Decision 09-10-009 October 15, 2009

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.	Rulemaking 07-09-007 (Filed September 20, 2007)

DECISION AMENDING GENERAL ORDER 118 TO INCLUDE STANDARDS FOR THE SIZE OF BALLAST MATERIAL USED ON EMPLOYEE WALKWAYS IN RAILWAY SWITCHING YARDS

1. Summary

This decision does not adopt in total the proposed settlement to amend General Order 118, between the Union Pacific Railroad Company, Burlington Northern Santa Fe Railway Company, 10 short-line railroads (Short Lines), the Brotherhood of Locomotive Engineers and Teamsters (Teamsters) and the United Transportation Union addressing ballast size specifications used in railway switching yard walkways. The terms of the proposed settlement are set forth in the body of this decision. Pursuant to Rule 12.4 of the Commission's Rules of Practice and Procedure, this decision adopts the settlement with modifications.

The primary differences between the parties' proposed settlement and the revisions to the General Order adopted herein are:

- Commission staff are not limited to performing ballast measurement in accordance with American Railway Engineering and Maintenance-of-Way Association methods; and
- The new ballast size provisions apply to Standard No. 3 and Standard No. 5 walkways on mainline tracks in switching yards.

This proceeding is closed.

2. Background

The Commission issued Order Instituting Rulemaking (OIR) 07-09-007 on September 25, 2007, for the purpose of determining the appropriate size ballast[1] for use on walkways within railway switching yards for the occupational health and safety of railway employees.[2] The Rulemaking required United Transportation Union (UTU) to provide the names of railway switching yards where the conditions of walkways are of particular concern. The Commission's Consumer Protection and Safety Division (CPSD) was ordered to inspect the sites and file a report with the Commission on the findings.

UTU filed a response to the Rulemaking on October 17, 2007, and provided the location of Union Pacific Railroad Company (UP) and Burlington Northern Santa Fe Railway Company (BNSF) switching yards considered most out of compliance with industry best practices regarding ballast size. UTU identified UP switching yards at Roseville, West Colton, Bakersfield, Fresno and Los Angeles (East Yard). UTU identified BNSF switching yards at Barstow, Stockton (Mormon Yard), Bakersfield, and Fresno. UP and BNSF filed a joint response to the Rulemaking on October 25, 2007.

On January 17 and 18, 2008, CPSD staff conducted inspections at the UP Roseville Yard and the BNSF Mormon Yard, respectively. The inspections were witnessed by representatives of all parties. CPSD filed its inspection report on

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[1] Ballast is crushed rock placed under and around railroad tracks to provide support and drainage.

[2] The Rulemaking was opened pursuant to Petition for Modification 06-12-012 filed by United Transportation Union.

February 22, 2008, noting multiple exceptions where ballast size exceeded the American Railway Engineering and Maintenance-of-Way Association (AREMA) #5 standard. On April 11, 2008, UP filed comments on the staff inspection report and an amended response to the OIR. On April 23, 2008, BNSF and the Short Lines[3] filed comments on the staff inspection report.

The Administrative Law Judge (ALJ) issued a ruling on June 4, 2008, scheduling a CPSD-conducted workshop for July 29 and 30, 2008. On the afternoon of July 29, 2008, the parties informed CPSD staff of the desire to use the remainder of the workshop time to engage in settlement negotiations. The request was granted and CPSD filed its workshop report on September 4, 2008.

The original statutory deadline for resolution of this proceeding was March 25, 2009. In December 2008, by email, the parties notified the ALJ that settlement negotiations were progressing, but due to the number of participants, more time was needed to finalize the agreement. Pub. Util. Code § 1701.5 provides that quasi-legislative cases be resolved within 18 months of the scoping memo unless the Commission makes findings why that deadline cannot be met and issues an order extending the deadline. No single order may extend the deadline for more than 60 days. Decision (D.) 09-03-012 extended the statutory deadline to May 21, 2009.

The parties filed the settlement agreement on March 11, 2009. The ALJ sought additional information from the parties regarding the settlement agreement on April 20, 2009. Because there was insufficient time for the ALJ to

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[3] California Northern Railroad Co., Central California Traction Co., Central Oregon & Pacific, McCloud Railway Co., Modesto & Empire Traction Co., Pacific Harbor Line,

Footnote continued on next page

review the parties' responses to the ruling and prepare a proposed decision before the May 21, 2009, deadline, the Commission extended the statutory deadline a second time to July 20, 2009, (D.09-05-010). Because of the Commission meeting schedule and the required 30-day public review and comment period, it was necessary to extend the statutory deadline a third time to September 18, 2009. The final decision in this proceeding was held over from the Commission meeting of September 10, 2009, making it impossible to resolve this proceeding by the statutory deadline of September 20, 2009. The statutory deadline was extended a fourth time to November 17, 2009.

3. The Settlement

The parties filed responses to the OIR and the staff inspection report, participated in workshops and filed information relevant to the resolution of the issues in this proceeding. The parties engaged in settlement negotiations which produced a settlement. UP, BNSF, the Short Lines, Teamsters and UTU (Settling Parties) are all parties to the settlement. CalTrain and Metrolink are not signatories of the settlement, but the Settling Parties assert that both CalTrain and Metrolink have represented through their counsel that they do not oppose adoption of the settlement. Neither CalTrain nor Metrolink filed comments in opposition to the settlement. The Settling Parties responded to the ALJ's request for additional information to clarify the terms of the settlement.[4]

Inc., Richmond Pacific Railroad Corp., Santa Maria Valley Railroad Co., San Diego & Imperial Valley Railroad, and San Joaquin Valley Railroad.

[4] UP filed the response to the April 20, 2009 ALJ Ruling in consultation with the other Settling Parties. Due to time constraints, the Settling Parties did not file jointly.

The Settling Parties propose the Commission adopt the following settlement terms:

1. General Order 118 is hereby amended to add the following to the standards filed by railroad corporations subject to General Order 118:

   A. Where crushed material is used for walkway surfaces, 100% of the material must be capable of passing through a 1½-inch square sieve opening and 90%-100% of the material must be capable of passing through a 1-inch square sieve opening; provided, however, that a de minimis variation of this standard shall not be a violation where the railroad has made a good faith effort to comply. This standard does not apply in emergencies.

   B. This standard applies only to walkways adjacent to tracks within yards where employees are regularly on the ground to perform their normal trackside duties; it does not apply to walkways adjacent to mainline tracks in yards or to tracks outside of yards.

   C. For purposes of this standard, any measurement of the size of crushed material used to surface walkways must be performed according to the prevailing standards and practices for such measurements as set forth by the American Railway Engineering and Maintenance-of-Way Association (AREMA).

   D. This standard applies only at locations owned or controlled by a railroad corporation at the time that walkway materials are applied.

   E. This standard applies only to walkway materials applied on or after the date that the Commission adopts this standard as a binding amendment to General Order 118.

2. This amendment does not limit the ability of railroad employees to use any procedures that may otherwise be available to pursue complaints regarding walkway conditions, including the size of ballast used at locations other than those covered by this amendment.

All parties to this proceeding have expressed a strong interest in providing a reasonably safe work environment for railroad employees. The Settling Parties assert that the settlement is in the public interest because it strikes a proper balance, achieving increased employee safety within the context of federal law and industry engineering practices applicable to ballast.[5]

4. Discussion

Rule 12(d) of the Commission's Rules of Practice and Procedure (Rule) provides that:

> The Commission will not approve settlements, whether contested or uncontested, unless the settlement is reasonable in light of the whole record, consistent with the law, and in the public interest.

This is the standard of review for this settlement.

4.1. Paragraph 1.A. of the Settlement

Paragraph 1.A. of the settlement describes with specificity the size of materials to be used as ballast on walkway surfaces. The ALJ ruling issued on April 20, 2009, asked the parties to provide the ballast specifications currently used by UP and BNSF for California switching yards. In the response to the ALJ ruling, UP cited the source of its ballast specifications as the engineering standard entitled "Ballast & Subballast Gradation Table." A copy of the table was attached to the response. According to the response, UP follows the table's guidelines when determining the appropriate ballast size for a specific location or condition. The response concluded by stating that BNSF follows a similar standard.[6]

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[5] Response to April 20, 2009 ALJ Ruling at 8.

[6] Response to April 20, 2009 ALJ Ruling at 6.

The specifications in Paragraph 1.A. of the settlement are consistent with the standards currently in use by the mainline railroads. UTU represents the railroad employees whose occupation health and safety are directly affected by the settlement's proposed ballast size provisions. UTU was a signatory to the settlement. The Commission finds no reason to reject the ballast size specifications contained in Paragraph 1.A. of the settlement.

Including Paragraph 1.A. of the settlement in General Order (GO) 118 formalizes current industry practice regarding ballast size on walkways, provides all railroads with uniform specifications and railroad employees with an enforceable standard that protects their occupational health and safety. Therefore, the ballast size specifications contained in Paragraph 1.A. of the settlement are in the public interest and the Commission adopts it.

4.2. Paragraph 1.B. of the Settlement

Paragraph 1.B. of the settlement exempts walkways adjacent to mainline tracks within switching yards from the ballast size specifications in Paragraph 1.A. The April 20, 2009 ALJ ruling asked parties to explain why walkways adjacent to mainline tracks in switching yards are exempt from the provisions of Paragraph 1.A.

The Settling Parties responded that trains on mainline tracks carry freight between destinations as distinguished from yard track that is used for activities such as receiving trains, switching cars to assemble trains, preparing trains for departure, and refueling and repairing cars; activities commonly performed by employees on the ground adjacent to yard tracks. Trains may enter a yard on mainline track and never switch onto yard track and therefore the walkways adjacent to mainline tracks in railroad switching yards are not as commonly used

by employees and, according to the Settling Parties, should be exempt from the ballast size specifications. The Settling Parties refer to the 1990 consensus agreement adopted by the Commission which classifies track as one of four types depending on the frequency with which employees may be required to be on the ground adjacent to tracks. On one end of the scale are tracks where employees are routinely on the ground and on the other end are tracks where employees are only on the ground after an emergency.[7] The parties also point out that mainline tracks account for only a fraction of the miles of tracks in railway switching yards.

Although switches on mainline tracks are power-operated and remotely controlled, when switching is performed at such locations railroad employees are on the ground operating switches manually and otherwise occupying the walkway areas. The conditions in the areas of such switches are currently governed by Standard No. 3 and Standard No. 5 of GO 118.[8] To exclude all mainline track within railway switching yards from the ballast size provisions would reverse the currently applicable provisions of GO 118. The purpose of this rulemaking was to provide additional protection for railroad employees, not take a step backward from the existing standards. For this reason, Paragraph 1.B. of the settlement is modified to include only those areas of mainline track walkways in railroad switching yards where employees regularly conduct switching operations, which includes areas in yards covered by

[7] *Id.* at 4.

[8] Standard No. 3 governs walkways conditions at mainline switches entering yards and serving industry tracks except as provided in Standard No. 5. Standard No. 5. governs walkway conditions at Short Line and Branch line switches, and locations where switches are power-operated.

Standard No. 3 and Standard No. 5 of GO 118. Similarly, a reference to the existing walkway surface requirements was added to clarify that the new provisions do not alter the generally applicable requirement that walkways shall provide a reasonable and regular surface.[9] With these modifications, Paragraph 1.B. of the settlement is in the public interest and the Commission adopts it.

4.3. Paragraph 1.C. of the Settlement

Paragraph 1.C. of the settlement requires that any measurement of the size of crushed material must be done according to AREMA standards. The ALJ ruling sought clarification regarding this provision and how it would be applicable to Commission staff compliance inspections. Parties replied that while the settlement did not create a requirement that measurements be taken, in the event that a measurement is performed for any purpose related to the new rule, the proper measurement method is the AREMA standard.[10]

The AREMA standards require that a random sample be run through sieves connected to a mechanical shaker. The results from the sieves are weighed and compared to the applicable size standard to ensure conformity. It is important to note that AREMA standards are used for the purpose of measuring the ballast material at the point of manufacture and purchase and in that case requires a representative sample be taken from each 1,000 tons of ballast being loaded for shipment.

The Commission's interpretation of the settlement provision, confirmed by the Settling Parties' response to the ALJ ruling, is that prior to any enforcement

[9] The "reasonable and regular surface" requirement is renumbered as Paragraph 11. of GO 118-A, (included as Attachment B).

[10] Response to April 20, 2009 ALJ Ruling at 7.

action on the part of CPSD staff, a measurement taken according to AREMA standards would need to occur. This provision places an onerous burden on Commission staff. The settlement is unclear regarding who is responsible for providing the sieves and mechanical shakers. CPSD currently has no sieves or mechanical shakers, nor does it have plans to acquire such equipment in the near future. It would be impractical, if not impossible, for CPSD staff to implement this measurement out in the field. This requirement would effectively preclude CPSD staff from enforcing the provisions of the settlement.

Paragraph 1.A. provides that a de minimis variation of the standard is not a violation as long as the railroad has made a good faith effort to comply. This language should allay any fears that railroads will be subject to enforcement action for minor noncompliance with the new standard and renders the measurement requirements in Paragraph 1.C. unnecessary. For this reason, Paragraph 1.C. is not in the public interest and the Commission declines to adopt it.

4.4. Paragraph 1.D. of the Settlement

Paragraph 1.D. states that the provisions of Paragraph 1.A. only apply to locations owned or controlled by the railroad at the time walkway materials are applied. In response to the ALJ ruling, parties explain that the provisions of Paragraph 1.D. are intended to address a very specific circumstance where railroad facilities are not owned or controlled by the railroads. Certain non-regulated industrial customers may provide the tracks and walkways at their facilities which may not comply with GO 118. The parties state that the railroads and staff have methods of strongly encouraging compliance, but that

jurisdictional issues exist because the Commission does not have regulatory authority over the industries or their track.[11]

The Settling Parties explain that the provisions of Paragraph 1.D. are to ensure that a railroad acquiring such property could not be required to replace non-compliant walkway material at the time the railroad acquires it. The Settling Parties find this provision particularly important to the Short Lines who have limited resources, but who are usually the entities acquiring facilities from industrial customers. According to the provisions of Paragraph 1.D., the acquiring railroad would only be responsible for ballast size compliance with respect to future applications of walkway material.[12] The Short Lines state that the provisions in Paragraph 1.D. allow them to expand their businesses and use scarce financial resources more efficiently by allowing compliance with the new requirements to occur concurrently with repairs and maintenance. The Commission finds this rationale reasonable and in the public interest and adopts the provisions of Paragraph 1.D. as proposed.

4.5. Paragraph 1.E. of the Settlement

Paragraph 1.E. applies the provisions of Paragraph 1.A. to walkway materials applied on or after the date the Commission amends GO 118. Paragraph 1.E. balances the concerns for employee safety with the financial burden of requiring the railroads to bring all tracks into immediate compliance. Because existing tracks owned and controlled by railroads are held to the current standards of GO 118, there exists a built-in deference to employee safety that is

[11] Response to April 20, 2009 ALJ Ruling at 7.

[12] *Id.* at 8.

not present in the provisions of Paragraph 1.D. that relate to non-railroad-owned facilities. For that reason, Paragraph 1.E. is in the public interest and the Commission adopts it.

4.6. Paragraph 2 of the Settlement

Paragraph 2 of the settlement is a statement regarding the rights of employees to use and pursue all complaint procedures regarding ballast size. Although the Commission believes this guarantee is implicit, there is no harm in including the statement in GO 118. The provisions of Paragraph 2 are in the public interest and the Commission adopts the provisions of Paragraph 2.

4.7. Conclusion

The settlement, as modified above, is reasonable in light of the whole record. The settlement, as modified, does not violate any statute or Commission decision or rule. Thus, the settlement, as modified, is consistent with law.

The settlement, as modified, results in standardized ballast material size for walkways in switching yards and provides increased occupational health and safety for railroad employees while performing their trackside duties. Therefore, the settlement, as modified, is also in the public interest and should be adopted.

Rule 12.4 indicates the steps the Commission may take in rejecting or modifying a settlement. In this instance, the Commission proposes modified settlement terms. The modifications are discussed and included in Attachments A and B to this decision. Attachment A contains a revised version of the General Order with the changes tracked. Attachment B is a clean revised copy of the new GO 118-A.

Although the provisions of the settlement, as modified, pertain only to tracks within switching yards, this decision does not supersede the existing requirements in GO 118 that railroads provide a reasonable and regular surface

on all other walkways. The Commission is concerned that walkways adjacent to tracks in switching areas outside of switching yards are not included in the new provisions, but are also areas where railroad employees are susceptible to injury while performing tasks related to switching operations. To ensure the Commission is kept informed of the status of walkways adjacent to tracks in switching areas not covered by the new provisions, UP and BNSF will jointly file a report with the Commission every twelve months after the effective date of this decision. The report will provide information on the condition of walkways adjacent to tracks in switching areas outside of railroad switching yards. This information will assist the Commission in determining if further action is necessary.

5. Administrative Clean-Up of the General Order

In the course of reviewing this settlement, it has become apparent that the General Order requires some clean-up to improve clarity and to integrate the provisions of the settlement adopted today. In addition, because we have modified certain provisions of the settlement, even those terms we adopt must be revised slightly to ensure they are limited to railway switching areas and to ensure clean integration into the General Order. Attachment A shows all changes in strikeout format, with Attachment B reflecting a clean revised copy of GO 118-A.

6. Categorization and Need for Hearing

The Commission preliminarily categorized this proceeding as quasi-legislative, and preliminarily determined that hearings were not necessary. Given that parties reached a settlement, it is not necessary to change the preliminary determinations.

7. 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 comments are allowed pursuant to Rule 14.3. Opening comments were timely filed on August 31, 2009, by UP and BNSF jointly, and the Short Lines. UTU filed no comments by the August 31, 2009, deadline. No party filed reply comments.

UP and BNSF object to applying the new ballast size requirements to walkways adjacent to mainline tracks in switching yards, elimination of the AREMA standards for measuring ballast and the time limit for bringing newly acquired facilities into compliance with the new requirements.

The Short Lines' primary objection was the time limit for bringing newly acquired facilities into compliance with the new ballast size requirement. Where appropriate, the necessary revisions have been incorporated into the decision.

8. Assignment of Proceeding

Dian M. Grueneich is the assigned Commissioner and Linda A. Rochester is the assigned ALJ in this proceeding.

Findings of Fact

1. UP, BNSF, the Short Lines, Teamsters, and UTU are parties to the settlement.

2. CalTrain and MetroLink, although not signatories to the settlement, did not file opposition to the proposed settlement terms.

3. Teamsters and UTU represent the interest of railroad employees.

4. UP, BNSF, and the Short Lines represent the interests of the railroad owners and shareholders.

5. The settlement, as modified, does not violate any statute or Commission decision.

6. The settlement, as modified, is consistent with current industry practice regarding ballast size on walkways, provides all railroads with uniform specifications and railroad employees with an enforceable standard that protects their occupation health and safety.

Conclusions of Law

1. Rule 12.1(d) provides that the Commission will not approve settlements, whether contested or uncontested, unless the settlement is reasonable in light of the whole record, consistent with law, and in the public interest.

2. The settlement, as modified, is reasonable in light of the whole record.

3. The settlement, as modified, is consistent with the law.

4. The settlement, as modified, is in the public interest.

5. The settlement, as modified, should be adopted.

6. The Commission should be kept informed of walkway ballast conditions adjacent to mainline tracks within switching yards and tracks outside of switching yards that are not covered by the settlement, as modified, but where switching-related tasks are performed.

O R D E R

IT IS ORDERED that:

1. The motion of Union Pacific Railway Company, Burlington Northern Santa Fe Railway Company, the 10 short-line railroads, the Brotherhood of Locomotive and Engineers and Teamsters, and the United Transportation Union to adopt the settlement is denied and the settlement, as modified, is adopted.

2. General Order 118 is amended as shown in Attachments A and B of this decision.

3. The Commission's Consumer Protection and Safety Division will publish the final amended General Order 118-A, set forth in Attachment B, within 30 days of the effective date of this decision.

4. Union Pacific Railroad Company and Burlington Northern Santa Fe Railway Company will file a report with the Commission every twelve months regarding the condition of walkways adjacent to all tracks where switching operations are performed, but are not covered by the settlement, as modified. The first report is due November 1, 2010.

5. Rulemaking 07-09-007 is closed.

This order is effective today.

Dated October 15, 2009, at San Francisco, California.

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

D0910009 Attachment A
D0910009 Attachment B