

Agenda Date: May 12, 2004
Item Number: C1

Docket: TR-040151

Company Name: Rulemaking – Railroad

Staff: Mike Rowswell, Rail Safety Manager
Jonathan Thompson, Assistant Attorney General
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Recommendation:

Direct the Secretary to file a Notice of Proposed Rulemaking (CR-102) with the office of the Code Reviser in Docket TR-040151 proposing amendments to Chapter 480-62 WAC.

Background:

Point protection is a term used in the railroad industry for positioning a crew member near the leading end of a train that is being “shoved” (*i.e.*, backed up, as opposed to being pulled by the locomotive) to ensure that the train does not strike or come into conflict with people, vehicles, or other railroad equipment in its path. This procedure significantly lessens the risk of vehicle-train and train-train collisions. Federal Railroad Administration (FRA) statistics confirm this point by showing that the failure to protect the point is the second leading cause of accidents due to human causes.

The General Code of Operating Rules (GCOR) is a set of railroad operating rules adopted by most railroads throughout the United States, including the Burlington Northern and Santa Fe Railroad Company (BNSF) and the Union Pacific Railway Company (UP). While railroads must file the GCOR with FRA, the GCOR does not have the force of law and neither FRA nor FRA-certified state inspectors may enforce these rules or assess penalties for violations.

There are two GCOR’s addressing point protection, GCOR 6.5 – Handling Cars Ahead of Engine, and GCOR 6.32.1 – Cars Shoved, Kicked or Dropped. GCOR 6.5 is a more general rule providing that “when conditions require” someone should be positioned near the leading end of the movement of the train as a lookout when the train is being shoved. GCOR 6.32.1 contains more specific instructions for protecting the point of the shoving movement when the movement is over an at-grade road crossing.

The proposed rule in this docket evolved from discussions in a separate rulemaking (Docket No. TR-021465) addressing remote-control operations. Information developed in the remote-control locomotive rulemaking proceeding revealed that point protection was a safety issue not just concerning movements in remote-control operations, but in railroad operations generally. FRA statistics show that accidents due to the failure to protect the point decreased for several years, but jumped about 58% in 2003 over 2002.

In addition, the Brotherhood of Locomotive Engineers performed a work practice observations pilot study in 2003. Initial observations revealed that in over 26% of the incidents observed, failure to protect the point of a shoving movement was a problem.

During the open meeting on January 28, 2004, the Commission sought information about whether to pursue point protection rules in Docket No.

TR-021465 or to consider a point protection rule generally in a separate rulemaking. Based in part on accident statistics published by FRA and concerns about addressing point protection too narrowly, the Commission decided after discussions in the open meeting to address point protection issues generally in a separate rulemaking. Following the January 28, 2004, open meeting, the Commission directed that a CR-102 (Notice of Consideration of Rulemaking) be issued in Docket No. TR-021465 on notice requirements and definitions only, and that a CR-101 be issued on the general issue of point protection in Docket No. TR-040151.

Process:

The Commission filed a CR-101 form with the Code Reviser on February 18, 2004. The CR-101 was published in the Washington State Record on March 3, 2004. On February 20, 2004, the Commission mailed a Notice of Opportunity to File Written Comments to all persons on the interested persons list in Docket TR-No. 021465 requesting comments on draft language by March 19, 2004. The notice stated that workshops were not scheduled in this proceeding because the workshops in Docket No. TR-021465 provided sufficient background information on the issue of point protection generally.

On March 19, 2004, the Commission received comments from Cherie Rodgers, a member of the Spokane City Council, Mark K. Ricci, President of the Washington State Legislative Board of the Brotherhood of Locomotive Engineers and Trainmen (WSLB-BLET), and representatives of BNSF and UP. Ms. Rodgers and Dr. Ricci submitted general comments supporting the draft rules, while the railroads submitted detailed comments critical of the rulemaking and the draft rules. A summary of the written comments received and response to the comments is available on the Commission's website at www.wutc.wa.gov/040151.

Based on the information available to the Commission and from the comments submitted on March 19, 2004, a small business economic impact statement, or SBEIS, was not prepared for this rulemaking proposal. RCW 19.85.030 requires agencies to prepare an SBEIS "If the proposed rule will impose more than minor costs on businesses in an industry." The draft proposed rule does not require a change in current railroad operations because it requires railroads to follow existing railroad rules and procedures. The economic impact to railroads resulting from the draft proposed rule is not significant.

