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October 5, 1999

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Utilities and Transportation Commission  
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Post Office Box 47250  
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Re: PROPOSED WALKWAY RULE  
WUTC PROPOSED RULEMAKING  
TR - 981101

Dear Ms. Washburn:

The Burlington Northern and Santa Fe Railway Company (BNSF) and Union Pacific Railroad Company (UP) hereby submit written comments in response to the Commission's request for more information on the walkway rule under consideration.

**THERE SHOULD BE A CONTINUATION OF THE RULEMAKING  
PROCESS IF THE COMMISSION INTENDS TO PASS A WALKWAY  
RULE MORE RESTRICTIVE THAN EXISTING INDUSTRY  
STANDARDS OR APPLICABLE TO MAINLINE SWITCHES**

The consensus of those concerned is that the existing rule is vague. If the intent of the rule is to apply a standard smaller than 1<sup>1</sup>/<sub>2</sub> inch ballast or around mainline switches, then BNSF and UP feel compelled to request a continuance of the adoption of the walkway rule. If an expansive reading of the rule is contemplated, then BNSF and UP do not feel that they have had a fair opportunity to comment. Nor has the Commission staff adequately explored the financial impact on small business from an expansive reading of the rule. Lastly, there has not been a full and honest discussion of the safety, financial and engineering aspects of a rule applied to mainline switches or involving smaller ballast.

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## **BACKGROUND OF THE RULE-MAKING PROCESS**

In March of 1999, the railroads were for the first time given notice of the proposed language of a walkway rule.<sup>1</sup> The proposed new section, WAC 480-60-035, provided:

(1) Walkways must be provided where employees regularly work on or near tracks, trestles, or bridges.

(2) Walkways must be adequate for employees to use without injury or substantial strain which could lead to injury. All walkway slopes must not be excessive. Walkways must be sufficiently wide to allow employees to safely perform all duties associated with the use of the walkways. Walkways must have a reasonably regular surface. They must be maintained in a safe condition, clear of vegetation, debris, standing water, and other obstructions which constitute a hazard to employees working on the ground.

Attorneys for the railroads attended the workshop of April 20, 1999, when the above rule was discussed. Also under consideration at that workshop were rules covering all of WAC Chapters 480-60 and 480-66. Walkways were only one of forty sections being discussed; and, during discussions about them, everyone seemed to agree that existing walkways were acceptable if kept in proper maintenance. The railroads' representatives were lead to believe that the rule under consideration was proposed to deal with the isolated and infrequent times when walkways fell into disrepair.

The commission staff encouraged this interpretation of the new rule. At the workshop a WUTC employee provided photographs showing a walkway in disrepair. The WUTC staff assured the railroad that it was looking for a rule that would allow it to ensure proper maintenance of the walkways already in place. The WUTC staff stated that it did not believe its rule would require any new walkways. Rather, it was only intended to provide a method to identify defects in walkways built to industry specifications.

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<sup>1</sup> The first notice that walkways would be discussed at a stakeholders' meeting was contained in a notice sent out on March 26, 1999. The railroads' files of this rule-making do not show prior notices that this new section was under consideration.

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The railroads' reliance on these comments is clearly evident in their written response following the workshop. In their letter to the Commission on May 14, 1999 at page 6, the railroads noted:

The good news on walkways is that there is general agreement that the railroad walkways in this state are in good shape. UTU's representative felt, however, that there were a few trouble spots in need of repair. The present rule is broader than is necessary to meet this need. The suggestion by the UTU was not that there is a statewide deficiency in or lack of walkways, but that UTU members wanted a way to address their concerns about specific problem areas.

