

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

March 20, 2008

Agenda ID #7488

TO PARTIES OF RECORD IN RESOLUTION ROSB-002

**NOTICE OF RESOLUTION ADOPTING A RAILROAD CARRIER CITATION
PROGRAM FOR ENFORCING COMPLIANCE WITH GENERAL ORDERS AND
OTHER REQUIREMENTS AND OPPORTUNITY TO COMMENT**

A draft resolution (ROSB-002) by the Consumer Protection and Safety Division recommending adoption of a Railroad Carrier Citation Program is scheduled for consideration on the May 15, 2008 Commission meeting agenda. The Commission may vote on the resolution at that time, or it may postpone a vote. The Commission may adopt all or part of ROSB-002, amend or modify it, or set it aside and prepare a different resolution.

The Commission will consider the draft resolution at its May 15, 2008 meeting. Railroads subject to the Railroad Carrier Citation Program may file comments on the draft resolution. An original and 2 copies of comments must be filed with the Consumer Protection and Safety Division by May 1, 2008, at the address set forth below. Commenters must also serve comments on the other railroads potentially subject to the Citation Program, and send copies of comments by electronic mail to the e-mail address below. Comments shall focus on factual, legal or technical error in the draft resolution. (See 14.5 for detailed requirements.) Subject railroads may view comments at the Commission's San Francisco Office or at the "Currently Open for Comment" section of the Commission's Internet site at cpuc.ca.gov.

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Attachment

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Consumer Protection and Safety Division
Railroad Operations Safety Branch

San Francisco, California
May 15, 2008
Resolution ROSB-002

RESOLUTION**RESOLUTION ADOPTING A RAILROAD CARRIER CITATION PROGRAM FOR ENFORCING COMPLIANCE WITH GENERAL ORDERS AND OTHER REQUIREMENTS INCLUDING PROCEDURES FOR APPEAL OF CITATIONS ISSUED TO RAILROAD CARRIERS.****SUMMARY**

This resolution approves a citation program under the administration of the Director of the Consumer Protection and Safety Division (CPSD) for enforcing compliance with certain General Orders and other requirements for railroad carriers operating in California. Specifically, the citation program will enforce compliance with the requirements for walkways, clearances, notification of hazardous materials release, and certain railroad operating rules agreed to by the Union Pacific Railroad Company (UPRR) and BNSF Railway Company (BNSF) in *Union Pacific Railroad Co. v. CPUC*, Case No. 07-cv-001 (E.D. Cal. June 1, 2007) ("AB 3023 Suit"). Staff is delegated authority to draft and issue citations for specific violations and levy penalties in specified amounts as set forth in Appendix A.

Delegation of authority to CPSD will allow prompt action by Staff to protect the public and fulfill the objectives of the Commission's rail safety responsibilities. Authority for this resolution is derived from provisions of: the California Constitution; California statutes and court decisions; and prior Commission decisions and orders. Nothing in this resolution diminishes, alters, or reduces the Commission's existing authority to promote and enforce public safety requirements.

BACKGROUND

California law, including Public Utilities Code § 7, allows the Commission to delegate certain of its powers to Commission Staff.¹ The Commission may delegate to its Staff the performance of certain functions, including investigation of facts preliminary to agency action, and the assessment of specific penalties for certain types of violations.² Over the last several years the Commission has developed and enhanced its citation programs in numerous areas, including household good movers, charter party carriers, passenger stage corporations, maintenance and operation of power plants, slamming by telecommunications providers, and compliance with resource adequacy requirements for electric power.

A citation program administered by Staff for specified violations of the Commission's General Orders and other requirements that apply to railroad carriers will allow prompt action by Staff to protect railroad employees, the public, and the environment, minimize enforcement costs, and fulfill the objectives of the Commission's railroad safety program. This citation program is consistent with other approved citation programs and will expedite railroad compliance with General Orders (G.O.s) 26-D and 118 and Public Utilities Code § 7662 as set forth in the Settlement Agreement in the "AB 3023 Suit," *supra*.

G.O. 26-D establishes minimum clearances between railroad tracks, parallel tracks, side clearances on railroad tracks, overhead clearances on railroad tracks, freight car clearances, and clearances for obstructions, motor vehicles, and warning devices next to railroad tracks at highway-rail crossings.

G.O. 118 provides standards for the construction, reconstruction, and maintenance of walkways adjacent to railroad tracks to provide a safe area for train crews to work. G.O. 118 also requires those walkways to be kept reasonably free of vegetation.

The Settlement Agreement in the "AB 3023 Suit," *supra*, establishes standards for the posting of signage and flags, milepost markers, and permanent speed signs. Under this Settlement Agreement, California Public Utilities Code §§ 7662 and 7662.5 shall be interpreted by the Commission in such manner as to avoid conflicts with federal law, to comply with past California Federal Court decisions applying to the Commission, and to follow UPRR's and BNSF's present operating rules, while remaining consistent with the purpose and intent of the statute. Both Railroads also agreed to provide notification

¹ See D.06-01-047, mimeo at pp. 9-12, which modifies and denies rehearing of D.04-05-017 and D.04-05-018, and thereby upholds the Commission's delegation of authority to staff under the G.O. 167 citation program, among other things.

² *Ibid*.

to the collective bargaining unit of any affected employee concerning new utilization of remote controlled locomotives.

