

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of	)	DOCKET TR-140424
	)	
BNSF RAILWAY CO.,	)	ORDER 01
	)	
Petitioner,	)	
	)	ORDER GRANTING
Seeking Exemption from the	)	EXEMPTION FROM RULE
Provisions of WAC 480-60-040	)	
Relating to overhead clearance rules	)	
.....	)	

**BACKGROUND**

- 1     On March 17, 2014, Zachry Engineering Corporation (Zachry), on behalf of BNSF Railway Co. (BNSF or Company), filed with the Washington Utilities and Transportation Commission (Commission) a petition requesting exemption from WAC 480-60-040, which requires railroad companies to maintain an overhead clearance of at least 22 feet 6 inches from the top of the rail to the nearest structure.
  
- 2     BNSF’s petition relates to the construction of a coal train re-spray facility located at milepost 142.36 on the BNSF Lakeside Subdivision in Pasco, Washington. The re-spray facility is located on mainline track 3 within the BNSF Pasco Yard. The purpose of this facility is to provide a spray coating of dust abatement solution to the top surface of coal which is transported on westbound trains. BNSF is the only railroad operating loaded coal trains at this location.
  
- 3     Mainline track 3 is capable of passing all train types including double stack intermodal cars with a maximum height of 23 feet. The re-spray facility contains the spray bars and spray bar lift equipment. When the spray bars begin to function they move from a stored position of 24 feet to an operational position of 16 feet 6 inches from top of rail and require a permanent exemption from the overhead clearance rules.
  
- 4     A transponder reader placed ahead of the re-spray facility will identify the locomotive number of the approaching westbound train as a coal train requiring a re-spray treatment. Trains passing by the transponder that are not hauling coal will be ignored by the system and the spray bars will not lower to their operating positions. Trackside signals for approaching train crews will be required to show the spray bars are at their

fail safe “UP” position. When the spray bars are not “UP,” the trackside signals for east and westbound directions on mainline track 3 show “STOP.”

- 5 The re-spray facility also contains redundant “load too high” photo eye sensors located approximately 200 feet east on the inbound track to cause emergency retract of the spray bars in the event a railroad vehicle greater than 16 feet high is detected inbound.
- 6 Although train crewmembers have no reason to ride on the top of a rail car, the Company agrees that any clearance exemption should be conditional upon (a) a prohibition against riding on the top of a rail car approaching the re-spray facility; and (b) clearly marking and signing the re-spray facility as having lower vertical clearance.
- 7 As coal trains approach the re-spray facility, train crews will view an information signal stand indicating the re-spray system is “OK” for service and the system is armed and ready to operate. The train crew will then set the locomotive “pacesetter” train speed to 10 mph for constant speed. The spray bars will automatically be lowered into operating position after the lead locomotives have passed and will spray only the coal and not the spaces between the cars. In the event of power failure, counterweights on the spray bar headers will retract the spray bars to the fail safe “UP” position.
- 8 In the event the crew of an approaching train not requiring spray treatment sees a signal that the system is “ARMED,” Centralized Traffic Control (CTC) can disarm the system by depressing the “Demand Disarm” push button on its console. This would occur only if there is a transponder reader failure.
- 9 Commission Staff reviewed the request and recommended granting BNSF’s request for exemption, subject to the following condition(s):
  - (a) BNSF will properly maintain transponders, track signals, photo eye sensors and spray bar equipment to ensure the safety of train crews passing through the re-spray facility.
  - (b) BNSF will post and maintain signs on each end of the re-spray facility stating “No Riding Top of Cars.”

- (c) Upon completion of the construction of the re-spray facility and installation of the signage, BNSF must notify Commission Staff within 60 days. Acceptance is subject to inspection by Commission Staff verifying that the signage has been installed as specified herein.

