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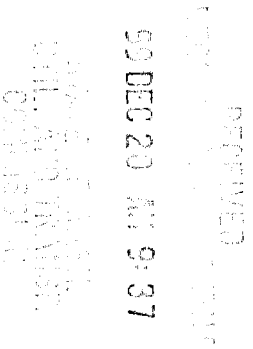

Mike Rowswell
Utilities and Transportation Commission
1300 E. Evergreen Park Dr. S.W.
P.O. Box 47250
Olympia, Washington 98504-7250

Re: Railroad Companies - Operations Rulemaking, TR - 981102

Dear Mr. Rowswell:

Please accept the following written comments on the latest draft of the proposed operations rules. By letter dated May 6, 1999, BNSF and UP submitted general comments on the authority of the Washington Utilities and Transportation Commission ("Commission") and the doctrine of federal preemption. In those comments it was noted that the United States Constitution and acts of Congress have preempted many state laws affecting railroads, including the authority of the state to regulate railroad safety. This letter will supplement our previous submission with additional comments on specific rules addressed at the stakeholders meetings.

WAC 480-62-XXX (Grade Crossing Petitions):

The proposed section requires a petition for approval of certain actions at grade crossings. The railroads are concerned about expansive language used in the rule. Under section (1)(g) a petition is required for any change in crossing surface or physical change to highway approaches.[1] This language would prevent even the most minor maintenance on crossing surfaces without a petition. As written, the section would require a petition to fill potholes or replace a single rotting plank. If the language of the rule was changed to exclude minor repairs or renovation and to cover only material alterations of crossings and approaches, the overbroad interpretation could be avoided.

[1] The draft rule contains two sections (1)(g) which were combined for purposes of these comments.

WAC 480-62-XXX (Procedure to Set Train Speed Limits):

We understand that this section was written to help municipalities understand that the Commission is preempted by federal law in the area of train speed increases. We certainly understand the Commission's desire to inform governmental bodies and their citizens of changes in train speed. The railroads would certainly want to give its own notice of train speed increases to the affected persons. We do not believe, however, that any rule should be enacted that purports to limit train speeds, even if only during the consideration of local safety hazards.

We have recently seen some jurisdictions reluctant to have ordinances on their books that conflict with federal law. One municipality recently passed an ordinance that prohibited train speeds "in excess of that authorized by the United States Secretary of Transportation." This approach is consistent with the intent of federal law. The Federal Railway Administration has said:

> FRA's current regulations governing train speed do not afford any adjustment of train speeds in urban settings or at grade crossings. The omission is intentional. FRA believes that locally established speed limits may result in hundreds of individual speed restrictions along a train's route, increasing safety hazards and causing train delays. The safest train maintains a steady speed. Every time a train must slow down and then speed up, safety hazards, such as buff and draft forces are introduced. These kind of forces can enhance the chance of derailment with its attendant risk of injury to employees, the traveling public, and surrounding communities.

The FRA has also observed:

> The physical properties of a moving train virtually always prevent it from stopping in time to avoid hitting an object on the tracks regardless of the speed at which the train is traveling. Prevention of grade crossing accidents is more effectively achieved through the use of adequate crossing warning systems and through the observance by the traveling public of crossing restrictions and precautions.

The Commission's objectives can be met by a simple two sentence rule that prohibits speeds in excess of those set by the federal government and allows interested parties to petition the Commission for mitigation of local safety hazards. If the Commission chooses to stay with the format of the rule proposed here, we would suggest that the last line of section (1) be changed to read:

> Accordingly, the Commission prohibits train speeds in excess of that authorized by the United States Secretary of Transportation. The

> Commission will act to limit train speeds below those set by the United States Secretary of Transportation only where it finds that there exists such a local safety hazard and that reduction of the train speed is necessary to eliminate or reduce that hazard.

Section (2) should read:

> The Commission will consider whether to set a train speed limit below that authorized by the United States Secretary of Transportation either upon petition or upon its own motion.

Section (3) deals with factors which might be considered in determining whether an essentially local safety hazard exists. The question of what is an essentially local safety hazard is a question of federal law. As the federal judiciary further defines the concept, this rule will become dated. Petitioners under this section should be encouraged to satisfy themselves as to how federal law defines an essentially local safety hazard and not be encouraged to rely on a state rule that over time may become incorrect or misleading. It may be most appropriate to eliminate this section entirely.

WAC 480-62-030 (Flaggers):

At the workshop we clarified that the flagger rule was not intended to cover the flagging of a track by train crews who are, for example, making a shove across a crossing. Rather, the rule applies to flagging of vehicle traffic during the construction or repair of crossings or overpasses. To avoid future confusion we suggest that this clarification be included in the rule.

WAC 480-62-XXX (Community Notice Requirements):

This rule is premised on the desire to notify municipalities of planned closures of grade crossings in their jurisdiction. As written, however, the rule would require notice of all events that anyone views as impacting a community, including, potentially, impacts outside the Commission's jurisdiction to address. We believe that the phrase "planned action that will have a significant impact on a community" be changed to read "planned inspection, reconstruction or maintenance activity that will significantly disrupt use of a crossing" and that subparagraph (2) be eliminated in its entirety.

An additional problem arises because of the inability to precisely predict construction schedules. Construction on a particular crossing may be planned for a Monday, but not start until Friday. The railroads understand the importance of keeping the road authority informed of changes and delays, and do not want to have the flexibility required for such projects limited by a notice requirement. This concern would be greatly diminished by changing section (3)(d) to require only a best estimate of start and completion dates.

