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VIA FACSIMILE AND U.S. MAIL

Ms. Carole J. Washburn
Executive Secretary
Washington Utilities and Transportation Commission
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Additional BNSF and UP Comments on Railroad
Operating Rules Relating to Point Protection (Docket No. TR-040151)

Dear Ms. Washburn:

The Burlington Northern and Santa Fe Railway Company ("BNSF") and Union Pacific Railroad Company ("UP") jointly submit these additional comments on Railroad Operating Rules Relating to Point Protection (Docket No. TR-040151) pursuant to the Notice of Opportunity to File Written Comments served May 21, 2004.

These comments supplement extensive comments filed on behalf of BNSF and UP (and by the Association of American Railroads) in Dockets TR-040151 and TR-021465. The Railroads also made oral presentations and comments recently (on April 28, 2004 and May 12, 2004). All such comments and presentations are incorporated by reference into this submission.

Throughout these proceedings, BNSF and UP have strenuously argued that the WUTC should not attempt to promulgate and enforce rules affecting general railroad operations or remote control operations. This is true not only for legal reasons, but sound policy reasons as well. Federal law and the federal Constitution preempt the adoption and enforcement of the rules staff proposed on or about May 5, 2004. This is true even under the 9th Circuit case upon which staff seems to rely, as will be discussed.¹

¹ Union Pacific RR. Co. v. California Public Utilities Commission, (9th C., 2003), will be discussed briefly in this submission, as its holdings impact the last version of the proposed rules.

Even if adoption of these rules weren't preempted, this submission will discuss why they are unnecessary and would be counterproductive to the safety of railroad workers and the general public.

The Goal of Adopting the Railroads' Own Rules is Flawed.

The process of drafting and promulgating railroad operating rules, and backing them with suitable training and enforcement, is long and complex. The General Code of Operating Rules ("GCOR") is amended from time to time, but the process involves long and careful consideration. Seasoned experts examine every conceivable situation before rules are recommended. Even then, railroads are free to adopt or modify them as needed.

The rules have changed substantially over time. What was standard twenty years ago is dramatically different from what is in the rules today. The ability to modify rules to conform to best practices is crucial. The GCOR rules currently used will be replaced in April 2005. Participating railroads have known what they will be for months now. UP has already adopted at least one of these new rules, whereas BNSF has not as yet, as was demonstrated in the Comparison Chart on May 12, 2004 (Attached hereto for convenience).

There is a misconception inherent in the draft rules that the GCOR and similar rules are the only source of operating rules, when many other sources also make up the body of operating rules (i.e., timetables, General Orders and the like, each subject to change). Adopting part of one set of rules without considering the entire context can result in different requirements from what Railroads mandate in their rules.

For all these reasons, it is bad policy to adopt regulations that take a snapshot of GCOR rules at one moment in time and take away the Railroads' ability to improve operating practices as experience and technology warrant.

There are Procedural Irregularities That Signal Great Haste.

The thorough industry process and similar FRA processes should be contrasted with the procedures that have been employed in Dockets TR-040151 and TR-021465. The latest example is the proposal by WUTC staff of eight new, completely different rules that appeared on the Commission's web site on or about May 5, 2004, just a week before the open meeting. There had been no opportunity for comments. This occurred after very different rules had been posted for months and commented on in our submissions of March 10 and March 19, 2004. Nonetheless, on April 28, 2004, staff recommended and the Commission adopted the rules in TR-021465 and, on May 12, WUTC staff repeated its recommendation that the Commission enter a CR-102 on the new rules in TR-040151.

It has been our understanding that CR-102s are normally not issued until an agency has written the proposed rules and tested them by requesting public comment. That did not happen with these rules until the Notice of May 21, nine days after the CR-102 hearing. A record like this is not the proper basis for an important rulemaking.