Substantive Comments:

The railroads, BNSF and UP, raise several issues in their comments: They argue that the rulemaking does not consider preemption issues; that federal statutes state a preference for nationally uniform railroad safety rules; that the draft rule impedes the railroads' need for flexibility in revising the GCOR in the near future; and that the process for developing the draft rule lacks input from FRA or qualified individuals, and lacks "scientific, technical, economic or other evidence to support the need for the proposed rules."

Preemption. The railroads argue that the Commission has not considered the threshold jurisdictional issue of preemption. The Commission addressed this issue during the January 28, 2004, open meeting when first presented with the issue of whether to initiate the point protection rulemaking, and fully addressed the issue in the context of the remote control rulemaking. In order to fully address the issue in this rulemaking proceeding, a full preemption analysis is set forth below.

The Federal Railroad Safety Act (FRSA) permits States to adopt railroad safety regulations if the Secretary of Transportation has not "prescribe[d] a regulation or issue[d] an order covering the subject matter of the State requirement." 49 U.S.C. § 20106.

Although the Railroads' own internal operating rules (which the railroads file with the FRA pursuant to 49 C.F.R. Part 217) include rules governing point protection for shoving movements, no FRA regulation specifically discusses the railroad's point protection rules, and no federal regulation requires the railroads to include point protection rules within their operational rules. Therefore, there is no basis for federal preemption concerning point protection.

In *Union Pacific Railroad Co. v. California Public Utils. Comm'n*, 346 F.3d 851 (9th Cir. 2003), the Ninth Circuit Court of Appeals upheld, against a preemption challenge that was based on Part 217, the California PUC's rules that (1) required railroads to comply with their own internal track-train dynamics (TTD) rules and provided civil penalties for violations of those rules, and that (2) required railroads to obtain approval from the PUC before making any changes to their internal TTD rules.

The draft proposed point protection rule, like the TTD rules at issue in *Union Pacific*, essentially requires the railroads to comply with portions of the existing General Code of Operating Rules and other internal railroad rules that already apply throughout the railroads' multi-state territories. Additionally, unlike TTD rules, which impact the makeup of trains in interstate commerce, a point protection rule would have no extraterritorial effect and therefore would not raise commerce clause concerns.

In *Union Pacific*, the court rejected the railroads' arguments that the usual presumption against preemption does not apply to railroad safety regulation. *Id. at n. 17*. It also reaffirmed its holding from *S. Pac. Transp. Co. v. Pub. Util. Comm'n*, 9 F.3d 807, 812, n.15 (9th Cir. 1993) that the railroads' rules themselves have no preemptive effect and

that states may institute operating rules above those required by the railroads, assuming the FRA has not covered the subject matter. *Id. at n.14.*

While the proposed rule is focused on point protection for shoving movements in general, it does address train movements made by remote control that are the equivalent to shoving movements because the operator is not positioned on the leading locomotive. While the FRA is monitoring remote-control locomotive (RCL) operations, it has neither adopted rules regulating RCL operations nor affirmatively concluded that such regulation is unnecessary. Until the FRA does one or the other, there is no basis for preemption.

In its Safety Advisory 2001-1 (establishing recommended minimal guidelines for the operation of remote control locomotives) the FRA considered the need for regulation of remote control locomotive operations and concluded that (1) currently available information does not lead to the conclusion that RCL operations should be prohibited on safety grounds, and (2) some aspects of RCL use are already subject to FRA regulation. Those aspects of RCL use that are already covered by existing federal requirements are (1) certification of operators if it would be required of conventional operators under the same circumstances and (2) periodic inspection requirements for RCL equipment.

Based on standard “covering the subject matter” preemption analysis, the FRA’s Safety Advisory preempts state regulation of the *certification and qualification* of RCL operators and regulation of RCL *equipment*. However, it does not follow that all aspects of the *use* of RCL technology are immune from safety regulation by states.

Nationally Uniform Rules. In the context of asserting preemption, the railroads assert that the FRSA provides that railroad safety rules “shall be nationally uniform to the extent practicable,” and that only the FRA, which the railroads assert is knowledgeable of railroad operating rules, should adopt mandatory railroad safety rules. While the FRSA does state a preference for nationally uniform rules, as discussed above, the FRSA also allows states to develop railroad safety rules in areas in which the FRA has not adopted rules or issued an order. While the FRA may be aware of railroad operating rules, including point protection rules, the FRA has not acted to develop rules or issue any orders addressing the topic. Adopting a point protection rule consistent with current railroad operating rules and internal rules also mitigates any concern that compliance with the rule will be difficult.

