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140th anniversary
Nauman Smith
Attorneys At Law

Please Reply to:
P. O. Box 840
Harrisburg, PA 17108-0840

Benjamin C. Dunlap, Jr.
E-mail: bdunlapjr@nssh.com
Telephone Extension: 21

November 21, 2011

Via Electronic Mail
Confirmed Via Hand Delivery

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17105-3265

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RE: **Pennsylvania Public Utility Commission**
Proposed Rulemaking Amending 52 Pa. Code Chapter 33
Docket No. L-2011-2233841

Dear Secretary Chiavetta:

I am enclosing the original and fifteen (15) copies of the Joint Comments of Consolidated Rail Corporation, CSX Transportation, Inc. and Norfolk Southern Railway Company in connection with the Commission's review of the existing rail transportation regulations above. If you have any questions or need additional information, please do not hesitate to contact me.

Sincerely yours,

Benjamin C. Dunlap, Jr.

BCDjr/jc
Enclosures
cc: J. Broder, Esquire
R. Noe, Esquire
D. Hoffman, Esquire

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Proposed Rulemaking Amending 52 Pa. Code Chapter 33	:	Docket No. L-2011-2233841
	:	**Filed Electronically**

JOINT COMMENTS OF CONSOLIDATED RAIL CORPORATION, CSX TRANSPORTATION, INC. AND NORFOLK SOUTHERN RAILWAY COMPANY TO PROPOSED RULEMAKING ORDER

I. INTRODUCTION

The Pennsylvania Public Utility Commission ("PUC" or "Commission") published a Proposed Rulemaking Order in the *Pennsylvania Bulletin* on October 22, 2011 [41 Pa.B. 5634], at the above-referenced docket number. Pursuant to its statutory charge, the Commission is proposing modifications to its current regulations governing railroad common carriers at 52 Pa. Code Chapter 33. The stated purpose of these amendments, as noted in the introduction to the Proposed Rulemaking Order, is to "reflect the technological and operational changes of the railroad industry that have occurred over the last 30 years [since the regulations were last significantly amended] and reflect current Federal standards." The introduction further stated the basis as to provide a "more efficient and effective means to regulate the rail industry."

The published notice of the Proposed Rulemaking Order provided for comments to be submitted to the Office of the Secretary of the Commission within thirty (30) days of the Order's publication in the *Pennsylvania Bulletin.* Consolidated Rail Corporation ("Conrail"), CSX Transportation, Inc. ("CSXT") and Norfolk Southern Railway Company ("Norfolk Southern") collectively submit these Joint Comments in response to

the Proposed Rulemaking Order. Conrail, CSXT and Norfolk Southern hereinafter will be jointly referred to as the "Railroads."

The Railroads support this much needed effort to modernize the Commission's railroad regulations. The Railroads filed Comments and Reply Comments in response to the Commission's Notice inviting interested parties to file comments regarding any proposed revisions to those regulations within 30 days of publication of the Notice of Review of Existing Railroad Transportation Regulations in the *Pennsylvania Bulletin* on November 28, 2009, at Docket No. M-2009-2140262 ("2009 Review Notice").

The Railroads take no substantive issue with those regulations chosen for revision in the Commission's Proposed Rulemaking Order. The Railroads think, however, that the Commission did not go far enough in amending other regulations that are outdated due to technological changes or federal preemption, as noted in its original Joint Comments filed on December 28, 2009, at Docket No. M-2009-2140262 ("Railroads' 2009 Comments").

The Railroads request that the Commission reconsider its decision to not include certain other regulations for amendment in its Proposed Rulemaking Order. The basis for the Railroads' request for reconsideration of these other regulations, which in one case includes the recent adoption of a final rule by the Federal Railroad Administration ("FRA") in regard to camp cars, thereby preempting § 33.65, are addressed in Section III of these Joint Comments.

The Commission is empowered to revise its proposed regulations to address the additional amendments requested by the Railroads, so long as such revisions come within the original purpose of the amendments as stated in the Proposed Rulemaking Order. 45

P.S. § 1202 ("The agency text of any administrative regulation or change therein as finally adopted may contain such modifications to the proposed text as published pursuant to section 201 [45 P.S. § 1201] as do not enlarge its original purpose . . . "). Courts have sustained agency revisions from the published text which come within these parameters. *Brocal Corp. v. Cmwlth. Dept. of Transportation,* 515 Pa. 224, 528 A.2d 114 (1987) (change in method for calculating program reimbursement levels in revised regulations from that in proposed rulemaking order upheld, as the method for calculating those levels was changed, not the reason for creating such levels); *Community Services Management Corp. v. Cmwlth. Dept. of Public Welfare,* 85 Pa. Cmwlth. 512, 482 A.2d 1192 (1984) (additional accreditation criteria in revised regulation from that in proposed rulemaking order upheld, as such criteria came within the original purpose of establishing standards for the regulated facilities).

The Pennsylvania Supreme Court stated in *Brocal* that the word "purpose," as used in Section 202 of the Commonwealth Documents Law, 45 P.S. § 1202, refers to the reason for enacting the regulations, not the particular course or scheme chosen to achieve that end. *Brocal,* 515 Pa. at 233, 528 A.2d at 118. All of the additional amendments requested by the Railroads come within the purpose of the Proposed Rulemaking Order, *i.e.,* to update the PUC's regulations due to operational and technological changes in the industry and federal preemption and standards. This is in contrast to the amendments proposed by the various unions filed in response to the 2009 Review Notice, most of which addressed new regulatory provisions to meet ends that do not come within these purposes.[1]

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[1] To the extent that these new proposed regulations are again raised as comments to the Proposed Rulemaking Order, the Railroads object to any adoption of those proposals as violative of 45 P.S. § 1202 in

The scope of the Commission's review of its regulations was "to ensure that the regulations address a compelling public interest; ensure that the costs of regulation do not outweigh the benefits; are written in a clear and concise manner; and, where federal regulations exist, the Commission's regulations should not exceed federal standards unless justified by a compelling Commonwealth interest or required by State law," according to the introduction to the Proposed Rulemaking Order. Those standards and the aforementioned purposes of the review were kept foremost in drafting the Railroads' current Comments to the Proposed Rulemaking Order as well as in the Railroads' 2009 Comments.

The Railroads understand that the Commission does not view its proposal as "an exhaustive compilation of our regulations that may be in need of revision," according to the introduction to the Proposed Rulemaking Order, but instead just those "which clearly require revision." The Railroads respectfully submit that the additional regulations they cite below also "clearly require revision." As history shows that these regulatory updates are not often undertaken, the current effort should comprehensively address all those regulations that have become obsolete through technological advances or federal preemption.

II. LEGAL BASIS OF COMMENTS

State regulation of railroad activities is limited by the Federal Railroad Safety Act of 1970, as amended, 49 U.S.C. §§ 20101 *et seq.* (2008) ("FRSA"). State regulation is

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addition to the substantive reasons provided in the Railroads' Joint Reply Comments filed on January 10, 2010, and their Joint Answer with New Matter to Unions' Motion to Extend Time Within Which to Reply to Comments (with proposed responses) and the Joint Answer with New Matter of Railroads to PA AFL-CIO Motion to Extend Time Within Which to Reply to Comments (with proposed responses) filed on February 11, 2010, all in the proceeding docketed to M-2009-2140262.

also limited by the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C.S. §§ 10101 *et seq.* (2008) ("ICCTA"). The FRSA provides that after the FRA has issued a regulation covering the same subject matter, "[a] state may adopt or continue in force a law, regulation, or order related to railroad safety or security" only when such an order "(A) is necessary to eliminate or reduce an essentially local safety or security hazard; (B) is not incompatible with a law, regulation, or order of the United States Government; *and* (C) does not unreasonably burden interstate commerce." 49 U.S.C. § 20106(a)(1)(A-C) (emphasis added).

Since the passage of the FRSA, the FRA has set about promulgating a rather extensive set of regulations governing most areas of rail safety. All citations from the *Code of Federal Regulations* herein derive their organic authority from the FRSA as amended, unless otherwise noted. The direct effect of this federal regulation has been the preemption of numerous common law, statutory and regulatory pronouncements of the states.

The federal courts have continued to embrace the concept of preemption of contrary or contradictory state law and regulation. The most often cited example of this is the decision of the United States Supreme Court in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 113 S.Ct. 1732 (1993), and its sister decision of *Norfolk Southern Railway Company v. Shanklin*, 529 U.S. 344, 120 S.Ct. 1467 (2000). In *Easterwood*, the Supreme Court found that state common law claims of excessive speeding of trains were expressly preempted by the FRSA as the FRA had promulgated specific regulations regarding track speed based upon the classification of track upon which the train was traveling. As the Court in *Easterwood* noted, "Applicable federal

regulations may preempt any state law, rule, regulation, order, or standard relating to railroad safety." *Id.*, 507 U.S. at 664, 113 S.Ct. at 1737. Seven years later in *Shanklin*, the Supreme Court, relying upon *Easterwood*, held that state claims of inadequate warning devices at railroad crossings were also preempted where federal funding was involved due to the regulations promulgated by the FRA regarding the expenditure of federal funds for particular types of warning devices at railroad crossings.

When determining preemption, "[t]he focus of preemption analysis is not upon a state law's intent or purpose but, rather, upon the state law's operation . . . . Otherwise, state law could frustrate the operation of federal law simply by stating that its purpose is something other than the federal objective." *Mastrocola v. Southeastern Pennsylvania Transportation Authority*, 941 A.2d 81, 90-91 (Pa. Cmwlth. 2008); see also *Krentz v. Consolidated Rail Corporation*, 589 Pa. 576, 910 A.2d 20 (2006) (blocked crossing statute preempted as incompatible with brake testing regulations promulgated under FRSA). The state law or regulation sought to be preempted does not need to be identical to the federal regulation reviewed but the federal regulation must substantially subsume the area considered. See *Burlington Northern and Santa Fe Railway v. Doyle*, 186 F.3d 790, 796 (7th Cir. 1999).

The express preemption clause contained within Section 20106 permits a state rule addressing subjects covered by federal regulation in only narrow circumstances. As noted above, the "savings clause" permits a state rule addressing subjects covered by federal regulation only when (a) it is necessary to eliminate or reduce an essentially local safety hazard, (b) it is not incompatible with any federal law, and (c) does not unreasonably burden interstate commerce. 49 U.S.C. §20106(a)(2). It must be noted,

however, that the courts have been very restrictive in what constitutes a "local safety hazard" and have repeatedly held that the situation sought to be addressed must truly be "local" and cannot be statewide in character or capable of being encompassed within national uniform standards. *CSX Transportation, Inc. v. Williams*, 406 F.3d 667 (D.C. Cir. 2005). This is an extension of the concept that the standards governing rail safety must be nationally uniform to the fullest extent possible and must not subject the railroads to numerous, inconsistent standards among the states.

In 2007, as part of the 9/11 Commission Act of 2007, Congress amended Section 20106. The express preemption provision of the original FRSA was preserved, renumbering it as subsection 20106(a). Two additional subsections were added, however, it was expressly noted that the restructuring of the preemption provision was "not intended to indicate any substantive change in the meaning of the provision." *H.R. Conf. Rep. No. 110-259 at 351 (2007, as reprinted in 2007 U.S.C.C.A.N. 119, 183)*. The new subsections were added to address federal court decisions related to a rail accident occurring in Minot, North Dakota. Courts which have addressed the 2007 amendment have repeatedly rejected arguments that this amendment legislatively overruled the preemption analysis as announced in *Shanklin* and *Easterwood*. The courts have explained that the 2007 amendment is merely a clarification and did not change the substance of preemption analysis under prior decisions. See, *e.g.*, *Nickels v. Grand Trunk Western Railroad, Inc.*, 560 F.3d 426, 432 (6th Cir. 2009), *Henning v. Union Pacific Railroad*, 530 F.3d 1206, 1214-16 (10th Cir. 2008), *Mastracola v. SEPTA*, *supra*.

In a similar fashion to the FRSA, the ICCTA notes that the jurisdiction of the Surface Transportation Board ("STB") over

> transportation by rail carriers...with respect to rates, classifications, *rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities* of such carriers; and . . . *operation . . . of spur, industrial, team, switching, or side tracks, or facilities* . . . is exclusive. . . . [T]he remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under [other] Federal or state law."

49 U.S.C. § 10501(b)(1-2) (emphasis added).

The ICCTA is a companion statute governing railroads which also has preemptive effect on certain rail safety issues. ICCTA created the STB and vested it with exclusive jurisdiction with respect to the regulation of rail transportation and, in particular, the construction or operation of rail facilities. Federal courts have held that the ICCTA and the FRSA must be construed *in pari materia.* See, *e.g.*, *Island Park, LLC v. CSX Transportation, Inc.*, 559 F.3d 96, 107-108 (2nd Cir. 2009). ICCTA has been found to preempt state anti-crossing blocking statutes, *Elam v. Kansas City Southern Railway Co.*, 635 F.3d 796 (5th Cir. 2011), *Friberg v. Kansas City Southern Railway Company*, 267 F.3d 439 (5th Cir. 2001) and environmental regulation, *City of Auborn v. U.S. Government*, 154 F.3d 1025 (9th Cir. 1998).

As the above statutes and the case law cited demonstrate, the preemptive effect of federal regulation in the area of rail safety is pervasive and complete once the FRA or the STB has acted to cover or subsume an area of rail safety. State law and regulation which attempts to regulate the same areas is expressly preempted except in the most narrow of circumstances.

III. ADDITIONAL REGULATORY PROVISIONS PROPOSED FOR AMENDMENT

Section 33.1 – Definitions

- "Camp car or trailer."

The FRA issued a final rule amending 49 CFR Part 228 on October 31, 2011, which was published in the Federal Register at 76 FR 67073-01. The final rule creates regulations prescribing minimum safety and health requirements for camp cars that a railroad provides as sleeping quarters to any of its train employees, signal employees and dispatching service employees (covered-service employees) and individuals employed to maintain its right-of-way. The comprehensive regulations were enacted to carry out the Congressional rulemaking mandate in the Rail Safety Improvement Act of 2008, P.L. 110-43, § 420 (enacted October 16, 2008) ("RSIA08"), in which Congress mandated that the FRA "shall prescribe regulations [with respect to camp cars] to protect the safety and health of any employees and individuals employed to maintain the right-of-way of a railroad carrier." As the issuance of these regulations pursuant to § 420 of the RSIA08 completely occupy the field of the regulation of camp cars, state definitions of the same and regulation of their use as contained in § 33.65 are preempted by those regulations and should be deleted.

- "Blind Cars."

As noted in the Railroads' 2009 Comments, there was a similar rulemaking proceeding in 1992 to revise, update and streamline the PUC's railroad transportation regulations at Docket No. L-00920070. In addition to the other specific comments made in their 2009 Comments, the Railroads urged that the Commission incorporate in its

amendments all the revisions detailed in Annex A to the Final Rulemaking Order entered March 31, 1994, in the earlier rulemaking proceeding ("1994 Rulemaking Order"). A copy of the 1994 Rulemaking Order is attached hereto as Exhibit "A".

In that 1994 Rulemaking Order at pages 6-7, the PUC had proposed that the definition of "blind car" at § 33.1 should be deleted, as that definition does not describe the term as commonly used in the railroad industry today. Blind cars are currently understood in the industry to be railroad cars placed in front of a locomotive and pushed. Because the cars block the locomotive engineer's vision, a trainman must ride on the front of the cars being pushed.

Section 33.1, however, defines "blind cars" as a car attached behind a caboose or rear of a passenger train upon which a trainman cannot ride. The definition is obsolete since most railroads operating in the state do not currently use cabooses. This inconsistency between the definition and how the term is used in the industry will only create confusion and therefore supports that the definition should be deleted.

- "Bureau."

The technical staff of the Bureau of Transportation and Safety have been moved into the new the Bureau of Technical Utility Services, effective August 11, 2011, as noted in the Final Procedural Order implementing Act 129 of 2008, published in the *Pennsylvania Bulletin* on August 27, 2011, at 41 Pa.B. 4732. The definition should therefore be amended to reflect this change.

- "Chemical closet" and "closet compartment."

These definitions should be deleted as preempted by the definition in 49 C.F.R. § 229.5 ("Railroad Locomotive Safety Standards; Definitions"): "[t]oilet facility means a system that automatically or on command of the user removes human waste to a place where it is treated, eliminated, or retained such that no solid or non-treated liquid waste is thereafter permitted to be released into the bowl, urinal, or room and that prevents harmful discharges of gases or persistent offensive odors."

- "Non-train accident", "train accident" and "train service accident."

These definitions should be deleted as unnecessary since the provisions for reportable accidents at § 33.11 through § 33.14 will be substantially changed under the Proposed Rulemaking Order to reflect the reporting requirements under the FRSA. As these sections of the regulations will no longer include those terms, these definitions should be deleted.

Section 33.21 – General

Subsection (a) of § 33.21 should be deleted as comprehensively preempted by 49 C.F.R. § 229.125 ("Railroad Locomotive Safety Standards; Safety Requirements; Headlights and auxiliary lights").

Subsection (b) of § 33.21 refers to the use of watchmen to provide protection against accidents at grade crossings. Watchmen have not been stationed at grade crossings to provide such warnings or protections in many years. Therefore, references to them and their work should be deleted from Subsection (b) as follows:

(b) No carrier shall, without Commission approval, remove the protection afforded by interlocking signals, crossing gates, ~~watchmen~~, automatic crossing signals, or any other protection against accidents, ~~or reduce the number of hours that manual protection is maintained,~~ or substitute or alter any existing form of protection at crossings, at grade, of the tracks of a carrier across a public highway, or the tracks of another carrier.

Section 33.31 – Regulations and Procedures

The Commission no longer has jurisdiction over the services of railroads, which has been subsumed by the STB under the ICCTA. See 49 U.S.C. § 10501(b)(1-2). Therefore, the words "of service" should be deleted from this regulation in regard to the stated need for Commission consent for the abandonment of such services.

Section 33.42 – Switches marked by lamps

This section was addressed comprehensively in the PUC's 1994 Rulemaking Order. The Railroads agree with the analysis in that Order at pages 8 through 12, which would have deleted this section as being preempted.

The Unions responding to the Commission's 2009 Review Notice soliciting comments on the regulations admit that at least reflectorized switch targets "may be preempted because of various existing federal requirements," citing 49 C.F.R. §§ 218.101 – 109; 49 C.F.R. § 236.410; and FRA Emergency Order No. 24 (October 19, 2005). See page 2 of Unions' Joint Comments filed December 28, 2009, at Docket No. M-2009-2140262. As § 33.42 by its terms only deals with prohibitions against the use of reflectorized switch targets in certain circumstances, it should therefore be deleted.

In addition, the Unions note that § 406 of the RSIA08 directs the FRA "to issue standards or guidance governing the use of technology in nonsignalized territory, such as

switch position, monitor devices or indicators." *Id.* According to the attached document from the FRA's Railroad Safety Advisory Committee dated December 14, 2010, and attached hereto as Exhibit "B", such regulations should be forthcoming, as the Working Group (which includes union representation) had a goal of September 30, 2011, to report recommendations to the FRA Administrator for a proposed or interim final rule on the subject. See Exhibit "B" at 10-11.

In contending that lighted switch targets are not covered by the FRA regulations and that this section should be retained by the PUC, the Unions in their prior comments took an exceedingly narrow view of preemption. As explained in the legal background section above, federal preemption in the area of railroad safety is comprehensive, and the express preemption clause contained in 49 U.S.C. § 20106(a)(2) permits a state rule addressing the subjects covered by federal regulation in only very narrow circumstances. Therefore, the comprehensive regulation of switch targets by the FRA preempts any regulation of lighted switch targets by the PUC under § 33.42.

Section 33.43 – Walkways and railings

This section was comprehensively addressed by the PUC in its 1994 Rulemaking Order, which would have deleted the section as being negatively preempted by *Norfolk and Western Railway Co. v. Public Utility Comm'n of Ohio*, 926 F.2d 567 (6th Cir. 1991). The Railroads think that the Commission's rationale for deleting this section in 1994 was persuasive and should be adopted at this time. The significance of the *Norfolk and Western* case is that when the FRA decides not to address an issue, regulation of that issue is off limits to the states. The PUC found the analysis in that case to be "persuasive

and correct." See Exhibit "A" at 15. Therefore, this section should be deleted as decided in the 1994 Rulemaking Order. See also *Tyrrell v. Norfolk Southern Railway Co.*, 248 F.3d 517, 525 (6th Cir. 2001) (citing *Norfolk and Western* as controlling authority in determining negative preemption under FRSA).

Section 33.52 – Blind cars.

The 1994 Rulemaking Order would have deleted this section in its entirety as obsolete, as railroads have not for many years allowed trainmen to ride at the rear of a train except in switching operations. *Id.* at 17-18. This section should therefore be deleted.