More generally, TR-21465 and TR-040151 have bounced around until no one can be sure exactly what is intended to be regulated. TR-21465 started as a scheme to regulate aspects of RCL operations, but it finally devolved into definitions and notice requirements on the subject of remote control operations. As everyone knows, definitions cannot be given meaning until they are seen in the context of rules. However, a second docket (this TR-040151) now has morphed into proposed rules, some specifically on remote control and some not.

The following kinds of issues are created by this irregular procedure. Are the new rules modified by the definitions in the other Docket? If so, why are they not repeated in the new rules? If not, what definitions will be used in the new rules? The record will not be of much assistance due to the great haste evident in the procedures employed.

Railroad operating rules require careful drafting, internal consistency, precise interpretation and extensive training. None of that has been present in rules proposed from time to time in this Docket. This is a recipe for denigrating safety.

The Railroads strongly register their concern about the haste of these proceedings and urge the Commissioners to end the process before real damage is done to safety.

The Preemption Argument.

This record is replete with extensive analysis supporting the Railroads' preemption arguments. This Commission simply does not have the authority to regulate the subject matter encompassed in the draft rules. We submit that every point made by the Railroads in earlier submissions about preemption is just as valid after the latest rule versions. This was the thrust of our presentation to the full Commission on May 12 and this submission will discuss those policy issues more fully.

The Criteria for These Rules Cannot Be Met.

The Railroads do not believe that it is possible for WUTC staff to draft point protection rules that meet the five criteria spelled out in the Notice.² Some of the reasons

² In the Notice of May 21, 2004, WUTC staff requested assistance in drafting a proposed rule that "1. Is understood by the railroads; 2. Does not interfere with existing operations; 3. Allows for the use of new technologies when they are shown to provide the same level of safety as previous techniques; 4. Takes into account concerns expressed by any commenter in this proceeding; and 5. Promotes safety by providing a rule to be enforced by the Commission through the imposition of penalties that requires railroads to detect and respond to persons or property in front of a movement unless it is clear that other means of protection substitute for that decision."

supporting this position will be repeated in these comments as we reply to the questions in the Notice that WUTC staff propounded.

There is No Valid Reason for WUTC Intervention in Operating Rules.

Fundamentally, the Railroads submit that there is no valid public policy reason for the WUTC to attempt to promulgate such rules. A fundamental justification for the WUTC staff's recommendation that the Commission adopt point protection rules was as follows: "There is currently no enforcement by FRA or the railroads of point protection rules." (Rulemaking Comment Summary, Docket No. TR-040151, edited May 3, 2004). That statement is untrue. Railroads train their employees on point protection, test them for compliance and discipline them for non-compliance. The Federal Railroad Administration requires that railroads provide training on and enforce these rules. The FRA is intimately and closely involved with virtually all aspects of railroad operations and enforcement. As the next discussion will show, the FRA is not taking the "hands-off" approach that some have alleged. The Commissioners should decide that there is no need for them to try to promulgate railroad operating rules because doing so would in fact be harmful, not helpful, to the cause of safety.

The FRA Interim Report Sheds New Light on These Dockets.

To our knowledge, there is no convincing evidence in the Commission's files that would support WUTC point protection rules. It is unclear upon what evidence staff may be relying, but to our knowledge it has not been shared with either stakeholders or Commissioners. This defective procedure forms no valid basis for a rulemaking by the Commissioners. To the contrary, there is overwhelming evidence that such WUTC rules are unnecessary and that such rules --- even if they were not preempted by federal regulation --- would actually be counterproductive to the objective of increasing safety.

On May 13, 2004, just one day after the last open meeting on this subject, the Federal Railroad Administration issued its interim report to Congress on its audit of railroad remote control operations. A copy of that report is attached.

The Railroads request that a copy of the Interim Report be furnished by staff to each Commissioner. The document speaks for itself, but we wish to point out several places in the document where FRA is directly and cogently speaking to the issues now before the WUTC. BNSF and UP invite the Commissioners' attention to the entire document and to the following in particular.