The types of violations that Staff may enforce by citation and the citation procedures themselves are similar to those approved in G.O. 167 for the citation program administered by Staff for the operation and maintenance standards for electric generation facilities.³ The amounts of the proposed penalties also are similar to those approved in G.O. 167. The penalty for failure to notify the California Office of Emergency Services of the release of hazardous materials is well within the level of penalties allowed pursuant to Public Utilities Code § 2107, and reflects the potentially severe health and safety impact if notification does not occur in a timely manner.

In addition, based on the Local Safety Hazard decisions in the District Court for the Northern District of California and in the U.S. Court of Appeals for the Ninth Circuit, California and the CPUC may impose fines and penalties on railroads for violations of California rail safety laws and regulations not “covered” by federal law or regulations. “Because the FRA [Federal Railroad Administration] merely deferred making a rule, rather than determining that no regulation was necessary, the state can legitimately seek to fill this gap ... we concluded that the FRSA did not preempt CPUC's imposition of civil penalties against the Railroads for failing to follow their own internal operating rules....” (*Union Pac. R.R. v. Cal. Pub. Util. Comm’n*, 346 F.3d 851, 868 (9th Cir. 2003) (Local Safety Hazard “LSH 9th Circuit Opinion”).) Further, the District Court below, in the same proceeding, held:

While Congress clearly wanted a single, national entity to enforce *federal* railway laws, this statement does not speak to state enforcement of rules governing subject matters that are *not* covered by federal law. Indeed, in this regard, the FRSA [Federal Railroad Safety Act] savings clause specifically permits states to enforce state rules, like the one at issue here, that address a subject matter not covered by the FRSA [original italics].

(*Union Pacific R.R. Co. v. Calif. Public Util. Comm’n*, 109 F.Supp.2d 1186, 1218 (N.D. Calif. 2000) (Local Safety Hazard “LSH District Court Opinion”).)

In enforcing compliance with railroad safety requirements, or in response to any Specified Violation, the Commission may initiate any authorized formal proceeding or pursue any other remedy authorized by the California Constitution, the Public Utilities Code, other state or federal statutes, court decisions or decrees, or otherwise by law or

³ See also Resolution ALJ-187, Sept. 22, 2005, and Resolution UEB-001, Aug. 24, 2006.

in equity. Finally, the Commission's enforcement of this resolution by citation process does not bar or affect the remedies otherwise available to other persons or government agencies.

CITATION PROGRAM

The citation program authorizes the Railroad Operations Safety Branch (ROSB) of CPSD to issue citations to railroad carriers for violation of specified Public Utilities Code sections and Commission General Orders. A carrier issued such a citation may accept the fine imposed or contest it through a process of appeal. The Commission adopts the following procedures to govern the issuance and appeal of these citations.

1. *Citation: Contents.* The citation served upon the respondent by the investigator shall include:
 - (a) A specification of each alleged violation as listed in Appendix A;
 - (b) A statement of the facts upon which each alleged violation is based;
 - (c) A statement that the respondent may either pay the amount of the fine set forth in the citation or appeal the citation, as set forth herein, and that the respondent will forfeit the right to appeal the citation by failing to do either of these things within the allowable period;
 - (d) An explanation of how to file an appeal, including an explanation of the respondent's right to have a hearing, to have a representative at the hearing, to request a transcript, and to request an interpreter; and
 - (e) A form of Notice of Appeal.
2. *Citation: Response.* The respondent, within 30 days after the date of service of the citation, shall either remit payment of the full amount of the fine to CPSD, agree with CPSD on conditions for payment, or serve a Notice of Appeal upon CPSD. Upon request made to CPSD before the expiration of this deadline, the time to pay the fine or serve a Notice of Appeal may be extended by CPSD for an additional period not to exceed 30 days. CPSD may, in its discretion, grant one additional extension at the request of the respondent so that the total extension period may not exceed 60 days
3. *Citation: Payment of fine; default.* If the respondent pays the full amount of the fine within the time allowed hereunder, the citation shall become final. If the respondent, within the time allowed pursuant to Paragraph 2, fails to pay the full amount of the fine or to file a Notice of Appeal, or if the respondent, having entered into an agreement with CPSD, fails to comply with any

provision of that agreement, the respondent shall be in default, and the citation shall become final. In this event, the respondent shall have forfeited its right to appeal the citation. If the respondent fails to pay the full amount of the fine within 30 days after the date of service of the citation, CPSD may take all necessary action provided by law to recover any unpaid fine and ensure compliance with applicable statutes and Commission orders.

