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MAILED DATE
9/8/97

Decision 97-09-063 SEPTEMBER 3, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the causes of recent derailments of Southern Pacific Transportation Company trains, compliance of Southern Pacific with applicable laws, rules, and regulations, the existence of any local safety hazards, and recommendations for improvements in state and federal laws or regulations.	I.91-08-029 (Filed August 22, 1991)

ORIGINAL

ORDER DENYING REHEARING OF DECISION 94-11-068, GRANTING LIMITED REHEARING OF DECISION 94-11-069, AND MODIFYING DECISIONS

I. INTRODUCTION

Southern Pacific Transportation Company (SP) has filed applications for rehearing of Decision (D.) 94-11-068 and D.94-11-069. The Commission's Railroad Safety Branch (Staff) filed a response. D.94-11-068 and D.94-11-069 were issued in the Commission's investigation of SP's rail accidents in July of 1991 near Seacliff in Ventura County and Dunsmuir in Siskiyou County. In D.94-11-068 (the Seacliff Decision) and D.94-11-069 (the Dunsmuir Decision) we analyzed the causes of the accidents, imposed penalties on SP for not complying with certain state laws, and developed new rules necessary to ensure safety in railroad operations.

SP argues that the Commission is preempted by federal law from imposing requirements relating to rail safety in the Dunsmuir Decision. SP also contends that the Commission erred in imposing penalties on SP for not complying with Public Utilities Code section 7673(a) and 7673(b), and in amending the definition of hazardous materials in General Order 161. SP asserts that the

Commission failed to provide adequate notice and opportunity to be heard on these issues. Finally, SP contends that the Commission erred in concluding that SP did not comply with Public Utilities Code sections 7672.5 and 7673(c) in connection with the Seacliff accident.

We have carefully reviewed each and every allegation of error raised by SP and have considered Staff's response. We conclude that good cause for a limited rehearing of the Dunsmuir Decision has been shown on the issues of penalties and the amendment of General Order (GO) 161. In all other respects, rehearing of the Dunsmuir and Seacliff Decisions is denied. We will, however, modify the decisions to correct minor errors pointed out by the applications for rehearing.

II. BACKGROUND

The Seacliff accident occurred on July 28, 1991 and involved an SP freight train which derailed 14 loaded cars, five of which contained hazardous materials. In the Seacliff Decision, the Commission determined that SP failed to comply with Public Utilities Code section 7672.5, which requires railroads involved in an accident resulting in the release of hazardous material to immediately report it to the state Office of Emergency Services (OES), and section 7673(c)(4), which requires railroads involved in a hazardous material release to provide the emergency response agency (ERA) with emergency handling procedures for each hazardous material transported. The Commission also found that SP violated 49 Code of Federal Regulations (CFR), section 172.202, which requires a description of hazardous materials on the shipping papers to include the

total quantity by weight, volume, or other appropriate method of measurement.[1]

The Commission imposed the maximum penalties of $2,000 for SP's failure to comply with section 7672.5 and $2,000 for SP's failure to comply with section 7673(c)(4).[2] In addition, the Commission approved a Stipulated Settlement Agreement between SP and the Staff of the Railroad Safety Branch (Staff) which involved the enhancement of rail safety equipment.

The Dunsmuir accident occurred on July 14, 1991, when a freight train derailed one locomotive and seven cars on the Cantara Loop near Dunsmuir. The only loaded car to derail contained 20,000 pounds of metam sodium, an agricultural herbicide. Much of the contents of that car leaked into the Sacramento River. In the Dunsmuir Decision, the Commission concluded that the accident was caused by improper train make-up, which, when combined with an increase of power and negotiation of a sharp curve, resulted in derailment. However, the train make-up was not in violation of any requirements. In order to avoid repetition of this type of accident, the Commission adopted train make-up rules and and other rules regarding railroad operations for the Cantara Loop segment of SP's track.

The Commission adopted Staff's recommendations that SP be required to develop and implement a locomotive maintenance quality improvement program and a system safety program, and to prepare a cost/benefit analysis report on side view mirrors. The Commission also amended the definition of "hazardous materials" contained in General Order 161 to be consistent with Public Utilities Code section 7672.

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1. This requirement was previously contained in 49 CFR section 172.202(a)(4) and is now in section 172.202(a)(5).

2. Subsequent to this investigation, the maximum statutory penalty was changed to $20,000 for each offense. (Pub. Util. Code § 2107.)

The Commission found that SP failed to comply with Public Utilities Code section 7673(a) and section 7673(b), which require railroads transporting hazardous materials to provide OES with a system map and emergency handling procedures. The Commission imposed the maximum penalties of $2,000 per day for each day that SP was not in compliance between July 14, 1991 and November 12, 1991, resulting in $244,000 for failure to comply with section 7673(a) and $244,000 for failure to comply with section 7673(b).