1. The letters to Senators McCain and Hollings. Of particular interest is the FRA finding that RCL train accident rates have been *13.5% lower* than rates for conventional switching operations. Employee injury rates have been "an impressive" *57.1% lower*

than rates for conventional switching operations.³ By contrast, WUTC staff has apparently relied on statistics sounding exactly the opposite. The FRA report discusses accidents and causes in great detail and with great clarity and authority. The Report should convince WUTC Commissioners that railroad safety issues are being actively, aggressively and accurately pursued by FRA and there is no need for state resources to pursue the same subject matter.

2. Discussion of Safety Advisory 2001-01. FRA's discussion of its Safety Advisory 2001-01 should also allay fears that the people of the state of Washington are somehow in need of WUTC regulation of railroad operating rules. FRA's approach to rulemaking is carefully explained in part I of the Report (beginning at p. 2). FRA points out (at page 2) that whenever the "Advisory" references a railroad safety regulation, *compliance with the regulation is mandatory*. FRA's close and detailed involvement in virtually all aspects of railroad safety (not only RCL), including training, is evident in this section. The close coordination of rules and *training* is stressed (at 3). What training is the WUTC prepared to provide its staff and railroad employees if new, Washington-specific rules are promulgated? The rules are silent.

3. Riding Freight Cars. Various issues are discussed in the Interim Report (beginning at 9). BNSF and UP draw attention to Issue 2 (at 10) in which the FRA is questioning allowing RCOs to ride the side of cars when operating an RCL. WUTC draft rules (specifically numbers 2 and 6) make no such distinction. They could be construed to *require* this practice in certain situations, although it is prohibited by existing rules for safety reasons (i.e., at road crossings, with certain equipment, or other special situations). This is typical of the consequences that could occur if rules are unclear or incomplete and no training is supplied to either railroad or agency personnel.

4. Point Protection Issues are Specifically Discussed. Issue 5 discusses point protection specifically and cites lack of adequate protection during movements as an issue. Rather than hastily writing rules, however, FRA is taking a deliberate approach spelled out in the "Status" discussion. In that discussion, FRA observes that point protection must be provided according to existing operating rules. Importantly, FRA is also saying here (by implication) that such protection is *not* required in given RCL situations. The point here is that nothing drafted in these Dockets reaches --- or could reach --- the degree of sophistication required in the text or enforcement of such rules.

5. Federal Regulations are Involved in Grade Crossing Operations. The staff has, in essence, argued that WUTC is free to promulgate rules in areas where the FRA has not acted. They appear to be loosely relying on the 9th Circuit case previously cited. Reading Issue 7 (at p. 14) should shed more light on this subject. FRA observes that "...train crews are required by federal regulation to provide proper protection at all

³ These findings should be compared to the allegation repeated by staff that there was a 58% *increase* in certain injuries, though exactly what was being measured and how is unclear. What relevance it has is also unclear because the last proposed rules mish-mash general and RCL rules together under the "point protection" umbrella. The Report shows that FRA takes a much more precise and detailed approach.

crossings.” Its discussion of the subject of crossings is thorough and illustrates, again, the complexity of the operating rulemaking process when properly done.

6. The Conclusion of the Report is Required Reading. The Conclusion beginning at page 10 summarizes the FRA’s active, constant vigilance and interest in the entire area of rules proposed here by WUTC staff.

Setting aside the preemption argument, the Commissioners will, we believe, read this Report and conclude that state intervention in the field of railroad operating rules is unwarranted and unwise, even if these proposed rules were permissible under federal law.

Commission’s Eight Questions.

The Commission’s request for comments asked for input on eight specific topics:

Question 1. The requested terms are not found in the GCOR glossary. These and many other terms have uniquely different meanings depending upon the context of the rule(s) where they are used. Some are modified by other words, such as “Dutch drop” or “gravity drop.” Also, their meanings vary by railroad and, sometimes, even by areas where they are used. They are understood because, like every aspect of the rules, they are reinforced by extensive and continuous training within the context of the situation and the body of rules in use.

Question 2. The table furnished to the Commission at the May 12, 2004 open meeting contains the versions of GCOR 6.5 adopted by BNSF and UP.

