

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Consumer Protection and Safety Division
Railroad Operations Safety Branch

San Francisco, California
Date: November 6, 2008
Resolution ROSB-002

RESOLUTION**RESOLUTION ADOPTING A RAILROAD 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, 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.

This citation program is designed to more efficiently utilize limited resources and improve overall railroad safety in California. The Commission's rail inspectors must carefully allocate their time between state regulation enforcement and federal regulation enforcement in their capacity as joint Commission/Federal Railroad Administration ("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 railroad sometimes 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.

The Director or Deputy Director will issue citations only after a notice of defect or violation has been given to the railroad by the CPUC inspection Staff, the railroad has had an opportunity to correct the defect or violation, and the railroad has failed to correct the defect or violation in a timely manner.

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

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.*

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 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 have agreed to provide notification 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.

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

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

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 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 Director or Deputy Director of CPSD to issue citations to railroad carriers for violation of specified Public Utilities Code sections and Commission General Orders. A railroad 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. CPSD, the Administrative Law Judge ("ALJ"), or the Commission may extend the time for appeal upon a showing of good cause.
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 ALJ 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 ALJ.
 - (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 ALJ, 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 ALJ 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 ALJ 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 ALJ.
- (h) Ordinarily, the appeal shall be submitted at the close of the hearing. In the discretion of the ALJ 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 ALJ 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 ALJ, 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 fines vary between \$500 per incident and \$50 per day for continuing violations and \$1,000. (See Appendix A to this resolution.) The fact that each General Order in Appendix A has a fixed penalty amount establishes a Commission delegation of a ministerial act without the exercise of any significant 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 recognize 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 upon the issuance of the second Notice of Inspection "recommending issuance of a citation" (if later a citation is determined to be warranted) 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.⁴ 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

⁴ 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.

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 protections provided the railroads, i.e., Staff's interpretations of General Orders are not binding on the Commission.⁵

A further justification for the citation program is to efficiently utilize limited Staff enforcement resources. The Commission's rail inspectors must carefully allocate their

⁵ 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.

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 railroad sometimes 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.

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 between the railroads and Staff as to the proper interpretation of these standards will be resolved in the hearing process provided the railroads in appealing a citation.

Notification of Hazardous Materials Spills:

In earlier drafts of the resolution, Staff included notices and citations for failure to immediately report hazardous material spills under 49 C.F.R. Part 225.9. Staff has

removed this category of violation from the resolution on grounds that such violations are so serious in nature as to demand a more thorough and time-consuming presentation of evidence under the Commission's procedures for Orders Instituting Investigation.

Specific Concerns of the Railroads Regarding General Orders, Notices, and Penalties:

California railroads have not been regular parties to recent administrative hearings at the Commission as have other regulated entities. Consequently, we shall attempt to reassure the railroads regarding fairness in our hearing procedures. For instance, the railroads are concerned about notice of inspections citing a defect or violation of a rule in the General Orders that they believe is contrary to rail safety. In those instances where the railroads present a "good faith" position for failing to correct the alleged violation, the Commission generally discourages daily penalties and, further, may determine that no penalty is reasonable given the railroad's good faith position regarding the alleged violation.

The railroads are similarly concerned with multiple penalties for the same defect or violation. For example, if a railroad were to construct a series of switches or other devices that conflicts with the General Orders, or agreed variances to the General Orders, would they be subject to multiple penalties for the same defects. Here, the Commission notes that these penalties serve one purpose and one purpose only, remediation of unsafe conditions. Penalties cannot and should not be considered a revenue source for the State of California although they will be deposited with the State's General Fund. Where the Commission finds multiple violations of a similar kind and the railroads agree to remediate in a reasonable period of time, the Commission believes that the cost of remediation should be considered as an off-set to penalties. In short, where the cost of remediation is substantial and the railroad agrees to remediation, penalties are of little value so long as remediation is completed in a timely fashion.

Further, the railroads are concerned that the administrative costs of enforcing state safety General Orders could be significant and that monies paid by the railroads to the Commission under the Federal-State Safety Participation Plan ("Plan")⁶ could be allocated to State safety matters beyond the amount currently agreed to between the FRA and the Commission in the Plan. As we have previously noted, Staff contends that this enforcement plan will actually decrease rather than increase enforcement costs under the Plan.

