

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND)	DOCKET TR-110221
TRANSPORTATION COMMISSION,)	
)	
Complainant,)	ORDER 02
)	
v.)	
)	INITIAL ORDER IMPOSING
MEEKER SOUTHERN RAILROAD,)	PENALTY OF \$5,000
)	
Respondent.)	
)	
.....)	

1 **NATURE OF PROCEEDING:** Docket TR-110221 is a formal complaint filed on April 1, 2011, by the Washington Utilities and Transportation Commission’s (Commission) regulatory staff (Commission Staff or Staff)¹ against Meeker Southern Railroad (Meeker Southern. The complaint alleges that Meeker Southern commenced operations on a spur track at the 134th Avenue East grade crossing in Pierce County, Washington (USDOT #085536R), prior to completing all required work to the satisfaction of Commission Staff and Pierce County Public Works and Utilities Staff as required by Order 01 in Docket TR -100036. Commission Staff alleges 50 separate violations of that order and requests penalties of up to \$1,000 per violation under RCW 81.04.380.

2 Meeker Southern filed its answer to the complaint on April 21, 2011. Meeker Southern admits to starting operations on the spur line prior to obtaining all required approvals but offers a series of affirmative defenses in mitigation and extenuation. Meeker Southern does not dispute that between October 17, 2010, and December 18, 2010, its trains crossed 134th Avenue East on 18 separate days for a total of 50 individual crossings.

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.

- 3 **APPEARANCES.** Fronda Woods, Assistant Attorney General, Olympia, Washington, represents Commission Staff. David L. Halinen, Fircrest, Washington, represents Meeker Southern. Pierce County did not appear in this proceeding.
- 4 **SETTLEMENT NEGOTIATIONS.** At the May 9, 2011, prehearing conference, Commission Staff and Meeker Southern asked for the opportunity to engage in settlement discussions before the Commission established a procedural schedule. The Commission granted the request, directing the parties to ensure any proposed resolution appropriately sanctioned the railroad for violating a Commission order and precluded Meeker Southern from realizing undue profit attributable to any unlawful commercial operations on the spur track.
- 5 The Commission set a deadline of Friday, June 10, 2011, for the parties to submit a Settlement Agreement and supporting Narrative. The parties did not reach an accord but instead submitted individual status reports setting out their respective positions with regard to an appropriate penalty amount.²
- 6 **PARTY POSITIONS.** Commission Staff notes that Meeker Southern has been cooperative throughout the investigation and has acted in good faith. Therefore, Commission Staff concludes that a maximum penalty (\$50,000) is not appropriate in this case.³ Instead, Commission Staff suggests a penalty amount of \$10,640; this is Staff's estimate of Meeker Southern's gross revenues earned from premature operations over the spur track.⁴
- 7 Meeker Southern responds that a \$10,640 penalty is a very significant sum for a small short line railroad company. Further, Meeker Southern asserts that the maximum

² At the prehearing conference, the parties asked that if they were successful in their negotiations and filed a settlement, entry of an Initial Order should be waived in favor of having the Commissioners enter a Final Order as permitted by WAC 480-07-820(1)(b)(iv). The parties are not in agreement in proposing a penalty amount. Therefore, the Commission is following its standard procedures and entering an Initial Order in this docket, allowing both parties an opportunity to petition for administrative review.

³ See Commission Staff Status Report, ¶ 8.

⁴ Commission Staff calculated that Meeker Southern delivered a total of 28 carloads of freight to Sound Delivery Service. Further, Commission Staff determined that Meeker Southern earns \$380 per carload for its deliveries to Sound Delivery Service. Commission staff Status Report, ¶¶ 5-6.

penalty it can be subjected to is \$5,000.⁵ Although Meeker Southern notes that \$5,000 would represent an overstated gross profit margin of 47 percent, the railroad states its agreement to being penalized in this amount.⁶ Finally, Meeker Southern requests that it be allowed to pay its penalty in installments.

8 **COMMISSION DECISION.** The Commission takes seriously any failure to comply with its orders.⁷ In this matter, Meeker Southern accepted responsibility, cooperated with Commission Staff and Pierce County, and took prompt action to implement a plan to ensure public safety at the 134th Avenue East crossing. Our orders in Docket TR-100036 adequately memorialize the railroad's curative efforts; we need not recount them further in this decision.

9 We conclude that Meeker Southern should be penalized for violating Order 01 in Docket TR-100036. We further conclude that Meeker Southern should be sanctioned an additional amount to prevent the railroad from realizing any profit attributable to its unlawful commercial operations on the spur line.

10 In this case, the parties agree that Meeker Southern should be sanctioned for violating the Commission's order. We conclude that a penalty of \$2,500 for violating Order 01 in Docket TR-100036 will be sufficient to deter Meeker Southern from similar behavior in the future. We are satisfied that Meeker Southern's earnest participation in this proceeding and the re-opened Docket TR-100036 reflect the railroad's commitment to strictly adhere to Commission orders and rules going forward. That leaves us to determine the amount of additional penalty required to deny Meeker Southern any financial reward from its actions.

