

Decision 19-01-022

January 10, 2019

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission’s Own Motion into the Fatal Accident on the Bay Area Rapid Transit District’s Line Between the Walnut Creek and Pleasant Hill Stations in the County of Contra Costa, California on October 19, 2013.

Investigation 16-06-010
(Filed June 23, 2016)

**ORDER DENYING REQUEST FOR
SUSPENSION OF DECISION (D.) 18-10-020**

I. INTRODUCTION

In this Order, we dispose of the Request for Suspension of Decision (D.) 18-10-020 (or “Decision”) filed by the Bay Area Rapid Transit District (“BART”).¹

BART is a rail transit agency (“RTA”) subject to the Commission’s safety jurisdiction pursuant to Public Utilities Code Sections 211, 216, 451, 778, 29047, and 99152,² 49 CFR Part 659 et seq., 49 U.S.C. 5330 et seq., and Commission General Orders (“GOs”) 95, 127, 143-B, 164-D, and 172.³

On October 19, 2013, BART train 963 struck and killed two engineering employees while they were working on BART’s main tracks near Walnut Creek, California. It was one of two trains being operated by BART managers because BART’s union employees were on strike. No paying passengers were being transported by either

¹ Unless otherwise noted, citations to Commission decisions since 2000 are to the official pdf versions, which are available on the Commission’s website at: <http://docs.cpuc.ca.gov/DecisionsSearchForm.aspx>.

² All subsequent section references are to the Public Utilities Code unless otherwise specified.

³ See, e.g., *Order Instituting Rulemaking to Consider Roadway Worker Protections by Transit Agencies in California* [D.13-10-073] (2013) at pp. 9-11 (slip op.).

train.⁴ Following the accident report from the National Transportation Safety Board (“NTSB”), the Commission opened its own investigation into the incident on June 28, 2016.⁵

In D.18-10-020, we found that BART, through its overall management, certain high level managers, and senior level employees, violated GO 172 and several Commission approved BART safety rules, in a manner that contributed to and/or resulted in the death of the two engineering employees on October 19, 2013.⁶ As a result, we imposed a fine of \$1,348,000, with one half stayed on the condition that BART complies with specified conditions of probation for a 3-year period.⁷

On November 7, 2018, BART filed a Request for Suspension of D.18-10-020 while the Commission considers its Application for Rehearing of D.18-10-020. BART filed the Request for Suspension prior to its November 16, 2018 filing of its Application for Rehearing. Review of BART’s rehearing application is still pending. Today’s order neither disposes of or prejudices the rehearing application. This order solely addresses BART’s Request for Suspension.

As discussed below, we have reviewed BART’s request to suspend D.18-10-020 on the ground it will suffer serious or irreparable harm absent a suspension while the Commission is considering BART’s companion Application for Rehearing. We are of the opinion that good cause has not been established to grant a suspension. Accordingly, the Request for Suspension of D.18-10-020 is denied.

⁴ See D.18-10-020, Attachment B, National Transportation Safety Board Railroad Accident Brief, dated April 13, 2015, at p. 1.

⁵ *Order Instituting Investigation on the Commission’s Own Motion into the Accident on the Bay Area Rapid Transit District’s Line Between the Walnut Creek and Pleasant Hill Stations in the County of Contra Costa, California, on October 19, 2013* (I.16-06-010), issued June 28, 2016. BART’s own accident report, required within 60 days of an incident under GO 164-D, Section 8.3, was not submitted to the Commission until January 2017.

⁶ GO 172 established Rules and Regulations Governing Roadway Worker Protection Provided by Rail Transit Agencies and Fixed Guideway Systems. The GO can be located at: <http://www.cpuc.ca.gov/generalorders/>. Pursuant to GO 164-D, the Commission requires and approves RTA System Safety Plans (“SSPPs”). (See GO 164-D, Section 3.1.).

