

AUG 9 1991

Decision 91-08-019 August 7, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion to Adopt a General Order Prescribing Rules and Regulations for the Transportation of Hazardous Materials by Rail.

ORIGINAL

(Filed July 22, 1988)

OPINION

Summary of Decision

Due to the increased transportation of hazardous materials by rail throughout the state and incidents involving hazardous materials which pose a threat to public safety and the environment, the Commission today adopts rules and regulations governing the transportation of hazardous materials by rail. The recent tragic spill of toxic liquid from a derailed tank car near Dunsmuir highlights the need to ensure that this state and its communities can rely on railroads having solid effective emergency preparedness plans. The rules we adopt today have been under development for some time. They address a number of concerns relating to the transportation of hazardous materials, such as local emergency response in the event of an incident and the storage of hazardous materials. We are confident that they fill a void in the existing state-federal regulatory scheme governing the regulation of hazardous materials transportation by rail.

While we recognize that federal rules extensively regulate the transportation of hazardous materials, coordination between the state, local agencies, and the railroads, particularly in the area of emergency response, is necessary to enhance safety in the transportation of hazardous materials. These rules are intended to complement the federal regulatory framework by, among other things, encouraging communication between local emergency response agencies and railroads transporting hazardous materials.

Many other states have adopted hazardous materials regulations. Because these rules address safety concerns not addressed by the federal rules, we conclude that these rules are not preempted by federal law.

Background

On July 22, 1988, the Commission issued an Order Instituting Rulemaking (R.) 88-07-039 to adopt a general order (GO) prescribing rules and regulations for the transportation of hazardous material by rail.

A copy of the proposed GO was served on all railroad corporations subject to the Commission's jurisdiction (respondents), and to all police, sheriff, and fire departments through whose jurisdictions common carrier rail operations occur. The Commission invited respondents and other parties to comment on the proposed GO.

Law enforcement agencies and fire departments supported the GO. However, certain parties opposed the proposed GO on grounds that the rules were (1) preempted by federal law and (2) unduly burdensome.

After reviewing the objections to the proposed GO, the Transportation Division of the Commission filed a motion on November 10, 1988 requesting suspension of the schedule for filing reply comments. The Transportation Division also requested hearings on the proposed GO to resolve factual contentions raised by parties. On November 16, 1988, the Administrative Law Judge (ALJ) extended the deadline for filing reply comments on the proposed GO indefinitely.

On February 15, 1989, the Commission created the Safety Division and transferred responsibility for monitoring railroad safety from the Transportation Division to the Railroad Safety Branch (Safety Branch) of the Safety Division. Safety Branch modified the proposed GO. The modified GO prescribed rules and regulations for the transportation of hazardous material by rail

which, according to Safety Branch, were not preempted by federal law and were not burdensome to railroads.

On September 28, 1989, Safety Branch filed a motion requesting hearings on the modified GO. Safety Branch's motion also requested that a prehearing conference be held to schedule hearings and the exchange of prepared testimony. A copy of the modified GO was attached to the motion. The ALJ allowed parties until November 30, 1989, to file comments on the modified GO as well as Safety Branch's request to hold hearings. (ALJ ruling dated October 4, 1989.)

Various parties including certain fire and police departments, The Atchison, Topeka and Santa Fe Railway Company (Santa Fe), Southern Pacific Transportation Company (Southern Pacific), Union Pacific Railroad (Union Pacific), and the California Manufacturers Association (CMA) filed comments on Safety Branch's motion. The fire and police departments which filed comments supported the modified GO. CMA and the railroad companies pointed out various problems and ambiguities in the modified GO. To remove ambiguities, parties provided extensive comments on the proposed rules and requested explanations.

As to Safety Branch's request for hearings, CMA and the railroads urged that the question of hearing be addressed only after Safety Branch responded to the comments regarding ambiguities and clarified its proposed rules.