11 Commission Staff suggests that Meeker Southern's gross revenues, measured by the number of railcars handled for Sound Delivery Service, exceed \$10,000. Meeker Southern responds that its net profits are much less than the fees it charges, but the railroad failed to provide any evidence documenting its actual commercial gain from

⁵ Meeker Southern cites to RCW 81.53.210, a more recent (enacted in 1913) and specific statute than RCW 81.04.380 (enacted in 1911), cited in the Complaint. *See* Meeker's Status Report, ¶ 5.

⁶ *See* Meeker's Status Report, ¶¶ 6-7.

⁷ *See In the Matter of the Petition of Avista Corporation d/b/a Avista Utilities For an Order Authorizing Implementation of a Natural Gas Decoupling Mechanism and to Record Accounting Entries Associated With the Mechanism*, Docket UG-060518, Order 05, ¶ 24 (April 11, 2008).

the 28 unauthorized commercial freight car deliveries. Instead, Meeker Southern asks only that we limit the total penalty imposed to \$5,000.⁸

- 12 There is no dispute that Meeker Southern gained a commercial advantage by delivering 28 carloads to Sound Delivery Service before it was authorized to conduct operations on the spur track. Meeker Southern charged a fee of \$380 per carload, but the record contains no additional data to allow the Commission to avoid speculation in determining what portion of that fee Meeker Southern recovered as profit.
- 13 We recognize that Commission's Staff suggested penalty amount of over \$10,000 might be too harsh a reprimand, particularly in difficult economic times.⁹ Rather than engage in conjecture about a short line railroad's profit margin, we conclude that an additional penalty of \$2,500, will adequately achieve the Commission's goal of denying the railroad ill-gotten returns on its unlawful commercial operations.¹⁰
- 14 In sum, the Commission imposes a sanction on Meeker Southern in two parts: \$2,500 for violating the Commission's prior order and another \$2,500 to avoid unjust enrichment of the railroad. The Commission concludes that a total penalty of \$5,000 is appropriate to fully resolve this matter.¹¹

⁸ In fact, Meeker Southern actually acquiesces to a penalty not to exceed the \$10,640 sought by Commission Staff. *See* Meeker's Status Report, ¶ 7.

⁹ Commission Staff's recommendation was admittedly made on the basis of gross revenues because Staff had "no other information about how much money Meeker earned from unlawful commercial operations on the spur track." *See* Commission Staff Status Report, ¶ 6.

¹⁰ Penalizing Meeker Southern this additional \$2,500 to preclude the railroad from realizing a profit on deliveries of 28 carloads can be characterized as a penalty of approximately \$89.30 per carload, or just under 23.5 percent of Meeker Southern's gross revenues from these deliveries.

¹¹ Given the imposition of a \$5,000 total penalty, an amount within the range of financial consequences stipulated to by Meeker Southern as appropriate and acceptable, we need not take up each of the specific arguments raised by the railroad in its answer to the complaint or raised for the first time in its status report of June 10, 2011.

FINDINGS AND CONCLUSIONS

- 15 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington having jurisdiction over public railroad-highway grade crossings within the State of Washington. *Chapter 81.53 RCW.*
- 16 (2) The 134th Avenue East grade crossing, identified as USDOT #085536R and UTC #42A32.40, is a public railroad-highway grade crossing located in Pierce County, Washington.
- 17 (3) On January 12, 2010, Meeker Southern Railroad obtained the Commission's permission to modify the 134th Avenue East grade crossing on condition that the railroad not start operation of the new spur line until completion of all upgrades to safety equipment and associated roadwork.
- 18 (4) On or about October 17, 2010, Meeker Southern Railroad commenced operations on the spur line, in violation of a Commission Order.
- 19 (5) Meeker Southern Railroad conducted 50 unauthorized crossings at the 134th Avenue East grade crossing between October 17, 2010, and December 18, 2010, each without appropriate safeguards in place to protect the motoring public.
- 20 (6) Meeker Southern realized gross revenues of approximately \$10,000 as a result of its premature commencement of commercial operations on the spur line.
- 21 (7) Meeker Southern should not be permitted to realize a net profit from its unlawful use of the spur track.
- 22 (8) Meeker Southern should pay a total penalty in the amount of \$5,000.
- 23 (9) The Commission should establish a payment plan for Meeker Southern to make installment payments on the penalty and a deadline for Meeker Southern to pay off its fine.

ORDER

THE COMMISSION ORDERS THAT:

- 24 (1) Meeker Southern Railroad must pay a total penalty of \$5,000 for its violation of Order 01 in Docket TR-100036.
- 25 (2) Meeker Southern Railroad may pay its penalty in four equal installments of \$1,250, each installment payment due no later than the 15th day of each month following the date of this Order, beginning on August 15, 2011; Meeker Southern Railroad's entire penalty must be paid in full no later than November 15, 2011.
- 26 (3) The Commission retains jurisdiction to effectuate the terms of this Order.

DATED at Olympia, Washington, and effective July 21, 2011.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

ADAM E. TOREM
Administrative Law Judge

NOTICE TO 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*. What must be include in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within ten (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of 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. No Answer to a Petition to Reopen will be accepted for filing absent express notice by the Commission calling for such answer.

RCW 80.01.060(3) 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.

One copy of any Petition or Answer filed must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An original and **seven (7)** copies of any Petition or Answer must be filed by mail delivery to:

Attn: David W. Danner
Executive Director and Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, WA 98504-7250