4. *Citation: Appeal.*

- (a) The Chief Administrative Law Judge shall designate an Administrative Law Judge to hear appeals of citations. Citation appeals will not be docketed as formal Commission proceedings.
- (b) Appeals of citations shall be heard in the Commission's San Francisco courtrooms on regularly scheduled days. Appeals shall be calendared accordingly, except that a particular matter may be re-calendared at the direction of the designated Administrative Law Judge.
- (c) The appeal shall be brought by serving a Notice of Appeal upon CPSD, and the respondent shall indicate the grounds for the appeal in the notice. CPSD shall promptly advise the Chief Administrative Law Judge upon receipt of a timely Notice of Appeal.
- (d) Upon advice from CPSD that a citation has been appealed, the Chief Administrative Law Judge shall promptly forward the matter to the designated Administrative Law Judge, who shall set the matter for hearing on the first Citation Calendar not less than 10 days after advice of the appeal is received from CPSD. The Administrative Law Judge may, for good cause shown or upon agreement of the parties, grant a reasonable continuance of the hearing.
- (e) The respondent may order a transcript of the hearing, and shall pay the cost of the transcript in accordance with the Commission's usual procedures.
- (f) The respondent may be represented at the hearing by an attorney or other representative, but such representation shall be at the respondent's sole expense.
- (g) At the hearing, CPSD shall bear the burden of proof in establishing a violation. CPSD shall also bear the burden of producing evidence and, therefore, shall open and close. The Administrative Law Judge may, in his or her discretion, alter the order of presentation. Formal rules of evidence do not apply, and all relevant and reliable evidence may be received in the discretion of the Administrative Law Judge.

- (h) Ordinarily, the appeal shall be submitted at the close of the hearing. In the discretion of the Administrative Law Judge upon a showing of good cause, the record may be kept open for a reasonable period to permit a party to submit additional evidence or argument.
- (i) The Administrative Law Judge shall issue a proposed resolution resolving the appeal not later than 60 days after the appeal is submitted, and the proposed resolution shall be placed on the first available agenda, consistent with the Commission's applicable rules.
- (j) From the date that CPSD receives a Notice of Appeal to and including the date when the final order is issued, neither the respondent nor the investigator, or agent or other person on behalf of the respondent or investigator, may communicate regarding the appeal, orally or in writing, with a Commissioner, Commissioner's advisor, or Administrative Law Judge, except as expressly permitted under these procedures. Inquiries strictly limited to procedural matters are permitted.

NOTICE

A first draft of this resolution was issued on August 30, 2007, for public review and comment. It was served on all known California railroad companies (see the service list attached hereto) and by notice in the Commission's Daily Calendar.

COMMENTS

A first draft resolution of the CPSD in this matter was mailed on August 30, 2007, in accordance with Public Utilities Code § 311 and Rule 14.2(c) of the Commission's Rules of Practice and Procedure. We asked for comments by September 24, 2007, and reply comments by October 1, 2007. We received comments or reply comments from the following: Union Pacific Railroad Company and BNSF Railway Company (UPRR/BNSF), Metrolink (Southern California Regional Rail Authority), [San Diego] Metropolitan Transit System (including the San Diego Trolley, Inc.), Caltrain (Peninsula Corridor Joint Powers Board), North Coast Railroad Authority and Northwestern Pacific Railroad Company (NCRA/Northwestern Pacific), Trona Railway Company, LLC (Trona), Los Angeles Junction Railway Company (LA Junction), Modesto and Empire Traction Company (Modesto and Empire), Pacific Harbor Line, California Northern Railroad Company (Calif. Northern), RailAmerica Operations Support Group, Inc. (RailAmerica), McCloud Railway Company (McCloud), California Shortline Railroad Association (Calif. Shortlines Assn.), San Joaquin Valley Railroad Company

(San Joaquin Valley), Central California Traction Company (Central Calif. Traction), and The Brotherhood of Locomotive Engineers (BLE).

We have carefully reviewed and considered these comments. To the extent that such comments required changes to the proposed resolution, the changes have been incorporated into the body of this resolution and in Appendix A. We note in particular, that our changes remove G.O. 72-B and G.O. 75-D from the list of specified violations and scheduled penalties. We now think that enforcement of these two General Orders, which largely concern highway-rail crossing safety rather than railroad operations, might better be examined separately, at a later time.

Federal Due Process:

Both the UPRR and the BNSF argue that the citation program violates the federal due process clause of the U.S. Constitution as interpreted in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The private interest in *Mathews* was a claimant's disability income. The U.S. Supreme Court ruled that an evidentiary hearing was not required even though the claimant might be without disability income for as long as a year. Both railroads contend that the potential citable violations are numerous, that the proposed fines are "substantial," i.e., larger than most traffic violation fines, and provide the railroads fewer safeguards than provided traffic offenders. (UPRR & BNSF Comments at page 15.) By withdrawing G.O. 72-B and 75-D from the citation program, we have greatly reduced the kinds of violations that may be cited.

Further, we do not agree that the potential fines are "substantial" (UPRR & BNSF Comments at page 15) or "ruinous" (NCRA/Northwestern Pacific Comments at page 2). We find these potential fines are reasonably calculated, in light of the harm of the misconduct they are intended to deter and correct, and in light of the size of the corporate entities that are potential respondents. The bulk of the fines are \$500 per incident and \$50 per day for continuing violations following adequate notice of the alleged violation to the railroads. (See Appendix A to this resolution.) The fact that each General Order in Appendix A has a fixed penalty amount, and that each violation for failure to immediately report a hazardous material or toxic spill (see Public Utilities Code § 7662(g) and 49 C.F.R. Part 225.9) also has a fixed penalty amount,⁴ establishes a Commission delegation of a ministerial act without the exercise of any significant

⁴ The fine for failure to immediately report a hazardous material or toxic spill is the largest penalty that can be assessed under the citation program, \$10,000 per incident plus \$500 per hour beyond the first hour of violation. This amount must be considered in the context of the cost to the State of railroad hazardous materials spills, e.g., over \$70 million for the Dunsmuir spill (see D.94-11-069) in Northern California in 1991, and over \$250 million for BNSF's Cajon grade spill in Southern California in 1996.

discretion on the part of Staff. For reasons previously discussed (and further discussed below) concerning the ability of the railroads to appeal any and all of the proposed citations, we find the safeguards provided the railroads to be adequate as demanded under fundamental principles of due process of law.

