

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND)	DOCKET TR-150284
TRANSPORTATION COMMISSION,)	
)	
Complainant,)	ORDER 02
)	
v.)	
)	FINAL ORDER APPROVING
BNSF RAILWAY COMPANY,)	SETTLEMENT AGREEMENT WITH
)	CONDITIONS
Respondent.)	
.....)	

BACKGROUND

1 On March 19, 2015, the Washington Utilities and Transportation Commission (Commission) through its regulatory Staff (Staff)¹ filed a complaint against BNSF Railway Company (BNSF or Company). The complaint alleges that BNSF failed to report 14 hazardous material releases in the manner required by WAC 480-62-310, resulting in 700 violations of that rule. The Commission convened a prehearing conference on May 18, 2015, and adopted a procedural schedule for this proceeding.

2 On August 27, 2015, BNSF and Staff filed a Settlement Agreement (Settlement) and Narrative Supporting Settlement Agreement (Narrative) that would resolve all issues in this docket. The Settlement includes the following provisions:

- BNSF admits that it violated WAC 480-62-310 but does not agree that every violation alleged in the complaint is supported by fact or law.²
- The Commission will impose a penalty of \$71,700, of which \$40,000 will be suspended and then waived on the condition that the Company complies with

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 the proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. See RCW 34.05.455.

² Settlement ¶ 4.

WAC 480-62-310 for one year following the effective date of the Settlement. The Company will pay the remaining \$31,700 portion of the penalty within 30 calendar days of the effective date of the Settlement.³

- “At a mutually convenient time and date to be established by separate agreement of the parties, Staff will meet with Company representatives to discuss, among other potential topics, best practices for compliance with WAC 480-62-310.”⁴

3 The Narrative explains that information BNSF provided to Staff during settlement discussions and informal discovery “caused Staff to reevaluate certain alleged violations.”⁵ As a result, “for settlement purposes, Staff agreed that it lacked sufficient proof and/or an evidentiary basis for several alleged violations and would no longer seek penalties for those allegations. Staff’s concessions reduced the Company’s exposure from 700 possible violations to 239.”⁶

4 On September 17, 2015, the Commission issued bench requests to the parties seeking additional information about the incidents in the 14 causes of action alleged in the complaint and the extent to which those incidents are included in the Settlement, as well as more detail about the meeting required between BNSF and Staff. The parties filed joint responses to the bench requests on October 5, 2015.

5 On October 18, 2015, the Commission conducted a hearing on the Settlement (Settlement Hearing). The parties provided witnesses and counsel to address the Settlement terms and related issues, and a representative from the state Emergency Operations Center (EOC) participated and provided the Commission with information about its processes. The Commission made additional bench requests during the Settlement Hearing, and the parties and the EOC submitted timely responses to those requests.

6 P. Stephen DiJulio and Christopher G. Emch, Foster Pepper PLLC, Seattle, represent BNSF. Julian Beattie, Assistant Attorney General, Olympia, represents the Staff.

³ *Id.* ¶ 5.

⁴ *Id.* ¶ 6.

⁵ Narrative ¶ 6.

⁶ *Id.*

DISCUSSION AND DECISION

7 “The commission supports parties’ informal efforts to resolve disputes without the need for contested hearings when doing so is lawful and consistent with the public interest, and subject to approval by commission order.”⁷ Such settlements conserve Commission and party resources and result in resolution of issues through the agreement of affected parties. Settlements are particularly useful in circumstances like those presented here where legal or factual uncertainties exist.

8 “The commission will approve settlements when doing so is lawful, the settlement terms are supported by an appropriate record, and when the result is consistent with the public interest in light of all the information available to the commission.”⁸ The Commission may approve the Settlement, with or without conditions, or reject it. The Commission concludes that it should approve the Settlement but only with additional conditions.

9 The complaint alleges 700 violations of WAC 480-62-310, which requires a railroad company to provide a report to the EOC within 30 minutes of the release of any hazardous material:

(1) A railroad company must make a telephone report to the commission's designee, the Washington state emergency operations center's twenty-four-hour duty officer (duty officer) at 1-800-258-5990 of any event connected to the operation of the railroad company that results in the:

(a) Release of any hazardous material (i.e., materials that are corrosive, flammable, explosive, reactive with other materials, or toxic); . . .

(2)(a) Telephone reports of events listed in subsection (1) of this section must be made by the railroad company within thirty minutes of when it learned of the event. The report must provide detailed information of the event to the duty officer. After receiving the telephone report from the railroad company, the duty officer will identify the necessary critical response and remediation resources and agencies on an initial and continuous basis through the completion of the response to the event; and

⁷ WAC 480-07-700.

