

Decision 89 02 032 FEB 8 1989**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's
own motion into the operations and
practice of SOUTHERN PACIFIC
TRANSPORTATION COMPANY, a
corporation.

FEB 14 1989

I.85-01-002
(Filed January 3, 1985)

In the Matter of the Application
of Southern Pacific Transportation
Company for Authority to Deviate
from the Provisions of General
Order Number 118 on a portion of
its White Hills Branch in Santa
Barbara County, CA.

Application 85-03-052
(Filed March 12, 1985)

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O P I N I O N

Comments on the Proposed Decision
of the Administrative Law Judge

As provided by Public Utilities (PU) Code § 311, the proposed decision of Administrative Law Judge (ALJ) John B. Weiss was served on the parties. After requesting, pursuant to Rule 77.2 of the Commission's Rules of Practice and Procedure, and being granted, extensions of time to make comments, both the Commission's Transportation Division and the United Transportation Union (union) submitted comment. Southern Pacific Transportation Company (SP) submitted no comment, but after similar extension of time, did submit response to those comments.

The union in its comment contends that the ALJ went beyond his authority when he analyzed and interpreted General Order (GO) 118 in his decision. We cannot agree. The principal purpose of this investigative proceeding was to determine whether SP was in compliance with various provisions of the General Order. Each party to the proceeding, including staff, had its own conception of what the General Order required, and in order to decide whether there was compliance it was first necessary for the ALJ to determine, in this first impression case, what the general order actually requires. And to weigh the contradictory assertions of the parties it was both appropriate and necessary to review, using the record and notes preserved in the 1963 Case 7306 file, the circumstances, events, and negotiations (i.e., the "legislative history") leading to GO 118 and the subsequently-filed standards. Over the years this Commission's hearing officers in complaint, application, investigative, etc. proceedings necessarily and regularly have had to analyze and interpret not only our general orders, but also the PU Code and other statutes to determine intent, meaning, purpose and consideration.

While the union may not agree with the ALJ's proposed interpretation of GO 118, its argument that his approach in the proposed decision exceeds "the permissible limits of authority to investigate (an) OII" must fail because in any investigation of compliance with a general order it necessarily must first be determined what the general order requires. Of course, this does not mean that the views of the ALJ will always coincide with those of the Commission.

Staff asserts that if we do not adopt staff's interpretation of the General Order, the "safety umbrella" previously afforded will be reduced. SP replies that the ALJ's interpretation is based on a fair reading of the language and history of GO 118.

While different parties may have different ideas regarding the interpretation of a general order, only the Commission or the courts can ultimately decide what a general order means. If the general order is clearly drafted, our task is easy. But where, as here, the language of a general order is ambiguous, the Commission's task is harder. We note that an interpretation can only prevail if it is consistent with the language and intent of the general order.

Both staff and union object that the proposed decision would now inject a "grandfathering" concept into the general order. In 1963, when the Commission adopted the final compromise version to be its General Order, a key feature of the compromise was that a future date certain for compliance was omitted, and compliance was left for future construction and reconstruction, when such should occur, except in all switching areas where a substantial amount of switching is performed, along main, branch, and industrial trackage. For such areas a walkway improvement program was mandated. To the extent that compliance by a certain date was not required for all trackage, GO 118 could be read as allowing existing walkway conditions to continue until either walkways are

constructed or reconstructed, or until compliance is required by implementation of a railroad's Paragraph 6 obligation to improve its walkways in certain areas. Some might characterize this as "grandfathering."

Our own D.86-02-58, ____ CPUC 2d ____ (1986), paved the way for such a mischaracterization. There we stated that:

"Substantially the same grandfather provisions relative to the reconstruction of walkways found in GO 118 are also found in GO 26-D."
(Slip Opinion, at page 16.)

Since D.86-02-58 focused on GO 26-D rather than GO 118, perhaps we did not discuss GO 118 as carefully as we should have. While it is true that both GO 118 and GO 26-D allow certain non-complying conditions to continue until construction or reconstruction occurs, since both refer in their preambles to the need to "hereafter" observe the walkway or clearance standards, only GO 26-D has anything like a real grandfather clause. Section 15 of GO 26-D provides that minimum clearances must be provided whenever buildings or other structures lawfully constructed prior to GO 26-D are relocated or reconstructed. This clearly implies that compliance is not required until such relocation or reconstruction. GO 118, however, provides in Paragraph 6 for a program of improvement designed to bring walkways in certain switching areas and along main, branch, and industrial trackage into substantial conformity with the general order. Here, the implication is that railroads must improve walkways in certain areas even though no construction or reconstruction occurs. There is no provision for relatively permanent non-compliance, as is the case with GO 26-D. Thus, while immediate compliance with walkway standards along all tracks is not required, Paragraph 6's requirement for a program of improvement means pre-existing walkway conditions in areas subject to that program must eventually be brought into substantial conformity with the standards. Today's decision will reflect this requirement.

Staff and the union restate their position that the walkway standards are "minimum standards." The general order itself does not mention "minimum standards." The standards filed by the railroads, however, contain track cross-section and plan-view diagrams which specify minimum walkway lengths and widths. Every distance specified in standards 1 through 6 is followed by the word "minimum," or the abbreviation "min."

The preamble to GO 118 requires railroads to observe the standards they filed in compliance with the general order. Whether the "minimum" distances set forth in the standards filed by SP are considered "minimum standards" or "minimum measurements contained in 'reasonable' standards" makes no difference in terms of the compliance required. SP must observe the walkway standards it filed in compliance with GO 118. Today's decision will reflect this reasoning.

Staff restates its position that Paragraph 6 of the General Order requires a program of improvement along trackage outside switching areas. Paragraph 6 states that railroads "...shall pursue a program of improvement of walkways in all switching areas where a substantial amount of switching is performed, along its main, branch and industrial trackage..." Our task would be easier if GO 118 simply stated that the railroads "...shall pursue a program of improvement of walkways along all trackage...", or had simply omitted the phrase ", along main, branch and industrial trackage." The absence of such simple language renders Paragraph 6 susceptible to either the interpretation of the staff or of the railroad. Where a statute, or a general order, is ambiguous, the Commission must, under the rules of statutory interpretation, adopt an interpretation designed to further the intent of the body whose rule is being interpreted. Here, the Commission's intent was to protect workers. (See, Re. Union Pacific Railroad, 6 CPUC 2d 196, 205 (1981); see also, D.83-10-030 and D.86-02-958.) The rules of statutory construction

also require that regulations be consistent with the statutes they implement. PU Code §§ 761, 762, and 768, the statutes GO 118 implements, are intended to promote safe utility operations and to protect utility employees and the public.

After a thorough review of the history surrounding the adoption of GO 118, the actual language of GO 118, the legislation GO 118 implements, and the prior Commission decisions regarding GO 118, we find that staff's safety oriented interpretation is consistent with the language and purpose of the general order.

On the other hand, SP's interpretation of Paragraph 6 is also consistent with the actual language of that paragraph, and the record suggests that SP believed that the compromise language it bargained for reflected that interpretation.

Given the ambiguous nature of Paragraph 6, we find it necessary to initiate a proceeding to clarify the railroads' responsibility for improving walkways along tracks in existence when GO 118 was adopted. We hope that staff, the railroads, and railroad workers and their representatives will be able to cooperatively develop a program which requires the improvement of the most dangerous walkways first and aims at developing cost effective solutions for correcting walkway hazards.

Staff also urges that segments of the roadbed and walkways have been constructed or reconstructed, and that GO 118 standards apply to those walkways. Mr. Mahon testified that in his 17 years of overseeing maintenance of way on this branch line there has never been a continuous walkway along the south side, but that there were segments of walkways which his crews incidentally constructed when replacing track ballast and subgrade lost to ditch overflow and hill runoff during recurrent seasonal storms. While these maintenance activities were not designed to provide a continuous south side walkway, to the extent they resulted in the construction of new walkways or the reconstruction of existing walkways they invoked the preamble to GO 118. The preamble

requires railroads to "hereafter, on the construction and reconstruction of its tracks and walkways, observe its standards filed with the Commission in accordance with the provisions of this order." (Emphasis added.) Staff is, therefore, correct. The proposed decision has been amended to reflect this fact.

Staff's observation that the ALJ's determination that a particular switch area standard does not apply at derails is based solely upon evidence of the White Hills operation is well taken. The circumstances of other derail switches in other locations should be kept open for examination to determine the extent of activities actively occurring there and what standard should apply there. The findings have been amended to reflect this limitation.

We also amend the findings of fact to limit the deviation authority until construction or reconstruction of the branch line or its adjacent walkway area or an appreciable segment is undertaken. The deviation authority is also amended to reflect the fact that because SP states that there are complying walkways south of Switches 2584 and 2587 and east of Switch 2584, there is no need to grant a deviation for those areas.

Ordering Paragraph 2 is amended to more precisely reflect the fact that the order is directed to the railroad company.

Our interpretation of GO 118 requires a number of additional changes to the ALJ's proposed decision.

Statement of Facts

Southern Pacific Transportation Company (SP) is a wholly owned subsidiary of the Southern Pacific Company, providing railroad services primarily in the western and southwestern areas of the United States. The SP rail system comprises approximately 12,000 track miles and related facilities utilized principally for freight service. In California it operates 1,230 miles of branch lines alone, and the Surf-Lompoc Branch, completed on July 1, 1899, is a segment of this branch trackage.

The Johns-Manville Corporation (J-M) mines, processes, and ships diatomaceous earth from deposits located at White Hills, east of the Vandenberg Air Force Base in Southern California.¹ To accommodate this freight opportunity, SP in 1923 constructed a 3.7-mile branch line, the White Hills Branch, to the J-M plant from White Hills Junction on its then existing Surf-Lompoc Branch Line. The White Hills Branch Line ascends from an elevation above sea level of 109 feet at the White Hills Junction to 429 feet at the J-M plant, rising on a consistent 3% grade as it approaches the J-M plant entrance.

Over the years SP's only customer on the White Hills Branch has been J-M. Initially, when the branch was constructed, virtually the entire plant output was moved by rail. But because of the relatively high bulk and low density of diatomaceous earth it is well adapted for truck shipment, and over the intervening years to date an ever-increasing proportion of the plant output has shifted from rail to trucks. In a past five-year period alone the number of rail cars shipped dropped from over 5,000 annually to 2,148 (in 1984). By April 1986 SP was operating only one short train (approximately 10 cars) per day. Such decreasing volume of train operations does not cause significant deterioration of track. Consequently, apart from minor rail repairs in 1967 to scattered areas of the branch, the branch has not received extensive tie or rail renewal, and is still largely made up of original materials.

1 Diatomaceous earth is the siliceous remains of diatoms, minute prehistoric fresh or salt water creatures. Mined, dried, crushed, and sized, its primary use is as a filtration agent in the processing of beer, wine, and food and in pharmaceutical manufacturing. It is also used as a soft abrasive, and as a filler or extender in paint, paper, plastics, and insecticides. A relatively high-bulk low-density commodity, it is mined and produced in many countries. The United States accounts for about 38% of world production.

Pursuant to provisions of the California Constitution (see Const. Art. 12 § 23 (repealed; see, now, Const. Art. 12 §§ 3 and 5) and the Public Utilities (PU) Code (see PU Code §§ 701, 702, 761, 762 and 768)), this Commission, originally known as the Railroad Commission, since 1911 has regulated railroad operations in the State, with increasing emphasis in safety matters. In 1961, numerous complaints of poor footing conditions in railroad walkways, conditions resulting in slipping, tripping, and falling accidents to railroad workers - both while getting on and off equipment and while otherwise performing their required duties - led, after extensive consultations between staff, carriers, and unions, to the adoption on April 9, 1963 of Commission General Order (GO) 118 to govern the construction, reconstruction, and maintenance of walkways adjacent to railroad trackage, and the control of vegetation adjacent to the trackage (see Appendix A for the full text and standards applicable). On May 3, 1963, in response to the requirement contained in § 1 of GO 118, SP filed with the Commission its walkway standards. GO 118 continues in effect today.

In fulfillment of its duty, prior to 1978 the Commission's Operations and Safety Branch made general surveys which covered large segments of a railroad's trackage, including industrial spurs, attempting to identify safety conditions and determine compliance with GO 118. In 1978 this practice had to be discontinued because of staff reductions. However, on April 3, 1979, three copies of one of the last of these general surveys completed, survey L74 applicable to SP's operations between San Luis Obispo and Santa Monica, were sent to Mr. DeMoss, SP's vice president and general manager, requesting corrective action. One of the items applied to the White Hills Branch. It read:

**1089. Main Track: Near 10 car and 25 car markers, walkway is eroded to ends of ties in several areas. Reasonably level walkways per Standard 4, GO 118, should be provided."

Thereafter, random and smaller area surveys on the SP system were made, as well as follow-ups on prior general survey open items. With regard to Item 1089 on the White Hills Branch, inspections were made May 12, 1981,² August 21, 1981, and August 17, 1982. The area involved is the last half mile of the White Hills Branch track leading to the J-M plant, from the point near Miguelito Road, where the asphalt private approach road of J-M crosses the branch track, to the J-M plant gate. Road and track are parallel in this area. On its south side the track follows adjacent to the base of a hill as the track ascends through a narrowing canyon defile leading to the plant gate. East of the gate this canyon debouches upwards into the plant area, and the first (#2584) of a series of switches detaching spur tracks off the branch line is encountered about 75 feet below and outside the gate. These spur tracks fan off to serve various parts of the sprawling plant facilities inside the gate (See Appendix B map).

Staff made a number of informal contacts through SP's engineering department in efforts to resolve the walkway problems listed in Item 1089. However, the efforts produced only the response that SP was considering possible installation of a covered drain on the south side of the track in this area. Then in July of 1982 staff learned that SP might seek a deviation from the standards for the south side of the track, and limit walkways to the north side of the track.

On August 5, 1983, while detraining during daylight in clear weather from the caboose of a six-car empty freight trains

2 The May 12, 1981 photos depicted the south side of the branch track leading to the plant entrance, focusing on an area extending to the west approximately 300 feet beyond the original location of a derail switch 50 feet west of Switch 2584. An eroded gully or ditch 2 feet deep by 2-1/2 feet across had been cut out at the base of the bluff by swiftly coursing runoff water in what ordinarily might have been a walkway path.

travelling at 5 mph ascending into the plant area, a brakeman slipped and fell, injuring both knees and right elbow. The precise area of the fall was not ascertained, although it was believed to be in the vicinity of Switch 2584.

Eight months later, on April 16, 1984, staff investigated the incident. The investigation disclosed what staff characterized as "deeply eroded walkways on both sides of track for 1/2 mile west of switch."³ Frustrated by its belief that SP was completely ignoring staff's recommendations, and by concern that the situation represented a hazard to crewmen on foot in that switching area, staff concluded it would have to recommend to the Commission an Order Instituting Investigation (OII/I.) to get action.

However, in a final effort to resolve the matter, staff members Hunt and Privette, accompanied by staff attorney McKenzie, on December 26, 1984 went to see SP's general manager for its Southern Region, Bredenberg. His staff on holiday leave, Bredenberg received them alone. Bredenberg testified that he was left with the impression that SP was in clear violation of a GO; that walkway hazards rendered the White Hills Branch unsafe for rail employees; that the Commission would issue an OII wherein staff would ask that the branch line be taken out of service - shut down - until walkways were constructed; and that SP would be required to pay heavy punitive fines. Bredenberg further testified that he was given to understand by staff that, provided SP restored walkways and installed a drain pipe as previously considered, staff would recommend lifting the OII and that SP might avoid payment of

3 These 1984 photos depicted the same type of eroded ditch on the south side of the track at the base of the bluff, but extending about 800 feet west of Switch 2584, as was depicted in the May 12, 1981 photos (see Footnote 2). These photos also showed some walkway surface displacement and deterioration on the north side of the track, obviously the effect of water runoff.

punitive fines. Unfamiliar with the requirements of GO 118 and without knowledge of such problems at White Hills, Bredenberg heard staff out, and promised to have his staff look into the matter after the Christmas leave. He stated he would have a response after a week.

On January 2, 1985, two staff members made an unannounced late-in-the-day visit to the plant entry area to observe switching operations and take photos. They observed a 2-engine, 10-car train descend from the plant and stop west of Switch 2587,⁴ and then engage in switching operations. Two trainmen on the ground were both on the south side of the track. One remained in the background on the south side of the track inside the plant area. The second remained across the track from Switch 2587 (which is on the north side of the track), after crossing the track to align the switch and then returning to the south side to pass lantern signals to the engineer in the engine. Staff observed switching as the train moved back and forth with cars being shoved from Switch 2587 unto various tracks to the east inside the plant. Prior to any eastward movement of a car from Switch 2587, the brakeman on the ground gave lantern signals from his location on the south side of the track. Staff concluded that it was not possible to pass lantern signals to the engineer's side of the cab of the locomotive, except from the south side of the track, because of the track curve.

That same January 2, 1985 afternoon staff took photos of the area around Switch 2587 and westward beyond the derail switch approximately 150 feet away. These showed some deterioration of footing conditions north of the track apparently caused by runoff

4 Switch 2587 is the second track switch encountered when entering the plant area. It is situated about 100 feet east of Switch 2584.

water downhill from the J-M plant. On the south side of the track, across from Switch 2587, there are the shallow beginnings of a ditch being scoured out along the base of the bluff, although from Switch 2587 to the derail switch on the south side, footing appears adequate. But beyond the derail switch, the ditch at the base of the south bluff denies any footing area as the bluff constricts the space between it and the track to the westward. One photo shows water in this ditch.

Meanwhile, Bredenberg's operations people had inspected and reported back to him on White Hills. They told him that generally there were good walkways on the north side of the track, but problems on the south side. They recommended relocating the derail switch west of Switch 2584 to the north side of the track; use of radios for switching in that area; a possible scaling back of the bluff on the south side to allow room between the bluff and the track for installation of drainage pipe and provision of a level walkway. Bredenberg passed these to SP's engineering department for consideration.⁵

On January 4, 1985 staff's Hunt telephoned Bredenberg for his response to the December 26 visit, and was told of the recommendations Bredenberg had received, that these had been passed to engineering, and that SP would be able to do something. Hunt asked to receive a copy of any SP construction schedule, telling Bredenberg that the problem was now a legal matter. Bredenberg, it developed, was not aware that the day before (January 3, 1985) the Commission had issued this OII, with hearing to begin March 12,

5 At that point in time, construction, maintenance of way and other engineering functions were not part of an SP regional general manager's responsibility. In other railroads general managers had such responsibility. On August 1, 1985, in anticipation of the Santa Fe merger (a company where the latter practice obtained), SP's general managers were given supervision over engineering functions.

1985, to determine: whether SP was complying with GO 118; whether a cease and desist order should issue, and whether fines should be assessed.

After his conversation with Hunt, Bredenberg learned from SP's assistant vice president for maintenance of way and engineering that SP did not own the bluff alongside the south side of the track; that scaling back of that stony bluff was impractical from an engineering standpoint and would not solve the problem. He was told that the only way SP could build and maintain a walkway on the south side would be by installation of extensive and expensive drainage facilities; one not reasonably necessary in SP's view for employee safety as staff insists.⁶ SP's view that GO 118 "grandfathered" certain non-complying conditions was explained to Bredenberg by SP's law department, and he then determined that since an OII had been issued, SP's line departments would do no more but would let the legal staff take over.

Thereupon, SP's counsel and staff's counsel engaged in discussions in an effort to reach a stipulated resolution of the issues. SP on February 11, 1985 wrote that the deficiencies noted in the current inspections were not uncorrected continuations of leftover 1979 deficiencies; that the former had been corrected, and that the latter was the reappearance of a continuing problem caused by recurring water erosion which wreaked havoc along the bluff side. The letter set forth SP's plan to relocate the derail target across the track from the south to the north side, thereby, in SP's opinion, obviating any need to be on the ground south of the track. SP also indicated acceptance of responsibility to maintain GO 118 walkways along the north side of the track in this area. Staff did

⁶ Bredenberg later testified that his engineers told him that a permanent fix would require extensive track realignment.

not accept this, contending that walkways along both sides of the track were required by GO 118.

Efforts at resolution failing, on March 12, 1985 SP filed Application (A.) 85-03-052 to obtain authority pursuant to paragraph 7 of GO 118 to deviate from the standard. Early in 1985 SP also shifted the derail target from its previous south side of the track location across to the north side, 50 feet west of Switch 2584. Therefore, SP considered there no longer existed any need for a crew member to get on or off a train, or work or walk on the south side of the track at any time. SP contends that as the daily train to J-M does not have to meet or pass any other train, and because of the shortness of the run, there is no operating necessity to stop or to have to make a walking inspection short of Switch 2584 at the J-M plant entrance. SP asserts it will do all switching signaling on the north side, and to the extent that ground visual communication should ever be impaired, radios can be used. SP states each crew member has a personal radio assigned for such communication purposes on this run. SP further accepts that despite recurrent erosive effects of severe winter storms, the north side walkway can and will be maintained in this area to GO 118 standards. SP asserts that a walkway was not even contemplated for the south side of this branch track in the original 1920 construction design, long before the advent of GO 118. This is evident, SP states, from the fact that in places along the track the rock face of the bluff on the south side of the track does not allow sufficient clearance for a walkway. SP asserts that the narrow space between the track and the bluff is subject to recurrent strong scouring action from heavy runoff down that canyon from the J-M plant and surrounding hills. This runoff fouls the drain ditch and would carry away walkway materials, regularly wrecking any attempt to create or maintain any walkway approaching GO 118 standards. SP maintains that this is not a switching area and, therefore, pursuant to GO 118, until track

reconstruction becomes necessary and is undertaken, the conditions on the south side of the track are "grandfathered." With removal of the derail switch across to the north side of the track, SP contends there no longer exists any requirement for train crews to be on the south side of the track. Accordingly, SP on May 20, 1985 issued a timetable bulletin instructing employees "not to detrain, entrain or walk on embankment or south side of track between Johns Manville private road crossing MP 316 and 50 feet west of Johns Manville derail switch." On November 1, 1985 this instruction was reissued as part of SP's General Order 1. In addition, signs to that effect were placed on each side of the track leading to the area.

Staff opposes granting SP any deviation in this instance, contending that the walkways at issue over this last half mile of track leading to the J-M gate do not meet GO 118 standards, are not safe, and could not safely accommodate the exigencies of operating personnel in the event of radio failure or mechanical failure requiring immediate attention to equipment from the south side of the track. Staff is concerned that granting a variance would dilute the Commission's safety standards by allowing economic factors to become determinants of minimal safety requirements.

On March 20, 1985 the United Transportation Union (U.T.U.) filed a protest to A.85-03-052, stating that the need for a walkway on both sides of the railroad tracks is an operational necessity; that a deviation in this instance would allow an entirely unsafe and hazardous condition to continue, noting that in the event of unpredictable emergency stops, a walking inspection of the train as required by SP rules could not be made without a safe and standard walkway.

On March 18, 1985 Administrative Law Judge (ALJ) John B. Weiss ruled that I.85-01-002 and A.85-03-052 would be consolidated for hearing. After due notice public hearing began in San Francisco before the ALJ on April 23, 1985, continuing on the 24th

and 25th. Thereafter, for the convenience of the respective parties, various continuances were granted. The last of these was that requested by SP on January 13, 1986. By that request the SP counsel also advised that SP was considering further motions, declaratory proceedings, etc., to obtain clarification of this Commission's jurisdiction, vis-a-vis federal authority, over walkway matters; all grounded in SP's developing conception of preemption issues. On January 24, 1986 the ALJ asked that should SP decide to pursue a jurisdictional issue based on its developing conception of preemption, SP was to advise the ALJ and all parties to the proceeding, giving its basis for such assertions, no later than March 31, 1986. On April 2, 1986 the railroad's attorney wrote the ALJ and stated its conclusion that California jurisdiction had been preempted under provisions of the Railroad Safety Act of 1970. He stated that in SP's view the Commission's remaining jurisdiction in the current proceedings was limited to whether or not any "localized safety hazard" existed on the White Hills Branch (under the Federal Railroad Administration's so-called federal "policy" statements, "localized safety hazards" remained open to state regulatory enforcement).

Hearing resumed on April 14, 1986. At the outset, after affording counsel for both the staff and the union opportunity to respond to SP's April 2, 1986 assertions, ALJ ruled that the Commission's jurisdiction over requirements for reasonably safe and adequate walkways adjacent to railroad trackage in this State (to advance which safety objective CO 118 was promulgated and continues in force) had not been preempted, either by the Railroad Safety Act of 1970 or by the subsequent actions of the Federal Railroad Administration (See Appendix C for the text of the ALJ's ruling).

The ALJ thereupon ordered that the consolidated hearing go forward without further delay, both on the I.85-01-002 issues (whether SP had and was continuing to operate on the White Hills

Branch in nonconformance with GO 118; should be ordered to cease and desist; and whether a fine should be assessed and other appropriate orders entered) and the A.85-03-052 issue (whether SP should be granted a deviation applicable to the area in issue from the GO 118 requirements). Thereupon hearing continued through April 15, 16, and 17, and was concluded on April 18, 1986. On July 25, 1986 concurrent briefs on all issues were filed pursuant to the ALJ's instructions, and the consolidated proceedings were submitted.

During the 8 days of hearing 38 exhibits were received into evidence, and the ALJ took official notice of the file in Case (C.) 7306 (the proceeding which resulted in Decision (D.) 65208 issued April 9, 1963 adopting GO 118). During the hearing the Commission staff presented evidence through 15 exhibits and the associated and sponsoring testimony of Thomas Hunt, senior operations supervisor; Robert Harwood and Gary Rosenthal, associate operations supervisors; and Paul King, assistant operations supervisor (all members of the Railroad Operations and Safety Branch); and Curt Schmutte, a California registered civil engineer as well as an hydrologist of the State Department of Water Resources (DWR). SP offered 23 exhibits and the associated testimony of Robert Wolfe, senior fleet manager; William Giles, Santa Barbara Division train master; Rollin Bredenberg, Southern Region general manager; Harry Williamson, retired former SP chief engineer; Walter Mahon, Santa Barbara District maintenance of way manager; Raymond Branstetter, Southern California regional engineer; and Nahap Noori, an SP registered civil engineer. The union's participation was limited to cross-examination.

The Staff Evidence

Staff's evidence was to a large extent introduced to establish conclusively that various stretches between the SP track and the adjacent bluff on the south fail to provide any semblance of what might pass for a footpath meeting or even approaching

GO 118 standards, and to show that under existing conditions that narrow strip is unsafe for any foot traffic.

Staff's evidence does establish that the present conditions have existed for years. Photo exhibits taken over a four-year span abundantly evidence the continued existence of an apparently naturally eroded trench, gully, or ditch in this very restricted space, at the base of the bluff. This ditch becomes progressively but unevenly deeper and wider as it extends westward along the base of the bluff from the area of Switch 2584. These photo exhibits indicate the ditch to be 2 to 5 feet deep in places and 2-3 feet wide. Exposed stones in this ditch show indications of the rapid flow and scouring effect of runoff rainwater, and of the rock and shale-like composition of the earth. The exhibits make it obvious that at places there simply is not sufficient space between the track and the bluff for both this ditch and a standard walkway unless the latter can be somehow superimposed on top of the former. There is graphic evidence that walkway material, ballast, and railroad subgrade materials have been washed into and along the ditch. In areas the railroad subgrade has been buttressed by bags of material placed along the track side of the ditch. And it is very evident from the photographic evidence and the anthropometric analysis furnished by witness King that at some places on the south side of the track in the area at issue, that not only the slope into the drain ditch but also the dropoff would make impossible normal mounting or dismounting functions, or allow safe walking. A trainman could not safely dismount a slowly moving train on the

south side much less safely perform a walking inspection alongside a stopped train in this area.⁷

But with regard to the walkway conditions on the north side of the track in the area at issue, staff's evidence falls short of conclusively depicting continued existence of deficient or unsatisfactory conditions. While photo exhibits taken in March-April of 1984 and January-April of 1985 show some localized minor furrows, grooving, and displacement of walkway materials, obviously these had been caused by heavy storm runoff. These uneven surfaces were readily correctable by surface blading, and there was no clear evidence that these conditions had existed continuously for any long period or that the walkway on the north side generally was not being reasonably maintained or restored after storm periods.

Staff's evidence shows identification in 1979 of the absence of standard walkway conditions on the south side of this track. Its evidence indicates follow-ups in 1981 and 1982 with efforts to remedy administratively what it considered a deficiency that could not be accepted. A fall injury somewhere on this same branch line in 1983 triggered a 1984 staff investigation which led to staff's determination to pursue the walkway issue to a conclusion. There is clear evidence of staff's continued and frustrated attempts to obtain action from SP's local engineering

7 Because of the apparent danger, SP agreed on April 26, 1985 to issue a temporary timetable bulletin restriction to read as follows:

"Account drainage ditch adjacent to track on embankment (or south) side of track in area between derail switch at Johns-Manville Plant entrance and private road crossing, Milepost 316, employees are not to detrain, entrain or walk on embankment (or south) side of track between J-M private road crossing, Milepost 316, and 50 feet west of J-M derail switch."

representatives or through correspondence with higher echelon SP management. And it is clear that these frustrations finally led to this OII.

Staff's evidence included testimony relative to actual switching operations observed at dusk on January 2, 1985 by staff; operations involving a typical 10-car, 2-locomotive train switching "empties" onto tracks which led off Switches 2584 and 2587 into the J-M plant. To accomplish this, given the particular configuration of the tracks in that vicinity,⁸ it was staff's opinion that visual signals could feasibly be done only from the south side of the track (the staff witness questioned the feasibility and reliability of use of radios for those switching operations). As the train would back to the west, a switchman at Switch 2584 would signal by lantern from the south side of the track to the engineer in his engine at the west end of the train to stop the train. Then the switchman would cross over to the north side, line the switch located there, cross back to the south side, and make lantern signals to the engineer who would cause the engine to push the cars onto the desired track back eastwardly up to the J-M plant.

Further, staff's evidence supported the contentions of the staff and union that there always existed the possibility of unexpected emergency developments, such as broken knuckles, air leaks, and dragging equipment. It was argued that these might require trainmen to work from the south side of the track. However, no evidence was presented by either staff or union that any such emergency had ever occurred on this stretch of track.

Staff's evidence also showed that SP had relocated the derail switch sometime early in 1984 to a new position 500 feet

⁸ From the engine of a 10-car train pushing up to the plant, the engineer cannot get a line-of-sight view of the 2584 or 2587 switch targets from the 10-car marker.

west of its previous location on the north side of the track. Staff argues that the derail switch necessarily applies to the entire J-M plant which includes at least three car spots, and staff applies its March 1, 1968 (Rev. June 10, 1974) clarification of GO 118 to conclude that standard walkways are required on both sides of the track 150 feet beyond the point of switch.⁹ Since SP has a walkway on one side only, it is staff's contention that in making this move SP committed an entirely new violation of GO 118.

And finally, staff presented evidence through witness Schmutte that it would technically be possible to provide an 8-foot, 6-inch space on the south side of the track, thus permitting both an adequate drain and a standard walkway. Schmutte would accomplish this by installing approximately 640 feet of 36-inch corrugated metal pipe, buried in four locations, with realignment of the existing drain ditch in other areas, and over the drain pipe he would place a walkway. His estimate of the cost of such a project would be \$25,000 complete.

The SP Evidence

SP presented evidence designed to show that the railroad could never have provided a walkway meeting GO 118 standards along the cliff base on the south side of the branch line track over the half mile approach up the narrowing canyon into the J-M plant.

9 That clarification of GO 118, applicable to Minimum Walkway Standards for Industrial Trackage, states:

"Standard No. 6 walkways at turnouts and at car spots will extend beyond the point of switch and its clear point and on each side of the car spot, where applicable, a distance equal:
1 Car Spot - 50' minimum, 2 Car Spots - 100' minimum, and 3 or more Car Spots - 150' minimum." (The Standard 6 walkway requires a 6-foot minimum from outside rail on both sides of the track.)