In addition to the instant applications for rehearing, SP filed motions to stay the ordering paragraphs of the Seacliff and Dunsmuir Decisions which ordered the payment of penalties to the General Fund. (Ordering Paragraphs 2 and 3 of D.94-11-068, and Ordering Paragraphs 14 and 15 of D.94-11-069.) The Commission granted a stay of those ordering paragraphs pending further order of the Commission. (D.95-02-047.)

II. DISCUSSION

A. Whether the Rules Are Preempted by Federal Law

SP argues that the Commission's regulatory actions with respect to the Dunsmuir Decision are either preempted by federal law or unduly burden interstate commerce. In evaluating the preemptive effect of a federal law, courts make the assumption that the historic police powers of the state may not be superseded by a federal act "unless that was the clear and manifest purpose of Congress." (Ray v. Atlantic Richfield Co. (1978) 435 U.S. 151, 157.)

The Federal Railroad Safety Act (FRSA) (formerly 45 U.S.C. § 421 et seq., recodified as 49 U.S.C. § 20101 et seq.) provides that a state may adopt or continue a rule relating to rail safety until the Secretary of Transportation has adopted a rule "covering the subject matter" of the state requirement. Even after federal rules have been promulgated, a state may adopt more stringent requirements "when necessary to eliminate a local safety hazard," provided such requirements are "not incompatible

with" federal laws and are not an undue burden on interstate commerce. (Formerly 45 U.S.C. § 434, recodified as 49 U.S.C. § 20106.)[3]

The United States Supreme Court has stated that the term "covering" displays "considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by savings clauses." (CSX Transportation, Inc. v. Easterwood (1992) 507 U.S. 658, 665.) A state requirement will be preempted only if federal regulations "substantially subsume the subject matter of the relevant state law." (Id. at p. 664.)

Under the FRSA, the rejection as well as the adoption of standards can preempt state regulation. However, a state regulation may be preempted only "if after due consideration the (Federal Railroad Administration) determines that a particular regulation is not justified." (Southern Pacific Transportation Co. v. Public Utilities Comm. of California (N.D.Cal. 1986) 647 F.Supp. 1220, 1226; accord, Marshall v. Burlington Northern, Inc. (9th Cir. 1983) 720 F.2d 1149.)

As stated above, even if federal rules cover a particular subject matter, a state is permitted to adopt more stringent rules covering the same subject if the state rule (1) is necessary to eliminate or reduce an "essentially local safety

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3. 45 U.S.C. section 434 provided: "The Congress declares that laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce."

hazard," (2) is not incompatible with federal rules, and (3) does not unduly burden interstate commerce. (Donelon v. New Orleans Terminal Company (1973) 474 F.2d 1108, 1112.)

1. Locomotive Issues

The Dunsmuir Decision finds that, in order to help prevent future derailments involving locomotive surging and to assist Staff in carrying out its federal responsibilities, SP should provide Staff with its locomotive maintenance quality improvement program and procedures to ensure compliance with such a program. (Finding of Fact No. 40.) In addition, the Dunsmuir Decision requires SP to continue its program of testing side view mirrors, and to prepare a report analyzing the cost/benefit analysis of such mirrors for submission to the Commission. (Ordering Paragraph No. 11.)

SP contends that regulatory action regarding these two matters is preempted by federal law. Specifically, SP objects to the locomotive maintenance program on the ground that it misconstrues Staff's responsibilities under federal law. According to SP, Staff must follow federal standards of inspection and may not review or approve of SP's locomotive maintenance plan. SP contends that the requirement pertaining to side view mirrors is preempted by the Locomotive Boiler Inspection Act (formerly 45 U.S.C. § 22 et seq.; recodified as 49 U.S.C. § 20701 et seq.)

a. The Boiler Inspection Act

The Boiler Inspection Act allows railroads to use a locomotive or tender on its railroad line only when the locomotive or tender and "its parts and appurtenances" are in proper condition and safe to operate, have been inspected as required by federal law, and are able to withstand tests prescribed by the Secretary of Transportation. Although the Boiler Inspection Act contains no express preemption provision, it has long been held that federal regulations under the act

totally occupy the field of locomotive equipment and safety, thus preventing state regulation on the same subject. (See, e.g., Law v. General Motors Corp. (9th Cir. 1997) 114 F.3d 908, 910; Marshall v. Burlington Northern, Inc., supra, 720 F.2d at p. 1152.) The scope of preemption under the Act is determined by the words "parts and appurtenances." This phrase includes "[w]hatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the [Secretary of Transportation]." (Southern Railway Co. v. Lunsford (1936) 297 U.S. 398, 402.)

