Decision 07-09-006 September 6, 2007

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Petition for Rulemaking to Modify General Order 118 to limit the size of ballast on railroad rights-of-way.	Petition 06-12-012 (Filed December 11, 2006)

OPINION GRANTING PETITION FOR LIMITED RULEMAKING

1. Summary

This decision grants United Transportation Union's (UTU) Petition for a Rulemaking. The Rulemaking will be limited in scope to the issue of ballast size in railroad switching yards and any necessary changes to General Order 118, to address the problem of slip and fall injuries due to walking on uneven surfaces.

2. Background

On December 11, 2006, UTU filed a petition for rulemaking to modify portions of General Order 118 to limit the size of ballast used on railroad walkways. The petition alleged that the use of ballast larger than that specified in a June 1990, agreement among the railroad corporations, railroad workers' representatives and Commission staff is the cause of injuries to UTU's members.

An Administrative Law Judge's (ALJ) ruling dated January 31, 2007, granted Union Pacific Railroad Company's and BNSF (UP/BNSF) Railway Company's motion for a 30-day extension of time to respond to United's petition. The ALJ ruling directed parties to provide responses to a series of questions regarding injuries and ballast size. It also directed parties to use the 30-day

extension to conduct meet-and-confer sessions to attempt to resolve the issues and report back to the ALJ on the results.

Parties responded to the ALJ ruling and reported that the first of several meet-and-confer sessions would be held in February. In March, in response to an inquiry from the ALJ, parties reported by email that the first meet-and-confer session was held on March 13, 2007. Parties reported that the meet-and-confer session was productive and that issues were being narrowed. Parties also reported that in order to observe actual conditions, site inspections of several yards in the state were in the planning stages. It was anticipated these would occur in April.

An ALJ ruling issued on May 25, 2007, directing parties to report back to the ALJ no later than June 1, 2007, regarding the status of meet-and-confer sessions. By email, the ALJ was informed that although parties met face-to-face several times, including two days of field inspections, and communicated via email and telephone, no agreement could be reached. Parties sought and were allowed additional time to report to the ALJ on their respective positions. On June 15, 2007, UTU served a Supplemental Memorandum and on June 25, 2007, UP filed its Response.

3. Discussion

Pursuant to Pub. Util. Code § 1708.5(b)(1),[1] within six months of receiving a petition, the Commission must either deny the petition or institute a proceeding to adopt, amend, or repeal the regulation. Accordingly, the six-

[1] Subsequent statutory references are to the Pubic Utilities Code unless otherwise indicated.

month time period for resolution of this petition ended on June 11, 2007. The parties requested additional time for meet-and-confer sessions to attempt to resolve the issues cooperatively. Since the issues involved affect all railroads under the Commission's jurisdiction and their employees, it was in the public interest to grant the parties' request. The statutorily imposed deadline is for the protection of the parties. It requires the Commission to resolve parties' petitions in a timely manner, ensuring no party is disadvantaged by undue delay. In this case, the delay was a product of parties' request for additional time. As such, the resulting time loss has not disadvantaged any party to the proceeding.

An ALJ Ruling issued on January 31, 2007, asking the parties to provide information on five issues:

- Records of injuries due to ballast size
- Optimum ballast size to prevent injuries
- Other states' experience re injuries and specific ballast size
- Difference between past, present and petitioner's proposed ballast size
- Adverse engineering or economic impact of petitioner's proposed ballast size

Parties' responses to the ruling assert that neither party keeps records of injuries in a manner allowing ready access to the information.[2] However, UTU did supply statistics obtained from the Federal Railroad Administration (FRA)

[2] See Reply by United Transportation Union to Administrative Law Judge's Order of January 31, 2007, page 1, and Union Pacific's February 20, 2007, Response to Petition, page 10.

records.[3] The FRA records indicate that during the past five years BNSF Railway had 42 and UP had 73 recorded injuries from slipping, falling, or stumbling due to irregular surface, climatic condition, oil, grease, object, ballast spike etc., or other cause.[4] UTU's filing also cites numerous reports alleging railway underreporting of injuries and complaints by workers of harassment and intimidation not to report injuries.[5]

UP/BNSF's response to the Petition and the ALJ's ruling stressed the difficulty of answering the questions without more information and did not provide even a qualified response to any of the issues. Specifically, UP/BNSF stated that UTU's petition fails to identify which walkways are being addressed and that the failure to do so makes it impossible to assess the effect of the proposed rule change.[6] UP/BNSF's response lists specific information it believes is required to determine the necessity of prescribing ballast size.[7] UP/BNSF's response also questions the Commission's jurisdiction over the issue and contemplates a possible constitutional challenge if the Commission institutes a formal rulemaking.[8]

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[3] The FRA compiles the injury data based on information supplied by the railroads.