SP's evidence also indicates that there was no intention to do so when the track was laid down back in 1923. SP claims that its 17-foot right of way in the final and crucial 350-foot approach was never wide enough to accommodate walkways on both sides, even when the drainage ditch within the right of way is not taken into consideration. Although dual walkways would be theoretically possible if the track could have had its centerline exactly in the middle of the right of way, the track cannot be in the middle of the 17-foot right of way up the canyon because of necessary track curvature. SP's evidence showed that various parts of right of way are occupied by the naturally formed drainage ditch, which handles not only heavy J-M plant runoff down the canyon, but also drainage from the hill along the south side of the ditch. All this runoff funnels down the 3% grade of the canyon westward. SP's testimony was that only at Switches 2584 and 2587 has SP provided GO 118 walkways on the south side of the track. SP asserts that west of these switches the drain ditch precludes such walkways. The SP testimony also demonstrated that at times heavy storm runoff simply overflows the ditch area, crossing the track and the parallel road to the north, washing out gravel and ballast materials, and eroding the surfaces even north of the track. There was testimony that during one witness' tenure there was no semblance of any walkway on the south side between 1959 and April 1963. He further testified that conditions then were not unlike those prevailing today. Assertedly, when switching operations tailed out west of the gate to the old 10- and 25-car markers, signaling was customarily done on the north side of the track where there was a walkway provided.¹⁰ The testimony was that during that period no injuries

¹⁰ This was facilitated at that time as to hand signals by the fact that there was a fireman in the cab of the locomotive to pass signals.

were reported, there were no break-in-two's, no derailments or undesirable emergencies, and that broken air hoses were no problem; this despite the fact that the earlier traffic volume pushing empties up and pulling loaded cars down the 3-mile run to Lompoc was double today's traffic. Another witness, the current division trainmaster, testified that during the past nine years there have been no mechanical failures or break-in-twos.¹¹

SP readily conceded that the surface along the south side of the track, except at Switches 2584 and 2587, has not been, and today does not constitute, a walkway complying with GO 118 standards. But SP asserts that this area is a nonconforming, pre-April 29, 1963 track segment conditionally grandfathered by GO 118. SP witness Williamson, former SP chief engineer and an SP representative in the 1963 negotiations which led to adoption of GO 118, testified that the record of those negotiations and exhibits show clearly that the adopted general order represented a compromise among the Commission staff, the California railroad industry, and certain union representatives; that a key component in this compromise was the staff's backing down from its earlier proposals which would have required that all existing walkways be brought up to GO 118 standards within three years. Williamson testified that the order directs carriers to "pursue a program of improvement of walkways in all switching areas where a substantial amount of switching is performed." According to Williamson, only new constructions, and all substantial reconstruction (more than 50%) after April 29, 1963 were to be to the GO 118 standards. To support his testimony the witness introduced certain draft proposed general orders, which he alleged led to the final version adopted

¹¹ But if there were, the trainmaster testified, there is no problem, whether it be a broken air hose, broken knuckle, or brake rigging, which could not be handled entirely from the north side without going to the south side.

by the Commission. The result, the witness testified, was that railroads were under no duty to improve nonconforming track areas where substantial amounts of switching were not performed. The witness testified it was clear that the walkway standards adopted were absolutely not to be "minimal" or "minimum" standards as staff here asserts, but rather were to be "reasonably safe and adequate walkways adjacent to the tracks in all switching areas." The witness testified that the railroads agreed to improve deficient walkways in switching areas where employees were regularly on the ground, but all other areas were exempted until they underwent a 50% reconstruction. In some of these nonswitching areas, because of climatic or geographic conditions, the witness testified, it was impossible to provide walkways on one or sometimes both sides of the track, and Williamson stated he could recall no instance of the Commission instituting an investigation such as in the present instance. Williamson testified that the exception to grandfathering was to be found in paragraph 5 of GO 118 where, after hearing, the Commission might order elimination of an unsafe walkway condition, but that for any such condition the railroad might apply for a deviation.¹²

In support of Williamson's testimony, another SP witness testified that on long stretches of track north of Willits belonging to SP's subsidiary, Northwestern Pacific, there are no walkways on either side, or only on one side, dual walkways being limited to yard trackage, switching areas, and sidings in the area where men must regularly be on the ground. This trackage includes both main and branch lines. SP claims that although these tracks

¹² His testimony was to the point that if staff complained, alleging a serious situation, the railroad would look at it. If the railroad agreed, they would take care of it; if not, they would ask for a deviation, or an abandonment, or any other option they might have before the Commission.

have been inspected over the years complaints filed have been limited to switch or yard areas, and that this shows Staff does not believe it has the authority to complain of walkway conditions in other areas.¹³

SP introduced evidence to show that since the addition in 1978-79 of a run-around track within the J-M plant, SP's engines pull empties up from Lompoc into the plant area to the east end of whatever plant track is to be used. The engine then returns to the rear of the train via the run-around track in order to begin switching. The point of this evidence was to indicate there is no need for any crew members to be on the ground south of the track west of Switch 2584 for switching. SP's testimony was that its personnel working this branch have all been issued personal radios for use if needed, and that because of canyon characteristics present here there is minimum radio interference and no bleed-over problem. For the return run with loaded cars to Lompoc, testimony

13 Staff rebuts SP's argument by pointing out that staff time and resource constraints, and access problems, require giving priority to heavily used switching areas. The record shows that until 1978, staff regularly conducted comprehensive GO 26-D-118 surveys of substantial portions of railroad trackage, but that budget constraints and staff reductions reduced staff's ability to conduct such surveys. Three surveys in the record support staff's statements regarding its interpretation of GO 118. Each of these surveys cited a number of main line deficiencies, and showed that all substandard conditions were corrected. There is no evidence of any discussion regarding whether "substantial switching" took place, with the exception of item 1089 relating to the White Hills Branch.

NOTE: In survey GO 26D-118/L74 (Exhibit 1), Items 1066, 1075, 1080, 1084, 1086, and 1098 are main line items. In survey GO 26D-118/L74-S4 (Exhibit 1), Items 129, 138, 139, 141, and 142 are main line items. In survey GO 26D-118/187 (Exhibit 37), Items 100, 107, 130, 132, 186, 191, 200, 205, 211, 229, 236, 240, and 247 are main line items. The circles around these items indicate they were corrected. [TR 19].

was that the return trains are made up east of either Switch 2584 or 2587 inside the plant area where there are walkways. Air tests and train inspections are made there before the train proceeds out and west to the derail. After the derail is relined, the train proceeds to Lompoc. SP's testimony was that no train member need be on the ground west of the derail on either side, although a walkway is provided on the north side.

SP also introduced testimony contravening staff's application of Standard 6. Staff would require walkways on both sides of a track at a derail. SP's testimony was that, while a derail may technically be termed a "switch," at a derail there is no switching from a branch line to a diversion track, as there is at a conventional switch, for the simple reason that at a derail there is no diversion track. SP states that a derail is merely a protective device to derail cars in an emergency: All that is needed is sufficient ground area at and on the side of the derail stand in order for a crew member to be able to throw the target.¹⁴ Only if there was a diversion track at the derail site would there be any need for a crew member having to walk down the diversion track off the branch line. Thus, SP insists there is no

14 The derail west of the gate to the J-M plant was installed in either 1979 or 1980 to be able to derail any cars that might move uncontrolled out of the plant down the canyon grade. It replaced separately located derails on three different tracks up in the plant. Initially it was installed on the south side of the track, but then was relocated to the north side of the track in order to obviate any need for a crewman to be on the ground south of the track to operate the derail stand. Even more recently, in order to allow J-M to use its plant car mover in tailing out of the plant into the SP branch line absent SP personnel, the derail stand was again relocated, 4 car lengths further west but still on the north side of the track.

requirement for a walkway across the track from a derail stand, and that Standard 6 of GO 118 does not apply to derails.¹⁵

SP also provided testimony and exhibits relating to its consideration of various ways to provide both walkways and drainage in the area at issue. SP's evidence was that it considered installation of diversion conduits under the track to attempt diversion of the J-M plant runoff into a canyon-like ditch paralleling the track and road on the north side of the canyon. It considered shifting the tracks themselves, and also cutting back the face of the southern hill facing the track so as to widen the right of way. Its testimony was that these measures all would necessarily involve other people's property and entail substantial expense without entirely resolving the problems. SP also testified of the consideration given to installing a 30-inch pipe in the drain ditch under a standard walkway. Its evidence was that such a drain pipe could provide only for part of the runoff, mostly from the plant area, but would leave the runoff from the adjacent south side cliff alongside the ditch to wash out any walkway. With regard to the positioning of a walkway over a drain pipe SP offered the testimony of its engineer witness Noori to rebut that of staff's witness Schmutte. Noori testified there just was insufficient space between track and cliff face; that a minimum 10 feet from track centerline would be required, not the 8 feet, 6 inches assumed by Schmutte. Noori pointed out that railroad design practice required that any pipe trench would have to be 4 feet, 6

¹⁵ SP presented testimony that the intent of its Rule 109 (formerly Rule 727) was to require walking inspections be performed on trains that had been moving at speed on the mainline, after such trains went into a siding in order to be passed by another train. But walking inspections were not to be performed when a train halts merely to reline a derail. Even when a mainline train stops to line a switch to head into a siding, no walking inspection is required until after the train has gone into the siding.

inches deep in order to provide the necessary 18 inches of cover below bottom line of the ties to top of the pipe. Schmutte assumed a 2-inch cover would suffice. Noori testified this cover is required both to support the pipe itself and to allow track maintenance. Noori further testified that such a ditch requires a one-to-one slope or an expensive interlocking sheet metal pipe shoring system. Noori also testified that a concrete runoff gutter to accommodate the cliff side runoff waters would have to surmount any continuous drain pipe installation in the ditch in order to prevent runoff from the cliff sides merely scouring away any walkway that might be installed atop the pipe

Judicial Resolution of the
Alleged Federal Preemption Issue

SP solicited, and received from the chief counsel of the Federal Railroad Administration, an advisory letter containing that counsel's statement that it was his view that the subject matter pertaining to walkway requirements contained in California's GO 118 had been preempted by federal rules and official federal pronouncements. On May 15, 1986 SP filed a complaint in U.S. District Court against this Commission, and asserted these views. On November 3, 1986 the District Court ruled in favor of this Commission and against SP, concluding that the Commission's safety jurisdiction relative to walkways had not been preempted and that GO 118 did not constitute an unconstitutional burden upon interstate commerce (Southern Pacific Transportation Company v. Public Utilities Commission (N.D. Cal. 1986) 647 F.Supp. 1220). SP thereupon appealed, and in a brief decision (No. 86-2983) issued June 30, 1987 the Ninth Circuit Court of Appeals affirmed the decision of the District Court. As November 30, 1987 (the final day for any appeal to the U.S. Supreme Court) passed without SP filing an appeal, the District Court decision, as affirmed by the Ninth Circuit Court of Appeals, became final. This Commission continues to have railroad walkway safety jurisdiction, and the provisions of GO 118 have not been preempted.

Differing Views of What GO 118 Requires

The differing conceptions of what was intended by the Commission held by our Railroad Operations and Safety Branch, the Railroads, and the unions continue to cause friction, and are inimical to attainment of what must be the common goal - promotion of railroad worker's safety. That underlying question demands a definitive answer.

Staff asserts that GO 118 requires railroads to provide walkways meeting the appropriate standard on all trackage sidings, switches, yards, etc. throughout California; that there were and are no provisions to "grandfather in," or exempt, pre-existing conditions. Staff's view is that GO 118 standards are "minimum standards" applicable everywhere after the effective date of the general order. Staff contends that "pre-1963 walkway conditions are not forever exempt from upgrading, even if reconstruction does not take place," basing that argument on the language in GO 118 that each railroad "shall pursue a program of improvement of walkways in all switching areas where a substantial amount of switching is performed, along its main, branch and industrial trackage toward substantial conformity with its standards filed with the Commission pursuant to this order."

The unions basically are in agreement with staff.

On the other hand, SP contends that a nonconforming walkway is not necessarily a GO 118 violation; that it may well be a "grandfathered" area which the railroad is under no past or present duty to improve either (1) until a new walkway in that area is constructed, or (2) until an existing walkway in that area is reconstructed, or (3) unless "a substantial amount of switching is performed" on that track, or (4) the Commission, after hearing, orders upgrading of that specific nonconforming walkway to the GO standard to eliminate an unsafe walkway condition that has been identified.

It is useful to remember that GO 118 was essentially a compromise between what the Transportation Division staff of that time and the railroad unions urged for adoption, and what the railroads contended would be economically feasible and possible to live with. As is customary in such situations, no party got all it wanted. Today the positions of the parties in these proceedings continue to reflect these 1963 divisions.

Discussion

We will begin by reemphasizing what we have stated many times before:

"The Commission has the responsibility to 'require every public utility to construct, maintain, and operate its line, plant, system, equipment, apparatus, tracks, and premises in such manner as to promote and safeguard the health and safety of its employees, passengers, customers, and the public, ...' (Public Utilities Code § 768, see also §§ 761, 762.) GOs 26-D and 118 were adopted to protect the health and safety of railroad employees." (D.93105, Re: Union Pacific Railroad Company 6 CPUC 2d 196, 205 (1981); See also D.83-10-030, ___ CPUC 2d ___ (1983) Slip Opinion at pp. 11-12; and D.86-02-058, ___ CPUC 2d ___ (1986) Slip Opinion at p. 30.)

A passage from United Transportation Union v. Southern Pacific Transportation Company, D.84-08-122, ___ CPUC 2d ___, (1984) (Slip Opinion at 3), concerning walkway safety is also worth repeating:

Safety, as relative here, simply means such freedom from danger to life, health, and welfare as the nature of the employment, and the place of employment, will reasonably permit. An employer has a duty to provide his employees a safe place to work. This does not mean the absolute elimination of danger, but does mean that the place of work be as secure as the exercise of reasonable care by the employer can make and keep it. The duty is a continuing one. It does not suffice that the employer merely put the place of work in a reasonably safe condition once and then allow

it to deteriorate or fail to maintain it. It must reasonably be kept continuously a safe place to work. And such a duty is as applicable to a railroad roadbed as to a machine shop.

The Commission's specific power to require railroads to provide standard adequate walkways is based primarily on PU Code § 768, which authorizes the Commission to require railroads to construct, maintain, and operate their facilities in a manner so as to promote and safeguard the health and safety of railroad employees. Section 768 gives the Commission the power to establish "uniform or other standards of construction and equipment, and to require the performance of any other act which the health and safety of its employees and the public may demand." PU Code §§ 761 and 762 reinforce § 768 by requiring the Commission to act if a hearing reveals that a utility is operating in an unsafe manner.

Adoption of GO 118 and approval of the accompanying uniform walkway standards did not alter the Commission's authority or duty to ensure walkway safety. It did, however, establish standards for what are presumed to be safe walkways.

In this proceeding, we are primarily concerned with the safety of workers in the area at issue. Because compliance with GO 118 creates a presumption that walkway conditions are safe, it is important to determine whether SP's White Hills Branch Line leading into the J-M plant complies with that general order. Once this determination is made, we can take the next step of determining whether SP has adequately justified the need for a deviation and demonstrated that such a deviation could be granted without jeopardizing worker safety. We can also determine whether additional measures need to be taken in order to ensure worker safety.

GO 118

We will now interpret GO 118 and apply it to the facts before us. The language appearing in the preamble and seven

paragraphs of provisions which follow the preamble is not as clear as it might be. We will give the general order its plain meaning wherever possible. Where ambiguity exists, we will interpret the general order in accord with the rules of statutory construction.

Our goal is to interpret GO 118 in a manner that is entirely consistent with both the procedural history of the general order which is amply documented both in our present proceeding and the records of C.7306, the investigative vehicle which led in 1963 to adoption of GO 118, and with PU Code §§ 768, 761, and 762, the statutes that GO 118 is designed to help implement.

At this point, it is helpful to ask: "What obligations does GO 118 place on SP"? GO 118 requires, most pertinently:

1. That SP shall "file its standards for the construction, reconstruction and for the subsequent maintenance of walkways adjacent to its tracks as hereinafter required ... and shall hereafter, in the construction and reconstruction of its tracks and walkways, observe its standards filed with the Commission in accordance with the provisions of this order." (Preamble to GO 118.)
2. That SP's "standards...for the construction or reconstruction of walkways adjacent to its tracks shall be filed with the Commission for its approval not later than thirty days after the effective date of this order." (Paragraph 1 of GO 118.)
3. That SP shall file standards which provide for "reasonably safe and adequate walkways adjacent to its track in all switching areas, and shall provide that all such walkways shall be maintained and kept reasonably free from vegetation as may be appropriate to prevailing conditions, and shall provide for abatement of weeds and brush adjacent to walkways as necessary to prevent the growth of objectionable vegetation encroaching upon such walkways." (Paragraph 3 of GO 118.)

4. That SP "pursue a program of improvement of walkways in all switching areas where a substantial amount of switching is performed, along its main, branch and industrial trackage toward substantial conformity with its standards filed with the Commission pursuant to this order." (Paragraph 6 of GO 118.)

Relevant to other issues raised by the present proceedings, GO 118 also provides that:

1. "The Commission, after hearing, may order the railroad corporation to eliminate any unsafe walkway condition and may specify such reasonable time within which the improvement shall be completed as may be appropriate under the circumstances." (Paragraph 5 of GO 118.)
2. "Deviations from the filed standards or the provisions of this order may be authorized by the Commission for any specific installation for good cause upon application by a railroad corporation; which application shall include a full statement of the conditions which prevail at the time and place involved, and the reasons why deviation is deemed necessary." (Paragraph 7 of GO 118.)

In 1963, there were substantial segments of each railroad's system that failed to meet the railroad's filed standards. GO 118 did not require that all tracks be brought into compliance with the filed walkway standards immediately, or by any set date. Instead, the general order established a two part program for compliance with the standards. First, the preamble to GO 118 makes clear that railroads must, after the effective date of the general order, observe the standards they filed with the Commission as required by GO 118 "hereafter, in the construction and reconstruction of its tracks and walkways." Second, Paragraph 6 of GO 118 requires railroads to pursue a program of improvement of walkways in certain areas, without regard for whether tracks and

walkways are constructed or reconstructed in these areas after the effective date of the general order.

Requirements Applicable to Tracks and
Walkways in Existence When GO 118 Was Adopted

Perhaps the most important ambiguity in GO 118 concerns the need for improvements to walkways on tracks already in existence when the general order was adopted. Paragraph 6 is not a model of clarity, and has been interpreted one way by the staff, and another way by SP.

Paragraph 6 reads as follows:

6. Each railroad corporation operating within the State shall pursue a program of improvement of walkways in all switching areas where a substantial amount of switching is performed, along its main, branch and industrial trackage toward substantial conformity with its standards filed with the Commission pursuant to this order.

SP believes that Paragraph 6 requires only that the railroad must develop a program for improving walkways in areas where substantial switching occurs, and that there is no requirement that the railroad bring other areas into compliance with walkway standards until walkways in those areas are either constructed or reconstructed.

Staff, on the other hand, believes that Paragraph 6 requires a program for improvement of walkways not only in areas of substantial switching, but also "along main, branch and industrial tracks."

SP notes that during negotiations over the language of Paragraph 6, language proposed by the staff which required that railroads bring all tracks into compliance with GO 118 standards within 3 years was replaced by language that did not specify any date by which compliance was required. SP also notes the insertion

of the phrase "where a substantial amount of switching is performed," after the words "switching areas."

Staff notes that SP's interpretation of Paragraph 6 ignores the comma and the words "along its main, branch and industrial trackage" that follow the reference to switching areas. Staff witness King testified that the staff's long-standing interpretation of this paragraph is that improvements must be undertaken in switching areas and along its main, branch and industrial trackage.

The type and scope of the improvement program required by Paragraph 6 is clearly ambiguous.

Where a statute is theoretically capable of more than one construction, we must choose that which most comports with the intent of the Legislature. (California Manufacturers' Association v. Public Utilities Commission, 24 C 3d 836, 844 (1979).) The same principle applies to our general orders. In the present proceeding, both the legislative history of GO 118 and the wider historical circumstances of its enactment are legitimate and valuable aids in divining the general order's purpose, (*Id.*)

As the contents of the file in C.7306, of which the ALJ took official notice, reveal, during the 1959 regular session of the California Legislature there were numerous bills relating to the health and safety of railroad employees before the Assembly. These bills were referred to committee for interim study, and after hearings, a committee report in essence urged that the subject matter be referred to the Public Utilities Commission for possible disposition through issuance of a general order. Subsequently, numerous informal complaints were received by our staff from railroad workers concerned with inadequacies of walkways adjacent

to railroad tracks. ¹⁶ The Transportation Division staff of that day prepared a proposed general order. On May 22, 1961 this draft order was circulated for comment to the railroads and the respective railroad unions. The draft order contained proposed regulations to govern the construction, reconstruction, and maintenance of walkways adjacent to railroad trackage. The preamble paragraphs referred to these proposals as "minimum standards," and would have required that compliant walkways be provided adjacent to all tracks not later than December 31, 1965.

The unions responding were generally in favor of the proposed general order, although there were also objections to deferring compliance to December 31, 1965. The railroads objected to adoption of any general order, insisting that no accident records existed which could directly attribute any accident to unsafe underfoot conditions; they ascribed many of the tripping and falling incidents of record to the carelessness of those involved. While insisting that they believed in providing safe places to work in yards, at sidings, and at switches, they could see no need to provide walkways on open trackage between stations and sidings. Finally, they contended that the proposed general order would be an economic disaster for the railroads.

On March 27, 1962 the Commission issued its OII into whether a general order should be adopted, accompanied by essentially the same draft general order circulated earlier. The carriers made it clear that they would oppose the proposed general

¹⁶ In the hearing in which the compromise proposed general order was presented to the Commission, Staff witness Carlock testified that during the eight years preceding 1963, the Commission received an average of 14 such complaints a month. [C.7306 TR 106-107.] Exhibits 2 and 3 in that proceeding constitute, respectively, a "Recapitulation of Informal Complaints and Related Matters Pertaining to Walkways and Vegetation Along Railroad Tracks for Period 1954-1963," and a supplemental recapitulation of such complaints in the Los Angeles area for 1962-1963.

order with every legal avenue available. Eventually, the parties agreed to work toward master standards acceptable to all. While progress was slow, compromises were hammered out.

On November 27, 1962, railroads, unions, and staff agreed upon "Standards for Construction and Reconstruction of Walkways and Maintenance Thereof." It was not until some time later that a final version of the general order itself was agreed upon.

In D.65208 issued on April 9, 1963, the Commission noted:

"As a result of the studies and understandings reached during the conferences with respondents and with some of the interested parties, there was drafted by the Commission's Operations and Safety Section a proposed general order on this subject which was introduced at the hearing and identified as Exhibit No. 7. Also received in evidence was Exhibit No. 8, setting forth standards to be filed by the railroads with the Commission in the event that the proposed general order, Exhibit No. 7, was adopted by the Commission.

"The staff introduced evidence of the need for the proposed general order and that it is required for the safety of railroad personnel and the public. The respondents deferred cross-examination and presented no testimony on the understanding hereinafter mentioned.

"The position of the respondents generally was that there is no necessity for any general order regarding the subject matter; however, if the Commission deems it advisable to adopt the proposed general order, Exhibit No. 7, they would be willing to file standards with the Commission conforming to those set forth in Exhibit No. 8; but if the Commission does not adopt the proposed regulations, they would want to have this matter reopened and be heard fully on the merits of any revisions to the proposed general order or of any other general order pertaining to the subject matter. The matter was submitted upon such understanding by all the parties."

The Commission went on to state that it found that "these proposed regulations and the Standards for Construction and Reconstruction of Walkways and Maintenance Thereof presented by the railroads as Exhibit 8 provide a reasonable standard of safety for railroad employees, passengers and customers of common carriers and the public in general." The Commission then adopted the proposed general order introduced as Exhibit 7. Exhibit 7 thereupon became GO 118, and the railroads thereafter formally filed the 6 standards set forth in Exhibit 8.

The historical context of the adoption of GO 118 shows that 1) the Commission was acting in response to legislative pressure to consider a general order designed to protect railroad workers from the hazards of their employment, and in response to informal complaints by railroad workers alleging the existence of unsafe walkways standards, and 2) it believed that GO 118 and the specific standards accompanying it provided a reasonable standard of safety for railroad employees and others.

Subsequent Commission decisions make clear that GO 118 was adopted to protect railroad workers. In Re: Union Pacific Railroad Company, 6 CPUC 2d 196, 205 (1981), the Commission stated:

"The Commission has the responsibility to 'require every public utility to construct, maintain, and operate its ... system, equipment, apparatus, tracks, and premises in such a manner as to promote and safeguard the health and safety of its employees... and the public,... (Public Utilities Code § 768, see also §§ 761, 762.) GOs 26-D and 118 were adopted to protect the health and safety of railroad employees."

See also, D.83-10-030, Re Union Pacific Railroad Company - Yermo Yard, ___ CPUC 2d ___, (1983) Slip Opinion at pp. 11-12; see also D.86-02-958, Re Southern Pacific Transportation Company - Fresno Yard, ___ CPUC 2d ___ (1986) Slip Opinion at 30. Thus, an interpretation of the general order which does not provide for a reasonable standard of safety is contrary to the legislative

intent. These decisions, however, provide little guidance regarding the meaning of Paragraph 6.

SP believes that the details of the 1963 negotiations support its interpretation of Paragraph 6. On the other hand, staff has consistently interpreted Paragraph 6 as requiring that railroads develop a program for improvement of walkway conditions along all tracks in existence when GO 118 was adopted.

Different parties to a compromise such as GO 118 have by definition agreed to the language of the compromise, but there is no guarantee that the parties agree about what that language means. That is clearly the case here. It is evident that after 25 years GO 118 Paragraph 6 still causes confusion.

In light of the above discussion, we believe it is best to convene a proceeding for the narrow purposes of determining what actions railroads should be required to take to improve walkways along tracks and switching areas predating the adoption of GO 118, and when those actions must occur.

We hope that the proceeding we initiate can provide a forum for staff, railroads, and railroad workers and their representatives to cooperate to develop a model walkway improvement program setting appropriate priorities for walkway improvement and developing cost effective safety solutions, in order to decrease the most risk for the least cost in the least time.

We expect that the OII will address at least the following questions:

1. To what extent, as of the effective date of this order, are walkways complying with GO 118 standards in existence along all pre-GO 118 tracks?
2. What are the estimated costs associated with establishing complying walkways along all pre-GO 118 tracks that do not presently have complying walkways?

3. Should the program for improvement include all pre-GO 118 tracks or just those in switching areas?
4. If the program is limited to switching areas where substantial switching occurs, how should the phrase "where substantial switching occurs" be defined?
5. Should the program for improvement include something more than switching areas but something less than all pre-GO 118 tracks? That is, should it also include other areas where railroad workers are frequently in need of safe footing? If so, what other pre-GO 118 tracks should be subject to the program for improvement?
6. Should the program for improvement set priorities for remedying walkway conditions in switching areas first and then improving other areas as time and resources permit?
7. Should any priorities be set on the basis of accident frequencies, cost effectiveness of potential improvements or a combination of these two factors? How could this be done?
8. What time frame, if any, should govern the program for improvement?
9. To what extent, if any, have railroads improved walkway conditions along pre-GO 118 main, branch and industrial tracks?
10. Should the program for improvement require actual compliance or merely "substantial conformity" with GO 118 standards with regard to walkways subject to the program for improvement?
11. If "substantial conformity" is required, rather than actual compliance, then how could the term "substantial conformity" be defined so that the program for improvement can be enforceable?

All railroads will be required to file with the Commission walkway improvement programs conforming with the requirements developed in this proceeding.

"Minimum" vs "Reasonable" Standards

Staff and SP also disagree as to whether GO 118 imposes "minimum" standards or "reasonable" standards for railroad walkways. SP notes that at least one early version of GO 118 which was proposed by staff but not adopted by the Commission included the phrase "minimum standards," and that the general order itself refers simply to "standards." This is true. Staff, however, notes that while the general order itself may refer simply to standards, the standards the railroads agreed to file with the Commission as part of the GO 118 compromise refer to "minimum" walkway measurements. The record in C.7306 shows that the word "minimum" was dropped from the GO 118 preamble only when the railroads accepted the staff's proposed standards with their "minimum" measurement language. Since SP is bound to observe these walkway standards, SP's walkways must at least meet the minimum measurements set forth therein.

Staff's position is correct. D.65208 makes clear that the Commission was well aware of the specific standards the railroads agreed to file in compliance with GO 118 at the time GO 118 was adopted. That decision noted the position of the railroads that:

"there is no necessity for any general order regarding the subject matter; however, if the Commission deems it advisable to adopt the proposed general order, Exhibit No. 7, they would be willing to file standards with the Commission conforming to those set forth in Exhibit No. 8;..." and went on to state that "The Commission finds that these proposed regulations and the Standards for Construction and Reconstruction of Walkways and Maintenance Thereof presented by the railroads as Exhibit No. 8 provide a reasonable standard of safety for railroad employees, passengers and customers of common carriers and the public in general." (D.65208, 60 PUC 756, at 757 (1963) (emphasis added).)

The standards filed by the railroads contain track cross-section and plan view diagrams which specify minimum walkway lengths and widths. Every distance specified in standards 1 through 6 is followed by the word "minimum," or the abbreviation "min."

The preamble to GO 118 requires railroads to observe the standards they filed in compliance with the general order. Whether the "minimum" distances set forth in the standards filed by SP are considered "minimum standards" or "minimum measurements contained in 'reasonable' standards" makes no difference in terms of the compliance required. SP must observe the walkway standards it filed in compliance with GO 118.

We note that SP's own witness, Williamson, conceded that where the standards of GO 118 applied they were minimum standards [TR 595] - his main contention was that these standards did not apply to most pre-existing walkway conditions.

Application of GO 118 to
the Present Situation

In the present case, SP does not dispute the applicability of GO 118 standards to the White Hills Branch Line walkways which have been constructed or reconstructed after GO 118 became effective in 1963. It acknowledges that in 1963 there were essentially no walkways south of the tracks, but that walkways were constructed thereafter on an intermittent basis as washed out sections of roadbed and ballast were replaced during maintenance operations. SP witness Mahon testified that SP commonly replaced two or three 40-foot sections of subballast, ballast and fill, approximately 3 feet wide, from underneath the rail to the bottom of the south side ditch. Mr. Mahon testified that there are walkways south of switches 2584 and 2587. SP claims that there has never been a continuous walkway, that GO 118 does not require the construction of new walkways where none existed before, and that it makes little sense for the railroad to maintain intermittent stretches of walkway interspersed by sections where SP believes no

compliance with GO 118 standards is necessary. Staff contends that SP's intermittent replacement of storm damaged roadbed and construction and/or reconstruction of south side walkways ultimately amounted to construction and/or reconstruction of walkways along the south side of the entire portion of the branch line in question. These post-1963 walkways clearly invoke GO 118 standards. Even if certain areas south of the tracks never had walkways, Staff argues, SP has violated its Paragraph 6 obligation to engage in a program for bringing its main, branch, and industrial track into substantial compliance with GO 118 standards.

To the extent the SP tracks, switch installations, or walkways in the final half mile leading up to the J-M gate are new since 1963, or have been "reconstructed" since 1963, SP is clearly under an obligation to provide GO 118 standard walkways in the absence of a deviation. The track up the canyon approach was installed circa 1923. With steadily declining usage because of lost custom from trucking inroads, none of the 3.7-mile branch line itself had been reconstructed. However, the derail switch has been relocated twice, and the roadbed underlying sections of the track has been reconstructed after heavy storms washed it from under the tracks. It is not necessary for a railroad to replace at least 50% of materials on the entire branch line in order to invoke GO 118 standards, it is sufficient that any segment of track or walkway has been reconstructed. Furthermore, the evidence clearly shows that while there were no walkways on the south side of the tracks in 1963, some such walkways were constructed thereafter in conjunction with maintenance activities. Under the preamble to GO 118, these post-1963 walkways must conform to GO-118 standards.

The Derail Switch Issue

We will now determine which standards apply to the derail installed in 1979-1980 west of Switch 2584, which originally had its switch stand and target located on the south side of the track. This derail replaced others located up inside the J-M plant.

Subsequently, the switch stand and target was moved across to the north side of the track where there always has been an adequate walkway. SP's stated reason was to remove any need at any time for crew members to be on the south side of the track. Still later the derail was moved further west of Switch 2584. The switch stand and target remains on the north side of the track.

These relocations certainly constituted either "constructions" or "reconstructions," and thus they invoke the railroad's obligations under GO 118 to observe GO 118 standards in doing the work. The question then becomes, which standards?

Staff contends Standard 6 applies to the derail and asserts that SP did not adhere to that standard. Staff contends that a derail is a "switching area," and would apply its March 1, 1968 (Rev. June 10, 1974) "Clarification of General Order No. 118" to conclude that standard walkways were required for both sides of the track in advance of and beyond the "switch," a distance of 150 feet; as they are "locations where operating conditions regularly require members of the train crew to be on the ground." SP strongly disputed this, in turn contending that a derail is only termed a "switch" technically; that at a derail there is no switching from a branch line to a diversion track; that there is no turnout, and car spots do not apply. A derail, SP states, is merely a protective device to derail cars off the track unto the ground in an emergency. SP contends that all that GO 118 requires is a safe and sufficient area on the side of the track where the derail target is sited to be able to safely throw it. Staff counters this view by pointing out that it is the usual and preferred practice for trainworkers to signal to the engineer and dismount from the side of the locomotive where the engineer can easily see them. When arriving at the Manville plant, the engineer is on the side of the locomotive opposite the derail switch and in order to stay in view of the engineer, a trainworker must operate from the ditch side.

We agree with staff that a derail is indeed a switch for the purposes of GO 118. The railroad, in numerous exhibits and testimony, refers to the "derail switch." The derail is a device designed to let trains pass when set in one position, but to divert runaway train cars to an off track location when set in a second position. The "lining" and "re-lining" of the derail switch requires the use of a switch stand and target similar to that used on other switches. SP witnesses Williamson and Giles testified that there is no practical difference between the derail and other switches from the standpoint of the worker using the switch, although they pointed out that the use of certain other switches might require additional follow-up activity evidently not required here.

A primary purpose of the GO 118 standards for areas where switching occurs is to provide workers with a safe place to stand when operating a switch and controlling the movement of trains. The need for compliance does not depend on the type of switch or the frequency of switch use, but rather on the need to protect workers when the switch is used.

In this case, the evidence shows that trainworkers line, and reline, the derail switch at least twice a day, in conjunction with the daily train to the J-M plant. Workers using the derail switch at issue need safe footing.

Given these facts, we find no good reason to distinguish between the derail and other switches. We find that GO 118 standards for switching areas apply to locations where derails are used.

Standard 6, advocated by staff, applies to areas where switching is performed to divert train cars to diversion tracks or to car spot tracks. Walkways in such areas are required on both sides of the track in order to inspect cars halted there. But the full length, as opposed to width, of a Standard 6 walkway is not designed for derail situations where the only activity involves the

lining of the derail and none of the activity usually involved in the diversion of cars onto other tracks. Walking inspections are not performed when a train is halted merely to line a derail. And no one would normally be on the ground at any appreciable distance in the area preceding or beyond the derail during the lining or relining of a derail. We find that Standard 6 is appropriate as far as the width of the walkway at a derail is concerned, but not the length, if the area is not otherwise a switching area or railroad yard. The standards do not establish a reasonable length before and beyond the switch in the case of a derail.

Given our resolution of SP's deviation request, and given the fact that there appears to be an adequate walkway complying with all GO 118 switching area standards (Standards 3, 5, and 6) on the north side of the track where the switch stand and target is located and where workers need to be to operate the switch, we need not now determine precisely what walkway is required south of the derail switch.

An interesting question arises with regard to the state of the south side walkway at the first location the derail was moved to after the three derails were removed from tracks within the J-M plant. Because this first move required reconstruction of tracks and walkways, it invoked GO 118 walkway standards. The record does not reveal the present state of the walkways at this location, but we note that unless those walkways conform to the appropriate standard, SP is in violation of GO 118.

Should the Commission Grant a Deviation?