Section 33.53 – Pusher engines.

Section 33.53 should be deleted, as the regulation of "pusher engines" by the Commonwealth of Pennsylvania fundamentally constitutes a regulation of a railroad "rule" or "practice," which is preempted by the ICCTA. 49 U.S.C. § 10501(b)(1). In addition, § 33.53 is also preempted by the FRSA. Title 49 of the *Code of Federal Regulations*, § 229.13 ("Railroad Locomotive Safety Standards; General; Control of locomotives") sets forth guidelines on the control of locomotives that encompass the control and use of pusher locomotives. Finally, an additional statute, the Locomotive Inspection Act of 1911 ("LIA"), 36 Stat. 913 (enacted Feb. 17, 1911) governs circumstances in which locomotives may or may not be used. *See* 49 U.S.C. § 20701. Title 49 of the *Code of Federal Regulations*, § 229.7 ("Railroad Locomotive Safety Standards; General; Prohibited acts") implements the LIA and governs specific locomotive handling practices. The ICCTA, the FRSA, and the LIA each individually

preempt state regulation in this area. Read together, they stipulate that § 33.53 is unenforceable and should be repealed.

Section 33.55 – Interchange of traffic and loading of commodities on open top cars

Section 33.55 should be deleted as preempted by the ICCTA, since it constitutes by its own terms a prohibited "rule (including car service, *interchange*, and other operating rules) ... ." 49 U.S.C. § 10501(b)(1) (emphasis added).

Section 33.56 – Safety of operation of railroad trains

The 1994 Rulemaking Order would have deleted this section in its entirety as unnecessary as well as being preempted by the NORAC Operating Rules filed with the FRA pursuant to the requirements of 49 C.F.R. §§ 217.1 – 217.15. See 1994 Rulemaking Order at 18-19. In addition, the FRA has issued comprehensive rules for conductors, which *inter alia* require them to be qualified on the characteristics of the territory over which they operate. See Final Rule published November 9, 2011, at 76 Fed. Reg. 69802-01, adopting rules for the certification of railroad conductors, which imposes a regulation at 49 C.F.R. § 242.121 requiring testing to "effectively examine and measure a conductor's knowledge of ... the physical characteristics of the territory on which a person will be or is currently serving as a conductor." *Id.* at 69823, 69850-69851. This negates one of the Unions' objections to that proposed rule change in the 1994 Rulemaking Order. See Exhibit "A" at 18-19.

Section 33.62 – Locomotives

Section 33.62 should be deleted, as it is completely coincidental in subject matter to 49 C.F.R. §§ 229.137 ("Railroad Locomotive Safety Standards; Safety requirements; Sanitation, general requirements") and 229.139 ("Railroad Locomotive Safety Standards; Safety requirements; Sanitation, servicing requirements"). Section 229.137 provides, among other requirements, for functioning toilets that are properly ventilated and equipped with toilet paper and locked doors. Section 229.139 sets minimum servicing time frames that are more specific and arguably more robust than the Chapter 33 section it preempts. Among its specific obligations, that section of the *Code of Federal Regulations* requires regular maintenance of sanitation equipment pursuant to a locomotive's mandated mechanical maintenance cycle as discussed elsewhere in Part 229.

Furthermore, 49 C.F.R. § 229.137(k) requires potable water to be used in locomotive washing systems, and 49 C.F.R. § 229.5 defines "potable water" to include fresh drinking water, defined as water that has been approved for drinking pursuant to federal standards as well as commercially available, bottled drinking water. In addition to express preemption, the foregoing read in combination with a similar requirement for potable water in camp cars in the newly enacted final regulations amending 49 C.F.R. Part 228 indicates field preemption of the fresh drinking water issue within the meaning of the FRSA jurisprudence. See 49 C.F.R. § 228.323 (effective December 30, 2011). These provisions thereby subsume the separate fresh drinking water requirements in § 33.62, which is therefore preempted by federal regulation.

In addition, it is to be noted that the Unions responding to the 2009 Notice agreed with the Railroads on the point that the toilet requirement on locomotives is preempted by the Sanitary Compartment Standards under the FRA regulations at 49 C.F.R. §§ 229.137 – 139. See page 5 of Unions' Joint Comments filed December 28, 2009, at Docket No. M-2009-2140262.

Section 33.63 – Cabin cars

As a "cabin car" is defined in § 33.1 to be a "[c]aboose," and since federal appellate courts have conclusively determined that the mandated use and regulation of cabooses is preempted, § 33.63 should be deleted in its entirety. In considering FRA regulations in 49 C.F.R. Parts 221 ("Rear End Marking Device—Passenger, Commuter, and Freight Trains") and 232 ("Break System Safety Standards for Freight and Other Non-Passenger Trains and Equipment; End-of-Train Devices"), two Federal Circuit Courts concluded within a month of each other in the Summer of 1989 that states were preempted from requiring cabooses. In *Burlington N. R. Co. v. Montana,* 880 F.2d 1104, 1107 (9th Cir. 1989), the Ninth Circuit noted that:

> The FRA's refusal to adopt a federal caboose requirement reflects its judgment that telemetry devices are an adequate substitute for the old method of having a crew member ride at the rear of the train so he or she could make visual inspections. In its deliberations, the FRA explicitly considered whether train safety would be better served by a caboose requirement, and decided it would not. . . . [The preemption provision, now codified at 49 U.S.C. § 20106(a)] of the [Federal Railroad Safety] Act preempts the states from second-guessing that judgment.

The Federal Court of Appeals for the Eighth Circuit reached an identical conclusion, citing the same provisions of the *Code of Federal Regulations* and the same preemption provision of the FRSA in *Burlington N. R. Co. v. Minnesota*, 882 F.2d 1349

(8th Cir. 1989). States are therefore definitively preempted from regulating cabooses. For this reason, in concert with the fact that their use is antiquated and inconsistent with modern railroad practice, § 33.63 should be deleted in its entirety.

The Railroads note that push cars and shoving platforms have been used in certain locations where cabooses are no longer used. Pursuant to its authority granted by the FRSA, the FRA has chosen to comprehensively regulate shove movements. These regulations are codified in 49 C.F.R. § 218.99 ("Shoving or pushing movements"), which is contained in Subpart F of that Part ("Handling Equipment, Switches and Fixed Derails"). This regulation requires that every railroad

> adopt and comply with an operating rule which complies with the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of an operating rule which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

49 C.F.R. § 218.99(a)(1).

Section 218.99(b) ("General movement requirements") goes on to set forth details, which include requirements for job briefings, point protection and assuring visually that the track is clear. In addition, § 218.99(c) ("Additional requirements for remote control movements") sets forth, as its title would indicate, additional requirements for remote control operations. In sum, any safety concern is thus adequately addressed both by the proscriptive aspects of § 218.99(b) and (c) as well as by the railroad operating rules enacted pursuant to the requirements in § 218.99(a)(1).

Finally, the comprehensive regulation of shove movements in § 218.99 evinces field preemption under the FRSA. Any PUC regulation regarding shove movement protection would therefore be preempted by federal law.

Section 33.64 – Protection cars

"Protection cars," used in the switching of molten steel gondolas according to long-time Transportation personnel, are no longer used in Pennsylvania or as a matter of railroad practice. Therefore, this section should be deleted as obsolete.

Section 33.65 – Camp cars and trailers

As previously discussed, the FRA issued comprehensive final regulations in regard to the subject of camp cars on October 31, 2011, in the *Federal Register* at 76 FR 67073-01, which amended 49 C.F.R. Part 228. Those regulations comprehensively preempt the Commission's regulations regarding camp cars in this section, which should therefore be deleted in their entirety due to these recent federal regulations. As noted by the *Brocal* court, administrative agencies "must be able to fluidly and effectively respond to changing conditions through rulemaking." *Id.,* 515 Pa. at 236, 528 A.2d at 120.

Section 33.67 – Use of back up hose in rail operations

According to long-serving Transportation personnel, a back up hose was a device used decades ago by a conductor or brakeman riding a cut of cars being shoved by a locomotive. The hose connected with the air brake reservoir lines in the cars and, by manipulation, could be used to apply the emergency brakes of the cut to the degree that the locomotive lost control of its ability to regulate the air brakes if the engineer did not

have knowledge of this fact. Back up hoses have not been used since the advent of hand-held radios, as a conductor can now call the engineer by radio and ask for an application of emergency brakes in the situation where he formerly could only resort to the back up hose or the very dangerous alternative of jumping off of the cut of cars and running to the locomotive. The antiquated nature of this provision, in combination with the fact that it is almost certainly facially preempted by 49 C.F.R. Part 232 (2008) ("Brake System Safety Standards for Freight and Other Non-Passenger Trains and Equipment; End-of-Train Devices"), leads to the conclusion that this section should be deleted in its entirety. In addition, the rules at 49 C.F.R. § 218.99 on protecting shoving or pushing movements further bolsters the argument that this section is preempted.

Section 33.91 – General Regulations
Section 33.92 -- Transportation of Employes

This was addressed by the PUC in its 1994 Order at page 27. That Order would have deleted these regulations regarding the transportation of crews, but would have noted that the carriers now transporting such crews were required to comply with 52 Pa. Code § 29.111, which requires compliance *inter alia* with § 29.101. That section of the Commission regulations incorporates the driver requirements in Subchapter F of the Chapter 29 regulations, 52 Pa. Code § 29.501 *et seq.*, which contain comprehensive requirements regarding driver safety. The Railroads agree with the Commission's earlier amendments in this regard, which would address the present circumstance of railroad employees being transported by contractors. See Exhibit "A" at 27 and Annex A at 19-20.

In addition, to the extent that federal regulation would apply, the provisions of the Federal Motor Carrier Safety Act, 49 U.S.C. § 13101 *et seq.*, and the regulations under it contain extensive regulation of driver safety. See 49 C.F.R. Parts 380 and 383 *et seq.*

Section 33.128 – Application of Regulations

Section 33.121(a) of the railroad transportation regulations provide for a minimum overhead clearance above tracks, used or proposed to be used for transporting freight cars, to be twenty-two (22) feet as a general rule for new structures. Similarly, § 33.122(a) and (b) provide generally for minimum side clearances from the center line of tangent railroad tracks, used or proposed to be used for transporting freight cars, of twelve (12) feet from the center line of the track. Exemptions from any of the requirements in the subchapter containing the aforementioned clearance regulations, when deemed necessary by the carrier concerned, may be granted by the PUC upon application for such an exemption pursuant to § 33.127(b) of the regulations.

Section 33.128(b), however, provides that the clearance requirements do not apply "to repairs, renewals, maintenance, extensions, additions, or rearrangements in substantially the same location and within the general plan of existing installations if existing clearances are not reduced." The Keystone State Railroad Association ("KSRRA") has requested that the Commission interpret § 33.128(b) to not require such exemption applications in situations involving only railroad-owned facilities, such as railroad trestles or tunnels, in instances where the bridge or tunnel has substandard clearances prior to construction as well as after construction, so long as the resulting clearances are the same or greater than the original clearances and do not involve a public rail-highway crossing.

An example would be where the overhead clearances in a railroad tunnel are being increased from eighteen (18) feet six (6) inches to twenty-one (21) feet. The resulting twenty-one (21) foot clearance, although an improvement, is less than the minimum overhead clearance of twenty-two (22) feet otherwise required pursuant to § 33.121(a). KSRRA interprets such work as "extensions, additions or rearrangements in substantially the same location and within the general plan of existing installations" which do not reduce existing clearances, therefore making the clearance provision at § 33.121 (a) inapplicable in such circumstances, pursuant to § 33.128(b).

Commission staff has made an initial determination disagreeing with this interpretation, which the KSRRA has appealed to the full Commission and is awaiting a decision. See Petition for Appeal attached hereto as Exhibit "C." If the Commission should determine that this matter requires a revision of its regulations, rather than merely an interpretation of the current regulation, the Railroads request that the PUC amend subsection (b) of § 33.128 by adding the following sentence at the end of the subsection to effect the KSRRA proposal:

> The provisions of Section 33.121(a) and 33.122(b) specifically do not apply to the reconstruction of existing bridges carrying rail facilities or railroad tunnels having substandard clearances prior to reconstruction as well as after reconstruction, so long as the resulting clearances are the same or greater than the original clearances and do not involve public rail-highway crossings.

As noted in the KSRRA appeal, regulation in the above circumstances is outmoded and serves no useful public safety purpose, instead merely adding unnecessary costs for the PUC and the involved parties. The proposed revision therefore comports with the Commission's stated purpose in amending its railroad regulations to efficiently and effectively regulate the rail industry.

Section 33.129 – Enforcement

The 1994 revisions to update this section by deleting its specific enforcement procedures and coordinating PUC enforcement with federal regulation should be adopted at this time. See Exhibit "A", Annex A at 21-26.

Respectfully submitted,

NAUMAN, SMITH, SHISSLER & HALL, LLP

By: _____

Benjamin C. Dunlap, Jr., Esquire
Supreme Court ID#66283
P. O. Box 840
Harrisburg, PA 17108-0840
Telephone: (717) 236-3010
Facsimile: (717) 234-1925

Attorneys for Consolidated Rail Corporation, CSX Transportation, Inc. and Norfolk Southern Railway Company

Date: November 21, 2011

EXHIBIT "A"

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held March 24, 1994

Commissioners Present:

David W. Rolka, Chairman
Joseph Rhodes, Jr., Vice Chairman
John M. Quain
Lisa Crutchfield
John Hanger

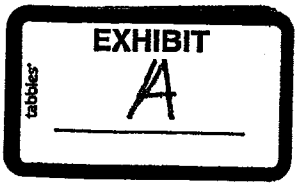
Revisions to Railroad Transportation Regulations at 52 Pa. Code §§33.1, 33.11, 33.12, 33.13, 33.14, 33.23, 33.31, 33.42, 33.43, 33.52, 33.56, 33.62, 33.63, 33.65, 33.66, 33.76, 33.77, 33.81, 33.82, 33.83, 33.84, 33.91, 33.111, 33.113, 33.129, and 3.551; Forms E, F and G.

Docket No. L-00920070

ORDER

BY THE COMMISSION:

By order adopted September 17, 1992, at L-920070, we initiated a proposed rulemaking pursuant to Section 501 of the Public Utility Code (66 Pa. C.S. §501) and the Commonwealth Documents Law (45 P.S. §1201, et. seq.) and regulations promulgated thereunder at 1 Pa. Code §7.1-7.4. The purpose of the proposed rulemaking was to amend existing Commission regulations governing railroad transportation in the Commonwealth. The purpose of the proposed amendments was to delete existing Commission regulations which conflict with



current federal regulations found at 49 C.F.R. and to delete Commission regulations which have become outdated or obsolete.

On October 27, 1992, the Office of Attorney General issued its approval of the proposed regulations as to form and legality. On November 23, 1992, copies of the proposed rulemaking were delivered to the Chairperson of the House Committee on Consumer Affairs, the Chairman of the Senate Committee on Consumer Protection and Professional Licensure, the Independent Regulatory Review Commission (IRRC) and the Legislative Reference Bureau. The proposed rulemaking was published for comment at 22 Pa. B. 5774 (December 5, 1992).

Several comments were filed to the proposed rulemaking. On January 18, 1993, the Cambria and Indiana Railroad Company, Conemaugh and Black Lick Railroad Company, Philadelphia, Bethlehem and New England Railroad Company, and the Steelton and Highspire Railroad Company through their Chief Engineer, Patrick Loughlin, filed comments supporting the Commission's proposed amendments. On January 22, 1993, the Brotherhood of Maintenance of Way Employees (BMWE) through its State Legislative Director, William K. Manning, filed comments objecting to several of the proposed amendments. On January 25, 1993, the Pennsylvania Legislative Board of the United Transportation Union (UTU) through its State Legislative Director, Donald W. Dunlevy, filed comments to the proposed rulemaking objecting to several of the proposed amendments. On February 16, 1993, the Honorable Clarence D. Bell, member of the Senate Committee on Consumer Protection and Professional Licensure, filed

comments on the proposed rulemaking and urged the Commission to address the issues raised in the comments of both the UTU and the BMWE. On February 18, 1993, the Honorable David R. Wright, Chairman of the House Consumer Affairs Committee, filed comments on the proposed rulemaking urging the Commission to promulgate final regulations so as to ensure the safety of all railroad employees and facilities. On February 24, 1993, IRRC filed comments to the proposed rulemaking. IRRC also forwarded comments it received from the Honorable Joseph A. Petrarca, Chairman of the House Transportation Committee, and the Honorable J. Barry Stout, member of the Senate Transportation Committee. These comments raised the same objections expressed by the UTU.

On February 17, 1993, the UTU filed an addendum to its comments expanding on its previously filed objections. This addendum will be considered in spite of its late filing. Finally, throughout the regulatory review, Commission staff has reviewed the amendments. We will address each of the comments on a section by section basis.

Before proceeding with this analysis, it is important to set forth the relationship between federal and state law in the area of railroad regulation. Congress enacted the Federal Railroad Safety Act (FRSA), 45 U.S.C. §421 et. seq. in 1970 "to promote safety in all areas of railroad operations and to reduce railroad related accidents." 45 U.S.C. §421. The Federal Railroad Administration

(FRA) enforces the provisions of the FRSA and promulgates railroad safety regulations pursuant to FRSA. The FRSA contains an express preemption provision, which states:

> The Congress declares that laws, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any federal law, rule, regulation, order or standard and when not creating an undue burden on interstate commerce. 45 U.S.C. §434.

States are precluded from regulating railroad safety in areas already covered by regulations promulgated by the FRA pursuant to FRSA. The only exception to this is when a state regulation addresses an essentially local safety hazard.

Courts have held that using a state-wide regulation as a means of addressing a local safety hazard is inappropriate. Norfolk and Western Railway Company v. Public Utility Commission of Ohio, 926 F.2d 567 (6th Cir. 1991). One court has noted that virtually all state regulations affecting the train itself appear preempted by federal law. Missouri Pacific Railroad v. Railroad Commission of Texas, 850 F.2d 264 (5th Cir. 1988).

In the last 15-20 years many of the Commission's regulations have been superseded or preempted by regulations promulgated by the

FRA pursuant to FRSA. See National Association of Regulatory Utility Commissioners v. Coleman, 542 F.2d 11 (3rd Cir. 1976).

In view of this, it makes no sense to retain regulations which are expressly preempted. Where the Commission retains authority to regulate in order to address local safety hazards, state-wide regulations are likewise inappropriate. The Commission retains authority to regulate and address local safety hazards pursuant to 66 Pa. C.S. §1501 which provides in part:

> Every public utility shall furnish and maintain adequate, efficient, safe and reasonable service and facilities and shall make all such repairs, changes, alterations, substitutions, extensions and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public...

The Commission has in the past used this authority to address local safety hazards and direct remedial measures. These remedial measures have been upheld on appeal. Monongahela Connecting Railroad Company v. Pa. P.U.C., 45 Pa. Commonwealth Ct. 164, 404 A.2d 1376 (1979). In light of the Commission's authority under 66 Pa. C.S. §1501 and the preemptive provisions of FRSA, the appropriate method of addressing local safety hazards is on a case by case basis pursuant to 66 Pa. C.S. §1501 not through statewide regulations.

We recognize that 66 Pa. C.S. §1501 does not provide standards or criteria for addressing a given safety problem. If a local safety hazard arises, it may be brought to the Commission's attention by formal written complaint and the Commission can order

appropriate remedial measures based on the evidence presented. We believe this is consistent with the preemptive provisions of FRSA and the Commission requiring public utilities to operate in a safe manner.

Section 33.1, Definitions.

The UTU states that the definition of "blind car" should not be changed since §33.52 dealing with blind cars should not be deleted as suggested in the proposed regulations. The Commission believes that the definition of "blind car" at §33.1 and §33.52 dealing with blind cars should be deleted as set forth in the proposed regulation. The definition of "blind car" at §33.1 doesn't describe "blind car" as the term is commonly used in the railroad industry today. Commission staff advises that blind cars are currently understood in the railroad industry to be railroad cars placed in front of a locomotive and pushed. Because the cars block the locomotive engineer's vision, a trainman must ride on the front of the cars being pushed.

Section 33.1 defines "blind cars" as a car attached behind a caboose or rear of a passenger train upon which a trainman cannot ride. This definitiion is obsolete since most railroads operating in the Commonwealth do not currently use cabooses. In addition, the definition at §33.1 is not consistent with how the term "blind car" is commonly used in the railroad industry today. This inconsistency will only create confusion as to what the term "blind car" means.

Because the definition of "blind car" at §33.1 is obsolete and inconsistent with current industry usage of the term, the Commission believes it should be deleted. The Commission declines to adopt the recommendation of the UTU. The definition of "blind car" will be deleted as previously published.