## **THE RULE PRESENTED FOR ADOPTION BY THE COMMISSION WAS NOT DISCUSSED IN STAKEHOLDERS' MEETINGS**

The rule presented to the commission was substantially different from the rule discussed at the workshop. It provided for 1<sup>1</sup>/<sub>2</sub>-inch rock where employees regularly work on the ground and for a minimum distance of 125 feet from switches. Although it was not apparent to anyone immediately, the new rule was ambiguous and misleading. The railroads continued to believe that the rule was intended to allow the WUTC to intervene and require repair and maintenance of existing walkways. The railroads had understood (or assumed) that the modifier "where employees regularly work on the ground" applied not only to yards but also to switches outside of yards. The railroads did not understand the intent of the rule to be that walkways would be required at mainline switches where employees are not regularly at work. Nothing in the staff's representations to the Commission alerted them to any intent that they be required to make major changes to their properties. To the contrary, on June 23, 1999 the staff recommended filing of a CR 102 and stated as to the walkway rule:

"Staff decided that insufficient information about injuries or other problems was available to warrant extensive regulation."

This was consistent with the railroads' understanding that the rule applied only to areas where the railroads were already complying with the requirement for 1<sup>1</sup>/<sub>2</sub> inch ballast -- primarily in their yards. The staff had also reported:

"All parties agreed at the workshop that a requirement specifying 1<sup>1</sup>/<sub>2</sub> inch crushed rock would be acceptable."

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Since the only representation made by the railroads was that 1<sup>1</sup>/<sub>2</sub>-inch rock was consistent with the railroad standard (in yards) this was taken as further acknowledgment that the rule was intended to be limited in scope.

On July 22, 1999, the Commission's secretary mailed out the Small Business Impact Statement. It asserted:

The Commission track inspector, who pays close attention to walkways as part of his inspections, has stated that railroads would, for the most part, be in compliance with this rule if it was adopted. Labor and company comments at the final workshop support that conclusion. **Proper maintenance of existing walkways probably is the principal current problem; however, existing rules do not allow the Commission to force compliance.**

This statement comports with what the railroad believed was under consideration. If the WUTC inspector, labor and the railroads agreed that the railroads' walkways were generally in compliance; then the term regularly works on the ground could not have been intended to apply to mainline switches.<sup>2</sup> The rule was clearly not meant to involve reconstruction of large numbers of switches or yards, but was thought to be consistent with what already existed. There was little concern about cost, because the rule was thought to be consistent with what already existed.

It was not until shortly before the adoption hearing that a concern arose within the railroads regarding the ambiguity of the terms used in the proposed rule. The railroads at the adoption hearing pointed out that the rule was vague in its use of terms and, specifically, that the rule could be misread to include mainline switches where 2<sup>1</sup>/<sub>2</sub> inch ballast is specified by engineering standards. It was suggested by others, however, that routinely thrown switches should include every active switch or any switch thrown more than twice a week. It was also suggested ballast smaller than 1<sup>1</sup>/<sub>2</sub> inch should be required in yards.<sup>3</sup> The confusion regarding the rule and the varied opinions regarding how it should be interpreted further suggest that the rule was not adequately discussed and researched.

## **RE-EVALUATION OF WALKWAY LENGTH REQUIREMENT**

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<sup>2</sup> The standard for the walkways around mainline switches is 2<sup>1</sup>/<sub>2</sub> inch ballast.

<sup>3</sup> While it was stated at the hearing that Oregon requires even smaller ballast in some places, it should be noted that Oregon's rock size requirement applies only to new or resurfaced walkways, and grandfathers existing walkways.

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The Commission has asked for comments on whether the stakeholders understood that the proposed rule would require a walkway with a total length of 250 feet at switches; and whether a walkway of that length is needed.

The BNSF and UP understood that the rule would require a walkway with a total length of 250 feet, but now question the basis for this requirement. Oregon requires a walkway 125 feet in length on each side of the switch, but, in the limited time since the September 22 hearing, we have been unable to determine why this standard was imposed. If the standard is tied to the needs of employees disembarking from moving equipment, the 125-foot standard might bear no applicability to a railroad, such as BNSF, which does not permit its employees to get on and off moving equipment. The BNSF and UP request that the Commission refer the issue of walkway lengths back to its staff for further study and input from stakeholders. We cannot assume that what Oregon perceived as being needed 25 years ago when it adopted its walkway rules reflects what is needed in Washington today.

