160 provide statutory authority for the WUTC to adopt the proposed rule?

RCW 80.01.040 states that the "utilities and transportation commission *shall* exercise all the powers and perform all the duties prescribed by this Title [80] and by Title 81 RCW..." The code goes on to elaborate that the commission shall "regulate in the *public interest...services...of...railway companies.*" (Emphasis added) RCW 81.04.160 goes on to state that the "commission is hereby authorized and empowered to adopt, promulgate and issue rules and regulations covering...any and all *services* concerning the same, or *connected therewith...*" (Emphasis added) RCW 81.04.160 goes on to state that "such rules and regulations shall be promulgated and issued by the commission on its own motion..."

It is clear that the utilities and transportation commission has a mandate from these codes to regulate "services," but what is a service? RCW 81.04.010 states "the term service

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is used in this title in its broadest and most inclusive sense.” Is it overly broad to suggest that a service provided to the public by railroads is safe rail operations? Is it unreasonable to conclude that the framers of Title 80 and Title 81 did not envision limiting the scope of the utilities and transportation commission with respect to public safety in railroad operations? The definition of service and its use throughout Titles 80 and 81 mandate a broad and inclusive use of the term. Is it a railroad service to the public to provide protection at railroad crossings? Is it a service to employees and passengers to provide rules that avoid collisions between freight trains and passenger trains? Is it a service to shippers to provide rules that ensure shipments are made without damage to lading from collision? It seems reasonable to conclude that avoiding collisions by providing point protection is a “service...in connection with the safety, comfort, and convenience of the person transported” as well as a “service...of the property transported...” (See RCW 81.04.010.)

Yet, RCW 80.01.040 and RCW 81.04.160 are not the sole source of authority granted the commission by the legislature. Rather, authority extends throughout Title 80 and Title 81 and must be considered complimentary to the language of these two statutes.

The Commission Staff asks: Do other statutes in Title 81 RCW provide statutory authority for the Commission to adopt the proposed rule e.g. RCW 81.44.065, 81.53.030, 81.104.102

Clearly, the legislature has placed the onus of safety on railroad companies to be enforced by the WUTC when RCW 81.28.010 states “Every common carrier shall...and to promote the safety, health, comfort and convenience of its patrons, employees and the public.”

The legislature addresses specifically the safety of passengers and property when it wrote RCW 81.28.240 that states “Whenever the commission shall find...the rules, regulations, practices...service of any common carrier in respect to the transportation of persons or property are unjust, unreasonable, unsafe...inadequate or insufficient, the commission shall determine the just, reasonable, safe, adequate, sufficient and proper rules

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and regulations, practices...or service to be observed...or enforced and be used in the transportation of persons and property...and fix the same by its order or rule.

In RCW 81.44.010 the legislature imposed on the commission a duty to ensure the security and convenience to passengers, property, employees, and the public when it wrote “Whenever the commission shall, after a hearing had upon its own motion or upon complaint, find that...or any other...apparatus...in connection with the transportation of persons or property, ought reasonably to be provided...in order to promote the security or convenience of the public or employees, or in order to secure adequate service or facilities for the transportation of passengers or property, the commission may, after a hearing, either on its own motion or after complaint, make and serve an order directing such repairs, improvements, changes or additions to be made.”

When the legislature created the commission it continued the long history of authority exercised by commission predecessors when RCW 81.44.065 states “The utilities and transportation commission shall exercise all powers and duties in relation to the inspection of tracks, bridges, structures, equipment, apparatus, and appliances of railroads with respect to the safety of employees and the public and the administration and enforcement of all laws providing for the protection of the public and employees of railroads which prior to April 1, 1955 were vested in and required to be performed by the director of labor and industries.”

Even when minor authority is extended to other state jurisdictions, the WUTC retains oversight for example RCW 81.48.015 states “Prior to enacting the ordinance, the cities and counties shall provide written notification to the railroad companies affected by the proposed ordinance, and to the state utilities and transportation commission, for the purpose of providing an opportunity to comment on the proposed ordinance.”

The legislature clearly intends the WUTC to be preminent with respect to grade crossing authority when it wrote RCW 81.53.030 “...The commission may provide in the order authorizing a grade crossing, *or at any subsequent time*, that the railroad company shall

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install and maintain proper signals, *warnings, flagmen*, interlocking devices, or other devices or means to secure *the safety of the public and its employees.*" (Emphasis added)

Again, the legislature calls on the commission expertise to address public safety at crossings on behalf of the legislature when RCW 81.53.261 states "...If the commission shall determine from the evidence that public safety requires the installation of such signals or other warning devices at such crossing or such change in the existing warning devices at said crossing, it shall make determinations to that effect and enter an order directing the installation of such signals or other warning devices or directing that such changes shall be made in existing warning devices...The hearing and determinations authorized by this section may be instituted by the commission on its own motion, and the proceedings, hearing, and consequences thereof shall be the same as for the hearing and determination of any petition authorized by this section..."

While issues often fade from legislative consciousness, rail safety particularly point protection continues to concern the legislature as recently as the 2003 findings in RCW 81.53.271 that states under notes "The legislature finds that grade crossing, rail trespass, and other safety issues continue to present a public safety problem." How better to address legislative concerns than the Staff proposed point protection regulation in TR-040151.

What is undisputed from 1911 to the present and is reiterated in RCW 81.104.120 is that "The utilities and transportation commission shall maintain safety responsibility for passenger rail service operating on freight rail lines. Agencies providing passenger rail service on lines other than freight rail lines shall maintain safety responsibility for that service."

Commission Staff asks: What about RCW 81.44.065 devolution of powers and duties relative to safety of railroads.

While the interest of the WUTC has gravitated over the years to the economic protections of the citizens of Washington, first and foremost the powers devolved to the

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Commission from the Department of Labor and Industries prior to 1955 are the express duty of the WUTC. These powers specifically address the safety of railroad workers. In addition to the powers of labor and industries, the powers that devolved to labor and industries from the “public service commission” and the “state safety board” also devolve to the WUTC in as much as these powers had previously devolved to the department of labor and industries.

RCW 81.44.065 states that “The utilities and transportation commission shall exercise all powers and duties in relation to the inspection of tracks, bridges, structures, equipment, *apparatus*, and appliances of railroads with respect to the safety of employees and the public and the administration and enforcement of all laws providing for the protection of the public and employees of railroads which prior to April 1, 1955 were vested in and required to be performed by the director of labor and industries.” (Emphasis added)

Webster’s Dictionary (1991) defines an apparatus as “the means by which a system functions: *the apparatus of government.*” The railroad system operates in Washington State using a common means titled the General Code of Operating Rules. The General Code of Operating Rules or GCOR is the “apparatus of railroad operations,” as defined by Webster’s Dictionary. By no other means does the railroad system operate in Washington State. Under the department of labor and industries duties noted above, the division of safety had the duty and power to “...in relation to the inspection of...apparatus of railroads...and the administration and enforcement of all laws providing for the protection of employees of railroads...and required to be performed by, the public service commission.”

The enumerated powers of the division of safety as written into the statute of 1931 are both specific and general, so that they might be interpreted to be inclusive not discriminatory. These same powers devolved to the WUTC.

While the use of “apparatus” in the RCW 81.44.065 does not exude the same flavor as the use of the term “apparatus of railroads” in the 10838 statute of 1931, the powers and duties of the labor and industries as discussed in the 1931 statute directly devolve to the WUTC. These are not new powers, rather these are duties and powers that always existed

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but have been dormant, disused, and neglected by the WUTC. It might be noted that the term “apparatus” is used in numerous RCW’s, always with the purpose of creating a comprehensive and inclusive power, not a limited power (see RCW 81.44.010.) At any rate, the WUTC has authority over the apparatus of railroads, or in the proceeding TR-040151, railroad operating rules like point protection.

Commission Staff asks: What about language in RCW 81.53.030 that states that the “commission may provide in the order authorizing a grade crossing, or at any subsequent time, that the railroad company shall install and maintain...flagmen...or other devices or means to secure the safety of the public and its employees.

This language is significant for three reasons. First, this language was first formulated in 1913, not 1911, as with other commission authority signifying an evolving authority granted by the legislature to expand commission authority from the transportation of persons or property to the general safety of the public and employees at grade crossings. Second, this language directly identifies the authority of the commission to require the use of flagmen as well as devices to secure public safety. Both of these authorities may be used in the application of the point protection rules proposed by commission staff at public crossings. Third, this language subjects “the legislative authority of a county, or the municipal authorities of a city, or the state officers authorized to lay out and construct state roads, or the state parks and recreation commission” as well as railroads to the authority of the commission with respect to railroad crossings and the safety of employees and the public.

Other authority discussed below, e.g. RCW 81.48.015, continues to be delegated to the police powers of municipal authorities, but the language of RCW 81.53.030 grants authority and mandates immediate action by the commission with respect to railroad crossings.

Commission Staff asks: What about RCW 81.104.120 (3) “the utilities commission shall maintain safety responsibility for passenger rail service operating on freight rail lines.

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This language is significant for two reasons. First, this language dates to 1990. As such, it demonstrates an ongoing responsibility for passenger safety to be exercised by the commission on behalf of the legislature on freight rail lines first enumerated in 1911. Secondly, it reiterates this continuing and unquestioned authority for passenger safety with respect to new transit initiatives progressing in Washington State.

Commission Staff asks: RCW 81.04.160 “comfort and convenience” Does this language authorize the Commission to adopt rules for the safety of the general public as opposed to comfort and convenience of the customers of railroads?

It is significant that the regulation RCW 81.04.160 mandates “rules as pertain to the comfort and convenience of the public” as distinguished from other legislative authority that limits the scope of the WUTC authority to “the transportation of persons and property.” The previous sentence of this regulation uses the language “transportation of persons and property.” It is significant that the legislature chose to expand the language from a limited scope to the general public in the second sentence.

Another significant aspect of this regulation is the authority “such rules and regulations shall be promulgated and issued by the commission on its own motion.” The legislature is again demonstrating a concern for public safety mandated to the oversight of the utilities and transportation commission. It is clear that point protection is necessary for the comfort and convenience of employees, passengers and the general public. That the legislature imparted this authority to the WUTC through Titles 80 and 81 demonstrates nearly a century of delegated authority from the legislature as conferred by Article XII Section 13 of the Washington State constitution.

Commission Staff asks: RCW 81.28.240 determine just reasonable safe adequate sufficient rules regulations practices What significance should the Commission attribute to the phrase “in respect to the transportation of persons and property by such common carrier” Please consider the definitions of the terms “transportation of persons” and “transportation of property” in 81.04.010

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The question the staff struggles with is “does RCW 81.28.240 restrict the commission to enact rules that only address the safety of passengers and property on a particular common carrier?”

Logically, it does not follow that the legislature should grant the commission authority to impose sufficient safety rules and mandate the commission be responsible for public safety from railroad operations under RCW 81.28.010, 81.44.010, 81.44.065, 81.53.030, 81.53.261, 81.53.271; yet restrict the tools to accomplish safety to one group of people from another. Further, it does not seem logical that the legislature would place greater latitude in the commission to ensure the safety of property than the general public. For the staff to emphasize a restricted authority to passengers or property the commission would necessarily have to conclude that the legislature of the State of Washington places a greater importance on the safety of property than the safety of the general public. However, the legislature refuted this with its findings in RCW 81.53.271 written in 2003 that do not mention a concern for property but do mention a concern for public safety.

In addition, even if the commission concluded that the legislature placed a higher premium on the safety of property over the safety of the general public, the proposed rules staff considers for adoption, particularly the point protection before fouling adjacent tracks directly attends to the safety of persons and property being transported by railroads. Just for clarity, Puget Sound Transit is operated by BNSF crews. The BNSF is the railroad responsible for safety in the transportation of persons in the Puget Sound region of Washington State.

Commission Staff asks: Do the AG 1916 opinion and Seattle Electric Company v. Seattle authorities require that the Commission’s rulemaking authority under this statute is limited to prescribing rules for the safety of the passengers or shippers using the services of the regulated common carrier as opposed to the safety of motorists or the general public?

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First, the attorney general notes that Article XI section 11 of the constitution states that local police powers are enforceable so long as they “are not in conflict with general laws.” The attorney general went on to state that the authority of the public service commission extended to “the safety, health, comfort and convenience of its patrons, employees, and the *public*.” (Emphasis added.) As the 1916 opinion is responding to a second hand correspondence from the health officer of Spokane to the Public Service Commission, the opinion generally focuses on limiting the scope of the police powers of the city of Spokane, rather than limiting the authority of the Public Service Commission to address public safety. In the opinion, the AG sees clear limitation to the police powers of the city when it comes to “transportation of persons and property.” Even then, the AG asserted that this determination “is not free from difficulty.” The AG did assert however that “we have no doubt that until *the state acts by general law* the municipality may regulate.” (Emphasis added.)

Second, the Supreme Court of Washington in *Seattle Electric Co. v. City of Seattle*, et al asserted that “the appellants concede that these provisions of the law endow the public Service Commission with power to regulate and control street railways [common carrier].” The significance of the ruling was not did the public service commission have the authority in question, rather when did that authority supercede the police powers of the municipality? “The ultimate question to be determined then is whether the public service law revoked the power of the city to legislate upon the subject-matter of the ordinance at the time the law took effect, or does the city retain such power until the public service commission shall issue an order covering the same subject-matter?” The court goes on to answer the question “it seems plain to us that it was the legislative intent that the power and authority to regulate public utilities was vested in the Public Service Commission from and after the time the law took effect, and that when the law became effective it revoked the power of the city to legislate upon the subject-matter covered by the ordinance.”

Finally, as to staff’s question above is commission authority “limited to prescribing rules for the safety of the passengers or shippers using the services of the regulated common carrier as opposed to the safety of motorists or the general public?” The court did not

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address this issue. “Some mention has been made of the right of the city to control the use of its streets. But obviously that question is not involved in this proceeding.” Having said that, the 1916 AG opinion affirms that the 1911 public service law requires common carriers to “promote the safety, health, comfort and convenience of its patrons, employees and the public.” This same authority devolves to the utilities and transportation commission from RCW 81.44.065.

Commission Staff asks: If answer to #4 extends to public, does this mean that local governments in Washington are precluded from adopting ordinances applicable to railroads that are for the safety of the general public? “Kennewick Municipal Code” Would those opinions mean that such local ordinances would be preempted by the 1911 public service law?

As stated above, it is not clear that the Washington Supreme Court or the AG fully addressed the issues this commission currently ponders. However two things are clear, the Constitution of Washington and the legislature of Washington State have imbued within the commission the authority to enact “general laws” that are in the interest of public safety. Second, the city of Kennewick acknowledged this authority with 11.80.900 “This chapter shall be construed consistently with applicable federal and state laws and regulations.”

Kennewick has adopted language in 11.80.070 that is virtually identical to language being considered by the utilities and transportation commission. This suggests two considerations. First, the railroads have asserted that a legal challenge might necessarily result from the commission enacting these regulations. Yet, Kennewick endured no legal challenge from the railroads even though the ordinance was adopted in 1996. Second, should the citizens of Kennewick benefit from a safety ordinance but the citizens of other cities do not have the same protection? What about rural travelers in Washington? Does the WUTC have some duty to extend the protections afforded Kennewick residents to those unincorporated areas of the state? The WUTC has the authority to enact this regulation, but does it recognize the duty to enact this regulation?

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Finally, the legislature has adopted statutes that specifically empower municipalities to address specific and limited local issues. In 1995, the legislature adopted RCW 81.48.015 to address excessive noise from railroad operations at crossings. Significant in this legislation was the inclusion of the WUTC in the municipal ordinance making process. At no time has the legislature excluded the WUTC from freight railroad and passenger operations on freight railroads safety authority. Rather, in very rare circumstances that are differentiated from these two responsibilities, the legislature has conferred authority on other agencies, see RCW 81.104.120.

While it is not clear if municipalities have authority to enforce the above ordinance, it is very clear that the WUTC has the authority to enact and enforce the regulation proposed by commission staff. It should be noted that Seattle in 1987 confirmed that RCW 46.20.025 (6) preempted the city from requiring an engineer to display a driver's license as a conflicting local ordinance to the general laws of the state. Further, Seattle ordinance 117239 (an ordinance dealing with railroads) was deemed not enforceable by the city attorney. It is clear from these tangential issues that local authority is often unenforceable when it comes to railroad operations. State authority has a better track record of addressing safety issues of passengers, property, employees, and the general public.

Commission Staff asks: 81.28.230 What significance to the words “after *such* hearing” and “*such* common carrier”

It is not clear that the commission staff has articulated a relevant concern with respect to the hearing process. The WUTC has completed a CR-101 process in accordance with the laws of the State of Washington. This process involved numerous “such hearings” to bring the issue to where the debate exists today.