WAC 40-62-XXX (Miscellaneous Reporting Requirements):

Section (1) requires notice of abandonment of a "portion of a spur, branch or line." As noted during our meetings, most spur tracks are installed and serviced pursuant to contracts with the serviced industry. If the number of switches falls below a certain level, the service directly to the industry may be discontinued and transferred to a team track. This does not appear to be the type of transaction that the rule was intended to cover. Reference to spur tracks, therefore, should be removed.

The information requested in section (2) consists of data that the railroads already attempt to provide to the federal government on a voluntary basis, although some computer problems need to be resolved to facilitate reporting at the federal level. It is our understanding that the information reported to the FRA is available to the states. Rather than adopt a rule at this time, we suggest that further investigation be made of the ease and/or difficulty in securing the requested information from the FRA and that the railroads be given the opportunity to resolve any data problems on an informal basis before enacting a rule that mandates these reports.

The railroads have no objection to providing the information identified in sections (4) and (5). We believe that the Commission already has access to this information if requested. From the railroads' viewpoint, it would be preferable to provide the Commission access to the information when needed. Access could be provided online in some instances. The Commission could also review information on site or request copies of material needed. The rule could read, for example:

> (4) Upon request every railroad shall provide the Commission access to or copies of track profiles and timetables. The access required by this rule may be satisfied by allowing electronic access to the information.

WAC 480-62-080 (Accident Reports):

> The Code of Federal Regulations § 225.1 provides:
>
> Issuance of these regulations under the federal railroad safety laws and regulations preempts States from prescribing accident/incident reporting requirements. Any State may, however, require railroads to submit to it copies of accident/incident and injury/illness reports filed with FRA under this part, for accidents/incidents and injuries/illnesses which occur in that State.

The railroads understand the Commission's concern is not the failure to notify the Commission, but the timing of the notification. To the extent that the rule is not preempted, this concern is met by requiring timely notification under subsections (5) and

(6).

WAC 480-62-XXX (Crossing Blockages):

As written, this rule prohibits the blocking of crossing for over ten minutes, even when a train is moving. Such a prohibition is preempted. In CSX Transport, Inc. v. City of Plymouth, 86 F.3d 626 (6th Cir. 1996), the court noted that the only way to comply with blocked crossing restrictions would be to shorten trains or increase speed. It went on to explain the interplay between control of a moving train and areas preempted by federal safety regulations:

> Requiring trains to be shorter would necessarily require CSXT to use more trains. The district court, quoting an April 1989 Report of Secretary of Transportation to the United States Congress, noted that "'[c]hanges in highway traffic volumes and total trains per day effect accident rates more than other factors.'" Plymouth presents no evidence contrary to this conclusion. As the evidence indicates that accident rates would be affected by compliance in this manner and accident rates unquestionably relate to railroad safety, the ordinance is "related to railroad safety." This is true even though this relationship is from an " effect [that] is only indirect." Morales, 504 U.S. at 386, 112 S.Ct. at 2038..

The court went on to address the issue of train speed at follows:

> [F]aster trains, the only logical compliance alternative to shorter trains, also have a connection with and are thus related to railroad safety. The Secretary of Transportation's report indicates the obvious: Higher average train speeds increase the number of "fatal accidents, as a proportion of all accidents." This is true whether these trains would be made faster by existing engine power, an extra "pusher engine," or altered tracks.

Id., see also, Norfolk and Western Railway v. City of Oregon, Case No. 3:96 CV 7695 (W.D. Ohio 1997). We do not believe that the rule should be written to include moving trains.

As to trains stopped on a crossing, the rule presents other problems that require clarification. Where a train is cut to clear a crossing, for example, reconnecting the train and performing required air tests may cause the crossing to be blocked for more than ten minutes. It is possible that cutting a train and then rebuilding it may actually result in longer blocking of crossings. The rule allows no discretion to a train crew faced with the option of blocking a crossing for twelve minutes or cutting the train and blocking the crossing for 25 minutes while the train is rebuilt and the air brakes tested. It would

seem appropriate to build greater flexibility into the rule. For example, the rule could state that no stopped train shall block a crossing in excess of 10 minutes without reasonable justification.

WAC 480-62-XXX (Crossing Surfaces):

We understood at the workshop that this rule would be further discussed in a smaller committee of interested persons. As indicated before, however, we believe that coming up with a workable rule may be difficult or impossible. By their very nature, grade crossings start to deteriorate as soon as they are built. A rule that identifies the standard to which a crossing should be built can never be achieved on an ongoing basis. Attempting to draw a "bright line" to define when a crossing must be fixed is unlikely to be successful because of the differences in crossings including levels of train traffic, levels of vehicular traffic, vehicle speeds, crossing configurations, weather conditions, etc. In addition, a "bright line rule" is unnecessary. The testimony presented at the work sessions was not that there was disagreement over whether a crossing needed repair or not, but, rather, the timeliness of the railroads' response to the complaint. That issue can be addressed under the Commission's authority to enforce existing statutes regarding the obligation to maintain safe and sufficient crossings. We recommend against attempting to adopt any specific rule on grade crossing surface specifications.

We hope that these comments are helpful. If you have any questions, please feel free to call.

Yours very truly,

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