[4] *See* Reply by United Transportation Union to Administrative Law Judge's Order of January 31, 2007, page 1.

[5] *Id.*, page 2.

[6] UP and BNSF Response to Petition, page 3.

[7] *Id.*, pages 6 & 7.

[8] *Id.*, pages 4 & 5.

We agree that clarification was necessary, however, the ALJ ruling seeking additional information and directing parties to conduct meet-and-confer sessions was an attempt to achieve that goal. It appears that although the meet-and-confer sessions did not result in a settlement between the parties, they did result in a narrowing of the issues.

The Commission has safety jurisdiction over switching area walkways in California rail yards. This safety jurisdiction is exercised under GO 118 as provided under § 765.5, requiring the Commission to take "all appropriate action necessary to ensure the safe operation of railroads in this state." Further, § 768 provides that "the Commission may, after a hearing require every public utility to construct, maintain, and operate its line or system, equipment, apparatus, tracks and premises in a manner so as to promote and safeguard the health and safety of its employees, passengers, customers, and the public." Consequently, the Commission has jurisdiction to review petitioner's request to improve the safety of walkways in switching areas of rail yards by limiting the size of track ballast. The Commission exercises its jurisdiction over walkways in rail yards pursuant to *Southern Pacific Transp. Co. v. Public Util. Comm'n of California*, 647 F.Supp. 1220 (N.D.Cal 1986) *aff'd* 820 F.2d 1111 (9th Cir 1987) (*per curiam*) and in compliance with the minimum standards for ballast set forth in 49 C.F.R. Parts 213.103[9] and 213.334. [10] At such time as the Federal Railroad Administration or

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[9] 49 C.F.R. Part 213.103 "Unless it is otherwise structurally supported, all track shall be supported by material which will:

(a) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;

Footnote continued on next page

the U.S. Secretary of the Department of Transportation adopts ballast size standards for walkway areas, the federal standards shall preempt those issued in any Commission rulemaking.

By email, in response to a June 4, 2007, email inquiry from the ALJ, parties indicated a desire to continue meet-and-confer sessions. A May 2, 2007 ALJ ruling had already given parties until June 1, 2007, to either submit a settlement agreement or report to the ALJ on the status of meet-and-confer sessions. By return email, the ALJ gave parties until June 15, 2007, to meet the requirement of the May 2, 2007 ruling and informed the parties that no further extensions would be forthcoming.

UTU mailed a response to the ALJ ruling in the form of a Supplemental Memorandum (Memorandum) on June 14, 2007.[11] UP/BNSF filed its response on June 25, 2007. UTU's filing included a settlement proposal by the railroads which, as UP/BNSF pointed out in its response to the Memorandum, is a breach of confidentiality.[12] We agree. All proposals or offers to settle stemming from meet-and-confer sessions are subject to Rule 12.6 of the Rules of Practice and

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(b) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails;

(c) Provide adequate drainage for the track; and

(d) Maintain proper track crosslevel, surface, and alinement.

[10] The wording of 49 C.F.R. Part 213.334 is identical to 49 C.F.R. Part 213.103.

[11] UTU did not originally file the document with the Docket Office. It was subsequently filed on June 28, 2007.

[12] UP and BNSF Response to Supplemental Memorandum of United Transportation Union, page 2.

Procedure[13] governing the confidentiality of settlement negotiations. Therefore, we did not consider the content of UP's proposal, any comments by UTU on the proposal, or the fact that a proposal was proffered in reaching our conclusion here today.

UP/BNSF's response also asserts that UTU's petition is deficient and should be dismissed because it does not comply with § 1708.5 and Rule 6.3. Specifically, it contains multiple procedural errors since it does not:

- Apply to future conduct only;
- State the justification;
- Propose specific wording;
- Disclose previous litigation; or
- Verify factual allegations.

We disagree. Although it has been a torturous route, we believe that UTU has ultimately met its burden here.

UP/BNSF asserts that UTU's Memorandum rejects its proposal because it is only prospective and therefore proves that UTU is seeking impermissible retroactive application of any modification to the rules. UP/BNSF cannot have us disregard its proposal due to UTU's breach of confidentiality, yet consider it in the context of supporting its claim of procedural insufficiency. As stated above, we did not consider the settlement proposal in reaching our conclusion; similarly, we will not consider UTU's statements about the settlement proposal.

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[13] Subsequent references to Rules are to the Commission's Rules of Practice and Procedure.