10 The Commission considered the petition at its regularly scheduled open public meeting on April 24, 2014. The Sierra Club, Dogwood Initiative, Climate Solutions and Washington Environmental Council (Sierra Club) provided both written and oral comments. Individual citizens in Washington and British Columbia also provided oral comments. These participants raised the following issues and concerns, among others:

- What is the chemical composition of the surfactants and how will the chemicals impact the environment, both when they are sprayed on the coal and when that coal is burned?
- Why is the coal being re-sprayed when it was originally sprayed at the mine?
- What will be the impact of coal trains in general and the spraying in particular on people who live close to the tracks?
- How much water will the re-spray station use?
- Will the re-spray station cause significant noise or aesthetic issues given its height and location?
- Have similar re-spray stations ever been tested or deployed in other locations?
- How might the State Environmental Policy Act (SEPA) apply?
- What other permits will BNSF need to obtain to build this re-spray station?
- How effective will these surfactants be in suppressing coal dust by the time they reach the trains reach their destination in British Columbia?

11 The Sierra Club and several individuals recommended that the Commission postpone action on the petition to enable further legal briefing on the Commission's jurisdiction to address these and other health and safety issues related to the proposed re-spraying station and ultimately to conduct a more thorough investigation. Alternatively, the participants recommend that the Commission deny the petition for failure to demonstrate that the re-spray station is consistent with the public interest.

12 BNSF responded that all of these issues are unrelated to an exemption from the overhead clearance rule requested in the petition and that federal agencies are the appropriate forum for addressing such concerns. BNSF reiterated that it was making every effort to minimize the impact of the spraying on the environment and the people who live nearby and that it is building the re-spray station in response to a request

from the terminal in British Columbia to further reduce the possibility of coal dust escaping from the trains as they travel through Canada.

## DISCUSSION AND DECISION

- 13 The transportation of coal by railroad in uncovered cars raises a number of significant environmental and safety issues. What we have before us involves one aspect of that transportation: a petition to waive the application of one safety regulation involving the height clearance above the tracks for railroad facilities.
- 14 Our rules allow for an exemption from otherwise applicable safety requirements “if consistent with the public interest, the purposes underlying the regulation, and applicable statutes.”<sup>1</sup> While we appreciate the comments and issues raised by the Sierra Club and other interested persons in this docket, our focus in this proceeding is narrow. Petitions for waiver of the overhead clearance requirements in WAC 480-60-040 generally are routine and focus entirely on rail worker safety concerns. The nature of BNSF’s operations giving rise to its waiver request, however, has generated substantial controversy. Commenters have voiced legitimate concerns about those operations, but we nevertheless grant BNSF’s petition.
- 15 The Commission began as an agency dedicated to regulating railroads, and RCW 81.28.010 continues to authorize the Commission to regulate railroad operations safety.<sup>2</sup> However, over the years, Congress has preempted a substantial part of state authority.
- 16 In 1970, Congress enacted the Federal Railroad Safety Act (FRSA) “to promote safety in every area of railroad operations.”<sup>3</sup> The Federal Railroad Administration (FRA), pursuant to delegation by the Secretary of Transportation, has the authority under the FRSA “to prescribe, as necessary, appropriate rules, regulations, orders, and standards in all areas of railroad safety.”<sup>4</sup> States may only “adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the [FRA] has adopted a rule, regulation, order, or standard covering the subject matter of such state requirement.” Even after federal standards have been

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<sup>1</sup> WAC 480-60-020(3).

<sup>2</sup> In addition, RCW 81.28.240 permits the Commission to order improved facilities and service and revised practices.

<sup>3</sup> 49 U.S.C. § 20101.

<sup>4</sup> 49 U.S.C. § 20103.

promulgated, the states may adopt more stringent safety requirements “when necessary to eliminate or reduce an essentially local safety hazard,” if those standards are not incompatible with federal laws or regulations and not an undue burden on interstate commerce.<sup>5</sup>

17 In addition, in the ICC Termination Act of 1995, Congress gave the Surface Transportation Board “exclusive jurisdiction over transportation by rail carriers . . . with respect to rates, classifications, rules . . . practices, routes, services, and facilities of such carriers,” as well as over the “construction” and “operation” of “facilities.”<sup>6</sup>

18 The sum of these two federal statutes leaves states limited jurisdictional space.<sup>7</sup> However, no FRA regulations address overhead clearances, and the ICC Termination Act does not address safety. The Commission, therefore, has undisputed jurisdiction to regulate in this area, and WAC 480-60-040 sets forth the Commission’s railroad safety requirements for overhead clearances. WAC 480-06-020(3) authorizes the Commission to grant exemptions to its rules if consistent with the public interest, the purposes underlying the rule, and applicable statutes.