No comments were received with respect to changes in definitions of "Bureau", "Carrier", "non-train accident", "train accident", "train service accident", or "water closet" proposed at §33.1 and those definitions are amended as previously published.

Section 33.11, General.

No comments were received with respect to §33.11 and that section is amended as previously published.

Section 33.12, Reportable Accidents.

No comments were received with respect to §33.12 and that section is amended as previously published.

Section 33.13, Telegraph and Telephone Reports.

No comments were received with respect to §33.13 and that section is amended as previously published.

Section 33.14, Accident Report Forms.

No comments were received with respect to §33.14 and that section is amended as previously published.

Section 33.23, Aid From The Commission.

No comments were received with respect to §33.23 and that section is amended as previously published.

Section 33.31, Regulations and Procedure.

No comments were received with respect to §33.31 and that section is amended as previously published.

Section 33.42, Switches Marked By Lamps.

The UTU, IRRC, and Representative Petrarca filed comments to §33.42. Section 33.42 provides that reflectorized switch targets shall not be installed either on yard tracks where there are five or more switching movements at night or on a main track or passing track unless the track is used only in daylight or is protected by automatic block signals, cab signal or train controls or by distant switch signals or indicator in manual block or train order territory. The Commission proposes to delete this section in its entirety.

The UTU contends that the FRA Regulation at 49 C.F.R. §213.135(g) does not mandate that switches used at night be provided with targets or switch position indicators which operating personnel can see when necessary. UTU also states that in a recent Commission decision at Docket No. C-903157, a Commission Administrative Law Judge (ALJ) has upheld 52 Pa. Code §33.42. The UTU contends that the reflectorized targets are inadequate and that §33.42 should be retained. UTU also states that the regulation should be amended to require self-illuminated targets in accordance with §33.42 and reflectorized targets on all other switches. Representative Petrarca's and Senator Stout's comments reiterate the concerns expressed by the UTU.

IRRC notes that Commission staff indicated to it that many railroads have not used self-illuminated lamps since the mid-1970's. In addition, IRRC notes that Commission staff reports no accidents or injuries due to an absence of self-illuminated lamps. IRRC agrees with the Commission that self-illuminated lamps should no longer be required. IRRC, however, recommends that the Commission provide more information on the safety aspects of using reflectorized switch targets at switching points and investigate the requirements of other states on this matter.

The UTU's characterization of the federal regulation at 49 C.F.R. §213.135(g) is incorrect. 49 C.F.R. §213.135(g) states that each switch position indicator must be clearly visible at all times. If the switch position indicator is clearly visible at all times, it must be visible at night as well as during the day. The UTU's comments that the federal regulation does not mandate that switches used at night be provided with targets or switch position indicators which operating personnel can see when necessary is simply incorrect.

Furthermore, while it is true that reflectorized targets require a light from some source other than the target itself, the Commission fails to see how this creates a safety problem. Yard workers working at night carry a flashlight or lantern or other illuminating device so that they can see where they are going. This light source is sufficient to illuminate a reflectorized switch target. If a particular switchlamp, switch target or yard area creates a safety hazard, the Commission has authority under 66

Pa. C.S. §1501 to order installation of a self-illuminated switchlamp at a particular location if a self-illuminated switchlamp will alleviate the safety hazard. The Commission also notes that the UTU's comments do not state that eliminating §33.42 will lead to unsafe conditions in railroad operations. The UTU's comments do not even state that self-illuminated switchlamps are necessary for the safe operation of railroads or employee safety.

UTU also points to the ALJ's Recommended Decision in United Transportation Union-Pennsylvania State Legislative Board v. The Pittsburgh and Lake Erie Railroad Company at Docket No. C-903157 as upholding the regulation at §33.42. The ALJ's Recommended Decision has since been adopted in part by Commission order entered July 8, 1993. Paragraph 9 of the order provides that the respondent railroad, may file a petition seeking exemption from 52 Pa. Code §33.42. Subsequently, the respondent railroad filed a petition requesting recision of the July 8, 1993 order because the railroad no longer operates the facilities in question. The July 8, 1993 order does not prohibit the Commission from revising its regulations in any event.

In addition, testimony in the case at C-903157 by the respondent, Pittsburgh and Lake Erie Railroad, indicates that the railroad has not used self-illuminated switchlamps since 1984, that these switchlamps are subject to theft and vandalism and therefore in need of constant repair or replacement. In comparison, reflectorized switch targets are relatively maintenance free. In

addition, a reflectorized switch target is fail safe while a self illuminated switch lamp is subject to failure which renders it inoperable.

As the comment by IRRC notes, the Commission is unaware of any accidents or injuries resulting from violations of §33.42. The Commission is aware of only two formal written complaints filed with the Commission in previous five years alleging violations of §33.42. Both of these complaints were filed by the UTU. No other rail union has filed comments alleging that this regulation is necessary for employee safety or for the safe operation of railroads.

The Commission complied with IRRC's recommendation and contacted the appropriate state agencies with jurisdiction over rail safety in neighboring states to ascertain whether the states surrounding Pennsylvania have similar statutes or regulations requiring self-illuminated switchlamps. Commission staff contacted representatives of the West Virginia Public Service Commission, the Ohio Public Utility Commission, New York Department of Transportation, New Jersey Department of Transportation and the Maryland Division of Labor and Industry. These agencies have authority over railroad safety in their respective states. None of these states have either regulations or statutes requiring self-illuminated switchlamps. These agencies report no safety problems or accidents due to a lack of such a regulation or statute. These agencies report that they only enforce the federal regulation regarding switch position indicators.

In addition, Commission staff contacted the Virginia State Corporation Commission, Tennessee Public Service Commission, Oregon Public Utility Commission and Texas Railroad Commission. Of these agencies, only the Texas Railroad Commission reported a state law requiring self-illuminated switchlamps. However, a representative of the Texas Railroad commission reports that the statute is not enforced. Furthermore, the statute does not apply to railroads which have all their locomotives equipped with electric headlights. See Tex. Rev. Civ. Stat. Ann. Art. 6373. Clearly, this statute is outdated.

The other agencies report no regulations or statutes requiring self-illuminated switchlamps. These agencies report no safety problems or accidents due to lack of such a regulation or statute. These agencies also enforce the federal regulation regarding switch position indicators.

Out of nine agencies contacted, only one reports a state requirement similar to Section 33.42 requiring self-illuminated switchlamps. All of the agencies contacted enforce the federal regulation at C.F.R. §213.135(g). None of the agencies contacted have indicated that they have received any reports of accidents or injuries as a result of the lack of self-illuminated switchlamps.

This confirms the Commission's view that this regulation is obsolete and unnecessary. Furthermore, the Commission believes that any bona fide safety problems at a particular location may be dealt with under Commission's authority at 66 Pa. C.S. §1501. We believe that the foregoing addresses the comments filed by UTU with

respect to §33.42. We decline to adopt the recommendations of UTU. Section 33.42 will be deleted as previously published.

Section 33.43. Walkways and Railings.

The UTU, BMWE, and IRRC filed comments regarding §33.43. Section 33.43 requires railroads to provide and maintain walkways and railings on certain railroad bridges located in the Commonwealth. The Commission proposes to delete this section in its entirety.

The UTU comments that the case cited in the Commission's proposed regulation, Norfolk and Western Railway Company v. Public Utility Commission of Ohio, 925 F.2d 567 (6th Cir. 1991) is not applicable to the Commission's regulations at §33.43. In Norfolk and Western the Sixth Circuit Court of Appeals held that Ohio's regulations regarding walkways and bridges were preempted by a rulemaking pursuant to the FRSA. The UTU asserts that the Sixth Circuit's ruling is not controlling in Pennsylvania which is in the Third Circuit. UTU concludes that the Third Circuit may reach a different conclusion than the Sixth Circuit did.

The UTU further notes that the FRA in its 1977 rulemaking decided that regulations requiring walkways were not appropriate because: (a) the large dollar cost could not be justified in view of the financial conditions of the railroads; (b) walkways increase trespasser problems; and, (c) there is no proof that walkways provide any safety enhancement. The UTU responds that the railroads are presently in better financial condition to provide walkways, that most trespassers are killed or injured when no

walkways are present and that the need for walkways has been recognized by railroads before any regulations existed and have been provided by the railroads in the past. In addition, the UTU contends that the FRA rulemaking was initiated to determine if walkways were needed to protect maintenance of way employees not operating personnel. The UTU also points out that the FRA rulemaking at 42 Fed. Reg. 22189 (May 2, 1977) asserts that states are in a better position to address safety problems at a particular area or particular structure.

The UTU attempts to distinguish the Commission's regulations from the Ohio regulations which the Sixth Circuit found to be preempted in Ohio by stating that the Pennsylvania regulations do not require walkways on all bridges as Ohio's did but only those bridges within one mile of a rail yard. Representative Petrarca and Senator Stout voice similar concerns regarding bridges and walkways.

In its Addendum to its comments the UTU asserts that without walkways on trestles, train crew members can not properly perform their duties. The UTU proposes that the current regulation be expanded to require walkways at any location where train crew members may be required to inspect the train or observe conditions at the rear of the train.

The BMWE also states that the Norfolk and Western case is not controlling on Pennsylvania since Pennsylvania is within the jurisdiction of the Third Circuit Court of Appeals. The BMWE also states that the Third Circuit may rule differently than the Sixth

Circuit did. The BMWE contends that the FRA rulemaking covered bridge safety issues only with regard to protecting maintenance of way employees but did not deal with the safety of train men and that the state agency retains authority to regulate because of this distinction. The BMWE also points out that the federal rulemaking proceeding at 42 Fed. Reg. 22185 (May 2, 1977) provides that states may be in a better position to assess the local need for a walkway on a particular structure or any particular area.

IRRC points out that the Norfolk and Western case is a Sixth Circuit case which has no binding affect on the Commission since the Commission is within the authority and jurisdiction of the 3rd Circuit Court of Appeals. IRRC also contends that the Commission has the authority to provide safety standards for trestles since there are no federal regulations governing this area.

The Commission recognizes that the Sixth Circuit decision is not a binding precedent in the Third Circuit. However, the rationale set forth in the decision is persuasive and correct. The Commission believes that the rationale would be persuasive on other Circuit Courts, including the Third Circuit. Given the negative preemptive effect of the FRA rulemaking on walkways, statewide regulations requiring walkways are inappropriate. The Third Circuit in National Association of Regulatory Utility Commissioners v. Coleman 542 F.2d 11 (3rd Cir. 1976) stated that the local safety hazard exception to the preemptive provisions of the FRSA cannot be

used to uphold statewide rules. In this case, the local safety hazard exception cannot be used to uphold the Commission's statewide rules on walkways.

The Sixth Circuit Court's decision does not hinge on what employees the regulations were designed to protect. The FRA rulemaking was undertaken to determine whether employee safety required walkway regulations and did not differentiate between maintenance of way employees and operating personnel.

In addition, the Commission's authority pursuant to 66 Pa. C.S. §1501 provides it with sufficient authority to address any local safety hazards. If a local hazard necessitates installation or maintenance of walkways at a particular location, the Commission can order walkways installed or maintained pursuant to 66 Pa. C.S. §1501. In the past, the Commission has directed the installation of walkways at a particular location where a party presented adequate evidence to demonstrate that a local hazardous condition existed and installation of a walkway was necessary to alleviate the hazardous condition. See United Transportation Union v. Baltimore and Ohio Railroad Company, Opinion and Order entered January 22, 1976 at Docket No. C-20741. We believe that this adequately addresses the comments filed by the UTU, the BMWE, and IRRC. We decline to adopt the recommendations of UTU, BMWE and IRRC. The regulation will be amended as previously published.

Section 33.52, Blind Cars.

The UTU filed comments to this section dealing with blind cars. The Commission proposes to delete this provision in its entirety.

The UTU states that the regulation is still relevant where flagging is required. The UTU also believes that a rider car or caboose should be placed at the lead end of trains except in switching movements. Representative Petrarca and Senator Stout voice similar concerns.

The Commission fails to see how the UTU's comments are relevant to blind cars. If the situation described by the UTU comes about and a train does go into emergency, the employee is going to have to walk the length of the train regardless of the blind car regulation. This is because most railroads operating in the Commonwealth prohibit employees from riding anywhere on the train except in the locomotive. Section 33.52 only applies if a trainman is required to ride at the rear of a train.

UTU also suggests cabooses be required on trains in certain circumstances. This suggestion ignores federal court decisions which have ruled that state laws mandating cabooses are preempted. See Missouri Pacific Railroad Company v. Railroad Commission of Texas, 850 F.2d 264 (5th Cir. 1988); Burlington Northern Railroad Company v. State of Montana, 880 F.2d 1104 (9th Cir. 1989); and, Burlington Northern Railroad Company v. State of Minnesota, 882 F.2d 1349 (8th Cir. 1989).

The Commission is unaware of any written formal complaints filed with the Commission in the last five years alleging any accidents or injuries resulting from violations of §33.52. The Commission declines to adopt the recommendations of the UTU. This section will be amended as previously published.

Section 33.56, Safety of Operation of Railroad Trains.

The UTU, and IRRC filed comments to this section. This section establishes requirements for conductors and engineers to ensure they are competent to safely operate railroad equipment. The Commission has proposed deleting Section 33.56 in its entirety.

UTU believes Section 33.56 should be left in place. The UTU points out that the operating rules promulgated by Northeast Operating Rules Advisory Committee (NORAC) only provide that an engineer be qualified on the physical characteristics of the territory over which he is to operate and that the NORAC rules do not require that the conductor be familiar with that territory. UTU contends that this makes operations unsafe. UTU also states that nothing in the federal regulations at 49 C.F.R. covers this problem. IRRC expresses similar concerns as does Representative Petrarca.

The Commission first notes that the NORAC operating rules were promulgated and filed with the FRA pursuant to the requirements of 49 C.F.R. 217.1-217.15. It is questionable whether states have the authority to direct railroads to comply with operating rules

promulgated by state agencies. The NORAC operating rules filed with the FRA cover the same subject matter as §33.56 and arguably preempt §33.56.

More importantly, UTU's comment that NORAC's operating rules require only the engineer to be qualified on the characteristics of the territory over which he is to operate is incorrect. NORAC rule 940 specifically requires train service employees, which includes conductors to be qualified on the physical characteristics of the territory over which they operate. Since 49 C.F.R. 217.9 requires railroads to periodically test for compliance with its operating rules and 49 C.F.R. 217.11 requires railroads to instruct employees on the application of those operating rules, Section 33.56 is unnecessary as well as preempted. The Commission declines to adopt the recommendations of the UTU. The regulation will be amended as originally published.

Section 33.62, Locomotives.

No comments were received with respect to §33.62 and that section is amended as previously published.

Section 33.63, Cabin Cars.

UTU filed comments to this section which regulates cabin cars. In particular, the UTU objects to the Commission changing the requirement for rear end markers on cabin cars.

The UTU contends that the Commission regulation is inapplicable when a cabin car is not on the end of a train. The UTU also states that the federal regulation set forth at 49 C.F.R. 221.1-221.17 only applies to "main" track but not to other tracks

and therefore is defective. The UTU urges the Commission to amend the regulation to apply to all trains regardless of what the track they are operating on is called. Representative Petrarca voices similar concerns.

The Commission first questions the need for regulation of cabin cars at all since the Commission's Railroad Safety Division Staff is aware of only one railroad in the Commonwealth that even uses cabin cars or cabooses. As stated earlier, several federal courts have ruled that states cannot require railroads to use cabooses. It is also clear that the federal regulations at 49 C.F.R. §§221.1-221.17 cover the area of rear end marking devices which §33.63(e) regulates. Finally, directing railroads operating in the Commonwealth to comply with §33.63(e) instead of, or in addition to, 49 C.F.R. §§221.1-221.17 saddles the railroads with additional costs with no discernable improvement in employee safety.

In addition, the UTU is misconstruing the term "main" track set forth at 49 C.F.R. 221. The definition of "main" track as set forth at 49 C.F.R. 221.5(d) states that a "main" track is one on which trains are operated by timetable or train order or both or the use of which is governed by a signal system. The Commission's Railroad Safety Division indicates that this definition encompasses all types of track except yard track. Therefore, the federal regulations regarding rear end markers encompass all tracks except

for yard tracks. For these reasons, we decline to adopt the recommendation of the UTU. The regulation will be amended as originally published.

Section 33.65, Camp Cars and Trailers.

The BMWE and IRRC have filed comments regarding this section. This section deals with camp cars which house maintenance of way workers. The Commission proposes to delete most of this section.

The BMWE states that the Commission's camp car regulation should be retained. BMWE contends that 49 C.F.R. 228 does not preempt the Commission in this area. It asserts that the regulations are not mandatory while the Commission's regulations are mandatory upon railroads operating within the Commonwealth. IRRC raises similar concerns and states that the federal regulations are not enforceable.

The Commission believes that the FRA regulations at 49 C.F.R. 228, Appendix C, preempt Section 33.65. At 55 Fed. Reg. 3089 (July 27, 1990) FRA indicates that camp cars are not subject to state or local codes. This is reiterated in 49 C.F.R. 228, Appendix A. The FRA also states in 49 C.F.R. 228, Appendix A that it is unable to rely on either state or local authorities regarding camp cars. This clearly is preemptive language barring the states from promulgating regulations such as Section 33.65 regarding camp cars.

The purpose of the federal regulations is to provide opportunity for rest for train crews or train workers. The FRA notes at 55 Fed. Reg. 30892 (July 27, 1990) that it will enforce these provisions where it is shown that violation of the provisions

has kept the worker from obtaining rest. The standard is whether the employee's rest is interrupted by a violation of the regulations. These comments indicate that the regulations are indeed mandatory and enforceable.

The Commission's Railroad Safety Division indicates that its personnel do not enforce Section 33.65 but rather enforce the FRA regulations at 49 C.F.R. 228, Appendix C. The Commission's Railroad Safety Division also advises that only one railroad, Consolidated Railroad Corporation, uses camp cars. All other railroads operating in the Commonwealth send their employees to motels or hotels when necessary and provide the employees with a meal allowance. In addition, the Commission has received no formal written complaints within the last five years regarding violation of this section or safety problems arising as a result of violation of this section. For these reasons, we decline to adopt the recommendations of the UTU and IRRC. The regulation will be amended as originally published.

Section 33.66, Safety Glazing in Railroad Equipment.

No comments were received with respect to §33.66 and that section is amended as previously published.

Section 33.76, Additional Trains.

No comments were received with respect to §33.76 and that section is amended as previously published.

Section 33.77, Saving Clause.

No comments were received with respect to §33.77 and that section is amended as previously published.

Section 33.81, Track Alignment.

BMWE filed comments regarding §33.81 which sets forth standards for track alignment. BMWE believes that this regulation should remain in effect because FRA has published a proposed rulemaking to modify some of the criteria set forth in its regulations. See 57 Fed. Reg. 54038 (November 16, 1992). BMWE contends it is premature to modify Commission regulations until completion of FRA rulemaking procedures.

IRRC filed comments as well on this section. IRRC believes that it is not necessary for the Commission to await the outcome of FRA regulations before modifying this regulation.

The Commission believes that the regulations at §33.81 are expressly preempted by FRA regulations at 49 C.F.R. 213.55-213.57. The federal regulations dealing with track alignment cover the same area as the Commission regulations at §33.81. The FRA rulemaking at 57 Fed. Reg. 54038 (November 16, 1992) does affect 49 C.F.R. 213.55-213.57 but only in terms of changing alignment standards not eliminating them. Therefore, any modification of 49 C.F.R. 213.55-213.57 will still preempt §33.81. Moreover, the Commission's Rail Safety Division staff indicates it does not use Section 33.81 at all when inspecting track for defects. It makes no sense to retain a regulation or delay its deletion when it is expressly preempted and is not used by the Commission's Railroad Safety Division. Therefore, Section 33.81 is amended as previously published.

Section 33.82, Track Anchors.

BMWE filed comments on this section which deals with track anchors. The comments filed by BMWE are similar to those filed on §33.81. BMWE is concerned that the FRA is in the process of promulgating rules which may somehow affect the Commission's regulations.

IRRC filed comments on this section as well. IRRC's comments are similar to those filed on §33.81. IRRC does not believe that the FRA rulemaking should delay the Commission's modification of this section.

The Commission believes that §33.82 is expressly preempted by FRA regulations at 49 C.F.R. 213.127. The federal regulations cover the same subject matter as the Commission's regulations at §33.82. The FRA rulemaking at 57 Fed. Reg. 54038 (November 16, 1992) does affect 49 C.F.R. 213.127 but only in terms of altering the standard used to measure gauge restraint capability of the rail fastening system rather than eliminating existing federal standards. Any modification of 49 C.F.R. 213.127 will still preempt §33.82. The Commission's Rail Safety Division staff advises that it does not use Section 33.82 at all when inspecting track for defects. It makes little sense to retain §33.82 or delay its deletion when it is expressly preempted and not used by the Commission's Railroad Safety Division. Section 33.82 is amended as previously published.