Even if a particular part or attachment has not been prescribed by federal law, states may be preempted from requiring such equipment. In Marshall v. Burlington Northern, supra, 720 F.2d at p. 1152, a wrongful death action, the Ninth Circuit held that "the state may not impose liability for failure to install a part or attachment of a locomotive if it is 'within the scope of the authority delegated to the [Secretary]' to prescribe the same part of attachment." (Ibid., quoting Napier v. Atlantic Coast Line R.R. Co. (1926) 272 U.S. 605, 611.) Thus, the Ninth Circuit concluded that the Boiler Inspection Act "preempts any state regulation of locomotive equipment." (Marshall v. Burlington Northern, supra, 720 F.2d at p. 1152; see also Napier v. Atlantic Coast Line R.R. Co., supra, 272 U.S. at p. 611 [The power delegated to the Secretary by the Boiler Inspection Act "extends to the design, the construction and the material of every part of the locomotive and tender and of all the appurtenances."].)

b. The Locomotive Maintenance Program

The Commission's requirements regarding the locomotive maintenance program do not appear to be clearly preempted by the federal rules. SP cites the Code of Federal Regulations (CFR), which provides for joint federal/state planning on inspections to ensure compliance with federal safety regulations (49 CFR § 212.109) and includes standards and inspection requirements for locomotives (49 CFR 229.1 et seq.). However, SP has cited no

cases which indicate that locomotive maintenance program falls under the strict preemption standard of the Boiler Inspection Act.

Under the Boiler Inspection Act, the addition of parts or appurtenances to a locomotive have generally been preempted. For example, courts have preempted state rules requiring automatic firedoors and effective cab curtains to protect safety of firemen and engineers (Napier v. Atlantic Coast Line R.R. Co., supra, 272 U.S. 605) and radios in cabooses, end of train telemetry devices, and wayside detectors which require installation of receiving equipment in locomotives. (Burlington Northern Railroad v. State of Montana (D.Mon. 1992) 805 F.Supp. 1522; Missouri Pacific R.R. Co. v. Railroad Comm. of Texas (W.D.Tex. 1987) 671 F.Supp. 466, affirmed Missouri Pacific R.R. Co. v. Railroad Comm. of Texas (5th Cir. 1988) 850 F.2d 264.)

In actions for damages, courts have held that the subjects of excessive noise from locomotives (Law v. General Motors Corp., supra, 114 F.2d 908) and additional on-train warning devices (Marshall v. Burlington Northern, supra, 720 F.2d 1149) were preempted by the Boiler Inspection Act. In contrast, the locomotive maintenance program does not require the railroads to add any equipment, parts or appurtenances to locomotives.

Other cases have carved out areas of regulation relating to locomotives that are not preempted. Southern Railway Co. v. Lunsford, supra, 297 U.S. 398 suggests that there may be liability for failure to maintain an experimental device outside the absolute liability imposed by the Boiler Inspection Act. Moreover, the Ninth Circuit has held that regulation of the use of locomotive parts is not preempted by the Boiler Inspection Act. (Southern Pacific v. Public Utility Comm. of Oregon (9th Cir. 1993) 9 F.3d 807, 811; accord Civil City of South Bend, Ind. v. Consolidated Rail Corp. (N.D.Ind. 1995) 880 F.Supp. 595, 602 [regulating use of equipment is distinct from regulating equipment under Boiler Inspection Act].) Finally, for a state law to fall within the preempted zone, it must have some direct

and substantial effect on the regulated field. (English v. General Electric Co. (1990) 496 U.S. 72, 85; Southern Pacific v. Public Utility Comm. of Oregon, supra, 9 F.3d at p. 811.)

Here, the maintenance program does not attempt to require the addition of any equipment. In addition, one of the reasons for requiring the maintenance program is to ensure compliance with the federal regulations. Under these circumstances, it appears that the locomotive maintenance requirement does not interfere with the goals of the Boiler Inspection Act and is not clearly preempted.

c. Side View Mirrors

The Dunsmuir Decision also requires SP to continue its program of testing side view mirrors, and to prepare a report analyzing the cost/benefit analysis of such mirrors for submission to the Commission. (Ordering Paragraph No. 11.) SP contends this requirement is preempted by the Boiler Inspection Act.

SP has not pointed to any federal regulations regarding side view mirrors. Furthermore, the Dunsmuir Decision merely directs SP to continue its testing program and to prepare a cost-benefit analysis. It does not require additional equipment on the locomotive. (Compare Marshall v. Burlington Northern, supra, 720 F.2d at p. 1152.) Indeed, these requirements may simply be used by the Commission to obtain evidence as to the appropriate standards, which could be submitted to federal regulatory authorities. For these reasons, the regulations are not clearly preempted.

2. The System Safety Plan

The Dunsmuir Decision requires SP to develop and implement a system safety plan. (Ordering Paragraph No. 10 at p. 57.) A system safety approach is a forward-looking plan designed to prevent accidents, rather than to respond to accidents once they have occurred. Key preventative safety activities are

hazard identification, analysis, and resolution. (See Ex. 50 at pp. 4-5 and App. A, Railroad Accident Overview - SP Derailments at Cantara Loop and Seacliff, dated March 1992, received into evidence November 19, 1992.)

