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VIA EMAIL AND U.S. MAIL

Ms. Carole J. Washburn
Executive Secretary
Washington Utilities and Transportation Commission
1300 E. Evergreen Park Dr. S.W.
P.O Box 47250
Olympia WA 98504-7250

BNSF and UP Comments on Rulemaking to Consider Amending Rules Pertaining to Walkways (Docket No. TR-041051)

Dear Ms. Washburn:

Pursuant to the Notice of Opportunity to File Written Comments served October 13, 2004. The Burlington Northern and Santa Fe Railway Company ("BNSF") and Union Pacific Railroad Company ("UP") jointly submit these comments on amendment of WAC 480-60-035, Walkways, to address rock size for walkways located on switching leads (Docket No. TR-041051).

Genesis of this Rulemaking

This proceeding arises from letters dated June 7 and July 12, 2004, from Tom Retterath, State Legislative Director of the United Transportation Union ("UTU"), to Carole J. Washburn, Executive Secretary of the WUTC, requesting a new or amended rule on the size of rock to be used in walkways along switching leads. A pre-proposal statement of inquiry (CR-101) was filed by WUTC following dismissal of the letters as petitions. Other letters from individuals have also been posted on the Commission's website.

In his letter of June 7, Mr. Retterath asked that a "new short section" be added to WAC 480-60-035 as follows:

"Material that is three-quarter inch or less in size is required for switching leads."

He cited “problems we have been having with the BNSF,” with emphasis on Everett, Washington, as the reason for the request.

The Current Rule

The present rule (WAC 480-60-035) was adopted in a recent rulemaking that took months to conclude (TR-981101; Order No. R-469 effective 2/21/00). The Railroads’ comments relative to walkways in that proceeding are included in these comments by reference.

The current rule allows for some flexibility in the choice of rock. This flexibility was permitted based on (a) the consensus among all parties that the walkways in the state were generally already in good shape; and (b) the recognition that the railroads in Washington did not have identical ballast standards and had used a variety of gradations of ballast in building those walkways. The rule was designed to continue allowing what already existed, but to give the WUTC enforcement authority over maintenance.

When the current rule was written, the WUTC staff inserted a “Note” in the subsection cited above, which says “...Material that is three-quarter inch or less in size is *recommended* for switching leads in yards.” (Emphasis added.)

The provision was not made mandatory for several reasons. The framers of the rule understood, from numerous workshops and comments, that there are safety concerns with using rock that could inhibit proper drainage. Unless the ballast beyond the ends of the ties that forms the walkway is of a material compatible with the rest of the track structure, and drains as readily as the original ballast, it will produce a “bathtub” effect. This will cause water to be retained in the roadbed under the ties. Poor drainage threatens the integrity of the track and track structure. If the subsurface fails, this can cause a warp in the rails, or make them out of cross-level, or cause track pumping, any of which could lead to a derailment. Poor drainage will also lead to muddy, slippery walkway conditions for employees.

Railroads must have latitude to use materials of sufficient properties to support the track and allow water to drain properly. The ballast must be sized based on the components of the rest of the track structure, the terrain, local weather conditions, the speed and weight of rail traffic over the track, and the amount of on-the-ground work done by employees. A rigid rule cannot anticipate the variety of circumstances that must be taken into consideration.

Impact of Revising the Current Rule

Changing the rock standard now would have enormous consequences for UP and BNSF. Whether three-quarter inch rock will allow for adequate drainage of the track structure depends on what kind of rock lies below it. It is not a sound engineering practice to spread three-quarter inch ballast on all track beds without regard to whether

the new three-quarter inch rock will drain as readily as the existing rock. Mandating that the surface be covered with three-quarter inch rock would equate, in many instances, to a mandate that the ballast structure below that surface also be replaced.

The railroads must, under federal law, ensure that their tracks are adequately supported. 49 CFR §213.103 states:

§213.103 Ballast; general.

Unless it is otherwise structurally supported, all track must be supported by material which will --

- (a) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;
- (b) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails;
- (c) Provide adequate drainage for the track; and
- (d) Maintain proper track cross-level, surface and alinement.¹

Spreading three-quarter inch rock along all switching leads, regardless of the make-up of the underlying track structure, would jeopardize railroads' ability to maintain the proper drainage, maintain the proper track alignment, etc., mandated by this federal rule. In a state with as much rainfall as Washington, drainage is a significant concern.

BNSF's Policy

To the extent the rule change proposed by the UTU is prompted by concerns over BNSF's walkway policy, we believe the UTU misunderstands that policy. BNSF's policy regarding walkway rock size is stated in its current Engineering Instructions. These instructions apply System-wide.

A section of the Instructions is entitled "Walkway Section Construction." The policy is to ensure that the selected aggregate meets a list of requirements in the Instructions. Among these requirements is "ease and safety of walking."