Remote-Control Issues. The railroads’ comments primarily address concerns over Commission regulation of remote-control operations and assume that the rulemaking is intended to focus primarily on remote-control. The Commission stated following the January 28, 2004, open meeting, that it initiated this rulemaking proceeding to address point protection issues generally, instead of limiting the focus to point protection in remote-control operations. The Commission did so because of concerns that point protection is a safety issue in general railroad operations and is not limited to remote-control operations. The draft proposed rule does address point protection for remote-control operations to reflect that such operations should be considered a shoving move

and require point protection, consistent with the railroads' internal rules. The focus of the rule is not simply to regulate remote-control operations as asserted by the railroad, however, but to address a broader safety issue.

Flexibility in Operations and Amending the GCOR. The railroads assert that requiring railroads to adhere to the same point protection rule instead of their own operating rules will hamper the railroads' ability to address unique operating conditions. The railroads also assert that it is inappropriate to lock in place rules governing point protection and remote-control operations as the railroads plan to adopt a different system-wide GCOR by April 2005.

The draft proposed rule mirrors the existing point protection rules in GCOR Sections 6.5 and 6.32.1, as well as an internal operating rule addressing remote-control operations adopted by BNSF and UP. The GCOR has been adopted by 11 of 22 railroads operating in the state - BNSF, UP, and Puget Sound & Pacific Railroad, as well as by Camas Prairie RailNet, Inc., Cascade and Columbia River Railroad, Columbia Basin Railroad Co., Columbia and Cowlitz Railway, Lewis and Clark Railway Company, Palouse River and Coulee City Railroad, Pend Oreille Valley Railroad, and Tacoma Municipal Belt Line – the 11 largest railroads operating in the State. As such, the rule simply codifies requirements that are already voluntarily applied by railroads under a wide variety of operating conditions.

In addition, the draft proposed rule includes a new subsection (7), which states that the proposed rules apply “unless and until” a railroad files operating rules with the FRA that are materially different from GCOR Sections 6.5 and 6.32.1. This new section mitigates the railroads' concern about flexibility in altering their own point protection rules.

Input from qualified individuals and the FRA. The railroads argue that the draft rule was developed without input from personnel who are qualified in the area of operating practices, asserting that the Commission lacks an FRA-certified operating practices inspector. The draft proposed rule was developed as a result of input received during the Commission's RCL operations rulemaking in Docket No. TR-021465, during which proceeding the Commission received tremendous input from qualified individuals. The Commission continues to receive such input in this rulemaking from Commission staff as well as interested persons.

In addition, the Commission has hired a staff person with 16 years of railroad experience as a switchman, conductor, hosteller, yard engineer, and over the road engineer who can review any specific and substantive issues presented. This staff person will likely be FRA-certified as an operating practices inspector within 9 months, rather than the years asserted by the railroads.

Draft Rules Lack Proper Evidentiary Support. The railroads also assert that the Commission's rulemaking proceeding in this docket lacks the evidentiary support

developed in the California PUC's TTD rulemaking. The railroads also criticize the lack of statements made under oath or subject to cross-examination.

First, point protection for shoving movements is a vastly simpler and more common sense topic than train make-up. Train make-up involves the science of placing cars to balance the force within the train, with consideration for empty versus loaded cars, short versus long, and the effects of terrain and curvature.

Second, the evidentiary support developed by the CPUC was for a system of performance-based standards that were to *replace* the railroads' existing train make-up rules. The CPUC's requirement that the railroads must comply with their *existing* TTD rules pending the adoption of performance-based standards neither merited nor required the gathering of a large evidentiary record. The railroads could hardly have argued that such rules were unnecessary or unwarranted since they were the railroads' own rules.

Finally, under chapter 34.05 RCW, rulemakings are not adjudicative proceedings that require statements to be made under oath or subject to cross-examination. Through this proceeding, the Commission will develop the record necessary to support adopting rules addressing point protection, generally. If it appears that the record does not support adoption, the Commission will consider that at the appropriate stage of the proceeding. The Commission will develop a record in this proceeding through comments from interested persons, as well as other information available to the Commission. The Commission will incorporate into the record in this proceeding any relevant information contained in the record in Docket No. TR-021465.

Proposed Rule Language:

The language for the proposed point protection rule, WAC 480-62-218, is attached to this memorandum. The draft rule as sent to interested parties on February 20, 2004, has been modified slightly to make the language consistent with definitions adopted in Docket No. TR-021465. In addition, definitions of "shove", "drop", and "kick" have been included as a new subsection (1) and subsections (6) and (7) have been added to address several of the railroads' concerns.

