

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Penalty Assessment
Against

BNSF Railway Co.

in the amount of \$100

DOCKET TR-191025

ORDER 01

DENYING MITIGATION

BACKGROUND

- 1 On December 31, 2019, the Washington Utilities and Transportation Commission (Commission) assessed a \$100 penalty (Penalty Assessment) against BNSF Railway Co. (BNSF or Company) for one violation of Washington Administrative Code (WAC) 480-62-310. This regulation requires railroad companies to report certain accidents to the Washington State Emergency Operations Center (EOC) within 30 minutes of learning of the accident. The Penalty Assessment noted that a BNSF freight train struck and fatally injured a pedestrian south of Sumner, Washington, but did not report the accident to the EOC.
- 2 On January 22, 2020, BNSF requested a continuance for its response to the Penalty Assessment. A continuance was granted until February 21, 2020.
- 3 On February 20, 2020, BNSF filed its application for mitigation, asking for a decision based solely on its written submission. BNSF explained that it “does not contest the assessed penalty and is not seeking any mitigation of the penalty amount,” but suggests that WAC 480-62-310 is “likely preempted by federal law.” BNSF stated it was paying the penalty to avoid a lengthy dispute.
- 4 On March 3, 2020, Commission staff (Staff) filed its reply.¹ Staff argues that the extent of federal preemption is “debatable.” However, Staff asserts that federal regulation 20 C.F.R. § 225.1 provides that states may require railroads to submit copies of accident and

¹ In formal proceedings, such as this, the Commission’s regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners’ policy and accounting advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. RCW 34.05.455.

injury reports submitted to the Federal Railroad Administration (FRA).

DISCUSSION AND DECISION

5 The Commission has jurisdiction to regulate the transportation of persons or property in the state for compensation.² The Commission has authority to regulate common carriers³ “to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.”⁴ The Commission specifically regulates railroad safety to the fullest extent allowed by federal and state law.⁵

6 Washington law requires that “[e]very public service company shall give immediate notice to the Commission of every accident resulting in death or injury occurring on its lines or system, in such a manner as the commission may prescribe.”⁶

7 Accordingly, the Commission requires that railroads make a telephone report to the EOC of any event resulting in death, injury to a person, release of hazardous materials, or significant property damage.⁷ The railroad must make this report “within thirty minutes of when it learned of the event.”⁸

8 When a public service company violates or fails to comply with the Commission’s rules or orders, the public service company shall be subject to a penalty not to exceed \$1,000 for each and every offense.⁹

9 The Commission considers several factors when entertaining a request for mitigation, including whether the company introduces new information that may not have been

² RCW 80.01.040.

³ Railroads are both a “public service company” and a “common carrier” under state law. RCW 81.04.010.

⁴ RCW 81.28.010.

⁵ RCW 81.04.550.

⁶ RCW 81.28.280.

⁷ WAC 480-62-310.

⁸ *Id.*

⁹ RCW 81.04.380. *See also* RCW 81.04.405 (providing for an additional \$100 penalty per violation).

considered in setting the assessed penalty amount, or explains other circumstances that convince the Commission that a lesser penalty will be equally or more effective in ensuring the company's compliance.¹⁰ The Commission also considers whether the violations were promptly corrected, a company's history of compliance, and the likelihood the violation will recur.¹¹

10 The Penalty Assessment includes a \$100 penalty for one violation of WAC 480-62-310, which requires railroad companies to report certain events to the EOC within 30 minutes of learning the event occurred. In its response, BNSF does not request mitigation of the penalty but argues that WAC 480-62-310 is likely preempted by federal law.

11 We decline to mitigate the penalty. BNSF does not contest the penalty or request mitigation of the penalty amount. We nevertheless address the legal issue presented in BNSF's response to clarify our expectations going forward.

12 We appreciate BNSF's statement that it "understands the State's interest receiving timely information about fatalities and sees the value in communicating this information to the Commission as soon as possible." This suggests that BNSF is cooperative and responsive, relevant factors to consider under our Enforcement Policy.¹²

13 While BNSF asserts it has a history of compliance, Staff has assessed penalties against BNSF for failing to follow EOC notification requirements on more than one occasion.¹³ This history of penalty assessments weighs against mitigating the penalty had BNSF requested any reduction of the penalty amount.

14 We reject BNSF's suggestion that WAC 480-62-310 is preempted by federal law. States may adopt laws concerning railroad safety when they are necessary to eliminate or reduce an essentially local safety or security hazard; are not incompatible with federal law; and do not unreasonably burden interstate commerce.¹⁴

¹⁰ Docket A-120061, Enforcement Policy for the Washington Utilities and Transportation Commission (January 7, 2013).

¹¹ Enforcement Policy ¶19.

¹² Enforcement Policy ¶ 15.

¹³ See *WUTC v. BNSF*, Docket TR-171021 (June 18, 2018), *WUTC v. BNSF*, Docket TR-150284 (Feb. 25, 2016), *WUTC v. BNSF*, Docket TR-160912 (Dec. 15, 2016).

¹⁴ 49 U.S.C. § 20106.

15 By requiring railroads to report accidents to the EOC, Washington is addressing local safety hazards created by accidents. When the EOC receives notice of a railroad accident, the EOC follows procedures for notifying appropriate state, local, and tribal agencies, such as the Washington State Patrol, the Washington Department of Transportation, and the Commission itself.¹⁵ Accident reporting is directly concerned with reducing local safety hazards by fatal accidents such as this one.

16 BNSF does not establish that requiring accident reports to the EOC either conflicts with federal law or unreasonably burdens interstate commerce. Federal regulations require railroads to report fatal accidents to the FRA “immediately.”¹⁶ As Staff observe, States may require copies of accident reports submitted to the FRA.¹⁷ The Commission’s requirement for a report to the EOC within thirty minutes of an accident is not incompatible with these federal regulations and does not create any conflicting duties for BNSF.

FINDINGS AND CONCLUSIONS

17 (1) The Commission is an agency of the State of Washington, vested by statute with authority to regulate railroads and railroad safety to the fullest extent allowed by federal and state law, and the Commission has jurisdiction over the parties and subject matter of this proceeding.

18 (2) BNSF Railway Co. is a railroad subject to Commission regulation.

19 (3) BNSF Railway Co. violated WAC 480-62-310 by failing to report a fatal accident.

20 (4) BNSF Railway Co. should be penalized \$100 for one violation of WAC 480-62-310.

¹⁵ *WUTC v. BNSF*, Docket TR-150284 Memorandum of Understanding between WUTC and EMD (Feb. 25, 2016)

¹⁶ 49 C.F.R. § 225.9. *See also* 49 C.F.R. § 840.3 (requiring a railroad to report a fatal accident to the National Transportation Safety Board within two hours).

¹⁷ 49 C.F.R. § 225.1.

ORDER

THE COMMISSION ORDERS:

- 21 (1) BNSF Railway Co.'s request for mitigation of the \$100 penalty is DENIED.
- 22 (2) The penalty is due and payable no later than March 19, 2020.
- 23 The Secretary has been delegated authority to enter this order on behalf of the
Commissioners under WAC 480-07-903(2)(e).

DATED at Olympia, Washington, and effective March 5, 2020.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARK L. JOHNSON
Executive Director and Secretary

NOTICE TO PARTIES: This is an order delegated to the Executive Secretary for decision. As authorized in WAC 480-07-904(3), you must file any request for Commission review of this order no later than 14 days after the date the decision is posted on the Commission's website.