Question 3. The Commission asked for examples of practical differences between the railroads’ own operating rules (current GCOR 6.5 or UP’s version of Rule 6.5, which will be the official GCOR version when those rules are republished next spring) and the draft rule presented at the open meeting on May 12, 2004.

The WUTC’s draft rule mimics the first sentence of the current version of GCOR 6.5, except that it adds the following preamble: “Except when it is reasonably certain that neither people nor equipment could be in the way . . .” Thus, the WUTC’s rule would not require point protection if the crew member were reasonably certain that no people or equipment were in the way.

The avoidance of collisions is not the only reason that railroads want the point of the movement to be protected. They also want to make sure that the switch is lined properly for a movement, that cars aren’t shoved where they could foul another track, that cars aren’t shoved off the end of a track, etc. This discrepancy between the two rules could create confusion. By emphasizing only part of the railroads’ own rules, the WUTC appears to be minimizing the importance of the part of the rule relevant to incidents much more common than collisions, such as running through switches. It can only

create confusion for railroad employees to tell them to abide by two somewhat similar rules, but to ignore one of them if they are reasonably certain no people or equipment are in the way.

The draft rule requires a crew member to “take an easily seen position on the leading car or engine, or be ahead of the movement” *“[e]xcept when it is reasonably certain that neither people nor equipment could be in the way.”* It is unclear what degree of certainty the crew member must have about the absence of any people. There are places and times when this rule should never apply. For example, railroads currently do not ever require an employee to ride the point or be ahead of the movement in the bowl of a hump yard. In a hump yard, employee access to the bowl tracks is strictly limited. Cars are allowed to roll by gravity down a lead track, with their speed controlled by retarders along the track. A tower operator controls which bowl track the car will roll into by remotely opening the appropriate switch. Under the WUTC’s draft rule, if a trespasser wandered into the hump yard and were struck by a car rolling into a bowl track, the railroad might be accused of violating the point protection rule. It might be asserted that the railroad “couldn’t have been reasonably certain that no one was there since someone was there.” Such an interpretation would require substantial changes in the operation of hump yards and create new risks for railroad employees, forcing them to ride cars through the retarders or run ahead of the cars into the bowl tracks. With slips, trips and falls being the most common source of railroad employee injuries, such a requirement would undoubtedly increase injuries to railroad employees. The Railroads doubt this result is actually intended by the WUTC staff, but it is an example of the unintended consequences that flow from this entire rulemaking effort.

The Railroads also doubt it is the WUTC’s intent to create new legal rights for trespassers in railroad yards, or to enact a rule that would make the railroad responsible for ensuring that no unauthorized person has entered the yard before performing normal hump yard activities. However, here again, someone could conceivably so interpret these draft rules.

The version of GCOR 6.5 that will be adopted on April 1, 2005 (which is the same as UP’s current Rule 6.5) requires point protection “when conditions require,” but does not limit the methods of providing point protection to riding the point or being ahead of the movement. Examples:

“Conditions require” that crew members make sure a route is properly lined to avoid running through switches. Historically, a crew member would walk in front of a movement or ride the point, get off the car, and line each switch by hand to make sure the switches were lined properly. Under the upcoming 2005 version of GCOR 6.5 (or UP’s current Rule 6.5), a crew member could ensure that a switch were properly lined for the movement by relying on (a) electronic radio feedback from a radio-controlled switch; (b) a tower operator’s notification that a tower-operated switch has been lined for the move; (c) notification from another crew that it had lined the switch; or (d) visual confirmation of the positioning of the green target stand at the switch.

We cannot tell whether the WUTC would interpret its draft rule to not require a crew member to ride the point or proceed in front of the movement if the crew member had electronic feedback from a radio-controlled switch, notification from a tower operator or another crew, or could see from the green target stand that the switch was lined correctly. We do not know how the WUTC would interpret when “conditions require.” If the occurrence of an accident will be interpreted to mean that conditions did require a person at the point, railroads will not be free to utilize excellent, improved, but not 100% guaranteed error-free technology. Instead, they may be mandated to employ historical practices that might be less safe for railroad employees and less reliable than the new technology. If the traditional methods worked 98% of the time and the new methods work 99% of the time, the WUTC’s draft rule could be wrongfully used to prevent railroads from utilizing the new technology. This, too, would be bad policy, as the FRA Interim Report is suggesting.

