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October 16, 2000

Ahmer Nizam
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. Nizam:

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 last stakeholders meetings.

WAC 480-62-X1.1(8) (Multi-track grade crossing):

We understand the proposed rules are being redrafted to eliminate the definition of "multi-track crossing." We agree that there is insufficient basis for the adoption of the previously proposed definition and agree that it would be inappropriate to establish a definition without further study of the implications of doing so.

WAC 480-62-X1.7 (Grade Crossing Petitions):

The BNSF and UP continue to be concerned by the inclusion of language that requires a petition to the WUTC to change a crossing surface. It is not uncommon for the railroad and road authority to agree that the best method for repairing a grade

crossing is to upgrade the crossing. Since it is inconceivable that the Commission would deny a petition under these circumstances, the process would not serve its apparent purpose of Commission oversight. We are aware of no statutory authority for the Commission to require or disapprove the use of any particular type of crossing surface. If a particular surface is not performing well, the Commission has authority to require that the situation be remedied, pursuant to its general authority over crossing surfaces, but the suggested requirement that a railroad secure authority to use a particular type of surface material goes too far. Nor should this rule be used to help inventory grade crossing surfaces. If notice is the only issue, this concern is met by the new Railroad Community Notice Requirements being imposed by the Commission. For these reasons, we believe that the reference to petitions for changes in grade crossing surfaces should be deleted.

WAC 480-62-X1.8 (Procedure to Set Train Speed Limits):

The Commission is preempted by federal law in the area of train speed increases. We were previously told that that this section was written to help municipalities understand the Commission's very limited role in this area. The rule as drafted, however, requires railroads to seek the Commission's permission to increase train speeds in areas where pre-*Easterwood* train speed orders may have been enacted.[1] This is clearly improper. It is inappropriate to require a railroad to petition to increase train speeds to a level within what is authorized by the U.S. Secretary of Transportation.

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

[1] *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993) held that federal train speed regulations issued by the Secretary pursuant to FRSA and codified at *49 CFR § 213.9(a)* (1992) preclude additional state regulation of train speeds in the absence of a unique local safety hazard that cannot otherwise be mitigated.

> 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 BNSF and UP again suggest a simplified 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.

WAC 480-62-X2.5 (Blockage of Public Grade Crossings):

We understand this proposed rule is being rewritten to address comments received at the October 2, 2000 workshop. We may have further comments after we see the rewritten rule.

WAC 480-62-X2.6 (Crossing Surfaces):

The responsibility is placed on "Railroad Companies" to maintain grade crossing surfaces. It fails to distinguish between crossings owned by a railroad and crossings owned by another. Where an industry owns the crossing, the obligation of maintenance should not be placed on the non-owning railroad.

We understand the portion of this rule relating to multi-track crossings is being rewritten. We may have additional comments after seeing the redrafted rule.

On an unrelated note, this rule contains its own notice requirement. Since, as to railroads, the issue of notice is covered elsewhere, we see no need for this duplication in the last sentence of WAC 480-62-X2.6(5).

WAC 480-62-X2.8 (Flaggers):

The railroads' concerns regarding these flagging rules were previously expressed at the emergency rulemaking stage. A copy of that letter is attached for convenience. The Commission staff has indicated that the rule was drafted to conform to the Department of Labor and Industries' rule on the same subject. It was our understanding at the time of the workgroup that the L&I rule was not yet final. That aside, consistency is no basis for ignoring what the railroads believe are legitimate concerns with the rule as written.

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

As noted earlier, the railroad is concerned with its ability 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 could be met by allowing the railroad to provide the "anticipated" starting and completion dates of the action. This does not, however, address the issue of immediate repair for FRA defects or other repairs that could be taken care of quickly were it not for the notice requirement.

We believe that emergency repairs should be explicitly eliminated from the scope of the rule and that, as to other work, the ten-day notice requirement be modified by inserting a new sentence at the end of WAC 480-62-X3.2, along the following lines: "If a ten-day written notice is not feasible or practicable, the railroad shall give whatever shorter notice, including notice by telephone only, as is reasonable under the circumstances."