On February 1, 1990, Safety Branch filed a motion to hold a prehearing conference. Safety Branch claimed that a prehearing conference would provide the best means to formulate legal and factual issues in the case.

Santa Fe and Southern Pacific filed responses to Safety Branch's February 1, 1990 motion. These railroads reiterated their claim that Safety Branch's request for a prehearing conference would not be useful until the questions raised in respondents' November 30, 1989 filings were answered.

The ALJ denied Safety Branch's request for a prehearing conference and directed Safety Branch to file its response to the issues raised by CMA, Santa Fe, Southern Pacific, and Union Pacific. (ALJ ruling dated March 21, 1990.)

On June 22, 1990, Safety Branch filed its response to questions raised by CMA, Santa Fe, Southern Pacific, and Union Pacific. Safety Branch explained the modified GO and answered the question raised by the parties. Safety Branch made additional revisions to the GO.

Subsequent to June 22, 1990, Safety Branch met informally with Santa Fe, Southern Pacific, and Union Pacific to resolve any disagreements about the GO revisions. Based on these discussions, Safety Branch further revised the GO and filed a motion on March 29, 1991 to adopt the GO. The GO in its final form is designated as GO 161 and is attached to this order as Appendix A.

In its motion Safety Branch contends that GO 161 is not preempted by federal law and is not burdensome. Safety Branch asserts the need for GO 161 as a supplement to other federal and state requirements to enhance public safety and to protect the environment.

Cities of Azusa, Downey, El Segundo, and Santa Clarita filed comments in support of Safety Branch's motion to adopt GO 161.

Southern Pacific and Union Pacific also filed comments on Safety Branch's motion to adopt GO 161. Although Southern Pacific and Union Pacific do not oppose the adoption of GO 161, they believe that there is a substantial likelihood that GO 161 is preempted by the Federal Railroad Safety Act (FRSA) and the Hazardous Materials Transportation Act (HMTA).

Safety Branch filed a response to comments filed by Southern Pacific and Union Pacific.

Following is a brief description of positions of parties.

Position of Southern Pacific

Southern Pacific recommends that GO 161, if adopted, should be submitted to the Research and Special Programs Administration (RSPA) of the Department of Transportation for a determination of federal preemption. Southern Pacific also recommends that GO 161 should contain an additional rule (Rule 10) which should read as follows:

"Rule 10

To the extent that the provisions of this General Order conflict or are inconsistent with Federal statutes or regulations, the Federal requirements shall prevail."

Position of Union Pacific

According to Union Pacific, FRSA provides that states may not "adopt or continue in force any law, rule, regulation, order or standard relating to railroad safety" if the Secretary of Transportation has adopted rules on the same subject. Union Pacific cites CSX Trans. Inc. v Public Utilities Commission of Ohio, (6th Cir. 1990) 901 F 2d. 497, in which the Federal Appeal Court invalidated an Ohio statute that had adopted the provisions of HMTA as state law. The court ruled that because the HMTA, and the implementing rules adopted by DOT, were laws "relating to railroad safety," the FRSA precluded Ohio from adopting the HMTA as state law. On January 22, 1991, the United States Supreme Court refused to review the 6th Circuit's ruling.

Union Pacific opines that although Congress amended HMTA (after the CSX case) by adopting the Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA), which authorizes the states to participate in the enforcement of HMTA violations, there is still a possibility that provisions of GO 161 may be preempted by FRSA and HMTUSA.

Position of Safety Branch

According to Safety Branch, although CSX Transportation is not binding on this Commission, it has withdrawn its recommendation to adopt any provisions of HMTA in GO 161. Safety Branch believes that no other provisions of GO 161 are preempted by federal law under the provisions of FRSA or HMTA.