“Conditions require” that cars not enter a main line track without authority. This can be ensured not only by riding the point or preceding the movement, but also through other methods, including derails, track and time permits from the dispatcher, transponders (“pucks”) that slow and stop a movement as it nears a main line switch, or perhaps, in the future, through some global positioning system device that tracks and controls the movement of cars and engines. We cannot tell whether the WUTC would interpret its draft rule to not require a crew member at the leading end of the movement if the crew had a track and time permit or if pucks, derails, or some other technology were in place to keep unauthorized cars from entering the main line.

It is not possible to provide an exhaustive list of circumstances in which the WUTC’s draft rule and the railroads’ own rules are in conflict because we do not know how the WUTC staff will interpret or apply the terms “when conditions require” or “take an easily seen position.” However, the examples given are a sample of what is involved.

Question 4. The Commission asks how UP’s version of Rule 6.5 allows for use of new technology if a crew member must provide protection. UP allows a crew member to confirm such things as the lining of a switch through methods other than being on the point or preceding the movement. Examples were given above.

Question 5. UP thinks the version of GCOR 6.5 that will be adopted nationwide next spring is preferable. BNSF will adopt that version when it is adopted nationally (if not sooner).

Question 6. The Commission asked what operations would be allowed under GCOR Rule 6.32.1 that would not be allowed under the WUTC’s proposed rules. We do not know whether the WUTC will agree that crews can verify through a camera that crossing gates are in their fully lowered position or that no traffic is approaching or stopped at the crossing. In addition, GCOR 6.32.1 does not exist in isolation. It is modified by UP in remote control situations by UP Rule 35.1.6 to require more from

crews than in conventional switching operations. UP Rule 35.1.6 requires a crew member to verify, by looking through a camera monitor, not only that the gates are down but that they activated as designed when the train was approaching the crossing.

Question 7. The Commission requested verification of the FRA's position on diagnostic team validation of the use of cameras at crossings. The FRA's recommendation, as set forth on pages 15-16 of the FRA Interim Report, is as follows:

- Before camera assisted RCL operations are permitted at highway-rail grade crossings, a Crossing Diagnostic Team should evaluate the crossing. The Diagnostic Team should have representatives from the railroad, FRA, the State Department of Transportation (or other state agency having jurisdiction over the highway) and local governmental authorities. The Diagnostic Team should evaluate the suitability of each crossing for remote camera operations. They should consider factors such as average daily traffic counts; number of highway lanes; highway speed limits; number of railroad tracks; volume of school bus, transit bus, emergency vehicle, large truck and hazardous material traffic over the crossing; minimum RCL operator sight distances of roadway approaches to the crossing; and other relevant factors that could effect the safety of the crossing. The Diagnostic Team should also consider the appropriate number of camera and appropriate camera angles needed to provide for the remote operation of RCL's over the crossing.
- Remote cameras should only be used at crossings equipped with warning lights, gates, and constant warning and motion sensor devices.
- The cameras should be arranged so as to give the RCO a clear view of the rail approaches to the crossing from each direction to accurately judge the locomotive's proximity to the crossing.
- The cameras should be arranged so as to give the RCO a clear view to determine the speed and drive behavior (e.g. speeding, driving erratically) regarding any approaching motor vehicles.
- Either the camera resolution should be sufficient to determine whether the flashing lights and gates are working as intended or the crossing should be equipped with a remote health monitoring system that is capable of notifying the RCO immediately if the flashing lights and gates are not working as intended.
- The railroad should notify local FRA offices when this type of protection has been installed and activated at a crossing to ensure that FRA grade crossing specialists and signal inspectors can monitor these operations.