These internal instructions are flexible, as they must be. Various materials, in addition to the standard 1 1/2" and smaller yard ballast, may be used, including Roadbase (1"), Chips (1/4" – 3/4"), and Fines or waste (1/4" minus size). Fines are to be avoided where good drainage is required or slopes greater than 3 percent are encountered, since fines tend to be muddy when wet and dusty when dry.

Different ballast is used in different applications. It is BNSF policy to use yard ballast (1 1/2" to #4) in yards and "walkway ballast" or "Roadbase" (1" and smaller) on walkways, including walkways on switch leads. Although the policy permits use of 1 1/2" yard

¹ The rule spells the word "alinement," but "alignment" will be used here to mean the same thing.

ballast on walkways, it must meet the criteria in instruction 8.2.4.B, including “ease and safety of walking.”

BNSF’s Policy as Applied

In the UTU letters referenced above, much was made of problems at Delta Yard in Everett, Washington. What happened at Delta is not reflective of BNSF’s policy and is being corrected.

At Delta Yard, BNSF recently received and applied a shipment of what was ordered as yard ballast. After the material was applied, it was discovered that the source pit had given BNSF material that did not meet specifications. The supplier was stopped from supplying any more material and BNSF is now taking action to dig down one foot and replace the offending material in switching lead walkway areas. WUTC’s Mike Rowswell is familiar with BNSF’s efforts to correct the problem at this location.

The rule amendment proposed by the UTU here would not have prevented the problem that arose at Everett. The Delta incident was unfortunate and regrettable, but it does not reflect an “attitude” or policy change regarding walkways.

BNSF believes that UTU’s requests to the Commission are based on a misunderstanding of BNSF’s policy and that, once the misunderstandings are corrected, a consensus will be reached that there is no valid reason to modify current rules.

Ongoing Safety Programs

Among many other safety programs, both BNSF and UP operate employee suggestion programs through the use of Safety Committees. These committees regularly address lists of issues such as walkway defects or other safety issues. These problems are promptly addressed. The Company reports back to the Committee on what was done to correct the problem. This is an ongoing effort to work with employees to address problems of common concern, such as walkway issues, and BNSF and UP believe these efforts have been effective.

From time to time, there will inevitably be disagreements between the railroads and some employees on exactly where and how walkways are to be built and maintained, but these problems are usually discussed and resolved in a routine manner. The railroads and their employees work together, as they must, to resolve issues such as walkways, and they do so successfully on an ongoing basis.

Basis for Jurisdiction

BNSF and UP believe that there are questions about whether WUTC has the jurisdiction under state law to regulate walkways through rules.

WUTC is an agency of the state of Washington. As such, it is a creature of the Legislature, having no powers or jurisdiction except what has been specifically and

lawfully delegated to it by the Legislature. Powers and jurisdiction will not be implied, particularly where rules are in derogation of rights and purport to be civilly and criminally enforceable. The fact that there are already walkway rules on the books does not make them valid or enforceable.

The current walkway rule cites RCW 80.01.040 and RCW 81.04.160 as authority for the rule. RCW 80.01.040 is a general delegation of power to regulate “as provided by the public service laws...” RCW 80.01.040(2). The statute delegates no power independent of other laws and it does not address walkways. RCW 81.04.160 is a list of specific delegations of authority having no connection to walkways. Here, too, walkways and walkway standards are not mentioned.

It is unknown upon what other basis someone might attempt to base walkway regulations. BNSF and UP request that Commission staff address the jurisdiction issue before the scheduled workshop and recommend termination of this Docket before time is wasted on the workshop if jurisdiction cannot be found.

Federal Preemption

In previous proceedings involving walkways and other subjects, BNSF and UP have extensively discussed preemption of state walkway rules by federal law. We shall do so again in this proceeding if necessary, but only wish to raise the preemption issue in these initial comments.

Pursuant to the Federal Rail Safety Act, the Federal Railroad Administration has promulgated track maintenance standards at 49 CFR Part 213. Walkways are a part of the track and track structure. Construction and maintenance of walkways can affect track and track structure, as discussed above. Moreover, the present state rules and the amendment undeniably affect rail safety. Additionally, there are also preemption issues under the Interstate Commerce Commission Termination Act of 1995. See 49 USC § 10501. See *City of Seattle v. Burlington Northern R.R. Co.*, 145 Wn 2d 661, 41 P 3d 1169 (2002), for a general introduction to the preemption issues.

Conclusions

BNSF and UP intend to participate in any workshops that may be held in this Docket, but believe that there is no need for the requested modification of the rules, the Commission does not appear to have state law authority to promulgate or enforce such rules, and there are federal preemption issues with both the existing and proposed amendment rules.

Very truly yours,

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