Having completed hearing, and having arrived at a determination that staff has demonstrated conclusively that the drainage ditch area on the south side of the track cannot as presently constituted be considered a safe walkway, posing as it does a severe hazard to any employee who might enter that area, we next turn to the question whether the Commission should order SP to eliminate this potentially unsafe condition and set a specific time

for compliance. Or, as requested by SP's deviation application in this consolidated proceeding, should the Commission authorize a deviation for this specific installation?

These questions lead us to consideration of the fundamental issue: Has SP provided its workers with a safe place to work on the White Hills Branch line leading to the Manville Plant? And, if so, has SP demonstrated the need for a deviation from GO 118 walkway standards along the south side of the last half mile of the White Hills Branch Line leading to the J-M plant?

SP requests a deviation under Paragraph 7 of GO 118, which provides that:

"Deviations from the filed standards or the provisions of this order may be authorized by the Commission for any specific installation for good cause upon application by a railroad corporation; which application shall include a full statement of the conditions which prevail at the time and place involved, and the reasons why deviation is deemed necessary."

In addition to arguing that the maintenance of an intermittent south side walkway is impractical, SP insists that no walkway at all is necessary on the south side; that the roadway on the north side is fully adequate and has and is being maintained; and that the north side walkway provides a safe area for the minimal work on the ground that is required. SP's testimony was that there is nothing about operating the daily train to J-M that requires employees to be on the ground on that south side; that crews have been assigned radios to facilitate north side switching; that its crew members have been ordered not to be in that area; that signs have been posted reminding them of this order; and that the same instructions have been incorporated in their general order. The railroad insists there is no advantage, no convenience, no switching, and no work that need be done there or that could advantageously be done there. It strongly objects to being required to provide what it perceives to be an expensive and

impractical (given the nature of the area) walkway in an area where none is needed: a requirement, it states, that would merely result in a wasteful and inefficient allocation of resources with no measurable benefits. SP suggests that staff's basic antagonism to a deviation is driven by a primary motivation not to accede to any deviation, anytime, anywhere, regardless of provisions paragraph 7 of GO 118, because it feels deviations are undesirable events which dilute the safety standards based on economic factors.

Staff objects to any deviation, arguing that "deviations should be granted only in emergency situations with the ultimate attempt to restore the walkways." Staff would reserve permanent deviations, such as SP seeks here, only to extreme circumstances, and citing our SP Fresno Yard Case (D.86-02-058, Slip Opinion at p. 30), would not let financial considerations determine where worker safety is at issue.

Staff disagrees with SP's contention that workers need never be on the south side of the tracks. Staff notes that while SP witness Giles testified that every problem that arises on the south side could be fixed from the north side of the track, his proposed methods include working on cars while standing completely between the rails and crawling underneath cars. Staff witness Harwood pointed out that these are risky maneuvers which could more safely be undertaken if the train crew were able to work on both sides of the train.

Staff observes that the daily train typically arrives in daylight but leaves in the twilight or dark when lighting conditions are poor. In addition, the crews must work quickly to keep on schedule. These conditions exacerbate the dangers of working on the White Hills Branch. Staff infers that workers need all the safety help they can get.

Staff fears that notwithstanding orders, employees might be tempted to or inadvertently cross to the south side to work. Staff notes that before SP's order prohibiting employees from being

on the south side of the track, trainmen were observed signaling from the south side. Staff points out that these trainmen must have found a south side location useful in carrying out their duties.

Staff witness King, with ten years of railroad experience, testified that railroad workers detraining for switching operations instinctively exit the train in such a way that they can maintain visual contact with the engineer at all times. On the White Hills Branch, King testified, this would be the south side of the tracks.

King also presented numerous Federal Railroad Administration reports describing accidents in which experienced railroad workers were killed in areas of obvious hazard that they were prohibited from occupying.

Staff notes that human error does occur, and rules will not prevent it; that good walkways do not prevent errors from occurring, but they reduce the seriousness of the consequences of a single misstep.

Do the conditions cited by SP in support of its application for a deviation justify a deviation? Or do staff's criticisms compel us to deny SP's deviation request. A closer look at the conditions and staff's rebuttal is necessary. Before we take that look, we will explain the principles we will apply in evaluating deviation requests.

First, we will never grant a deviation from GO 118 when to do so would have an adverse impact on worker safety. Such action would be contrary to our PU Code § 768 mandate to make sure railroad operations are conducted safely.

Second, we expect deviation requests to be based on a comprehensive statement of the conditions which prevail at the time and place involved, and the reasons why deviation is deemed necessary. This comprehensive statement is required by GO 118 Paragraph 7. The more comprehensive this statement is, the easier

it is for us to evaluate the deviation request. We do not look favorably on vague assertions of physical impossibility or financial impracticality.

Third, we will start with the assumptions that safe walkways are necessary along both sides of all tracks, and that walkways in compliance with GO 118 standards are reasonably safe. We will not start with the assumption that the provision of safe walkways along one side of a track obviates the need for safe walkways along the other side. Such an assumption is contrary to the standards accompanying GO 118.

Fourth, the cost of compliance is one factor that may be considered in a deviation proceeding, but is not relevant to a determination of whether a violation of a general order has occurred and is not an excuse for non-compliance in the absence of a deviation granted by this Commission. (D.86-02-085 (Southern Pacific Transportation Company - Fresno Yard, supra, Slip Opinion at p. 31).)

Fifth, in order to justify a deviation from GO 118, a railroad must demonstrate:

- 1) that compliance with GO 118 walkway standards is physically impossible, or that compliance is physically very difficult and can be achieved only at a cost that is unreasonable in light of the safety benefit gained;
- 2) that the railroad has made all possible efforts to mitigate the hazards resulting from non-compliance; and
- 3) that worker safety will not be significantly compromised by the granting of a deviation.

Sixth, staff, and railroad employees and/or their representatives, will be given an opportunity to rebut the assertions made by a railroad in a deviation request. Deviations will not be granted on an ex parte basis.

Seventh, deviations will be limited in scope to the areas which truly qualify for them.

Eighth, deviations will be limited in time to the period in which the measures the railroad institutes to mitigate the hazards resulting from the deviation are strictly enforced.

Ninth, deviations will cease to be effective as soon as the railroad constructs, or reconstructs walkways in the area subject to the deviation.

With these principles in mind, we turn to the facts in this case.

SP's deviation application claims that compliance with GO 118 is physically impossible in certain areas, because of the narrowness of the railroad's right of way. We do not find this a compelling indication of impossibility of compliance. SP acknowledged, upon cross-examination, that Johns-Manville owned the property on either side of the right of way and that SP has not explored the option of discussing with Johns Manville the possibility of expanding that right of way. We note further that GO 118 standards allow for diminished walkway dimensions in situations of congestion. The introduction to the walkway standards provides that:

"These standards shall not be applicable to:

- "(2) Within cities, towns, populated or congested areas where insufficient width of right of way is available, except these standards shall apply to the full width of the right of way available."

Even if SP could not obtain a wider right of way, it would not be in violation of GO 118 standards as long as it provided an adequate walkway to the extent possible. SP's legal right of way argument is not convincing.

SP claims that winter storms wash out the south side walkways that SP has intermittently constructed, and that this prevents compliance with GO 118 standards. Again, the standards

address this storm damage situation. The introduction to the walkway standards provides that:

"These standards shall not be applicable to:

- "(3) During periods of heavy rain or snow, derailments, rock and earth slides, and other abnormal periods, including reasonable duration of time after return to normal to permit necessary restoration."

SP is thus not in violation of GO 118 standards so long as it repairs storm damaged south side walkways within a reasonable period of time. No deviation is necessary in this situation.

SP claims that it is impractical to maintain a walkway on the south side on the intermittent basis it assumes is acceptable because of its assumption that the south side need not improved in areas where no walkways were constructed or reconstructed after the effective date of GO 118. We do not find this "intermittency" argument alone a compelling reason to grant a deviation. We note that to the extent the intermittent nature of the walkway interfered with compliance, SP has always been free to maintain a south side walkway on a continuous basis.

SP contends that a south side walkway is impractical because of the difficulty in laying pipe adequate to carry storm run off in the area between the tracks and the cliffs south of the track. SP states that it has explored, and rejected for engineering or cost effectiveness reasons, a number of options designed to allow construction of a permanent walkway south of the track. This is SP's best argument for a deviation.

Staff counters SP's assertions with engineering evidence of its own. Staff took the unusual step of requesting assistance from an expert hydrologist from the Department of Water Resources. Staff witness Schmutte testified that a series of 36 inch culverts, interspersed with open ditches, could carry the storm run off and provide a foundation for a walkway at a cost of roughly \$25,000. Storm water would travel through the culverts at a velocity

sufficient to wash away any sediment that might build up in the pipes as previous storm waters subsided, and trash racks could prevent the entry of branches and other materials that might clog the pipes. Most of the run off from the south side cliffs would naturally flow into the ditches between the culverts, which would be located only where there was inadequate space between the track and the cliffs to provide for a ditch and a walkway side by side.

SP witnesses claimed that SP had explored and rejected a similar option involving 30 inch pipe, which had been estimated to cost \$49,556. This option was rejected because the 30 inch pipe was inadequate to carry all the run off expected, and because it was feared that sediment, tree branches, and diatomaceous earth debris would clog the pipes, and because expensive scaling back of the cliffs would have been necessary. SP witness Noori claimed that engineering safety considerations and Public Utilities Commission clearance regulations would make it impossible to install Schmutte's culverts in the trackside ditch as he proposed, and that in some areas the distance between the track center and the cliff face was too small to permit culvert installation without expensive excavation of the cliff footing. He also asserted that Schmutte's cost estimate was grossly inadequate.

SP claims that staff's proposed solutions will not work, and that only full relocation of the tracks involved would provide a permanent solution. SP claims this would cost \$166,000. It would prefer to spend this money elsewhere. One example of SP's priorities is the reconstruction of tracks in its Los Angeles diesel facility, where workers have complained of unsafe footing due to grease and oil on the ground near the tracks. We note that in federal litigation involving GO 118 walkway standards, of which we take official notice, SP Engineer of Standards Martin J. Karlovic stated that "In two recent instances in which the specific cost of adding walkways to conform to a General Order No. 118 requirement has been calculated, the actual estimates have been...;

for approximately 640 feet of walkway at White Hills, California, \$30,000." (Declaration of Martin J. Karlovic in Support of Plaintiff's Motion for Summary Judgment, page 17 (N.D. Cal. No. C-86-2480 WWS, See, Southern Pacific Transportation Company v. Public Utilities Commission, ___ F.Supp. ___ (1986); aff'd on appeal ___ F. 2d ___ (1986)).) Since we favor permanent solutions over temporary ones, we will give SP the benefit of the doubt and consider the higher figure to be their best estimate for the purposes of this deviation request.

The evidence of the engineering feasibility of constructing and maintaining an adequate walkway is conflicting. We are not entirely convinced that a solution less drastic than full track relocation is impractical, but we believe that such a solution would cost more than staff estimates. SP convinces us that staff's solution would be subject to some degree of wear and tear due to the effect of run off on the walkways overlying the proposed culverts. This would require continuing maintenance. On the other hand, we recognize that if staff is correct, and the run off effect is minimal, then SP would save some of the money it presently spends on maintenance if it adopted staff's proposal.

Before we finally determine whether a deviation is appropriate, we come to the issue of worker safety. Has SP shown that worker safety will not be significantly impaired by the granting of a deviation?

This 3.7-mile branch line was constructed 65 years ago when the carrier derived considerable freight traffic from it. However, today this single track line carries only a fraction of the freight it initially carried. There is but one customer. Switching is relatively minor in the area for which SP seeks the deviation, with all switch stands and targets, including the derail, now located on the north side of the track. With introduction of personal radios and the 1978-79 construction of the J-M run-a-round track, necessary switching operations can be, and,

since orders of the carrier are, all performed only from the north side, obviating any need for crew members to be in the south of the track, ditch-side, area. Indeed, SP employees are specifically prohibited from being on the south side. Walking inspections are all carried out inside the plant or at the terminus 3.7 miles away. There has never been a breakdown on this short line nor is one very likely, given that distance and the proximity of the walking inspection area when the train departs. As long as crew members on the trains to J-M are not permitted or required to work on the south side of the track on the portions of the final one-half mile approach to the J-M plant where there are unsafe walkways, there is no present need for the immediate provision of a continuous walkway on that side. We find that crew members can safely operate without it.

SP has provided evidence that it has attempted to mitigate the hazards arising from the absence of complying walkways south of the tracks. While we might add certain conditions to ensure these mitigation measures continue at an appropriate level, we do not fault SP for its showing on this issue. We conclude that as long as SP enforces restrictions on work south of the tracks, maintains and lights or constructs from reflective material the signs warning workers not to enter the area, maintains the radios and other equipment necessary to avoid the need for workers to be in the area, and periodically re-informs the workers of the need to avoid the area, then the granting of a deviation will not have a significant adverse effect on worker safety.

Although the call is a close one, we find that SP has adequately demonstrated that compliance with GO 118 walkway standards on the south side of the last half mile of track leading to the J-M plant would be physically impractical without the expenditure of an amount of money that is unreasonable in light of the worker safety benefit that would be gained by full compliance. Critical to our decision is the fact that SP's safety hazard

mitigation measures reduce the adverse impact on worker safety to an insignificant level.

We conclude that SP has presented sufficient reasons why a deviation from the Standards and provisions of GO 118 should be authorized for this specific south side of the track installation. We will grant SP's request for a deviation from compliance with GO 118 walkway standards for the south side of the last half mile of the White Hills Branch Line leading to the J-M plant, with the exception of Switches 2484 and 2587, which the record shows have presently complying walkways necessary to ensure safe footing for workers utilizing those switches. This deviation will be subject to a number of conditions designed to ensure that the safety hazards to workers continue to be mitigated.

We also conclude that there is a need to clarify the area for which the deviation will be granted. There is some uncertainty with regard to the condition of the south side of the track between the present location of the derail switch and the J-M plant fence. SP testified that only in the areas south of switches 2584 and 2587 has the railroad maintained GO 118 standard walkways. Yet we note that on May 20, 1985 SP issued a timetable bulletin instructing employees "not to detrain, entrain or walk on embankment or south side of track between Johns Manville private road crossing MP 316 and 50 feet west of Johns Manville derail switch." On November 1, 1985 this instruction was reissued as part of SP's railroad General Order 1. In addition, signs to that effect were placed on each side of the track leading to the area. To the extent that south side walkway areas east of the present derail switch location, but west of Switch 2584, do not conform to GO 118 standards, the present signs do not ensure that workers detrain only where walkway conditions are safe.

We will order SP to either provide a safe south side walkway between the present location of the derail switch and switch 2584 or amend its signs and instructions to prohibit workers

from detrainning before switch 2584. This modification is necessary to ensure that no detrainning takes place in unsafe areas.

We will order SP to maintain appropriate signs at both ends of the deviation area. These signs must either be lighted, or constructed with reflective material so they are visible to workers at night.

We will order SP to periodically remind employees that they are not to enter the area subject to the deviation.

We will also condition the deviation on the continued performance by SP of the mitigation measures it has implemented to ensure worker safety on the White Hills Branch. Should SP cease these mitigation measures, its deviation will cease also.

As long as SP complies with the above conditions, and enforces present access restrictions, SP should be authorized a deviation until reconstruction of the White Hills Branch Line or an appreciable segment is undertaken, or until south side walkways are constructed or reconstructed.

The Fine Issue

Finally, we address the issue of a fine as recommended by our staff. PU Code § 2115 authorizes the Commission to impose a fine not to exceed \$2,000 whenever the Commission determines that a railroad has violated any order of the Commission concerning the condition of track walkways, among other fixtures.

Staff primarily argues that SP violated GO 118 by not conforming to walkway standards during construction and reconstruction of walkways south of the track in question. Staff claims that SP's actions violate the preamble to GO 118, which states that:

"...each railroad corporation...shall file its standards for the construction, reconstruction and for the subsequent maintenance of walkways adjacent to its tracks as hereinafter required ...and shall hereafter, in the construction and maintenance of its tracks and walkways, observe its standards..."

We have examined the evidence and concluded that the south of the track ditch area does not meet standards, despite the fact that intermittent walkways were constructed and reconstructed in this area after the effective date of GO 118. These facts show that SP has violated the preamble to GO 118, since it has not fully observed its walkway standards in accordance with the provisions of that order. The fact that SP did not reconstruct the branch line itself is irrelevant, since the preamble to GO 118 requires compliance with the walkway standards in connection with construction or reconstruction of "tracks and walkways."¹⁷

Since a violation of a Commission order has been found, a fine would be appropriate. We choose not to fine SP, however, since we would prefer the money be spent on worker safety.

Staff also argues that SP violated Paragraph 6 of GO 118 by not including the J-M approach in its program for walkway improvement. Given our determination to clarify Paragraph 6 improvement program requirements, we need not address staff's argument further at this time.

Although are we not fining SP for its non-compliance with GO 118, we are concerned with the history of this matter. It has been over nine years since staff concluded (1) that there was an unsafe walkway condition south of the White Hills Branch Line and that working on the ground in that area could be hazardous for

17 The GO 26-D reference to reconstruction of the track should not be confused with the GO 118 preamble requirement that railroads observe the walkway standards in "reconstruction of tracks and walkways." Note also that Paragraph 1 of GO 118 requires railroads to file standards "for the construction or reconstruction of walkways adjacent to its tracks." (Emphasis added.) The other numbered paragraphs of GO 118 also refer to "walkways" without making that reference depend on track reconstruction. The preamble merely adds the requirement that walkway standards must be observed where tracks are constructed or reconstructed, just as they must be when walkways alone are constructed or reconstructed.

train crew members, and (2) began an extensive, albeit unfruitful dialogue with employees and management personnel of the railroad.

SP is obligated to comply with our general orders even in the absence of staff enforcement actions, unless and until it obtains a deviation from the Commission. We would have expected a more satisfactory and expeditious resolution of this matter.

Findings of Fact

1. SP is a railroad corporation within the meaning of PU Code § 230, and it provides rail freight service, as relevant to these proceedings, on its White Hills Branch Line serving the J-M plant at White Hills near Lompoc, California.

2. The White Hills Branch Line was constructed in 1923, and apart from minor switch and derail relocations, has not been reconstructed since.

3. Rail shipments of the diatomaceous earth product of the J-M plant have drastically diminished over recent years as truck shipments have superseded rail shipments, until today there is one short train daily into and from the plant.

4. In the final approach of this single track branch line into the J-M plant, the SP right of way for the track laid down in 1923 narrows to 17 feet, bordered on the south by a rocky, shale-like cliff face. The rail bed generally follows the center of the right of way to the extent permitted by track curvatures.

5. There is a reasonably safe walkway substantially conforming to GO 118 standards north of the White Hills Branch Line. Adjacent to and generally paralleling this north side walkway is the asphalt approach road to the J-M plant.

6. Along the south side of the track, with some exceptions, no walkway was originally provided or today exists; the confined space within the right of way at the foot of the cliff substantially being occupied by a drainage ditch, up to 5 feet deep and of varied width, naturally eroded out of the shale-like rock by storm water runoff and cliff side drainage.

7. Over the years SP has repeatedly worked to protect and maintain its roadbed from the coursing action of this storm water in the south side drainage ditch. SP commonly replaced two or three 40-foot sections of subballast, ballast and fill, approximately 3 feet wide, from underneath the rail to the bottom of the south side ditch.

8. SP states that in 1963 there were essentially no walkways south of the White Hills Branch tracks, but acknowledges that walkways were constructed thereafter on an intermittent basis in conjunction with the replacement of washed out sections of roadbed and ballast during maintenance activities. These newly constructed walkways do not comply with GO 118 walkways standards, except in the areas south of switches 2584 and 2587.

9. Segments of the walkways along the south side of the White Hills Branch have been reconstructed.

10. Derails are devices designed to let trains pass when set in one position, but to divert runaway train cars to an off track location when set in a second position.

11. Derails of the type used on the White Hills Branch use a switch stand and target similar to that used to operate other switches.

12. There is no practical difference between the White Hills derail and other switches from the standpoint of the worker using the switch, although the use of switches with diverging tracks may involve follow up activity not required at White Hills.

13. Workers need safe places to stand when operating switches.

14. A primary purpose of the GO 118 standards for areas where switches are located is to provide workers with safe places to stand when operating switches.

15. The need for compliance with walkway standards for switching areas does not depend on the type of switch or frequency

of switch use, but rather on the need to protect workers when the switch is used.

16. "Derails" constitute a form of switch, however, the applicable switching area walkway standard depends on the specific location of the derail switch.

17. The walkway north of the derail switch on the White Hills Branch meets any GO 118 walkway standard applicable to switching areas. In view of our disposition of SP's deviation request, we need not determine precisely which standard applies south of the derail. The presence of the derail switch stand and target on the north side of the track relieves our safety concerns since necessary operations on this branch line are confined to that side.

18. During the eight years preceding the adoption of GO 118, staff received an average of 14 informal complaints a month from railroad workers concerned about unsafe walkway conditions resulting in slipping, tripping, and falling incidents, both while getting on and off equipment and while otherwise performing their required duties.

19. The file in C.7306, of which the ALJ took official notice, reveals that during the 1959 regular session of the California Legislature there were numerous bills relating to the health and safety of railroad workers before the Assembly. These bills were referred to committee for interim study, and after hearings a committee report urged that the subject matter be referred to the Public Utilities Commission for possible disposition through issuance of a general order.

20. In 1961, the Commission opened an investigation into the need for and content of safe walkway standards.

21. Negotiations between Commission staff and the railroads led to the creation of a compromise proposed general order and a set of specific walkway standards which the railroads agreed to file if the compromise general order was adopted.

22. In D.65208 issued on April 9, 1963, the Commission adopted the compromise general order, after stating that it found:

"these proposed regulations and the Standards for Construction and Reconstruction of Walkways and Maintenance Thereof presented by the railroads as Exhibit 8 provide a reasonable standard of safety for railroad employees, passengers and customers of common carriers and the public in general." (60 CPUC 756, at 757 (1963).)

23. Following the adoption of GO 118, the railroads filed the standards set forth in Exhibit 8 in C.7306. These standards include minimum walkway measurements, and can fairly be characterized as minimum standards.

24. The historical context of the adoption of GO 118 shows that 1) the Commission was acting in response to Legislative concern about railroad worker safety and informal complaints by railroad workers alleging the existence of unsafe walkways standards, and 2) the Commission believed that GO 118 and the specific standards accompanying it provided a reasonable standard of safety for railroad employees and others.

25. GO 118 was adopted to protect railroad workers. See, eg., Re: Union Pacific Railroad Company, 6 CPUC 2d 196, 205 (1981), See also, D.83-10-030, Re Union Pacific Railroad Company - Yermo Yard, ___ CPUC 2d ___, (1983) Slip Opinion at pp. 11-12; and D.86-02-958, Re Southern Pacific Transportation Company - Fresno Yard, ___ CPUC 2d ___ (1986) Slip Opinion at p. 30.

26. Railroads have a duty to provide their employees a safe place to work. See, United Transportation Union v. Southern Pacific Transportation Company, D.84-08-122, ___ CPUC 2d ___, (1984) (Slip Opinion at p. 3).

27. PU Code § 768 authorizes the Commission to require railroads to construct, maintain, and operate their facilities in a manner so as to promote and safeguard the health and safety of railroad employees, and gives the Commission the power to establish

"uniform or other standards of construction and equipment, and to require the performance of any other act which the health and safety of its employees and the public may demand."

28. PU Code §§ 761 and 762 reinforce § 768 by requiring the Commission to take remedial action if a hearing reveals that a utility is operating in an unsafe manner.

29. Adoption of GO 118 and the accompanying walkway standards established standards for what are presumed to be safe walkways.

30. A failure to provide safe walkways could lead to a person landing on a railroad track and risking being run over by a train.

31. In its efforts to implement GO 118, staff has consistently interpreted Paragraph 6 as requiring that railroads develop a program for improvement of walkway conditions along tracks in existence when GO 118 was adopted.

32. Staff interprets the GO 118 Paragraph 6 requirement that railroads pursue a "program for improvement of walkways in all switching areas where a substantial amount of switching is performed, along main, branch and industrial trackage," to mean that railroads must improve walkways along main, branch and industrial trackage as well as in areas where substantial switching occurs.

33. Staff believes that GO 118 requires that all pre-1963 trackside conditions covered by the general order be brought into eventual conformity with the walkway standards.

34. SP interprets GO 118 Paragraph 6 as if it reads: "...pursue a program of improvement of walkways in all switching areas where a substantial amount of switching is performed...toward substantial conformity with its [filed] standards...." SP does not give meaning to the phrase ",along its main, branch and industrial trackage," which follows the reference to switching areas.

35. SP believes GO 118 requires a program for remedial walkway improvement only in switching areas where substantial switching is performed. Thus, as long as SP did not construct

walkways where they did not exist along other track built before 1963, and did not reconstruct walkways that did exist at that time, SP would never be under any obligation to improve those walkways, barring a specific staff investigation of the hazards thereon, followed by a Commission order requiring improvement.

36. Staff regularly conducted comprehensive GO 26D-118 surveys of substantial portions of railroad trackage until 1978, when budget constraints and staff reductions reduced staff's ability to do so.

37. Staff rebuts SP's argument that staff's failure to complain of main and branch line conditions on Northwestern Pacific tracks shows an absence of belief in its ability to do so by pointing out that staff time and resource constraints, and access problems, require giving priority to heavily used switching areas.

38. Three surveys introduced by staff support staff's statements regarding its interpretation of GO 118. Each of these surveys cited a number of main line deficiencies, and showed that all substandard conditions were corrected. There is no evidence of any discussion regarding whether "substantial switching" took place, with the exception of item 1089 relating to the White Hills Branch.

39. Commission staff brought unsafe walkway conditions along the White Hills Branch to SP's attention in 1979. Today's decision will resolve disputes between SP and staff concerning walkway conditions along one half mile of this marginal branch line. Proceedings of this length are an absurd way to resolve disputes concerning railroad worker safety.

40. Guidance in interpreting GO 118 is provided by a California Supreme Court decision which states that: "Where a statute empowers an administrative agency to adopt regulations, such regulations, 'must be consistent, not in conflict with the statute, and reasonably necessary to effectuate its purpose.'" (Woods v. Superior Court, 28 C 3d 668, 679 (1981).)

41. SP has requested a deviation under GO 118 Paragraph 7, which provides that:

"Deviations from the filed standards or the provisions of this order may be authorized by the Commission for any specific installation for good cause upon application by a railroad corporation; which application shall include a full statement of the conditions which prevail at the time and place involved, and the reasons why deviation is deemed necessary."

42. Heavy storm runoff both from the J-M plant, the steep south cliff face and the hills above regularly fills and overflows the drainage ditch, at times sending stone debris coursing over the roadbed, washing away both roadbed materials and such walkway materials as were provided.

43. SP contends that a south side walkway is impractical because of the difficulty in laying pipe adequate to carry storm runoff in the area between the tracks and the cliffs south of the track.

44. SP states that it has explored, and rejected for engineering or cost effectiveness reasons, a number of options designed to allow construction of a permanent walkway south of the track.

45. Staff witness Schmutte, an expert hydrologist from the Department of Water Resources, testified that a series of 36-inch culverts, interspersed with open ditches, could carry the storm runoff and provide a foundation for a walkway at a cost of roughly \$25,000.

46. SP witnesses claimed that SP had explored and rejected a similar option involving 30-inch pipe, which had been estimated to cost \$49,556. This option was rejected because the 30-inch pipe was inadequate to carry all the run-off expected, and because it was feared that sediment, tree branches, and diatomaceous earth debris would clog the pipes, and because expensive scaling back of the cliffs would have been necessary.

47. SP witness Noori claimed that engineering safety considerations and Public Utilities Commission clearance regulations would make it impossible to install Schmutte's culverts in the trackside ditch as he proposed, and that in some areas the distance between the track center and the cliff face was too small to permit culvert installation without expensive excavation of the cliff footing. He also asserted that Schmutte's cost estimate was grossly inadequate.

48. In federal litigation involving GO 118 walkway standards, of which we take official notice, SP Engineer of Standards Martin J. Karlovic estimated the cost of adding walkways conforming to GO 118 standards to the White Hills Branch to be \$30,000. It is unclear what, if any, drainage work this included. (Declaration of Martin J. Karlovic in Support of Plaintiff's Motion for Summary Judgment, page 17 (N.D. Cal. No. C-86-2480 WWS, See, Southern Pacific Transportation Company v. Public Utilities Commission, ___ F.Supp. ___ (1986); aff'd on appeal ___ F. 2d ___ (1986)).)

49. SP claims that staff's proposed solutions will not work, and that only full relocation of the tracks involved would provide a permanent solution. SP claims this would cost \$166,000. It would prefer to spend this money elsewhere. One example of SP's priorities is the reconstruction of tracks in its Los Angeles diesel facility, where workers have complained of unsafe footing due to grease and oil on the ground near the tracks.

50. The evidence of the engineering feasibility and cost of constructing and maintaining an adequate walkway without relocating the track is conflicting.

51. We are not entirely convinced that a solution less drastic than full track relocation is wholly impractical, but we believe that such a solution would cost more than staff estimates.

52. Since we favor permanent solutions over ones that may be temporary, we consider SP's \$166,000 figure to be the best estimate of the cost of compliance with GO 118 along the White Hills Branch.

53. Rules prohibiting workers from entering an area or engaging in unsafe practices do not guarantee that workers will not enter the area or engage in unsafe practices; numerous Federal Railroad Administration reports describe accidents in which experienced railroad workers were killed in areas of obvious hazard that they were prohibited from occupying.

54. Safety measures designed to eliminate the need for and the convenience of working in a prohibited area are necessary supplements to rules prohibiting such work.

55. SP has undertaken a number of measures designed to mitigate the hazards to workers resulting from unsafe walkway conditions south of the White Hills Branch Line. These measures include:

1. Issuing personal radios to workers so they need not be on the south side of the tracks to signal to engineers during switching operations.
2. Issuing instructions and bulletins warning workers not to detrain in the area of unsafe walkways.
3. Constructing signs designed to keep workers out of the area of unsafe walkways.
4. Moving the derail stand and target from the south to the north side of the tracks so that workers need not be on the south side to operate the derail switch.

56. The short 3.7-mile route of the White Hills Branch Line, a consistent 3% grade, is not an arduous or problem route, and equipment operated in this service on it is not stressed by severe grades or sharp curves.

57. Because of the pre-start walking inspection made on each train run before each start, and the shortness of the run between the White Hills Junction and the J-M plant (and reverse run loaded), there is only a remote likelihood of any mechanical or lading problem occurring enroute that would require a non-emergency

unscheduled stop. Accordingly, the chance of any non-emergency routine walking inspection being required enroute is very remote.

58. However, any non-emergency routine walking inspection that should be required can be safely and adequately performed on this 3.7-mile stretch of the branch line from the safe and adequate walkway provided and maintained on the north side of the track.

59. All necessary switching activities incidental to the operation of this branch line, including operation of the derail switch, may be performed adequately and safely from the north side of the track so that there is no need for any train crew member to be on the ground on the south side of the track in the area at issue.

60. There is no present operating necessity for any walkway on the south side of the track in the area at issue.

61. To the extent standard walkways on both sides of the tracks, not only in all switching areas, but on all trackage, are the ultimate objective of GO 118, the existing situation on the south side of the track on the White Hills Branch Line approach to the J-M plant deviates.

62. SP has demonstrated:

- 1) that compliance with GO 118 walkway standards along the south side of the White Hills Branch Line is physically very difficult and can be achieved only at a cost that is unreasonable in light of the safety benefit gained;
- 2) that the railroad has made all possible efforts to mitigate the hazards resulting from non-compliance; and
- 3) that worker safety will not be significantly compromised by the granting of a deviation.

63. Staff, and railroad employees and their representatives, were given an opportunity to rebut the assertions made by SP in its deviation request.

Conclusions of Law

1. I.85-01-002 should be closed.
2. The Commission has the responsibility to require every public utility to construct, maintain, and operate its system, equipment, apparatus, tracks, and premises in such a manner as to promote and safeguard the health and safety of its employees and the public. (Public Utilities Code §§ 761, 762 and 768).
3. Adoption of GO 118 and approval of the accompanying walkway standards did not alter the Commission's authority or duty to ensure walkway safety.
4. In all new construction or reconstruction of tracks or walkways, railroads must comply with GO 118 walkway standards.
5. At all times since adoption of GO 118, SP has been under the obligation to provide standard walkways on the south side of the track at each location where a new walkway was constructed or an existing walkway reconstructed. SP has not complied with this obligation. Although intermittent walkways were constructed and reconstructed in connection with certain track roadbed maintenance activities, only the walkways south of switches 2584 and 2587 were constructed and maintained to GO 118 standards.
6. SP's failure to observe GO 118 walkway standards at all locations where new walkways were constructed or existing walkways were reconstructed constitutes a violation of GO 118.
7. Because SP has violated GO 118 in its operations on the approach to the J-M plant on SP's White Hills Branch Line, SP could be fined under PU Code § 2115.
8. GO 118 Paragraph 6 requires railroads to pursue a program for improvement of walkway conditions in all switching areas where a substantial amount of switching is performed, along main, branch, and industrial trackage, designed to bring trackside conditions into substantial conformity with GO 118 walkway standards.
9. GO 118 Paragraph 6 applies to tracks pre-dating the adoption of GO 118 in 1963.

10. GO 118 Paragraph 6 is subject to more than one interpretation with regard to the scope of the program railroads must pursue to improve walkways in all switching areas where substantial switching is performed, along main, branch and industrial trackage.

11. The Commission should clarify the program of improvement required by GO 118 Paragraph 6.

12. The Paragraph 6 program for improvement should be consistent with the intent of the statutes GO 118 implements, with the Commission's intent in adopting GO 118 to protect railroad workers, with the railroads' obligation to provide employees with a safe place to work, and with sound sense and wise policy.

13. Railroads are obligated to comply with our general orders even in the absence of staff enforcement actions, unless and until they obtain a deviation from the Commission.

14. The cost of compliance is not relevant to a determination of whether a violation of a general order has occurred and is not an excuse for non-compliance. D.86-02-085 (Southern Pacific Transportation Company - Fresno Yard, ___ CPUC 2d ___, (1986) (Slip Opinion at p. 31).)