Section 33.83, Tracks Undergoing Maintenance.

BMWE filed comments on §33.83 dealing with procedures for track being replaced or repaired. BMWE raises the same concerns raised in its comments to §33.81 and §33.82.

IRRC filed comments on this section similar to those filed in §§33.81 and 33.82. IRRC does not believe that the Commission should delay the rulemaking pending outcome of the FRA proposed rulemaking.

The Commission believes that §33.83 is expressly preempted by 49 C.F.R. 213.11. The federal regulation covers the same subject matter as the Commission's regulation at §33.83. The FRA rulemaking at 57 Fed. Reg. 54038 (November 16, 1992) does affect 49 C.F.R. 213.11 but only to the extent of possibly imposing speed restrictions in certain instances. Any modification of 49 C.F.R. 213.11 will still preempt §33.83. In addition, the Commission's Rail Safety Division advises that it does not use or enforce this regulation. It makes no sense to retain §33.83 or delay its deletion when it is expressly preempted and not used by the Commission's Railroad Safety Division. Section 33.83 is amended as originally published.

Section 33.84, Track Inspection.

BMWE filed comments on §33.84 regarding frequency of inspection and other inspection criteria. BMWE is specifically concerned that the FRA's regulations do not limit the amount of track an inspector may inspect in a single day. Section 33.84 specifically limits the amount of track an employee may inspect to

100 miles of track per day. BMWE believes that without this 100 mile limitation, railroads will require their employees to inspect more track and that the employees will be rushed and not perform adequate inspections. The BMWE therefore requests that the regulation be left in place.

IRRC has filed comments on §33.84 as well. IRRC's concern is similar to that of the BMWE. IRRC recommends that the Commission continue the requirement that track inspectors be limited to inspecting 100 miles of track in a day.

The Commission believes that §33.84 is expressly preempted by 49 C.F.R. 213.231-213.241. The subject matter of §33.84 is covered by the FRA regulations set forth at 49 C.F.R. 213.231-213.241. The FRA rulemaking at 57 Fed. Reg. 54038 (November 16, 1992) affects 49 C.F.R. 213.231-213.241 to the extent it may require additional inspections or change the method of inspection. Any modification of 49 C.F.R. 213.231-213.241 will still preempt §33.84.

The comments from the BMWE or IRRC do not address the issue of whether the Commission may limit the amount of track an employee may inspect in light of the preemptive provision of 45 U.S.C. §434 and the existence of the regulations at 49 C.F.R. 213.231-241. Clearly under the ruling of National Association of Regulatory Utility Commissioners v. Coleman, 542 F.2d 11 (3rd Cir. 1976) the Commission cannot require railroads to comply with state regulations which differ from federal regulations. FRA could have chosen to place a limitation on the number of miles an employee may

inspect to ensure track safety but chose instead to require track be inspected at certain time intervals. See 49 C.F.R. 213.233.

It makes no sense to retain §33.84 or delay its deletion. Section 33.84 is amended as originally published.

Section 33.91, General Regulations.

The UTU has filed comments on this section. In particular, UTU objects to limiting the requirements of this section to vehicles owned or operated by a common carrier railroad. UTU points out that employees are now moved from one point to another in vehicles furnished and operated by contractors. UTU therefore believes that any such contractor should be subject to the provisions of this section.

IRRC has filed comments on this section as well. IRRC notes the same concerns as UTU. However, IRRC notes that at 52 Pa. Code §29.111 there are regulations which govern contract carriers and brokers. IRRC recommends that the Commission include a citation to this section in order to clarify that contract carriers and brokers are still subject to regulation by the Commission.

The Commission believes that the comment and suggestion by IRRC is appropriate. While it is clear that contract carriers and brokers are subject to Commission regulation pursuant to 52 Pa. Code §29.111, the Commission will insert a reference to that section in §33.91 to make it clear that contract carriers and brokers are subject to Commission regulation when transporting railroad workers. We will therefore add a sentence to §33.91 referencing 52 Pa. Code §29.111.

Section 33.111, Change in Status of a Station.

No comments were received with respect to §33.111 and that section is amended as previously published.

Section 33.113, Training of Equipment Inspectors.

No comments were received with respect to §33.113 and that section is amended as previously published.

Section 33.129, Enforcement.

No comments were received with respect to §33.129 and that section is amended as previously published.

Section 3.551, Official Forms.

No comments were received with respect to §3.551 and that section is amended as previously published.

Having considered all comments filed to the proposed rulemaking, we believe that regulations as set forth here in Annex A should be adopted as the final rulemaking. Accordingly, under 66 Pa. C.S. §501 and the Act of July 31, 1968 (P.L. 769, No. 210) (45 P.S. §§1201-1208), known as the Commonwealth Document Law, and regulations promulgated thereunder at 1 Pa. Code §7.1-7.4, we amend the regulations at 52 Pa. Code §§33.1 et seq. and 3.551 Forms E, F and G as set forth in Annex A; THEREFORE,

IT IS ORDERED:

1. That the regulations of the Pennsylvania Public Utility Commission at 52 Pa. Code §33.1 et seq. and §3.551, Forms E, F and G are hereby amended to read as set forth in Annex A.

2. That the Secretary shall submit this order and Annex A to the Office of Attorney General for approval as to legality.

3. That the Secretary shall submit this order and Annex A to the Governor's Budget Office for review of fiscal impact.

4. That the Secretary shall submit this order and Annex A for formal review by the designated standing committees of both houses of the General Assembly and for formal review by the Independent Regulatory Review Commission.

5. That the Secretary shall deposit this order and Annex A with the Legislative Reference Bureau for publication in the Pennsylvania Bulletin.

6. That the Secretary shall serve copies of this order and Annex A upon each of the commentators.

7. That these regulations shall become effective upon publication in the Pennsylvania Bulletin.

8. That this rulemaking docket is hereby closed.

BY THE COMMISSION,

John G. Alford
Secretary

(SEAL)

ORDER ADOPTED: March 24, 1994

ORDER ENTERED: MAR 31 1994

ANNEX A
TITLE 52. PUBLIC UTILITIES
Part 1 Public Utility Commission
Subpart B Carriers of Passengers or Property
Chapter 33. Railroad Transportation
Subchapter A General Provisions

§33.1 Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

[**Blind car**--A railroad car attached behind the caboose of a freight train or at the rear end of a passenger train upon which a member of the crew cannot ride in order to properly protect the rear of the train in the event of an emergency.]

Bureau--[The Bureau of Transportation of the Pennsylvania Public Utility Commission.] <u>The Bureau of Safety and Compliance of the Pennsylvania Public Utility Commission</u>

* * * * *

Carrier--Any railroad, railway company, or corporation other than a street railway, subject to Commission jurisdiction, which operates [a steam or electric railroad] in this Commonwealth.

* * * * *

[**Nontrain accident**--An accident involving passengers or travellers if on railway company property but not on trains.]

* * * * *

[**Train accident**--Any accident classified under United States Department of Transportation regulations as a train accident.]

[**Train service accident**--Any accident classified under United States Department of Transportation regulations as a train service accident.]

* * * * *

Water closet--A sanitary facility for defecation, [equipped with a hopper or trap and a device for flushing the bowl with water.] equipped with a chemical or flush toilet.

* * * * *

Subchapter B. Service and Facilities.

§33.11. General.

[(a) If an accident occurs in a yard or on a road or division operated jointly or in common by two or more carriers, it shall be reported by the carrier which employes the superintendent who is in immediate charge of the yard, road, or division in question. An accident occurring on a private siding or track of like character shall be reported by the carrier having possession of the locomotive involved or responsible for the subsequent movement in commerce of the railroad equipment involved, or employing the person injured or killed.]

[b] (a) Each carrier shall submit a report of each reportable accident involving its facilities or operation in this Commonwealth. Such reports shall be addressed to the Bureau of [Transportation,] Safety and Compliance, Pennsylvania Public Utility Commission, P.O. Box 3265, Harrisburg, Pennsylvania [17120.] 17105-3265.

§33.12. Reportable accidents.

(a) A reportable accident is one [arising from the operation of a carrier which results in one or more of the following

circumstances:] as defined in 49 C.F.R. and which a carrier is required to report to the Federal Railroad Administration pursuant to 49 C.F.R.

[(1) The death of a person in a train or train service accident or of a passenger or traveller not on a train or on company premises in a nontrain accident, or an employe, unless the employe accident occurs in connection with new construction, in repair shops, engine houses, freight or passenger stations or accidents at coal or water stations which do not occur directly as the result of the operation of a train or trains.

(2) Injury to a person other than an employe, in a train or train service accident, or to a passenger or traveller not on a train in a nontrain accident, sufficient to incapacitate the injured person from performing his or her customary vocation or mode of life, for a period of more than one day.

(3) Injury to an employe, unless the accident occurs in connection with new construction, in repair shops, engine houses, freight or passenger stations or accidents at coal or water stations which do not occur directly as the result of the operation of train or trains, sufficient to incapacitate the injured person from performing his or her ordinary duties for more than three days in aggregate during the ten days immediately following the accident. This paragraph applies to employes on duty and to those classed as not on duty, but does not apply to employes classed as passengers or trespassers.

(4) For the year 1948, damage to railroad property amounting to more than $250, including the expense of clearing wreck, but no damage to or loss of freight, animals, or property of noncarriers on or adjacent to right of way. For years subsequent to 1948, such minimum amount shall be that adopted by United States Department of Transportation. Casualties, as provided for in this section, shall be included in the report.

(5) All accidents occurring at highway-railroad crossings, at grade, involving contact between engines or trains and highway vehicles or pedestrians, irrespective of the amount of property damage or extent of casualties.

(6) Nontrain accidents involving highway vehicles running into and damaging crossing gates and other types of protection shall be reported on Monthly Statement Form UCTA-31, or such accidents may be reported individually on Form UCTA-7.]

§33.13 [Telegraph and t] Telephone reports.

[A report by telephone or telegram shall be made immediately in the event of the occurrence of a reportable accident resulting in fatalities, except as to trespassers, and of train collisions and passenger train derailments, as follows:] A carrier shall immediately report to the Bureau by telephone (717) 787-9732 any accident or incident which requires the carrier to notify the Federal Railroad Administration by telephone pursuant to 49 C.F.R.

[(1) A preliminary report shall be submitted by telephone or telegram of a reportable accident resulting in the death of a person, except trespassers, in an accident defined in § 33.12 of this Title (relating to reportable accidents) or in the death of any person, trespasser or otherwise, in an accident defined in § 33.12 of this Title (relating to reportable accidents.)

(2) A preliminary report shall be submitted by telephone or telegram of a reportable accident involving the collision of an engine or train with another engine or train.

(3) A preliminary report shall be submitted by telephone or telegram of a reportable accident resulting in injury to an employe, except trespassers, in an accident as defined in §33.12 of this Title (relating to reportable accidents.

(4) A preliminary report shall be submitted by telephone or telegram of a reportable accident resulting from the derailment of any part of a passenger train carrying passengers.

(5) A preliminary report shall be submitted by telephone or telegram of any accident which occurs at any highway-railroad crossing at grade and involves a collision between an engine or train and a bus, taxicab, street car, or loaded gasoline or oil truck or trailer, regardless of whether the accident results in injury to a person or persons and such preliminary report shall furnish the name of the operator and of the owner of the vehicle.

(6) A preliminary report shall be submitted by telephone or telegram of any condition which will result in the obstruction of a main track for a period in excess of two hours.]

§33.14 Accident report forms.

[Reports shall be made on prescribed accident report forms of the Commission (UCTA-1, UCTA-2, UCTA-7 and Statement Form UCTA-31), as follows:

(1) UCTA-1. If no reportable accident has occurred during a month the carrier shall submit a report to that effect on Form UCTA-1. Such report shall be mailed to the Commission on or before the 30th day of the month following.

(2) UCTA-2. Reports of accidents to employes, passengers, trespassers, and others and nontrain accidents to employes, passengers, and travellers not on trains shall be made on Form UCTA-2 and shall be filed with the Commission on or before the 30th day of the month following that in which the reportable accident occurred. Form UCTA-2 is so prepared that it corresponds to the United States Department of Transportation Form FRA F 6180-54, with respect to spacing, and it may be prepared as a carbon copy of the Form FRA F 6180-54. A carbon copy of Form LIBC-344 to the Workmen's Compensation Bureau will be accepted by the Commission in lieu of Form UCTA-2 in filing a report of reportable nontrain accidents involving employes injured and incapacitated for more than three days. Accidents to be reported on Form UCTA-2 do not include those occurring in connection with new construction in repair shops, engine houses, freight or passenger stations, or accidents at coal and water stations which do not occur directly as the result of the operation of a train or trains. Reports shall be

filed of accidents resulting in injury to employes while engaged in repairing track, work on or about bridges, telegraph and catenary wires, and the like or of any similar nontrain accident, if incapacitation is for more than three days in the aggregate during the ten days immediately following the accident. Reportable injuries to employes arising from the operation of section motor or hand cars (equipment chargeable to Account 37, Roadway Machines) shall be reported on Form UCTA-2 or by carbon copy of Form LICB-344.

(3) UCTA-7. Highway-railroad crossing at grade accidents shall be reported on Form UCTA-7, and shall be filed with the Commission or or before the 30th day of the month following that in which the accident occurred. All accidents which occur at public highway crossings and involve damage to crossing gates or flashing-light signals by a highway vehicle which does not collide with an engine or train shall be listed and reported on Form UCTA-31 at the end of each month, or, in lieu of filing such statement, the carrier may file an individual report of each such accident on Form UCTA-7. If report of an accident is submitted on Form UCTA-7, a report of the accident on Form UCTA-2 is not required. Accidents involving highway collisions between section motor cars or hand cars and highway vehicles or pedestrians at public or private highway crossing shall be reported on Form UCTA-7. All accidents which occur at public or private crossings and involve collision

between engines or trains and vehicles or pedestrians shall be reported on Form UCTA-7, irrespective of the extent of casualties or the amount of damages to carrier property.

(4) UCTA-31. Monthly reports of nontrain accidents which involved damage to crossing gates and flashing-light signals and are defined in § 33.12(a) of this Title (relating to reportable accidents) shall be reported on Form UCTA-31 and shall be filed with the Commission on or before the 30th day of the following month. In lieu of filing monthly statements on Form UCTA-31, the carrier, if it so desires, may file individual reports on Form UCTA-7 of such accidents occurring during the month.] Carriers shall make reports to the Bureau on forms which the carrier must file with the Federal Railroad Administration as prescribed by 49 C.F.R. Reports must be submitted to the Commission within the same time period as such reports are required to be submitted to the Federal Railroad Administration pursuant to 49 C.F.R.

§33.23 Reserved.

§33.31. Regulations and procedure.

Each carrier shall comply with the provisions of section [409] 2702 of the Public Utility [Law of 1937 (66 P.S. § 1178),] Code, 66 Pa. C.S. §2702 and obtain Commission approval of the construction, alteration, or relocation of every public highway and railroad crossing at grade, above grade, or below grade, unless the

Commission has given its prior unconditional consent to an abandonment of service or facilities of the line of railroad upon which such crossing or crossings are located.

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§33.42. Reserved.

§33.43. Reserved.

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§ 33.52. Reserved.

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§33.56. Reserved.

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§33.62. Locomotives.

(a) All locomotives operated by or on each of the railroads in this Commonwealth, except those specifically exempted, shall be

equipped with flush or chemical toilets [or similar devices which sanitarily dispose of human waste matter,] together with toilet paper properly protected from soil prior to use.

* * * * *

[(4) Locomotives commonly known as a "GG-1" and road switchers with or without steam generators commonly known as "EMD-GP-7", "EMD-GP9", "ALCO-RS2", and "ALCO-RS3." This exemption will terminate July 1, 1974.]

* * * * *

(f) All new locomotives of the road and road switcher type acquired, except those excluded by subsection (b) of this section, shall be equipped with [flush toilets or similar devices which sanitarily dispose of human waste matter.] flush or chemical toilets.

§33.63 Cabin cars.

[(a) All windows and door glass installed in cabin cars shall be shatterproof.]

[(b)] (a) * * *

[(c)] (b) * * *

[(d)] (c) * * *

[(e)] (d) Each cabin car in use shall be equipped with [either flashing or constant burning electric marker lights displayed to the rear. These lights shall be of such intensity and so equipped with proper lens as to be visible at a distance of

3,000 feet under normal atmospheric conditions, except that cabin cars operated exclusively during daylight hours are exempt from this requirement.] rear end markers in accordance with Federal Railroad Administration Regulations at 49 C.F.R. 221.1 et seq.

[(f)] (e) * * *

* * * * *

§33.65. Camp cars and trailers.

[(a) All screen doors on camp cars and trailers shall be self-closing and all doors shall be equipped with hardware which insures their proper manipulation, and shall be maintained in such a manner as to insure proper functioning of doors at all times. The doors shall be provided with windows having sash so constructed and maintained as to insure easy opening.

(b) All camp cars and trailers shall be properly heated and shall have adequate ventilation obtained by windows opening to the atmosphere. Such windows shall be so constructed and maintained as to insure easy opening. Both windows and doors shall be equipped with screens for use during the season when flies and insects are prevalent. The use of properly functioning air-changing and air-cooling equipment is permitted.

(c) All camp cars and trailers shall be lighted electrically and equipped with sufficient fixtures to insure adequate illumination.

(d) No room shall be designated for sleeping purposes, in any camp or trailer, which does not provide a minimum of 250 cubic feet of air space for each occupant.]

[(e)] (a) * * *

[(f) All camp cars and trailers shall be provided with adequate toilet rooms, showers, wash basins, and hot and cold running water; a minimum of one facility shall be provided for each 15 persons to be accommodated.]

[(g) All camp cars and trailers shall contain adequate individual locker space equipped for individual locking in which employes may store clothing and personal belongings.]

[(h)] (b) * * *

[(i) If employes are furnished meals in camp cars or trailers, adequate and sanitary facilities, dining space, and accommodations shall be provided.

(j) If kitchen cars are furnished, such cars shall be properly ventilated and shall be well equipped with refrigeration equipment for preserving food and adequate kitchen equipment for the preparation and serving of food. Kitchen cars shall be maintained in a clean and sanitary condition at all times.

(k) All camp cars, trailers, and kitchen cars shall be provided with an adequate supply of pure and potable water, obtained from a source approved by the Department of Health of the Commonwealth.

(l) All camp cars and trailers shall be equipped with a suitable drinking water container, a suitable container for individual paper drinking cups, and an adequate supply of paper drinking cups, toilet tissue, and paper towels. The use of a common drinking cup and a common towel is prohibited.

(m) All employers shall maintain camp cars, trailers, and kitchen cars, including the plumbing, lighting, heating and ventilating systems, and shall keep such cars in good repair, in a clean condition, and free from vermin and any accumulation of dirt, garbage, or other refuse.]

§33.66. Safety glazing in railroad equipment.

(a) Every railroad over which the Commission has jurisdiction, operating within this Commonwealth, shall provide safety glazing in all windows and doors in accordance with 49 C.F.R. in lieu of other glazing in all cars, cabin cars and locomotives used in the transportation of passengers and employes of the company, including those engaged in the operation of the equipment.

[(b) "Safety glazing material," as used in this section, shall be construed to mean any glass or transparent product manufactured or fabricated in such manner as substantially to

prevent shattering and flying of the glass or transparent product when struck or broken, and which is approved by the Commission for use in appropriate locations.

(c) One third of all equipment, to which this section applies, of each railroad shall be in compliance with the provisions of this section on or before July 31, 1975; 2/3 of such equipment shall be in compliance by July 31, 1976; and the remaining equipment shall be so equipped on or before July 31, 1977; in any event equipment not in compliance shall not be operated within this Commonwealth after July 31, 1977.

(d) Glazing material used in automotive-type railroad equipment designed for use on land highways shall be in conformance with Federal Rules and Regulations--49 C.F.R. Part 571 (relating to Federal motor vehicle safety standards).

(e) The minimum standards for glazing material used in railroad equipment, other than automotive-type equipment designed for use on land highways, shall be standards described in USAS Z26.1-1966 and in Underwriters Laboratories Standard for Safety UL972 insofar as it has been adopted as American National Standard designated ANSI SE4.5-1972, with exceptions as noted and for use in locations as set forth in subsection (f) of this section.

(f) Reference should be made to the Table 1-Page 11-Grouping of Tests-USAS Z26.1 and numbered paragraphs on pages dated June 2, 1972 ANSI SE4.5-1972:

(1) **Safety Glazing Material for use in windshields for locomotives, railroad equipment and engineman's compartments of multiple unit cars.** Glazing material for use in windshields shall have minimum properties as determined by tests listed in Item 1, Table 1 USAS Z26.1-1966.

