

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Amend
General Order 118 Regarding the
Appropriate Size Materials, Including
Ballast Rock Used in Railway Switching
Yards for Occupational Health and Safety.

FILED
PUBLIC UTILITIES COMMISSION
SEPTEMBER 20, 2007
SAN FRANCISCO, CALIFORNIA
RULEMAKING 07-09-007

**ORDER INSTITUTING RULEMAKING ON BALLAST SIZE
IN RAIL SWITCHING AREAS OF CALIFORNIA RAIL YARDS**

1. Summary

With this decision, the Commission opens a narrowly focused Order Instituting Rulemaking (OIR or rulemaking) to determine the appropriate size material (including ballast rock) for use in railway switching area walkways and whether revisions are needed to General Order (GO) 118.

2. Background

On December 11, 2006, United Transportation Union (UTU) filed a petition for rulemaking to modify portions of GO 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 Railway Company's (UP/BNSF) motion for a 30-day extension of time to respond to UTU's petition. The ALJ ruling directed parties to provide responses to a series of questions

regarding safety, injuries and ballast size, including information from other states. It also directed parties to use the 30-day extension to conduct meet-and-confer sessions to attempt and resolve the issues and to report back to the ALJ on the results.

Parties' responses to the ALJ ruling cited a lack of recorded, easily accessible information of the type requested in the ruling. Only UTU attempted to provide responses to the questions posed. Parties reported that the first of several required 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 stated 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, directed 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/BNSF filed its Response.

On September 6, 2007, the Commission issued Decision 07-09-006. The decision directed that a rulemaking be opened, narrowly focused on determining ballast size for railway switching area walkways to minimize injuries due to walking on uneven surfaces and any needed modifications to GO 118.

3. Preliminary Scoping Memo

This rulemaking is instituted for the purpose of determining the appropriate size ballast for use in railway switching area walkways and if any modification to GO 118 is needed in order to ensure compliance. Rule 7.1(d) of the Rules of Practice and Procedure (Rules)¹ requires that a rulemaking “shall attach a preliminary scoping memo” and that the assigned Commissioner shall rule on the scoping memo after the prehearing conference if one is held.

The scope of this rulemaking includes the following issues upon which we seek comments from respondents and interested parties:²

- Records of injuries to California railway workers due to slip, trip, and fall for the last five years.
- What is the appropriate ballast size for use in railway switching area walkways in order to reduce employee injuries due to slip, trip, and fall or walking on uneven surfaces? Is there an industry “best practice” regarding ballast size in rail yard switching area walkways? Is the industry “best practice” adequate?
- Are railways complying with industry established “best practices,” if any, regarding ballast size in rail yard switching area walkways?
- What is the approximate cost to railways of complying with any industry “best practices” or Commission ordered changes regarding ballast size in railway switching area walkways?
- What size ballast is used in other states and why, if known?
- What is the best mechanism to ensure compliance by railways regarding the appropriate ballast size in railway switching area walkways? If needed, propose specific revisions to GO 118.

¹ All further references to Rules pertain to the Commission’s Rules of Practice and Procedure.

² Some of these issues are narrower versions of information sought in P.06-12-012.

Additionally, we seek specific supplementary information from UTU and UP. We direct UP to file with the Docket Office and serve upon the service list, the relevant portions of the American Railway Engineering and Maintenance of Way Association (AREMA) manual with the Commission. For our purposes, the relevant sections are considered to be those sections of the AREMA manual dealing with ballast size used in railway switching areas.

We direct UTU to provide the Commission with information regarding California railway switching yards considered most troublesome or out of compliance with industry “best practices” regarding ballast size in switching area walkways. The information shall be filed with the Commission’s Docket Office and served upon the service list.

We direct the Consumer Protection and Safety Division (CPSD) to conduct site inspections of two or more switching yards identified by UTU as trouble spots. The actual inspection sites will be determined by the ALJ and CPSD staff. CPSD will prepare a report on conditions observed during the site inspection and file the report with the Docket Office and serve it on all parties.

4. Category of Proceeding

Pursuant to Rule 7.1(d), this rulemaking is preliminarily determined to be quasi-legislative as that term is defined in Rule 1.3(d). Our purpose is to solicit comments from interested parties regarding the appropriate size ballast for use in railway switching area walkways in order to minimize employee injuries. We also seek comments on the appropriate mechanism to ensure railway compliance with ballast size in the switching area walkways

It is contemplated that this proceeding shall be conducted through a written record. An order will issue on the merits-based record established in this

docket. However, the Commissioner and ALJ assigned to this OIR may deem evidentiary hearings necessary.