Safety Branch also disagrees with Southern Pacific's recommendations to submit GO 161 to RSPA for a determination of preemption and to add Rule 10 to GO 161. Safety Branch maintains that the Commission has the initial authority to determine if its rules are preempted by federal law. Safety Branch asserts that it has responded to Southern Pacific's and other railroads' preemption arguments and that the Commission has adequate information to determine if GO 161 is preempted by federal law. According to Safety Branch, a decision to adopt GO 161 will, implicitly if not explicitly, constitute a determination that the Commission is not preempted by federal law. Safety Branch opines that the Commission, having made a determination about federal preemption, should not apply to RSPA for a ruling.

Discussion

The key provisions of GO 161 will require each railroad which transports hazardous materials to:

1. Immediately notify by telephone the appropriate emergency response agency (ERA) about a release or threatened release of a hazardous material.
2. Provide ERAs along each rail line the railroad's 24-hour emergency telephone number.
3. Have in place an emergency preparedness plan to respond to hazardous material spills.
4. Ensure that train crew members have the ability to communicate via radio transceivers with each other and with the train dispatcher.

Neither FRSA nor HMTA/HMTUSA include such specific provisions. Therefore, the provisions of GO 161 supplement, rather than duplicate or conflict with, federal safety requirements; and they are needed to address valid health and safety concerns arising out of transportation of hazardous material by rail. Adoption of GO 161 will enable an ERA to mitigate the harmful effects of accidental release of hazardous material transported through the agency's jurisdiction. We will adopt GO 161.

Turning to Southern Pacific's and Union Pacific's federal preemption concerns, these railroads assert only that there is a likelihood that GO 161 is preempted by federal law. The railroads have not cited any specific provision of GO 161 which would be preempted by federal law nor have they cited any federal statutes which prevent a state agency from adopting rules which do not duplicate or conflict with federal law. Besides, we have already noted that neither FRSA nor HMTA/HMTUSA include the specific provisions of GO 161. In its final form, proposed GO 161 does not conflict with federal statutes. We believe that no purpose would be served by submitting GO 161 to RSPA for determination of preemption.

Finally, we see no need to add Southern Pacific's proposed Rule 10 to the GO. If a party perceives a conflict between provisions of the GO and federal statutes, the party can raise the issue in an appropriate forum.

Findings of Fact

1. On July 22, 1988, the Commission issued R.88-07-039 to adopt a GO prescribing rules and regulations for transportation of hazardous material by rail.
2. All railroad corporations subject to the Commission's jurisdiction were made respondents to this rulemaking.
3. A copy of the proposed GO was served on respondents and on all police departments, sheriffs, and fire departments through whose jurisdictions common carrier rail operations are conducted.

4. Respondents and other parties were invited to comment on the proposed GO.

5. Law enforcement agencies and fire departments supported the proposed GO.

6. Certain parties opposed the proposed GO on grounds that the rules were (1) preempted by federal law and (2) unduly burdensome.

7. Safety Branch met informally with railroad companies to resolve any disagreements regarding the proposed revisions to the GO.

8. Based on its discussion with the railroad companies, Safety Branch revised the proposed GO.

9. The revised GO, which in its final form is designated as GO 161, is included in Appendix A.

10. On March 29, 1991, Safety Branch filed a motion to adopt GO 161.

11. Safety Branch contends that GO 161 is not preempted by federal law because it has removed all provisions from the GO which would duplicate federal requirements for railroad safety.

12. Southern Pacific and Union Pacific believe that there is a possibility that GO 161 is preempted by FRSA and HMTA/HMTUSA.

13. Provisions of GO 161 require railroads which transport hazardous material to notify the appropriate ERA regarding release or potential release of hazardous material.

14. Provisions of GO 161 require railroads which transport hazardous material to have an emergency preparedness plan and to have other safety devices such as radio communication available to its crews.

15. Neither FRSA nor HMTA/HMTUSA contain the specific provisions included in GO 161.

16. No party has requested a hearing in the matter.

Conclusions of Law

1. No hearings are necessary.

2. GO 161 is needed to address valid health, safety, and environmental concerns arising out of transportation of hazardous material by rail.
3. GO 161 is not preempted by federal law.
4. GO 161 included in Appendix A should be adopted.
5. Concern for public safety requires that this order be made effective immediately.