19 BNSF’s petition asks only that we grant an exemption to WAC 480-60-040 so that BNSF can spray surfactants on coal cars from a height of 16 feet, six inches above the track, rather than at or above the 22 feet, six inches minimum clearance required in the rule. The Sierra Club and other commenters, however, ask us to expand the scope of this proceeding to address matters beyond the worker safety concerns underlying the rule, including health and environmental issues. The latter issues are arguably beyond the Commission’s authority to regulate,<sup>8</sup> but we do not find it necessary to address or resolve these complex jurisdictional issues. Rather, we make our determination in this docket based on the limits of the petition itself, as well as of the Commission’s expertise.

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<sup>5</sup> 49 U.S.C. § 20106.

<sup>6</sup> 49 U.S.C. § 10502(b).

<sup>7</sup> See, e.g., *City of Auburn v. United States*, 154 F.3d 1025 (9<sup>th</sup> Cir. 1998), *cert. denied*, 577 U.S. 1022 (1999); *City of Seattle v. Burlington Northern Ry. Co.*, 145 Wash.2d 661, 41 P.3d 1169 (2002).

<sup>8</sup> The Interstate Commerce Commission Termination Act (ICCTA) addresses economic regulation of railroad operations and grants the Surface Transportation Board exclusive jurisdiction over transportation by and facilities of rail carriers with respect to rates, classifications, rules, practices, routes, services, and facilities. 49 U.S.C. § 10501.

- 20 BNSF asks only that we grant an exemption from the overhead clearance requirements in WAC 480-60-040 for a single facility. The Commission investigates the reasons for such requests to ensure that the exemption is consistent with the public interest, the safety purposes underlying the rule, and applicable statutes. Historically, however, we have not expanded that inquiry to explore or second-guess the railroad's business operations, and we do not find sufficient justification to depart from that approach under the circumstances presented here.
- 21 BNSF proposes to build the re-spray facility in Pasco in response to a request from the Port of Metro Vancouver for redundant measures to reduce the risk of coal dust escaping from the trains transporting the coal. Pasco represents the half-way point between the Powder River Basin mines in Wyoming and Montana, where an initial surfactant spray is applied, and the shipping terminal in British Columbia. BNSF plans to construct an enclosed building there in which to apply the surfactant to the coal cars. The requested exemption from WAC 480-60-040 would enable BNSF to lower the spraying device to just above the surface of the coal for greater accuracy and process efficiency and to minimize the amount of surfactant that is not applied to the coal. BNSF has also agreed to implement several conditions to enhance the safety of these operations for the employees who work at the facility and on the trains passing through it. We find these measures to be consistent with the public interest, the safety concerns underlying WAC 480-60-040, and applicable statutes.
- 22 The concerns the Sierra Club and other commenters expressed, on the other hand, do not arise as a result of exempting the re-spray facility from overhead clearance requirements. They raise potential health and safety dangers associated with the transportation coal in uncovered cars from the mines to point of shipment, in this case near Vancouver, British Columbia. From the limited record we have before us, it appears that there are numerous significant environmental and health issues associated with that transportation from the Powder River mines to the Port of Vancouver. However, the dangers of coal dust and the efficacy and impacts of the surfactants used to suppress it will continue to exist with or without the requested exemption. Denial of the exemption would not lessen these commenters' health and environmental concerns and could exacerbate them by causing more surfactants to be released into the environment due to the reduced accuracy and control of spraying the coal from a significantly greater height.
- 23 We will not expand the scope of this docket beyond the overhead clearance exemption BNSF requests in its petition, and we agree with Staff's recommendation to grant that request. Pursuant to WAC 480-60-020(3), there is sufficient "public

interest” justification for granting the requested exemption. BNSF agreed that spraying from the lower level this exemption would allow would be safer, ensuring that more of the spray would reach the coal and less spray would be carried away from the coal cars onto the ground or otherwise into the environment. That coupled with the reality that there is no need for persons to ride on top of the cars and there are protections in place in case someone does justifies this exemption.