⁸ WAC 480-07-750(1).

(b) The duty officer will notify the commission, the affected county or city emergency management office and other appropriate agencies of the event report.

- 10 This reporting requirement plays an important role in the Commission's and other state agencies' efforts to protect the public. The Commission may participate as a supporting agency in the investigation into the cause of leaks or accidents involving hazardous materials depending on the nature and extent of the event. In the case of a major incident, a Commission inspector needs to be on site as quickly as possible to work with the Federal Railroad Administration (FRA) to coordinate the investigation and identify any conditions that may impact whether the FRA should authorize the railroad to move the train to another location for clean-up and repairs. Certain types of events, such as a spill or leak near water, require an immediate response to minimize adverse impacts on public safety and the environment. Accordingly, the Commission expects not only strict compliance with the letter of this rule but railroad company cooperation in achieving the rule's objectives.
- 11 The Settlement, as written, makes progress toward this goal, but does not fully achieve it. The parties' agreement has two essential terms: (1) a penalty of \$71,700 assessed against BNSF, of which \$40,000 will be suspended and then waived on condition of the Company's compliance with WAC 480-62-310 for one year; and (2) a requirement that the parties meet to discuss best practices for BNSF to comply with the rule. Unfortunately, neither the Settlement nor the Narrative sufficiently explains how these terms appropriately resolve the allegations in the complaint. The information the parties and the EOC provided at the Settlement Hearing and in response to the Commission's bench requests leads us to conclude that the Settlement is not fully supported by the record or consistent with the public interest without additional conditions.

Staff access to information

- 12 Our first concern is the information available to Staff. The Settlement reflects Staff's agreement to reduce the total number of possible violations to 239, one-third of the 700 violations alleged in the complaint. The vast majority of that reduction is attributable to six events the complaint alleges BNSF never reported to the EOC, but which Staff

subsequently learned from the EOC or BNSF that the Company had reported the day they occurred but which the EOC did not provide to Staff.⁹

- 13 The lag in Staff's receipt of these reports is troubling. The EOC appeared at the Settlement Hearing and provided an explanation and subsequent documentation of its processes and procedures for receiving and forwarding the reports railroads make in compliance with WAC 480-62-310. To its credit, the EOC accepted responsibility for the lack of notice of the six reports at issue in this docket. The EOC representative committed to reinforce with its personnel the importance of following its standard operating procedures and to address failures to comply with those procedures with individual duty officers.¹⁰
- 14 We appreciate the EOC providing railroad company reports to Staff under WAC 480-62-310 and the EOC's participation in this proceeding. That agency's efforts protect public safety and assist the Commission to do the same. We are heartened to hear that Staff and the EOC "have had multiple conversations since this case started, to make sure [Staff] understood procedures [and to talk] about the problems that occurred and [EOC's] assurances that those were corrected."¹¹ That is a good start, but in light of the importance of prompt notifications to Staff, we believe that something more formal is needed to ensure fulfillment of the objectives in WAC 480-62-310.
- 15 Accordingly, we direct Staff to work with the EOC to develop a memorandum of understanding or other agreement between the EOC and the Commission establishing the expectations, procedures, and responsibilities of each agency arising from the reporting that WAC 480-62-310 requires. We also condition our approval of the Settlement on Staff and BNSF providing a recommendation to the Commission on the desirability and feasibility of the Company reporting the events specified in the rule both to the EOC and to Staff.

Unresolved dispute on events BNSF must report

- 16 We are also concerned that the Settlement does not resolve the parties' dispute over the events BNSF must report pursuant to WAC 480-62-310. The information the parties

⁹ Joint Response to Bench Request No. 1 at 3-5.

¹⁰ TR 23:18-24.