15. The cost of compliance is one factor to be considered in a deviation proceeding.

16. GO 118 Paragraph 7 provides that a railroad may apply for a deviation from the walkway standards or the provisions of GO 118 for any specific installation.

17. GO 118 Paragraph 7 requires that deviation requests include a comprehensive statement of the conditions which prevail at the time and place involved, and the reasons why deviation is deemed necessary. Vague assertions of physical impossibility or financial impracticality are not sufficient.

18. In evaluating GO 118 deviation requests, the Commission must start with the assumptions that safe walkways are necessary along both sides of all tracks, and that walkways in compliance

with GO 118 standards are reasonably safe. An assumption that the provision of safe walkways along one side of a track obviates the need for safe walkways along the other side would be contrary to the standards accompanying GO 118.

19. Staff, and railroad employees and their representatives, must be given an opportunity to rebut the assertions made by a railroad in a deviation request. Deviations should not be granted on an ex parte basis.

20. The Commission should never grant a GO 118 deviation when to do so would have an adverse impact on worker safety. Such action would be contrary to the Commission's mandate under PU Code §§ 761, 762, and 768 to make sure railroad operations are conducted safely.

21. In order to ensure that railroad operations are conducted safely, the Commission should not grant deviations from GO 118 or its walkway standards unless the railroad applying for the deviation demonstrates:

- 1) that compliance with GO 118 walkway standards is physically impossible, or that that compliance is physically very difficult and can be achieved only at a cost that is unreasonable in light of the safety benefit gained;
- 2) that the railroad has made all possible efforts to mitigate the hazards resulting from non-compliance; and
- 3) that worker safety will not be significantly compromised by the granting of a deviation.

22. A GO 118 deviation should be limited in scope to the area which truly qualifies for the deviation in order to avoid unnecessarily exposing workers to hazardous conditions.

23. A GO 118 deviation should terminate if the measures the railroad institutes to mitigate the hazards resulting from the deviation are not strictly enforced, since failure to enforce those

measures constitutes a change in the conditions upon which the deviation was based and could result in workers being injured.

24. A GO 118 deviation should terminate if the railroad constructs, or reconstructs walkways in the area subject to the deviation, or constructs or reconstructs tracks in the area subject to the deviation.

25. A GO 118 deviation should terminate if there is evidence that the deviation has had a significant adverse impact on worker safety.

26. The deviation sought by SP by A.85-03-052 should be granted but with conditions to assure worker safety as provided in the following order.

27. SP is required to comply with GO 118 standards if its deviation terminates.

28. An Order Instituting Investigation should be initiated for the purpose of clarifying the type, scope, and timing of the program for walkway improvement railroads will be required to undertake along track in existence at the time GO 118 was adopted in 1963. The investigation should consider at least the following questions:

1. To what extent, as of the effective date of this order, are walkways complying with GO 118 standards in existence along all pre-GO 118 tracks?
2. What are the estimated costs associated with establishing complying walkways along all pre-GO 118 tracks that do not presently have complying walkways?
3. Should the program for improvement include all pre-GO 118 tracks or just those in switching areas?
4. If the program is limited to switching areas where substantial switching occurs, how should the phrase "where substantial switching occurs" be defined?

5. Should the program for improvement include something more than switching areas but something less than all pre-GO 118 tracks? That is, should it also include other areas where railroad workers are frequently in need of safe footing? If so, what other pre-GO 118 tracks should be subject to the program for improvement?
6. Should the program for improvement set priorities for remedying walkway conditions in switching areas first and then improving other areas as time and resources permit?
7. Should any priorities be set on the basis of accident frequencies, cost effectiveness of potential improvements or a combination of these two factors? How could this be done?
8. What time frame, if any, should govern the program for improvement?
9. To what extent, if any, have railroads improved walkway conditions along pre-GO 118 main, branch and industrial tracks?
10. Should the program for improvement require actual compliance or merely "substantial conformity" with GO 118 standards with regard to walkways subject to the program for improvement?
11. If "substantial conformity" is required, rather than actual compliance, then how could the term "substantial conformity" be defined so that the program for improvement can be enforceable?

The OII should also invite proposals by staff, the railroads, and railroad workers and their representatives.

O R D E R

IT IS ORDERED that:

1. I.85-01-002 is closed.
2. A.85-03-052 of Southern Pacific Transportation Company for authority to deviate from the walkway standards provided for by General Order 118 on the south side of its White Hills Branch Line approach track, from Switch 2584 near the Johns-Manville plant entrance fence line to that company's private road crossing, a distance of approximately one-half mile, is granted subject to the following conditions:
 - a. Throughout the duration of this deviation, SP shall continue to notify its crews with the following instruction: "Because of the existence of a drainage ditch adjacent to the track, and the nonexistence of an adequate and safe walkway on that side of the track, crew members of trains serving the plant are not to detrain, entrain, or walk on that side of the track."
 - b. Written instructions (Railroad General Order, timetable, train order, or special instructions) shall immediately be issued to affected train crews concerning Condition 2a, and filed with the Railroad Operations and Safety Branch of the Commission. These instructions shall periodically be re-issued to affected railroad personnel
 - c. SP shall provide train workers involved in switching or other activities with personal radios to facilitate communication with train engineers during the performance of their duties.
 - d. SP shall provide signs that are either lighted or built with reflective materials at both sides of the track at both ends of the deviation area visible to train workers from both directions. In the event SP fails to maintain these signs appropriately, this deviation shall

terminate, and south side walkways conforming to GO 118 standards shall be provided.

- e. In the event SP ceases to strictly enforce the measures it adopted to mitigate the hazards to workers resulting from the granting of this deviation, this deviation shall terminate, and south side walkways conforming to GO 118 standards shall be provided.
- f. In the event of reconstruction of this branch line or significant segment of the line, or the construction or reconstruction of walkways adjacent to the south side of the line, this deviation shall terminate, and south side walkways conforming to GO 118 standards shall be provided.
- g. In the event of evidence that the deviation has a significant adverse impact on worker safety, this deviation shall terminate, and south side walkways conforming to GO 118 standards shall be provided.

3. We shall, within 90 days, issue an Order Instituting Investigation to determine what actions railroads should be required to undertake in order to improve walkway conditions along tracks in existence when General Order 118 was adopted in 1963, the type of trackage subject to any program of improvement, and the time frame within which any actions ordered must occur. The investigation will consider at least the following questions:

- 1. To what extent, as of the effective date of this order, are walkways complying with GO 118 standards in existence along all pre-GO 118 tracks?
- 2. What are the estimated costs associated with establishing complying walkways along all pre-GO 118 tracks that do not presently have complying walkways?
- 3. Should the program for improvement include all pre-GO 118 tracks or just those in switching areas?

4. If the program is limited to switching areas where substantial switching occurs, how should the phrase "where substantial switching occurs" be defined?
5. Should the program for improvement include something more than switching areas but something less than all pre-GO 118 tracks? That is, should it also include other areas where railroad workers are frequently in need of safe footing? If so, what other pre-GO 118 tracks should be subject to the program for improvement?
6. Should the program for improvement set priorities for remedying walkway conditions in switching areas first and then improving other areas as time and resources permit?
7. Should any priorities be set on the basis of accident frequencies, cost effectiveness of potential improvements or a combination of these two factors? How could this be done?
8. What time frame, if any, should govern the program for improvement?
9. To what extent, if any, have railroads improved walkway conditions along pre-GO 118 main, branch and industrial tracks?
10. Should the program for improvement require actual compliance or merely "substantial conformity" with GO 118 standards with regard to walkways subject to the program for improvement?
11. If "substantial conformity" is required, rather than actual compliance, then how could the term "substantial conformity" be defined so that the program for improvement can be enforceable?

The OII will also consider any proposals made by staff, the railroads, and railroad workers or their representatives. All railroads subject to our jurisdiction will be made respondents to this OII, and railroad workers and their representatives will be invited to participate.

This order becomes effective 30 days from today.

Dated February 8, 1989, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
Commissioners

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY.


Victor Weiss, Executive Director

APPENDIX A

- 1 -

GENERAL ORDER No. 118

Public Utilities Commission of the
State of California

REGULATIONS GOVERNING THE CONSTRUCTION, RECONSTRUCTION,
AND MAINTENANCE OF WALKWAYS ADJACENT TO RAILROAD
TRACKAGE AND THE CONTROL OF VEGETATION ADJACENT
THEREETO.

Adopted April 9, 1963. Effective April 29, 1963.
(Decision No. 63208, Case No. 7306)

IT IS ORDERED by the Public Utilities Commission of the State of California that each railroad corporation operating in the State of California shall file its standards for the construction, reconstruction and for the subsequent maintenance of walkways adjacent to its tracks as hereinafter required and any future changes or revisions thereof in accordance with the following provisions and shall hereafter, in the construction and reconstruction of its tracks and walkways, observe its standards filed with the Commission in accordance with the provisions of this order:

1. The standards of each railroad corporation operating in the State of California for the construction or reconstruction of walkways adjacent to its tracks shall be filed with the Commission for its approval not later than thirty days after the effective date of this order.
2. Each railroad corporation operating in the State of California shall file with the Commission any change or reissue of its standards for the construction and reconstruction of walkways adjacent to its tracks. No change or reissue of any such standard shall become effective less than five days after approval thereof by the Commission. If the Commission does not approve or disapprove any standard, change or reissue within sixty days after the filing thereof, the change or reissue shall be deemed to be approved. If the Commission disapproves a proposed standard within the sixty day period, the railroad or railroads submitting such standard may file formal application thereafter to the Commission for approval of said standard.
3. The standards of each railroad corporation shall contain provisions for reasonably safe and adequate walkways adjacent to its tracks in all switching areas, and shall provide that all such walkways shall be maintained and kept reasonably free from vegetation as may be appropriate to prevailing conditions, and shall provide for abatement of weeds and brush adjacent to walkways as necessary to prevent the growth of objectionable vegetation encroaching upon such walkways.
4. Each railroad corporation shall furnish the Commission with the name and address of an appropriate general officer, or officers, to whom complaints relating to the provision and maintenance of walkways pursuant to this order may be reported.

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5. The Commission, after hearing, may order the railroad corporation to eliminate any unsafe walkway condition and may specify such reasonable time within which the improvement shall be completed as may be appropriate under the circumstances.

6. Each railroad corporation operating within the State shall pursue a program of improvement of walkways in all switching areas where a substantial amount of switching is performed, along its main, branch and industrial trackage toward substantial conformity with its standards filed with the Commission pursuant to this order.

7. Deviations from the filed standards or the provisions of this order may be authorized by the Commission for any specific installation for good cause upon application by a railroad corporation; which application shall include a full statement of the conditions which prevail at the time and place involved, and reasons why deviation is deemed necessary.

This order shall be effective April 29, 1963.

Approved and dated at San Francisco, California, this 9th day of April, 1963.

PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA

By R. J. PAJALICH, Secretary

APPENDIX A

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GENERAL ORDER No. 118

Public Utilities Commission of the
State of California

Standards Filed by Carriers Subject to General Order 118

STANDARDS FOR CONSTRUCTION AND RECONSTRUCTION OF WALK-
WAYS AND MAINTENANCE THEREOF

Reconstruction shall mean the use of more than 50% of material such as ties, ballast or fill or more than 50% of the current capital cost of the improvement.

Where such standards would be in conflict with General Order 26-D, the provisions of General Order 26-D shall apply.

These standards shall not be applicable to:

(1) Tracks in streets or tunnels, existing bridges, grade separation structures, ferry slips, road crossings, trestles, cattle guards, tracks adjacent to walks, abutments, platforms, pillars and structures where minimum widths are otherwise provided for in General Order 26-D.

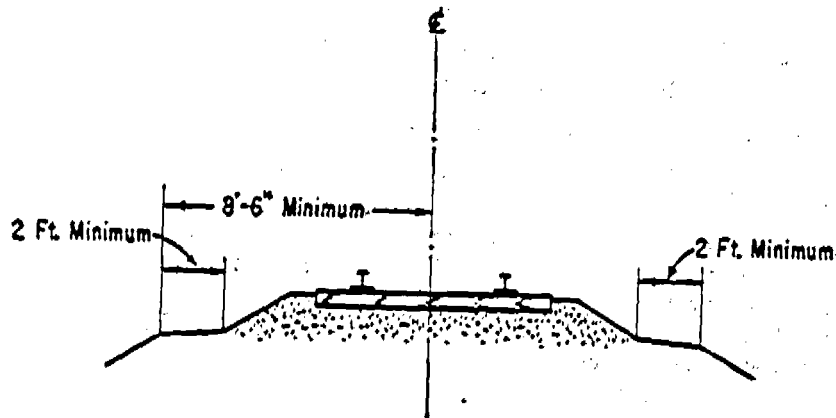
(2) Within cities, towns, populated or congested areas where insufficient width of right of way is available, except these standards shall apply to the full width of the right of way available.

(3) During periods of heavy rain or snow, derailments, rock and earth slides, and other abnormal periods, including reasonable duration of time after return to normal to permit necessary restoration.

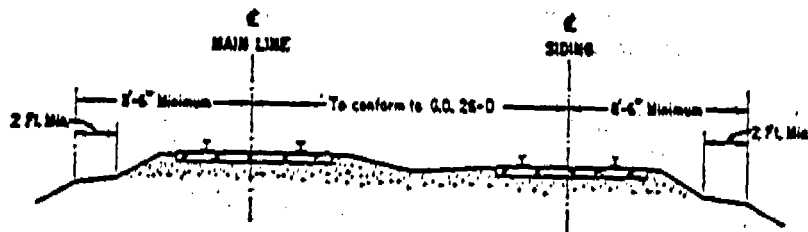
Walkways shall provide a reasonable regular surface with gradual slope not to exceed approximately one inch to eight inches.

APPENDIX A

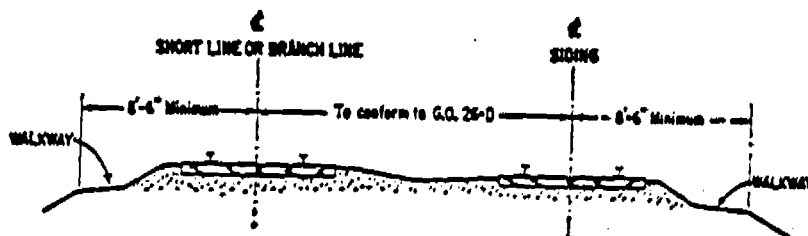
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STANDARD No. 1
WALKWAYS ALONG MAIN LINE TRACKS



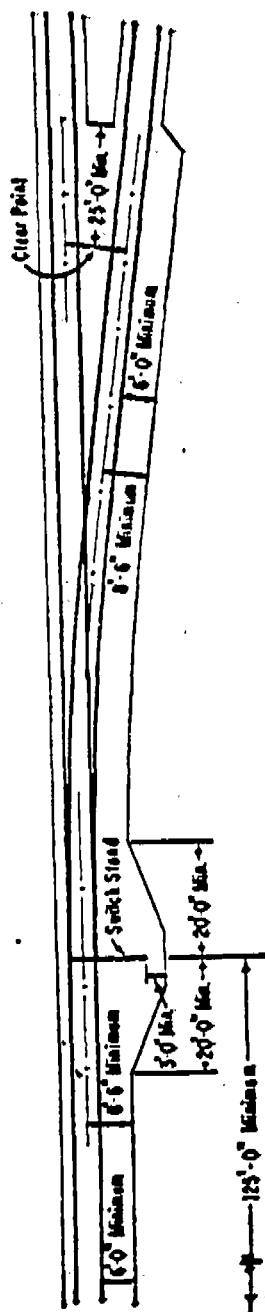
STANDARD No. 2
WALKWAYS ALONG MAIN LINE TRACKS



STANDARD No. 2-A
WALKWAYS ALONG SHORT LINE AND BRANCH LINE TRACKS

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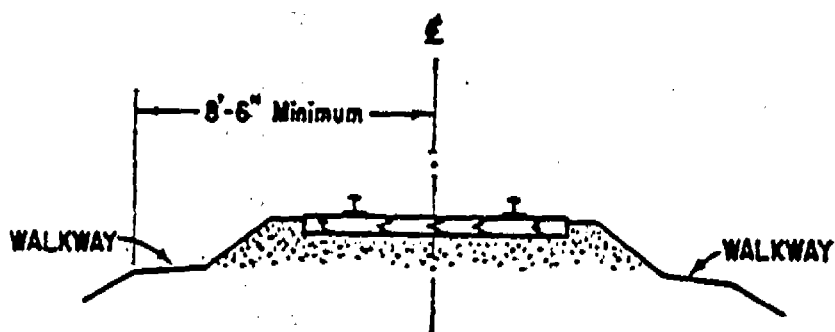


STANDARD No. 3

WALKWAYS AT MAIN LINE SWITCHES ENTERING YARDS AND SERVING
INDUSTRY TRACKS EXCEPT AS PROVIDED IN STANDARD No. 5

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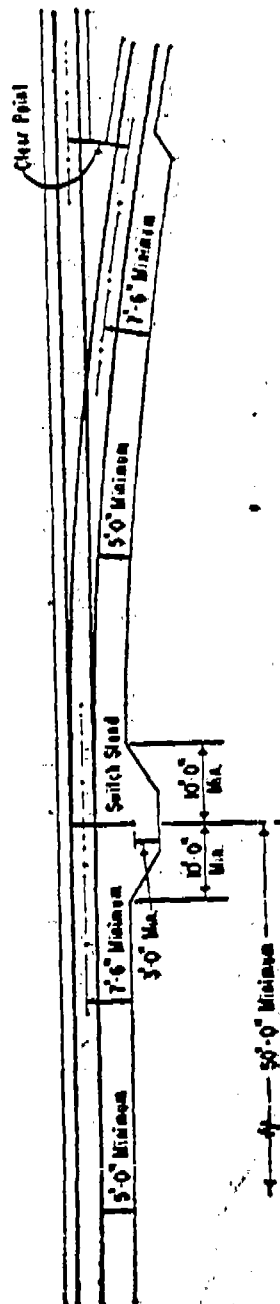


STANDARD No. 4

WALKWAYS ALONG SHORT LINE AND BRANCH LINE TRACKS

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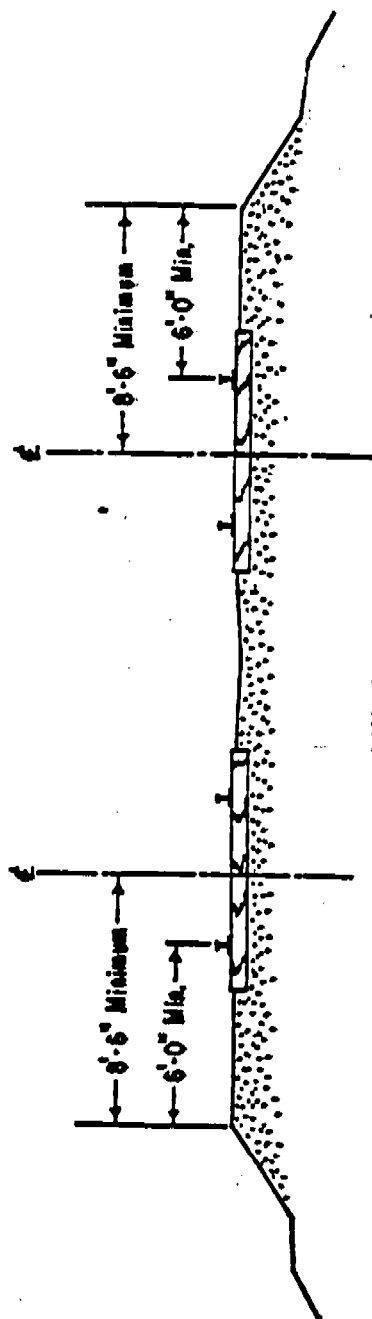


STANDARD No. 5

WALKWAYS AT SHORT LINE AND BRANCH LINE SWITCHES, AND LOCATIONS WHERE SWITCHES ARE POWER OPERATED

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STANDARD No. 6

WALKWAYS IN YARDS AND POINTS WHERE INDUSTRIAL SWITCHING IS PERFORMED,
BUT NOT LESS THAN 50 FT. IN ADVANCE OF SWITCH

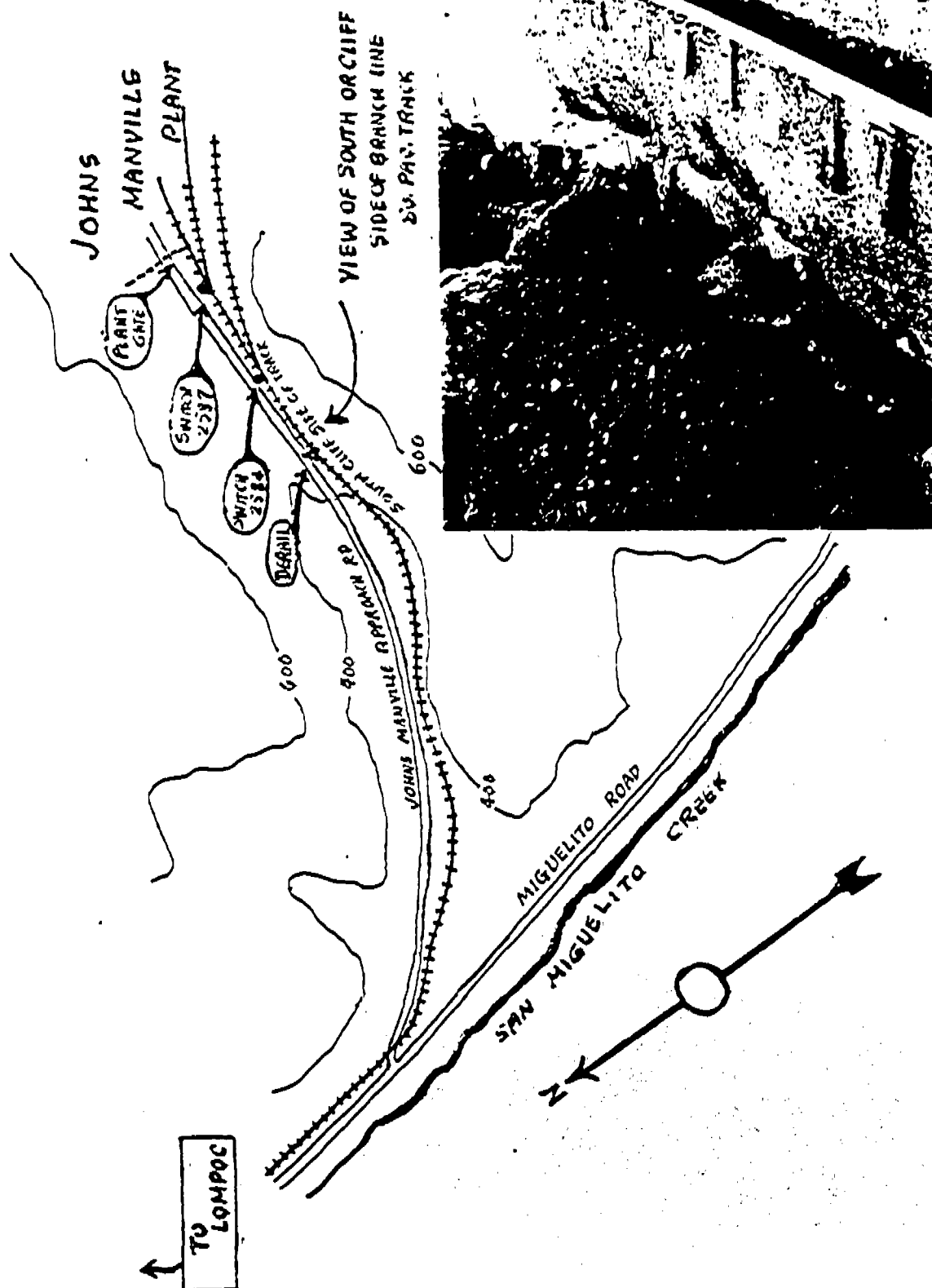
(END OF APPENDIX A)

I. 85-01-002

A. 85-03-052 ALJ/JBW/jt

APPENDIX B

SOUTHERN PACIFIC
APPROACH TRACK UP CANYON TO
JOHNS MANVILLE PLANT AT LOMPOC



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Ruling of Administrative Law Judge Weiss
on Preemption Issue

ALJ WEISS: The Commission will be in order.

ruling: "I am prepared to make my ruling and this is my

"The Bench has been informed by counsel for Southern Pacific Transportation Company that SP has concluded that by its actions, the Federal Railroad Administration has preempted general state action on walkways, that Commission General Order 118 has been preempted under the provisions of the Railroad Safety Act of 1970.

"Respondent therefore has further advised that it has concluded that any action directed at SP for the condition of its White Hills branch walkways must be premised upon the existence of a local safety hazard and not upon the fact that the conditions may not conform to the standards set forth in General Order 118.

"SP further advised that it would confine its further evidence to appropriate rebuttal of staff's case to date and focus upon the existence or nonexistence of localized safety hazards.

"The Bench has also received the views of staff counsel and those of counsel for the United Transportation Union as well as the United Transportation Union representative, all of whom deny preemption.

"After careful consideration, it is the ruling of the Bench that this Commission's requirements for reasonably safe and adequate walkways adjacent to railroad tracks as embodied in General Order 118 have not been preempted by the Railroad Safety Act of 1970, nor by subsequent actions and adoptions of the Federal Railroad Administration.

"In enacting the Federal Railroad Safety Act, Congress' primary, paramount concern was safety and to reduce railroad-related accidents.

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"To the degree practicable, uniformity was also sought. But safety was the paramount concern. And Congress made it clear that a state may continue to enforce any law, rule, regulation, order or standard relating to railroad safety until such time as the Secretary of Transportation acting through the Federal Railroad Administration adopts a rule, regulation, order or standard covering the subject matter of the state requirement.

"Federal Railroad Administration policy statements are not enough to preempt. They merely announced the agency's intentions, what it seeks to do, and we have seen that the path to regulatory fulfillment is strewn with aborted attempts.

"Further, regulation of a problem which in some way may affect the safety of railroad workers does not mean the subject matter of state worker safety requirements is therefore covered and the state preempted.

"The act specifically provides that a state safety regulation remains effective until such time as the Secretary of Transportation has adopted a rule covering the subject matter of the state requirement.

"General Order 118 specifically addresses walkways and footing conditions.

"It requires the railroad to provide safe walkways with even tractive surfaces so as to lessen the possibility of a railroad worker tripping or falling, whether into an adjacent gully, down a hillside, or under a moving train, any of which accidents could result in their deaths or injuries.

"General Order 118 also regulates vegetation on or adjacent to walkways from the safety aspect.

"The Federal Railroad Administration has not adopted workplace regulations or specific regulations concerning walkways.

"The track safety standards of 49 CFR Part 213, with subparts concerned with roadbed, track geometry, track structure and track application and inspections, do not, except in the most peripheral sense, cover the subject matter of state worker

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safety requirements, and cannot be said to serve to preempt state regulation. They are almost exclusively concerned with the safe operation of trains.

"General Order 118 was adopted to protect railroad workers from the risk of death and injury arising from walkway conditions. The Federal Railroad Administration has not adopted regulations covering this subject matter. Furthermore, the bench is not impressed with the special syllogistic reasoning offered in the December 19, 1985 letter of FRA's chief counsel to SP wherein an attempt is made to bootstrap FRA's 1977 termination of a rulemaking proceeding pertaining to construction of walkways on bridges, trestles, and similar structures to the dignity of preemption action applicable to walkways generally.

"Preemption effect in the field of railroad worker safety, in light of Congressional declarations in the Federal Railroad Safety Act, is limited to the specific content of a federal regulation.

"In view of its foregoing conclusions, the Bench rules that this consolidated proceeding will go forward without further delay to determine: First, under OII 85-01-002, A, whether SP has and is operating over tracks on the White Hills branch that fail to comply with General Order 118 provisions; B, whether SP should be ordered to cease and desist in such operations; C, whether a fine should be assessed; D, and if other appropriate orders should be entered;

"And second, under Application 85-03-092, whether SP, unless it withdraws its application, should be granted a deviation from the requirements of General Order 118 for the area in issue.

"That concludes my ruling on this matter."

(END OF APPENDIX C)

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O P I N I O NComments on the Proposed Decision
of the Administrative Law Judge

As provided by Public Utilities (PU) Code § 311, the proposed decision of Administrative Law Judge (ALJ) John B. Weiss was served on the parties. After requesting, pursuant to Rule 77.2 of the Commission's Rules of Practice and Procedure, and being granted, extensions of time to make comments, both the Commission's Transportation Division and the United Transportation Union (union) submitted comment. Southern Pacific Transportation Company (SP) submitted no comment, but after similar extension of time, did submit response to those comments.

The union in its comment contends that the ALJ went beyond his authority when he analyzed and interpreted General Order (GO) 118 in his decision. We cannot agree. The principal purpose of this investigative proceeding was to determine whether SP was in compliance with various provisions of the General Order. Each party to the proceeding, including staff, had its own conception of what the General Order required, and in order to decide whether there was compliance it was first necessary for the ALJ to determine, in this first impression case, what the general order actually requires. And to weigh the contradictory assertions of the parties it was both appropriate and necessary to review, using the record and notes preserved in the 1963 Case 7306 file, the circumstances, events, and negotiations (i.e., the "legislative history") leading to GO 118 and the subsequently-filed standards. Over the years this Commission's hearing officers in complaint, application, investigative, etc. proceedings necessarily and regularly have had to analyze and interpret not only our general orders, but also the PU Code and other statutes to determine intent, meaning, purpose and consideration.

While the union may not agree with the ALJ's proposed interpretation of GO 118, its argument that his approach in the proposed decision exceeds "the permissible limits of authority to investigate (an) OII" must fail because in any investigation of compliance with a general order it necessarily must first be determined what the general order requires. Of course, this does not mean that the views of the ALJ will always coincide with those of the Commission.

Staff asserts that if we do not adopt staff's interpretation of the General Order, the "safety umbrella" previously afforded will be reduced. SP replies that the ALJ's interpretation is based on a fair reading of the language and history of GO 118. While different parties may have different ideas regarding the interpretation of a general order, only the Commission or the courts can ultimately decide what a general order means. If the general order is clearly drafted, our task is easy. But where, as here, the language of a general order is ambiguous, the Commission's task is harder. We note that an interpretation can only prevail if it is consistent with the language and intent of the general order. After a thorough review of the history surrounding the adoption of GO 118, the actual language of GO 118, the legislation GO 118 implements, and the prior Commission decisions regarding GO 118, we find that staff's safety oriented interpretation is most consistent with the language and purpose of the general order.

Both staff and union object that the proposed decision would now inject a "grandfathering" concept into the general order. In 1963, when the Commission adopted the final compromise version to be its General Order, a key feature of the compromise was that a future date certain for compliance was omitted, and compliance was left for future construction and reconstruction, when such should occur, except in all switching areas where a substantial amount of switching is performed, along main, branch, and industrial

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trackage. For such areas a walkway improvement program was mandated. To the extent that compliance by a certain date was not required for all trackage, GO 118 could be read as allowing existing walkway conditions to continue until either walkways are constructed or reconstructed, or until compliance is required by implementation of a railroad's Paragraph 6 obligation to improve its walkways in certain areas. Some might characterize this as "grandfathering."

Our own D.86-02-58, ___ CPUC 2d ___ (1986), paved the way for such a mischaracterization. There we stated that:

"Substantially the same grandfather provisions relative to the reconstruction of walkways found in GO 118 are also found in GO 26-D."
(Slip Opinion, at page 16.)

Since D.86-02-58 focused on GO 26-D rather than GO 118, perhaps we did not discuss GO 118 as carefully as we should have. While it is true that both GO 118 and GO 26-D allow certain non-complying conditions to continue until construction or reconstruction occurs, since both refer in their preambles to the need to "hereafter" observe the walkway or clearance standards, only GO 26-D has anything like a real grandfather clause. Section 15 of GO 26-D provides minimum clearances must be provided whenever buildings or other structures lawfully constructed prior to GO 26-D are relocated or reconstructed. This clearly implies that compliance is not required until such relocation or reconstruction. GO 118, however, provides in Paragraph 6 for a program of improvement designed to bring walkways in certain switching areas and along main, branch, and industrial trackage into substantial conformity with the general order. Here, the implication is that railroads must improve walkways in certain areas even though no construction or reconstruction occurs. There is no provision for relatively permanent non-compliance, as is the case with GO 26-D. Thus, while immediate compliance with walkway standards along all tracks is not required, Paragraph 6's requirement for a program of improvement

means pre-existing walkway conditions in areas subject to that program must eventually be brought into substantial conformity with the standards. Today's decision will reflect this requirement.

Staff and the union restate their position that the walkway standards are "minimum standards." The general order itself does not mention "minimum standards." The standards filed by the railroads, however, contain track cross-section and plan view diagrams which specify minimum walkway lengths and widths. Every distance specified in standards 1 through 6 is followed by the word "minimum," or the abbreviation "min."

The preamble to GO 118 requires railroads to observe the standards they filed in compliance with the general order. Whether the "minimum" distances set forth in the standards filed by SP are considered "minimum standards" or "minimum measurements contained in 'reasonable' standards" makes no difference in terms of the compliance required. SP must observe the walkway standards it filed in compliance with GO 118. Today's decision will reflect this reasoning.

Staff restates its position that Paragraph 6 of the General Order requires a program of improvement along trackage outside switching areas. Paragraph 6 states that railroads "...shall pursue a program of improvement of walkways in all switching areas where a substantial amount of switching is performed, along its main, branch and industrial trackage..." Our task would be easier if GO 118 simply stated that the railroads "...shall pursue a program of improvement of walkways along all trackage..." , or had simply omitted the phrase ", along main, branch and industrial trackage." The absence of such simple language renders Paragraph 6 susceptible to either the interpretation of the staff or of the railroad. Where a statute, or a general order, is ambiguous, the Commission must, under the rules of statutory interpretation, adopt an interpretation designed to further the intent of the body whose rule is being interpreted.