We understand the rule is being rewritten to delete subparagraph (2)(b).

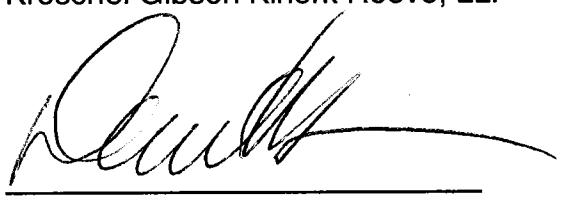
WAC 480-62-X3.4 (Miscellaneous Reporting Requirements):

We understand that subparagraphs (1), (4) and (5) of this proposed rule are being revised to address comments received at the October 2, 2000 workshop. We request that subparagraph (2) also be revised to clarify the intent of the rule, i.e., that railroads cooperate in providing this information to the Commission to the extent the information is reasonably available and not burdensome to furnish. We understand the WUTC intends to gather this information in informal conversations with trainmasters, based on their best estimates, and is not expecting computer-generated counts of this information.

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

Yours very truly,

Kroschel Gibson Kinerk Reeve, LLP



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May 8, 2000

Carole Washburn Secretary
Washington Utilities and Transportation Commission
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Olympia, WA 98504-7250

Re: Emergency Rulemaking for Flaggers
WAC 480-62-XXX
Docket No. TR-000606

Dear Ms. Washburn:

These comments regarding the emergency flagging rules are submitted on behalf of The Burlington Northern Santa Fe Railway Company and the Union Pacific Railroad Company. We understand that these emergency rules were prompted by the unfortunate death of two flaggers during the last legislative session. Although the accidents did not involve any railroad activity, the legislature has mandated that the Commission review its flagging rules to determine if additional steps can be taken to protect persons engaged in this sometimes dangerous activity.

As discussed below, we feel that the Commission should consider the following:

1. The new rule should explicitly state that it does not cover flagging operations preempted by existing federal regulations such as the signal maintenance, inspection and testing provisions of the Code of Federal Regulations (49 CFR Part 234).

2. The rule should remove all danger to flaggers from vehicular traffic by encouraging the closing of crossings during construction work where possible.

3. The rules that are in conflict with existing rules should not be enacted because they would require the railroads to comply with two conflicting standards.

4. Where the rules simply restate what is already in existing rules, they should be modified.

We hope that these comments are helpful, and look forward to your responses.

1. Federal Flagging Regulations Preempt WUTC Rulemaking

The Commission should carefully consider the extent to which the proposed regulations are preempted by federal laws and regulations. Unfortunately, the speed at which emergency rules are submitted to the Commission often leads to unforeseen conflicts with other rules and regulations. The preemptive effect of federal regulations has been discussed at some length in prior submissions to the Commission. A copy of comments to rulemaking TR-981101 and TR-091102 is attached to this letter for ease of reference. As noted in our prior submissions, 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. For example, the Commission should consider the preemptive effect of 49 CFR Part 234.

We suggest that a preamble such as the following be added to the new section on railroad flagging:

> The following rules shall be observed whenever any railroad company engages in the construction, maintenance, or repair of a grade crossing or overpass, except where the subject is already covered by federal regulations (e.g., when a railroad company is responding to warning system malfunctions involving an activation failure, a partial activation or a false activation for which 49 CFR Part 234 imposes specific requirements for warning highway traffic and railroad employees).

The Code of Federal Regulations clearly deals with issues of "Maintenance, Inspection, and Testing" of signal systems at grade crossings. 49 CFR §§ 234.201 et seq. This Part also deals with the issue of flaggers, their equipment and protective gear while flagging at grade crossings. 49 CFR § 234.5. To remove any question of the preemptive effect of this Part the following language was included:

> Under 49 U.S.C. 20106 (formerly §205 of the Federal Railroad Safety Act of 1970 (45 U.S.C. 434)), issuance of these regulations preempts any state law, rule, regulation, order, or standard covering the same subject matter, except a provision directed at an essentially local safety hazard that is consistent with this part and that does not impose an undue burden on interstate commerce.