⁷ D.18-10-020, at pp. 2-6, 139-145 [Ordering Paragraph Numbers 1-8].

II. DISCUSSION

A. Request for Suspension of D.18-10-020

BART requests suspension of D.18-10-020 pursuant to Public Utilities Code Sections 1733 and 1735. Section 1733 provides in pertinent part:

(a) Any application for rehearing made 10 days or more before the effective date of the order as to which a rehearing is sought, shall be either granted or denied before the effective date, or the order shall stand suspended until the application is granted or denied; but, absent further order of the commission the order shall not stand so suspended for more than 60 days after the filing of the application, at which time the suspension shall lapse, the order shall become effective, and the application may be taken by the party making it to be denied.

(Pub. Util. Code, § 1733, subd. (a).)

Under Section 1731, the Commission has discretion to determine when a decision will become effective.⁸ Here, we set D.18-10-020 to be effective immediately, i.e., on October 11, 2018, the date on which we voted to approve the Decision.

Section 1733 is inapplicable here because the statute only applies in instances where the Commission sets a future effective date, such as 30 to 60 days from when a decision is approved. For this reason, BART is not entitled to a suspension under Section 1733.

Section 1735 governs a request for a suspension or stay in connection with an application for rehearing. The statute provides:

[A]n application for rehearing shall not excuse any corporation or person from complying with and obeying any order or decision, or any requirement of any order or decision of the commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, *except in such cases and upon such terms as the commission by order directs.*

(Pub. Util. Code, § 1735 (emphasis added).)

⁸ Pub. Util. Code, § 1731, subd. (a).

Under Section 1735, the grant of a suspension or stay is discretionary.² In exercising this discretion, the Commission normally considers the following factors: (1) whether the moving party will suffer serious or irreparable harm if the stay is not granted; (2) whether the moving party is likely to prevail on the merits of the application for rehearing; (3) whether the public interest warrants a stay through balancing harm to the moving party if the stay is not granted and the decision is later reversed, versus the harm to other parties if the stay is granted and the decision is later affirmed; and (4) other factors relevant to the particular case.¹⁰

BART addresses only one of the above factors: serious or irreparable harm. (Request for Suspension, at pp. 1-2.)

In evaluating irreparable harm, the Commission exercises its broad discretion based on the facts and circumstances of a given case. In this particular case, we do not find good cause to grant suspension of D.18-10-020.¹¹

² See *Order Instituting Investigation into the Proposal of Sound Energy Solutions to Construct and Operate a Liquefied Natural Gas Terminal at the Port of Long Beach* (“SES OIP”) [D.04-07-040] (2004), at pp. 3-6 (slip op.).

¹⁰ See, e.g., *SES OII, supra*, at p. 3 (slip op.), citing *Pacific Gas and Electric Company* [D.99-09-035] (1999) 2 Cal.P.U.C.3d 329; *Re Southern California Edison Company* [D.90-12-101] (1990) 39 Cal.P.U.C.2d 14 [not reprinted].

¹¹ Even if BART were to seek a suspension or stay in Court it would not be able to make the required showing under *North Shuttle Service, Inc. v. Public Utilities Commission* (“*North Shuttle Service*”) (1998) 67 Cal.App.4th 386. Under that strict standard, the Legislature has erected substantial barriers to granting temporary stays.” (*Id* at p. 392.) Related to *North Shuttle Service*, this Commission has stated:

Under the standard employed by the California Court of Appeal, and cited by the Commission, monetary loss alone is not an adequate showing of irreparable harm, [citation omitted.] According to *North Shuttle*, the Court of Appeal will only consider monetary loss to be irreparable harm where the applicant has specifically demonstrated that the loss is severe enough to jeopardize an applicant’s entire enterprise. [citation omitted.]

(*Consumer Rights and Consumer Protection Rules Applicable to All Telecommunications Utilities* [D.04-08-056], at p. 4 (slip op.).)