SP objects to this requirement because it allegedly places an undue burden on interstate commerce. SP contends that a system safety plan is only effective if it encompasses the total operating system of an entity. According to SP, its total operating system would include railroads in three countries, maintenance facilities from Chicago to the West Coast, and the practices of other railroad companies in the United States and adjacent foreign countries. Therefore, SP argues that requirement has extra-territorial effect, in contravention of federal laws, the North American Free Trade Agreement (NAFTA), and Canadian transport law, and imposes unduly burdensome and ineffectual requirements on SP.

SP asserts that no other major railroad has such a plan, and no such plan is required by the Federal Railroad Administration (FRA) or any other state. Given this background, SP concludes that separately stated findings of fact and conclusions regarding the necessity and the cost-effectiveness of such a plan must be included in the decision to justify a California system plan.

SP has not alleged any facts or law which demonstrate that the system safety plan is preempted by federal law. SP's only argument against a California-only plan is that such a plan would not be effective. SP's argument is without merit. The record in this case demonstrates a need for a system safety plan. (See Ex. 50.)

3. Train Make-Up Rules

The Dunsmuir Decision adopts train make-up rules for the Cantara Loop vicinity. (Ordering Paragraph No. 1 and Attachment A.) SP again asserts that these rules have an extra-territorial impact and affect train make-up at Portland, Los

Angeles, El Paso, and other major out-of-state terminals. SP argues that these rules are obsolete and out of step with system practice. Finally, SP contends that these rules are preempted by federal rules covering the placement and location of railroad cars in freight trains. SP cites 49 CFR section 174.85.

The rules contained in section 174.85 address the placement of cars carrying hazardous materials. These rules do not deal with the subject of train make-up for certain types of of terrain. Therefore, it cannot be concluded that the federal rules "substantially subsume the subject matter of the relevant state law." (CSX Transportation, Inc. v. Easterwood, supra, 507 U.S. at p. 665.)

Even if the train make-up were a subject matter "covered" by the federal rules, the state may nevertheless adopt more stringent rules if the state rule (1) is necessary to eliminate or reduce an "essentially local safety hazard," (2) is not incompatible with federal rules, and (3) does not unduly burden interstate commerce. (Donelon v. New Orleans Terminal Company, supra, 474 F.2d at p. 1112.)

An "essentially local safety hazard" has been defined as one that is "not statewide in character and not capable of being adequately encompassed within uniform national rules." (National Association of Regulatory Utility Commissioners v. Coleman (3d Cir. 1976) 542 F.2d 11, 15.) The determination of whether a rule addresses a local safety hazard has been dealt with primarily on a case-by-case basis.

In CSX Transportation, Inc. v. Easterwood, supra, 507 U.S. 658, respondent brought a wrongful death action against CSX alleging that CSX was negligent under state law for operating its train at an excessive speed. After finding that the federal rules covered the subject matter of the speed of trains, the court addressed respondent's argument that common-law speed restrictions come under the local safety hazard exception.

> The statute law on which respondent relies is concerned with local hazards only in the

> sense that its application turns on the facts of each case. The common law of negligence provides a general rule to address all hazards caused by lack of due care, not just those owing to unique local conditions.

(Id. at p. 675.)

In Burlington Northern Railroad v. State of Montana, supra, 805 F.Supp. 1522, the district court held that a Montana statute, which required two-way telemetry devices on trains operating within "mountain grade" territory, did not come under the local safety hazard exception. The court explained that "mountain grades" are certainly not unique. Furthermore, the statute defined mountain grade territory by reference to "mile posts in the railroads official timetable and operating rules" and provided that a train operating in mountain grade territory "may not depart a crew change point or its local point of origin unless the train is equipped with the telemetry system." (Id. at p. 1528.) The court stated that these portions of the statute "illustrate a fundamental flaw in the statute as pertains to the local safety hazard exception. A local safety hazard is necessarily restricted geographically, not logistically or administratively." (Ibid.)

In Union Pacific R.R. Co. v. Public Utility Comm. of Oregon (D.Ore. 1989) 723 F.Supp. 526, the district court reviewed an Oregon regulation that required occupied cabooses on trains operating on sections of track running through "local safety hazards." Local safety hazards were identified as (1) areas sensitive to hazardous waste materials, (2) gradient areas, (3) urban areas, and (4) railroad-highway grade crossings where maximum speed limits had been imposed. The court found that the hazards, as defined, encompassed 21% of route miles of the railroads located in Oregon, occurred throughout the state, and were for practical purposes "statewide." Therefore, the court held that the rules were not allowed under the local safety hazard exception. (Id. at p. 530.)

On the other end of the spectrum, state courts have upheld regulations under the local safety hazard exception where the regulations have covered one particular geographic area in the state. (See State of Northern Carolina ex rel. Utilities Commission v. Seaboard Coast Line R.R. Co. (1983) 303 S.E.2d 549 [requiring railroads to repair and improve drainage ditches along its tracks insofar as ditches related to safe and proper maintenance of railroads; Monongahela Connecting R.R. Co. v. Pennsylvania Public Utilities Comm. (1979) 404 A.2d 1376 [directing railroad to install an occupational block signal at the approaches of a blind curve on a railroad track at a steel plant].) Moreover, in State of Washington v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co. (1971) 484 P.2d 1146, the court found that a state statute which required spark arresters on locomotives when operated "in dangerous proximity to any bush, grass, or other inflammable materials" to address "an essentially local safety hazard." (Id. at pp. 1147, 1149.)