## **CLARIFICATION OF THE “REASONABLY POSSIBLE” STANDARD**

The Commission asked for comments on the stakeholders’ understanding of the phrase “reasonably possible.” The BNSF and UP understand this phrase to mean what is practicable, looking on a case-by-case basis at the feasibility and costs of achieving the regulatory standard.

## **EVERYONE WOULD BE BETTER SERVED BY AN OPEN AND HONEST DEBATE OF WALKWAY STANDARDS OVER ADOPTION OF A RULE WHICH IS EXPENSIVE TO IMPLEMENT AND HAS LITTLE OR NO IMPACT ON SAFETY**

The railroads certainly feel that they have never been given a fair opportunity to respond to all the issues presented by a rule that could require the expenditure of millions of dollars without demonstrable benefit to safety. The additional three weeks before adoption (with the staff allowing 8 working days to respond to it) is inadequate to address the issues. If 1½ inch ballast is going to be a standard for all switches, for example, regardless of where they are located or how regularly they are used, BSNF would need up to 6 weeks to survey its switches to identify the financial and engineering impact. Finding the studies

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conducted by the BNSF to establish its engineering standards will take several weeks.

In the brief conversations that have been possible since the last Commission hearing it has been determined that the standard of 1<sup>1</sup>/<sub>2</sub> inch minus in yards reflected a balance between proper drainage and stability of walkways. Studies were undertaken by the BNSF to insure that a safe walkway was provided. Concerns have been expressed that the use of smaller ballast on the mainline near switches could adversely effect the track structure and integrity.

The railroads in Washington have made decisions based upon what it considered sound engineering practices that weigh the need for safe walkways, the need for a safe track structure and the need for proper drainage. If the WUTC is now proposing different engineering standards, it should do more than assume that a rule passed by an adjoining state twenty-five years ago was based on good engineering standards and continues to represent the best balance between safety, drainage, and track integrity. While the railroads are in agreement that its walkways should be kept in good repair free of tripping hazards, they do not agree that the Oregon statute represents the best engineering standard. If the Commission intends to adopt walkway standards that require changes in the railroads' own engineering standards for track and roadbed, they should be based upon sound engineering or scientific foundation.

To date, the Commission staff has not identified a more appropriate engineering standard than already exists. It has made no effort to review the relative safety of various standards, willing rather to rely on anecdotal evidence. At the last meeting (September 28, 1999) the staff stated that there had been complaints, but had no evidentiary or statistical basis for a substantive change of existing walkway standards. The UTU representative's evidence was no better. He suggested that a large number of accidents occur on railroads while walking. This in no way established that Washington has a disproportionate share of these injuries or even that they occurred on walkways.

Most disturbing, perhaps, was the suggestion by the UTU attorney, present by phone link, that he was involved in a lawsuit involving "career ending injury" to a worker because the walkway in question was not in compliance with the Oregon standard. By further independent research it has become clear that the case in question did not involve a railroad owned or maintained walkway. Rather, it involved a wooden walkway off railroad property, maintained by an industry, and not involved with switching or near a switch. The proposed rule would have had no effect on the injury. This illustrates the problems with using unconfirmed

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anecdotal evidence as the basis for making rule-making decisions.

## CONCLUSION

The BNSF and UP welcome an honest debate regarding whether a walkway rule more restrictive than their own roadbed standards improve overall safety. Such a rule, however, should be based on good science. The commission staff lacks a rational basis to determine that walkways maintained to existing standards represent a safety hazard. The staff has said that disrepair is the issue, and has never suggested that it believes that the railroads' existing standards are inappropriate. Evidence offered by the railroad unions has consisted mostly of bald allegations with anecdotal evidence. The railroad standards, on the other hand, are based on sound engineering principles. The walkway surface, drainage and track integrity were all taken into consideration before enacting the standards. The commission should continue the discussion of these issues before adopting a rule on walkways.

If you have any questions regarding the above, or need any additional information, please feel free to contact either of the undersigned.

Yours very truly,

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