The railroads are provided with adequate due process since they may request an evidentiary hearing for any proposed citation. The fact that the railroads may request an evidentiary hearing for each citation removes the concern raised in *Mathews* that the private interest could be erroneously deprived of property, in this case, in the form of a fine.

Moreover, we find the fiscal or administrative burdens on the railroads are not significant under *Mathews* in defending against a citation since any railroad representative may appeal, appear at the evidentiary hearing, and present evidence. The Commission's rules allow but do not require an attorney to represent an appellant's interests at a Commission hearing. The railroads fail to adequately understand the appeals process afforded them under the proposed citation program; as further discussed later, unlimited prosecutorial discretion and fact-finding are not vested in the Staff. Staff may cite the railroad but if the railroad appeals, the matter will be set for evidentiary hearing before a neutral Administrative Law Judge (ALJ). UPRR's and BNSF's contention that Staff will "have an obvious incentive to issue the largest possible number of citations" (UPRR & BNSF Comments at page 16) is incorrect. The Commission's experience with similar citation programs in other areas of its jurisdiction indicates the railroads' concern about an alleged incentive to issue citations is misplaced. In fact, the prosecutorial discretion afforded by this program is carefully circumscribed and is fully reversible on appeal, i.e., the railroads may obtain an evidentiary hearing for each and every citation.

The Commission agrees that fundamental principles of due process require adequate notice to the railroad of the alleged violation. The proposed citation will provide adequate notice of the alleged violation so that the railroad may prepare an adequate defense. Under the resolution the fine will attach immediately but if the railroad timely appeals the citation no fine shall be imposed unless an ALJ finds an alleged violation actually existed. Should the railroad thereafter appeal to the full Commission, a majority of the Commission at a public and regularly scheduled conference would have to uphold the findings of the ALJ before the fine is finally imposed.

Alleged Improper Delegation of Authority to Staff:

UPRR/BNSF and others argue that the citation program unlawfully delegates authority to staff that the Public Utilities Code and other state law grant to the Commission, itself. We need not review, here, our comprehensive prior analyses of the law governing

delegation of ministerial functions by this Commission to its staff.⁵ It is well-established that Commission staff may apply scheduled fines for specified violations when we authorize them to do so.

Some comments argue, in the alternative, that even if the Commission may approve citation programs which delegate “traffic ticket” citation authority to staff, this program, as proposed, departs from other, approved programs by unlawfully expanding the scope of delegation. These contentions are likewise misplaced. As clarified by the changes made to the proposed resolution, this program closely resembles other citation programs – only the subject matter differs. The resolution clearly spells out the scope of delegation to staff and the appeal process available should a railroad believe a citation to be unfounded. The resolution does not transfer final decision making authority from the Commission to CPSD. Even the order of the ALJ hearing on appeal is further appealable to the full Commission, similar to other recommended orders by Commission hearing officers.

Staff Has the Burden of Proof in Establishing a Violation:

UPRR and BNSF contend that Staff does not have the burden of proof in an appeal of a citation for an alleged violation. We have modified the proposed resolution to clarify that Staff does indeed have the burden of proving the existence of any alleged violation.

Need and Justification for the Citation Program:

UPRR/BNSF and others argue that there is no authority or justification for the citation program. (UPRR & BNSF Comments at pages 5-7.) As noted by both railroads, the Commission’s Office of Governmental Affairs (OGA) did recommend that the citation program be included in AB 1935 (Bermudez) (2006). OGA pointed out that a citation program would be more efficient than issuing an Order Instituting Investigation (OII) for every minor violation of state rail safety rules. OGA did not ask for the authority from the Legislature to create the citation program. As OGA noted, the “CPUC already has established precedent for this type of citation process in the Transportation Enforcement Branch of CPSD [Consumer Protection and Safety Division].” (Page 3 of Ex. A to UPRR & BNSF Comments.) Authority to institute the citation program was not required because the Commission already has the authority. As for justification for the citation program, Ex. A (at page 3) to UPRR & BNSF Comments, accurately demonstrates both the need for the proposed citations (the citation process will “streamline” the cumbersome formal Order Instituting Investigation process) and the

⁵ See, e.g., D.06-01-047, denying rehearing of the G.O. 167 citation program approved by D.04-05-018 but modifying that decision in other respects; D. 04-05-018, approving the G.O. 167 citation program; D.02-02-049, denying rehearing of Resolution M-4801, which delegated to staff authority to suspend advice letters, but modifying the resolution in other respects.

protections provided the railroads, i.e., staff's interpretations of General Orders are not binding on the Commission.⁶

A further justification for the citation program is to efficiently utilize scarce enforcement staff resources. The Commission's rail inspectors must carefully allocate their time between state regulation enforcement and federal regulation enforcement in their capacity as joint Commission/FRA safety inspectors. Therefore, staff relies heavily on reports of unsafe conditions in the form of informal complaints from railroad employees. Typically staff will verify reported unsafe conditions during an on-site visit, then notify the railroad of the need for corrective action. Generally, the staff inspector and railroad agree to a timeframe for remediation informally. However, it has been staff's experience that the rail carrier often fails to meet its commitments. Consequently, CPUC inspection staff must make repeated site visits, or contact with the railroad carrier, in an effort to achieve compliance, or, in the alternative, consider recommending a formal investigation (Order Instituting Investigation) to the Commission. This places a further strain on staff's limited resources. The adoption of the citation process will allow staff to document persistent non-compliant conditions and provide a more certain timeframe for remediation.