UTU provided FRA statistics regarding slip, trip, and fall injuries and a statement from a railroad representative regarding the significance of such injuries to the overall safety record. While neither party could provide information regarding the primary cause of slip, trip, and fall injuries, FRA records include ballast and uneven surfaces among the causes of such injuries. UTU provided information regarding ballast size recently adopted for use in other states, similar to what UTU is seeking in its petition. All parties profess a commitment to safety. Safety is also a primary concern of the Commission and therefore, we are satisfied that there is sufficient justification for a rulemaking.

Contrary to UP's claim, UTU's petition provided specific, proposed language.[14] The sufficiency of the original filing is not negated merely because changes were not made as a result of narrowing the issues in meet and confer sessions. No settlement was adopted where we would have anticipated a change to the original proposed wording. Therefore, we disagree with UP/BNSF's assertion that UTU did not provide specific proposed language.

The ALJ ruling giving parties a firm deadline to report on progress may have abbreviated the settlement process. However, as progress was painfully slow, we do not think continued meet-and-confer sessions, workshops or mediation similar to what led to the 1990 Consensus Agreement would have resulted in an accord.[15] Even if the parties were content with such a leisurely pace, we are mindful of the statutory requirement for a timely resolution of this matter and support the ALJ's position denying further extensions.

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[14] Petition of The United Transportation Union, page 3.

[15] Parties met only twice between the January 31, 2007, ALJ ruling and the June 15, 2007, deadline, although phone calls and emails were also exchanged.

Regarding previous litigation of the issues before the Commission; UTU provided the legal history of the current provisions and clearly states in its petition that it believes they are inadequate to ensure employee safety on walkways in railway switching areas. UTU has identified a potential safety hazard, not specifically identified or addressed in the present wording of GO 118, posed by material (including the size of ballast rock) used in railroad yard walkway areas where train crews routinely conduct switching operations.

The verified factual information available are the FRA injury statistics, the railroad employee statement regarding the primary category of employee injuries and the information regarding similar ballast size being used in other states. UP/BNSF contends that agreements on ballast size in other states are part of larger negotiated measures responsive to localized needs and should not be taken out of context and imposed here.[16] The fact that they are part of larger agreements does not contradict the fact that other states actually use the proposed ballast size.

This decision does not resolve the issues in the petition; rather it determines there is sufficient information provided in the petition to institute a rulemaking that will decide whether a General Rule is appropriate. For the foregoing reasons, we believe UTU has met that burden.

4. Comments on Proposed Decision

The proposed decision of Commissioner Grueneich in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and Rule 14.3(a) of the Commission's Rules of Practice and Procedure.

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[16] UP Response to Petition, pages 9 and 10.

Comments were filed on August 27, 2007 by UP/BNSF and Reply Comments were filed on September 4, 2007, by UTU. We have made revisions, where appropriate, based on those comments.

5. Assignment of Proceeding

Dian M. Grueneich is the assigned Commissioner and Linda Rochester is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. This decision resolves the Petition for Rulemaking filed by UTU.
2. Parties were granted an extension beyond the statutory deadline because of the need to meet and confer, but were ultimately unable to reach agreement on the issues.
3. No parties were disadvantaged by the delay in resolution of this proceeding.
4. Parties do not keep readily accessible records on the type or cause of injuries involved in this proceeding.
5. The FRA records indicate 115 injuries to UP and BNSF employees due to slipping, tripping, and falling in the last five years.
6. Ballast size and irregular surface are among the listed causes of slip, trip, and fall injuries in the FRA records.
7. UTU's petition proposes amendments to General Order 118.
8. UTU's petition demonstrates sufficient justification for a rulemaking.
9. UTU's petition contains verified factual allegations.
10. UTU's petition identifies walkway areas in routine switching areas of California rail yards in which the current provisions of the GO may be inadequate to ensure employee safety.

11. Safety is a primary concern to all parties.

Conclusions of Law

1. United Transportation has met its burden of proof in this proceeding as specified by § 1708.5 and Rule 6.3.

2. The Commission has safety jurisdiction over the walkways along tracks in California rail yards where train crews routinely conduct switching operations.

3. United Transportation Union's Petition for Rulemaking should be granted.

4. The Commission should issue a narrowly focused rulemaking for the limited purpose of considering employee safety with respect to materials (including the size of ballast rock) used in rail yard walkways where crews routinely conduct switching operations.

O R D E R

IT IS ORDERED that:

1. United Transportation Union's Petition for a Rulemaking is granted.

2. The Commission shall issue a narrowly focused rulemaking for the limited purpose of considering employee safety with respect to materials (including the size of ballast rock) used in California rail yard walkways where train crews routinely conduct switching operations.

3. Petition 06-12-012 is closed.

This order is effective today.

Dated September 6, 2007, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners