

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. BNSF RAILWAY COMPANY, Respondent.	DOCKET TR-160912 ORDER 01 INITIAL ORDER APPROVING SETTLEMENT AGREEMENT
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BACKGROUND

- 1 On August 15, 2016, the regulatory staff (Staff)¹ of the Washington Utilities and Transportation Commission (Commission) filed a complaint against BNSF Railway Company (BNSF or the Company) alleging that the Company failed to report a release of hazardous materials for seven days after the incident, in violation of WAC 480-62-310. Specifically, the regulation requires railroad companies to alert the Washington State Emergency Operations Center (EOC) within thirty minutes of a company learning of a hazardous materials release. Staff recommended that the Commission impose a \$1,000 penalty for each of the seven violations, for a total penalty of \$7,000.
- 2 On August 16, 2016, Staff filed its Investigation Report including multiple appendices (Staff Investigation Report). The Staff Investigation Report cited one prior Commission enforcement action against BNSF involving 14 incidents of hazardous material releases.² BNSF and Staff reached a settlement in that matter which resulted in the Company agreeing to adjust “its policy and practice related to hazardous material reporting 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. *See* RCW 34.05.455.

² Staff Investigation Report at 4-5.

[make] changes to its compliance program to maximize compliance with WAC 480-62-310....”³

- 3 On December 7, 2016, Staff and BNSF filed a Settlement Agreement (Settlement), which is included as Attachment A to, and incorporated into, this Order. The Settlement and Supporting Narrative purport to resolve all of the contested issues in this proceeding.

COMPLAINT

- 4 On March 16, 2016, Mr. Matt Arnold, a Transportation Engineer with the Commission, noticed a BNSF tank car “leaking fluid from the manway cover and puddling on the ground.”⁴ The hazardous materials placard on the tank car “indicated UN1202 – Diesel fuel (gas/oil/combustible liquid).”⁵ Mr. Arnold informed Ed Lutz, BNSF’s trainmaster in Blaine, Washington, of the leak, and Mr. Lutz stated that he would address it.⁶ Mr. Arnold observed that the tank car was being repaired as he concluded his inspections.⁷
- 5 On March 22, 2016, Mr. Arnold verified that BNSF had failed to report the incident to the EOC.⁸ On March 23, 2016, Ms. Betty Young, Transportation Planning Specialist in the Commission’s Rail Safety section, notified Mr. Justin Piper, BNSF’s Director of Hazardous Materials and Staff’s contact for hazardous material incidents, of the March 16th incident.⁹ Mr. Piper stated that he would investigate the matter and provide a response to Staff.¹⁰ He contacted the EOC that same day and reported the hazardous materials release.¹¹

³ *Id.* at 5.

⁴ *Id.* at 6. Mr. Arnold was inspecting freight cars in the BNSF Elliott Yard in Ferndale, Washington.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

- 6 Mr. Piper contacted Staff on March 28, 2016, confirming the details of the leak as described by Mr. Arnold.¹² According to Mr. Piper, Mr. Arnold informed the BNSF trainmaster of the leak when it was discovered, and the BNSF trainmaster then contacted the shipper of the materials, Energy Logistics.¹³ Energy Logistics inspected the car and discovered that “the manway swing bolts had not been properly tightened, which allowed for diesel fuel to be released between the manway lid and the sealing surface as the liquid sloshed during the tank car movement.”¹⁴ Energy Logistics “secured the manway and cleaned the sides of the tank car.”¹⁵ Mr. Piper acknowledged that the local BNSF trainmaster erred in not following the Company’s internal notification protocol which required contacting the BNSF Service Interruption Desk in Fort Worth, Texas.¹⁶ Had the BNSF procedure been followed, Mr. Piper asserts that the EOC would have been timely notified on March 16.¹⁷ The Company has since provided support and counseling on spill notification procedures and BNSF’s policy to the Bellingham trainmaster and to the Company’s operations employees in its Northwest Division.¹⁸
- 7 Jeff Roberson, Assistant Attorney General, Olympia, Washington, represents Staff. Christopher G. Emch of Foster Pepper PLLC, Seattle, Washington, and Brooke Kuhl, BNSF, Missoula, Montana, represent BNSF.

SETTLEMENT

- 8 In the Settlement, BNSF admits that “it did not make a telephone call to the EOC until seven days after one of BNSF’s employees first learned of the incident.”¹⁹ The Company also agrees to pay the full penalty recommended by Staff, \$7,000, within 30 calendar days of the effective date of the Settlement.²⁰

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 6-7.

¹⁵ *Id.* at 7.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Settlement, ¶ 4.

²⁰ *Id.*, ¶ 5.

- 9 Staff and BNSF argue that the Settlement advances the public interest because all parties avoid “the expense, inconvenience, uncertainty, and delay inherent in a litigated outcome [...] and t]he public will similarly benefit if this dispute concludes without further expenditure of public resources.”²¹ Staff and the Company also assert that imposition of the full \$7,000 penalty is consistent with the Commission’s enforcement policy “that any penalty amount should depend on, among other factors, the seriousness of the violation and any history of similar violations.”²²

DISCUSSION AND DECISION

- 10 Pursuant to WAC 480-07-750(1), the Commission will approve settlements when doing so is lawful, the settlement terms are supported by an appropriate record, and when the result is consistent with the public interest in light of all the information available to the Commission. We may approve the Settlement, with or without conditions, or reject it. The Commission has reviewed the Settlement and supporting evidence and concludes that the Settlement terms meet the legal requirements set forth in our regulations.
- 11 BNSF has admitted violating WAC 480-62-310 by not reporting the March 16, 2016, hazardous materials leak to the EOC within thirty minutes of learning of the event, and the public interest will be advanced with imposition of the full penalty of \$7,000 against the Company. BNSF, while markedly late in fulfilling its reporting requirements, appears to have resolved forthwith the leak and address the aftermath with both employee education and hazardous materials clean up. We find that the Settlement terms are lawful, supported by an appropriate record, and consistent with the public interest in light of all the information available to the Commission. We therefore approve the Settlement without conditions.

FINDINGS AND CONCLUSIONS

- 12 (1) The Commission is an agency of the State of Washington vested by statute with authority to regulate railroad companies operating in Washington.
- 13 (2) The Commission has jurisdiction over BNSF Railway Company (BNSF) and the subject matter of this proceeding.

²¹ Supporting Narrative, ¶ 10.

²² *Id.*, ¶ 11.

- 14 (3) The Settlement terms are lawful, supported by an appropriate record, and consistent with the public interest in light of all the information available to the Commission.
- 15 (4) The Commission should approve the Settlement without condition.

ORDER

THE COMMISSION ORDERS That

- 16 (1) The Commission approves without conditions the Settlement Agreement filed by BNSF Railway Company (BNSF) and the Commission's regulatory staff, which is included as Attachment A to, and incorporated into, this Order.
- 17 (2) BNSF is assessed a penalty of \$7,000, which is due and payable within 30 calendar days of the effective date of this Order.
- 18 (3) The Commission retains jurisdiction over the subject matter and the parties to this proceeding to effectuate the terms of this Order.

DATED at Olympia, Washington and effective December 15, 2016.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARGUERITE E. FRIEDLANDER
Administrative Law Judge

NOTICE TO THE PARTIES

This is an initial order. The action proposed in this initial order is not yet effective. If you disagree with this initial order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this initial order, and you would like the Order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this initial order to file a *Petition for Administrative Review*. Section (3) of the rule identifies what you must include in any petition as well as other requirements for a petition. WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within (10) days after service of the petition.

WAC 480-07-830 provides that before the Commission enters a final order any party may file a petition to reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. The Commission will not accept answers to a petition to reopen unless the Commission requests answers by written notice.

RCW 80.01.060(3), as amended in the 2006 legislative session, provides that an initial order will become final without further Commission action if no party seeks administrative review of the initial order and if the Commission fails to exercise administrative review on its own motion.

You must serve on each party of record one copy of any Petition or Answer filed with the commission, including proof of service as required by WAC 480-07-150(8) and (9). To file a Petition or Answer with the Commission, you must file an original and **5** copies of your Petition or Answer by mail delivery to:

Attn: Steven V. King, Executive Director and Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, Washington 98504-7250

Attachment A