Alleged Vagueness of the General Orders and Statutory Safety Standards:

UPRR and BNSF also contend that the proposed resolution is void for vagueness regarding its prohibitions. We disagree. Most of the General Order prohibitions and State statutory prohibitions incorporated in the resolution have existed for many years. The railroads have never expressed a difficulty in general in complying with these requirements. We find that both railroads have failed to adequately identify any vagueness in the prohibitions incorporated within this resolution. For the reasons previously stated that Staff will not be both prosecutor and finder of fact, we disagree that the penalty scheme proposed "shifts the interpretation of General Orders, and court orders, away from the Commission and into the hands of individual members of the Staff." (UPRR & BNSF Comments at page 19.) The Commission's ALJs and the Commissioners themselves will be the arbiters regarding the alleged violations and prohibitions in the Commission General Orders, court orders, and California statutes.

⁶ Among the protections provided the railroads in this citation program, the penalty schedule for railroad safety violations is substantially less than \$20,000 fine per violation applied to stationary utilities under Public Utilities Code § 2107 in D.04-04-065 as cited by UPRR and BNSF. Further, the Commission held that "[w]hile CPSD's past interpretation of GO compliance may be relevant in setting appropriate penalties, *staff's interpretations of GOs are not binding on the Commission* [emphasis added]." D.04-04-065, COL #16 at 201 Cal. PUC LEXIS 823 at pp. 94-95. Thus, the Commission will fully review on the merits every alleged violation in an appeal of a citation.

UPRR and BNSF specifically contend that the Commission's General Orders "include a number of open-ended aspirational statements that are subject to substantial interpretation...." (UPRR & BNSF Comments at page 20.) However, this citation program sets forth objective standards. Staff and the railroads have generally agreed as to the standards referred to in the General Orders and California statutes as set forth in the Settlement Agreement in the "AB 3023 Suit," *supra*. Only the General Orders and California Public Utilities Code sections referred to in that Settlement Agreement and described in the penalty schedule in this resolution shall be the subject of this citation program. Any disagreement as to the proper interpretation of these standards will be resolved in the hearing process provided the railroads in appealing a citation.

With respect to Public Utilities Code §§ 7672 and 7672.5, the Commission has agreed with the railroads (in the parties' Settlement Agreement in the "AB 3023 Suit," *supra*) that the statutes are preempted by the U.S. Department of Transportation's Hazardous Materials Transportation Act (HMTA) except as to the immediate notification of a railroad accident. See also: "LSH District Court Opinion," *supra*.

With regard to the immediate telephone notification of a hazardous material or toxic spills by the railroads, the HMTA does not preempt state laws requiring such immediate notification. In *National Assoc. of Regulatory Utility Comm'rs v. Coleman*, 542 F.2d 11, 15 (3rd Cir. 1976), the court held that the federal notification requirement "does not prevent [the States] from requiring rail carriers to provide immediate notification of accidents in order to enable the states promptly to launch their own investigation." The District Court's Order on Motion for Reconsideration (June 17, 1998), at pages 9-10, in "LSH District Court Opinion," *supra*), in which both UPRR and BNSF were parties, held that:

In short, the subject matter of section 7672.5 – the immediate oral reporting of incidents involving hazardous materials to emergency respondents – is simply not "covered" by DOT federal regulations. As such, California is free to regulate in this area, and section 7672.5 [requiring immediate verbal reporting] is therefore not preempted by the FRSA.

Neither UPRR nor BNSF appealed the ruling. Nevertheless, we recognize, as the railroads have argued, that the FRA has provided a valuable definition of "immediate notification." Notification to California Governor's Office of Emergency Services will be considered immediate if it is made within one hour following the time that the determination or estimate under 49 C.F.R. 225.9 is made, or could reasonably have been made, whichever comes first, taking into consideration the health and safety of those affected by the accident/incident, including actions to protect the environment.

With regard to Public Utilities Code § 7665.2 (requiring risk assessments for each rail facility) enacted in 2006 and the subject of a Settlement Agreement in the “AB 3023 Suit,” *supra*, the Commission recognizes that the federal court retains “continuing jurisdiction to hear disputes over [the Settlement Agreement’s] application, interpretation, or amendment.” (See the “AB 3023 Suit,” *supra*, Stipulated Final Judgment, ¶ G at p. 16.) Among other things, the Settlement Agreement applies to the Commission’s railroad security jurisdiction. California’s security jurisdiction over railroads is limited to the application of federal law and the enforcement of that law and relevant regulations under the FRA’s State Participation Plan.