Additionally, the railroads are concerned with their potential penalty liability under the General Orders for defects and violations, i.e., when will the penalties begin to be assessed under the resolution. Attached to the resolution is a proposed Notice of Inspection. The Notice will indicate whether the "Remedial Action is Required." The

⁶ See 49 CFR Part 212.

CPUC inspector shall note a time agreed for remedial action if such action is required. The railroads in the June 16, 2008 meetings, contend (in those circumstances where the railroad does not have a “good faith” reason opposing compliance) that “Remedial Action is Required” notification will result in the railroads entering the defect or violation into a database so that correction will be ensured. Only if an inspector’s subsequent inspection following the agreed time for remediation determines that no remediation was made by the railroad may a Notice of Inspection be given to the railroad recommending issuance of a citation. Only after that second Notice issues may the Director or Deputy Director consider issuance of a citation. The citation must issue within 60 days (subject to a reasonable extension upon a showing of good cause) from the date of the second Notice of Inspection recommending issuance of a citation. The Commission notes that it may waive the time for a railroad’s appeal upon a showing of good cause.

Finally, the railroads are concerned that G.O. 118 is applied fairly and consistently with the Consensus Agreement adopted June 6, 1990, in D.90-09-047 (37 CPUC2d 399) by the railroads and the railroad employees’ collective bargaining representatives. In enforcing G.O. 118, Staff shall apply some of the same set of common working principles adopted by the Commission and the parties in the Consensus Agreement.

1. Where the inspector determines that safety is not at risk, walkways do not require improvements, citations should not issue are not necessary.

2. Because the safety of walkways is the overriding requirement of G.O. 118, inspectors may choose not to issue notices of defects/violations for technical defects that do not compromise employee safety.

3. In enforcing G.O. 118, Staff should view the safety of the walkway requirements in light of the functions railroad employees are required to perform on those walkways and the frequency of that performance, as well as the existing condition of the walkways as required for the track Types A, B, C, and D, pursuant to the Consensus Agreement in D.90-09-047 (37 CPUC3d 399).

Further, while the walkway improvement program timelines and procedures – which are the subjects of the Consensus Agreement – closed in 1992, the identification of tracks and the differing levels of walkway protections required for these tracks, Type A, Type B, Type C, and Type D track, shall apply to G.O. 118’s enforcement under the resolution.

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 at issue here generally predate the FRSA by many years. Moreover, the signage, flagging, milepost

markers, and notification of Remote Controlled Locomotive operations, that were the subject of a Settlement Agreement between UPRR, BNSF, and the Commission in the AB 3023 litigation, have been agreed to by the Class 1 railroads and conform to the railroads' General Code of Operating Rules presently existing and applied by the railroads.

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, under which the Commission has committed rail inspection staff to devote the majority of their on-duty time toward the federal rail safety program of the FRA. The remaining 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 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])."

In the June 16, 2008 meeting of counsel for the UPRR, BNSF, and Staff (discussed *infra*), the railroads brought to Staff's attention a brief filed by the U.S. Solicitor General in the U.S. Supreme Court's certiorari review in 1992 of the Fifth Circuit's decision in *Mo. Pac. R.R. Co. v. R.R. Comm'n of Texas*, *supra*. However, the fact that the U.S. Solicitor General's brief characterized the Ninth Circuit's decision as "flawed" and that the Ninth Circuit would address its error by adopting a position similar to the Fifth Circuit's, as now argued by both railroads, is speculation. The Commission contends that railroad employee safety concerning walkways is preserved under the Ninth Circuit's decision and ignored by the Fifth Circuit in *Mo. Pac. R.R. Co. v. R.R. Comm'n of Texas*, *supra*. We are compelled to follow the decision under *So. Pac. Transp. Co. v. Pub.*

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.

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."

Util. Comm'n of the State of California, 820 F.2d 1111 (9th Cir. 1987) *per curiam*, both by its logic, as set forth in District Court Judge Swarzer's decision adopted by the Ninth Circuit and specifically commended in the Ninth Circuit's short decision,⁹ and by applicable Circuit Court precedent.