24 We hasten to add, however, that we make no findings or conclusions on the merits of any other issues or the extent to which the Commission has the authority to consider the concerns the Sierra Club and other commenters expressed in a more appropriate proceeding. Nor do we conclude that the Commission has no jurisdiction or authority over any aspect of the re-spray facility or certain rail activities, operations, or safety within our state. While Congress has placed substantial preemptive limitations around state authority, there still may be jurisdictional room to maneuver in a proper proceeding. Further, there may be a federal forum in which these issues may be raised.<sup>9</sup> Indeed, the federal court litigation the Sierra Club stated it has initiated against BNSF may address some of the issues, and we would not want to interfere with that proceeding. Accordingly, we leave those issues for another day and perhaps another forum.

### FINDINGS AND CONCLUSIONS

- 25 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington having jurisdiction over railroad clearance requirements.
- 26 (2) BNSF is engaged in the business of providing railroad services within the state of Washington and is a public service company subject to Commission jurisdiction.
- 27 (3) BNSF is subject to WAC 480-60-040, which requires railroad companies to maintain an overhead clearance of at least 22 feet 6 inches from the top of the rail to the nearest structure.
- 28 (4) Under WAC 480-60-020(3), the Commission may grant an exemption from the provisions of any rule in WAC 480-60, if consistent with the public interest, the purposes underlying regulation and applicable statutes.

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<sup>9</sup> The Commission has authority to initiate and participate in federal proceedings where practices of transportation companies are at issue. RCW 80.01.075.

- 29 (5) This matter came before the Commission at its regularly scheduled meetings on  
April 24, 2014, and May 8, 2014.
- 30 (6) After review of the petition filed in Docket TR-140424 by Zachry Engineering  
Corporation, on behalf of BNSF, on March 17, 2014, and giving due  
consideration, the Commission finds that the exemption is in the public interest  
and is consistent with the purposes underlying the regulation and applicable  
statutes and should be granted.
- 31 (7) The Commission makes no findings or conclusions concerning the  
environmental, health, and safety issues raised by the Sierra Club and other  
interested persons or the Commission's jurisdiction to address some or all of  
those issues.

## **O R D E R**

### **THE COMMISSION ORDERS:**

- 32 (1) After the effective date of this Order, BNSF Railway Co. is granted an  
exemption from WAC 480-60-040, relating to overhead clearances, for the re-  
spray facility located at milepost 142.36 on the BNSF Lakeside Subdivision in  
Pasco, Washington.
- 33 (2) This exemption is subject to the following conditions:
- (a) BNSF Railway Co. will properly maintain transponders, track signals,  
photo eye sensors and spray bar equipment to ensure the safety of train  
crews passing through the re-spray facility.
  - (b) BNSF Railway Co. will post and maintain signs on each end of the re-  
spray facility stating "No Riding Top of Cars."
  - (c) Upon completion of the construction of the re-spray facility and  
installation of the signage, BNSF Railway Co. must notify Commission  
Staff within 60 days. Acceptance is subject to inspection by  
Commission Staff verifying that the signage has been installed as  
specified in this Order.



- 34 (3) The Commission retains jurisdiction over the subject matter and BNSF Railway Co. to enforce the provisions of this Order.

DATED at Olympia, Washington, and effective May 8, 2014.

**WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

DAVID W. DANNER, Chairman

PHILIP B. JONES, Commissioner

JEFFREY D. GOLTZ, Commissioner