O R D E R

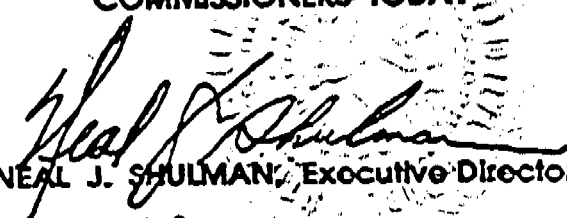
IT IS ORDERED that:

1. Appendix A is adopted as General Order 161 of the Commission.
2. The proceeding is closed.
This order is effective today.
Dated August 7, 1991, at San Francisco, California.

PATRICIA M. ECKERT
President
G. MITCHELL WILK
JOHN B. OHANIAN
NORMAN D. SHUMWAY
Commissioners

Commissioner Daniel Wm. Fessler,
being necessarily absent, did
not participate.

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


NEAL J. SHULMAN, Executive Director
PB

APPENDIX A

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

GENERAL ORDER NO. 161

RULES AND REGULATIONS GOVERNING THE TRANSPORTATION OF HAZARDOUS MATERIALS BY RAIL

Adopted August 7, 1991 Effective August 7, 1991

IT IS ORDERED that these regulations for the safe transportation of hazardous materials by railroads shall be observed in the State on tracks served, leased, owned or operated by common carrier railroads.

TABLE OF CONTENTS

	PAGE
RULE 1 PURPOSE	2
RULE 2 DEFINITIONS	2
RULE 3 EMERGENCY NOTICE OF INCIDENTS	3
RULE 4 NOTIFICATION REQUIREMENTS	3
RULE 5 EMERGENCY PREPAREDNESS PLAN	4
RULE 6 RADIO REQUIREMENTS	5
RULE 7 RULES APPLICABLE TO INDUSTRIAL TRACK	5
RULE 8 INSPECTION OF DOCUMENTS BY COMMISSION STAFF	5
RULE 9 EXEMPTIONS	6

RULE 1 - PURPOSE

The purpose of this order is to establish safety standards for the rail transportation of hazardous materials. These rules and regulations supplement the Hazardous Materials Regulations prescribed by the United States Department of Transportation, Title 49 of the Code of Federal Regulations, Parts 171-174, 178 and 179 and implement the overall state policy of promoting railroad safety as set forth in California Public Utilities Code sections 768 and 7671-7673.

RULE 2 - DEFINITIONS

Unless the context otherwise requires, the following definitions govern the construction of this Order:

2.1 "Administering agency" means such agency as defined in Health and Safety Code section 25501(a).

2.2 "Commission" means the California Public Utilities Commission.

2.3 "Emergency response agency" ("ERA") means the fire department or district or other public agency with responsibility for responding to an emergency occurring in the area of an incident.

2.4 "Hazardous materials" means any material transported by rail which is designated "hazardous material", "hazardous substance", or "hazardous waste" under Title 49 of the Code of Federal Regulations, section 171.8, as may be revised, amended, and published in the Federal Register.

2.5 "Identification number" means the identification number assigned to hazardous materials in Title 49 of the Code of Federal Regulations, Part 172, Subpart B.

2.6 "Incident" means any condition involving a release or threatened release of hazardous materials where there is a reasonable belief that the actual or threatened release poses a significant present or potential harm to persons, property or the environment.

2.7 "Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment, unless permitted or authorized by a regulatory agency.

2.8 "STCC" means the first four digits of the Standard Transportation Commodity Code, as contained in Standard Transportation Commodity Code Tariff STCC 6049 series, as amended, and all supplements issued thereafter.

2.9 "Threatened release" means a condition creating a substantial probability of harm, when the probability and potential extent of harm make it reasonably necessary to take immediate action to prevent, reduce, or mitigate damages to persons, property, or the environment.