Subsection (2) of the draft proposed rule tracks, almost verbatim, the language of GCOR Section 6.5. The language of GCOR Section 6.32.1 is split into subsections (3) and (4) of the draft proposed rule. Subsection (5) of the draft rule mirrors language in special instructions adopted by BNSF and UP, which provide that remote control movements are considered shoving movements.

The draft rule that Staff recommends for consideration as a proposed rule:

- Defines the terms "shove", "kick", and "drop" used in subsections (2) through (4) to be consistent with railroad usage. (Subsection1)

- Requires railroads to ensure that railroad employees are able to observe the leading end of a movement when conditions require. (Subsection 2)
- Requires railroads to ensure that a railroad employee is on the ground at a crossing to warn traffic and to provide direction to the employee controlling the train's movement unless crossing gates are in the fully lowered position or it is clearly seen that no traffic is stopped at the crossing or approaching it. (Subsections 3 and 4)
- Applies the foregoing rules to pulling movements as well as shoving movements when a train is operated by remote control. (Subsection 5)
- Relieves the railroads of the requirements of subsections (2) through (5) of the rule when a railroad has activated a remote control zone in accordance with the railroad's own rules, except at grade crossings and where a car or engine could block mainline tracks. (Subsection 6)
- Provides that the rule does not apply if a railroad has filed operating rules with the FRA that materially modify the requirements of Sections 6.5 and 6.32.1 of the GCOR. (Subsection 7)

Discussion:

The consequences for vehicle occupants in a collision with a train, even at low train speeds, can be disastrous. If a hazardous materials rail car is punctured on impact with a vehicle, or if there is a derailment after impact, an entire community can be at risk. The Commission has a statutory responsibility for rail safety, including the safety of passenger trains. In this state, passenger trains operate on freight lines that pass by yards and sidings where switched trains can enter the line on which the passenger trains travel.

Existing, but currently unenforceable, GCOR rules require railroad personnel who are in contact with the engineer or conductor to be at or ahead of the leading end of a movement when a shove is made. The purpose is clear: someone needs to be able to see in front of the train to ensure safety at crossings, connecting tracks, and other obstacles. This procedure significantly lessens the risk of the types of collisions mentioned above. Federal Railroad Administration statistics confirm this point by showing that failure to protect the point is the second leading cause of human factor accidents.

Remote-control operations present an additional consideration: Often no one is in the cab of the train. As a result, pulling movements become identical to shoving movements. Existing GCOR rules, however, do not prohibit pulling movements without personnel at the head end of the train even though the dangers are the same as those for shoving movements.

Railroads do treat safety seriously. The rules railroads impose upon themselves are often enough to prevent accidents, but not always. Sometimes these rules are insufficient, and

sometimes rules are not followed because of fatigue, human error, reduced crew sizes, and the need to expedite work. It is important to note that of 22 railroads operating in this state, three use remote-control operations. Other railroads are expected to begin use of remote-control locomotives. Not every railroad can be expected to have the same high safety standards.

Given the potential risks and consequences involved, coupled with the Commission's statutory responsibilities, it is appropriate to create an enforceable rule to provide additional incentives for railroads to follow existing railroad rules and procedures and to avoid potentially costly and harmful accidents due to the failure to protect the leading end of the movement.

The proposed rule does not increase burdens on railroads or restrict existing or proposed operations. The rule mirrors existing general railroad rules (GCOR) concerning point protection and language from railroad special instructions to appropriately apply the rule to pullout moves using remote-control devices. Flexibility is provided for remote-control zones, and for railroads to make revisions to their operating rules.

The purpose of the proposed rule is to provide the Commission with an additional tool to ensure railroad employee and public safety. The proposed rule was designed to address a specific and universally recognized safety concern: point protection. Affirmative action to address that concern is warranted because of the increasing number of accidents caused by the failure to protect the point of train movements. The rule was designed to avoid areas where the FRA has affirmatively acted or affirmatively decided that rules are not necessary. Although the FRA is studying the issues relating to one aspect of point protection, there is no reason why the Commission should await federal action while there is a current need for an enforcement tool.

Conclusion

Staff recommends that the Commission direct the Secretary to file a Notice of Proposed Rulemaking (CR-102) with the office of the Code Reviser in Docket TR-040151 proposing amendments to Chapter 480-62 WAC relating to regulation of railroad operations, consistent with the proposal attached to this memorandum.