Revised Draft Resolution:

On March 20, 2008, a revised Draft Resolution was mailed to the Service List. A second round of comments was submitted by California Northern Railroad Company, California Shortline Railroad Association, McCloud Railway Company, Modesto and Empire Traction Company, Pacific Harbor Line, and the Union Pacific Railroad and BNSF Railway jointly. We have carefully reviewed and considered these comments and have revised the resolution where appropriate.

On the morning of June 16, 2008, attorneys for UPRR, BNSF, and Staff met again to discuss concerns of the Class 1 railroads. In the afternoon of June 16, 2008, Staff hosted an All-Parties Meeting in which all California railroads and California railroad employee collective bargaining representatives were invited. Again, the railroads presented their concerns most of which we have addressed in this third revised resolution, labor representatives provided their position in support of the resolution, and Staff addressed questions and concerns presented by the group.

Regular Meetings of Staff and Railroad Management to Improve Communication:

It is important that Staff work with the railroads to quickly identify safety trends and promptly correct defects and violations. Therefore, Staff and the railroads should engage in regular communications to ensure early identification of problems along with early and effective corrective action. As a means of accomplishing this, Staff and the railroads should engage in Safety Resolution Forums (SRFs) on a regular basis. These SRFs should improve regular communication between Staff inspectors and the railroads resulting in early trend diagnosis and the earliest possible corrective actions.

The goal of the SRFs should include:

⁹ "We note that the district court failed to recognize that the topic of rail track clearances had been mentioned in an administrative statement issued by the Federal Railroad Administration in 1987. This oversight, however, does not detract from the soundness of the district court's reasoning nor its conclusion that California's track clearance and walkway regulations have not been preempted by federal rule, regulation, order or standard covering the same subject matter as these state requirements. 45 U.S.C. § 434. This conclusion of the district court is correct." *So. Pac. Transp. Co. v. Pub. Util. Comm'n of the State of California*, 820 F.2d 1111 (9th Cir. 1987) *per curiam*.

1. The improvement of Staff/railroad communications and increased responsiveness of the railroads to safety concerns and corrective action timetables;
2. The development of rail industry best practices in observing defect/violation trends and early correction of those defects/violations;
3. Increased education and training by railroads concerning CPUC general orders, current safety conditions, or emerging safety issues that may impact railroads;
4. Increased efficiency in the utilization of Staff resources and overall railroad responsiveness to issues documented in Notices of Inspections.

The railroads should identify a company-specific, senior management person as a contact so that particularly complex or long-running violations can receive prompt action from senior-level railroad officials. While senior railroad management personnel will not need to be contacted in most cases, this senior management level contact may assist Staff in early communication and resolution of more important safety concerns.

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. The railroads shall meet with CPSD (Safety Resolution Forums) on a quarterly basis to improve regular communication between Rail safety inspectors and the railroads of pending trends in complaints and potential safety defects/violations that need attention.
3. The railroads shall identify a company-specific senior management personnel contact so that particularly complex or long-running violations can receive prompt action from a senior-level railroad official.
4. Authority is delegated to the Director and Deputy Director of the Consumer Protection and Safety Division 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.
5. 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, 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.

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

7. 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 November 6, 2008, the following Commissioners voting favorably thereon:

/s/ PAUL CLANON

PAUL CLANON
Executive Director

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

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

Specified Violation	Scheduled Penalty
<p>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.</p>	<p>\$1,000 per incident.</p>
<p>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%). G.O. 118 shall apply consistently with the track categories set forth in the Consensus Agreement adopted June 6, 1990, D.90-09-047 (37 CPUC2d 399) by the railroads and the railroad employees' collective bargaining representatives. E.g., Type A, B, C, and D track requiring differing levels of walkway safety protections.</p>	<p>\$500 per incident <i>plus</i> \$50 per day for each day in violation.</p>
<p>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 relating to Signage, Flags, & new Remote Control Locomotive usage.</p> <ul style="list-style-type: none"> • (a)(1), (d) Signs approaching grade crossings; • (b)(1) & (2) Yellow flags warning of a restriction to train movement; 	<p>\$500 per incident <i>plus</i> \$50 per day for each day in violation.</p>