49 CFR § 234.4. Failure to exclude areas from the scope of the Commission's rules that are clearly preempted by federal regulations runs the risk of calling into question the validity of the entire rule. Clearly language excepting situations such as those covered by 49 CFR Part 234 should be included.

2. Safety Of Flaggers Can Be Best Assured By Closing Crossings During Construction

In the context of railroad operations at grade crossings, flaggers refers to individuals who control vehicular traffic during construction or maintenance work. The most effective way to prevent the accidental injury of flaggers during such operations is to remove the necessity for flaggers. A rule which encourages the closing of crossings during construction work would eliminate injuries to flaggers by eliminating the need to flag vehicular traffic. A rule which states that the railroads and the road authority should cooperate to close crossings during construction activities would accomplish this result.

3. The Commission Should Not Enact a Rule Which Conflicts With Existing Rules

a. Direct conflicts with the MUTCD.

Washington Administrative Code 480-62-020 requires railroads comply with the national standard set forth in the Manual on Uniform Traffic Control Devices (MUTCD) as adopted by the Federal Highway Administration. The Code of Federal Regulations also encourages conforming with the MUTCD in 49 CFR §234.5. The 1988 edition of the MUTCD, Revision 3 (September 3, 1993) deals at some length with flagging.[1] The following conflicts exist between the proposed rule before the Commission and the existing standard mandated by WAC 480-62-020. Due process and fundamental fairness require that a regulatory body not enact two conflicting sets of rules, and the proposed rule should be modified accordingly.

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[1] References to the MUTCD are all to Part VI of the revised 1988 edition

The proposed rule suggests that railroads should develop and use a method to warn flaggers of objects approaching from behind. The primary problem with this section is an implied recognition that a flagger could be placed in a situation where vehicles are approaching him from behind. The proposed rule suggests that a spotter be provided to work with the flagger. The MUTCD provides, however, that flaggers should be placed as follows:

> The Flagger should stand either on the shoulder adjacent to the traffic being controlled or in the barricaded lane. At a "spot" construction, a position may have to be taken on the shoulder opposite the barricaded section to operate effectively. A flagger should stand only in the lane being used by moving traffic after traffic has stopped, and the flagger needs to be visible to other traffic or to communicate with drivers. Because of the various roadway geometrics, *flaggers should be clearly visible to approaching traffic at all times. For this reason the flagger should stand alone. Other workers should not be permitted to congregate around the flagger station.* The flagger should be stationed far enough ahead of the work force to warn them (for example with horns, whistles, etc.) of approaching danger, such as vehicles out of control.

The concept of a spotter is contrary to the specific recommendation of the MUTCD that flaggers, to enhance visibility and safety, should stand alone.

Mirrors on handheld equipment are likewise contraindicated. Flaggers should not be distracted from their primary focus on approaching traffic. Implicit in the rules that flaggers "shall face traffic" (MUTCD §6E-5) and never be in traffic lanes unless traffic has come to a complete stop (MUTCD §6E-6) is an understanding that the flagger should not be positioned with his or her back to moving traffic. Section 6E-5 further requires flaggers to hold their STOP/SLOW paddle "with the arm extended horizontally away from the body." (See attached Figure VI-4 from the MUTCD). Mirrors on a STOP/SLOW paddle could not be used unless and until this rule is violated.

b. Conflicts with the general concepts of the MUTCD.

Some of the provisions of the proposed rule do not directly conflict with existing rules. They do, however, conflict with the underlying principles of the MUTCD. In addition to the rules above that conflict with specific requirements of the MUTCD, the Commission should consider whether other provisions violate the underlying principles of the MUTCD.