In the instant case, the train make-up rules are designed to apply to a specific geographic location, the Cantara curve, where there is a particularly sharp curve on an unusually steep grade. (See Dunsmuir Decision at p. 36.) Unlike the cases discussed above which preempt the challenged requirements, the instant rules do not attempt to regulate a statewide problem. Moreover, the train make-up rules are not incompatible with federal rules, and there has been no showing that the rules unduly burden interstate commerce. Therefore, the rules would fall under the local safety hazard exception.

4. Definition of Hazardous Materials

The Dunsmuir Decision amended the definition of hazardous materials contained in General Order (GO) 161 in order to make the definition consistent with Article 7.5 of the Public Utilities Code, which relates to the transportation of hazardous material by rail. (See Conclusion of Law No. 24 and Ordering Paragraph No. 9.) Section 7672 of Article 7.5 provides:

> For purposes of this article, "hazardous material" means any of the following:
> (a) A hazardous material as defined in Section 171.8 of Title 49 of the Code of Federal Regulations.
> (b) A hazardous material defined in Section 25501 of the Health and Safety Code.
> (c) Any commodity listed by the Office of Environmental Health Hazard Assessment pursuant to Section 59019 of the Health and Safety Code.

Article 7.5 and GO 161 contain similar requirements on incident reporting and the provision of information to the Office of Emergency Services (OES) and to the Commission.

SP contends that the definition of hazardous material in GO 161 is preempted by federal law. SP also asserts that the amendment to GO 161 was accomplished without notice and an opportunity to be heard as required by Public Utilities Code section 1708.

The proposed decision (PD) on Dunsmuir, mailed on September 20, 1994, directed a copy of the decision containing the amendment of GO 161 to be sent to all railroads operating in the state. (Dunsmuir PD, Ordering Paragraph No. 11.) Any railroad affected by the amendment to GO 161, which had not participated in the investigation, was permitted to file comments to the PD within 30 days, accompanied by a motion. (Ordering Paragraph No. 12.) When the Commission modified the PD, these ordering paragraphs were not removed from the final version. Therefore, the final Dunsmuir Decision, mailed on December 2, 1994, also allowed 30 days for comments from parties wishing to respond to the GO 161 amendment. (Dunsmuir Decision, Ordering

Paragraph No. 12 and No. 13.)[4]

On January 10, 1995, The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) filed a motion and comments on January 10, 1995, objecting to the expanded definition of hazardous material. In addition to arguing federal preemption, Santa Fe contended that the amendment to GO 161 was procedurally improper because it was made without a hearing and without notice to parties affected as required by Public Utilities Code section 1708.[5]

On February 9, 1995, the California Short Line Railroad Association (CSLRA) sent a letter to the Safety and Enforcement Division Director requesting a clarification of whether the expanded version of GO 161 applied to any short line California railroad. The letter states that, to the best of CSLRA's knowledge, no California short line railroad was given the opportunity to comment on the GO 161 amendment.

Public Utilities Code section 1708 allows the Commission to amend or modify any order "upon notice to the parties, and with opportunity to be heard as provided in the case of complaints." Because it appears that all parties affected by GO 161 may not have been provided adequate notice and opportunity to be heard, we will order a rehearing on the amendment to the hazardous material definition in GO 161. Notice should be served on all parties to the proceeding adopting GO 161, as well as any other affected parties. Parties should be given the opportunity

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4. On November 23, 1994, decisions on both the Dunsmuir and Seacliff were mailed. However, these decisions were not the versions that were adopted by the Commission at its November 22, 1994 meeting. Therefore, corrected versions were issued on December 2, 1994. (See D.94-12-001 and D.94-12-002.)

5. According to Santa Fe, a copy of the Dunsmuir Decision was served on Santa Fe by the Director of the Commission's Safety and Enforcement Division on December 7, 1994, which was received by Santa Fe on December 11, 1994.

to request hearings on this issue in addition to submitting written comments.

B. Whether the Imposition of Penalties Violated SP's Due Process Rights

The Seacliff PD imposed fines of $2,000 for SP's failure to comply with section 7672.5, $2,000 for SP's failure to comply with section 7673(c)(4), $20,000 for SP's failure to comply with section 7673(a), and $20,000 for failure to comply with section 7673(b). No penalties were imposed in the Dunsmuir PD. In the final decisions, the fines for violation of section 7673(a) and 7673(b) were transferred to the Dunsmuir Decision and increased from $20,000 to $244,000 for each of the two statutory requirements.[6]

SP asserts that its due process rights were violated because the Commission imposed fines without adequate notice or an opportunity to be heard. SP contends that it was first put on notice that penalties would be assessed when the PDs were issued. Moreover, as SP points out, the fines imposed in the Dunsmuir Decision were increased from $40,000 in the PD to $488,000 in the final decision.

