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December 13, 2000

RECEIVED
RECORDS MANAGEMENT
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STATE OF WASH.
UTIL. AND TRANSP.
COMMISSION

Carole Washburn
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 Ms. Washburn:

The Burlington Northern and Santa Fe Railway Company ("BNSF") and Union Pacific Railroad Company (UP) respectfully submit the following written comments on the Commission's Notice Proposed Rulemaking (CR-102) for the above docket number.

We wish to reiterate the concerns that we expressed at the workshops regarding proposed requirements for increasing train speed limits, rules for community notice, and other notification rules. We have worked with the Commission's staff from the outset of this rulemaking in an effort to resolve our differences in a cooperative manner. Throughout this proceeding, the BNSF and UP have challenged this Commission's jurisdiction over certain subject matter and have also pointed out the sheer impracticality of some of the rules proposed. We continue to be concerned by the Commission's failure to seriously consider our federal preemption claims.

The proposed rule to require prior approval before a railroad may modify its track speeds is patently unconstitutional. The railroads are willing to continue to work with the Commission's staff to reach a pragmatic resolution of the various legal and political issues, but for the reasons set forth below, it is our position that

further modifications to the proposed rules are necessary before the amendments are presented to the Commission for adoption.

WAC 480-62-155 (Procedure to Set Train Speed Limits):

The Commission staff has already acknowledged that the state is preempted by federal law from restricting the railroads' ability to implement train speed increases. See, Stakeholder Workshop Discussion Paper No. 1, May 27, 1999. ("Staff has discussed the issue and is of the opinion that under federal law, the Commission can only consider whether unique local conditions are present when considering each request.") Although the stated intent of the Commission's staff was to propose a rule that would help explain the limits of the Commission's authority to local communities, the proposed rule as written far exceeded this limited objective.

In analyzing this rule, the primary issue to be addressed is whether the Commission has any residual power now that RCW 81.48.030 and 81.48.040 are now clearly preempted by federal law. The Commission derives its authority, except where preempted by federal law, from the Revised Code of Washington. It has been generally agreed that the Commission's authority over railroads operating in Washington has been drastically reduced since these code sections were first adopted. Regulating train speeds is a prime example.

Federal law recognizes the paramount need for a uniform system of safety in an industry that freely interchanges trains, locomotives, cars and equipment. 49 U.S.C.A. §20106. A state may not adopt or continue in force regulations once "the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C.A. §20106. The United States Supreme Court in CSX v. Easterwood, 507 U.S. 658 (1993), held that federal regulations covered the subject matter of train speed and preempted state regulation of train speeds. This was consistent with the longstanding position of the Federal Railroad Administration that federal regulations preempt any local speed restrictions on trains. See, FRA Docket No. RST-90-1, Notice No. 8, 63 Fed. Reg. 33992.

"A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety" only if it can meet very specific requirements. The law, regulation or order is permissible only if it:

(1) is necessary to eliminate or reduce an essentially local safety hazard;

(2) is not incompatible with a law, regulation, or order of the United States government; and

(3) does not unreasonably burden interstate commerce.

49 U.S.C.A. §20106. It is highly unlikely that the Commission would ever be presented with an essentially local safety hazard that could be resolved by the regulation of train speed that does not violate these requirements of 49 U.S.C.A. §20106.

The FRA has stated, for example, that its regulations "do not afford any adjustment of train speeds in urban settings or at grade crossings . . . [because the] 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 FRA's position is that the safest train maintains a steady speed. The FRA has maintained this position even though local communities believed that increased speeds created issues of grade crossing safety, pedestrian safety and risk of derailments. FRA Docket No. RST-90-1, Notice No. 8, 63 Fed. Reg. 33992. The safety concerns normally associated with train operations in the urban setting would not be subject to state regulation under the exception for an "essentially local safety hazard" because they are capable of being regulated under a nationally uniform rule, and the FRA has already taken them into account.

It is likely that any attempted regulation by this Commission of an "essentially local safety hazard" by controlling a train's speed would be incompatible with federal regulations and would violate the second requirement of §20106. It is also likely that it would be deemed to constitute an unreasonable burden on interstate commerce. Indeed, it is virtually impossible to think of a situation where the Commission could mitigate an essentially local safety hazard by limiting or conditioning train speeds without violating the second and third prongs of §20106.

In addition, since the power to regulate train speeds does not rest with the Commission, the Commission cannot require railroads to seek its prior approval of speed increases. This has not been disputed during the rulemaking process. The rule as written, however, only partially acknowledges this limitation on the Commission's authority. Federal preemption of state's regulatory authority over train speeds extends not only to the state's *adoption* of more stringent requirements, but also to the *continuation in force* of such requirements. The rule as written seeks to *continue in force* existing train speed restrictions and require prior approval from the Commission for any change in train speeds. For these reasons, the proposed rule is preempted.

The Commission staff has stated that the rule was written primarily to help municipalities understand the Commission's limited role in the area of speed regulation. The WAC does not appear to be the proper place to educate the public about the limits on the Commission's powers. If this is the sole reason the rule was drafted, then it should be deleted in its entirety. If, for some other reason, a rule is deemed necessary, it must not be a rule that seeks to *continue in force* train speed restrictions that are preempted by federal law. At most, it should be a simplified rule that prohibits speeds in excess of those set by the federal government and allows governmental parties to petition the Commission for mitigation of local safety hazards and shoulder the burden of proving that such restrictions or conditions would comply with federal law if imposed.

WAC 480-62-305 (Community Notice Requirements):

BNSF and UP remain concerned that this rule is inconsistent with maintenance practices and could result in delays of routine non-emergency repairs. The railroad is generally unable to predict when it will have time to conduct non-emergency repairs. For example, if the opportunity presents itself a railroad may replace a broken plank in a crossing. But, if the railroad is required to give advance notice before commencing the repair, it will be less likely to seize that opportunity. The rule should be modified to allow flexibility needed to perform routine maintenance. Only when it is likely that the project will inflict a significant impact on the community, and it is practicable to provide advance notice, should the railroad be expected to do so.

WAC 480-62-315 (2) (Miscellaneous Reporting Requirements):

This proposed rule requests information that is not kept in the ordinary course of the railroads' business. While the Commission staff has insisted that it only intends to elicit information that is readily available to railroads, the proposed requirements far exceed this modest objective. For example, at the last workshop it was suggested that subsection (2), which requires reports on daytime and nighttime through trains and switching movements, could be easily estimated and provided by a trainmaster or other local official. However, the railroads do not maintain such information in the form that is specified by the rule (no records are kept on switching moves and records on through trains cannot easily be sorted to give time of day information). A costly and time-consuming study would be required to develop this data. Staff has never articulated any justification for the rule that would warrant imposing such a heavy burden on the railroads. Rather than mandating railroads to gather information that is not readily available, the rule should be modified to require the railroads to cooperate in a reasonable manner to respond to reasonable data requests.

If you have any questions regarding the above comments, please feel free to call either of the undersigned.

Very truly Yours,

KROSHCEL GIBSON KINERK REEVE, L.L.P.

David M. Reeve
Attorney for The Burlington Northern and Santa Fe Railway Company

KILMER, VOORHEES & LAURICK, P.C.

Carolyn Larson
Attorney for Union Pacific Railroad Company

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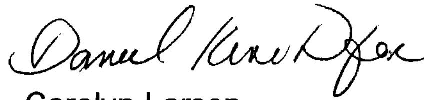

Carolyn Larson
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