As discussed above, the MUTCD states that flaggers "shall face traffic." The MUTCD states that "judicious use of special warning and control devices may be helpful for certain difficult work area situations." The MUTCD warns, however, that "misuse and overuse of special devices/techniques can greatly lessen their effectiveness." See Part VI at §6D-2. Mirrors on hard hats and proximity detectors are unproven devises which may not be effective. On the other hand, they would certainly distract a flagger from his primary obligation of watching oncoming traffic. In addition, such devices would, from time to time, give false and distracting warnings. If this occurred too often, the warnings would soon be ignored.

The equipment prescribed for flaggers is covered in detail in the MUTCD at 6E-3. The requirement that white coveralls be worn at night (presumably under the flaggers high visibility garment), however, is not covered by the MUTCD. This requirement is not a commonly seen one. The apparent hope is that a white overall would make a flagger more visible at night. Upon reflection, however, it would seem that during some of the more dangerous weather conditions such as snow or fog white overalls may make the flagger less noticeable. No one wants to see someone hurt because dark clothing blends in with dark background or because white clothing blends in with a snowy bank. Because the primary protection comes from high visibility garments, it would seem appropriate to leave the choice of additional clothing to the employee.

Modifications of the MUTCD (and federal standards) will also result in different clothing and equipment being required at the same crossing depending on the type of work being performed. Likewise, a crew working in Portland, Oregon, and Vancouver, Washington, would have to have two sets of equipment for the same work dependent on what state the job was in. Such results are contrary to the attempt of the Federal Highway Administration to set a uniform standard and should obviously be avoided.

A far more logical approach to the concern of flaggers being hit from behind would be enforce the requirements of the MUTCD and other federal regulations. Although it appears to be covered by the MUTCD's requirement that a flagger shall face approaching traffic, the Commission could adopt a rule which states that flaggers should not be placed in positions where they are at risk of being hit by objects from behind. We understand that the accident that has prompted the proposed rule involved the backing up of construction equipment. This type of accident would not occur if a general rule such as that suggested were implemented and followed.

4. The Proposed Rule Should be Redrafted To Compliment Existing Standards and Not Merely Restate Them

For the most part, the remaining portions of the proposed emergency rules duplicate existing standards. In 1997 Governor Gary Locke mandated that the Washington Administrative Code be updated and streamlined to remove duplicative, archaic and unneeded provisions. See Executive Order 97-002. Indeed, the Commission's existing flagging rules are part of an ongoing rulemaking process pursuant to Governor Locke's mandate. See TR-981101. Since sections (3), (4) and (5) of the emergency rule are covered by the MUTCD, and since the MUTCD is incorporated into the Washington Administrative Code by WAC 480-62-020, the Commission should significantly streamline these sections as follows:

> (3) Safety briefing of flaggers must include familiarizing the flagger with the Traffic Control Plan (TCP) and any special considerations mandated by train movements.

This modification would take into account the work that is performed in developing a TCP under the MUTCD. There does not appear to be any good reason to attempt to create a new briefing requirement under these rules. This is especially true since the areas covered by the proposed section (3) are already covered by the TCP.

The issue of signing the maintenance area is also covered in section 6C-2 and 6F-1b(3) and (11) of Part VI of the MUTCD. The type and placement of warning signs for flaggers is covered by these sections. Section 6F-1b(11) provides that standard flagger warning signs with supplemental distance plates should be used. The draft emergency rules suggest that additional signs should be required. Since the MUTCD has determined the optimal placement of warning signs based on traffic speed and braking distance, an obvious question is where the new sign should be placed. More importantly, the MUTCD recognizes that placement of multiple warning signs may or may not be necessary or effective and that multiple signs may actually decreases their effectiveness. For this reason we suggest section (4) be modified to read:

> (4) Where appropriate under the MUTCD, advance warning signs marked "Flagger Ahead" should be used.

Section (5) of the rule should be removed since it adds nothing to the existing requirements of the MUTCD and WAC 480-62-020. Section (6), in turn, should be changed to section (5).

If you have any questions regarding the above, or would like to discuss it further, please feel free to give us a call.

Yours very truly,

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