¹¹ TR 37:19-22.

provided in response to the Commission's bench requests and at the Settlement Hearing indicates that BNSF continues to dispute its obligation to make any report of the events underlying the 239 violations included in the Settlement. The most significant such event was a spill of 1,611 gallons of petroleum crude oil at the BP Cherry Point facility in Blaine on November 5, 2014 (Cherry Point Event). BNSF takes the position that the spill occurred when the tank car was within the shipper's custody without clear evidence that the leak occurred in transit, so the Company was not required to report the event to the EOC. BNSF, however, reported the spill on the U.S. Department of Transportation (USDOT) Hazardous Materials Incident Report (5800 Form) the Company submitted to the FRA.¹²

- 17 BNSF has not explained why it reported the Cherry Point Event to the FRA but not to the EOC. Company representatives stated at the Settlement Hearing that they did not know whether BNSF has any procedures to report spills on a shipper's property of which the Company becomes aware.¹³ Nor did BNSF's counsel know of any contractual or other obligation or process for a shipper to inform the railroad of a leak or spill from a tank car when it is in the shipper's control.¹⁴ Yet the EOC representative testified that the railroad, rather than the shipper, primarily reports oil leaks on trains.¹⁵
- 18 The Settlement leaves this issue open. The parties stipulated that the 111 alleged violations arising from the Cherry Point Event remain in dispute.¹⁶ The parties made the same stipulation with respect to all of the other 128 violations the Settlement includes,¹⁷ despite BNSF's admission that it violated WAC 480-62-310.¹⁸ Similarly, Staff stipulated only for purposes of settlement that the two events involving release of lube oil were not reportable incidents.¹⁹ From the record, it appears that BNSF and Staff do not have a common understanding of which events BNSF must report.

¹² Joint Response to Bench Request No. 1 at 2; TR 70-73.

¹³ TR 54-55.

¹⁴ TR 53 & 55-56.

¹⁵ TR 51-52.

¹⁶ Joint Response to Bench Request No. 1 at 2.

¹⁷ *Id.* at 3-6.

¹⁸ TR 54-55.

¹⁹ Joint Response to Bench Request No. 1 at 5-6.

- 19 Nor is a common understanding likely to develop as a result of the Settlement. That document provides only that “[a]t a mutually convenient time and date to be established by separate agreement of the parties, Staff will meet with Company representatives to discuss, among other potential topics, best practices for compliance with WAC 480-62-310.”²⁰ This “meeting will not result in a binding agreement establishing how BNSF will comply with WAC 480-62-310. The meeting will instead give Staff an opportunity to provide BNSF with informal technical assistance regarding compliance with WAC 480-62-310.”²¹ The parties represent that they “may discuss whether certain factual scenarios will or will not trigger the company’s duty to report.”²²
- 20 As is the case with Staff’s discussions with the EOC, the parties’ agreement to meet to discuss enhancing the Company’s compliance with WAC 480-62-310 is a positive step. Without a tangible outcome, however, such a meeting alone is insufficient to ensure both that BNSF and Staff will have a common understanding of the Company’s obligations under the rule, and that BNSF will comply with those obligations.
- 21 Accordingly, we condition our approval of the Settlement on the parties filing a stipulation detailing how BNSF will comply with WAC 480-62-310 in the future. That stipulation, at a minimum, must address (1) what constitutes an “event connected to the operation of the railroad company that results in the . . . [r]elease of any hazardous material” that BNSF will report pursuant to WAC 480-62-310, at least with respect to the types of events at issue in this docket; (2) what constitutes a “hazardous material” the release of which BNSF will report pursuant to WAC 480-62-310, with examples of materials that the Commission should (or should not) consider to be “hazardous” within the meaning of the rule, at least with respect to the materials at issue in this docket; and (3) the best practices for compliance with WAC 480-62-310 that BNSF will implement and the strategies Staff and the Company will use for more effective communication between them.
- 22 We observe that the Settlement, Narrative, and party responses to bench requests are brief to the point of insufficiency in some instances. We expect the stipulation to be more

²⁰ Settlement ¶ 6.

²¹ Joint Response to Bench Request No. 2.

²² *Id.*

expansive and to provide a detailed and thorough explanation of the information the Commission requires.

Suspended penalty amount

- 23 The parties agree that the Commission should impose a penalty of \$71,700 on BNSF, suspend \$40,000 of that amount, and then waive the suspended amount after one year if the Company complies with WAC 480-62-310 during that time. We are not convinced that any purpose would be served by suspending a portion of the assessed penalty.
- 24 Staff contends that suspending \$40,000 of the assessed penalty will provide BNSF with an additional incentive to comply with the rule. Staff and the Company claim to have modeled this aspect of the Settlement on the settlement agreement the Commission approved in Docket TR-121921. Staff maintains the Commission's suspension of a portion of the penalty assessed in that case resulted in the Company's complete compliance with the crossing requirements that were at issue.
- 25 The settlement agreement in Docket TR-121921, however, prescribed in detail the suspension conditions BNSF was required to satisfy, including specific time frames to respond to Commission notices of crossing defects and submission of photographs showing the repairs the Company made.²³ The Settlement here, in contrast, conditions the suspension only on "the Company compl[ying] with WAC 480-62-310 for one year following the effective date of this Agreement."²⁴ The Settlement makes no attempt to identify the actions BNSF must take to demonstrate such compliance. In light of the parties' unresolved disputes over which incidents the Company must report, future disputes over whether BNSF has satisfied this Settlement provision appear likely.
- 26 Staff nevertheless testified at the Settlement Hearing that BNSF has "made a substantial improvement" in its reporting, and Staff "believe[s] that there has been complete compliance" since the Commission initiated this proceeding.²⁵ Such testimony, however, serves to demonstrate that a suspended penalty is not necessary to ensure the Company's future compliance. The possibility of initiating another complaint, which Staff also