Compliance with the Decision includes the payment of a fine and the imposition of conditions of probation for a 3-year period. With respect to setting the amount of the fine, we look to the longstanding criteria established in *Re Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates* [D.98-12-075] 84 Cal.P.U.C.2d 155.¹² We generally apply this standard in any case where a fine or penalty is assessed against a regulated entity.

While we determined that the violations warranted significant fines, we also recognized that BART is a public agency, and that the total \$1,348,000 fine would impact its budget, fees and service to the public. Accordingly, we stayed one half the total fine and made provision for the remaining \$674,000 to be paid in installments over a 2-year period.¹³ BART does not establish how this arrangement is either unreasonable or will result in irreparable economic harm to the agency.

With respect to the conditions of probation, the Decision similarly recognized the need to balance safety enhancement policies in a way that would not cause undue burden to the public. And the need to provide redress for the violations, but in a just and fair manner.

With that in mind, the conditions of probation require that during the probationary period BART must: (1) track and annually submit a report of all safety rules, practices and policies, etc., including disciplinary actions; (2) to reevaluate its current safety training programs and culture and implement a plan to improve their effectiveness; and (3) develop and implement annual safety refresher courses for managers and senior employees entrusted with ensuring compliance with all safety rules, practices, and policies, etc.¹⁴ BART fails to establish how these conditions are unreasonable or will result in irreparable economic harm.

¹² The primary criteria under D.98-12-075 include the severity of the offense, the conduct of the utility, the financial resources of the utility, precedent, and the totality of the circumstances. (D.98-12-075, *supra*, 84 Cal.P.U.C.2d at pp. 93-95. See also D.18-10-020, at pp. 73-89.)

¹³ D.18-10-020, at pp. 4-6, 40, 139-141 [Ordering Paragraph Numbers 1-3].

¹⁴ D.18-10-020, at pp. 4-6, 40, 141-142 [Ordering Paragraph Number 5].

BART also claims that the Decision causes irreparable harm to its reputation because it requires BART to post signage stating that the Commission found BART violated safety rules and assessed a fine of \$1,348,000, with one half stayed on the condition BART complies with the decision and improves its safety rules. (Request for Suspension, at p. 1, referring to D.18-10-020, at p. 141 [Ordering Paragraph Number 5(a).) We reject this argument.

The primary harm to BART's reputation was caused by one of its own trains striking and killing two individuals doing work on its tracks. That harm was directly attributable to the actions and/or inactions of BART employees. That the Decision holds BART accountable for related safety violations, and requires public notification via the signage, does not further harm BART's reputation. Rather, it is geared to do the opposite, i.e., provide the public with some level of assurance that similar violations will not, or should not, occur in the future.

We also note that BART admitted to almost all the determined violations. And where it did not, its primary contention seemed mainly to be that the violations should have been excused based on other considerations.¹⁵ It is neither reasonable nor fair to the public to suspend the signage condition which notifies the public of the occurrence of multiple safety violations. That would arguably be a far greater harm to the public than the posting of signage would be to BART's reputation.

For the above reasons, we find BART has failed to establish it will suffer irreparable harm of the nature that would warrant a suspension of D.18-10-020. Accordingly, we deny the Request for Suspension.

III. CONCLUSION

For the reasons stated above, we deny the Request for Suspension of D.18-10-020 because good cause has not been established.

THEREFORE, **IT IS ORDERED** that:

1. The Request for Suspension of D.18-10-020 is denied.

¹⁵ See, e.g., D.18-10-020, at pp. 41-61.

2. This proceeding, Investigation (I.) 16-06-010 remains open to address the associated Application for Rehearing.

This order is effective today.

Dated January 10, 2019, at San Francisco, California.

MICHAEL PICKER

President

LIANE M. RANDOLPH

MARTHA GUZMAN ACEVES

CLIFFORD RECHTSCHAFFEN

Commissioners