<ul style="list-style-type: none">• (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) Signs in advance of permanent speed reductions;• (f) Notification to an affected employees' collective bargaining unit of new Remote Control Locomotive usages.	<p>(Cont'd from previous page)</p> <p>\$500 per incident <i>plus</i> \$50 per day for each day in violation.</p>
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(END OF APPENDIX A)

**APPENDIX B:
SAMPLE NOTICE OF INSPECTION**



California Public Utilities Commission
Railroad Operations & Safety Branch

Inspection Report

Inspector Name: THOMPSON, MATT		Inspector's Signature:		Report #: MT1-001-08	Date: 6/30/2008		
Railroad or Company Name and Address: NEVERLAND RAILROAD NEVER ST SANTA NOWHERE CA 90000		R/C: R	Division: SYSTEM	RR/CO Representative (Receipt Acknowledged): Name: JOHNNY MANAGER Title: MANAGER Signature: _____			
Start Location: City: MADEUP County: NOWHERE Station: START Milepost: 3		End Location: City: MADEUP County: NOWHERE Station: FINISH Milepost: 6		Notes: SPOKE WITH JOHNNY MANAGER, STATED RAILROAD TIES WILL BE REMOVED BY 07/10/08 AND FENCE WILL BE REPAIRED BY 07/10/08			
		RR/CO Code: NRR	Subdivision: SYSTEM	Activity Code: 118 26D 7662	Units: 311		
Item 1	Milepost	Track No./Name	GPS Cor/Crossing Name:	# of Occ:	Defect: NU	Activity Code	Citation Recommended?: NO
Defect Description: NONE WHISTLE SIGNS FOR 1ST AVE CROSSING MILEPOST 5 ARE LOCATED 1/4 MILE FROM CROSSING IN EITHER DIRECTION, COMPLIES WITH PU CODE 7662 6 (D)							
Written Notification to CPUC of remedial action is: <input type="radio"/> Optional <input type="radio"/> Required							
Item 2	Milepost 4	Track No./Name INDUSTRIAL LEAD	GPS Cor/Crossing Name: 123.456.789	# of Occ: 1	Defect: YES	Activity Code 118	Citation Recommended?: NO
Defect Description: 103 - DEBRIS OF VARIOUS TYPES IN THE WALKWAY CREATES A TRIPPING HAZARD PERFORMED INSPECTION OF WALKWAYS BETWEEN MILEPOST 3-6 ON MADE UP INDUSTRIAL LEADS NOTED RAILROAD TIES IN WALKWAY AT MILEPOST 4. NOT COMPLYING WITH CPUC GENERAL ORDER 118. DEFECT NOTED							
Written Notification to CPUC of remedial action is: <input type="radio"/> Optional <input type="radio"/> Required							
Item 3	Milepost 4.5	Track No./Name INDUSTRIAL LEAD	GPS Cor/Crossing Name: 123.456.789	# of Occ: 1	Defect: YES	Activity Code 26D	Citation Recommended?: NO
Defect Description: 102 - ROUGH AND UNEVEN SURFACE CREATES A TRIPPING HAZARD FENCE ADJACENT TO RIGHT OF WAY AT MILEPOST 4.5 ON THE MADEUP INDUSTRIAL LEAD IS LEANING TOWARD TRACK 67" FROM CENTER. NON COMPLYING WITH GENERAL ORDER 26D SECTION 3.2. RAZOR WIRE AT TOP OF FENCE CREATES AN UNSAFE CONDITION FOR EMPLOYEES RIDING EQUIPMENT.							
Written Notification to CPUC of remedial action is: <input type="radio"/> Optional <input type="radio"/> Required							

(END OF APPENDIX B)

Updated ROSB Service Lists

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
1301 California Avenue
Parker, AZ 85344
Tanya.cecil@railamerica.com

BNSF

Doug Werner, Counsel
P.O.Box 961056
Fort Worth, TX 76161-0056
douglas.werner@bnsf.com

Brotherhood of Locomotive Engineers and Teamsters

Tim Smith-Chairman, State Legislative Board
610 Auburn Ravine Road, Ste C
Auburn, CA 95603
United States of America
tsmith@sbcglobal.net

California Short Line Railroad Association

Jalene Forbis
Executive Director
P.O. Box 1500
McCloud, CA 96057
cslra@hotmail.com

California Northern Railroad Co. (Sub of: RailAmerica)

Don Seil, General Manager
1100 Main Street Suite 210
Woodland, CA 945695
530-392-5032 (c)
Don.seil@railamerica.com

CalTrain

Peninsula Commute Service Joint Powers Board
Jose Cisneros (Chair)
1250 San Carlos Ave.
P. O. Box 3006
San Carlos, CA 94070-1306
Chris Payne, Safety Officer paynec@samtrans.com

Carrizo Gorge Railway Inc.