5. Respondents

For purposes of this proceeding, all California railroad corporations as defined in Pub. Util. Code § 230, are considered respondents.

6. Service List

The Executive Director shall serve copies of this rulemaking on respondents to this proceeding and on UTU and CPSD staff. We invite broad participation in this proceeding. All additional persons or entities seeking party status or that wish to monitor this proceeding may do so by informing the Commission's Process Office. Such requests should be sent to the Commission's Process Office via email (Process_Office@cpuc.ca.gov) or by postal mail (Process Office, California Public Utilities Commission, 505 Van Ness Avenue, San Francisco, California 94102). To be included on the service list for this proceeding, parties should so inform the Process Office no later than 20 days after the mailing date of this rulemaking and include pertinent information such as:

- Name and party represented, if any
- Address
- Telephone number
- Email address
- Assignment to the party, state service or information only category

While all respondents identified in the OIR will be bound by the outcome of this proceeding, only those who notify us they wish to be on the service list

will be accorded service by others until final rules are proposed and/or a final decision issued.

The initial service list will be posted on the Commission's website at www.cpuc.ca.gov. Parties should ensure they are using the most up-to-date service list by checking the Commission's website prior to each service/filing date.

We encourage electronic filing in this proceeding. Electronic filings should be made according to Rule 1.10 and Resolution ALJ-188. Consistent with those rules, a hard copy of all pleadings shall be concurrently served on the assigned ALJ.

7. Schedule

Following is the preliminary schedule for this rulemaking:

UTU and UP Responses to the OIR	30 days after OIR issued (mailed date)
ALJ and CPSD staff select field inspection sites	15 days after UTU's response is filed
CPSD field inspections	30 days after site selection
CPSD report to Commission	30 days after site inspection
Opening Comments	45 days after CPSD's report to the Commission
Reply Comments	14 days after Opening Comments

As previously stated, we do not anticipate the need for evidentiary hearings, but any party who believes hearings are necessary may make that request in their opening comments. The request must identify the specific disputed evidence necessitating evidentiary hearings. The assigned Commissioner or assigned ALJ will determine the need for a prehearing

conference or hearings and may alter the schedule or adopt further procedural processes as necessary.

Any objection to the preliminary categorization of this rulemaking as quasi-legislative must be filed no later than 10 days after the issuance of this rulemaking. This proceeding should be completed within the 18-month statutory deadline.

8. Public Advisor

Any person or entity interested in participating in this rulemaking as a party who is unfamiliar with the Commission's procedures should contact the Commission's Public Advisor's Office in San Francisco at (415) 703-2074 or (866)849-8390 or email public.advisor@cpuc.ca.gov.

9. Ex Parte Communications

Pursuant to Rules 8.4(b) and 8.2(a), ex parte communications are allowed in this proceeding without any restrictions or reporting requirements.

Therefore, **IT IS ORDERED** that:

1. A rulemaking is instituted for the purpose of determining the appropriate ballast size for use in railway switching area walkways and if any modifications to General Order 118 are necessary.
2. All railroad corporations under the Commission's jurisdiction are made respondents to this proceeding.
3. The Executive Director shall serve a copy of this rulemaking on all respondents to this proceeding, United Transportation Union, and CPSD staff.
4. This rulemaking is preliminarily determined to be a "quasi-legislative" proceeding as that term is defined in Rule 1.3(d).

5. No later than 20 days after the mailing date of this rulemaking, persons or entities seeking to be included on the service list for this proceeding may do so by informing the Commission's Process Office. Requests to be added to the service list should be sent via email (Process_Office@cpuc.ca.gov.) or by postal mail (Process Office, California Public Utilities Commission, 505 Van Ness Avenue, San Francisco, California 94102). The request should include the following information: (1) the full name, address and telephone number of the person or entity upon whom service should be made (if the participant is an entity, the full name of the entity's representative for service of process); (2) email address if available; and (3) assignment to party, state service or information only category.

6. Responses to the Order Instituting Rulemaking and Comments shall conform to Rule 6.2 and shall be filed with the Commission's Docket Office and served in conformance with the schedule contained in Section 7 of this document.

This order is effective today.

Dated September 20, 2007, at San Francisco, California.

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