At the time of the Seacliff and Dunsmuir accidents, Public Utilities Code section 2107 provided that any public utility which violates any provision of the Constitution or the Public Utilities Code, or any order or requirement of the Commission, in a case in which penalties have not otherwise been provided, is subject to penalties of $500 to $2,000 for each

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6. In the interim, incorrect versions of the Dunsmuir and Seacliff decisions were issued as final decisions, in which the penalties were unchanged from PDs. (See D.94-12-001 and D.94-12-002.)

offense.[7] Section 2108 provides that every violation is a separate and distinct offense and, in a case of a continuing violation, each day shall be considered a separate and distinct offense.

Section 2104 provides that "[a]ctions to recover penalties under this part shall be brought in the name of the people of the State of California, in the superior court" in the county or city in which the cause arose. "The action shall be commenced and prosecuted to final judgement by the attorney of the commission." The Commission has interpreted section 2104 to allow the Commission to impose penalties, but to require an action in superior court if the penalties are not paid voluntarily. (See, e.g., In re Application of Southern California Water Company (1991) 39 Cal.P.U.C.2d 507 (1991 Cal. PUC LEXIS 125, at p. *36); TURN v. Pacific Bell (1994) 54 Cal.P.U.C.2d 122, 124.)

In the Dunsmuir Decision, SP was assessed penalties for failure to comply with Article 7.5, sections 7673(a) and 7673(b), of the Public Utilities Code. Article 7.5 governs the transportation of hazardous materials by rail. It was enacted on September 30, 1990, and became effective on January 1, 1991. Section 7673(a) provides that each railroad which transports hazardous material in the state shall provide a "system map" to the Office of Emergency Services (OES) and the Commission, showing practical groupings of mileposts on the system; mileposts of stations, terminals, junction points, road crossings; and the locations of natural gas and liquid pipelines in the railroad rights-of-way. Section 7673(b) requires railroads transporting hazardous material to annually submit to OES a copy of a

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7. In 1993, the maximum amount of penalties that could be imposed was increased to $20,000.

publication identifying "emergency handling guidelines" for the surface transportation of hazardous material.

As stated above, the issue of whether SP complied with the system map and emergency handling guidelines requirements was initially addressed in the Seacliff PD. The PD found that as of November 12, 1991, Staff had been notified by OES that SP had not yet filed either the system map or the emergency handling guidelines publication. Although section 7673(a) and 7673(b) contain no compliance deadline, the PD concluded that a ten and a half month delay (from January 1, 1991 to November 12, 1991) was unreasonable. The PD imposed penalties of $2,000 per day pursuant to Public Utilities Code section 2107 and 2108 for a ten-day period for each violation, or $20,000 per violation. In the final decision, the Commission determined that SP's lack of compliance was unreasonable as of July 14, 1991, the date of the Dunsmuir accident, and imposed penalties of $2,000 per day for 122 days, or $244,000 per violation.[8]

According to SP, the first time SP had notice there was any issue regarding compliance with sections 7673(a) and 7673(b) was when Staff recommended that the Commission order SP to comply with these sections, and that <u>future</u> noncompliance should subject SP to penalties. (See Ex. 43 at p. 69, Railroad Accident Investigation - SP Derailment at Seacliff, dated March 1992, received into evidence November 19, 1992.) SP asserts that to the extent sections 7673(a) and 7673(b) were at issue at all in the Seacliff proceeding, they were peripheral issues. Therefore,

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8. The decision incorrectly states "108 days" rather than 122 days. We will modify it accordingly. SP also objects to language in the decision which states: "Indeed, the record in this case does not reflect, and we do not know, if SP ever filed the documents required by Article 7.5. We find such blatant disregard for the PU Code unconscionable." SP points out that the record demonstrates that by the end of 1992, SP had complied with sections 7673(a) and 7673(b). Therefore, this language will be deleted.

SP states it only presented limited evidence of its efforts to comply with these sections.

The requirements of due process depend on the circumstances of each case. It varies with the subject matter and the necessities of the situation. (In re Marriage of Flaherty (1982) 31 Cal.3d 637, 654; Sokol v. Public Utilities Comm. (1966) 65 Cal.2d 247, 254.) Nevertheless, when penalties are involved, due process requires prior notice, opportunity to respond, and a hearing when appropriate to resolve issues of fact. (See, e.g., In re Marriage of Flaherty, supra, at p. 654; Bauguess v. Paine (1978) 22 Cal.3d 626, 637-639; Lesser v. Huntington Harbor Corp. (1985) 173 Cal.App.3d 922, 928.)

In this case, we do not believe that SP was given adequate notice and opportunity to be heard on the issue of penalties for violations of sections 7673(a) and 7673(b). Contrary to SP's allegations, SP was put on notice in the Order Instituting Investigation (OII), filed August 22, 1991, that penalties may be imposed for violations of Commission rules or orders. However, we also recognize that compliance with sections 7673(a) and 7673(b) was not a major issue in this case. In addition, Staff only recommended penalties for future violations of these sections. Finally, even if inclusion of penalties in the PD constituted adequate notice, the increase of penalties to twelve times that amount in the final decision raises an issue of fairness. Therefore, we will grant rehearing on whether penalties should be imposed for SP's failure to submit a system map or emergency handling guidelines by November 12, 1991.

We want to clarify that our decision to grant rehearing is based on the totality of the circumstances presented in this case. Generally, when a party is notified by an OII that penalties may be imposed, the factual record demonstrates that violations have occurred, and fines are imposed in the PD, due process concerns may well be satisfied. However, in the instant case, we have concerns about the adequacy of the notice to SP

given the nature of the violations and the large increase in penalties in the final decision.

In this case, the issue of when it was reasonable to comply with sections 7673(a) and 7673(b) goes both to the amount of penalties assessed as well as whether there was a violation of the law. Therefore, although it was established factually that SP had not submitted the system map and emergency handling guidelines by November 12, 1991, the legal issue of whether SP's failure to submit these documents by that date was unreasonable should be reconsidered along with the issue of penalties.

The Seacliff Decision differs from the Dunsmuir Decision in several respects. In the Seacliff Decision, SP was given notice earlier that its compliance with sections 7672.5 and 7673(c) was at issue, and compliance with these provisions had a greater prominence in the case. In addition, SP was only fined $2,000 for each violation, and there was no change in the amount of penalties between PD and the final decision. Under these circumstances, SP had sufficient notice and opportunity to be heard on the penalties imposed in the Seacliff decision.

We note that SP contends that the page and time limitations on comments to a PD hinder the ability to fully address penalty issues. In some cases, addressing penalty issues in comments to a PD may not constitute an adequate opportunity to be heard. In such cases, separate briefs may be required. There may also be cases in which there are factual disputes pertaining to penalties which have not been resolved previously. In those cases, further evidentiary hearings would be appropriate. However, in the instant case, the underlying violations were fully litigated and the penalty issues were relatively simple and straightforward. For all of the foregoing reasons, SP has failed to demonstrate that its due process rights were violated because of the penalties imposed in the Seacliff Decision.

C. Whether the Record Supports the Findings in the Seacliff Decision that SP Failed to Comply with Public Utilities Code Sections 7672.5 and 7673(c), and 49 CFR Section 172.202

The Seacliff Decision finds that SP did not comply with Public Utilities Code sections 7672.5 and 7673(c), and imposes penalties as discussed above. The Seacliff Decision also concludes that SP did not comply with 49 CFR section 172.202. SP contends that the Commission's conclusions are in error because they are not supported by the record. SP's allegations are without merit.

Public Utilities Code section 7672.5 provides that any railroad corporation which is involved in an incident resulting in the release of hazardous material "shall immediately report the type and extent of the release in the manner specified in Section 25507 of the Health and Safety Code." Health and Safety Code section 25507 requires reporting to OES. Contrary to SP's assertions, the Seacliff Decision documents a one hour and 40 minute delay in reporting the derailment to OES.

Public Utilities Code section 7673(c) provides that, if there is an incident involving the release of hazardous material, the railroad shall provide the emergency response agency (ERA) with the following:

(1) A list of each car in the train and order of the cars.
(2) The contents of each car, if loaded, in the train.
(3) Identification of the cars and contents in the train which are involved in the incident, including, but not limited to, those cars which have derailed.
(4) Emergency handling procedures for each hazardous material transported in or on the involved cars of the train.

SP contends that it complied with the emergency handling procedures. However, the Seacliff decision based its finding of noncompliance on the fact that the consist for aqueous hydrazine which was provided to the Ventura County Fire

Department did not contain the percent of concentration or the quantity of hydrazine in each drum. This delayed neutralization efforts by the fire department for about 4 hours.

The Seacliff Decision concludes that SP did not comply with section 7673(c)(4). It appears from the record that the appropriate section is 7673(c)(3), which relates to cars and contents in the train. Although staff originally cited section 7673(c)(4) in its investigation (See Ex. 43 at p. 30), this was changed to section 7673(c)(3) in hearings on November 11, 1992. (See Tr. 675-683; Ex. 5 at pp. 4-5.) Therefore, we will modify the decision accordingly. In addition, although the factual findings support a conclusion that SP did not comply with section 7672.5 or section 7673(c), as SP points out, there are no conclusions of law regarding compliance with these provisions as required by Public Utilities Code section 1705. Therefore, we will modify the Seacliff Decision to include such conclusions.

49 CFR section 172.202 sets forth information which must be included in the required description of hazardous material on shipping papers. Section 172.202(a)(5) (previously 172.202(a)(4)) requires shipping papers to include the quantity of hazardous material transported. SP asserts that this requirement applies to shippers and not to SP.

Because this is a federal requirement, the Commission is not empowered to fine SP for noncompliance. However, SP's failure to have adequate documentation on board supports the conclusion that SP did not comply with Public Utilities Code section 7673(c)(3). Regarding SP's contention that the federal regulation applies to shippers, the Seacliff Decision states that the shipping documentation contained the required information, but the documentation was not on board the train. Therefore, the Seacliff Decision correctly finds SP responsible.

D. Whether the Dunsmuir Decision Is the Product of Erroneous Factual Findings

SP contends that the Dunsmuir Decision is the product of erroneous factual findings. First, SP argues that the Commission made inconsistent findings and conclusions on SP's duty to provide material safety data sheets for metam sodium. SP points out that Finding of Fact Number 31 states that the record "is not clear" as to whether SP had sufficient evidence of the potential adverse environmental consequences of the spill into the Sacramento River to establish a duty to identify the "weed killer" and to provide the Material Safety Data Sheet (MSDS) for metam sodium to the ERA as quickly as possible. On the other hand, Conclusion of Law Number 16 states that SP "had a duty to identify the 'weed killer' carried in the tank car" and to provide the MSDS for metam sodium to the ERA as quickly as possible.[9]

Staff responds that there is more than enough evidence to support a finding that SP had sufficient knowledge to have a duty to identify "weed killer" and to provide the MSDS. Staff points out that Finding of Fact Number 31 in the PD stated that SP had such a duty and recommends that the Commission modify the Dunsmuir Decision by replacing Finding of Fact Number 31 with the version in the PD. Therefore, we will change Finding of Fact Number 31 so that it is consistent with the finding in the PD.

Finally, SP argues that the following findings are erroneous: The finding that the small siding is unsafe; the finding that prior derailments in the vicinity of the Cantara

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9. The Dunsmuir Decision concludes that SP violated Public Utilities Code section 451, which requires public utilities "to maintain such adequate, efficient, just and reasonable service, instrumentalities, equipment, and facilities . . . as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public." However, no penalties were imposed for this violation.

curve reached statistical significance; findings that SP knew or should have known of the derailment risk; and findings suggesting that SP failed to adequately assist responding agencies. We conclude that these findings are supported by the record and that there is no merit to SP's arguments.

IV. CONCLUSION

For all of the foregoing reasons, we will grant limited rehearing on the issues of penalties and the amendment to GO 161 in the Dunsmuir Decision and will modify the Seacliff and Dunsmuir decisions as discussed above. In all other respects rehearing of the decisions as modified is denied.

THEREFORE, IT IS ORDERED that:

1. Rehearing of Decision (D.) 94-11-068 (the Seacliff Decision) is denied.

2. D. 94-11-068 is modified as follows:

a. On page 20, in the last sentence on the page, "Section 7673(c)(4)" is deleted and replaced with "Section 7673(c)(3)".

b. On pages 25 and 26, all references to section "7673(c)(4)" are deleted and replaced with section "7673(c)(3)".

c. On page 30, Finding of Fact No. 25 is modified to read:

> Public Utilities Code section 7673(c)(3) requires that a railroad furnish to the emergency response agency at the scene of an actual or potential hazardous material spill the identification of the cars and contents in the train which are involved in the incident, including those cars which have derailed.

d. On page 33, Conclusion of Law No. 13(a) is added to read:

> SP violated Public Utilities Code sections 7672.5, requiring immediate notification of a hazardous material incident to OES, and 7673(c)(3), setting forth information which must be provided to emergency response agencies.

e. On page 33, section "7673(c)(4)" is deleted and replaced with section "7673(c)(3)".

f. On page 34, Ordering Paragraph No. 3, section "7673(c)(4)" is deleted and replaced with section "7673(c)(3)".

3. A limited rehearing of Decision (D.) 94-11-069 (the Dunsmuir Decision) is granted on the issue of penalties imposed for violations of Public Utilities Code sections 7673(a) and 7673(b), and on the amendment to the definition of hazardous material contained in General Order 161. To the extent that there are no disputed facts to be resolved, rehearing on the penalty issues may be accomplished by written briefs. There shall be evidentiary hearings on the amendment to General Order 161 if requested by any of the parties.

4. D.94-11-069 is modified as follows:

a. On page 46, the last two sentences on the page are deleted.

b. On page 47, in the third line from the top of the page, "108 days" is deleted and replaced with "122 days".

c. On page 50, in Finding of Fact No. 31, the following language is deleted: "The record is not clear as to whether".

5. Except for the limited rehearing on the issues identified in this order, in all other respects rehearing of D.94-11-068 and D.94-11-069 is denied.

6. The stay of Ordering Paragraphs Nos. 2 and 3 of D.94-11-068 is lifted.

This order is effective today.

Dated September 3, 1997, at San Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners