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June 22, 2015

By Email: records@utc.wa.gov

Mr. Steven V. King
Executive Director and Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive S.W.
P.O. Box 47250
Olympia, WA 98504-7250

Docket TR-151079, Rulemaking to Consider Adoption of Rules Relating to Rail Safety

RE: Union Pacific Railroad Company Comments on Preproposal Statement of Inquiry (CR-101)

Dear Mr. King:

The Union Pacific Railroad Company ("Union Pacific") appreciates this opportunity to comment on the Preproposal Statement of Inquiry (CR-101) regarding Docket TR-151079, Rulemaking to Consider Adoption of Rules Relating to Rail Safety. From the contents of the Preproposal Statement of Inquiry as well as the CR-101 Notice of Opportunity to File Written Comments dated May 22, 2015 ("Notice"), Union Pacific understands that the Washington Utilities and Transportation Commission (the "Commission") is commencing a rulemaking to consider adoption of new rules within Washington Administrative Code 480-62. The Commission has not yet drafted rules, but requested preproposal comments. Before the Commission begins the rulemaking process, Union Pacific would like to provide the Commission with background on UP's safety practices and the preemptive effect of federal regulation of railroad operations.

Union Pacific understands the public's concern about the risks associated with crude-by-rail, and we take our federal common carrier responsibility to ship all commodities, including crude oil, very seriously. Union Pacific follows the strictest safety practices, and in many cases exceeds federal safety regulations. Union Pacific's goal is to have zero derailments and we work closely with the federal Department of Transportation ("DOT"), the Federal Railroad Administration ("FRA"), the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), the Association of American Railroads ("AAR") and our customers to ensure that Union Pacific operates the safest railroad possible.

Safety is Union Pacific's top priority. The best way to ensure safety is through comprehensive federal regulation. A state-by-state approach in which different rules apply to the beginning, middle, and end of a single rail journey would not be effective.

CR-101 and the Notice both state that the Commission will be considering (1) updates to annual reporting requirements on financial responsibility for railroads hauling crude oil, (2) introduction of safety standards for private crossings, and (3) enablement of first-class cities to opt in to the Commission's rail crossing safety program. Union Pacific has comments related to two of these three topics. Union Pacific does not object to first-class cities opting into the Commission's rail crossing safety program to the extent the program is not preempted by federal law.

Financial Reporting

The new law provides that public service companies, such as the railroads, must annually furnish a report in such form as the Commission may require, and shall specifically answer all questions propounded to it by the Commission. The law goes on to provide that the Commission may prescribe a "uniform system of accounts, and the manner in which the accounts must be kept." In addition, the Commission is authorized to require monthly reports of earnings and expenses and special reports, or both.

Union Pacific, as a publicly-traded company, is subject to very specific financial and accounting requirements under federal law, and this information is set forth in periodic reports that are publicly available. In addition, Union Pacific prepares detailed annual reports describing the dollar value of the assets it holds in the State of Washington. Union Pacific urges the Commission to avoid the confusion and added burden that would result from seeking to impose different requirements.

Private Crossings

All Union Pacific crossings are safe. We support the state's efforts to improve safety at railroad crossings, and we urge the Commission to ensure that whatever rules are adopted in connection with private crossings do not seek to impose the costs of improving such crossings on the railroads. Not only would such an imposition be preempted by federal law, it would undermine existing agreements between railroad companies and private landowners for the appropriate allocation of upgrades to private crossings. If railroads were required to subsidize the costs of maintaining private crossings across the state without the underlying agreements in place, one likely result is the closure of many of these crossings, which could detrimentally affect the private businesses and properties that many of these crossings serve. We attach our letter, dated April 29, 2015, to Governor Inslee concerning private crossings.

Questions Asked

You also asked for our comments on the following three questions:

1. What is your definition of a reasonably likely worst case spill of oil?
2. What is a reasonable per-barrel cleanup and damage cost of spilled oil?
3. What risk factors should the Commission consider in establishing safety standards on private crossings?

We believe the first question is best addressed through uniform federal regulation. As to the second question, the cost of an oil spill cleanup is highly dependent upon the facts and circumstances of such a spill, and does not lend itself to an easy per-barrel average cost. As to the third question, concerning safety standards on private crossings, all Union Pacific crossings are safe. Union Pacific and drivers on private crossings all have a role to play in crossing safety. When a crossing is maintained to Union Pacific maintenance standards, the stage has been set for a reasonably prudent driver to traverse the crossing safely. Union Pacific developed a robust the Crossing Assessment Program ("CAP") to analyze all 30,578 of its public and private crossings for opportunities for safety enhancement. We welcome the opportunity to present the CAP to the Washington Utilities and Transportation Commission.

Federal Preemption of State Laws Affecting Railroad Operations

Below, we discuss the federal regulation of Union Pacific as well as the broad preemptive effect of these federal regulations. Union Pacific encourages the Commission to consider the benefits of uniform regulation and the broad preemptive effect of federal law on state-by-state efforts to regulate railroad operations as the Commission enters the initial stages of the rulemaking process.

Some of the areas of regulation that appear to be anticipated by the Notice are clearly preempted by federal law, while others may be preempted unless crafted in a manner that recognizes the need to for uniform federal regulation in order to ensure the safe and efficient operation of our national railroad network.

Congress's assertion of federal authority over the railroad industry has been recognized as "among the most pervasive and comprehensive of federal regulatory schemes." *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981). State regulations that conflict with this comprehensive federal regulatory scheme are preempted by federal law. Proposed regulations as described in CR-101 and the Notice may be preempted by three different federal laws: the Federal Railroad Safety Act ("FRSA"), the Hazardous Materials Transportation Act ("HMTA"), and the Interstate Commerce Commission Termination Act ("ICCTA").

FRSA directs that "[l]aws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1). To accomplish that objective, Congress provided that a State may no longer "adopt or continue in force a law, regulation, or order related to railroad safety" once the "Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. § 20106(a)(2). In practice this means that once the federal government has enacted railroad safety regulations on a particular topic, states are prohibited from regulating in that area.

HMTA was enacted based on Congress's desire to create a uniform federal system of regulations governing the transportation of hazardous materials. Congress found that many states had

enacted laws and regulations which varied from federal laws, "thereby creating the potential for unreasonable hazards in other jurisdictions and confounding shippers and carriers which attempt to comply with multiple and conflicting registration, permitting, routing, notification, and other regulatory requirements." Hazardous Materials Transportation Uniform Safety Act of 1990, Pub.L. No. 101–615, § 2, 104 Stat. 3244, 3245 (1990).

ICCTA vests the Surface Transportation Board ("STB") with exclusive jurisdiction over licensing and economic regulation of interstate railroad operations. The express preemption clause in ICCTA declares that the STB's jurisdiction over transportation by rail carriers "is exclusive." 49 U.S.C. § 10501(b). The purpose of this preemption provision is to protect the railroad industry from a patchwork of state regulations that would subject a railroad to a different set of rules every time it crossed a state line. See *CSX Transp., Inc.—Pet. for Declaratory Order*, 2005 WL 584026, at *9 (STB served Mar. 14, 2005). The federal courts have repeatedly recognized that these provisions broadly preempt state laws regulating transportation operations. *See, e.g., City of Auburn v. United States*, 154 F.3d 1025, 1031 (9th Cir. 1998) (describing language of § 10521(b)(2) as "broad" and giving Board "exclusive jurisdiction over . . . operation . . . of rail lines"); *CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n*, 944 F.Supp. 1573, 1581 (N.D. Ga. 1996) ("It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations.").

Conclusion

UP is committed to following, and in many instances exceeding, the requirements of federal law as it transports crude oil and other products and commodities on Washington's railways. UP looks forward to working collaboratively with the Commission through the rulemaking process and will be pleased to provide comments as more detailed proposed rules are released.

Regards,

UNION PACIFIC RAILROAD COMPANY

Melissa Hagan

Melissa B. Hagan

cc: Scott Moore

April 29, 2015

The Honorable Jay Inslee
Governor of the State of Washington
P.O. Box 40002
Olympia, WA 98504-0002

Dear Governor Inslee:

On behalf of the two Class I railroads serving ports, farms, manufacturing firms and many other businesses in Washington State, we respectfully urge your veto of Section 22 of ESHB 1449, the Oil Transportation Safety Act (the "Act").

Section 22 directs the Washington State Utilities and Transportation Commission (the "UTC") to adopt rules governing the safety of private crossings in the state. While we certainly support the state's efforts to improve safety at railroad crossings, we find this section unworkable because of unintended consequences related to language at Section 22(1) on pg. 35, line 8-11.

The language in question states, "The commission is also authorized… to order the railroads to make improvements at private crossings, and enforce the orders." Our concern is that this language may empower the commission to assign costs for improving private crossings that intersect rail lines to the railroads. Such action would undermine existing agreements between railroad companies and private landowners for the appropriate allocation of upgrades to private crossings.

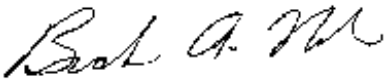
Previous versions of the Act stipulated, "Nothing in this section modifies existing agreements between the railroad company and the landowner governing cost allocation for upgrades to private crossings or liability for injuries or damages occurring at the private crossings." However, the final version passed in the final hours of the regular session did not include this language. If railroads are required to subsidize the costs of maintaining private crossings across the state without the underlying agreements in place, one likely result is the potential closure of many of these crossings, which could detrimentally affect the private businesses and properties that many of these crossings serve.

For these reasons, we urge you to veto Section 22 of ESHB 1449. We would work with your office, the UTC and legislative leaders to correct the omission of this important provision and pass a corrected version of Section 22 that includes the language protecting existing cost allocations and liabilities.

Thank you for your consideration.

Sincerely,

Johan Hellman
Executive Director, Government Affairs, PNW
BNSF Railway Co.



Brock Nelson
Director, Public Affairs, PNW
Union Pacific Railroad