(2) **Safety Glazing Material for use in side windows of locomotives, railroad equipment, engineman's compartments of multiple unit cars and in cabin cars.** Glazing materials for use in side windows shall have minimum properties as determined by tests listed in Item 4, Table 1 USAS Z26.1-1966, with the following exceptions:

(i) Rigid plastic material may be coated.

(ii) In lieu of the ball impact test in Item No. 4 USAS Z26.1 the material shall be qualified under Test No. 4 Multiple Impact Test; Test No. 5 Thermal Conditioning Test for Outdoor Use; and Test No. 7 High-Energy Impact Test as described on Pages 5, 6 and 7 dated June 1972 of ANSI SE4.5-1972.

(iii) That material shall be tested for abrasion resistance by testing in the manner described in Test No. 17 USAS Z26.1 except the specimens shall be subjected to abrasion for 300 cycles and the results interpreted on the basis of the arithmetic mean of the percentages of light scattered by the three abraded specimens not exceeding 5.0%.

(3) **Safety Glazing Material for use in passenger car windows and doors except for engineman's compartments in multiple unit cars.** Glazing materials for use in windows and doors shall have

the minimum properties as determined by tests listed in Items 3 or 5-Table 1 USAS Z26.1 except that rigid plastics may be coated and shall show abrasion resistance as described in paragraph (2)(iii) of this subsection.

(4) **Marking.** Marking of safety glazing material shall be in accordance with Paragraph 6 USAS Z26.1 and Paragraph 8 on Page 7 dated June 1972 of ANSI SE 4.5-1972.]

* * * * *

§33.76 [Additional trains.] Trial, temporary, additional service or service contingent upon outside funding.

[Nothing contained in §§33.71-33.77 of this Title (relating to passenger train service) shall prevent rail carriers from operating extra passenger trains, extra sections of scheduled trains, or the scheduling of additional passenger trains. If prior notification to the Commission of temporary or trial operation of such additional schedule is given. Commission approval as set forth in §§33.71-33.77 of this Title (relating to passenger train service,) will not be required for the removal or termination of such temporary or trial service, or schedule.]

Nothing contained in §33.71-33.78 of this title (relating to passenger train service) shall prevent rail carriers from operating extra passenger trains, or extra sections of scheduled trains. A rail carrier may provide scheduled additional trains or scheduled service on lines without rail passenger service. If prior notice is given to the Commission that such service is temporary, trial or

contingent upon outside funding, then Commission approval as required by this chapter shall not be required to remove the service but rather the carrier shall provide prior notice of such termination to the Commission.

If the carrier does not have a certificate of public convenience for the temporary, trial or service contingent upon outside funding; then upon prior notice to the Commission as provided above, the secretary shall issue such a certificate of public convenience for the service endorsed as for "temporary, trial or service contingent upon outside funding."

§33.77. Saving clause.

Nothing contained in §§33.71-33.77 of this Title (relating to passenger train service) shall preclude the Commission from instituting a proceeding upon complaint or upon its own motion concerning the adequacy of passenger train service rendered by any carrier in accordance with the provisions of the Public Utility [Law (66 P.S. § 1101 **et seq.**)], Code 66 Pa. C.S. 101, et seq. nor shall it preclude any railroad carrier from voluntarily filing with the Commission an application for Commission approval of the removal, elimination, or substantial change in any passenger train prior to the preparation of timetables effectuating such changes.

§33.81 Reserved.

§33.82. Reserved.

§33.83. Reserved.

§33.84. Reserved.

* * * * *

§33.91. General regulations.

(a) Each motor vehicle shall be inspected at the regular intervals prescribed by law and shall display a valid Commonwealth inspection certificate or be in compliance with the applicable reciprocity provisions of the Vehicle Code of Pennsylvania (75 [P.S.] Pa. C.S. § 101 **et seq.** Each motor vehicle shall conform with all other provisions of the Vehicle Code and laws applicable to its type and classification. **For purposes of this Section, motor vehicles shall mean any vehicle owned or operated by a common carrier railroad used to transport railroad employees. Contract carriers or brokers utilized by common carrier railroads shall be subject to the provisions of 52 Pa. Code 29.111.**

* * * * *

(j) Transportation of explosives and detonators shall conform with all appropriate provisions of The Vehicle Code of Pennsylvania (75 [P.S.] Pa. C.S. §101 **et seq.**) and the regulations of the Hazardous Substances Transportation Board of the Commonwealth. No

explosives or detonators may be carried on vehicles transporting personnel other than qualified blast men, one of whom shall be the driver of the vehicle.

* * * * *

(m) Each vehicle driver shall be at least 18 years of age and possess a valid driver's license issued by this Commonwealth for the type of vehicle used and service performed or comply with the applicable reciprocity provisions of The Vehicle Code of Pennsylvania (75 [P.S.] Pa. C.S. §101 **et seq.**). The driver shall be responsible for the safe and legal operation of the vehicle and have full authority for its control. If not more than five persons comprise the work crew, the vehicle driver may be responsible for the conduct of the passengers. If a foreman or leader is present, such individual shall be responsible for the safe and disciplined behavior of personnel while in transit.

* * * * *

§33.111. Change in status of a station.

* * * * *

(b) Subsequent to the filing of an application seeking approval of one or more of the changes listed in subsection(a) of this section, the applicant shall post due notice of the proposed change in the station involved and at three other conspicuous places in its vicinity. In addition, the applicant shall serve a copy of the application on the county, township and the city or borough where the station is located of the proposed change in the

status of the station. Notice to the public of the change in the status of the stations shall be made at the same time applicant files its application and will consist of advertising once a week for two consecutive weeks in a newspaper of general circulation in the area and contiguous to the area where the station proposed for abandonment or change in status is located.

* * * * *

§33.113. Reserved.

Subchapter C. Clearances

* * * * *

§33.129. Enforcement.

[(a) **Application.** The provisions of this section apply to violations of the Commission's regulations or orders or other law of the Commonwealth which is enforceable by the Commission. It shall not apply to the exercise of authority which a Federal agency has delegated to state enforcement personnel under section 206 of the Federal Railroad Safety Act of 1970, (45 U.S.C. § 435) or to other regulation or requirement preempted by Federal law.

(b) **Issuance of emergency order.** When a qualified safety inspector determines through testing, inspection, investigation or research that a locomotive, car, other facility or equipment of a railroad is so imminently hazardous as to present a dangerous or

potentially dangerous condition likely to result in injuries to any persons or in damage to property or in breakdown by reason of the fact that the equipment, track, locomotive, rolling stock or other facility being in violation of a law, regulation or order which the Commission is legally authorized to enforce, such inspector shall declare such locomotive, car or other facility "OUT OF SERVICE".

(c) **Action by inspector.** When an inspector declares a locomotive, car or other facility "OUT OF SERVICE", he shall affix thereto in a prominent place an "OUT OF SERVICE NOTICE" on Form PUC-BT-6. Such affixing of "OUT OF SERVICE NOTICE" shall constitute legal notice that the locomotive, car or other facility shall not be used or operated except as provided under Part IV regulations until all defects noted thereon shall be repaired. Such form shall not be removed by anyone until the defects noted by the inspector have been corrected by the railroad company, and the locomotive, car or other facility is placed in full compliance. In the case of a track or other facility for which it is not practical to affix an "OUT OF SERVICE" notice, the qualified inspector shall furnish immediate telephone or telegraphic notification to the owner of the track (in lieu of the affixing an "OUT OF SERVICE NOTICE"), describing the conditions, specific locations and defect. When an "OUT OF SERVICE NOTICE" has been affixed, the qualified inspector shall furnish Form PUC-BT-5 in duplicate by the most expeditious manner to the railroad immediately responsible for the operation of the defective locomotive, car or track. Such Form PUC-BT-5 shall indicate thereon the nature of the defects involved

which caused the equipment or other facility to be placed "OUT OF SERVICE". In addition the inspector shall immediately forward a copy of the Form PUC-BT-5 to the Secretary of the Commission, with a copy thereof to be retained by the qualified inspector.

(d) **Reduction in maximum speed of track.** When a qualified Commission inspector determines the existence of a hazardous local track condition, the inspector shall furnish immediate telephone or telegraphic notification to the owner of the track that movements within defined limits of the track must be made at a reduced maximum speed, which shall be that speed applicable to the highest FRA class designation which the inspector determines is appropriate. Within 48 hours of the telephone or telegraphic notification, the qualified inspector shall furnish Form PUC-BT-5 shall indicate thereon the full particulars of the conditions and the violations which create local safety hazards. Such conditions or violations shall be fully repaired or otherwise brought into compliance with the highest FRA class designation applicable to the speed at which trains will operate on the track in question.

(e) **Action by a railroad.** When any locomotive, car or facility of a railroad has been declared "OUT OF SERVICE", it shall be removed from service until the defect or defects are corrected. In the case of track being reduced in class, the railroad shall take the steps necessary to insure compliance with the findings of the Inspector. For the purpose of making necessary corrections, defective locomotive units, freight cars, cabin cars and passenger carrying cars may be moved to the nearest available point where the

unit can be repaired, provided that other similar units in suitable operation condition are also a part of the consist. When the defects noted on Form PUC-BT-5 have been corrected, the railroad shall complete the "Carrier Certification" portion of Form PUC-BT-5 and forward the entire form to the Secretary of the Commission at the address shown thereon.

(f) **Review.** Review shall be in accordance with the following:

(1) Upon issuance of Form PUC-BT-5, the railroad involved may request a reinspection. The Chief Engineer or an engineer designated by the Commission shall arrange for an immediate reinspection by a second qualified Commission inspector. If, on reinspection, the decision of the original inspector is sustained or modified by the Chief Engineer or an engineer designated by the Commission, the Chief Engineer or an engineer designated by the Commission shall notify in writing the railroad that the original finding is affirmed or modified. If, however, the decision of the original inspector is not sustained, the inspector shall immediately remove the "OUT OF SERVICE NOTICE", and enter an appropriate notation on the related Form PUC-BT-6; and the restrictions of the Notice shall then cease to be effective.

(2) In the event the Chief Engineer or an engineer designated by the Commission, on the basis of the reinspection, affirms or modifies the original finding, a railroad may then request complete review within 30 days of the affirmation or modification, by the

Commission, which may, after affording an opportunity for hearing, at which the inspectors shall be present, and at which other interested parties may testify, affirm, set aside, or modify in whole or in part, the actions taken. Requests for review by the Commission shall recite the facts relevant to the issuance and review of the "OUT OF SERVICE NOTICE". Actions on such reviews will be scheduled on an expedited basis in relation to other Commission business.

(3) The requirements of an "OUT OF SERVICE NOTICE" shall be effective pending action by the Commission.

(4) Requests for extension of time for compliance based on good cause will be decided by the Commission upon petition of the common carrier.]

[(g)] (a) **Penalties.** Any violation of this [section] chapter shall subject the violator to civil or criminal penalties as the [act] Public Utility Code may provide. Each day of noncompliance shall constitute a separate violation. [However, where a car or locomotive shall have been properly equipped and such equipment shall have become defective or insecure while such car or locomotive was being used by such carrier, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such equipment can be repaired, without liability for the penalties imposed by this section, if such movement is necessary to make such repairs and such repair cannot be made except at such repair

point.] The Commission may use whatever procedures it deems appropriate to enforce the provisions of this chapter. Any sections of this chapter which incorporate regulations found in 49 C.F.R. shall be enforceable pursuant to the provisions of 49 C.F.R.

TITLE 52 PUBLIC UTILITIES

Part 1 Public Utility Comission

Subpart A

Chapter 3. Special Provisions

Subchapter H. Forms

§3.551 Official Forms

* * * * *

E. APPLICATION FOR APPROVAL OF INSTALLATION, REMOVAL OR SUBSTITUTION OF PROTECTION AT PUBLIC CROSSINGS

(Public Utility [Law,] Code Section [409(b)] 2702(b)

* * * * *

F. PETITION FOR DAMAGES FOR PROPERTY TAKEN, INJURED OR DESTROYED IN A RAILROAD CROSSING PROCEEDING

(Public Utility [Law,] Code Section [411] 2704

* * * * *

5. Petitioner has been damaged in the sum of $_____ by reason of said construction, etc. for which he is entitled to be compensated under the provisions of [Article IV,] Section [411] 2704 of the Public Utility [Law,] Code and submits as Schedule B attached hereto, full particulars of his claim.

* * * * *

G. APPLICATION FOR APPROVAL OF THE CONSTRUCTION, ALTERATION, RELOCATION OR ABOLITION OF ANY CROSSING AT GRADE OR ABOVE OR BELOW GRADE

(Public Utility [Law,] Code Section [409] 2702

* * * * *

EXHIBIT "B"

Federal Railroad Administration

Railroad Safety Advisory Committee

Dark Territory Working Group
Task 10-02

December 14, 2010

Agenda

- Interpretation of the Congressional Mandate
- Formation of the Working Group
- Timelines for the Task

RSIA of 2008

TITLE I-Railroad Safety Improvements

Sec. 101
Sec. 102
Sec. 103
Sec. 104 **Implementation of positive train control**
Sec. 105
...
Sec. 110

TITLE IV-Railroad Safety Enhancements

Sec. 401
Sec. 402
Sec. 403
...
Sec. 406 **Development and use of rail safety technology**
Sec. 407
...
Sec. 412

Sec . 406 Development and Use of Rail Safety Technology

- Not later than 1 year after enactment of the RSIA of 2008... → Lagging behind
- ... prescribe standards, guidance, regulations, or orders... → NPRM, Final Rule
- ... governing the development, use, and implementation of rail safety technology in dark territory...

1. Switch position monitoring devices or indicators
2. Radio, remote control or other power-assisted switches
3. Hot box, high water, or earthquake detectors
4. Remote control locomotive zone limiting devices
5. Slide fences
6. Grade crossing video monitors
7. Track integrity warning systems
8. Other technologies as defined by the Secretary

→ **Main task:** Cover the use of these technologies by regulations

Safe Technologies for Dark Territories – Is this a New Issue?

NO! April 19, 2007: FRA Technical Conference, Informal Safety Inquiry

What technologies are being offered that are safety-relevant and pertain to railroad operations that are not already within some clearly defined regulatory program.

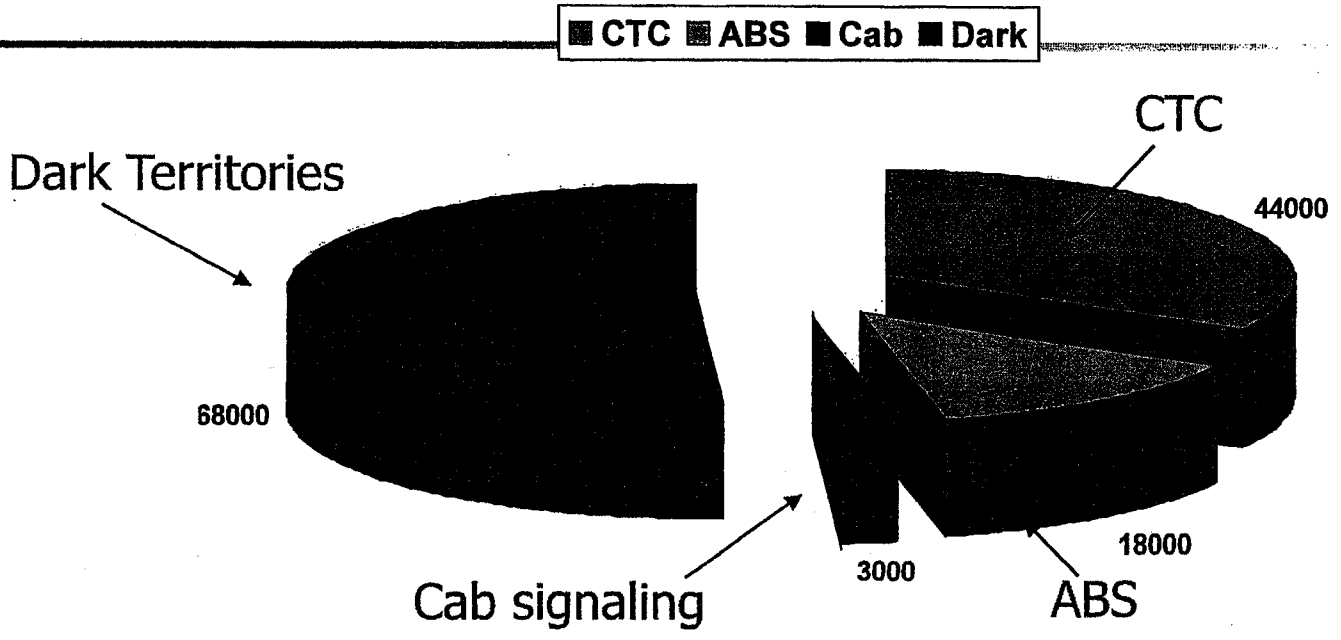
How the technology is being used. Some technology is being used in a manner other than that which the manufacturer intended.

What kind of **safety analysis** is being performed before it's introduced, what kinds of **safeguards** are being utilized to implement the technology and how personnel who are going to interact with the technology are being **trained** and familiarized with that technology.

PTC Technologies vs. New Technologies in Dark Territories: Similarities and Differences

	PTC Technology	New Technologies in Dark Territories
Is technology nature shifted (microprocessor-based, communication-based)?	Yes	Predominantly
Is voluntary participation encouraged?	Yes 49 CFR Part 236, Subpart H	Yes Not regulated.
Is implementation mandated?	Partially 49 CFR Part 236, Subpart I	No Should it be? Yet to be determined.
Performance-based regulations?	Yes	Yet to be determined.
Is safety and risk assessment set?	Yes	No Yet to be determined.

Route Mileage by Signal Control Type*



*Data from Volpe Rail Network, 1996. The network contains 133,000 route miles, of which 65,000 are equipped with some type of signal control.

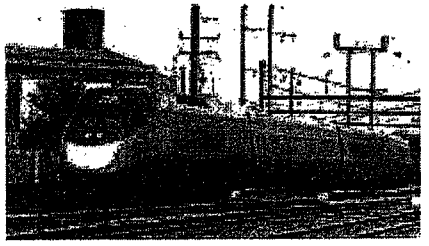
2005: 40% (62,000 track miles) – Dark Territories. 60% (92,000 mi – Signaled. 82% of total train traffic is operated on signaled trackage.

One of the primary WG tasks is to determine exact data

ZETA-TECH

Portion of Dark Territories on U.S. Railroads

	Number	Track-mi	%Dark
Class I Freight Railroads	7	140,000?	?
Intercity Passenger [Amtrak, Alaska Railroad]	2	?	?
Commuter Railroads/Agencies	22	?	?
Regional Railroads	33	?	?
Short-Line Railroads	519	?	?
Tourist, excursion, historical, etc.	?	?	?
Total Track Miles	600	200,000	40



Federal Railroad Administration

1. Switch position monitoring devices or indicators
2. Radio, remote control or other power-assisted switches
3. Hot box, high water, or earthquake detectors
4. Remote control locomotive zone limiting devices
5. Slide fences
6. Grade crossing video monitors
7. Track integrity warning systems
8. Other technologies as defined by the Secretary

Main task: Cover the use of these technologies by regulations

Type of Regulations

Prescriptive?

Maybe

Subparts A-G?

Performance-based?

Safety criterion must be set and risk assessment methodology must be created

Where does it fit? Part 236?

Subpart H?

All – to be determined

Working Group Formation

Committee Expressions of Interest were due by 1 December

The Working Group webpage is complete and to date we have received member nominations from the following Committee member organizations:

AAR	BMWE
APTA	BRS
ASLRRA	NCRMA
ATDA	RSI
BLET	NTSB

If you have not yet submitted nominations for participation please do so.

Timeline for the Working Group Task

Goal: September 30, 2011 – To report recommendations to the FRA Administrator for a proposed or interim final rule.

Meetings: Every 5-6 weeks starting February 2011, 5-6 meetings total.

Proposed date for the first meeting: Wednesday, February 16, 2011.

Scope of work and schedule is to be discussed in January 2011 and finalized during the first meeting of the Working Group.

Questions?

EXHIBIT "C"

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

IN RE:		
Bureau of Transportation & Safety, Rail Safety Division Procedural Streamlining Project	:	Docket No.
	:	**Filed Electronically**

PETITION FOR APPEAL FROM ACTION OF STAFF

The Keystone State Railroad Association ("KSRRA"), as represented by the law firm of Nauman, Smith, Shissler & Hall, LLP, hereby petitions for appeal from action of the staff in regard to its interpretation and enforcement of 52 Pa. Code § 33.126 in the above-referenced, undocketed matter,[1] pursuant to the provisions of 52 Pa. Code §§ 5.44 and 1.56(b), as follows:

1. In response to skyrocketing general assessments made against railroads in the 2007-2008 and 2008-2009 fiscal years, KSRRA initiated a study of procedures for the regulation of rail-highway crossings in neighboring states, with the goal of identifying best practices to increase efficiencies and cut assessment costs directly attributable to Commission regulation of the railroads.

2. Representatives of KSRRA met with representatives of the Commission legal staff and Rail Safety Division engineering staff for the purpose of presenting the results of its

[1] KSRRA was provided the opportunity to appeal the staff decision detailed herein in the letter from Michael Hoffman, Director of the Bureau of Transportation & Safety, Rail Division ("BTS"), dated April 28, 2011, attached hereto as Exhibit "H." A request that the Secretary's Bureau open a proceeding for purposes of this appeal is made in a separate letter to Secretary Chiavetta.

study and discussing KSRRA recommendations for streamlining certain procedures to achieve greater efficiencies in the carrying out of its mandate.

3. The joint Commission-industry effort to attempt to achieve greater procedural efficiencies within the current regulations had earlier received the endorsement of then-Commission Chairman James Cawley.

4. KSRRA received its initial Commission staff response to its recommendations, as approved by the Commission, in the memorandum attached hereto as Exhibit "B," which was sent on October 23, 2009.

5. KSRRA responded to the staff recommendations, seeking further information and clarification, in the letter dated January 13, 2010, which is attached hereto as Exhibit "C."

6. The Rail Safety Division adopted a pilot program regarding streamlined procedures on February 4, 2010, which are contained in the document attached hereto as Exhibit "D." The pilot program was scheduled to run through the end of 2010 and then be evaluated.

7. KSRRA received responses to its earlier inquiries and requests for clarification, as well as notice of the pilot program, in the letter dated February 5, 2010, attached hereto as Exhibit "E."

8. KSRRA had no objection to any provision of the pilot program as expressed in Exhibits "D" and "E."

9. The pilot program was extended to March 30, 2011. On March 15, 2011, KSRRA representatives were invited and met with Commission Law Bureau Deputy Counsel, the Director of BTS, and the new Manager of the Rail Safety Division to discuss the results of the

pilot program. At that meeting, KSRRA was presented with the document titled Rail Safety Division, Streamlined Procedures, dated March 10, 2011, attached hereto as Exhibit "F."

10. KSRRA objects to the staff's reversal from the pilot program in paragraph 4 of Exhibit "F." In that paragraph, BTS reversed its prior position that a railroad need not file an application for exemption from the Commission's regulations when construction projects involving only railroad-owned facilities were involved, such as trestles or tunnels, which would result in a greater substandard clearance to a pre-existing substandard clearance. As noted in that paragraph, BTS stated its belief that the PUC's requirements at 52 Pa. Code § 33.126 prohibit the Rail Safety Division from granting "a waiver" to railroads for substandard clearances in these circumstances.

11. Section 33.126 of the Commission regulations grandfather substandard clearances that were in place prior to the adoption of the Commission's regulations in 1946, but requires the minimum clearances to be provided whenever a building structure or facility having substandard clearances "is relocated or reconstructed." That section further provides that the Commission may grant specific requests "for the future continuance of prior clearances at such reconstructed buildings, structures or facilities, if application is made pursuant to Commission procedures."

12. Following extensive discussions, BTS agreed to reconsider its position and asked KSRRA to put its position in writing. BTS extended the effective date of the pilot program through June 30, 2011, for this purpose.

13. KSRRA stated its position on this issue in the letter dated April 7, 2011, which is attached hereto as Exhibit "G." In that letter, KSRRA reiterated its position that it was not

seeking a waiver of § 33.126, but rather a logical interpretation of that regulation under Commission precedent and the furtherance of safety-related considerations.

14. In the letter and case summaries attached as Exhibit "G," KSRRA pointed out how the Commission has traditionally used the term "reconstruction" to mean removal of the present structure and its replacement with a new structure. When track is lowered in a tunnel to achieve greater clearances, it is termed an "alteration." Lesser work than removal and replacement, such as construction of a new drainage system on a bridge, is likewise termed an "alteration" or "rehabilitation." "Repairs" are deemed to include matters such as the replacement of components of a bridge.

15. Information was provided in Exhibit "G" that in order to achieve greater overhead clearances in tunnels, either the track is lowered or the roof is raised. The track is lowered by undercutting the rock and lowering the track and ballast. The roof is raised by shaving off the liner and some existing rock and generally involves just the upper part of the roof structure.

16. Greater clearances are achieved on trestles or railroad bridges by modifying the bracing of those structural members above or immediately adjacent to the track that limit clearances.

17. The type of work to achieve greater clearances in railroad tunnels or trestles squarely falls within the term "alteration," not "reconstruction" as used by the Commission. Since this type of work does not involve "reconstruction," no approval is or should be required under 52 Pa. Code § 33.126.

18. By letter dated April 28, 2011, attached hereto as Exhibit "H," BTS rejected KSRRA's reasoning in its letter dated April 7, 2011, continuing to state that KSRRA was

seeking a "waiver" of the Commission's substandard clearance regulations. That letter also invited KSRRA to file an appeal pursuant to the provisions of 52 Pa. Code § 5.44 if it disagreed with the determination of BTS.

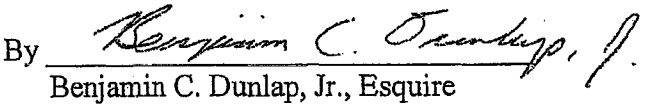
19. KSRRA's position regarding the application of § 33.126 to only "reconstructed" or "relocated" facilities is supported by the Commonwealth Court's application of this regulation to such structures in *Norfolk Southern Railway Co. v. Pa. Public Utility Commission*, 870 A.2d 942, 950-952 (2005).

20. Commission staff's interpretation of § 33.126 would do nothing to promote the Commission's primary mission of enhancing safety. The railroad work to achieve greater clearances, even if it does not meet current standards, enhances safety and would only apply when public roads or the facilities of other public utilities are not involved.

21. While doing nothing to enhance safety, Commission staff's interpretation of this regulation would merely waste Commission and railroad company time and resources for a meaningless exercise of the approval process. As such, the Commission staff's interpretation is contrary to the spirit of the effort to achieve greater procedural efficiencies within the present regulations without adversely affecting the Commission's safety mandate.

WHEREFORE, the Keystone State Railroad Association respectfully requests that this Honorable Commission reverse the decision of the Bureau of Transportation and Safety staff in regard to paragraph 4 of its proposed permanent streamlined procedures dated March 10, 2011, attached hereto as Exhibit "F" and reinstate the provisions of the pilot program as contained in paragraph 4 of the document dated February 4, 2010, which is attached hereto as Exhibit "D."

Respectfully submitted,
NAUMAN, SMITH, SHISSLER & HALL, LLP

By 
Benjamin C. Dunlap, Jr., Esquire
Supreme Court ID #66283

200 North Third Street, 18th Floor
P. O. Box 840
Harrisburg, PA 17108-0840
Phone: 717-236-3010
Fax: 717-234-1925

Attorneys for Keystone State Railroad Association

Date: May 20, 2011

VERIFICATION

I, **Benjamin C. Dunlap, Jr., Esquire**, a member of the firm of Nauman, Smith, Shissler & Hall, LLP, attorneys for Keystone State Railroad Association ("KSRRA") in the foregoing proceeding, make this verification on behalf of KSRRA, and do state that as an attorney for KSRRA, I am authorized to make this Verification on behalf of KSRRA, and further state that, based on information provided to me by KSRRA, the facts set forth in the foregoing **Petition for Appeal From Action of Staff** are true and correct to the best of my knowledge, information and belief. I understand that my statements are made subject to 18 Pa. C.S. § 4904 providing for criminal penalties for unsworn falsification to authorities.

Benjamin C. Dunlap, Jr.

Benjamin C. Dunlap, Jr., Esquire

Date: May 20, 2011

KEYSTONE STATE RAILROAD ASSOCIATION

SUMMARY/ANALYSIS OF RAILROAD-HIGHWAY CROSSING REGULATION IN SELECTED STATES AND RECOMMENDATIONS FOR STREAMLINING PA PUC PROCESSES TO REDUCE COSTS

BY
BENJAMIN C. DUNLAP, JR., ESQUIRE
NAUMAN, SMITH, SHISSLER & HALL, LLP

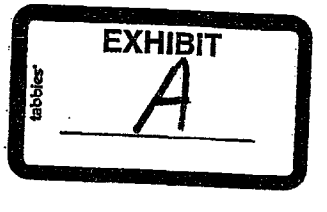
I. Overview

In response to skyrocketing assessment costs against railroads in the past two years, as well as overtures from the PUC that it is open to an examination of its procedures to achieve regulatory cost savings, Norfolk Southern, Conrail and CSX funded a study on behalf of the Keystone State Railroad Association (KSRRA). The study has two distinct parts:

(1) An examination of how Pennsylvania's neighboring states, as well as the State of Illinois, regulate rail-highway crossings. This portion of the study not only looked at the statutory provisions, but also involved discussions with appropriate highway administration or public utility commission employees as to how the states' statutes and regulations are carried out in practice.

(2) Recommendations for changes in Pennsylvania statutory provisions and Public Utility Commission staff practices to achieve lower assessments. Less PUC staff time and resources would be required if streamlined procedures are implemented, resulting in lower direct costs of regulation. The recommendations should also result in lower indirect costs for the railroads through less employee time spent on streamlined procedures.

This report deals only with those recommendations that are thought can be achieved without legislation. Any proposed legislative changes will be addressed separately. The recommendations come from discussions with CSX, Conrail and Norfolk Southern legal and engineering staffs and input from the broader KSRRA membership. The recommendations were shaped through discussions with PUC legal and Bureau of Transportation and Safety personnel, who have been most cooperative in this effort.



II. Separated Grade Crossing Regulation[1]

Delaware:

DelDOT is vested with authority over the construction of both highway over railroad bridges ("highway bridges") as well as railroad over highway bridges ("railroad bridges"). 2 Del.C. § 1804(b); 17 Del.C. § 703. According to Leo Graci, Railway Coordinator at DelDOT, Delaware has a very informal process for the construction, reconstruction or alteration of separated grade crossings. The vast majority of these are highway bridges, because the state is so flat, he said. The state will determine the need to establish a highway bridge. After determining the type, size and location of the bridge, it will then approach the participating railroad. The state generally pays the costs of construction. Del.DOT will then approach the participating railroad and enter into an agreement for the construction of the crossing. Disputes are settled by hearings conducted by DelDOT. 2 Del.C. § 1804(c).

DelDOT has the authority to order the maintenance of crossings by any party. 2 Del.C. § 1804(b). According to several DelDOT employees, the state is responsible for maintenance of highway bridges in their entirety. The highway authority is generally responsible for the substructure of railroad bridges, with the particular railroad responsible for the superstructure. When railroads have failed to maintain the superstructure of railroad bridges, DelDOT has initiated legal proceedings. Most of the roads in Delaware are under the jurisdiction of the state, with the exception of those within incorporated cities such as Wilmington, according to David Campbell, Program Support Manager, Delaware Transit Corp.

Illinois:

The Illinois Commerce Commission has authority over separated grade crossings in that state. 625 ILCS 5/18c-7401(3). The initiating party must seek the permission of the Commerce Commission to construct a new highway or railroad bridge or to alter an established crossing. *Id.*; 92 ILADC 1535.602. The process is initiated by the filing of a petition with the Commission. The Commission has authority to prescribe the terms of construction and allocate expenses among railroad, state, county, municipality or other public authority or party in interest following hearing, based upon benefits conferred. 625 ILCS 5/18c-7401(3). The Commerce Commission can order maintenance and allocate costs between the railroad, state, county, municipality or other party in interest. *Id.* According to Steve Natrisch, Chief Counsel for the Commission's Transportation Bureau, the railroad usually maintains railroad bridges and the highway authority usually maintains highway bridges.

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[1] Where Section 130 monies are used, the federal government places uniform restrictions on the costs that can be imposed upon railroads. Therefore, discussion of cost allocations in this study involves only those projects where federal funds are not used.

See expedited procedure under Illinois at-grade crossing regulation section.

Maryland:

The Maryland State Highway Administration ("SHA") has regulatory authority over separated grade crossings. Maryland Code, Transportation §§ 8-639, 8-640(b)(2). Where the separated grade crossing would eliminate a grade crossing, Maryland statutory law provides for a 75% state/25% railroad split on construction costs for both highway and railway bridges. However, according to Monica Pats, Special Assistant to the Director, Office of Structures, SHA, in practice railroads generally pay no costs for the construction or replacement of highway bridges. Where the state had proposed to eliminate an at-grade crossing by the construction of a railroad bridge, the involved railroad paid the state a set amount for the construction.

Maryland does not have a formal application process for the construction or replacement of separated grade crossings. Instead, the state and the involved railroad negotiate and enter into agreements. Glenn Vaughan, Deputy Director, Office of Structures, SHA, said that he never remembers any time that disputes were not worked out, although the negotiations are many times difficult. The process in Maryland may be more informal than in Pennsylvania, but it is not any easier, he said. The process leaves "a lot of blood on the tracks and a lot of bad feelings" in his opinion.

Maryland statutory law provides that maintenance costs for separated grade structures are split 75% state/25% railroad. However, in practice, highway bridges are maintained by the state or other highway authority while the railroad is responsible for the maintenance of a railroad bridge, according to Ms. Pats.

New Jersey:

The State Highway Department has regulatory authority over separated grade crossings in New Jersey. N.J.S.A. 27:1A-62. The DOT or New Jersey Transit Corporation is responsible for the construction and costs of new highway bridge projects. The law provides that construction costs for railroad bridges be allocated 15% to the railroad and 85% to DOT. N.J.S.A. 48:12-49.1. In practice, however, the state typically pays 100% of the construction costs of all new bridges, according to Todd Hirt, Project Engineer, Railroad Engineering and Safety Unit, NJ DOT.

New Jersey utilizes the same process as in Pennsylvania for the construction of new crossings and the alteration of crossings. A party files a petition with the DOT. A site conference is then held in all circumstances. If there is agreement among the parties, the DOT issues an Order setting forth the parties' responsibilities. If a party takes exception to the project, an exception review committee reviews the Order. If a party objects to the review committee's determination, appeal can then be taken to an Administrative Law Judge and a hearing is held. In Mr. Hirt's experience, very few matters go to the hearing stage.

The maintenance responsibility for all highway bridges is assigned to the DOT, New Jersey Transit, the county, or other public entity. N.J.S.A. 27:5G-5, 8, 9-11, 13. The railroad is responsible to keep railroad bridges in good repair. N.J.S.A. 48:12-49. The costs of enlarging, changing, reconstructing, relocating or modifying any railroad bridge are allocated 5% to the railroad and 95% to DOT. N.J.S.A. 48:12-49.1. However, the state is responsible to maintain, repair, and renew structures carrying railways over highways that were constructed or reconstructed after December 27, 1960. N.J.S.A. 48:12-75.

New York:

In New York, authority for separated grade crossings is vested in the State DOT. 61A NY Transportation Law § 14.15. According to the state's general railroad law, if a new separated grade crossing is requested by a municipality, the railroad and municipality split the construction costs 50/50. 49 NY Railroad Law § 94(2). If a new separated grade crossing is requested by a railroad, it bears the entire expense. 49 NY Railroad Law § 94(1). Changes to existing separated grade crossings under the Railroad Law are split 50% railroad, 25% state and 25% municipality. 49 NY Railroad Law § 94(3).

The construction of a highway or railroad bridge on an interstate highway is a 100% DOT expense, however. 25 NY Highway Law § 340-b. The state also has a grade crossing elimination program. See 61A NY Transportation Law § 222. It is unclear from the law how costs are allocated under the program.

The law provides for hearings by a DOT Administrative Law Judge for the construction or alteration of crossings. According to Donna Hintz, an associate attorney with the New York DOT, the hearings are held even when the parties are in agreement for such changes. An example would be when a railroad bridge was changed to a pedestrian crossing. However, according to Carl Roe, Principal Engineer-Public Projects of CSXT, hearings are not held in routine matters.

The Railroad Law provides that the railroad is responsible for maintenance of the framework and abutments of a highway bridge, and the municipality is responsible for the roadway and approaches. 49 NY Railroad Law § 93. It further provides that the railroad is responsible for the bridge and abutments of the railroad bridge, with the municipality responsible for the subways and their approaches. *Id.* The responsibility for new separated grade crossings under the Grade Crossing Elimination Act are assigned by DOT to the railroad, state or local municipality pursuant to the Highway and Railway Law. 61A NY Transportation Law § 222(6). The maintenance responsibility for both highway and railroad bridges on interstate highways is assumed entirely by the state. 25 NY Highway Law § 340-b.

In spite of those provisions of the law, in practice the highway authority generally maintains highway bridges and the railroad generally maintains railroad bridges, according to the experience of several railroads operating in New York. However, Carl Roe said that in his experience with CSXT and Conrail, railroads still have partial maintenance responsibility at most

local highway bridges in New York, except where there are agreements relieving the railroad of responsibility. Railroads also have some residual maintenance responsibility for a few older state highway bridges, he said.

Ohio:

A petition needs to be filed with the Court of Common Pleas for the establishment of a new separated grade crossing. The Court settles any preconstruction or cost disputes. Ohio RC § 4957.13-18, § 5523.05-07, § 5561.04-05. Where a grade crossing is eliminated, the costs are apportioned 85% to the government and 15% to the railroad, unless otherwise agreed upon. Ohio RC § 4957.18, § 4957.29, § 5532.08, § 5523.19, § 5561.06.

The applicable highway authority is responsible for the maintenance of highway bridges in Ohio. Ohio RC § 4957.06, § 4957.24, § 5523.17, § 5561.12. Railroads may have some residual maintenance responsibility for bridges constructed prior to 1953 on state highways, however. Ohio RC § 5523.19. Railroads are responsible to maintain the bridge and abutments of railroad bridges, and the highway authority is responsible to maintain the roadway and its approaches. Ohio RC § 4957.06, § 4957.24, § 5523.17, § 5561.12. However, a railroad may seek a cost contribution against counties and municipal corporations for the maintenance of railroad bridges by agreement or through the Court of Common Pleas. Ohio RC § 4957.06, § 5561.12.

West Virginia:

Jurisdiction for separated grade crossing construction and maintenance is under the Commissioner of Highways. WV ST § 17-4-8, 9, 17. In West Virginia, all public roads are state highways, except for municipal streets and private roads, according to Ray Lewis, Staff Engineer for Traffic Research and Special Studies in the West Virginia DOT. The state does not have much money for grade separations outside of federal funding, so most of such projects are initiated by a railroad or shipper, he said. The process is informal, with the parties having resort to circuit courts to settle disputes.

The railroad pays for grade separations for its purposes. WV ST § 17-4-8. The state pays for new grade separations to accommodate highway needs, except where an existing grade crossing is eliminated. WV ST § 17-4-9. Costs are then apportioned 90% to the state and 10% to the railroad, unless otherwise agreed upon. WV ST § 17-4-14.

The state maintains the highway, the structures supporting it and the drainage on highway bridges. WV ST § 17-4-17. The railroad maintains the tracks and structures supporting it on railroad bridges, with the state maintaining the highway and drainage. *Id.* According to Mr. Lewis, the state has 88 orphan spans that are not covered by the above statutes. In those cases, if the bridge is replaced, the railroad pays the cost it would have taken to strengthen the bridge to its original capacity, and the state pays the remaining costs.

III. Regulation of At-Grade Crossings

Delaware:

DelDOT is vested with authority over the construction of at-grade crossings. 2 Del.C. § 1804(b); 17 Del.C. § 703. No new construction is permitted on state highways except on spurs, sidings and branch lines by permission of DelDOT after need is shown. 17 Del.C. § 703(c). Most roadways in Delaware are state highways, according to David Campbell, Program Support Manager, Delaware Transit Corp.

The state has an annual program for the upgrade of crossings where Section 130 money is not available. The state generally pays for materials under the program and the involved railroad donates labor and overhead. The railroad will upgrade to state conditions regarding roadway width and surface.

The railroad is generally responsible for maintenance of the signalization at grade crossings, while the state or municipality is generally responsible for the roadway and surface of asphalt crossings. The state rarely contributes materially toward the maintenance of grade crossings, according to Mr. Grassi.

Illinois:

A party must seek permission of the Commerce Commission to construct a new at-grade crossing. 625 ILCS 5/18c-7401(3); 92 IL ADC 1535.201. The Commission has authority to prescribe the location, construction and maintenance of grade crossings. *Id.* The Commission prescribes the terms of maintenance prior to construction. The initiating party usually pays the costs for new at-grade crossings, according to Mr. Natrisch.

Costs for the alteration of grade crossings are allocated to the party initiating the change. 92 IL ADC 1535.207. The railroad is responsible to maintain, upgrade and renew signs, signals and other warning devices installed on its right-of-way. 92 IL ADC 1535.208. The railroad also generally maintains the surface, according to Mr. Natrisch.

About 80% of grade crossing matters are resolved by stipulated agreement, according to Mr. Natrisch, Chief Counsel for the Transportation Bureau at the ICC. The stipulated agreement is drafted by ICC Railroad Safety Staff, following the filing of a petition. The agreement is then sent out for execution by the interested parties. If it is agreed upon, it then goes to an ICC Commissioner for the issuance of an Order. The Railroad Safety Staff puts together the stipulated agreement to be sure that certain information is included in every agreement. Once there is apparent agreement among the parties, the railroad staff takes it from there.

The matter is then sometimes handled by conference call or sometimes just by a call to one or two of the parties to clarify certain information. The ICC Railroad Safety Staff

will call a site meeting with all in attendance only where requested or the need for such a meeting is shown. Most controversies that cannot be handled by stipulated agreement are about money, according to Mr. Natrisch. Stipulated agreements can also be used in separated grade crossing matters.

Maryland:

The Maryland SHA has authority over at-grade crossings in the state also. Maryland Code Transportation § 8-639. At-grade crossings are discouraged, but if a local government's application is permitted by the SHA, the local government pays 100% of the construction costs, according to Bob Herstein, Team Leader, Statewide Studies Team, SHA. The government usually pays for the upgrade of warning devices and crossing surfaces at established crossings. The railroad will then maintain the betterment, but does not replace crossing surfaces that are above its company's standard crossing surfaces.

The statutory law provides for a 25% railroad/75% state split of costs for grade crossing maintenance. Maryland Code Trans. § 8-642(a). However, in practice, the railroad pays for the maintenance of established at-grade crossings, according to Mr. Herstein.

New Jersey:

The DOT must approve the construction or alteration of at-grade crossings following a site meeting, evaluation and public comment. N.J.S.A. 48:2-28, 29. The process is initiated by the filing of a petition with DOT, according to Todd Hirt, Project Engineer, Railroad Engineering and Safety Unit, NJ DOT. The party establishing a new crossing pays the costs.

New Jersey statutory law provides that costs for the installation of safety devices to be allocated 5% to the railroad and 95% to the state. N.J.S.A. 48:12-49.1. However, according to Mr. Hirt, the state usually pays 100% of the costs for upgrades at established at-grade crossings.

The railroad pays for the maintenance of warning devices at grade crossings. The state pays for the upgrade of crossing surfaces or to replace crossing surfaces that are above the railroad's standard surface. The railroad pays for the maintenance of its standard crossing surfaces.

New York:

The state DOT has responsibility over grade crossings. 49 NY Railroad Law §§ 89, 90. Whenever practicable at-grade crossings are to be avoided. *Id.* The initiating party typically pays the cost for the establishment of a new at-grade crossing or the alteration of an established crossing, according to Donna Hintz, associate attorney at New York DOT.

Ms. Hintz said that the process for the establishment or alteration of a grade crossing is initiated by petition to the DOT. The DOT sets up a hearing and provides public notice. The hearing is held, at which all interested parties have the opportunity to testify. The Administrative Law Judge makes a Recommended Decision, and an Order is then issued by the DOT. The state DOT does not consider the change of a crossing surface to be an alteration requiring the approval of DOT, according to Ms. Hintz.

It is the responsibility of the railroad to maintain signs and warnings devices at grade crossings. 49 NY Railroad Law § 53a. It is the responsibility of the railroad to maintain the crossing and keep it in repair overall. 49 NY Railroad Company § 93a.

Ohio:

The construction of new at-grade crossings is disfavored in Ohio. Ohio RC § 4955.17; § 4957.27-29. However, a party can petition the Court of Common Pleas for permission to construction a new at-grade crossing. Ohio RC § 4957.30. The Court allocates the responsibilities.

The state Public Utility Commission, PUCO, has responsibility for the installation of additional warning devices at crossings. PUCO determines the work and share of costs in its order, after considering various criteria. Ohio RC § 4907.47 and 52. On existing crossings, the railroad generally pays 10% of crossing upgrades. Legislation has been proposed to give PUCO greater enforcement authority over at-grade crossings.

West Virginia:

The construction of new at-grade crossings is disfavored in West Virginia. WV ST § 17-4-9. The West Virginia Highway Department has responsibility to maintain the crossing approaches beyond the ends of the cross ties. The Highway Department is 100% responsible for the installation of safety devices, and the railroad is thereafter responsible to repair and maintain the safety devices. The railroad is also responsible to maintain the crossing surface in a safe condition. WV ST § 17-4-8.

IV. Recommendations

1. Streamline at-grade crossing applications. As noted above, some states, such as Illinois, have expedited procedures where all parties are in agreement regarding the construction or alteration of at-grade crossings. The recommendation is to change Pennsylvania's procedure to be more reflective of Illinois'. All interested parties will still receive notice of a crossing construction or alteration application, but a field conference will only be held if some party objects to the application or if the PUC staff determines that the particular circumstances of a crossing warrant it. This would eliminate the time and cost of sending PUC engineers out into the field for every application, even those involving

upgrades that are rather routine. It would also eliminate the need for railroad staff to attend as many field conferences. The PUC staff engineer would still put together a Secretarial Letter approving the application, and would work with the parties to obtain any necessary information in that regard. As is the present situation, a party would have 20 days to object to the Secretarial Letter after it is issued. If the parties cannot agree to the terms of construction or alteration, such as if a railroad objects to the proposed establishment of a new at-grade crossing, it could still request a hearing on the matter, as is the present case. In addition, final inspections should be eliminated unless some party lodges a complaint about the work, after being provided an opportunity to do so following completion of the work. It is not believed that this proposed modification of procedure would require any statutory or regulatory change, instead only the concurrence of the PUC.

2. Streamline plan approvals. Eliminate the sending of circuit plans to all parties except the PUC, unless explicitly requested and an e-mail address is provided. Much time and postage is wasted on sending circuit plans to multiple parties in crossing proceedings when very few, if any, of those parties review the plans. The proposal here is to just send location plans to the other parties and to permit such plans to be transmitted via e-mail.

   Regarding bridge plans, the railroads question the utility of having the PUC even approve bridge plans. Plans should only need to be submitted to the interested parties. If the parties are in agreement and the matter is not contrary to law, the PUC's blessing for final plans should not be necessary. If any party disagrees, it can request intervention by the PUC to resolve disputes.

   It is not believed that these procedural modifications would require any change in the statutes or regulations, only the concurrence of PUC staff.

3. Take bridge alterations outside of the PUC application process where a bridge is being replaced substantially in kind. A common example here is the superstructure replacement of a railroad bridge. If the railroad is replacing a single span structure with another single span structure having the same highway clearances, the application process should not be required. The railroad in that case should need only coordinate with the highway authority and any affected utilities. If the PUC would accept that such replacements are not truly alterations, making this change would require only a change in PUC procedures with its concurrence.

4. Allow property acquisitions to be handled outside of the PUC process where the parties are in agreement. Construction easements and property acquisitions between public utilities and governmental entities would be better handled privately, through agreement in a separate instrument for recording. It is believed that the provisions of 66 Pa.C.S. § 2702(d) provide for such alternate procedures. Where the parties cannot reach agreement, recourse could still be made to the PUC for disposition, or for transfer to a local court of common pleas for a determination of the amount of damages due under 66

Pa.C.S. § 2704(b), as is the usual case. If such agreements are with a municipal corporation, however, and are handled outside of the § 2702(b) process, they would still need to be submitted to the PUC for review under the simplified procedure of § 507 of the Code.

5. Eliminate the requirement that the railroad need to file an application for the approval of substandard clearances at crossings where only railroad-owned facilities are involved, such as with railroad trestles or tunnels. Presently the railroad has to file applications any time a crossing alteration involves substandard clearances, even if only the involved railroad would be affected by the clearances. Unless the Commission staff would agree that such alterations come within the exception of 52 Pa. Code § 33.128(b) where the existing clearances are not reduced, such a change would involve amending the overhead clearance regulations at 52 Pa. Code § 33.121.

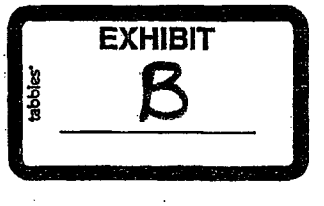
RAIL SAFETY PROCEDURES

Over the past several months, the staff and representatives of the railroad industry have been discussing ways to make the PUC rail processes more cost effective. These discussions are the result of the rail industry's concerns regarding the amount of assessments they are currently paying to the PUC. On July 14, 2009, staff from the Bureau of Transportation and Safety and the Law Bureau meet with representative of the railroad industry to discuss recommendations submitted by Benjamin Dunlap, Jr. of Nauman, Smith, Shissler & Hall, LLP, on behalf of the rail industry, for streamlining PUC rail processes. The purpose of the recommendations was to identify PUC processes that might be made more efficient to reduce costs and, hopefully, reduce railroad assessments. The report reviewed processes utilized by other states in handling rail matters and contained specific recommendations regarding areas that the rail industry believes can be streamlined. The staff recommendations, approved by the Commission, are discussed further below.

1. Streamline at-grade crossing applications. The railroad industry recommended that the PUC modify its current handling of the construction or alteration at crossings to reduce field conferences. In essence, the rail industry suggested that the PUC reduce the number of field conferences and instead, where all parties are in agreement, use a written process to review and approve an application. Field conferences occur at the beginning and at the end of the application process

    A. Field Conference at Initiation of Proceeding. A field conference at the beginning of the application process is essential and failure to conduct a field conference will hamper the assigned engineer's ability to assess the crossing and obtain timely information from all of the parties. It assists in identifying any safety problems with the crossing (i.e. warning devices, sight lines, advanced warning signs, pavement markings, etc.) that might not be available in the absence of a field conference. It provides transparency to surrounding property owners who are usually unfamiliar with the rail crossing process and deals with legitimate public concerns and questions. Holding a field conference at the beginning of the process is a necessary first step in the rail application process.

    B. Field Conference at the Conclusion of the Proceeding. A field conference at the conclusion of the proceeding is unnecessary if an enforceable



certification process exists. At the conclusion of a rail project, the parties will certify that the project has been completed and the case should be closed within 20 days, unless a party objects. The parties will be required to submit photographs of the completed project for BTS review. This will be handled as a pilot project. During the pilot project, BTS will perform spot checks to ensure that all required work has been properly completed.

2. Streamline Plan Approvals

   A. Circuit Plans – The industry recommended, and the Commission agrees, to eliminate the sending circuit plans to all parties. The PUC will receive an electronic copy and a copy will only be provided to other parties upon request. In addition, location plans will be provided to other parties electronically (via e-mail). This will be handled as a pilot project.

   B. Bridge Plans – the industry recommended that the industry not submit bridge plans to the PUC but only to other parties. The Commission has agreed to this proposal, in part. Where a rail company is replacing a bridge in kind (no change to abutments, configuration, grade, no other utilities affected, etc.), the submission of the plan to the PUC will not necessary. However, when other utilities might be affected by the replacement or the bridge is being reconfigured in some fashion, the plans should continue to be submitted to the PUC staff.

3. Allow Property Acquisitions to be handled outside the PUC process where parties are in agreement. The industry has agreed to examine this issue further and this proposal will not be implemented at this time.

4. Eliminate the requirement that the railroad need to file an application for the approval of preexisting substandard at crossing where only the railroad-owned facilities are involved, such as railroad trestles or tunnels. The industry recommended that the requirement be eliminated where there is no change to a substandard clearance. The Commission agreed to this if there is no change to the preexisting clearances and it only involves railroad-owned facilities. This may necessitate regulatory modifications or waiver or existing PUC regulations . See 52 Pa. Code §33.128(b) and 52 Pa Code §33.121. Further review of the legal issues will be required prior to implementation of this recommendation.

5. Possible Reduction of Safety Inspectors. The rail industry suggested that there might be some duplication of effort between the Federal Rail Administration and the PUC's rail inspectors. The FRA has not increased the number of rail inspectors in Pennsylvania. The FRA does have authorization to hire 300 additional employees nationwide but there has been no appropriation of money to fund these additional positions. In regard to any overlap of safety inspections, the FRA has indicated that the work plan between the PUC and FRA provides for communication between the two to avoid duplication of efforts. The Commission does not believe there is any duplication of effort and that any reduction in the PUC safety effort is unnecessary.

6. Mandatory Mediation for Contested Rail Proceedings. After a rail proceeding becomes a contested on-the-record proceeding, mediation should occur prior to the holding of a formal hearing. This might result in some cost savings because it might result in more settlements and less hearing time. This would reduce the cost of litigation for all parties. It should be noted that since mediation is consensual, parties can terminate the mediation process and proceed to a formal hearing if it appears that mediation is not assisting the settlement process. The Commission has agreed to implement this process with the clear understanding that mediation is consensual and any party can request the termination of mediation efforts if that party believes that mediation is not assisting in the efficient resolution of the dispute.

Nauman Smith
Attorneys At Law

Please Reply to:
P. O. Box 840
Harrisburg, PA 17108-0840

Benjamin C. Dunlap, Jr.
E-mail: bdunlapjr@nssh.com

January 13, 2010

Eric R. Rohrbaugh
Deputy Chief Counsel
PA Public Utility Commission
Law Bureau
P. O. Box 3265
Harrisburg, PA 17105-3265

RE: **Rail Safety Procedures**

Dear Eric:

I am writing in regard to the PUC's response to the rail industry's recommendations for streamlining PUC rail safety procedures in order to increase efficiency and lower costs, which you e-mailed to me on October 23, 2009. The thoughtfulness put into the PUC's response is appreciated. However, on behalf of the Keystone State Railroad Association ("KSRRA"), I am writing to comment and to request further clarification on a number of the Commission's responses. The numbers below correspond to those in your response for each item discussed.

1.B. and 2.A. -- When does BTS expect to initiate the pilot project for the certification process in lieu of holding a field conference when work is completed as well as the pilot project to eliminate the sending of circuit plans to all parties and the sending of location plans electronically? Will these projects be initiated through the revision of Commission regulations as part of its current Chapter 33 review or will this be accomplished more informally?

2.B. – The industry appreciates the Commission's agreement to not require the submission of bridge plans to the PUC where a rail company is replacing a bridge in kind (*i.e.*, no change to abutments, configuration, grade, no other utilities affected, *etc.*), which we presume took effect upon the sending of your response. Please confirm the effective date. However, the industry requests that the Commission reconsider whether the filing of an application should be required at all in those circumstances. The industry sees the replacement of a railroad bridge in kind as analogous to at-grade crossing repairs, when a crossing surface or the warning device equipment or circuitry at the crossing is replaced in kind, in which case applications are not required to be filed. The industry understands the PUC's position that when other utilities might be affected by the replacement or the bridge is being reconfigured in some fashion, both the filing of an application and the submission of plans to the Commission for approval are appropriate. Although it is conceded that these types of replacements are not a frequent occurrence, in the experience of the railroad engineers with whom

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I spoke, utilities are not often located on railroad bridges or affected by the replacement of such bridge structures in kind.

3. Norfolk Southern has some issues to work out with PennDOT in order to effect the recommendation that the PUC allow property acquisitions to be handled outside the PUC process where the parties are in agreement. CSXT also has some internal issues to work out. However, you today confirmed my understanding from the July 14, 2009, meeting that the Commission agreed that the provisions of 66 Pa.C.S. § 2702(b) and (d) allow amicable construction easements and property acquisitions between public utilities and governmental entities to be handled privately. This would generally be accomplished through agreement and a separate instrument for recording. The industry understands that if such agreements are with a municipal corporation, and are handled outside of the § 2702(d) process, they would still need to be submitted to the PUC for review under the simplified procedure of § 507 of the Code. Thus, while Norfolk Southern and CSXT may have some issues to be worked out prior to implementing this change, it is our understanding that the change can be implemented without further PUC involvement.

4. The Commission agreed that no application needs to be filed where there is no change to preexisting substandard clearances and where only railroad-owned facilities, such as railroad trestles or tunnels, are involved in a project. However, the response requires clarification. The industry's request was actually to not require such applications in instances where the bridge or tunnel has substandard clearances prior to construction as well as after construction, so long as the resulting clearances are the same or greater than the original clearances. Several examples in this regard can be found with CSXT's planned National Gateway Project. The project will include two railroad bridges, two tunnels, and one track lowering under a highway bridge in which the alterations will result in greater clearances than at present. Three of the projects do not implicate public roads, and but for the clearance regulations no application would be required in these circumstances. The industry had submitted that such alterations were not subject to the Commission's clearance regulations as an extension, addition or rearrangement of an existing installation, pursuant to the provisions of 52 Pa. Code § 33.128(b). However, if the Commission agrees with the concept, but thinks that it cannot be effected pursuant to § 33.128(b), then an amendment should be made to the clearance regulations at §§ 33.121 and 33.122 to exclude such alterations from the application process as part of the Commission's current review of its Chapter 33 regulations.

6. The industry concurs with the PUC's recommendation to initiate the mediation process automatically prior to the holding of a formal hearing. The industry concurs that this could reduce the costs of litigation for all parties. However, as you note, any party would have the ability to terminate the mediation process and proceed to a formal hearing at any time. How will this process be initiated?

Please contact me if you have any questions in regard to these responses or you want to discuss them further.

Sincerely yours,

Benjamin C. Dunlap, Jr.

BCDjr/jc

February 4, 2010

PROCEDURES FOR STREAMLINING THE RAIL SAFETY DIVISION

Effective Date – January 1, 2010

1. Streamline at-grade crossing applications:

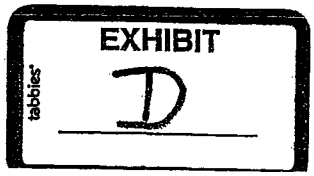
   A. Field Conference at Initiation of Proceeding – no change in procedure.

   B. Field Conference at the Conclusion of the Proceeding – This will be a pilot project where final inspections will be suspended for one year on applications involving at grade crossings. After one year this matter will be revisited.

      a. A party of record will be required to notify the Commission and all parties of record by letter certifying that all work has been completed in accordance with said Secretarial Letter or Order. The responsible party will be determined at the initial field conference.
      b. Upon receipt of written certification that the project is completed, PUC staff will send a letter to all parties giving the parties 30 days to file a written objection.
      c. If no response is received, a Secretarial Letter will be issued closing the case. After 20 days from the date of said letter, the proceeding will be marked closed.
      d. If an objection is filed with the Commission within 30 days, a final inspection will be held.
      e. Final inspections shall be made on at least 50% of the completed projects when you or another staff is holding a field conference in the general area.
      f. PENNDOT signal projects (Section 130) will require a final inspection with the exception of LED and circuitry upgrades. A 30 day staff letter will not be required on signal projects.
      g. Records shall be kept on how many cases were closed without a scheduled final inspection and whether the work was completed as directed.

2. Streamline Plan Approval

   A. Circuit Plans – Serving a copy of circuit plans to all parties of record will not be required. Parties will decide at the initial field conference as to which parties want to receive the plans. Copies of the situation plan (location plan) may be submitted to all interested parties electronically (email). Staff may receive a copy of the Situation Plan and Circuit Plan electronically for approval. If any party desires to view situation plan and/or the circuit plans, those plans will be available in the file room and on the website. This is a pilot project and records shall be kept noting any problems with this procedure. After one year this matter will be revisited.



February 4, 2010

E. Bridge Plans (Replacement in Kind) – Since the Commission is essentially expanding the definition of maintenance to include replacement in kind (no change to abutments, configuration, grade, no other utilities affected, and the work does not alter a public highway), neither PENNDOT nor the railroads will be required to submit an application with the PUC. The parties will be required to file a written notice with BTS Rail Safety, and all interested parties, that a bridge replacement is anticipated. That written notice should contain a "scope of work" description so that staff can determine whether the project is, in fact, a replacement in kind. This should provide adequate notice to parties who may have an interest in the replacement and will aid the Commission in tracking these projects during the pendency of this pilot program.

3. Allow Property Acquisition to be handled outside the PUC process where parties are in agreement – no change in existing procedure. The applicant or the affected parties will advise the Commission whether they are acquiring property amicably and/or seek to have the Commission appropriate said property.

4. Eliminate the requirement that the railroad need to file an application for the approval of preexisting substandard clearances on railroad own facilities (i.e. railroad trestles and tunnels) – Approval of substandard clearances will not be required if the proposed substandard clearance is greater than the preexisting substandard clearance but less than Commission's minimum clearance. I would note this only applies to railroad facilities that do not impact, in any way, public highways. For any rail project impacting a public highway, existing PUC practices will continue in force and effect. As further clarification, the Commission agreed to eliminate the requirement that the railroad needed to file an application for an exemption from the Commission's clearance requirements contained in 52 Pa. Code Sections 33.121 – 33.128 when the circumstances involve only the approval of preexisting substandard clearance where only the railroad-owned facilities are involved, such as trestles or tunnels. The Commission agreed to this only if there is no reduction in the preexisting substandard clearance and it only involves railroad-owned facilities. In circumstances where a substandard clearance is increased on railroad-owned facilities but is still less than the Commission's minimum requirement, an application will not be required. Alterations to substandard clearances that involve a public highway/railroad crossing will require the filing of an application for exemption of the Commission's clearance regulations. Anything beyond this may necessitate regulatory modifications or waiver of existing Commission regulations and further legal review of the issues would be required.

5. Mandatory Mediation for Contested Rail Proceedings The Commission has agreed to implement this process with the understanding that mediation is consensual.

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

FEB 22 2010

IN REPLY PLEASE
REFER TO OUR FILE

February 5, 2010

Benjamin C. Dunlap, Jr., Esquire
Nauman Smith Shissler & Hall, LLP
200 North 3rd Street
Harrisburg, PA 17101

Re: Rail Safety Procedures

Dear Ben:

I am responding to your January 13, 2010 letter regarding additional comments and a request for further clarification of the Commission's pilot project. Preliminarily, I would like to note that this is a pilot program that has been instituted by the Commission and is subject to periodic review to determine if it is both effective and properly ensures the protection of the public. If it is determined that the program is not effective or is inimical to public safety, the Commission will make changes, as necessary and appropriate. I would also remind you that any opinion or advice contained in this letter is unofficial and is not binding on the Commission, as provided for by 52 Pa. Code Section 1.96. I have, however, attempted to respond to the points you have raised in your letter.

1. B and 2.A – All phases of the pilot project were initiated on January 1, 2010. The pilot project will initially not be contained in formal Commission regulations. As you know, regulatory changes take time to effectuate. Consideration will be given to including these processes in the Commission's regulations after the Commission has had time to review the effectiveness of the pilot program. To further clarify the certification process, the Commission will direct one party to be responsible for informing the Commission, in writing, that the project was completed pursuant to Commission directives. Upon receipt of that written certification, a BTS staff engineer will send a letter to all parties of record giving those parties 30 days to file any written objection. If an objection is filed with the Commission, a final inspection will be held. I would note that in state highway projects involving signalization (Section 130 projects), the staff has determined that a final inspection will be held on all of these projects to ensure that the signals and timing are working properly. Under the original plan, the PUC staff intended to conduct final inspections of ½ of signalization projects but, in discussions with PennDOT staff, concluded that final inspections are necessary on all Section 130 projects. PennDOT has indicated there were approximately 36 signalization projects last year. Given the relatively small numbers involved, this should not significantly increase the number of final inspections that will be conducted by the staff. Regarding circuitry

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plans, the PUC will continue to receive those plans and the parties will decide at the initial field conference as to which parties want to receive those plans.

2. B. – The Commission has modified its definition of maintenance to include replacement in kind. Replacement in kind means that will be no change to abutments, configuration, grade, no other utilities affected, and the railroad project will not affect, alter or change a public highway in any way. If there is a replacement in kind, the party seeking replacement must file a written notification with BTS Rail Safety, and all interested parties, that a bridge replacement is anticipated. The written notification should contain a "scope of work" description so that Commission staff can determine whether the project is, in fact, a replacement in kind. This will aid the Commission in tracking these projects during the pilot program to determine the efficacy of the program. I would note that this process will also apply to PennDOT projects.

3. PennDOT issues regarding the acquisition of property. I do not believe this changes existing PUC processes.

4. Alteration of railroad facilities where the resulting substandard clearances are the same or greater than existed before. I would note this only applies to railroad facilities that do not impact, in any way, public highways. For any rail project impacting a public highway, existing PUC practices will continue in force and effect. As further clarification, the Commission agreed to eliminate the requirement that a railroad needed to file an application for an exemption from the Commission's clearance requirements contained in 52 Pa. Code Sections 33.121 – 33.128 when the circumstances involve only the approval of preexisting substandard clearance where only railroad-owned facilities are involved, such as trestles or tunnels. The Commission agreed to this only if there is no reduction in the preexisting substandard clearance and the project only involves railroad-owned facilities. In circumstances where a substandard clearance is increased on railroad-owned facilities but is still less than the Commission's minimum requirement, an application will not be required. Alterations to sub-standard clearances that involve a public highway/railroad crossing will require the filing of an application for exemption from the Commission's clearance regulations. Anything beyond this may necessitate regulatory modifications or waiver of existing Commission regulations and further legal review of the issues would be required.

5. Mediation – The railroad should request mediation, in writing, and should inform all parties and the Commission's mediation coordinator of the request. I have discussed this process with the Commission's mediation coordinator and that is the current process to invoke mediation.

In addition, I have also attached a memo that was sent to the Pennsylvania Department of Transportation regarding questions they had raised regarding this pilot project. I am also providing the Department of Transportation with a copy of this letter to ensure that all major participants in the pilot project are kept apprised of the implementation issues involved in this pilot.

If you have any further questions regarding this matter, please do not hesitate to contact me.

Sincerely yours,

Eric A. Rohrbaugh, Deputy Chief Counsel
Law Bureau
Pennsylvania Public Utility Commission

Pc: Michael Hoffman, Director, BTS
David Hart, Supervisor, BTS Rail Safety
Gina D'Alfonso, PennDOT

COMMONWEALTH OF PENNSYLVANIA

PUBLIC UTILITY COMMISSION

LAW BUREAU MEMO

DATE: January 28, 2010

SUBJECT: PA Dot Meeting Summary

TO: Gina D'Alfonso
Assistant Counsel-in-charge
Utility Section
Pa. Department of Transportation

FROM: Eric A. Rohrbaugh
Deputy Chief Counsel
Law Bureau

Summary of PUC/PennDOT meeting held on January 25, 2010
Re: Streamlined Rail Procedures

Based upon our discussions regarding the newly implemented Streamlined Rail Procedures, PennDOT and the PUC staff agreed to the following clarification of the recently implemented PUC pilot program to streamline PUC rail procedures:

Final Inspection at the Conclusion of a Proceeding - Notice of completion of project – The Commission will direct one party to inform the Commission, in writing, that a rail project was completed pursuant to Commission's directives. That party will be selected at the initial field conference. Upon receipt of the written certification from that party that the project was completed, the PUC staff engineer will send a letter to all parties giving the parties 30 days to file a written objection with the Secretary if a party believes that a final inspection is required. If an objection is filed with the Commission, a final inspection will be held by BTS.

Circuit Plans – Essentially there is no change to the streamlined procedures. BTS will continue to receive circuit plans but the parties, at the field conference, will decide which parties are to receive copies of the circuit plans. This is consistent with past practice and the Commission's regulations.

Bridge Plans (Replacing in Kind) - Since the Commission is essentially expanding the definition of maintenance to include replacement in kind (no change to abutments, configuration, grade, no other utilities affected, and the work does not alter a public highway), neither PennDOT nor the railroads will be required to submit an application with the PUC. The parties will be required to file a written notice with BTS Rail Safety, and all interested parties, that a bridge replacement is anticipated. That written notice should contain a "scope of work" description so that staff can determine whether the project is, in fact, a replacement in kind. This should provide adequate notice to parties who may have an interest in the replacement and will aid the Commission in tracking these projects during the pendency of this pilot program.

State Road Projects Involving Signalization - Where signals are involved, PennDOT will request a final inspection. PennDOT believes a final inspection is necessary to ensure that the installed signals work and are properly timed. Because of the safety ramifications of signalization, since the PUC has committed to have a final inspection on at least ½ of these projects during the pendency of the pilot and since the number of such projects is relatively low (PennDOT indicated there were approximately 36 signalization projects last year) an increase in final inspections should not have a significant impact on PUC staff time.

cc: Michael Hoffman, Director, BTS
David Hart, Supervisor, Rail Safety
Bohdan Pankiw, Chief Counsel

March 10, 2011

RAIL SAFETY DIVISION- STREAMLINED PROCEDURES

Effective Date – April 1, 2011

1. Field Conferences and Final Inspections:

   A. Field Conference at Initiation of Proceeding – no change in procedure. An initial field conference will be held on all cases with the exception of Wire & Pipe cases.

   B. Final Inspection at the Conclusion of the Proceeding

      i. Final inspections will be completed on all highway-rail crossing cases. In order to realize as much efficiency as possible, final inspections will be scheduled by the Rail Safety Division Manager, and conducted by a Rail Safety engineer when an engineer has another assignment in close proximity of the location of the final inspection.

2. Circuit Plans, Situation Plans and Bridge Plans

   A. Circuit Plans

      i. Railroads will not be required to serve a copy of circuit plans to all parties. Parties should stipulate at the initial field conference if the party desires to receive a copy of the circuit plan. PUC Rail Safety staff shall receive a copy of the circuit plan. Railroads can provide an electronic copy of circuit plans to all parties, including PUC Rail Safety staff. A copy of the circuit plan will be available for viewing in the PUC Secretary's Bureau.

   B. Situation Plans

      i. Railroads shall provide a copy of the situation plan (location plan) to all parties of record. Railroads may provide electronic copy of the situation plans to all parties, including PUC Rail Safety staff. A copy of the circuit plan will be available for viewing in the PUC Secretary's Bureau.

   C. Bridge Plans (Replacement in Kind)

      i. The Rail Safety Division is expanding the definition of maintenance to include "replacement in kind" (no change to abutments, configuration, grade, no other utilities affected, and the work does not alter a public highway), therefore neither PENNDOT nor the railroads will be required to submit an

application to the PUC. The parties will be required to file a written notice with BTS Rail Safety, and all interested parties, that a bridge replacement is anticipated. The written notice should contain a "scope of work" description so that staff can determine whether the project is, in fact, a replacement in kind. This should provide adequate notice to parties who may have an interest in the replacement, and it will provide the Commission with a necessary awareness of the projects.

3. Allow Property Acquisition to be handled outside the PUC process where parties are in agreement

    A. No change in existing procedure. The applicant or the affected parties will advise the Commission whether they are acquiring property amicably and/or seek to have the Commission appropriate said property.

4. Eliminate the requirement that the railroad need to file an application for the approval of preexisting substandard clearances on railroad own facilities (i.e. railroad trestles and tunnels)

    A. Approval of all substandard clearances will be required. 52 Pa. Code, Chapter 33.126 requires a railroad to obtain approval from the PUC for a substandard clearance.

        i. For the 2010 pilot project, the Commission had agreed to eliminate the requirement for railroads to file an application for an exemption from the Commission's clearance requirements contained in 52 Pa. Code Sections 33.121 – 33.128, when the circumstances involved the approval of a greater substandard clearance to a preexisting substandard clearance where only the railroad-owned facilities are involved, such as trestles or tunnels. The Commission agreed to this only if there is no reduction in the preexisting substandard clearance and it only involves railroad-owned facilities. However, it is believed that the PUC's requirements at 52 Pa. Code, Section 33.126, prohibits the Rail Safety Division from granting a waiver to railroads for substandard clearances involving railroad-owned facilities.

5. Mandatory Mediation for Contested Rail Proceedings The Commission has agreed to implement this process with the understanding that mediation is consensual.

140th anniversary
Nauman Smith
Attorneys At Law

Please Reply to:
P. O. Box 840
Harrisburg, PA 17108-0840

Benjamin C. Dunlap, Jr.
E-mail: bdunlapjr@nssh.com
Telephone Extension 21

April 7, 2011

Via Electronic Mail
Confirmed First Class U.S. Mail

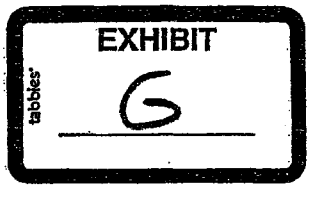
Michael Hoffman
Director, Bureau of Transportation and Safety
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Dear Mike:

I am writing in followup to our March 15, 2011, meeting regarding the proposed permanent procedures in the document titled "Rail Safety Division – Streamlined Procedures, Effective Date – April 1, 2011" following the year-long pilot project conducted by the Bureau of Transportation and Safety ("BTS"). Joe Gerdes and I attended that meeting on behalf of the Keystone State Railroad Association ("KSRRA") and also in attendance were Rod Bender and Eric Rohrbaugh.

At the meeting, I took issue with Item 4 in the Streamlined Procedures document. The proposed change from the pilot project in that item would require approval of all substandard clearances. As noted in item 4, the Commission had agreed in the pilot project to eliminate the requirement for railroads to submit an application for an exemption from the Commission's clearance requirements contained at 52 Pa. Code §§ 33.121-33.128 when the circumstances involved the approval of a greater substandard clearance where only railroad-owned facilities are involved, such as trestles or tunnels. The Commission agreed to this only where there was no reduction in the pre-existing substandard clearance and it only involves railroad-owned facilities.

Your explanation for this change was that BTS had determined that the Rail Safety Division was prohibited from granting a waiver to railroads for substandard clearances involving railroad-owned facilities under the requirements of 52 Pa. Code § 33.126. As stated at the meeting, I agree that the Rail Safety Division cannot unilaterally grant a waiver of this or any other Commission regulation. However, we do not consider the railroads' position on this issue, as adopted in the pilot project, to be a waiver of 52 Pa. Code § 33.126, but rather a logical



interpretation of that regulation under Commission precedent and the furtherance of safety-related considerations.

You had asked for a written explanation of our legal position, as well as additional information regarding the type of work that is performed in order to achieve greater clearances at railroad tunnels or trestles. You had also extended the effective date of the pilot project through June 30, 2011, to provide us the opportunity to supply this information and for BTS to reconsider its position, which is appreciated.

The relevant provision of the Commission's regulations, 52 Pa. Code § 33.126, provides as follows:

> Except as otherwise provided in this subchapter, if overhead or side clearances between a track and any building, structure, or facility are less than the minimum prescribed in this Subchapter, but were created prior to the adoption of such provisions such minimum clearances shall be provided whenever such a building, structure, or facility is relocated or reconstructed. However, the Commission may grant specific requests for the future continuance of prior clearances at such reconstructed building, structures, or facilities, if application is made as provided in § 33.127(b) (relating to exemptions).

This provision provides that where substandard clearances existed prior to the adoption of the Commission's clearance regulations in 1946, the minimum required clearances must be provided whenever such a building, structure or facility is "relocated or reconstructed." If required clearances are not achieved when a building, structure or facility is "reconstructed," then application must be made for the continuance of any substandard clearances. As the tunnels and trestles at issue are not being "relocated," the trigger requiring an application for the continuance of substandard clearances for these facilities is when they are "reconstructed."

We have looked at how the Commission uses the term "reconstruction" and related terms in prior proceedings. The cases cited in the enclosed memo support my statement at our meeting that the Commission has traditionally used the term "reconstruction" to mean removal of the present structure and its replacement with a new structure. When track is lowered in a tunnel to achieve greater clearances, as was done in the *Delaware and Hudson Railway Company* case cited, it is termed an "alteration." Lesser work than removal and replacement, such as construction of a new drainage system on a bridge, is likewise termed to be an "alteration" or "rehabilitation." "Repairs" are deemed to include matters such as the replacement of the components of a bridge.

As you requested, I spoke with railroad engineers to get a better idea of the type of work that is performed in railroad tunnels and trestles to achieve greater clearances. I spoke with Tom Bracey and Kevin Hauschildt of Norfolk Southern as well as Sean Markey of AECOM, who is a principal engineer for CSX's current National Gateway clearance project.

They agreed that in order to achieve greater overhead clearances in tunnels, either the track is lowered or the roof is raised. The track is lowered by undercutting the track and lowering the ballast by undercutting the rock underneath it. The roof is raised by shaving off the liner and some existing rock. This generally involves just the upper part of the arch.

Greater clearances are achieved on trestles or railroad bridges, which are generally thru truss structures, by modifying the vertical members above the track that interfere with clearances. It involves simply modifying how a couple of members are braced.

This type of work squarely falls within the term "alteration," not "reconstruction" as used by the Commission. Since this type of work does not involve "reconstruction," no approval is required under 52 Pa. Code § 33.126 when these facilities are altered to achieve greater clearances that still do not meet the clearance requirements for new or reconstructed structures.

The regulations, in other words, require a railroad to explain why substandard clearances are required and obtain permission for them only when a new or reconstructed structure is built.

Not only is the railroad's interpretation of this regulation congruent with the Commission's own use of terminology, but also makes sense from a practical standpoint. As you agreed at the meeting, railroad work to achieve greater clearances, even if it does not meet current standards, enhances safety. An interpretation of the Commission's regulations that would require railroads to obtain approval for greater substandard clearances in these situations would do nothing to promote the Commission's primary mission of enhancing safety, but would instead merely waste Commission and business time and resources for a meaningless exercise.

We hope that this provides sufficient information and support for the Commission to reconsider its position on this issue and revert to the position taken in the pilot project. We have noted that the Proposed Rulemaking Order entered April 1 does not address this issue. We do not think that the Rulemaking Order needed to address the issue, as we are not asking for a change in or waiver of the Commission's present regulations. However, if BTS determines to the contrary, we will address this in our comments to the Proposed Rulemaking Order. Therefore, we would appreciate a response to this letter with BTS's position on the issue prior to the deadline for comments to the Proposed Rulemaking Order.

Please do not hesitate to contact me if you have any further questions or would like to discuss this matter further.

Sincerely yours,

Benjamin C. Dunlap, Jr.

BCDjr/klf
Enclosure
cc: Rodney D. Bender, P. E., Manager, Rail Safety Division
Eric Rohrbaugh, Deputy Chief Counsel, PUC
Gina D'Alfonso, Esquire, PennDOT
Joe Gerdes, KSRRA

APR 29 2011

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
BUREAU OF TRANSPORTATION AND SAFETY
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

April 28, 2011

Benjamin C. Dunlap, Jr.
Nauman Smith Shissler & Hall, LLP
P.O. Box 840
Harrisburg, PA 17108-0840

Re: Rail Safety Procedures

Dear Ben:

I am responding to your April 7, 2011 letter regarding the additional information and comments that you provide about the Bureau of Transportation and Safety's (BTS) Rail Safety Division's Streamlined Procedures document. In particular your letter addresses the Bureau's revision to Item 4 in the Streamlined Procedures, which would require Commission approval of all substandard clearances beginning on April 1, 2011. At the meeting on March 15, 2011, attended by Joe Gerdes, you, Eric Rohrbaugh, Rodney Bender and me, I agreed to extend the effective date of the pilot project to allow the Keystone State Railroad Association to provide additional information for BTS to consider in its evaluation of Item 4.

As you know, during 2010 the BTS' Rail Safety Division conducted a pilot project of the streamlined procedures that were made effective on January 1, 2010. The purpose of the pilot project was to allow the Bureau to evaluate the streamlined procedures in order to determine whether these procedures should be made permanent. In January of 2011, I notified you that the pilot project would be extended until March 31, 2011, while the new Rail Safety Manager, Rod Bender, and I had sufficient time to evaluate the pilot project results.

During Manager Bender and my evaluation of Item 4 in the Streamlined Procedures document, we concluded that the Rail Safety Division was prohibited by 52 Pa. Code, § 33.126 from granting a waiver to railroads for substandard clearances. After reviewing your comments in your April 7 letter, as well as the other information attached to the letter, I continue to believe that 52 Pa. Code, § 33.126 prohibits the Rail Safety Division from granting a waiver for substandard clearances.

Therefore, I will be seeking the Commission's approval to make the Rail Safety Division's Streamlined Procedures permanent. I will notify you of the effective date.

The Bureau of Transportation and Safety will request the Secretary's Bureau to provide each Railroad that is currently providing intrastate transportation service with a copy of the Streamlined Procedures document when finalized.

Should you disagree with this determination, you may file an appeal from the action of staff pursuant to Section 5.44 of the Pa. Code, 52 Pa. Code Section 5.44.

Please feel free to contact me if you have any questions.

Sincerely,

Michael E. Hoffman, Director

Pc: Eric Rohrbaugh, Deputy Chief Counsel, Law Bureau
Rodney Bender, P.E., Manager, Rail Safety Division
Reading

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

IN RE:		
Bureau of Transportation & Safety, Rail Safety Division Procedural Streamlining Project	:	Docket No.
	:	**Filed Electronically**

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of May 2011, I served one (1) copy of the Petition for Appeal From Action of Staff of the Keystone State Railroad Association in the above action, this day by depositing the same in the United States mail, postage prepaid, in Harrisburg, Pennsylvania, addressed to:

Eric A. Rohrbaugh
Deputy Chief Counsel
PA Public Utility Commission
Law Bureau
P. O. Box 3265
Harrisburg, PA 17105-3265

Michael Hoffman, Director
Bureau of Transportation & Safety
PA Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17105-3265

Date: May 20, 2011

Jeannette Chelgren

Jeannette Chelgren, Secretary to
Benjamin C. Dunlap, Jr., Esquire