We also suggested that if a highway-rail crossing were equipped with supplemental safety devices that prevent motorists from driving around lowered gates, then perhaps some of the above recommendations may not be necessary to permit the safe remote operation of RCLs. However, a Diagnostic Team should make such determinations. FRA recognizes that camera assisted remote operation of RCLs may not be a viable alternative at all highway-rail grade crossings.

We were not able to find an FRA recommendation that “the responsible state safety oversight agency” be on the Crossing Diagnostic Team.

Question 8. The Commission asked whether its proposed rule on point protection in remote control zones would impose more limitations on the use of remote control locomotives than the railroads had envisioned. Yes, it would.

The WUTC’s draft rule would require a crew member to ride the point or proceed in front of the movement as it approached a main line track. As stated above, railroads have additional methods of protecting the point of the movement in these circumstances, including the use of derails, track and time permits, pucks and, potentially, GPS devices.

The Ninth Circuit Case Does Not Support the Proposed Rules.

WUTC staff has apparently relied on the Ninth Circuit case *Union Pacific RR. Co. v California Public Utilities Commission*, (CA 9, 2003) 346 F.3rd 851 (copy attached), to support the proposed rules. The Railroads submit that the case does not support promulgation of the proposed rules.

The CPUC promulgated regulations governing railroad track standards and certain internal railroad rules in response to derailments within the state. UP, BNSF and Southern Pacific Transportation Company sued to enjoin the regulations. The complicated decision of the District Court was appealed to the Ninth Circuit.

A thorough analysis would require more than is possible here. However, some basic principals can be gleaned from the case that are directly applicable here.

It should first be noted that the District Court and the Ninth Circuit found that the safety concern that most of CPUC's regulations were intended to address was already covered by a federal rule and was therefore preempted under the Federal Rail Safety Act, 49 USC Section 20106. Here, too, the subject matter of the proposed rule has already been addressed by FRA. CPUC attempted to justify some of its rules under the exception that is provided in 49 USC Section 20106 for an "essentially local safety hazard", but failed. The Ninth Circuit held that *none* of the mountain grade line segments that CPUC had identified manifested conditions that were essentially local in nature. Because the WUTC's rules are statewide, this exception obviously wouldn't apply.

Even if WUTC could establish that the subject is not covered by a federal rule, UP and BNSF have crews that originate in other states or provinces and enter Washington state. At least some of these crews would have to be trained in and observe special Washington rules while in this state, while observing other rules outside this state. For this reason, the Ninth Circuit observed in the CPUC case that state rules that have an

Carole Washburn

June 11, 2004

Page - 11

“extraterritorial effect” are “constitutionally infirm.” 346 F.3rd 851, 871. This “patch work regulatory scheme” would be an “immense burden” on interstate commerce, 346 F.3rd 851, 871, as well as contrary to the national goal of uniformity.

These few observations should dispel any notion that the Ninth Circuit case somehow sanctions the rules proposed here. To the contrary, we submit that this case and others discussed previously spell doom for the proposed rules. Reading the Ninth Circuit case will also demonstrate to anyone the complexity and precision with which railroad operating rules must be written and, if necessary, litigated.

States Are Preempted From Regulating RCL Operations.

In *Burlington Northern and Santa Fe Ry. Co. v. Doyle*, (CA 7, 1999) 186 F.3d 790, the Seventh Circuit analyzed another aspect of federal preemption – the doctrine that has come to be known as “negative preemption.” Where the FRA has considered an operating issue and affirmatively decided *not* to regulate such operations, state regulation is preempted. Thus, when analyzing the preemption issue, it is not enough simply find that there is no federal regulation covering the issue. When the attached “Rutter Letter” dated May 1, 2003, is read with *Doyle*, the conclusion is inescapable that state regulation of RCL operations is preempted. Thus, the proposed rules are preempted.

For all the reasons discussed in these and previous comments, the Railroads urge the Commissioners to decide against issuing a CR-102 on these or any similar rules.

Very truly yours,

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