With respect to the “such common carrier,” commission staff suggests that enforcing a regulation on a railroad must be for the benefit of that railroad's particular responsibilities and jurisdiction. This fails to take into account several realities of the railroad industry in Washington State. First, as stated above, Puget Sound Transit is operated on BNSF lines

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using BNSF crews clearly providing a relevant connection between the transportation of persons and property and the regulation of coincidental railroad operations. Further, all railroads operate jointly on much track throughout Washington State. It is not likely that actions by one railroad will not impact the operations of all other railroads in Washington. It is not clear how the narrow interpretation of such common carrier suggested by staff can even be made relevant to the evolving operations in Washington.

Finally, RCW 81.28.230 is not relevant to these proceedings. These proceedings are about railroad safety as it pertains to passengers, property, employees and the public. RCW 81.28.230 is authority for the commission to fix just, reasonable, and compensatory rates. RCW 81.28.240 is the authority for the commission to order improved facilities and service.

Commission Staff asks: 81.28.230 “this section does not apply to railroad companies, which shall be regulated in this regard by chapter 81.34”

Since RCW 81.28.230 is not relevant to these proceedings as stated above, this exemption is not relevant to these proceedings. It is notable that RCW 81.28.240, the relevant statute with respect to the safety of passengers, property, employees and the public, does not bear the same exemption for railroads from the legislature. This suggests that if the legislature wanted to limit the authority of the WUTC to address safety issues, it would have provided for that limitation in RCW 81.28.240 as it did in RCW 81.28.230 with respect to fixing rates.

Conclusion

Legal technicalities and nuance aside, the citizens of Washington State as far back as 1911 have relied on the commission and its precursors to address passenger, property, employee and public safety with respect to railroad operations in Washington State. These laws have been revisited anew in 1923, 1929, 1955, 1961, 1981, 1991, 1992, 1993, 2003. Consistently throughout the years, the WUTC and its predecessors have been called upon to address railroad safety in Washington State. It is temerity to suggest that in 1911, 1914, or

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1916, legislators, attorney generals, or Supreme Court justices would have envisioned railroad operations without any person on board the train. It is equally foolish to think that legislators did not write legislation to address the possibility that public safety might be endangered by short sighted railroad operators willing to compromise safety for imagined gain. The statutes giving authority to the WUTC are replete with examples of attempts by legislators to be inclusive with interpretations intended to be in the “broadest and most inclusive sense.”

Whether the WUTC chooses to adopt the language of the legislature and recognize that a railroad providing point protection is providing a service of comfort, convenience and security for passengers, property, employees, and the general public; or perhaps the WUTC might recognize that the General Code of Operating rules is an apparatus as discussed above, both choices that fall under the mandate imposed on the WUTC by the Washington legislature.

Perhaps the WUTC chooses to seek literal language to provide crossing point protection for the public and railroad employees and RCW 81.53.030 and RCW 81.53.261 provide that explicit mandate. Perhaps the WUTC chooses to seek literal language to provide point protection from collisions caused from movements fouling adjacent tracks then RCW 81.28.010, RCW 81.28.240, RCW 81.44.010, RCW 81.44.065 or RCW 81.104.120 provides that authority.

What the Revised Code of Washington does not provide for is a nuanced, hair splitting option to address passenger, property, employee and public safety from railroad operations. The very first sentence of the WUTC mandate states it “*shall*” not it “*may*” carry out the duties as prescribed by the legislature in Titles 80 and 81. The WUTC cannot be limited to what the railroads let them regulate, they must do what is necessary for the protection of railroad workers and Washington citizens.

Succinctly, the WUTC is being asked by hundreds of thousands of Washington citizens to impose a regulation on railroads that will provide for employee, property,

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passenger, and public safety. Citizens have provided statistical evidence to support a contention that the regulations being requested are railroad operating rules that are not observed to a level sufficient to protect Washington citizens. Since the regulation is a railroad operating rule, imposition of the regulation imposes no new cost to the industry. How difficult can it be to minimally address real world hazards to the citizens of Washington State from poorly operated railroads?

Respectfully submitted,

Mark K. Ricci, Ph.D., Chairman

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