Similarly, with regard to Section 7662, which was enacted in 2006 and the subject of the Settlement Agreement in the “AB 3023 Suit,” *supra*, the Commission recognizes that the Commission is limited to the interpretations of the provisions of Section 7662 as set forth in the Settlement Agreement. The Commission, UPRR, and BNSF agreed to the standards imposed under the Settlement Agreement. This resolution permits the Commission to enforce those agreed-upon standards under its proposed citation program. The standards remain as provided in Section II of the Settlement Agreement. Since the standards of Section 7662 are maintained in full force and effect as agreed to by UPRR and BNSF under the terms of the Settlement Agreement, the Commission has not “invade[d] the federal court’s [continuing] ... jurisdiction.” (UPRR & BNSF Comments at page 21.)

Alleged Violation of State Participation Program:

We reject UPRR’s and BNSF’s unsubstantiated argument that this resolution “authorize[s] state enforcement of requirements that can only be imposed and/or enforced through the [State Participation Plan] created by the Federal Railroad Safety Act [FRSA].” (UPRR & BNSF Comments at page 21.) The General Orders and state statutes at issue here generally predate the FRSA by many years. In order to succeed in having these railroad safety laws and regulations invalidated as federally preempted under the FRSA, the railroads would be required to establish that the California laws and regulations “more than ... ‘touch upon’ or ‘relate to’ that subject matter” of the federal laws or regulations...the federal regulations [must] substantially subsume the subject matter of the relevant state law.” *CSX Transp. v. Easterwood*, 507 U.S. 658, 664 (1993). “The term ‘covering’ is in turn employed within a provision that displays considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express saving clauses.” *Id.* at 665. UPRR and BNSF have not demonstrated that the Commission’s General Orders and California railroad safety statutes set forth in the penalty schedule for this citation program (Appendix A to this resolution) are preempted by federal law or regulations.

Further, the Commission considers all federal and state rail safety requirements to be critically important components in reducing risks from rail accidents, and, therefore, it

is expected that all rail carriers in California will comply with both. However, since most railroad safety requirements fall within the scope of the FRA, CPUC staff inspectors spend most of their time enforcing those federal regulations. The Commission has entered into a participation agreement with FRA pursuant to 49 CFR Part 212, whereby the Commission has committed rail inspection staff to devote 70% of their on-duty time toward the federal rail safety program of the FRA. The remaining 30% of staff time is allocated to a number of state-related functions, only one of which is the enforcement of state General Orders and California rail safety statutes. An even smaller fraction of those State and Commission rail safety standards are addressed in the resolution's citation program.

Federal Preemption:

With respect to G.O. 118 and 26-D, UPRR and BNSF contend that these General Orders are preempted because "they have an impermissible effect on the construction of trackbeds and track structures, and the management of vegetation near tracks – all subjects that have been covered by FRA's regulations. *See* 49 C.F.R. Part 213." (UPRR & BNSF Comments at page 23.) We agree that it is at least arguable that vegetation control is covered by 49 C.F.R. Part 213.37, i.e., "[v]egetation on railroad property which is on or immediately adjacent to roadbed shall be controlled so that it does not interfere with railroad employees performing normal trackside duties." Therefore, we exclude the vegetation control provisions of G.O. 118 from this resolution. Violations concerning overgrown vegetation shall be cited under the federal regulation within the Commission's authority under the State Participation Plan.

UPRR and BNSF admit that both the safety of track clearances and walkways under these General Orders were the subject of litigation in *So. Pac. Transp. Co. v. Pub. Util. Comm'n of the State of California*, 647 F.Supp. 1220 (N.D. Cal. 1986), *aff'd* 820 F.2d 1111 (9th Cir. 1987 (*per curiam*)).⁷ (UPRR & BNSF Comments at pages 23-24.) Both General Orders were upheld against an attack on grounds of federal preemption.

Nevertheless, UPRR and BNSF argue that this was only a *per curiam* decision and that a subsequent decision in the Fifth Circuit Court of Appeals in *Mo. Pac. R.R. Co. v. R.R. Comm'n of Texas*, 948 F.2d 179 (5th Cir. 1991), should apply because it is based on the U.S. Supreme Court's later decisions in *CSX Transp. v. Easterwood*, *supra*, and *Norfolk*

⁷ "None of the FRA standards, however, addresses the subject of track clearance covered by General Order No. 26-D. The FRA track safety regulations set forth requirements for individual tracks. They cover, for example, the subject of rail gage, which is the distance between rails in a track. 49 C.F.R. § 213.53 (1985). But they do not establish requirements for the distance between tracks." *So. Pac. Transp. Co. v. Pub. Util. Comm'n of the State of California*, 647 F.Supp. 1220, *supra*, at 1224.