²³ *In re Penalty Assessment against BNSF in the Amount of \$105,000*, Settlement Agreement ¶ 10 (May 30, 2013).

²⁴ Settlement ¶ 5.

²⁵ TR 83:9-13.

identifies as an available enforcement mechanism,²⁶ should provide ample incentive for BNSF to comply with its reporting obligations.

27 The Narrative also states that the Settlement is “consistent with the Commission’s enforcement policy adopted in Docket A-120061,” specifically that “Staff is satisfied that the likelihood of recurrence is low. BNSF has, to Staff’s knowledge, achieved total compliance with WAC 480-62-310 since the date the Commission issued its complaint in this docket.”²⁷ Again, Staff’s satisfaction and the Company’s current compliance lessens the utility of suspending a portion of the penalty. The Narrative fails to explain how the Settlement is consistent with the other 10 factors listed in the enforcement policy. Our own review of those factors does not support suspending \$40,000 of the \$71,700 penalty. The Settlement covers 239 serious violations by a very large company that has violated its regulatory obligations in the recent past. Under the circumstances presented here, we find that \$71,700 is an appropriate penalty for the violations at issue but not if any portion of that amount is suspended.

28 Accordingly we condition approval of the Settlement on the parties deleting the provision that suspends and waives after one year \$40,000 of the assessed penalty. We find that immediately imposing the entire penalty to which the parties agreed would be more effective than suspending a portion of that amount, both to provide the Company with an additional incentive to comply with its reporting obligations and to penalize BNSF for its past failure to do so.

29 With the conditions required in this Order, the terms of the Settlement are not contrary to law or public policy and reasonably resolve all issues in this proceeding. The Settlement does not provide that the parties must accept any Commission conditions, but we require either such acceptance, or rejection of the conditions and election to proceed with adjudication of the complaint, within five business days of the date of this Order.

FINDINGS AND CONCLUSIONS

30 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with authority to regulate certain aspects of railroad company operations in Washington.

²⁶ TR 93:9-11.

²⁷ Narrative ¶ 13.

- 31 (2) The Commission has jurisdiction over the subject matter of this proceeding and over BNSF.
- 32 (3) The reporting requirements in WAC 480-62-310 play an important role in the Commission's and other state agencies' efforts to protect the public.
- 33 (4) The Settlement has two essential terms: (1) a penalty of \$71,700 assessed against BNSF, of which \$40,000 will be suspended and then waived on condition of the Company's compliance with WAC 480-62-310 for one year; and (2) a requirement that the parties meet to discuss best practices for BNSF to comply with the rule.
- 34 (5) The Settlement reduces the total number of possible violations to 239, one-third of the 700 violations alleged in the complaint. The vast majority of that reduction is attributable to six events the complaint alleges BNSF never reported to the EOC, but which Staff subsequently learned from the EOC or BNSF that the Company had reported the day they occurred but which the EOC did not provide to Staff.
- 35 (6) The Commission should direct Staff to work with the EOC to develop a memorandum of understanding or other agreement between the EOC and the Commission establishing the expectations, procedures, and responsibilities of each agency arising from the reporting that WAC 480-62-310 requires.
- 36 (7) The Commission should condition approval of the Settlement on Staff and BNSF providing a recommendation to the Commission on the desirability and feasibility of the Company reporting the events specified in the rule both to the EOC and to Staff.
- 37 (8) The Settlement does not resolve the dispute over the types of events BNSF must report pursuant to WAC 480-62-310. Although BNSF admits the Company violated that rule, the Company continues to dispute each of the 239 violations the Settlement covers. Staff similarly agreed not to pursue two of the 14 events alleged in the complaint but only for settlement purposes.
- 38 (9) Without a common understanding between BNSF and Staff of the events the Company must report pursuant to WAC 480-62-310, disputes likely will continue to arise over BNSF's compliance with that rule.