Here, the Commission's intent was to protect workers. (See, Re. Union Pacific Railroad, 6 CPUC 2d 196, 205 (1981); See also, D.83-10-030 and D.86-02-958). The rules of statutory construction also require that regulations be consistent with the statutes they implement. PU Code §§ 761, 762, and 768, the statutes GO 118 implements, are intended to promote safe utility operations and to protect utility employees and the public. For these reasons, we favor the staff's interpretation of Paragraph 6.

On the other hand, SP's interpretation of Paragraph 6 is also consistent with the actual language of that paragraph, and the record suggests that SP believed that the compromise language it bargained for reflected that interpretation.

Given the ambiguous nature of Paragraph 6, we find it necessary to initiate a proceeding to clarify the railroads' responsibility for improving walkways along tracks in existence when GO 118 was adopted. There is no point in adopting an interpretation that would hamstring railroad worker safety progress, yet there is similarly no point in adopting an interpretation requiring a vague improvement program that might be only begrudgingly implemented by recalcitrant railroads. We hope that staff, the railroads, and railroad workers and their representatives will be able to cooperatively develop a program which requires the improvement of the most dangerous walkways first and aims at developing cost effective solutions for correcting walkway hazards.

Staff also urges that segments of the roadbed and walkways have been constructed or reconstructed, and that GO 118 standards apply to those walkways. Mr. Mahon testified that in his 17 years of overseeing maintenance of way on this branch line there has never been a continuous walkway along the south side, but that there were segments of walkways which his crews incidentally constructed when replacing track ballast and subgrade lost to ditch overflow and hill runoff during recurrent seasonal storms. While

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these maintenance activities were not designed to provide a continuous south side walkway, to the extent they resulted in the construction of new walkways or the reconstruction of existing walkways they invoked the preamble to GO 118. The preamble requires railroads to "hereafter, on the construction and reconstruction of its tracks and walkways, observe its standards filed with the Commission in accordance with the provisions of this order." (Emphasis added.). Staff is, therefore, correct. The proposed decision has been amended to reflect this fact.

Staff's observation that the ALJ's determination that a particular switch area standard does not apply at derails is based solely upon evidence of the White Mills operation is well taken. The circumstances of other derail switches in other locations should be kept open for examination to determine the extent of

activities actively occurring there and what standard should apply there. The findings have been amended to reflect this limitation.

We also amend the findings of fact to limit the deviation authority until construction or reconstruction of the branch line or its adjacent walkway area or an appreciable segment is undertaken. The deviation authority is also amended to reflect the fact that because SP states that there are complying walkways south of Switches 2584 and 2587 and east of Switch 2584, there is no need to grant a deviation for those areas.

Ordering Paragraph 2 is amended to more precisely reflect the fact that the order is directed to the railroad company.

Our interpretation of GO 118 requires a number of additional changes to the ALJ's proposed decision.

Statement of Facts

Southern Pacific Transportation Company (SP) is a wholly owned subsidiary of the Southern Pacific Company, providing railroad services primarily in the western and southwestern areas of the United States. The SP rail system comprises approximately 12,000 track miles and related facilities utilized principally for freight service. In California it operates 1,230 miles of branch lines alone, and the Surf-Lompoc Branch, completed on July 1, 1899, is a segment of this branch trackage.

The Johns-Manville Corporation (J-M) mines, processes, and ships diatomaceous earth from deposits located at White Hills, east of the Vandenberg Air Force Base in Southern California.¹

¹ Diatomaceous earth is the siliceous remains of diatoms, minute prehistoric fresh or salt water creatures. Mined, dried, crushed, and sized, its primary use is as a filtration agent in the processing of beer, wine, and food and in pharmaceutical manufacturing. It is also used as a soft abrasive, and as a filler or extender in paint, paper, plastics, and insecticides. A

(Footnote continues on next page)

To accommodate this freight opportunity, SP in 1923 constructed a 3.7-mile branch line, the White Hills Branch, to the J-M plant from White Hills Junction on its then existing Surf-Lompoc Branch Line. The White Hills Branch Line ascends from an elevation above sea level of 109 feet at the White Hills Junction to 429 feet at the J-M plant, rising on a consistent 3% grade as it approaches the J-M plant entrance.

Over the years SP's only customer on the White Hills Branch has been J-M. Initially, when the branch was constructed, virtually the entire plant output was moved by rail. But because of the relatively high bulk and low density of diatomaceous earth it is well adapted for truck shipment, and over the intervening years to date an ever-increasing proportion of the plant output has shifted from rail to trucks. In a past five-year period alone the number of rail cars shipped dropped from over 5,000 annually to 2,148 (in 1984). By April 1986 SP was operating only one short train (approximately 10 cars) per day. Such decreasing volume of train operations does not cause significant deterioration of track. Consequently, apart from minor rail repairs in 1967 to scattered areas of the branch, the branch has not received extensive tie or rail renewal, and is still largely made up of original materials.

Pursuant to provisions of the California Constitution (see Const. Art. 12 § 23 (repealed; see, now, Const. Art. 12 §§ 3 and 5) and the Public Utilities (PU) Code (see PU Code §§ 701, 702, 761, 762 and 768)), this Commission, originally known as the Railroad Commission, since 1911 has regulated railroad operations

(Footnote continued from previous page)

relatively high-bulk low-density commodity, it is mined and produced in many countries. The United States accounts for about 38% of world production.

in the State, with increasing emphasis in safety matters. In 1961, numerous complaints of poor footing conditions in railroad walkways, conditions resulting in slipping, tripping, and falling accidents to railroad workers - both while getting on and off equipment and while otherwise performing their required duties - led, after extensive consultations between staff, carriers, and unions, to the adoption on April 9, 1963 of Commission General Order (GO) 118 to govern the construction, reconstruction, and maintenance of walkways adjacent to railroad trackage, and the control of vegetation adjacent to the trackage (see Appendix A for the full text and standards applicable). On May 3, 1963, in response to the requirement contained in § 1 of GO 118, SP filed with the Commission its walkway standards. GO 118 continues in effect today.

In fulfillment of its duty, prior to 1978 the Commission's Operations and Safety Branch made general surveys which covered large segments of a railroad's trackage, including industrial spurs, attempting to identify safety conditions and determine compliance with GO 118. In 1978 this practice had to be discontinued because of staff reductions. However, on April 3, 1979, three copies of one of the last of these general surveys completed, survey L74 applicable to SP's operations between San Luis Obispo and Santa Monica, were sent to Mr. DeMoss, SP's vice president and general manager, requesting corrective action. One of the items applied to the White Hills Branch. It read:

"*1089. Main Track: Near 10 car and 25 car markers, walkway is eroded to ends of ties in several areas. Reasonably level walkways per Standard 4, GO 118, should be provided."

Thereafter, random and smaller area surveys on the SP system were made, as well as follow-ups on prior general survey open items. With regard to Item 1089 on the White Hills Branch,

inspections were made May 12, 1981,² August 21, 1981, and August 17, 1982. The area involved is the last half mile of the White Hills Branch track leading to the J-M plant, from the point near Miguelito Road, where the asphalt private approach road of J-M crosses the branch track, to the J-M plant gate. Road and track are parallel in this area. On its south side the track follows adjacent to the base of a hill as the track ascends through a narrowing canyon defile leading to the plant gate. East of the gate this canyon debouches upwards into the plant area, and the first (#2584) of a series of switches detaching spur tracks off the branch line is encountered about 75 feet below and outside the gate. These spur tracks fan off to serve various parts of the sprawling plant facilities inside the gate (See Appendix B map).

Staff made a number of informal contacts through SP's engineering department in efforts to resolve the walkway problems listed in Item 1089. However, the efforts produced only the response that SP was considering possible installation of a covered drain on the south side of the track in this area. Then in July of 1982 staff learned that SP might seek a deviation from the standards for the south side of the track, and limit walkways to the north side of the track.

On August 5, 1983, while detraining during daylight in clear weather from the caboose of a six-car empty freight travelling at 5 mph ascending into the plant area, a brakeman slipped and fell, injuring both knees and right elbow. The precise

2 The May 12, 1981 photos depicted the south side of the branch track leading to the plant entrance, focusing on an area extending to the west approximately 300 feet beyond the original location of a derail switch 50 feet west of Switch 2584. An eroded gully or ditch 2 feet deep by 2-1/2 feet across had been cut out at the base of the bluff by swiftly coursing runoff water in what ordinarily might have been a walkway path.

area of the fall was not ascertained, although it was believed to be in the vicinity of Switch 2584.

Eight months later, on April 16, 1984, staff investigated the incident. The investigation disclosed what staff characterized as "deeply eroded walkways on both sides of track for 1/2 mile west of switch."³ Frustrated by its belief that SP was completely ignoring staff's recommendations, and by concern that the situation represented a hazard to crewmen on foot in that switching area, staff concluded it would have to recommend to the Commission an Order Instituting Investigation (OII/I.) to get action.

However, in a final effort to resolve the matter, staff members Hunt and Privette, accompanied by staff attorney McKenzie, on December 26, 1984 went to see SP's general manager for its Southern Region, Bredenberg. His staff on holiday leave, Bredenberg received them alone. Bredenberg testified that he was left with the impression that SP was in clear violation of a GO; that walkway hazards rendered the White Hills Branch unsafe for rail employees; that the Commission would issue an OII wherein staff would ask that the branch line be taken out of service - shut down - until walkways were constructed; and that SP would be required to pay heavy punitive fines. Bredenberg further testified that he was given to understand by staff that, provided SP restored walkways and installed a drain pipe as previously considered, staff would recommend lifting the OII and that SP might avoid payment of punitive fines. Unfamiliar with the requirements of GO 118 and without knowledge of such problems at White Hills, Bredenberg heard

3 These 1984 photos depicted the same type of eroded ditch on the south side of the track at the base of the bluff, but extending about 800 feet west of Switch 2584, as was depicted in the May 12, 1981 photos (see Footnote 2). These photos also showed some walkway surface displacement and deterioration on the north side of the track, obviously the effect of water runoff.

staff out, and promised to have his staff look into the matter after the Christmas leave. He stated he would have a response after a week.

On January 2, 1985, two staff members made an unannounced late-in-the-day visit to the plant entry area to observe switching operations and take photos. They observed a 2-engine, 10-car train descend from the plant and stop west of Switch 2587,⁴ and then engage in switching operations. Two trainmen on the ground were both on the south side of the track. One remained in the background on the south side of the track inside the plant area. The second remained across the track from Switch 2587 (which is on the north side of the track), after crossing the track to align the switch and then returning to the south side to pass lantern signals to the engineer in the engine. Staff observed switching as the train moved back and forth with cars being shoved from Switch 2587 unto various tracks to the east inside the plant. Prior to any eastward movement of a car from Switch 2587, the brakeman on the ground gave lantern signals from his location on the south side of the track. Staff concluded that it was not possible to pass lantern signals to the engineer's side of the cab of the locomotive, except from the south side of the track, because of the track curve.

That same January 2, 1985 afternoon staff took photos of the area around Switch 2587 and westward beyond the derail switch approximately 150 feet away. These showed some deterioration of footing conditions north of the track apparently caused by runoff water downhill from the J-M plant. On the south side of the track, across from Switch 2587, there are the shallow beginnings of a

4 Switch 2587 is the second track switch encountered when entering the plant area. It is situated about 100 feet east of Switch 2584.

ditch being scoured out along the base of the bluff, although from Switch 2587 to the derail switch on the south side, footing appears adequate. But beyond the derail switch, the ditch at the base of the south bluff denies any footing area as the bluff constricts the space between it and the track to the westward. One photo shows water in this ditch.

Meanwhile, Bredenberg's operations people had inspected and reported back to him on White Hills. They told him that generally there were good walkways on the north side of the track, but problems on the south side. They recommended relocating the derail switch west of Switch 2584 to the north side of the track; use of radios for switching in that area; a possible scaling back of the bluff on the south side to allow room between the bluff and the track for installation of drainage pipe and provision of a level walkway. Bredenberg passed these to SP's engineering department for consideration.⁵

On January 4, 1985 staff's Hunt telephoned Bredenberg for his response to the December 26 visit, and was told of the recommendations Bredenberg had received, that these had been passed to engineering, and that SP would be able to do something. Hunt asked to receive a copy of any SP construction schedule, telling Bredenberg that the problem was now a legal matter. Bredenberg, it developed, was not aware that the day before (January 3, 1985) the Commission had issued this OII, with hearing to begin March 12, 1985, to determine: whether SP was complying with GO 118; whether a

5 At that point in time, construction, maintenance of way and other engineering functions were not part of an SP regional general manager's responsibility. In other railroads general managers had such responsibility. On August 1, 1985, in anticipation of the Santa Fe merger (a company where the latter practice obtained), SP's general managers were given supervision over engineering functions.

cease and desist order should issue, and whether fines should be assessed.

After his conversation with Hunt, Bredenberg learned from SP's assistant vice president for maintenance of way and engineering that SP did not own the bluff alongside the south side of the track; that scaling back of that stony bluff was impractical from an engineering standpoint and would not solve the problem. He was told that the only way SP could build and maintain a walkway on the south side would be by installation of extensive and expensive drainage facilities; one not reasonably necessary in SP's view for employee safety as staff insists.⁶ SP's view that GO 118 "grandfathered" certain non-complying conditions was explained to Bredenberg by SP's law department, and he then determined that since an OII had been issued, SP's line departments would do no more but would let the legal staff take over.

Thereupon, SP's counsel and staff's counsel engaged in discussions in an effort to reach a stipulated resolution of the issues. SP on February 11, 1985 wrote that the deficiencies noted in the current inspections were not uncorrected continuations of leftover 1979 deficiencies; that the former had been corrected, and that the latter was the reappearance of a continuing problem caused by recurring water erosion which wreaked havoc along the bluff side. The letter set forth SP's plan to relocate the derail target across the track from the south to the north side, thereby, in SP's opinion, obviating any need to be on the ground south of the track. SP also indicated acceptance of responsibility to maintain GO 118 walkways along the north side of the track in this area. Staff did not accept this, contending that walkways along both sides of the track were required by GO 118.

⁶ Bredenberg later testified that his engineers told him that a permanent fix would require extensive track realignment.

Efforts at resolution failing, on March 12, 1985 SP filed Application (A.) 85-03-052 to obtain authority pursuant to paragraph 7 of GO 118 to deviate from the standard. Early in 1985 SP also shifted the derail target from its previous south side of the track location across to the north side, 50 feet west of Switch 2584. Therefore, SP considered there no longer existed any need for a crew member to get on or off a train, or work or walk on the south side of the track at any time. SP contends that as the daily train to J-M does not have to meet or pass any other train, and because of the shortness of the run, there is no operating necessity to stop or to have to make a walking inspection short of Switch 2584 at the J-M plant entrance. SP asserts it will do all switching signaling on the north side, and to the extent that ground visual communication should ever be impaired, radios can be used. SP states each crew member has a personal radio assigned for such communication purposes on this run. SP further accepts that despite recurrent erosive effects of severe winter storms, the north side walkway can and will be maintained in this area to GO 118 standards. SP asserts that a walkway was not even contemplated for the south side of this branch track in the original 1920 construction design, long before the advent of GO 118. This is evident, SP states, from the fact that in places along the track the rock face of the bluff on the south side of the track does not allow sufficient clearance for a walkway. SP asserts that the narrow space between the track and the bluff is subject to recurrent strong scouring action from heavy runoff down that canyon from the J-M plant and surrounding hills. This runoff fouls the drain ditch and would carry away walkway materials, regularly wrecking any attempt to create or maintain any walkway approaching GO 118 standards. SP maintains that this is not a switching area and, therefore, pursuant to GO 118, until track reconstruction becomes necessary and is undertaken, the conditions on the south side of the track are "grandfathered." With removal

of the derail switch across to the north side of the track, SP contends there no longer exists any requirement for train crews to be on the south side of the track. Accordingly, SP on May 20, 1985 issued a timetable bulletin instructing employees "not to detrain, entrain or walk on embankment or south side of track between Johns Manville private road crossing MP 316 and 50 feet west of Johns Manville derail switch." On November 1, 1985 this instruction was reissued as part of SP's General Order 1. In addition, signs to that effect were placed on each side of the track leading to the area.

Staff opposes granting SP any deviation in this instance, contending that the walkways at issue over this last half mile of track leading to the J-M gate do not meet GO 118 standards, are not safe, and could not safely accommodate the exigencies of operating personnel in the event of radio failure or mechanical failure requiring immediate attention to equipment from the south side of the track. Staff is concerned that granting a variance would dilute the Commission's safety standards by allowing economic factors to become determinants of minimal safety requirements.

On March 20, 1985 the United Transportation Union (U.T.U.) filed a protest to A.85-03-052, stating that the need for a walkway on both sides of the railroad tracks is an operational necessity; that a deviation in this instance would allow an entirely unsafe and hazardous condition to continue, noting that in the event of unpredictable emergency stops, a walking inspection of the train as required by SP rules could not be made without a safe and standard walkway.

On March 18, 1985 Administrative Law Judge (ALJ) John B. Weiss ruled that I.85-01-002 and A.85-03-052 would be consolidated for hearing. After due notice public hearing began in San Francisco before the ALJ on April 23, 1985, continuing on the 24th and 25th. Thereafter, for the convenience of the respective parties, various continuances were granted. The last of these was

that requested by SP on January 13, 1986. By that request the SP counsel also advised that SP was considering further motions, declaratory proceedings, etc., to obtain clarification of this Commission's jurisdiction, vis-a-vis federal authority, over walkway matters; all grounded in SP's developing conception of preemption issues. On January 24, 1986 the ALJ asked that should SP decide to pursue a jurisdictional issue based on its developing conception of preemption, SP was to advise the ALJ and all parties to the proceeding, giving its basis for such asseptions, no later than March 31, 1986. On April 2, 1986 the railroad's attorney wrote the ALJ and stated its conclusion that California jurisdiction had been preempted under provisions of the Railroad Safety Act of 1970. He stated that in SP's view the Commission's remaining jurisdiction in the current proceedings was limited to whether or not any "localized safety hazard" existed on the White Hills Branch (under the Federal Railroad Administration's so-called federal "policy" statements, "localized safety hazards" remained open to state regulatory enforcement).

Hearing resumed on April 14, 1986. At the outset, after affording counsel for both the staff and the union opportunity to respond to SP's April 2, 1986 assertions, ALJ ruled that the Commission's jurisdiction over requirements that reasonably safe and adequate walkways adjacent to railroad trackage in this State (to advance which safety objective GO 118 was promulgated and continues in force) had not been preempted, either by the Railroad Safety Act of 1970 or by the subsequent actions of the Federal Railroad Administration (See Appendix C for the text of the ALJ's ruling).

The ALJ thereupon ordered that the consolidated hearing go forward without further delay, both on the I.85-01-002 issues (whether SP had and was continuing to operate on the White Hills Branch in nonconformance with GO 118; should be ordered to cease and desist; and whether a fine should be assessed and other

appropriate orders entered) and the A.85-03-052 issue (whether SP should be granted a deviation applicable to the area in issue from the GO 118 requirements). Thereupon hearing continued through April 15, 16, and 17, and was concluded on April 18, 1986. On July 25, 1986 concurrent briefs on all issues were filed pursuant to the ALJ's instructions, and the consolidated proceedings were submitted.

During the 8 days of hearing 38 exhibits were received into evidence, and the ALJ took official notice of the file in Case (C.) 7306 (the proceeding which resulted in Decision (D.) 65208 issued April 9, 1963 adopting GO 118). During the hearing the Commission staff presented evidence through 15 exhibits and the associated and sponsoring testimony of Thomas Hunt, senior operations supervisor; Robert Harwood and Gary Rosenthal, associate operations supervisors; and Paul King, assistant operations supervisor (all members of the Railroad Operations and Safety Branch); and Curt Schmutte, a California registered civil engineer as well as an hydrologist of the State Department of Water Resources (DWR). SP offered 23 exhibits and the associated testimony of Robert Wolfe, senior fleet manager; William Giles, Santa Barbara Division train master; Rollin Bredenberg, Southern Region general manager; Harry Williamson, retired former SP chief engineer; Walter Mahon, Santa Barbara District maintenance of way manager; Raymond Branstetter, Southern California regional engineer; and Nahap Noori, an SP registered civil engineer. The union's participation was limited to cross-examination.

The Staff Evidence

Staff's evidence was to a large extent introduced to establish conclusively that various stretches between the SP track and the adjacent bluff on the south fail to provide any semblance of what might pass for a footpath meeting or even approaching GO 118 standards, and to show that under existing conditions that narrow strip is unsafe for any foot traffic.

Staff's evidence does establish that the present conditions have existed for years. Photo exhibits taken over a four-year span abundantly evidence the continued existence of an apparently naturally eroded trench, gully, or ditch in this very restricted space, at the base of the bluff. This ditch becomes progressively but unevenly deeper and wider as it extends westward along the base of the bluff from the area of Switch 2584. These photo exhibits indicate the ditch to be 2 to 5 feet deep in places and 2-3 feet wide. Exposed stones in this ditch show indications of the rapid flow and scouring effect of runoff rainwater, and of the rock and shale-like composition of the earth. The exhibits make it obvious that at places there simply is not sufficient space between the track and the bluff for both this ditch and a standard walkway unless the latter can be somehow superimposed on top of the former. There is graphic evidence that walkway material, ballast, and railroad subgrade materials have been washed into and along the ditch. In areas the railroad subgrade has been buttressed by bags of material placed along the track side of the ditch. And it is very evident from the photographic evidence and the anthropometric analysis furnished by witness King that at some places on the south side of the track in the area at issue, that not only the slope into the drain ditch but also the dropoff would make impossible normal mounting or dismounting functions, or allow safe walking. A trainman could not safely dismount a slowly moving train on the south side much less safely perform a walking inspection alongside a stopped train in this area.⁷

⁷ Because of the apparent danger, SP agreed on April 26, 1985 to issue a temporary timetable bulletin restriction to read as follows:

(Footnote continues on next page)

But with regard to the walkway conditions on the north side of the track in the area at issue, staff's evidence falls short of conclusively depicting continued existence of deficient or unsatisfactory conditions. While photo exhibits taken in March-April of 1984 and January-April of 1985 show some localized minor furrows, grooving, and displacement of walkway materials, obviously these had been caused by heavy storm runoff. These uneven surfaces were readily correctable by surface blading, and there was no clear evidence that these conditions had existed continuously for any long period or that the walkway on the north side generally was not being reasonably maintained or restored after storm periods.

Staff's evidence shows identification in 1979 of the absence of standard walkway conditions on the south side of this track. Its evidence indicates follow-ups in 1981 and 1982 with efforts to remedy administratively what it considered a deficiency that could not be accepted. A fall injury somewhere on this same branch line in 1983 triggered a 1984 staff investigation which led to staff's determination to pursue the walkway issue to a conclusion. There is clear evidence of staff's continued and frustrated attempts to obtain action from SP's local engineering representatives or through correspondence with higher echelon SP management. And it is clear that these frustrations finally led to this OII.

(Footnote continued from previous page)

"Account drainage ditch adjacent to track on embankment (or south) side of track in area between derail switch at Johns-Manville Plant entrance and private road crossing, Milepost 316, employees are not to detrain, entrain or walk on embankment (or south) side of track between J-M private road crossing, Milepost 316, and 50 feet west of J-M derail switch."

Staff's evidence included testimony relative to actual switching operations observed at dusk on January 2, 1985 by staff; operations involving a typical 10-car, 2-locomotive train switching "empties" onto tracks which led off Switches 2584 and 2587 into the J-M plant. To accomplish this, given the particular configuration of the tracks in that vicinity,⁸ it was staff's opinion that visual signals could feasibly be done only from the south side of the track (the staff witness questioned the feasibility and reliability of use of radios for those switching operations). As the train would back to the west, a switchman at Switch 2584 would signal by lantern from the south side of the track to the engineer in his engine at the west end of the train to stop the train. Then the switchman would cross over to the north side, line the switch located there, cross back to the south side, and make lantern signals to the engineer who would cause the engine to push the cars onto the desired track back eastwardly up to the J-M plant.

Further, staff's evidence supported the contentions of the staff and union that there always existed the possibility of unexpected emergency developments, such as broken knuckles, air leaks, and dragging equipment. It was argued that these might require trainmen to work from the south side of the track. However, no evidence was presented by either staff or union that any such emergency had ever occurred on this stretch of track.

Staff's evidence also showed that SP had relocated the derail switch sometime early in 1984 to a new position 500 feet west of its previous location on the north side of the track. Staff argues that the derail switch necessarily applies to the entire J-M plant which includes at least three car spots, and staff

⁸ From the engine of a 10-car train pushing up to the plant, the engineer cannot get a line-of-sight view of the 2584 or 2587 switch targets from the 10-car marker.

applies its March 1, 1968 (Rev. June 10, 1974) clarification of GO 118 to conclude that standard walkways are required on both sides of the track 150 feet beyond the point of switch.⁹ Since SP has a walkway on one side only, it is staff's contention that in making this move SP committed an entirely new violation of GO 118.

And finally, staff presented evidence through witness Schmutte that it would technically be possible to provide an 8-foot, 6-inch space on the south side of the track, thus permitting both an adequate drain and a standard walkway. Schmutte would accomplish this by installing approximately 640 feet of 36-inch corrugated metal pipe, buried in four locations, with realignment of the existing drain ditch in other areas, and over the drain pipe he would place a walkway. His estimate of the cost of such a project would be \$25,000 complete.

The SP Evidence

SP presented evidence designed to show that the railroad could never have provided a walkway meeting GO 118 standards along the cliff base on the south side of the branch line track over the half mile approach up the narrowing canyon into the J-M plant. SP's evidence also indicates that there was no intention to do so when the track was laid down back in 1923. SP claims that its 17-foot right of way in the final and crucial 350-foot approach was

9 That clarification of GO 118, applicable to Minimum Walkway Standards for Industrial Trackage, states:

"Standard No. 6 walkways at turnouts and at car spots will extend beyond the point of switch and its clear point and on each side of the car spot, where applicable, a distance equal: 1 Car Spot - 50' minimum, 2 Car Spots - 100' minimum, and 3 or more Car Spots - 150' minimum." (The Standard 6 walkway requires a 6-foot minimum from outside rail on both sides of the track.)

never wide enough to accommodate walkways on both sides, even when the drainage ditch within the right of way is not taken into consideration. Although dual walkways would be theoretically possible if the track could have had its centerline exactly in the middle of the right of way, the track cannot be in the middle of the 17-foot right of way up the canyon because of necessary track curvature. SP's evidence showed that various parts of right of way are occupied by the naturally formed drainage ditch, which handles not only heavy J-M plant runoff down the canyon, but also drainage from the hill along the south side of the ditch. All this runoff funnels down the 3% grade of the canyon westward. SP's testimony was that only at Switches 2584 and 2587 has SP provided GO 118 walkways on the south side of the track. SP asserts that west of these switches the drain ditch precludes such walkways. The SP testimony also demonstrated that at times heavy storm runoff simply overflows the ditch area, crossing the track and the parallel road to the north, washing out gravel and ballast materials, and eroding the surfaces even north of the track. There was testimony that during one witness' tenure there was no semblance of any walkway on the south side between 1959 and April 1963. He further testified that conditions then were not unlike those prevailing today. Assertedly, when switching operations tailed out west of the gate to the old 10- and 25-car markers, signaling was customarily done on the north side of the track where there was a walkway provided.¹⁰ The testimony was that during that period no injuries were reported, there were no break-in-two's, no derailments or undesirable emergencies, and that broken air hoses were no problem; this despite the fact that the earlier traffic volume pushing

¹⁰ This was facilitated at that time as to hand signals by the fact that there was a fireman in the cab of the locomotive to pass signals.

empties up and pulling loaded cars down the 3-mile run to Lompoc was double today's traffic. Another witness, the current division trainmaster, testified that during the past nine years there have been no mechanical failures or break-in-twos.¹¹

SP readily conceded that the surface along the south side of the track, except at Switches 2584 and 2587, has not been, and today does not constitute, a walkway complying with GO 118 standards. But SP asserts that this area is a nonconforming, pre-April 29, 1963 track segment conditionally grandfathered by GO 118. SP witness Williamson, former SP chief engineer and an SP representative in the 1963 negotiations which led to adoption of GO 118, testified that the record of those negotiations and exhibits show clearly that the adopted general order represented a compromise among the Commission staff, the California railroad industry, and certain union representatives; that a key component in this compromise was the staff's backing down from its earlier proposals which would have required that all existing walkways be brought up to GO 118 standards within three years. Williamson testified that the order directs carriers to "pursue a program of improvement of walkways in all switching areas where a substantial amount of switching is performed." According to Williamson, only new constructions, and all substantial reconstruction (more than 50%) after April 29, 1963 were to be to the GO 118 standards. To support his testimony the witness introduced certain draft proposed general orders, which he alleged led to the final version adopted by the Commission. The result, the witness testified, was that railroads were under no duty to improve nonconforming track areas where substantial amounts of switching were not performed. The

¹¹ But if there were, the trainmaster testified, there is no problem, whether it be a broken air hose, broken knuckle, or brake rigging, which could not be handled entirely from the north side without going to the south side.

witness testified it was clear that the walkway standards adopted were absolutely not to be "minimal" or "minimum" standards as staff here asserts, but rather were to be "reasonably safe and adequate walkways adjacent to the tracks in all switching areas." In further support of this view, the witness also introduced a photocopy of a May 13, 1963 memorandum he had issued to his subordinates after the GO was adopted.¹² The witness testified that the railroads agreed to improve deficient walkways in switching areas where employees were regularly on the ground, but all other areas were exempted until they underwent a 50% reconstruction. In some of these nonswitching areas, because of climatic or geographic conditions, the witness testified, it was impossible to provide walkways on one or sometimes both sides of the track, and Williamson stated he could recall no instance of the Commission instituting an investigation such as in the present instance.¹³ Williamson testified that the exception to

12 That memo states in part:

"It is to be understood that this Order is not retroactive, and this does not mean that trackage now in existence is to be brought up to these standards on an out-of-face basis. There are provisions in the Order that if a specific hazardous condition, mutually agreed to, exists, it will be corrected. These situations, of course, will be relatively few, and are, for all practical purposes, the same as existed previously."

13 In support of Williamson's testimony, another SP witness testified that on long stretches of track north of Willits belonging to SP's subsidiary, Northwestern Pacific, there are no walkways on either side, or only on one side; dual walkways being limited to yard trackage, switching areas, and sidings in the area where men regularly must be on the ground. This trackage includes both main and branch lines. SP claims that although these tracks

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¹² His testimony was to the point that if staff complained, alleging a serious situation, the railroad would look at it. If the railroad agreed, they would take care of it; if not, they would ask for a deviation, or an abandonment, or any other option they might have before the Commission.

grandfathering was to be found in paragraph 5 of GO 118 where, after hearing, the Commission might order elimination of an unsafe walkway condition, but that for any such condition the railroad might apply for a deviation.¹⁴

SP introduced evidence to show that since the addition in 1978-79 of a run-around track within the J-M plant, SP's engines pull empties up from Lompoc into the plant area to the east end of whatever plant track is to be used. The engine then returns to the rear of the train via the run-around track in order to begin switching. The point of this evidence was to indicate there is no need for any crew members to be on the ground south of the track west of Switch 2584 for switching. SP's testimony was that its personnel working this branch have all been issued personal radios for use if needed, and that because of canyon characteristics present here there is minimum radio interference and no bleed-over problem. For the return run with loaded cars to Lompoc, testimony was that the return trains are made up east of either Switch 2584 or 2587 inside the plant area where there are walkways. Air tests and train inspections are made there before the train proceeds out and west to the derail. After the derail is relined, the train proceeds to Lompoc. SP's testimony was that no train member need

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have been inspected over the years complaints filed have been limited to switch or yard areas, and that this shows Staff does not believe it has the authority to complain of walkway conditions in other areas.

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13 Staff rebuts SP's argument by pointing out that staff time and resource constraints, and access problems, require giving priority to heavily used switching areas. The record shows that until 1978, staff regularly conducted comprehensive GO 26-D-118 surveys of substantial portions of railroad trackage, but that budget constraints and staff reductions reduced staff's ability to conduct such surveys. Three surveys in the record support staff's statements regarding its interpretation of GO 118. Each of these surveys cited a number of main line deficiencies, and showed that all substandard conditions were corrected. There is no evidence of any discussion regarding whether "substantial switching" took place, with the exception of item 1089 relating to the White Hills Branch.

NOTE: In survey GO 26D-118/L74 (Exhibit 1), Items 1066, 1075, 1080, 1084, 1086, and 1098 are main line items. In survey GO 26D-118/L74-S4 (Exhibit 1), Items 129, 138, 139, 141, and 142 are main line items. In survey GO 26D-118/187 (Exhibit 37), Items 100, 107, 130, 132, 186, 191, 200, 205, 211, 229, 236, 240, and 247 are main line items. The circles around these items indicate the were corrected. [TR 19].

be on the ground west of the derail on either side, although a walkway is provided on the north side.

SP also introduced testimony contravening staff's application of Standard 6. Staff would require walkways on both sides of a track at a derail. SP's testimony was that, while a derail may technically be termed a "switch," at a derail there is no switching from a branch line to a diversion track, as there is at a conventional switch, for the simple reason that at a derail there is no diversion track. SP states that a derail is merely a protective device to derail cars in an emergency: All that is needed is sufficient ground area at and on the side of the derail stand in order for a crew member to be able to throw the target.¹⁵ Only if there was a diversion track at the derail site would there be any need for a crew member having to walk down the diversion track off the branch line. Thus, SP insists there is no requirement for a walkway across the track from a derail stand, and that Standard 6 of GO 118 does not apply to derails.¹⁶

15 The derail west of the gate to the J-M plant was installed in either 1979 or 1980 to be able to derail any cars that might move uncontrolled out of the plant down the canyon grade. It replaced separately located derails on three different tracks up in the plant. Initially it was installed on the south side of the track, but then was relocated to the north side of the track in order to obviate any need for a crewman to be on the ground south of the track to operate the derail stand. Even more recently, in order to allow J-M to use its plant car mover in tailing out of the plant into the SP branch line absent SP personnel, the derail stand was again relocated, 4 car lengths further west but still on the north side of the track.

16 SP presented testimony that the intent of its Rule 109 (formerly Rule 727) was to require walking inspections be performed on trains that had been moving at speed on the mainline, after such trains went into a siding in order to be passed by another train. But walking inspections were not to be performed when a train halts

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SP also provided testimony and exhibits relating to its consideration of various ways to provide both walkways and drainage in the area at issue. SP's evidence was that it considered installation of diversion conduits under the track to attempt diversion of the J-M plant runoff into a canyon-like ditch paralleling the track and road on the north side of the canyon. It considered shifting the tracks themselves, and also cutting back the face of the southern hill facing the track so as to widen the right of way. Its testimony was that these measures all would necessarily involve other people's property and entail substantial expense without entirely resolving the problems. SP also testified of the consideration given to installing a 30-inch pipe in the drain ditch under a standard walkway. Its evidence was that such a drain pipe could provide only for part of the runoff, mostly from the plant area, but would leave the runoff from the adjacent south side cliff alongside the ditch to wash out any walkway. With regard to the positioning of a walkway over a drain pipe SP offered the testimony of its engineer witness Noori to rebut that of staff's witness Schmutte. Noori testified there just was insufficient space between track and cliff face; that a minimum 10 feet from track centerline would be required, not the 8 feet, 6 inches assumed by Schmutte. Noori pointed out that railroad design practice required that any pipe trench would have to be 4 feet, 6 inches deep in order to provide the necessary 18 inches of cover below bottom line of the ties to top of the pipe. Schmutte assumed a 2-inch cover would suffice. Noori testified this cover is

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merely to reline a derail. Even when a mainline train stops to line a switch to head into a siding, no walking inspection is required until after the train has gone into the siding.

required both to support the pipe itself and to allow track maintenance. Noori further testified that such a ditch requires a one-to-one slope or an expensive interlocking sheet metal pipe shoring system. Noori also testified that a concrete runoff gutter to accommodate the cliff side runoff waters would have to surmount any continuous drain pipe installation in the ditch in order to prevent runoff from the cliff sides merely scouring away any walkway that might be installed atop the pipe

Judicial Resolution of the
Alleged Federal Preemption Issue

SP solicited, and received from the chief counsel of the Federal Railroad Administration, an advisory letter containing that counsel's statement that it was his view that the subject matter pertaining to walkway requirements contained in California's GO 118 had been preempted by federal rules and official federal pronouncements. On May 15, 1986 SP filed a complaint in U.S. District Court against this Commission, and asserted these views. On November 3, 1986 the District Court ruled in favor of this Commission and against SP, concluding that the Commission's safety jurisdiction relative to walkways had not been preempted and that GO 118 did not constitute an unconstitutional burden upon interstate commerce (Southern Pacific Transportation Company v. Public Utilities Commission (N.D. Cal. 1986) 647 F Supp. 1220). SP thereupon appealed, and in a brief decision (No. 86-2983) issued June 30, 1987 the Ninth Circuit Court of Appeals affirmed the decision of the District Court. As November 30, 1987 (the final day for any appeal to the U.S. Supreme Court) passed without SP filing an appeal, the District Court decision, as affirmed by the Ninth Circuit Court of Appeals, became final. This Commission continues to have railroad walkway safety jurisdiction, and the provisions of GO 118 have not been preempted.

Differing Views of What GO 118 Requires

The differing conceptions of what was intended by the Commission held by our Railroad Operations and Safety Branch, the Railroads,

and the unions continue to cause friction, and are inimical to attainment of what must be the common goal - promotion of railroad worker's safety. That underlying question demands a definitive answer.

Staff asserts that GO 118 requires railroads to provide walkways meeting the appropriate standard on all trackage sidings, switches, yards, etc. throughout California; that there were and are no provisions to "grandfather in," or exempt, pre-existing conditions. Staff's view is that GO 118 standards are "minimum standards" applicable everywhere after the effective date of the general order. Staff contends that "pre-1963 walkway conditions are not forever exempt from upgrading, even if reconstruction does not take place," basing that argument on the language in GO 118 that each railroad "shall pursue a program of improvement of walkways in all switching areas where a substantial amount of switching is performed, along its main, branch and industrial trackage toward substantial conformity with its standards filed with the Commission pursuant to this order."

The unions basically are in agreement with staff.

On the other hand, SP contends that a nonconforming walkway is not necessarily a GO 118 violation; that it may well be a "grandfathered" area which the railroad is under no past or present duty to improve either (1) until a new walkway in that area is constructed, or (2) until an existing walkway in that area is reconstructed, or (3) unless "a substantial amount of switching is performed" on that track, or (4) the Commission, after hearing, orders upgrading of that specific nonconforming walkway to the GO standard to eliminate an unsafe walkway condition that has been identified.

It is useful to remember that GO 118 was essentially a compromise between what the Transportation Division staff of that time and the railroad unions urged for adoption, and what the railroads contended would be economically feasible and possible to

live with. As is customary in such situations, no party got all it wanted. Today the positions of the parties in these proceedings continue to reflect these 1963 divisions.

Discussion

We will begin by reemphasizing what we have stated many times before:

"The Commission has the responsibility to 'require every public utility to construct, maintain, and operate its line, plant, system, equipment, apparatus, tracks, and premises in such manner as to promote and safeguard the health and safety of its employees, passengers, customers, and the public, ...' (Public Utilities Code § 768, see also §§ 761, 762.) GOs 26-D and 118 were adopted to protect the health and safety of railroad employees." (D.93105, Re: Union Pacific Railroad Company 6 CPUC 2d 196, 205 (1981); See also D.83-10-030, CPUC 2d ____ (1983) Slip Opinion at pp. 11-12; and D.86-02-058, CPUC 2d ____ (1986) Slip Opinion at p. 30.

A passage from United Transportation Union v. Southern Pacific Transportation Company, D.84-08-122, CPUC 2d ____, (1984) (Slip Opinion at 3), concerning walkway safety is also worth repeating:

Safety, as relative here, simply means such freedom from danger to life, health, and welfare as the nature of the employment, and the place of employment, will reasonably permit. An employer has a duty to provide his employees a safe place to work. This does not mean the absolute elimination of danger, but does mean that the place of work be as secure as the exercise of reasonable care by the employer can make and keep it. The duty is a continuing one. It does not suffice that the employer merely put the place of work in a reasonably safe condition once and then allow it to deteriorate or fail to maintain it. It must reasonably be kept continuously a safe place to work. And such a duty is as

applicable to a railroad roadbed as to a machine shop.

The Commission's specific power to require railroads to provide standard adequate walkways is based primarily on PU Code § 768, which authorizes the Commission to require railroads to construct, maintain, and operate their facilities in a manner so as to promote and safeguard the health and safety of railroad employees. Section 768 gives the Commission the power to establish "uniform or other standards of construction and equipment, and to require the performance of any other act which the health and safety of its employees and the public may demand." PU Code §§ 761 and 762 reinforce § 768 by requiring the Commission to act if a hearing reveals that a utility is operating in an unsafe manner.

Adoption of GO 118 and approval of the accompanying uniform walkway standards did not alter the Commission's authority or duty to ensure walkway safety. It did, however, establish standards for what are presumed to be safe walkways.

In this proceeding, we are primarily concerned with the safety of workers in the area at issue. Because compliance with GO 118 creates a presumption that walkway conditions are safe, it is important to determine whether SP's White Hills Branch Line leading into the J-M plant complies with that general order. Once this determination is made, we can take the next step of determining whether SP has adequately justified the need for a deviation and demonstrated that such a deviation could be granted without jeopardizing worker safety. We can also determine whether additional measures need to be taken in order to ensure worker safety.

GO 118

We will now interpret GO 118 and apply it to the facts before us. The language appearing in the preamble and seven paragraphs of provisions which follow the preamble is not as clear as it might be. We will give the general order its plain meaning

wherever possible. Where ambiguity exists, we will interpret the general order in accord with the rules of statutory construction.

Our goal is to interpret GO 118 in a manner that is entirely consistent with both the procedural history of the general order which is amply documented both in our present proceeding and the records of C.7306, the investigative vehicle which led in 1963 to adoption of GO 118, and with PU Code §§ 768, 761, and 762, the statutes that GO 118 is designed to help implement.

At this point, it is helpful to ask: "What obligations does GO 118 place on SP?" GO 118 requires, most pertinently:

1. That SP shall "file its standards for the construction, reconstruction and for the subsequent maintenance of walkways adjacent to its tracks ... and shall hereafter, in the construction and reconstruction of its tracks and walkways, observe its standards filed with the Commission in accordance with the provisions of this order" (Preamble to GO 118).
2. That SP's "standards...for the construction or reconstruction of walkways adjacent to its tracks shall be filed with the Commission for its approval not later than thirty days after the effective date of this order" (Paragraph 1 of GO 118).
3. That SP shall file standards which provide for "reasonably safe and adequate walkways adjacent to its track in all switching areas, and shall provide that all such walkways shall be maintained and kept reasonably free from vegetation as may be appropriate to prevailing conditions, and shall provide for abatement of weeds and brush adjacent to walkways as necessary to prevent the growth of objectionable vegetation encroaching upon such walkways" (Paragraph 3 of GO 118).
4. That SP "pursue a program of improvement of walkways in all switching areas where a substantial amount of switching is performed, along its main, branch and industrial trackage toward substantial

conformity with its standards filed with the Commission pursuant to this order" (Paragraph 6 of GO 118).

Relevant to other issues raised by the present proceedings, GO 118 also provides that:

1. "The Commission, after hearing, may order the railroad corporation to eliminate any unsafe walkway condition and may specify such reasonable time within which the improvement shall be completed as may be appropriate under the circumstances." (Paragraph 5 of GO 118).
2. "Deviations from the filed standards or the provisions of this order may be authorized by the Commission for any specific installation for good cause upon application by a railroad corporation; which application shall include a full statement of the conditions which prevail at the time and place involved, and the reasons why deviation is deemed necessary." (Paragraph 7 of GO 118).

In 1963, there were substantial segments of each railroad's system that failed to meet the railroad's filed standards. GO 118 did not require that all tracks be brought into compliance with the filed walkway standards immediately, or by any set date. Instead, the general order established a two part program for compliance with the standards. First, the preamble to GO 118 makes clear that railroads must, after the effective date of the general order, observe the standards they filed with the Commission as required by GO 118 "hereafter, in the construction and reconstruction of its tracks and walkways." Second, Paragraph 6 of GO 118 requires railroads to pursue a program of improvement of walkways in certain areas, without regard for whether tracks and walkways are constructed or reconstructed in these areas after the effective date of the general order.

Requirements Applicable to Tracks and Walkways in
Existence When GO 118 Was Adopted

Perhaps the most important ambiguity in GO 118 concerns the need for improvements to walkways on tracks already in existence when the general order was adopted. Paragraph 6 is not a model of clarity, and has been interpreted one way by the staff, and another way by SP.

Paragraph 6 reads as follows:

6. Each railroad corporation operating within the State shall pursue a program of improvement of walkways in all switching areas where a substantial amount of switching is performed, along its main, branch and industrial trackage toward substantial conformity with its standards filed with the Commission pursuant to this order.

SP believes that Paragraph 6 requires only that the railroad must develop a program for improving walkways in areas where substantial switching occurs, and that there is no requirement that the railroad bring other areas into compliance with walkway standards until walkways in those areas are either constructed or reconstructed.

Staff, on the other hand, believes that Paragraph 6 requires a program for improvement of walkways not only in areas of substantial switching, but also "along main, branch and industrial tracks."

SP notes that during negotiations over the language of Paragraph 6, language proposed by the staff which required that railroads bring all tracks into compliance with GO 118 standards within 3 years was replaced by language that did not specify any date by which compliance was required. SP also notes the insertion of the phrase "where a substantial amount of switching is performed," after the words "switching areas."

Staff notes that SP's interpretation of Paragraph 6 ignores the comma and the words "along its main, branch and industrial trackage" that follow the reference to switching areas. Staff witness King testified that the staff's long-standing interpretation of this paragraph is that improvements must be undertaken in switching areas and along its main, branch and industrial trackage.

The type and scope of the improvement program required by Paragraph 6 is clearly ambiguous.

Where a statute is theoretically capable of more than one construction, we must choose that which most comports with the intent of the Legislature. (California Manufacturers' Association v. Public Utilities Commission, 24 C 3d 836, 844 (1979).) The same principle applies to our general orders. In the present proceeding, both the legislative history of GO 118 and the wider historical circumstances of its enactment are legitimate and valuable aids in divining the general order's purpose, (Id.)

As the contents of the file in C.7306, of which the ALJ took official notice, reveal, during the 1959 regular session of the California Legislature there were numerous bills relating to the health and safety of railroad employees before the Assembly. These bills were referred to committee for interim study, and after hearings, a committee report in essence urged that the subject matter be referred to the Public Utilities Commission for possible disposition through issuance of a general order. Subsequently, numerous informal complaints were received by our staff from railroad workers concerned with inadequacies of walkways adjacent

to railroad tracks.¹⁷ The Transportation Division staff of that day prepared a proposed general order. On May 22, 1961 this draft order was circulated for comment to the railroads and the respective railroad unions. The draft order contained proposed regulations to govern the construction, reconstruction, and maintenance of walkways adjacent to railroad trackage. The preamble paragraphs referred to these proposals as "minimum standards," and would have required that compliant walkways be provided adjacent to all tracks not later than December 31, 1965.

The unions responding were generally in favor of the proposed general order, although there were also objections to deferring compliance to December 31, 1965. The railroads objected to adoption of any general order, insisting that no accident records existed which could directly attribute any accident to unsafe underfoot conditions; they ascribed many of the tripping and falling incidents of record to the carelessness of those involved. While insisting that they believed in providing safe places to work in yards, at sidings, and at switches, they could see no need to provide walkways on open trackage between stations and sidings. Finally, they contended that the proposed general order would be an economic disaster for the railroads.

On March 27, 1962 the Commission issued its OII into whether a general order should be adopted, accompanied by essentially the same draft general order circulated earlier. The carriers made it clear that they would oppose the proposed general

¹⁷ In the hearing in which the compromise proposed general order was presented to the Commission, Staff witness Carlock testified that during the eight years preceding 1963, the Commission received an average of 14 such complaints a month. [C.7306 TR 106-107]. Exhibits 2 and 3 in that proceeding constitute, respectively, a "Recapitulation of Informal Complaints and Related Matters Pertaining to Walkways and Vegetation Along Railroad Tracks for Period 1954-1963," and a supplemental recapitulation of such complaints in the Los Angeles area for 1962-1963.

order with every legal avenue available. Eventually, the parties agreed to work toward master standards acceptable to all. While progress was slow, compromises were hammered out.

On November 27, 1962, railroads, unions, and staff agreed upon "Standards for Construction and Reconstruction of Walkways and Maintenance Thereof." It was not until some time later that a final version of the general order itself was agreed upon.

In D.65208 issued on April 9, 1963, the Commission noted:

"As a result of the studies and understandings reached during the conferences with respondents and with some of the interested parties, there was drafted by the Commission's Operations and Safety Section a proposed general order on this subject which was introduced at the hearing and identified as Exhibit No. 7. Also received in evidence was Exhibit No. 8, setting forth standards to be filed by the railroads with the Commission in the event that the proposed general order, Exhibit No. 7, was adopted by the Commission.

"The staff introduced evidence of the need for the proposed general order and that it is required for the safety of railroad personnel and the public. The respondents deferred cross-examination and presented no testimony on the understanding hereinafter mentioned.

"The position of the respondents generally was that there is no necessity for any general order regarding the subject matter; however, if the Commission deems it advisable to adopt the proposed general order, Exhibit No. 7, they would be willing to file standards with the Commission conforming to those set forth in Exhibit No. 8; but if the Commission does not adopt the proposed regulations, they would want to have this matter reopened and be heard fully on the merits of any revisions to the proposed general order or of any other general order pertaining to the subject matter. The matter was submitted upon such understanding by all the parties."

The Commission went on to state that it found that "these proposed regulations and the Standards for Construction and Reconstruction of Walkways and Maintenance Thereof presented by the railroads as Exhibit 8 provide a reasonable standard of safety for railroad employees, passengers and customers of common carriers and the public in general." The Commission then adopted the proposed general order introduced as Exhibit 7. Exhibit 7 thereupon became GO 118, and the railroads thereafter formally filed the 6 standards set forth in Exhibit 8.

The historical context of the adoption of GO 118 shows that 1) the Commission was acting in response to legislative pressure to consider a general order designed to protect railroad workers from the hazards of their employment, and in response to informal complaints by railroad workers alleging the existence of unsafe walkways standards, and 2) it believed that GO 118 and the specific standards accompanying it provided a reasonable standard of safety for railroad employees and others.

Subsequent Commission decisions make clear that GO 118 was adopted to protect railroad workers. In Re: Union Pacific Railroad Company, 6 CPUC 2d 196, 205 (1981), the Commission stated:

"The Commission has the responsibility to 'require every public utility to construct, maintain, and operate its ... system, equipment, apparatus, tracks, and premises in such a manner as to promote and safeguard the health and safety of its employees... and the public,... (Public Utilities Code § 768, see also §§ 761, 762.) GOs 26-D and 118 were adopted to protect the health and safety of railroad employees."

See also, D.83-10-030, Re Union Pacific Railroad Company - Yermo Yard, ___ CPUC 2d ___, (1983) Slip Opinion at pp. 11-12; see also D. 86-02-958, Re Southern Pacific Transportation Company - Fresno Yard, ___ CPUC 2d ___ (1986) Slip Opinion at 30. Thus, an interpretation of the general order which does not provide for a

reasonable standard of safety is contrary to the legislative intent.

SP has argued through its witness, Williamson, that the details of the 1963 negotiations support its interpretation of Paragraph 6. Williamson's testimony sheds some light on these negotiations but is not conclusive. "In construing a statute we do not consider the motives or understandings of individual legislators who cast their votes in favor of it." (In Re Marriage of Bouquet, 16 C 3d 583, at 589 (1976).) The same principles apply to the interpretation of regulations which are the result of negotiations between interested parties. Different parties to a compromise have by definition agreed to the language of the compromise, but there is no guarantee that the parties agree about what that language means. Or even that they really want such agreement.

The transcript of C.7306 provides a good illustration. When staff witness Carlock was questioned by the attorney for the Brotherhood of Railroad Trainmen, AFL-CIO, with regard to his interpretation of Exhibit 7 Paragraph 3 requirements for the abatement of weeds and brush adjacent to walkways, the attorney for the Atchison, Topeka & Santa Fe Railway Company and the Los Angeles Junction Railway Company objected as follows:

I object to the question on the grounds that it's incompetent and irrelevant. This document is itself the best evidence of what is intended and what is meant, and Mr. Carlock's personal view of that language is wholly irrelevant and immaterial. [C.7306 TR 96-97].

Presiding Commissioner Holoboff subsequently stated:

There is no question about it but that to the extent there is a legal conclusion involved Mr. Carlock's opinion will be immaterial. [C. 7306 TR 100].

Thus, the railroads had an opportunity in 1963 to obtain on the record a clear understanding of what each party thought it was getting and to obtain a joint understanding of what all parties meant by the compromise language which later became GO 118. They chose not to take this opportunity, evidently preferring the language to remain open to interpretation by the Commission. ✓

Mr. Williamson's present legal conclusions regarding the scope of GO 118 and the walkway standards are entitled to no more weight than the legal conclusions of Mr. Carlock were given back in 1963. At best, Mr. Williamson can testify to the considerations that led to his concurring in the proposed general order. That is all Mr. Carlock was allowed to do. ✓

How does SP's interpretation square with the regulatory intent noted above, and with the rules of statutory construction? SP's interpretation that remedial action is required only for switching areas where substantial switching is performed means that as long as SP did not construct walkways where they did not exist along other track built before 1963, and did not reconstruct walkways that did exist at that time, SP would never be under any obligation to improve walkway conditions along such track, barring a specific staff investigation of the hazards thereon, followed by a Commission order requiring improvement. This does not appear consistent with the intent of the Commission in adopting GO 118 to protect railroad workers.

Under the rules of statutory construction, "Interpretative constructions which render some words surplusage, defy common sense, or lead to mischief or absurdity, are to be avoided. California Manufacturers' Association v. Public Utilities Commission, supra, 24 C 3d at 844. SP interprets Paragraph 6 as if it reads: "...pursue a program of improvement of walkways in all switching areas where a substantial amount of switching is performed...toward substantial conformity with its [filed] standards..." SP would ignore the phrase ",along its main, branch and industrial trackage," which follows the

reasonable standard of safety is contrary to the legislative intent. These decisions, however, provide little guidance regarding the meaning of Paragraph 6.

SP believes that the details of the 1963 negotiations support its interpretation of Paragraph 6. On the other hand, staff has consistently interpreted Paragraph 6 as requiring that railroads develop a program for improvement of walkway conditions along all tracks in existence when GO 118 was adopted.

Different parties to a compromise such as GO 118 have by definition agreed to the language of the compromise, but there is no guarantee that the parties agree about what that language means. That is clearly the case here. It is evident that after 25 years GO 118 Paragraph 6 still causes confusion.

In light of the above discussion, we believe it is best to convene a proceeding for the narrow purposes of determining what actions railroads should be required to take to improve walkways along tracks and switching areas predating the adoption of GO 118, and when those actions must occur.

We hope that the proceeding we initiate can provide a forum for staff, railroads, and railroad workers and their representatives to cooperate to develop a model walkway improvement program setting appropriate priorities for walkway improvement and developing cost effective safety solutions, in order to decrease the most risk for the least cost in the least time.

We expect that the OII will address at least the following questions:

1. To what extent, as of the effective date of this order, are walkways complying with GO 118 standards in existence along all pre-GO 118 tracks?
2. What are the estimated costs associated with establishing complying walkways along all pre-GO 118 tracks that do not presently have complying walkways?

reference to switching areas. SP's interpretation is contrary to this rule of statutory construction both because it "renders some words surplusage" and because it defies common sense and leads to an absurd result. If SP was correct, the Commission would, in the guise of adopting a safety regulation, have exempted the railroad from ever having to construct complying walkways along any pre-GO 118 track outside areas where substantial switching occurs, in the absence of a staff investigation and subsequent Commission order. In view of the nine years since staff first notified SP of the concerns leading to the present proceeding, which covers walkway conditions on one half mile of a marginal branch line, this is an absurd result.

Furthermore, we note that: "Where a statute empowers an administrative agency to adopt regulations, such regulations, 'must be consistent, not in conflict with the statute, and reasonably necessary to effectuate its purpose.'" (Woods v. Superior Court, 28 C 3d 668, 679 (1981)). "Correspondingly, there is no agency discretion to promulgate a regulation which is inconsistent with the governing statute." Id. If we do not wish to have GO 118 struck down as an abuse of our discretion or as an action outside our authority, we must interpret GO 118 in a manner consistent with the statutes it implements. SP's interpretation of Paragraph 6 appears inconsistent with the purpose of the governing statutes, PU Code §§ 768, 761 and 762, which are designed to protect railroad employees and others from the hazards of railroad operations.

In its efforts to implement GO 118, staff has consistently interpreted Paragraph 6 as requiring that railroads develop a program for improvement of walkway conditions along tracks in existence when GO 118 was adopted. Staff rebuts SP's argument that staff's failure to complain of main and branch line conditions on Northwestern Pacific tracks shows an absence of belief in its ability to do so by pointing out that staff time and resource constraints, and access problems, require giving priority to heavily used switching areas. The record shows that until 1978, staff regularly conducted

3. Should the program for improvement include all pre-GO 118 tracks or just those in switching areas?
4. If the program is limited to switching areas where substantial switching occurs, how should the phrase "where substantial switching occurs" be defined?
5. Should the program for improvement include something more than switching areas but something less than all pre-GO 118 tracks? I.e., should it also include other areas where railroad workers are frequently in need of safe footing? If so, what other pre-GO 118 tracks should be subject to the program for improvement?
6. Should the program for improvement set priorities for remedying walkway conditions in switching areas first and then improving other areas as time and resources permit?
7. Should any priorities be set on the basis of accident frequencies, cost effectiveness of potential improvements or a combination of these two factors? How could this be done?
8. What time frame, if any, should govern the program for improvement?
9. To what extent, if any, have railroads improved walkway conditions along pre-GO 118 main, branch and industrial tracks?
10. Should the program for improvement require actual compliance or merely "substantial conformity" with GO 118 standards with regard to walkways subject to the program for improvement?
11. If "substantial conformity" is required, rather than actual compliance, then how could the term "substantial conformity" be defined so that the program for improvement can be enforceable?

comprehensive GO 26D-118 surveys of substantial portions of railroad trackage, but that budget constraints and staff reductions reduced staff's ability to conduct such surveys. Three surveys in the record support staff's statements regarding its interpretation of GO 118.¹⁸ Each of these surveys cited a number of main line deficiencies, and showed that all substandard conditions were corrected. There is no evidence of any discussion regarding whether "substantial switching" took place, with the exception of item 1089 relating to the White Hills Branch. We give great weight to the construction our staff places on the general order, just as courts give great weight, in similar situations, to the interpretation placed on a statute by the agency responsible for administering the statute. (City of Pasadena v Railroad Commission (1923) 192 C 61).

Staff's interpretation is in harmony with the safety legislation GO 118 was adopted to help implement (PU Code §§ 761, 762 and 768), with the intent of the Commission in adopting GO 118, and with the railroad's obligation to provide safe working conditions for its employees. Staff's interpretation is consistent with the rules of statutory construction, which require that every word and phrase in a statute be given meaning and that absurd results be avoided. Staff's interpretation is also consistent with the principle that regulations must not contradict or impair the purpose of the legislation they implement. Finally, staff's interpretation is consistent with sound sense and wise policy - it is better to require a program for eventual conformity with walkway safety standards than to find that no compliance is required on pre-1963

¹⁸ In survey GO 26D-118/L74 (Exhibit 1), Items 1066, 1075, 1080, 1084, 1086, and 1098 are main line items. In survey GO 26D-118/L74-S4 (Exhibit 1), Items 129, 138, 139, 141, and 142 are main line items. In survey GO 26D-118/187 (Exhibit 37), Items 100, 107, 130, 132, 186, 191, 200, 205, 211, 229, 236, 240, and 247 are main line items. The circles around these items indicate they were corrected. [TR 19].

All railroads will be required to file with the Commission walkway improvement programs conforming with the requirements developed in this proceeding.

"Minimum" vs "Reasonable" Standards

Staff and SP also disagree as to whether GO 118 imposes "minimum" standards or "reasonable" standards for railroad walkways. SP notes that at least one early version of GO 118 which was proposed by staff but not adopted by the Commission included the phrase "minimum standards," and that the general order itself refers simply to "standards." This is true. Staff, however, notes that while the general order itself may refer simply to standards, the standards the railroads agreed to file with the Commission as part of the GO 118 compromise refer to "minimum" walkway measurements. The record in C.7306 shows that the word "minimum" was dropped from the GO 118 preamble only when the railroads accepted the staff's proposed standards with their "minimum" measurement language. Since SP is bound to observe these walkway standards, SP's walkways must at least meet the minimum measurements set forth therein.

Staff's position is correct. D.65208 makes clear that the Commission was well aware of the specific standards the railroads agreed to file in compliance with GO 118 at the time GO 118 was adopted. That decision noted the position of the railroads that:

"there is no necessity for any general order regarding the subject matter; however, if the Commission deems it advisable to adopt the proposed general order, Exhibit No. 7, they would be willing to file standards with the Commission conforming to those set forth in Exhibit No. 8;..." and went on to state that "The Commission finds that these proposed regulations and the Standards for Construction and Reconstruction of Walkways and Maintenance Thereof presented by the railroads as Exhibit No. 8 provide a reasonable standard of safety for railroad employees, passengers and customers of common carriers and the public in general." (D.65208, 60 PUC 756, at 757 (1963) (emphasis added).)

main, branch, and industrial tracks in absence of a specific Commission order.

Where a statute or regulation is "fairly susceptible of two constructions, one leading inevitably to mischief or absurdity, and the other consistent with justice, sound sense, and wise policy, the former should be rejected and the latter adopted." (In re Mitchell, 120 C 384, 386 (1898)). This principle seems to favor staff's interpretation of Paragraph 6. ✓

On the other hand, the railroad's interpretation is also consistent with the language of Paragraph 6. There is some evidence that the railroad had its interpretation in mind when it agreed to the ambiguous language of Paragraph 6. It is evident that after 25 years GO 118 Paragraph 6 still causes confusion.

In light of the above discussion, we believe it is best to convene a proceeding for the narrow purposes of determining what actions railroads should be required to take to improve walkways along tracks and switching areas predating the adoption of GO 118, and when those actions must occur. There is no point in reading an ambiguous provision in a manner adverse to worker safety, nor is there any point in requiring a vague improvement program that does not establish priorities for the improvement of the most hazardous areas first and which may be only begrudgingly implemented by recalcitrant railroads.

Railroad walkway improvement programs should be designed to ensure that the more hazardous walkway situations have priority over those less likely to result in serious injury. But they should be designed to bring all walkways into eventual compliance with walkway safety standards. It has, after all, been 25 years since GO 118 was adopted. It is reasonable to insist that all walkways be made safe at some point.

We hope that the proceeding we initiate can provide a forum for staff, railroads, and railroad workers and their representatives to cooperate to develop a model walkway improvement program setting

appropriate priorities for walkway improvement and developing cost effective safety solutions, in order to decrease the most risk for the least cost in the least time.

Participants will be asked to consider the following approach:

1. List the factors that affect the degree of risk for walkway environments.
2. Determine how to measure these factors.
3. Select methods to determine the empirical relationship of these factors to risk.
 - a. Use data when available.
 - b. Use a consensus of expert judgment (railroads, unions, and staff) when data is not available.
4. Determine the empirical relationship of these factors to risk.
5. Create an empirical model that ranks walkway environments as to level of risk.
6. Develop categories of levels of risk.
7. Develop simple procedures for calculating the costs of remedying the risks in these categories.
8. Develop a timeframe for meeting the appropriate standard for each category, setting shorter timeframes for higher risk categories.
9. Develop a procedure for expedited recategorization of specific walkway areas, based on unusual costs.
10. Develop a procedure for expedited handling of deviation requests for specific areas in the lower risk categories, which have exceptionally high costs.

All railroads will be required to file with the Commission walkway improvement programs conforming with the requirements developed in this proceeding.

"Minimum" vs "Reasonable" Standards

Staff and SP also disagree as to whether GO 118 imposes "minimum" standards or "reasonable" standards for railroad walkways. SP notes that at least one early version of GO 118 which was proposed by staff but not adopted by the Commission included the phrase "minimum standards," and that the general order itself refers simply to "standards." This is true. Staff, however, notes that while the general order itself may refer simply to standards, the standards the railroads agreed to file with the Commission as part of the GO 118 compromise refer to "minimum" walkway measurements. The record in C.7306 shows that the word "minimum" was dropped from the GO 118 preamble only when the railroads accepted the staff's proposed standards with their "minimum" measurement language. Since SP is bound to observe these walkway standards, SP's walkways must at least meet the minimum measurements set forth therein.

Staff's position is correct. D.65208 makes clear that the Commission was well aware of the specific standards the railroads agreed to file in compliance with GO 118 at the time GO 118 was adopted. That decision noted the position of the railroads that:

"there is no necessity for any general order regarding the subject matter; however, if the Commission deems it advisable to adopt the proposed general order, Exhibit No. 7, they would be willing to file standards with the Commission conforming to those set forth in Exhibit No. 8;..." and went on to state that "The Commission finds that these proposed regulations and the Standards for Construction and Reconstruction of Walkways and Maintenance Thereof presented by the railroads as Exhibit No. 8 provide a reasonable standard of safety for railroad employees, passengers and customers of common carriers and the public in general." (D.65208, 60 PUC 756, at 757 (1963) (emphasis added).)

The standards filed by the railroads contain track cross-section and plan view diagrams which specify minimum walkway lengths and widths.

Every distance specified in standards 1 through 6 is followed by the word "minimum," or the abbreviation "min."

The preamble to GO 118 requires railroads to observe the standards they filed in compliance with the general order. Whether the "minimum" distances set forth in the standards filed by SP are considered "minimum standards" or "minimum measurements contained in 'reasonable' standards" makes no difference in terms of the compliance required. SP must observe the walkway standards it filed in compliance with GO 118.

We note that SP's own witness, Williamson, conceded that where the standards of GO 118 applied they were minimum standards [TR 595] - his main contention was that these standards did not apply to most pre-existing walkway conditions.

Application of GO 118 to
the Present Situation

In the present case, SP does not dispute the applicability of GO 118 standards to the White Hills Branch Line walkways which have been constructed or reconstructed after GO 118 became effective in 1963. It acknowledges that in 1963 there were essentially no walkways south of the tracks, but that walkways were constructed thereafter on an intermittent basis as washed out sections of roadbed and ballast were replaced during maintenance operations. SP witness Mahon testified that SP commonly replaced two or three 40-foot sections of subballast, ballast and fill, approximately 3 feet wide, from underneath the rail to the bottom of the south side ditch. Mr. Mahon testified that there are walkways south of switches 2584 and 2587. SP claims that there has never been a continuous walkway, that GO 118 does not require the construction of new walkways where none existed before, and that it makes little sense for the railroad to maintain intermittent stretches of walkway interspersed by sections where SP believes no compliance with GO 118 standards is necessary. Staff contends that SP's intermittent replacement of storm damaged roadbed and construction and/or reconstruction of south side walkways

ultimately amounted to construction and/or reconstruction of walkways along the south side of the entire portion of the branch line in question. These post-1963 walkways clearly invoke GO 118 standards. Even if certain areas south of the tracks never had walkways, Staff argues, SP has violated its Paragraph 6 obligation to engage in a program for bringing its main, branch, and industrial track into substantial compliance with GO 118 standards.

To the extent the SP tracks, switch installations, or walkways in the final half mile leading up to the J-M gate are new since 1963, or have been "reconstructed" since 1963, SP is clearly under an obligation to provide GO 118 standard walkways in the absence of a deviation. The track up the canyon approach was installed circa 1923. With steadily declining usage because of lost custom from trucking inroads, none of the 3.7-mile branch line itself had been reconstructed. However, the derail switch has been relocated twice, and the roadbed underlying sections of the track has been reconstructed after heavy storms washed it from under the tracks. It is not necessary for a railroad to replace at least 50% of materials on the entire branch line in order to invoke GO 118 standards, it is sufficient that any segment of track or walkway has been reconstructed. Furthermore, the evidence clearly shows that while there were no walkways on the south side of the tracks in 1963, some such walkways were constructed thereafter in conjunction with maintenance activities. Under the preamble to GO 118, these post-1963 walkways must conform to GO-118 standards.

The Derail Switch Issue

We will now determine which standards apply to the derail installed in 1979-1980 west of Switch 2584, which originally had its switch stand and target located on the south side of the track. This derail replaced others located up inside the J-M plant. Subsequently, the switch stand and target was moved across to the north side of the track where there always has been an adequate walkway. SP's stated reason was to remove any need at any time for

crew members to be on the south side of the track. Still later the derail was moved further west of Switch 2584. The switch stand and target remains on the north side of the track.

These relocations certainly constituted either "constructions" or "reconstructions," and thus they invoke the railroad's obligations under GO 118 to observe GO 118 standards in doing the work. The question then becomes, which standards?

Staff contends Standard 6 applies to the derail and asserts that SP did not adhere to that standard. Staff contends that a derail is a "switching area," and would apply its March 1, 1968 (Rev. June 10, 1974) "Clarification of General Order No. 118" to conclude that standard walkways were required for both sides of the track in advance of and beyond the "switch," a distance of 150 feet; as they are "locations where operating conditions regularly require members of the train crew to be on the ground." SP strongly disputed this, in turn contending that a derail is only termed a "switch" technically; that at a derail there is no switching from a branch line to a diversion track; that there is no turnout, and car spots do not apply. A derail, SP states, is merely a protective device to derail cars off the track unto the ground in an emergency. SP contends that all that GO 118 requires is a safe and sufficient area on the side of the track where the derail target is sited to be able to safely throw it. Staff counters this view by pointing out that it is the usual and preferred practice for trainworkers to signal to the engineer and dismount from the side of the locomotive where the engineer can easily see them. When arriving at the Manville plant, the engineer is on the side of the locomotive opposite the derail switch and in order to stay in view of the engineer, a trainworker must operate from the ditch side.

We agree with staff that a derail is indeed a switch for the purposes of GO 118. The railroad, in numerous exhibits and testimony, refers to the "derail switch." The derail is a device

designed to let trains pass when set in one position, but to divert runaway train cars to an off track location when set in a second position. The "lining" and "re-lining" of the derail switch requires the use of a switch stand and target similar to that used on other switches. SP witnesses Williamson and Giles testified that there is no practical difference between the derail and other switches from the standpoint of the worker using the switch, although he pointed out that the use of certain other switches might require additional follow up activity evidently not required here.

A primary purpose of the GO 118 standards for areas where switching occurs is to provide workers with a safe place to stand when operating a switch and controlling the movement of trains. The need for compliance does not depend on the type of switch or the frequency of switch use, but rather on the need to protect workers when the switch is used.

In this case, the evidence shows that trainworkers line, and reline, the derail switch at least twice a day, in conjunction with the daily train to the J-M plant. Workers using the derail switch at issue need safe footing.

Given these facts, we find no good reason to distinguish between the derail and other switches. We find that GO 118 standards for switching areas apply to locations where derails are used.

Standard 6, advocated by staff, applies to areas where switching is performed to divert train cars to diversion tracks or to car spot tracks. Walkways in such areas are required on both sides of the track in order to inspect cars halted there. But the full length, as opposed to width, of a Standard 6 walkway is not designed for derail situations where the only activity involves the lining of the derail and none of the activity usually involved to the diversion of cars onto other tracks. Walking inspections are not performed when a train is halted merely to line a derail. And

no one would normally be on the ground at any appreciable distance in the area preceding or beyond the derail during the lining or relining of a derail. We find that Standard 6 is appropriate as far as the width of the walkway at a derail is concerned, but not the length, if the area is not otherwise a switching area or railroad yard. The standards do not establish a reasonable length before and beyond the switch in the case of a derail.

Given our resolution of SP's deviation request, and given the fact that there appears to be an adequate walkway complying with all GO 118 switching area standards (Standards 3, 5, and 6) on the north side of the track where the switch stand and target is located and where workers need to be to operate the switch, we need not now determine precisely what walkway is required south of the derail switch.

An interesting question arises with regard to the state of the south side walkway at the first location the derail was moved to after the three derails were removed from tracks within the J-M plant. Because this first move required reconstruction of tracks and walkways, it invoked GO 118 walkway standards. The record does not reveal the present state of the walkway at this location, but we note that, unless those walkways conform to the appropriate standard, SP is in violation of GO 118.

Should the Commission Grant a Deviation?

Having completed hearing, and having arrived at a determination that staff has demonstrated conclusively that the drainage ditch area on the south side of the track cannot as presently constituted be considered a safe walkway, posing as it does a severe hazard to any employee who might enter that area, we next turn to the question whether the Commission should order SP to eliminate this potentially unsafe condition and set a specific time for compliance. Or, as requested by SP's deviation application in this consolidated proceeding, should the Commission authorize a deviation for this specific installation?

These questions lead us to consideration of the fundamental issue: Has SP provided its workers with a safe place to work on the White Hills Branch line leading to the Manville Plant? And, if so, has SP demonstrated the need for a deviation from GO 118 walkway standards along the south side of the last half mile of the White Hills Branch Line leading to the J-M plant?

SP requests a deviation under Paragraph 7 of GO 118, which provides that:

"Deviations from the filed standards or the provisions of this order may be authorized by the Commission for any specific installation for good cause upon application by a railroad corporation; which application shall include a full statement of the conditions which prevail at the time and place involved, and the reasons why deviation is deemed necessary."

In addition to arguing that the maintenance of an intermittent south side walkway is impractical, SP insists that no walkway at all is necessary on the south side; that the roadway on the north side is fully adequate and has and is being maintained; that the north side walkway provides a safe area for the minimal work on the ground that is required. SP's testimony was that there is nothing about operating the daily train to J-M that requires employees to be on the ground on that south side; that crews have been assigned radios to facilitate north side switching; that its crew members have been ordered not to be in that area; that signs have been posted reminding them of this order; and that the same instructions have been incorporated in their general order. The railroad insists there is no advantage, no convenience, no switching, and no work that need be done there or that could advantageously be done there. It strongly objects to being required to provide what it perceives to be an expensive and impractical (given the nature of the area) walkway in an area where none is needed: a requirement, it states, that would merely result

in a wasteful and inefficient allocation of resources with no measurable benefits. SP suggests that staff's basic antagonism to a deviation is driven by a primary motivation not to accede to any deviation, anytime, anywhere, regardless of provisions paragraph 7 of GO 118, because it feels deviations are undesirable events which dilute the safety standards based on economic factors.

Staff objects to any deviation, arguing that "deviations should be granted only in emergency situations with the ultimate attempt to restore the walkways." Staff would reserve permanent deviations, such as SP seeks here, only to extreme circumstances, and citing our SP Fresno Yard Case (D.86-02-058, Slip Opinion at p. 30), would not let financial considerations determine where worker safety is at issue.

Staff disagrees with SP's contention that workers need never be on the south side of the tracks. Staff notes that while SP witness Giles testified that every problem that arises on the south side could be fixed from the north side of the track, his proposed methods include working on cars while standing completely between the rails and crawling underneath cars. Staff witness Harwood pointed out that these are risky maneuvers which could more safely be undertaken if the train crew were able to work on both sides of the train.

Staff observes that the daily train typically arrives in daylight but leaves in the twilight or dark when lighting conditions are poor. In addition, the crews must work quickly to keep on schedule. These conditions exacerbate the dangers of working on the White Hills Branch. Staff infers that workers need all the safety help they can get.

Staff fears that notwithstanding orders, employees might be tempted to or inadvertently cross to the south side to work. Staff notes that before SP's order prohibiting employee from being on the south side of the track, trainmen were observed signaling from the south side. Staff points out that these trainmen must

have found a south side location useful in carrying out their duties.

Staff witness King, with ten years of railroad experience, testified that railroad workers detraining for switching operations instinctively exit the train in such a way that they can maintain visual contact with the engineer at all times. On the White Hills Branch, King testified, this would be the south side of the tracks.

King also presented numerous Federal Railroad Administration reports describing accidents in which experienced railroad workers were killed in areas of obvious hazard that they were prohibited from occupying.

Staff notes that human error does occur, and rules will not prevent it; that good walkways do not prevent errors from occurring, but they reduce the seriousness of the consequences of a single misstep.

Do the conditions cited by SP in support of its application for a deviation justify a deviation? Or do staff's criticisms compel us to deny SP's deviation request. A closer look at the conditions and staff's rebuttal is necessary. Before we take that look, we will explain the principles we will apply in evaluating deviation requests.

First, we will never grant a deviation from GO 118 when to do so would have an adverse impact on worker safety. Such action would be contrary to our PU Code § 768 mandate to make sure railroad operations are conducted safely.

Second, we expect deviation requests to be based on a comprehensive statement of the conditions which prevail at the time and place involved, and the reasons why deviation is deemed necessary. This comprehensive statement is required by GO 118 Paragraph 7. The more comprehensive this statement is, the easier it is for us to evaluate the deviation request. We do not look

favorably on vague assertions of physical impossibility or financial impracticality.

Third, we will start with the assumptions that safe walkways are necessary along both sides of all tracks, and that walkways in compliance with GO 118 standards are reasonably safe. We will not start with the assumption that the provision of safe walkways along one side of a track obviates the need for safe walkways along the other side. Such an assumption is contrary to the standards accompanying GO 118.

Fourth, the cost of compliance is one factor that may be considered in a deviation proceeding, but is not relevant to a determination of whether a violation of a general order has occurred and is not an excuse for non-compliance in the absence of a deviation granted by this Commission. (D.86-02-085, (Southern Pacific Transportation Company - Fresno Yard, supra, Slip Opinion at p. 31)).

Fifth, in order to justify a deviation from GO 118, a railroad must demonstrate:

- 1) that compliance with GO 118 walkway standards is physically impossible, or that that compliance is physically very difficult and can be achieved only at a cost that is unreasonable in light of the safety benefit gained;
- 2) that the railroad has made all possible efforts to mitigate the hazards resulting from non-compliance; and
- 3) that worker safety will not be significantly compromised by the granting of a deviation.

Sixth, staff, and railroad employees and/or their representatives, will be given an opportunity to rebut the assertions made by a railroad in a deviation request. Deviations will not be granted on an ex parte basis.

Seventh, deviations will be limited in scope to the areas which truly qualify for them.

Eighth, deviations will be limited in time to the period in which the measures the railroad institutes to mitigate the hazards resulting from the deviation are strictly enforced.

Ninth, deviations will cease to be effective as soon as the railroad constructs, or reconstructs walkways in the area subject to the deviation.

With these principles in mind, we turn to the facts in this case.

SP's deviation application claims that compliance with GO 118 is physically impossible in certain areas, because of the narrowness of the railroad's right of way. We do not find this a compelling indication of impossibility of compliance. SP acknowledged, upon cross-examination, that Johns-Manville owned the property on either side of the right of way and that SP has not explored the option of discussing with Johns Manville the possibility of expanding that right of way. We note further that GO 118 standards allow for diminished walkway dimensions in situations of congestion. The introduction to the walkway standards provides that:

These standards shall not be applicable to:

(2) Within cities, towns, populated or congested areas where insufficient width of right of way is available, except these standards shall apply to the full width of the right of way available.

Even if SP could not obtain a wider right of way, it would not be violation of GO 118 standards as long as it provided an adequate walkway to the extent possible. SP's legal right of way argument is not convincing.

SP claims that winter storms wash out the south side walkways that SP has intermittently constructed, and that this prevents compliance with GO 118 standards. Again, the standards

address this storm damage situation. The introduction to the walkway standards provides that:

These standards shall not be applicable to:

(3) During periods of heavy rain or snow, derailments, rock and earth slides, and other abnormal periods, including reasonable duration of time after return to normal to permit necessary restoration.

SP is thus not in violation of GO 118 standards so long as it repairs storm damaged south side walkways within a reasonable period of time. No deviation is necessary in this situation.

SP claims that it is impractical to maintain a walkway on the south side on the intermittent basis it assumes is acceptable because of its assumption that the south side need not improved in areas where no walkways were constructed or reconstructed after the effective date of GO 118. We do not find this "intermittency" argument alone a compelling reason to grant a deviation. We note that to the extent the intermittent nature of the walkway interfered with compliance, SP has always been free to maintain a south side walkway on a continuous basis.

SP contends that a south side walkway is impractical because of the difficulty in laying pipe adequate to carry storm run off in the area between the tracks and the cliffs south of the track. SP states that it has explored, and rejected for engineering or cost effectiveness reasons, a number of options designed to allow construction of a permanent walkway south of the track. This is SP's best argument for a deviation.

Staff counters SP's assertions with engineering evidence of its own. Staff took the unusual step of requiring assistance from an expert hydrologist from the Department of Water Resources. Staff witness Schmutte testified that a series of 36 inch culverts, interspersed with open ditches, could carry the storm run off and provide a foundation for a walkway at a cost of roughly \$25,000.

Storm water would travel through the culverts at a velocity sufficient to wash away any sediment that might build up in the pipes as previous storm waters subsided, and trash racks could prevent the entry of branches and other materials that might clog the pipes. Most of the run off from the south side cliffs would naturally flow into the ditches between the culverts, which would be located only where there was inadequate space between the track and the cliffs to provide for a ditch and a walkway side by side.

SP witnesses claimed that SP had explored and rejected a similar option involving 30 inch pipe, which had been estimated to cost \$49,556. This option was rejected because the 30 inch pipe was inadequate to carry all the run-off expected, and because it was feared that sediment, tree branches, and diatomaceous earth debris would clog the pipes, and because expensive scaling back of the cliffs would have been necessary. SP witness Noori claimed that engineering safety considerations and Public Utilities Commission clearance regulations would make it impossible to install Schmutte's culverts in the trackside ditch as he proposed, and that in some areas the distance between the track center and the cliff face was too small to permit culvert installation without expensive excavation of the cliff footing. He also asserted that Schmutte's cost estimate was grossly inadequate.

SP claims that staff's proposed solutions will not work, and that only full relocation of the tracks involved would provide a permanent solution. SP claims this would cost \$166,000. It would prefer to spend this money elsewhere. One example of SP's priorities is the reconstruction of tracks in its Los Angeles diesel facility, where workers have complained of unsafe footing due to grease and oil on the ground near the tracks. We note that in federal litigation involving GO 118 walkway standards, of which we take official notice, SP Engineer of Standards Martin J. Karlovic stated that "In two recent instances in which the specific cost of adding walkways to conform to a General Order No. 118

requirement has been calculated, the actual estimates have been...; for approximately 640 feet of walkway at White Hills, California, \$30,000." (Declaration of Martin J. Karlovic in Support of Plaintiff's Motion for Summary Judgment, page 17, (N.D. Cal. No. C-86-2480 WWS, See, Southern Pacific Transportation Company v. Public Utilities Commission, ___ F.Supp. ___ (1986); aff'd on appeal ___ F. 2d ___ (1986). Since we favor permanent solutions over temporary ones, we will give SP the benefit of the doubt and consider the higher figure to be their best estimate for the purposes of this deviation request.

The evidence of the engineering feasibility of constructing and maintaining an adequate walkway is conflicting. We are not entirely convinced that a solution less drastic than full track relocation is impractical, but we believe that such a solution would cost more than staff estimates. SP convinces us that staff's solution would be subject to some degree of wear and tear due to the effect of run off on the walkways overlying the proposed culverts. This would require continuing maintenance. On the other hand, we recognize that if staff is correct, and the run off effect is minimal, then SP would save some of the money it presently spends on maintenance if it adopted staff's proposal.

Before we finally determine whether a deviation is appropriate, we come to the issue of worker safety. Has SP shown that worker safety will not be significantly impaired by the granting of a deviation?

This 3.7-mile branch line was constructed 65 years ago when the carrier derived considerable freight traffic from it. However, today this single track line carries only a fraction of the freight it initially carried. There is but one customer. Switching is relatively minor in the area for which SP seeks the deviation, with all switch stands and targets, including the derail, now located on the north side of the track. With introduction of personal radios and the 1978-79 construction of the

J-M run-a-round track, necessary switching operations can be, and, since orders of the carrier are, all performed only from the north side, obviating any need for crew members to be in the south of the track, ditch-side, area. Indeed, SP employees are specifically prohibited from being on the south side. Walking inspections are all carried out inside the plant or at the terminus 3.7 miles away. There has never been a breakdown on this short line nor is one very likely, given that distance and the proximity of the walking inspection area when the train departs. As long as crew members on the trains to J-M are not permitted or required to work on the south side of the track on the portions of the final one-half mile approach to the J-M plant where there are unsafe walkways, there is no present need for the immediate provision of a continuous walkway on that side. We find that crew members can safely operate without it.

SP has provided evidence that it has attempted to mitigate the hazards arising from the absence of complying walkways south of the tracks. While we might add certain conditions to ensure these mitigation measures continue at an appropriate level, we do not fault SP for its showing on this issue. We conclude that as long as SP enforces restrictions on work south of the tracks, maintains and lights or constructs from reflective material the signs warning workers not to enter the area, maintains the radios and other equipment necessary to avoid the need for workers to be in the area, and periodically re-informs the workers of the need to avoid the area, then the granting of a deviation will not have a significant adverse effect on worker safety.

Although the call is a close one, we find that SP has adequately demonstrated that compliance with GO 118 walkway standards on the south side of the last half mile of track leading to the J-M plant would be physically impractical without the expenditure of an amount of money that is unreasonable in light of the worker safety benefit that would be gained by full compliance.

Critical to our decision is the fact that SP's safety hazard mitigation measures reduce the adverse impact on worker safety to an insignificant level.

We conclude that SP has presented sufficient reasons why a deviation from the Standards and provisions of GO 118 should be authorized for this specific south side of the track installation. We will grant SP's request for a deviation from compliance with GO 118 walkway standards for the south side of the last half mile of the White Hills Branch Line leading to the J-M plant, with the exception of Switches 2484 and 2587, which the record shows have presently complying walkways necessary to ensure safe footing for workers utilizing those switches. This deviation will be subject to a number of conditions designed to ensure that the safety hazards to workers continue to be mitigated.

We also conclude that there is a need to clarify the area for which the deviation will be granted. There is some uncertainty with regard to the condition of the south side of the track between the present location of the derail switch and the J-M plant fence. SP testified that only in the areas south of switches 2584 and 2587 has the railroad maintained GO 118 standard walkways. Yet we note that on May 20, 1985 SP issued a timetable bulletin instructing employees "not to detrain, entrain or walk on embankment or south side of track between Johns Manville private road crossing MP 316 and 50 feet west of Johns Manville derail switch." On November 1, 1985 this instruction was reissued as part of SP's railroad General Order 1. In addition, signs to that effect were placed on each side of the track leading to the area. To the extent that south side walkway areas east of the present derail switch location, but west of Switch 2584, do not conform to GO 118 standards, the present signs do not ensure that workers detrain only where walkway conditions are safe.

We will order SP to either provide a safe south side walkway between the present location of the derail switch and

switch 2584 or amend its signs and instructions to prohibit workers from detraining before switch 2584. This modification is necessary to ensure that no detraining takes place in unsafe areas.

We will order SP to maintain appropriate signs at both ends of the deviation area. These signs must either be lighted, or constructed with reflective material so they are visible to workers at night.

We will order SP to periodically remind employees that they are not to enter the area subject to the deviation.

We will also condition the deviation on the continued performance by SP of the mitigation measures it has implemented to ensure worker safety on the White Hills Branch. Should SP cease these mitigation measures, its deviation will cease also.

As long as SP complies with the above conditions, and enforces present access restrictions, SP should be authorized a deviation until reconstruction of the White Hills Branch Line or an appreciable segment is undertaken, or until south side walkways are constructed or reconstructed.

The Fine Issue

Finally, we address the issue of a fine as recommended by our staff. PU Code § 2115 authorizes the Commission to impose a fine not to exceed \$2,000 whenever the Commission determines that a railroad has violated any order of the Commission concerning the condition of track walkways, among other fixtures.

Staff primarily argues that SP violated GO 118 by not conforming to walkway standards during construction and reconstruction of walkways south of the track in question. Staff claims that SP's actions violate the preamble to GO 118, which states that:

... each railroad corporation ... shall file its standards for the construction, reconstruction and for the subsequent maintenance of walkways adjacent to its tracks as hereinafter required ... and shall

hereafter, in the construction and maintenance of its tracks and walkways, observe its standards...

We have examined the evidence and concluded that the south of the track ditch area does not meet standards, despite the fact that intermittent walkways were constructed and reconstructed in this area after the effective date of GO 118. These facts show that SP has violated the preamble to GO 118, since it has not fully observed its walkway standards in accordance with the provisions of that order. The fact that SP did not reconstruct the branch line itself is irrelevant, since the preamble to GO 118 requires compliance with the walkway standards in connection with construction or reconstruction of "tracks and walkways."¹⁹

Since a violation of a Commission order has been found, a fine would be appropriate. We choose not to fine SP, however, since we would prefer the money be spent on worker safety.

Staff also argues that SP violated Paragraph 6 of GO 118 by not including the J-M approach in its program for walkway improvement. Given our determination to clarify Paragraph 6 improvement program requirements, we need not address staff's argument further at this time.

Although are we not fining SP for its non-compliance with GO 118, we will express our displeasure at SP's handling of the

¹⁹ The GO 26-D reference to reconstruction of the track should not be confused with the GO 118 preamble requirement that railroads observe the walkway standards in "reconstruction of tracks and walkways." Note also that Paragraph 1 of GO 118 requires railroads to file standards "for the construction or reconstruction of walkways adjacent to its tracks." (Emphasis added.). The other numbered paragraphs of GO 118 also refer to "walkways" without making that reference depend on track reconstruction. The preamble merely adds the requirement that walkway standards must be observed where tracks are constructed or reconstructed, just as they must be when walkways alone are constructed or reconstructed.

White Hills matter. It has been over nine years since staff concluded (1) that there was an unsafe walkway condition south of the White Hills Branch Line and that working on the ground in that area could be hazardous for train crew members, and (2) began an extensive, albeit unfruitful dialogue with employees and management personnel of the railroad.

SP is obligated to comply with our general orders even in the absence of staff enforcement actions, unless and until it obtains a deviation from the Commission. Yet SP did not apply for a deviation until after the Commission commenced a formal enforcement proceeding in early 1985. Nor did SP restrict workers from entering the unsafe area until after the enforcement proceeding commenced. SP's treatment of staff's measured efforts to correct a hazardous situation first identified in 1981 appears to reflect a posture of either outright indifference or intentional delay.

SP's rather cavalier attitude toward staff's safety concerns is one reason why we must clarify the improvement program required by Paragraph 6 of GO 118. We cannot afford to spend nine years to resolve each dispute between staff and SP concerning the necessity for walkway improvements.

Findings of Fact

1. SP is a railroad corporation within the meaning of PU Code § 230, and it provides rail freight service, as relevant to these proceedings, on its White Hills Branch Line serving the J-M plant at White Hills near Lompoc, California.
2. The White Hills Branch Line was constructed in 1923, and apart from minor switch and derail relocations, has not been reconstructed since.
3. Rail shipments of the diatomaceous earth product of the J-M plant have drastically diminished over recent years as truck shipments have superseded rail shipments, until today there is one short train daily into and from the plant.

4. In the final approach of this single track branch line into the J-M plant, the SP right of way for the track laid down in 1923 narrows to 17 feet, bordered on the south by a rocky, shale-like cliff face. The rail bed generally follows the center of the right of way to the extent permitted by track curvatures.

5. There is a reasonably safe walkway substantially conforming to GO 118 standards north of the White Hills Branch Line. Adjacent to and generally paralleling this north side walkway is the asphalt approach road to the J-M plant.

6. Along the south side of the track, with some exceptions, no walkway was originally provided or today exists; the confined space within the right of way at the foot of the cliff substantially being occupied by a drainage ditch, up to 5 feet deep and of varied width, naturally eroded out of the shale-like rock by storm water runoff and cliff side drainage.

7. Over the years SP has repeatedly worked to protect and maintain its roadbed from the coursing action of this storm water in the south side drainage ditch. SP commonly replaced two or three 40-foot sections of subballast, ballast and fill, approximately 3 feet wide, from underneath the rail to the bottom of the south side ditch.

8. SP states that in 1963 there were essentially no walkways south of the White Hills Branch tracks, but acknowledges that walkways were constructed thereafter on an intermittent basis in conjunction with the replacement of washed out sections of roadbed and ballast during maintenance activities. These newly constructed walkways do not comply with GO 118 walkways standards, except in the areas south of switches 2584 and 2587.

9. Segments of the walkways along the south side of the White Hills Branch have been reconstructed.

10. Derails are devices designed to let trains pass when set in one position, but to divert runaway train cars to an off track location when set in a second position.

11. Derails of the type used on the White Hills Branch use a switch stand and target similar to that used to operate other switches.

12. There is no practical difference between the White Hills derail and other switches from the standpoint of the worker using the switch, although the use of switches with diverging tracks may involve follow up activity not required at White Hills.

13. Workers need safe places to stand when operating switches.

14. A primary purpose of the GO 118 standards for areas where switches are located is to provide workers with safe places to stand when operating switches.

15. The need for compliance with walkway standards for switching areas does not depend on the type of switch or frequency of switch use, but rather on the need to protect workers when the switch is used.

16. "Derails" constitute a form of switch, however, the applicable switching area walkway standard depends on the specific location of the derail switch.

17. The walkway north of the derail switch on the White Hills Branch meets any GO 118 walkway standard applicable to switching areas. In view of our disposition of SP's deviation request, we need not determine precisely which standard applies south of the derail. The presence of the derail switch stand and target on the north side of the track relieves our safety concerns since necessary operations on this branch line are confined to that side.

18. During the eight years preceding the adoption of GO 118, staff received an average of 14 informal complaints a month from railroad workers concerned about unsafe walkway conditions resulting in slipping, tripping, and falling incidents, both while getting on and off equipment and while otherwise performing their required duties.

19. The file in C.7306, of which the ALJ took official notice, reveals that during the 1959 regular session of the California Legislature there were numerous bills relating to the health and safety of railroad workers before the Assembly. These bills were referred to committee for interim study, and after hearings a committee report urged that the subject matter be referred to the Public Utilities Commission for possible disposition through issuance of a general order.

20. In 1961, the Commission opened an investigation into the need for and content of safe walkway standards.

21. Negotiations between Commission staff and the railroads led to the creation of a compromise proposed general order and a set of specific walkway standards which the railroads agreed to file if the compromise general order was adopted.

22. In D.65208 issued on April 9, 1963, the Commission adopted the compromise general order, after stating that it found:

"these proposed regulations and the Standards for Construction and Reconstruction of Walkways and Maintenance Thereof presented by the railroads as Exhibit 8 provide a reasonable standard of safety for railroad employees, passengers and customers of common carriers and the public in general." (60 CPUC 756, at 757 (1963))."

23. Following the adoption of GO 118, the railroads filed the standards set forth in Exhibit 8 in C.7306. These standards include minimum walkway measurements, and can fairly be characterized as minimum standards.

24. The historical context of the adoption of GO 118 shows that 1) the Commission was acting in response to Legislative concern about railroad worker safety and informal complaints by railroad workers alleging the existence of unsafe walkways standards, and 2) the Commission believed that GO 118 and the specific standards accompanying it provided a reasonable standard of safety for railroad employees and others.

all substandard conditions were corrected. There is no evidence of any discussion regarding whether "substantial switching" took place, with the exception of item 1089 relating to the White Hills Branch.

39. Commission staff brought unsafe walkway conditions along the White Hills Branch to SP's attention in 1979. Today's decision will resolve disputes between SP and staff concerning walkway conditions along one half mile of this marginal branch line. Proceedings of this length are an absurd way to resolve disputes concerning railroad worker safety. ✓★

40. Guidance in interpreting GO 118 is provided by a California Supreme Court decision which states that: "Where a statute empowers an administrative agency to adopt regulations, such regulations, 'must be consistent, not in conflict with the statute, and reasonably necessary to effectuate its purpose.'" (Woods v. Superior Court, 28 C 3d 668, 679 (1981)).

41. SP has requested a deviation under GO 118 Paragraph 7, which provides that: |

"Deviations from the filed standards or the provisions of this order may be authorized by the Commission for any specific installation for good cause upon application by a railroad corporation; which application shall include a full statement of the conditions which prevail at the time and place involved, and the reasons why deviation is deemed necessary."

42. Heavy storm runoff, both from the J-M plant, the steep south cliff face and the hills above regularly fills and overflows the drainage ditch, at times sending stone debris coursing over the roadbed, washing away both roadbed materials and such walkway materials as were provided. |

43. SP contends that a south side walkway is impractical because of the difficulty in laying pipe adequate to carry storm runoff in the area between the tracks and the cliffs south of the track. |

★ OLD FINDINGS 40-54
ARE DELETED

25. GO 118 was adopted to protect railroad workers. See, eg., Re: Union Pacific Railroad Company, 6 CPUC 2d 196, 205 (1981), See also, D.83-10-030, Re Union Pacific Railroad Company - Yermo Yard, ___ CPUC 2d ___, (1983) Slip Opinion at pp. 11-12; and D.86-02-958, Re Southern Pacific Transportation Company - Fresno Yard, ___ CPUC 2d ___ (1986) Slip Opinion at p. 30.

26. Railroads have a duty to provide their employees a safe place to work. See, United Transportation Union v. Southern Pacific Transportation Company, D.84-08-122, ___ CPUC 2d ___, (1984) (Slip Opinion at p. 3).

27. PU Code § 768 authorizes the Commission to require railroads to construct, maintain, and operate their facilities in a manner so as to promote and safeguard the health and safety of railroad employees, and gives the Commission the power to establish "uniform or other standards of construction and equipment, and to require the performance of any other act which the health and safety of its employees and the public may demand."

28. PU Code §§ 761 and 762 reinforce § 768 by requiring the Commission to take remedial action if a hearing reveals that a utility is operating in an unsafe manner.

29. Adoption of GO 118 and the accompanying walkway standards established standards for what are presumed to be safe walkways.

30. A failure to provide safe walkways could lead to a person landing on a railroad track and risking being run over by a train.

31. In its efforts to implement GO 118, staff has consistently interpreted Paragraph 6 as requiring that railroads develop a program for improvement of walkway conditions along tracks in existence when GO 118 was adopted.

32. Staff interprets the GO 118 Paragraph 6 requirement that railroads pursue a "program for improvement of walkways in all switching areas where a substantial amount of switching is performed, along main, branch and industrial trackage," to mean that railroads must improve walkways along main, branch and

44. SP states that it has explored, and rejected for engineering or cost effectiveness reasons, a number of options designed to allow construction of a permanent walkway south of the track.

45. Staff witness Schmutte, an expert hydrologist from the Department of Water Resources, testified that a series of 36 inch culverts, interspersed with open ditches, could carry the storm run off and provide a foundation for a walkway at a cost of roughly \$25,000.

46. SP witnesses claimed that SP had explored and rejected a similar option involving 30 inch pipe, which had been estimated to cost \$49,556. This option was rejected because the 30 inch pipe was inadequate to carry all the run-off expected, and because it was feared that sediment, tree branches, and diatomaceous earth debris would clog the pipes, and because expensive scaling back of the cliffs would have been necessary.

47. SP witness Noori claimed that engineering safety considerations and Public Utilities Commission clearance regulations would make it impossible to install Schmutte's culverts in the trackside ditch as he proposed, and that in some areas the distance between the track center and the cliff face was too small to permit culvert installation without expensive excavation of the cliff footing. He also asserted that Schmutte's cost estimate was grossly inadequate.

48. In federal litigation involving GO 118 walkway standards, of which we take official notice, SP Engineer of Standards Martin J. Karlovic estimated the cost of adding walkways conforming to GO 118 standards to the White Hills Branch to be \$30,000. It is unclear what, if any, drainage work this included. (Declaration of Martin J. Karlovic in Support of Plaintiff's Motion for Summary Judgment, page 17, (N.D. Cal. No. C-86-2480 WWS, See, Southern Pacific Transportation Company v. Public Utilities Commission, F.Supp. ____ (1986); aff'd on appeal ____ F. 2d ____ (1986)).

industrial trackage as well as in areas where substantial switching occurs.

33. Staff believes that GO 118 requires that all pre-1963 trackside conditions covered by the general order be brought into eventual conformity with the walkway standards.

34. SP interprets GO 118 Paragraph 6 as if it reads: "...pursue a program of improvement of walkways in all switching areas where a substantial amount of switching is performed...toward substantial conformity with its [filed] standards..." SP does not give meaning to the phrase ",along its main, branch and industrial trackage," which follows the reference to switching areas.

35. SP believes GO 118 requires a program for remedial walkway improvement only in switching areas where substantial switching is performed. Thus, as long as SP did not construct walkways where they did not exist along other track built before 1963, and did not reconstruct walkways that did exist at that time, SP would never be under any obligation to improve those walkways, barring a specific staff investigation of the hazards thereon, followed by a Commission order requiring improvement.

36. Staff regularly conducted comprehensive GO 26D-118 surveys of substantial portions of railroad trackage until 1978, when budget constraints and staff reductions reduced staff's ability to do so.

37. Staff rebuts SP's argument that staff's failure to complain of main and branch line conditions on Northwestern Pacific tracks shows an absence of belief in its ability to do so by pointing out that staff time and resource constraints, and access problems, require giving priority to heavily used switching areas.

38. Three surveys introduced by staff support staff's statements regarding its interpretation of GO 118. Each of these surveys cited a number of main line deficiencies, and showed that all substandard conditions were corrected. There is no evidence of any discussion regarding whether "substantial switching" took

49. SP claims that staff's proposed solutions will not work and that only full relocation of the tracks involved would provide a permanent solution. SP claims this would cost \$166,000. It would prefer to spend this money elsewhere. One example of SP's priorities is the reconstruction of tracks in its Los Angeles diesel facility, where workers have complained of unsafe footing due to grease and oil on the ground near the tracks.

50. The evidence of the engineering feasibility and cost of constructing and maintaining an adequate walkway without relocating the track is conflicting.

51. We are not entirely convinced that a solution less drastic than full track relocation is wholly impractical, but we believe that such a solution would cost more than staff estimates.

52. Since we favor permanent solutions over ones that may be temporary, we consider SP's \$166,000 figure to be the best estimate of the cost of compliance with GO 118 along the White Hills Branch.

53. Rules prohibiting workers from entering an area or engaging in unsafe practices do not guarantee that workers will not enter the area or engage in unsafe practices; numerous Federal Railroad Administration reports describe accidents in which experienced railroad workers were killed in areas of obvious hazard that they were prohibited from occupying.

54. Safety measures designed to eliminate the need for and the convenience of working in a prohibited area are necessary supplements to rules prohibiting such work.

55. SP has undertaken a number of measures designed to mitigate the hazards to workers resulting from unsafe walkway conditions south of the White Hills Branch Line. These measures include:

1. Issuing personal radios to workers so they need not be on the south side of the tracks to signal to engineers during switching operations.

place, with the exception of item 1089 relating to the White Hills Branch.

39. Commission staff brought unsafe walkway conditions along the White Hills Branch to SP's attention in 1979. Today's decision will resolve disputes between SP and staff concerning walkway conditions along one half mile of this marginal branch line. Proceedings of this length are an absurd way to resolve disputes concerning railroad worker safety.

40. The California Supreme Court has stated that under the rules of statutory construction, "Interpretative constructions which render some words surplusage, defy common sense, or lead to mischief or absurdity, are to be avoided." California Manufacturers' Association v. Public Utilities Commission, 24 C 3d 836, 844 (1979).

41. Further guidance in interpreting GO 118 is provided by a California Supreme Court decision which states that: "Where a statute empowers an administrative agency to adopt regulations, such regulations, 'must be consistent, not in conflict with the statute, and reasonably necessary to effectuate its purpose.'" (Woods v. Superior Court, 28 C 3d 668, 679 (1981)).

42. Staff's interpretation of GO 118 is in harmony with the legislation GO 118 was adopted to help implement (PU Code §§ 761, 762 and 768).

43. Staff's interpretation of GO 118 is consistent with the intent of the Commission in adopting GO 118 - to protect railroad workers from unsafe walkways.

44. Staff's interpretation of GO 118 is consistent with the railroad's obligation to provide safe working conditions for its employees.

45. Staff's interpretation of GO 118 is consistent with the rules of statutory construction, which require that every word and phrase in a statute be given meaning and that absurd results be avoided.

2. Issuing instructions and bulletins warning workers to detrain in the area of unsafe walkways.

3. Constructing signs designed to keep workers out of the area of unsafe walkways.

4. Moving the derail stand and target from the south to the north side of the tracks so that workers need not be on the south side to operate the derail switch.

56. The short 3.7-mile route of the White Hills Branch Line, a consistent 3% grade, is not an arduous or problem route, and equipment operated in this service on it is not stressed by severe grades or sharp curves.

57. Because of the pre-start walking inspection made on each train run before each start, and the shortness of the run between the White Hills Junction and the J-M plant (and reverse run loaded), there is only a remote likelihood of any mechanical or lading problem occurring enroute that would require a non-emergency unscheduled stop. Accordingly, the chance of any non-emergency routine walking inspection being required enroute is very remote.

58. However, any non-emergency routine walking inspection that should be required can be safely and adequately performed on this 3.7-mile stretch of the branch line from the safe and adequate walkway provided and maintained on the north side of the track.

59. All necessary switching activities incidental to the operation of this branch line, including operation of the derail switch, may be performed adequately and safely from the north side of the track so that there is no need for any train crew member to be on the ground on the south side of the track in the area at issue.

60. There is no present operating necessity for any walkway on the south side of the track in the area at issue.

61. To the extent standard walkways on both sides of the tracks, not only in all switching areas, but on all trackage, are the ultimate objective of GO 118, the existing situation on the

46. Staff's interpretation of GO 118 is consistent with the principle that regulations must not contradict or impair the purpose of the legislation they implement.

47. Staff's interpretation of GO 118 is consistent with sound sense and wise policy - it is better to require a program for eventual conformity with walkway safety standards than to find that no compliance is required on pre-1963 main, branch and industrial tracks in absence of a specific Commission order.

48. SP's interpretation of GO 118 would impair the Commission's ability to require railroads to develop a program for improving existing walkways outside of areas where substantial switching occurs, in the absence of a new, or revised, general order to that effect.

49. SP's interpretation of GO 118 would impair staff's ability to ensure that railroads provide safe walkway conditions for their workers by requiring staff to obtain a Commission order under Paragraph 5 of GO 118 each time it wished to have a specific hazardous walkway situation improved.

50. SP's interpretation of GO 118 would mean that the Commission had adopted regulations which impaired its ability to implement the safety legislation which authorizes GO 118 and which GO 118 was adopted to implement.

51. The California Supreme Court has stated that where a statute or regulation is "fairly susceptible of two constructions, one leading inevitably to mischief or absurdity, and the other consistent with justice, sound sense, and wise policy, the former should be rejected and the latter adopted." (In re Mitchell, 120 C 384, 386 (1898)).

52. By adopting GO 118 the Commission, among other things, intended that:

1. In all new construction and reconstruction of tracks and/or walkways, the railroads must observe their filed walkway standards.

south side of the track on the White Hills Branch Line approach to the J-M plant deviates.

62. SP has demonstrated:

- 1) that compliance with GO 118 walkway standards along the south side of the White Hills Branch Line is physically very difficult and can be achieved only at a cost that is unreasonable in light of the safety benefit gained;
- 2) that the railroad has made all possible efforts to mitigate the hazards resulting from non-compliance; and
- 3) that worker safety will not be significantly compromised by the granting of a deviation.

63. Staff, and railroad employees and their representatives, were given an opportunity to rebut the assertions made by SP in its deviation request.

Conclusions of Law

1. I.85-01-002 should be closed.
2. The Commission has the responsibility to require every public utility to construct, maintain, and operate its system, equipment, apparatus, tracks, and premises in such a manner as to promote and safeguard the health and safety of its employees and the public. (Public Utilities Code §§ 761, 762 and 768).
3. Adoption of GO 118 and approval of the accompanying walkway standards did not alter the Commission's authority or duty to ensure walkway safety.
4. In all new construction or reconstruction of tracks or walkways, railroads must comply with GO 118 walkway standards.
5. At all times since adoption of GO 118, SP has been under the obligation to provide standard walkways on the south side of the track at each location where a new walkway was constructed or an existing walkway reconstructed. SP has not complied with this obligation. Although intermittent walkways were constructed and reconstructed in connection with certain track roadbed maintenance

2. As to trackside pre-existing April 29, 1963, the railroads must pursue a program for improvement designed to bring trackside conditions into substantial conformity with the appropriate walkway standards; the ultimate objective being to provide reasonably safe walkways.

53. A railroad's program for improving walkway conditions should emphasize the improvement of areas presenting the greatest hazards to railroad workers and the public, and should be designed to ensure that all trackside is eventually brought into conformity with GO 118 walkway standards.

54. A railroad's program for improvement of walkway conditions should be designed to decrease the most risk for the least cost.

55. SP has requested a deviation under GO 118 Paragraph 7, which provides that:

"Deviations from the filed standards or the provisions of this order may be authorized by the Commission for any specific installation for good cause upon application by a railroad corporation; which application shall include a full statement of the conditions which prevail at the time and place involved, and the reasons why deviation is deemed necessary."

56. Heavy storm runoff both from the J-M plant, the steep south cliff face and the hills above regularly fills and overflows the drainage ditch, at times sending stone debris coursing over the roadbed, washing away both roadbed materials and such walkway materials as were provided.

57. SP contends that a south side walkway is impractical because of the difficulty in laying pipe adequate to carry storm runoff in the area between the tracks and the cliffs south of the track.

58. SP states that it has explored, and rejected for engineering or cost effectiveness reasons, a number of options

activities, only the walkways south of switches 2584 and 2587 were constructed and maintained to GO 118 standards.

6. SP's failure to observe GO 118 walkway standards at all locations where new walkways were constructed or existing walkways were reconstructed constitutes a violation of GO 118.

7. Because SP has violated GO 118 in its operations on the approach to the J-M plant on SP's White Hills Branch Line, SP could be fined under PU Code § 2115.

8. GO 118 Paragraph 6 requires railroads to pursue a program for improvement of walkway conditions in all switching areas where a substantial amount of switching is performed, along main, branch, and industrial trackage, designed to bring trackside conditions into substantial conformity with GO 118 walkway standards.

9. GO 118 Paragraph 6 applies to tracks pre-dating the adoption of GO 118 in 1963.

10. GO 118 Paragraph 6 is subject to more than one interpretation with regard to the scope of the program railroads must pursue to improve walkways in all switching areas where substantial switching is performed, along main, branch and industrial trackage.

11. The Commission should clarify the program of improvement required by GO 118 Paragraph 6.

12. The Paragraph 6 program for improvement should be consistent with the intent of the statutes GO 118 implements, with the Commission's intent in adopting GO 118 to protect railroad workers, with the railroads' obligation to provide employees with a safe place to work, and with sound sense and wise policy.

13. Railroads are obligated to comply with our general orders even in the absence of staff enforcement actions, unless and until they obtain a deviation from the Commission.

14. The cost of compliance is not relevant to a determination of whether a violation of a general order has occurred and is not an excuse for non-compliance. D.86-02-085 (Southern Pacific)

designed to allow construction of a permanent walkway south of the track.

59. Staff witness Schmutte, an expert hydrologist from the Department of Water Resources, testified that a series of 36 inch culverts, interspersed with open ditches, could carry the storm run off and provide a foundation for a walkway at a cost of roughly \$25,000.

60. SP witnesses claimed that SP had explored and rejected a similar option involving 30 inch pipe, which had been estimated to cost \$49,556. This option was rejected because the 30 inch pipe was inadequate to carry all the run-off expected, and because it was feared that sediment, tree branches, and diatomaceous earth debris would clog the pipes, and because expensive scaling back of the cliffs would have been necessary.

61. SP witness Noori claimed that engineering safety considerations and Public Utilities Commission clearance regulations would make it impossible to install Schmutte's culverts in the trackside ditch as he proposed, and that in some areas the distance between the track center and the cliff face was too small to permit culvert installation without expensive excavation of the cliff footing. He also asserted that Schmutte's cost estimate was grossly inadequate.

62. In federal litigation involving GO 118 walkway standards, of which we take official notice, SP Engineer of Standards Martin J. Karlovic estimated the cost of adding walkways conforming to GO 118 standards to the White Hills Branch to be \$30,000. It is unclear what, if any, drainage work this included. (Declaration of Martin J. Karlovic in Support of Plaintiff's Motion for Summary Judgment, page 17, (N.D. Cal. No. C-86-2480 WWS, See, Southern Pacific Transportation Company v. Public Utilities Commission, ___ F.Supp. ___ (1986); aff'd on appeal ___ F. 2d ___ (1986)).

63. SP claims that staff's proposed solutions will not work, and that only full relocation of the tracks involved would provide

Transportation Company - Fresno Yard, ___ CPUC 2d ___, (1986) (Slip Opinion at p. 31).

15. The cost of compliance is one factor to be considered in a deviation proceeding.

16. GO 118 Paragraph 7 provides that a railroad may apply for a deviation from the walkway standards or the provisions of GO 118 for any specific installation.

17. GO 118 Paragraph 7 requires that deviation requests include a comprehensive statement of the conditions which prevail at the time and place involved, and the reasons why deviation is deemed necessary. Vague assertions of physical impossibility or financial impracticality are not sufficient.

18. In evaluating GO 118 deviation requests, the Commission must start with the assumptions that safe walkways are necessary along both sides of all tracks, and that walkways in compliance with GO 118 standards are reasonably safe. An assumption that the provision of safe walkways along one side of a track obviates the need for safe walkways along the other side would be contrary to the standards accompanying GO 118.

19. Staff, and railroad employees and their representatives, must be given an opportunity to rebut the assertions made by a railroad in a deviation request. Deviations should not be granted on an ex parte basis.

20. The Commission should never grant a GO 118 deviation when to do so would have an adverse impact on worker safety. Such action would be contrary to the Commission's mandate under PU Code §§ 761, 762, and 768 to make sure railroad operations are conducted safely.

21. In order to ensure that railroad operations are conducted safely, the Commission should not grant deviations from GO 118 or its walkway standards unless the railroad applying for the deviation demonstrates:

- 1) that compliance with GO 118 walkway standards is physically impossible, or that

that compliance is physically very difficult and can be achieved only at a cost that is unreasonable in light of the safety benefit gained;

- 2) that the railroad has made all possible efforts to mitigate the hazards resulting from non-compliance; and
- 3) that worker safety will not be significantly compromised by the granting of a deviation.

22. A GO 118 deviation should be limited in scope to the area which truly qualifies for the deviation in order to avoid unnecessarily exposing workers to hazardous conditions.

23. A GO 118 deviation should terminate if the measures the railroad institutes to mitigate the hazards resulting from the deviation are not strictly enforced, since failure to enforce those measures constitutes a change in the conditions upon which the deviation was based and could result in workers being injured.

24. A GO 118 deviation should terminate if the railroad constructs, or reconstructs walkways in the area subject to the deviation, or constructs or reconstructs tracks in the area subject to the deviation.

25. A GO 118 deviation should terminate if there is evidence that the deviation has had a significant adverse impact on worker safety.

26. The deviation sought by SP by A.85-03-052 should be granted but with conditions to assure worker safety as provided in the following order.

27. SP is required to comply with GO 118 standards if its deviation terminates.

28. An Order Instituting Investigation should be initiated for the purpose of clarifying the type, scope, and timing of the program for walkway improvement railroads will be required to undertake along track in existence at the time GO 118 was adopted in 1963. The investigation should consider at least the following questions

a permanent solution. SP claims this would cost \$166,000. It would prefer to spend this money elsewhere. One example of SP's priorities is the reconstruction of tracks in its Los Angeles diesel facility, where workers have complained of unsafe footing due to grease and oil on the ground near the tracks.

64. The evidence of the engineering feasibility and cost of constructing and maintaining an adequate walkway without relocating the track is conflicting.

65. We are not entirely convinced that a solution less drastic than full track relocation is wholly impractical, but we believe that such a solution would cost more than staff estimates.

66. Since we favor permanent solutions over ones that may be temporary, we consider SP's \$166,000 figure to be the best estimate of the cost of compliance with GO 118 along the White Hills Branch.

67. Rules prohibiting workers from entering an area or engaging in unsafe practices do not guarantee that workers will not enter the area or engage in unsafe practices; numerous Federal Railroad Administration reports describe accidents in which experienced railroad workers were killed in areas of obvious hazard that they were prohibited from occupying.

68. Safety measures designed to eliminate the need for and the convenience of working in a prohibited area are necessary supplements to rules prohibiting such work.

69. SP has undertaken a number of measures designed to mitigate the hazards to workers resulting from unsafe walkway conditions south of the White Hills Branch Line. These measures include:

1. Issuing personal radios to workers so they need not be on the south side of the tracks to signal to engineers during switching operations.
2. Issuing instructions and bulletins warning workers to to detrain in the area of unsafe walkways.

3. Constructing signs designed to keep workers out of the area of unsafe walkways.

4. Moving the derail stand and target from the south to the north side of the tracks so that workers need not be on the south side to operate the derail switch.

70. The short 3.7-mile route of the White Hills Branch Line, a consistent 3% grade, is not an arduous or problem route, and equipment operated in this service on it is not stressed by severe grades or sharp curves.

71. Because of the pre-start walking inspection made on each train run before each start, and the shortness of the run between the White Hills Junction and the J-M plant (and reverse run loaded), there is only a remote likelihood of any mechanical or lading problem occurring enroute that would require a non-emergency unscheduled stop. Accordingly, the chance of any non-emergency routine walking inspection being required enroute is very remote.

72. However, any non-emergency routine walking inspection that should be required can be safely and adequately performed on this 3.7-mile stretch of the branch line from the safe and adequate walkway provided and maintained on the north side of the track.

73. All necessary switching activities incidental to the operation of this branch line, including operation of the derail switch, may be performed adequately and safely from the north side of the track so that there is no need for any train crew member to be on the ground on the south side of the track in the area at issue.

74. There is no present operating necessity for any walkway on the south side of the track in the area at issue.

75. To the extent standard walkways on both sides of the tracks, not only in all switching areas, but on all trackage, are the ultimate objective of GO 118, the existing situation on the south side of the track on the White Hills Branch Line approach to the J-M plant deviates.

1. To what extent, as of the effective date of this order, are walkways complying with GO 118 standards in existence along all pre-GO 118 tracks?
2. What are the estimated costs associated with establishing complying walkways along all pre-GO 118 tracks that do not presently have complying walkways?
3. Should the program for improvement include all pre-GO 118 tracks or just those in switching areas?
4. If the program is limited to switching areas where substantial switching occurs, how should the phrase "where substantial switching occurs" be defined?
5. Should the program for improvement include something more than switching areas but something less than all pre-GO 118 tracks? I.e., should it also include other areas where railroad workers are frequently in need of safe footing? If so, what other pre-GO 118 tracks should be subject to the program for improvement?
6. Should the program for improvement set priorities for remedying walkway conditions in switching areas first and then improving other areas as time and resources permit?
7. Should any priorities be set on the basis of accident frequencies, cost effectiveness of potential improvements or a combination of these two factors? How could this be done?
8. What time frame, if any, should govern the program for improvement?
9. To what extent, if any, have railroads improved walkway conditions along pre-GO 118 main, branch and industrial tracks?
10. Should the program for improvement require actual compliance or merely "substantial conformity" with GO 118 standards with regard to walkways subject to the program for improvement?

76. SP has demonstrated:

- 1) that compliance with GO 118 walkway standards along the south side of the White Hills Branch Line is physically very difficult and can be achieved only at a cost that is unreasonable in light of the safety benefit gained;
- 2) that the railroad has made all possible efforts to mitigate the hazards resulting from non-compliance; and
- 3) that worker safety will not be significantly compromised by the granting of a deviation.

77. Staff, and railroad employees and their representatives, were given an opportunity to rebut the assertions made by SP in its deviation request.

Conclusions of Law

1. I.85-01-002 should be closed.
2. The Commission has the responsibility to require every public utility to construct, maintain, and operate its system, equipment, apparatus, tracks, and premises in such a manner as to promote and safeguard the health and safety of its employees and the public. (Public Utilities Code §§ 761, 762 and 768).
3. Adoption of GO 118 and approval of the accompanying walkway standards did not alter the Commission's authority or duty to ensure walkway safety.
4. In all new construction or reconstruction of tracks or walkways, railroads must comply with GO 118 walkway standards.
5. At all times since adoption of GO 118, SP has been under the obligation to provide standard walkways on the south side of the track at each location where a new walkway was constructed or an existing walkway reconstructed. SP has not complied with this obligation. Although intermittent walkways were constructed and reconstructed in connection with certain track roadbed maintenance activities, only the walkways south of switches 2584 and 2587 were constructed and maintained to GO 118 standards.

11. If "substantial conformity" is required, rather than actual compliance, then how could the term "substantial conformity" be defined so that the program for improvement can be enforceable?

The OII should also invite proposals by staff, the railroads, and railroad workers and their representatives.

ORDER

IT IS ORDERED that:

1. I.85-01-002 is closed.
2. A.85-03-052 of Southern Pacific Transportation Company for authority to deviate from the walkway standards provided for by General Order 118 on the south side of its White Hills Branch Line approach track, from Switch 2584 near the Johns-Manville plant entrance fence line to that company's private road crossing, a distance of approximately one-half mile, is granted subject to the following conditions:
 - a. Throughout the duration of this deviation, SP shall continue to notify its crews with the following instruction: "Because of the existence of a drainage ditch adjacent to the track, and the nonexistence of an adequate and safe walkway on that side of the track, crew members of trains serving the plant are not to detrain, entrain, or walk on that side of the track."
 - b. Written instructions (Railroad General Order, timetable, train order, or special instructions) shall immediately be issued to affected train crews concerning Condition 2a, and filed with the Railroad Operations and Safety Branch of the Commission. These instructions shall periodically be re-issued to affected railroad personnel
 - c. SP shall provide train workers involved in switching or other activities with personal radios to facilitate communication with

6. SP's failure to observe GO 118 walkway standards at all locations where new walkways were constructed or existing walkways were reconstructed constitutes a violation of GO 118.

7. Because SP has violated GO 118 in its operations on the approach to the J-M plant on SP's White Hills Branch Line, SP could be fined under PU Code § 2115.

8. GO 118 Paragraph 6 requires railroads to pursue a program for improvement of walkway conditions in all switching areas where a substantial amount of switching is performed, along main, branch, and industrial trackage, designed to bring trackside conditions into substantial conformity with GO 118 walkway standards.

9. GO 118 Paragraph 6 applies to tracks pre-dating the adoption of GO 118 in 1963.

8. GO 118 Paragraph 6 is subject to more than one interpretation with regard to the scope of the program railroads must pursue to improve walkways in all switching areas where substantial switching is performed, along main, branch and industrial trackage.

10. The Commission should clarify the program of improvement required by GO 118 Paragraph 6.

11. The Paragraph 6 program for improvement should be consistent with the intent of the statutes GO 118 implements, with the Commission's intent in adopting GO 118 to protect railroad workers, with the railroads' obligation to provide employees with a safe place to work, and with sound sense and wise policy.

12. Programs for improvement of walkway conditions pre-dating the adoption of GO 118 may give priority to the improvement of walkways adjacent to switches and other areas of great hazard to workers, but should provide for eventual conformity with walkway standards in all areas subject to GO 118.

13. SP should be required to file with the Commission a GO 118 Paragraph 6 program for improvement of walkways once the

train engineers during the performance of their duties.

- d. SP shall provide signs that are either lighted or built with reflective materials at both sides of the track at both ends of the deviation area visible to train workers from both directions. In the event SP fails to maintain these signs appropriately, this deviation shall terminate, and south side walkways conforming to GO 118 standards shall be provided.
- e. In the event SP ceases to strictly enforce the measures it adopted to mitigate the hazards to workers resulting from the granting of this deviation, this deviation shall terminate, and south side walkways conforming to GO 118 standards shall be provided.
- f. In the event of reconstruction of this branch line or significant segment of the line, or the construction or reconstruction of walkways adjacent to the south side of the line, this deviation shall terminate, and south side walkways conforming to GO 118 standards shall be provided.
- g. In the event of evidence that the deviation has a significant adverse impact on worker safety, this deviation shall terminate, and south side walkways conforming to GO 118 standards shall be provided.

3. We shall, within 90 days, issue an Order Instituting Investigation to determine what actions railroads should be required to undertake in order to improve walkway conditions along tracks in existence when General Order 118 was adopted in 1963, the type of trackage subject to any program of improvement, and the time frame within which any actions ordered must occur. The investigation will consider at least the following questions

1. To what extent, as of the effective date of this order, are walkways complying with GO 118 standards in existence along all pre-GO 118 tracks?
2. What are the estimated costs associated with establishing complying walkways along all pre-GO 118 tracks that do not presently have complying walkways?
3. Should the program for improvement include all pre-GO 118 tracks or just those in switching areas?
4. If the program is limited to switching areas where substantial switching occurs, how should the phrase "where substantial switching occurs" be defined?
5. Should the program for improvement include something more than switching areas but something less than all pre-GO 118 tracks? I.e., should it also include other areas where railroad workers are frequently in need of safe footing? If so, what other pre-GO 118 tracks should be subject to the program for improvement?
6. Should the program for improvement set priorities for remedying walkway conditions in switching areas first and then improving other areas as time and resources permit?
7. Should any priorities be set on the basis of accident frequencies, cost effectiveness of potential improvements or a combination of these two factors? How could this be done?
8. What time frame, if any, should govern the program for improvement?
9. To what extent, if any, have railroads improved walkway conditions along pre-GO 118 main, branch and industrial tracks?
10. Should the program for improvement require actual compliance or merely "substantial conformity" with GO 118 standards with regard to walkways subject to the program for improvement?

improvement program requirements are clarified by further Commission order.

14. Railroads are obligated to comply with our general orders even in the absence of staff enforcement actions, unless and until they obtain a deviation from the Commission.

15. The cost of compliance is not relevant to a determination of whether a violation of a general order has occurred and is not an excuse for non-compliance. D.86-02-085 (Southern Pacific Transportation Company - Fresno Yard, ___ CPUC/2d ___, (1986) (Slip Opinion at p. 31).

16. The cost of compliance is one factor to be considered in a deviation proceeding.

17. GO 118 Paragraph 7 provides that a railroad may apply for a deviation from the walkway standards or the provisions of GO 118 for any specific installation.

18. GO 118 Paragraph 7 requires that deviation requests include a comprehensive statement of the conditions which prevail at the time and place involved, and the reasons why deviation is deemed necessary. Vague assertions of physical impossibility or financial impracticality are not sufficient.

19. In evaluating GO 118 deviation requests, the Commission must start with the assumptions that safe walkways are necessary along both sides of all tracks, and that walkways in compliance with GO 118 standards are reasonably safe. An assumption that the provision of safe walkways along one side of a track obviates the need for safe walkways along the other side would be contrary to the standards accompanying GO 118.

20. Staff, and railroad employees and their representatives, must be given an opportunity to rebut the assertions made by a railroad in a deviation request. Deviations should not be granted on an ex parte basis.

21. The Commission should never grant a GO 118 deviation when to do so would have an adverse impact on worker safety. Such

action would be contrary to the Commission's mandate under PU Code §§ 761, 762, and 768 to make sure railroad operations are conducted safely.

22. In order to ensure that railroad operations are conducted safely, the Commission should not grant deviations from GO 118 or its walkway standards unless the railroad applying for the deviation demonstrates:

- 1) that compliance with GO 118 walkway standards is physically impossible, or that that compliance is physically very difficult and can be achieved only at a cost that is unreasonable in light of the safety benefit gained;
- 2) that the railroad has made all possible efforts to mitigate the hazards resulting from non-compliance; and
- 3) that worker safety will not be significantly compromised by the granting of a deviation.

23. A GO 118 deviation should be limited in scope to the area which truly qualifies for the deviation in order to avoid unnecessarily exposing workers to hazardous conditions.

24. A GO 118 deviation should terminate if the measures the railroad institutes to mitigate the hazards resulting from the deviation are not strictly enforced, since failure to enforce those measures constitutes a change in the conditions upon which the deviation was based and could result in workers being injured.

25. A GO 118 deviation should terminate if the railroad constructs, or reconstructs walkways in the area subject to the deviation, or constructs or reconstructs tracks in the area subject to the deviation.

26. A GO 118 deviation should terminate if there is evidence that the deviation has had a significant adverse impact on worker safety.

27. The deviation sought by SP by A.85-03-052 should be granted but with conditions to assure worker safety as provided in the following order.

11. If "substantial conformity" is required, rather than actual compliance, then how could the term "substantial conformity" be defined so that the program for improvement can be enforceable?

The OII will also consider any proposals made by staff, the railroads, and railroad workers or their representatives. All railroads subject to our jurisdiction will be made respondents to this OII, and railroad workers and their representatives will be invited to participate.

This order becomes effective 30 days from today.

Dated _____, at San Francisco, California.

27. SP is required to comply with GO 118 standards if its deviation terminates.

29. An Order Instituting Investigation should be initiated for the purpose of clarifying the type, scope, and timing of the program for walkway improvement railroads will be required to undertake along track in existence at the time GO 118 was adopted in 1963.

ORDER

IT IS ORDERED that:

1. I.85-01-002 is closed.
2. A.85-03-052 of Southern Pacific Transportation Company for authority to deviate from the walkway standards provided for by General Order 118 on the south side of its White Hills Branch Line approach track, from Switch 2584 near the Johns-Manville plant entrance fence line to that company's private road crossing, a distance of approximately one-half mile, is granted subject to the following conditions:
 - a. Throughout the duration of this deviation, SP shall continue to notify its crews with the following instruction: "Because of the existence of a drainage ditch adjacent to the track, and the nonexistence of an adequate and safe walkway on that side of the track, crew members of trains serving the plant are not to detrain, entrain, or walk on that side of the track."
 - b. Written instructions (Railroad General Order, timetable, train order, or special instructions) shall immediately be issued to affected train crews concerning Condition 2a, and filed with the Railroad Operations and Safety Branch of the Commission. These instructions shall periodically be re-issued to affected railroad personnel.

- c. SP shall provide train workers involved in switching or other activities with personal radios to facilitate communication with train engineers during the performance of their duties.
- d. SP shall provide signs that are either lighted or built with reflective materials at both sides of the track at both ends of the deviation area visible to train workers from both directions. In the event SP fails to maintain these signs appropriately, this deviation shall terminate, and south side walkways conforming to GO 118 standards shall be provided.
- e. In the event SP ceases to strictly enforce the measures it adopted to mitigate the hazards to workers resulting from the granting of this deviation, this deviation shall terminate, and south side walkways conforming to GO 118 standards shall be provided.
- f. In the event of reconstruction of this branch line or significant segment of the line, or the construction or reconstruction of walkways adjacent to the south side of the line, this deviation shall terminate, and south side walkways conforming to GO 118 standards shall be provided.
- g. In the event of evidence that the deviation has a significant adverse impact on worker safety, this deviation shall terminate, and south side walkways conforming to GO 118 standards shall be provided.

3. We shall, within 90 days, issue an Order Instituting Investigation to determine what actions railroads should be required to undertake in order to improve walkway conditions along tracks in existence when General Order 118 was adopted in 1963, and to determine a time frame within which those actions must occur. The investigation will consider the proposal contained in this order, as well as any proposals made by staff, the railroads, or

railroad workers or their representatives. All railroads subject to our jurisdiction will be made respondents to this OII, and railroad workers and their representatives will be invited to participate.

This order becomes effective 30 days from today.

Dated FEB 8 1989, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. CHANIAN
Commissioners

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Ruling of Administrative Law Judge Weiss
on Preemption Issue

ALJ WEISS: The Commission will be in order.

ruling: "I am prepared to make my ruling and this is my

"The Bench has been informed by counsel for Southern Pacific Transportation Company that SP has concluded that by its actions, the Federal Railroad Administration has preempted general state action on walkways, that Commission General Order 118 has been preempted under the provisions of the Railroad Safety Act of 1970.

"Respondent therefore has further advised that it has concluded that any action directed at SP for the condition of its White Hills branch walkways must be premised upon the existence of a local safety hazard and not upon the fact that the conditions may not conform to the standards set forth in General Order 118.

"SP further advised that it would confine its further evidence to appropriate rebuttal of staff's case to date and focus upon the existence or nonexistence of localized safety hazards.

"The Bench has also received the views of staff counsel and those of counsel for the United Transportation Union as well as the United Transportation Union representative, all of whom deny preemption.

"After careful consideration, it is the ruling of the Bench that this Commission's requirements for reasonably safe and adequate walkways adjacent to railroad tracks as embodied in General Order 118 have not been preempted by the Railroad Safety Act of 1970, nor by subsequent actions and of the Federal Railroad Administration.

"In enacting the Federal Railroad Safety Act, Congress' primary, paramount concern was safety and to reduce railroad-related accidents.

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"To the degree practicable, uniformity was also sought. But safety was the paramount concern. And Congress made it clear that a state may continue to enforce any law, rule, regulation, order or standard relating to railroad safety until such time as the Secretary of Transportation acting through the Federal Railroad Administration adopts a rule, regulation, order or standard covering the subject matter of the state requirement.

"Federal Railroad Administration policy statements are not enough to preempt. They merely announced the agency's intentions, what it seeks to do, and we have seen that the path to regulatory fulfillment is strewn with aborted attempts.

"Further, regulation of a problem which in some way may affect the safety of railroad workers does not mean the subject matter of state worker safety requirements is therefore covered and the state preempted.

"The act specifically provides that a state safety regulation remains effective until such time as the Secretary of Transportation has adopted a rule covering the subject matter of the state requirement.

"General Order 118 specifically addresses walkways and footing conditions.

"It requires the railroad to provide safe walkways with even traction providing surfaces so as to lessen the possibility of a railroad worker tripping or falling, whether into an adjacent gully, down a hillside, or under a moving train, any of which accidents could result in their deaths or injuries.

"General Order 118 also regulates vegetation on or adjacent to walkways from the safety aspect.

"The Federal Railroad Administration has not adopted workplace regulations or specific regulations concerning walkways.

"The track safety standards of 49 CFR Part 213, with subparts concerned with roadbed, track geometry, track structure and track application and inspections, do not, except in the most peripheral sense, cover the subject matter of state worker

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safety requirements, and cannot be said to serve to preempt state regulation. They are almost exclusively concerned with the safe operation of trains.

"General Order 118 was adopted to protect railroad workers from the risk of death and injury arising from walkway conditions. The Federal Railroad Administration has not adopted regulations covering this subject matter. Furthermore, the bench is not impressed with the special syllogistic reasoning offered in the December 19, 1985 letter of FRA's chief counsel to SP wherein an attempt is made to bootstrap FRA's 1977 termination of a rulemaking proceeding pertaining to construction of walkways on bridges, trestles, and similar structures to the dignity of preemption action applicable to walkways generally.

"Preemption effect in the field of railroad worker safety, in light of Congressional declarations in the Federal Railroad Safety Act, is limited to the specific content of a federal regulation.

"In view of its foregoing conclusions, the Bench rules that this consolidated proceeding will go forward without further delay to determine: First, under OII 85-01-002, A, whether SP has and is operating over tracks on the White Hills branch that fail to comply with General Order 118 provisions; B, whether SP should be ordered to cease and desist in such operations; C, whether a fine should be assessed; D, and if other appropriate orders should be entered;

"And second, under Application 85-03-092, whether SP, unless it withdraws its application, should be granted a deviation from the requirements of General Order 118 for the area in issue.

"That concludes my ruling on this matter."

(END OF APPENDIX C)