Southern Railway Co. v. Shanklin, 529 U.S. 344 (2000).⁸ The plaintiff in *So. Pac. Transp. Co. v. Pub. Util. Comm'n of the State of California*, 647 F.Supp. 1220, *supra*, the Southern Pacific Transportation Company, was purchased by, and merged into, the Union Pacific Railroad Company. The holding in *So. Pac. Transp. Co. v. Pub. Util. Comm'n of the State of California*, *supra*, applies equally to UPRR as the successor in interest to Southern Pacific. See: 2 Witkin, Cal. Proc. (4th ed., 1997), Courts, § 267, "A judgment or final order, in respect to the matter directly adjudged, is conclusive between the parties and their successors in interest... (Cal. Code of Civ. Proc. § 99);" and 7 Witkin, Cal. Proc. (4th ed., 1997), Judgm. § 397, "The most common form of privity is succession in interest: One who succeeds to the interests of a party in the property or other subject of the action, after its commencement, is bound by the judgment with respect to those interests in the same manner as if he were a party. (Cal. Code of Civ. Proc. § 1908(a)(2) [citations omitted])." With respect to BNSF, the Commission declines to apply a Fifth Circuit Court of Appeal ruling in *Mo. Pac. R.R. Co. v. R.R. Comm'n of Texas*, *supra*, over an existing Ninth Circuit decision (*So. Pac. Transp. Co. v. Pub. Util. Comm'n of the State of California*, 647 F.Supp. 1220, *supra*) that specifically applies to the issues raised by the parties here.

Revised Draft Resolution:

On March 20, 2008, a revised Draft Resolution was mailed to the Service List. Parties may file written comments on the revised Draft Resolution within 30-days from the date of mailing.

IT IS ORDERED THAT the following procedures shall govern appeals of citations for violation of statutes or Commission orders relating to railroad carriers:

1. The citation program described above and in the Specified Violations and Scheduled Penalties, Appendix A, are hereby adopted.
2. Authority is delegated to the Consumer Protection and Safety Division, Railroad Operations Safety Branch, to issue citations and levy Scheduled Penalties for the Specified Violations set forth in Appendix A to enforce compliance by railroad carriers with safety requirements.
3. In enforcing compliance with railroad safety requirements or in response to any Specified Violation, the Commission may initiate any formal proceeding authorized by the California Constitution, the Public Utilities Code, other state and federal statutes,

⁸ But see *Grimes v. Norfolk Southern Ry. Co.*, 116 F.Supp.2d 995, 1002-1003 (N.D. Ind. 2000), "Every circuit that has considered the issue of walkways has concluded that the FRSA is silent on the question of walkways. The regulations are directed toward creating a safe roadbed for trains, not a safe walkway for railroad employees who must inspect the trains."

court decisions or decrees, the Commission's Rules of Practice and Procedure, or prior Commission orders, decisions, rules, directions, demands or requirements, and pursue any other remedy authorized by the California Constitution, the Public Utilities Code, other state or federal statutes, court decisions or decrees, or otherwise by law or in equity. The citation program adopted herein is an additional enforcement mechanism that may be used in addition to, or in lieu of, a formal proceeding.

4. Nothing in this resolution bars or affects the rights or remedies otherwise available to other persons or government agencies.

5. This resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed, and adopted at a conference of the Public Utilities Commission of the State of California held on May 15, 2008, the following Commissioners voting favorably thereon:

PAUL CLANON
Executive Director

**APPENDIX A:
SPECIFIED VIOLATIONS AND SCHEDULED PENALTIES**

Specified Violation	Scheduled Penalty
Failure to comply with G.O. 26-D. Regulations governing clearances on railroads and street railroads with reference to side and overhead structures, parallel tracks, crossings of public roads, highways and streets.	\$1,000 per incident.
Failure to comply with G.O. 118 (except as to vegetation control requirements) - Walkways shall provide a reasonable regular surface with gradual slope not to exceed approximately one inch to eight inches (1/8 or 12.5%).	\$500 per incident <i>plus</i> \$50 per day for each day in violation.
Failure to comply with the immediate telephone notification requirement contained within the court's Order on Reconsideration in <i>Union Pacific Railroad et al. v. CPUC</i>, C.97-3660TEH, dated June 17, 1998, to the California Governor's Office of Emergency Services within one hour following the time that the determination or estimate under 49 CFR 229.5 is made, or could reasonably have been made, whichever comes first, taking into consideration the health and safety of those affected by the accident or incident, including actions to protect the environment. (See also: <i>National Assn. of Regulatory Utility Comm'rs v. Coleman</i>, 542 F.2d 11 (3d Cir. Pa. 1976), Cal. Pub. Util. Code § 7662 (g) and 49 CFR 225.9_.)	\$10,000 per incident <i>plus</i> \$500 per hour beyond the first hour in violation (i.e., the second hour of failing to give telephone notification).

Failure to comply with the court's Final Judgment in <i>Union Pacific Railroad Co. and BNSF Railway Co. v. CPUC</i>, Case No. 1:07-CV-0001 OWW-TAG, ¶¶ A through E, concerning Cal. Pub. Util. Code §§ 7662 & 7662.5 relating to Signage, Flags, & new Remote Control Locomotive usage. • (a)(1), (d) Approaching grade crossings; • (b)(1) & (2) Yellow flags warning of a restriction to train movement; • (b)(1) & (4) Yellow-red flags warning of a location where a train may be required to stop because of men or equipment working; • (c) Readily visible milepost markers posted at 1-mile intervals; • (e) In advance of permanent speed reductions; • (f) Notification to an affected employees' collective bargaining unit of new Remote Control Locomotive usages.	\$500 per incident <i>plus</i> \$50 per day for each day in violation.
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(END OF APPENDIX A)

Service List**Altamont Commuter Express**

949 East Channel Street
Stockton, CA • 95202

AMTRAK

Joe Deely, Gn'l Mgr
530 Water Street
Oakland, CA 94607

Arizona & California Railroad Co.