- 39 (10) The Commission should condition its approval of the Settlement on the parties filing a stipulation detailing how BNSF will comply with WAC 480-62-310 in the future. The Commission should require that stipulation, at a minimum, to address the following:
- (a) what constitutes an “event connected to the operation of the railroad company that results in the . . . [r]elease of any hazardous material” that BNSF will report pursuant to WAC 480-62-310, at least with respect to the types of events at issue in this docket;
 - (b) what constitutes a “hazardous material” the release of which BNSF Railway Company will report pursuant to WAC 480-62-310, with examples of materials that the Commission should (or should not) consider to be “hazardous” within the meaning of the rule, at least with respect to the materials at issue in this docket; and
 - (c) the best practices for compliance with WAC 480-62-310 that BNSF will implement and the strategies Staff and the Company will use for more effective communication between them.
- 40 (11) Under the circumstances presented here, \$71,700 is an appropriate penalty for the violations at issue.
- 41 (12) Suspending and then waiving \$40,000 of the assessed penalty conditioned on BNSF’s future compliance with WAC 480-62-310 would not be in the public interest. BNSF has complied with the rule since the Commission initiated this proceeding. Suspension and waiver of any portion of the penalty would not achieve its intended purpose of creating an additional incentive to comply with the rule, particularly when BNSF and Staff continue to disagree on the events BNSF must report.
- 42 (13) The Settlement covers 239 serious violations by a very large company that has violated its regulatory obligations in the recent past. Imposing the entire penalty of \$71,700 would be more effective than suspending and waiving a portion of that amount, both to provide BNSF with an additional incentive to comply with its reporting obligations and to penalize the Company for its past failure to do so.
- 43 (14) The Commission should condition approval of the Settlement on deletion of the provision that suspends and waives after one year \$40,000 of the assessed penalty.

- 44 (15) With the conditions required in this Order, the terms of the Settlement are not contrary to law or public policy and reasonably resolve all issues in this proceeding.
- 45 (16) The Commission should require the parties, within five business days of the date of this Order, either to accept the conditions in this Order or to reject those conditions and proceed to adjudication of the complaint.

ORDER

THE COMMISSION ORDERS:

- 46 (1) The Commission approves the Settlement Agreement, which is attached as Exhibit A to, and incorporated into, this Order, and adopts the Settlement Agreement as the final resolution of the disputed issues in this docket with the additional conditions described in this Order.
- 47 (2) The Commission assesses a penalty of \$71,700, which is due and payable in its entirety within 10 business days from the date of this Order.
- 48 (3) By February 1, 2016, BNSF Railway Company and Commission Staff must file a stipulation with the Commission that describes in detail the following:
- (a) What constitutes an “event connected to the operation of the railroad company that results in the . . . [r]elease of any hazardous material” that BNSF Railway Company will report pursuant to WAC 480-62-310, including but not necessarily limited to the extent to which BNSF Railway Company will report leaks or spills on the property of a shipper or a third party and the other types of events involved in the violations alleged in the complaint;
 - (b) What constitutes a “hazardous material” the release of which BNSF Railway Company will report pursuant to WAC 480-62-310, with examples of materials that the Commission should (or should not) consider to be “hazardous” within the meaning of the rule, including but not necessarily limited to the materials involved in the violations alleged in the complaint; and

- (c) The best practices for compliance with WAC 480-62-310 that BNSF Railway Company will implement and the strategies for more effective communication BNSF Railway Company and Commission Staff will use on a going-forward basis, including but not limited to the desirability and feasibility of BNSF Railway Company reporting the events identified in WAC 480-62-310 to both the Washington state emergency operations center and Commission Staff.
- 49 (4) By April 1, 2016, Commission Staff will file with the Commission a memorandum of understanding or comparable agreement with the Washington state emergency operations center that establishes the expectations, procedures, and responsibilities of each agency arising from the reporting that WAC 480-62-310 requires.
- 50 (5) Within five business days from the date of this Order, BNSF Railway Company and Commission Staff each must notify the Commission whether that party accepts the conditions in this Order or rejects those conditions and elects to proceed with adjudication of the complaint.

51 (6) The Commission retains jurisdiction to enforce the terms of this Order.

DATED at Olympia, Washington and effective December 7, 2015.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DAVID W. DANNER, Chairman

PHILIP B. JONES, Commissioner

ANN E. RENDAHL, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.

Exhibit A
Settlement Agreement