RULE 3 - EMERGENCY NOTICE OF INCIDENT

3.1 Each railroad shall immediately notify by telephone the appropriate ERA of any incident, as defined in Rule 2.6, in addition to any other state or federal reporting requirements.

3.2 To comply with Rule 3.1, each railroad which transports hazardous materials in California shall provide to each of its dispatchers procedures for the immediate notification of the appropriate ERA of any incident. Such procedures shall include the name and 10-digit (area code and local number), 24-hour emergency number of each ERA along each rail line.

RULE 4 - NOTIFICATION REQUIREMENTS

4.1 Each railroad shall provide to each ERA along each rail line the railroad's current 10-digit, 24-hour emergency telephone number(s). The railroad shall notify each ERA of any change in the emergency telephone number(s).

4.2 Within 60 days of a written request by an ERA or an administering agency, the railroad shall provide to the ERA or administering agency a list of each type of hazardous material, listed by hazard class and by carload or container, transported through or within the line segment that includes the ERA or administering agency, for the most recent prior 12-month period available.

4.3 Upon written request by an ERA or an administering agency, the railroad shall provide to the ERA or administering agency the following information regarding leases for storage of hazardous materials within the jurisdiction of the requesting ERA or administering agency:

- a) Name of the commodity, STCC and identification number;
- b) Maximum number of cars to be stored at any one time; and
- c) Location of cars specific to track number and street address.

RULE 5 - EMERGENCY PREPAREDNESS PLAN.

Each railroad which transports hazardous materials in California shall have an emergency preparedness plan. The plan shall include, as a minimum, the following:

- a) Notification procedures for advising the appropriate ERA in case of an incident;
- b) Procedures for mitigation of a release or threatened release to minimize any potential harm or damage to persons, property or the environment; and
- c) Training procedures to instruct railroad personnel on what actions to take in the event of an incident.

RULE 6 - RADIO REQUIREMENTS

INDUSTRIAL TRACK - 6.1.1

To ensure that train crew members have the ability to communicate with each other and with the train dispatcher while transporting hazardous materials, all trains (including yard and switch engines) transporting hazardous materials shall be equipped with at least two (2) radio transceivers in good working order. The radios shall be able to transmit and receive on the same frequency. One radio shall be in the lead locomotive and at least one radio shall be of the handheld type. If a radio becomes inoperable, it shall be repaired or replaced at the earliest practicable opportunity.

RULE 7 - RULES APPLICABLE TO INDUSTRIAL TRACK

7.1 The Commission adopts as its own standards, and incorporates by reference, the Track Safety Standards contained in Part 213 of Title 49 of the Code of Federal Regulations, and any subsequent revisions thereto, for application to railroad track outside the general railroad system of transportation.

7.2 Each railroad shall provide its customers with appropriate standards for static protection for all track over which the railroad operates which is outside the general railroad system of transportation and which is used for the transfer of flammable liquids and flammable gasses.

7.3 When a railroad transporting hazardous materials is notified or otherwise becomes aware that the standards set forth in Rules 7.1 and 7.2 are not met, the railroad shall not operate on an affected track until the standards are met or until appropriate remedial action is taken.

RULE 8 - INSPECTION OF DOCUMENTS BY COMMISSION STAFF

Upon request by a duly authorized representative of this Commission, each railroad shall provide for inspection, at an office in California, any documents required by this Order. (See Public Utilities Code section 314(a).)

RULE 9 - EXEMPTIONS

APPENDIX A - 10-22-88

BY WRITTEN REQUEST. If, in a particular case, exemption from any of these rules and regulations is desired, a written request may be made to the Commission for such exemption. Such a request shall be accompanied by a full statement of the conditions existing and the reasons relied on to justify the exemption. It is to be understood that any exemption so granted shall be limited to the particular case covered by the request.

(END OF APPENDIX A)