Tanya Cecil
Sub of: *Railamerica*
5300 Broken Sound Blvd. NW
Boca Raton, FL 33487

BNSF

Doug Werner, Counsel
P.O.Box 961056
Fort Worth, TX 76161-0056

Brotherhood of Locomotive Engineers and Teamsters

Tim Smith, State Legislative Director
610 Auburn Ravine Road, Ste C
Auburn, CA 95603
United States of America

California Short Line Railroad Association

Ken Beard
Executive Director
P.O. Box 1500
McCloud, CA 96057

California Northern Railroad Co.

Don Seil, Gn'l Mgr
129 Klamath Court
American Canyon CA 94503
Sub of: *Railamerica*
5300 Broken Sound Blvd. NW
Boca Raton, FL 33487

Carrizo Gorge Railway Inc.

2295 Fletcher Pkwy. Suite 101
El Cajon, CA 92020

Central California Traction Company

Dave Buccolo
2201 W. Washington Street, #12
Stockton, CA 95203

Central Oregon & Pacific

Patrick Kerr
PO Box 1083
Roseburg, OR 97470
Subsidiary of: *Railamerica*
5300 Broken Sound Blvd. NW
Boca Raton, FL 33487

Fillmore & Western Railway

Dave Wilkinson
351 Santa Clara Avenue
Fillmore, CA 93015

Lake County Railroad

513 Center Street
Lakeview, OR 97630

Los Angeles Junction Railway

Olivia Chavez
4433 Exchange Avenue
Los Angeles, CA 90058

McCloud Railway Co.

Jeff Forbis
801 Industrial Way
PO Box 1500
McCloud, CA 96057

Modesto & Empire Traction Company

Ken Beard
P.O. Box 3106
530 11th Street
Modesto, CA 95353.

Napa Valley Railroad Co. (Wine Train)

Vince DeDominico
800 8th Street
Napa, CA 94559-3422

Niles Canyon Railway

Pacific Locomotive Association
P.O. Box 2247
Fremont, CA 94536-0247

North Coast Railroad Authority

Part of the Northwestern Pacific Railway Co., LLC
419 Talmage Road, Suite M
Ukiah CA 95482

North County Transit District (NCTD)

810 Mission Avenue
Oceanside, CA 92054

Pacific Harbor Line, Inc.

Andrew Fox, President
53 West Jackson Blvd., Suite 335
Chicago, IL 60604

Peninsula Commute Service (Caltrain)

1250 San Carlos Ave.
P. O. Box 3006
San Carlos, CA 94070-1306

Quincy Railroad Co.

Erick Shelby
P O Box 420
Quincy, CA 95971

Richmond Pacific Railroad Corp.

John Cockle
550 Hamilton Ave., Suite 329
Palo Alto, CA 94301

San Joaquin Valley Railroad Co.

Randy Perry
221 N. "F" Street
P.O. Box 937
Exeter, CA 93221

Santa Cruz, Big Trees & Pacific Railway, Co.

P.O. Box G-1
Felton, CA 95018

San Diego & Imperial Valley Railroad

Pete Jespersen
1501 National Avenue, Suite 200
San Diego, CA 92113
Sub of: *Railamerica*
5300 Broken Sound Blvd. NW
Boca Raton, FL 33487

Santa Maria Valley Railroad

Dave Jennings
625 South McClelland Street
P. O. Box 340
Santa Maria, CA 93456

Skunk Train, Fort Bragg-Willits, CA

Part of the Sierra Northern Railway
220 South Sierra Avenue
Oakdale, CA 95361

Sierra Northern Railway

Dave McGaw, President
341 Industrial Way
Woodland, CA 95776

Southern California Regional Rail Authority (SCRRA)**David Solow, CEO**

Metrolink
700 South Flower Street, Suite 2600
Los Angeles, CA 90017

Stockton Terminal & Eastern Railroad

Gregory Carney, President
1330 N. Broadway Ave.
Stockton, CA 95205

Trona Railway Co.

Mark Bennet
8300 College Blvd.
Overland Park, KS 66210

Union Pacific Railroad Company

Carol Harris, General Commerce Counsel
49 Stevenson Street, STE 1050
San Francisco, CA 94105

United Transportation Union

James P. Jones, State Legislative Director
1005 12th Street, STE 4
Sacramento, CA 95814

Ventura County Railroad Company, Inc.

333 Ponomo St
Port Hueneme, CA 93041 and
Sub of: *Railamerica*
5300 Broken Sound Blvd. NW
Boca Raton, FL 33487

West Isle Line, Inc.

Merle Engkle
4582 S. Ulster Street, Suite 1700
Denver, CO 80237

Yreka Western Railroad

Troy Hubbard
300 East Miner Street
Yreka, CA 96097

(END OF SERVICE LIST)

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a copy of Resolution ROSB-002 on all parties in this filing or their attorneys as shown on the attached service list.

Dated March 20, 2008, at San Francisco, California.

/s/ VIRGINIA D. LAYA
Virginia D. Laya

NOTICE

Parties should notify the Consumer Protection & Safety Division, Public Utilities Commission, 505 Van Ness Avenue, Room 3106, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the Resolution number on service list on which your name appears.