Ken Kahan
2295 Fletcher Pkwy. Suite 101
El Cajon, CA 92020
newkenak@cox.net

Central California Traction Company

Dave Buccolo
2201 W. Washington Street, #12
Stockton, CA 95203
dbuccolo@cctrailroad.com

Central Oregon & Pacific (Sub of: *RailAmerica*)

Patrick Kerr
PO Box 1083
Roseburg, OR 97470
Patrick.kerr@railamerica.com

Fillmore & Western Railway

Dave Wilkinson
351 Santa Clara Avenue
Fillmore, CA 93015
dave@fwry.com

Lake County Railroad

513 Center Street
Lakeview, OR 97630

Los Angeles Junction Railway

Marion Alexander
4433 Exchange Avenue
Los Angeles, CA 90058
Olivia.chavez@bnsf.com

McCloud Railway Co.

Jeff Forbis
801 Industrial Way
PO Box 1500
McCloud, CA 96057
jforbismcrwy@yahoo.com

Modesto & Empire Traction Company

Ken Beard
530 11th Street
Modesto, CA 95353
kbeard@metr.com

Napa Valley Railroad Co. (Wine Train)

Jeff Hullquist
800 8th Street
Napa, CA 94559-3422
nvrpd@sbcglobal.net

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
340 West Water Street
Wilmington, CA 90744
afox@anacostia.com

Quincy Railroad Co.

Eric Shelby
P O Box 420
Quincy, CA 95971
eshelby@spi-ind.com

Richmond Pacific Railroad Corp.

John Cockle
402 Wright Avenue
Richmond, CA 94804
johnck@levinterminal.com

San Joaquin Valley Railroad Co. (Sub of: *RailAmerica*)

Randy Perry, General Manager
221 N. "F" Street
Exeter, CA 93221
randy.perry@railamerica.com

Santa Cruz, Big Trees & Pacific Railway, Co.

Gary Guttebo
P.O. Box G-1
Felton, CA 95018
G_guttebo@yahoo.com

San Diego & Imperial Valley Railroad (Sub of: *RailAmerica*)

Pete Jespersen
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Santa Maria Valley Railroad

Dave Jennings, VP/COO
Santa Maria Valley Railroad Co.
628 S. McClelland Street
Santa Maria, CA 93454
P: 805-922-7941
F: 805-922-9554
C: 805-598-8566
E: jennings@smvrr.com
W: www.smvrr.com

Skunk Train, Fort Bragg-Willits, CA (Sub of Sierra Northern Railway)

220 South Sierra Avenue
Oakdale, CA 95361

Sierra Northern Railway

Dave Magaw-President
341 Industrial Way
Woodland, CA 95776
dmagaw@att.net

Southern California Regional Rail Authority (SCRRA)

David Solow, CEO

Metrolink
700 South Flower Street, Suite 2600
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solowd@scrra.net

Stockton Terminal & Eastern Railroad

Greg Carney, President
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greg@sterailroad.com

Trona Railway Co.

Mark Bennett, Mgr of Operations
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bennettm@svminerals.com
(760) 372-2280 phone
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Union Pacific Railroad Company

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caharris@up.com

United Transportation Union

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

Ventura County Railroad Company, Inc. (Sub of: *RailAmerica*)

Pete Jespersen, General Manager
333 Ponomo St
Port Hueneme, CA 93041 and
Pete.jespersen@railamerica.com

West Isle Line, Inc.

Randy Wuehler
3201 Avenue 54
Alpaugh, CA 93201
randyw@agriumretail.com

Yreka Western Railroad

Court Hammond
300 East Miner Street
Yreka, CA 96097