



OHIO LEGISLATIVE SERVICE COMMISSION

Bill Analysis

Kathleen A. Luikart

S.B. 90

132nd General Assembly
(As Introduced)

Sens. Skindell and Yuko, Brown, Thomas, Williams, Schiavoni

BILL SUMMARY

- Requires a railroad company to construct a walkway adjacent to the track in areas where company employees frequently perform switching activities if the company is constructing (on or after the bill's effective date) a track within a rail yard that it owns or operates.
- After a hearing finding that railroad company employees who frequently perform switching activities adjacent to a track in a rail yard are exposed to safety hazards due to the absence or condition of a walkway, permits the Public Utilities Commission (PUCO) to order a company to:
 - Construct a walkway adjacent to that portion of track; or
 - Modify an existing walkway constructed before the bill's effective date.
- Establishes standards that ensure that walkways have a reasonably uniform surface, are at least two feet in width, are surfaced with asphalt, concrete, planking, grating, native material, crushed material (of a specified size), or other similar material, and have a cross slope that does not exceed a 1:8 elevation to horizontal length ratio.
- Requires a railroad company to keep walkways safe and free of hazards and obstructions, except during (and for a reasonable period after) maintenance or any period of heavy rain or snow, derailments, rock and earth slides, washouts, and similar weather or seismic conditions.
- Permits a railroad company employee or a representative of the employee to file a complaint alleging a violation of the walkway requirements and requires PUCO to establish complaint procedures.

- Requires complaints to include written evidence that a railroad company employee or the employee's representative requested the company to address the circumstances for the complaint.
- Establishes a penalty for recklessly violating the walkway requirements and sets a \$100 fine for each day of violation.
- Allows a railroad company to petition the PUCO for a waiver from the bill's walkway requirements for good cause, including a showing that compliance would impose an undue hardship on the company.
- Specifies that the bill does not apply to (and the PUCO may not order) the construction or modification of a walkway if the area adjacent to the track is necessary, under federal law, for track stability or support or the construction or modification will prevent company compliance with federal law governing track stability or support.

CONTENT AND OPERATION

Walkway requirement along rail yard tracks

New track walkways

The bill requires a railroad company to construct a walkway adjacent to any track the company constructs, on or after the bill's effective date, in its rail yard in areas where company employees perform switching activities frequently (at least one shift per day, five or more days a week). Under the bill, "walkway" means any walkway in a rail yard, but does not include tracks constructed in industry yards owned by an entity other than a railroad company.¹ Although "switching activities" is not defined in the bill, "switching" means the movement of freight cars between two close locations, typically within a rail yard or to or from a rail yard and another industry location.²

Existing track walkways

The bill grants the Public Utilities Commission (PUCO) authority to order a railroad company to construct a walkway adjacent to a portion of track within a rail yard or require a company to modify an existing walkway due to safety concerns. PUCO can make such an order if it finds, after a hearing under the Administrative

¹ R.C. 4907.70(A)(1) and (2) and (B).

² BNSF Railway Company, "Glossary of Railroad Terms," available under Quick Links at <http://www.bnsf.com/customers/>, accessed March 22, 2017.

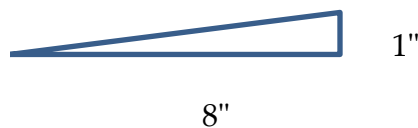
Procedure Act, that railroad company employees who frequently perform switching activities adjacent to that portion of track are exposed to safety hazards due to the absence of a walkway or due to the condition of a walkway constructed before the bill's effective date. If ordered by PUCO to construct or modify a walkway, the company must build the walkway in accordance with the bill's standards within "a reasonable period of time."³

Standards for walkway construction

The bill requires a railroad company that constructs or modifies a walkway to ensure that each of the following standards is met:

- Walkways must have a reasonably uniform surface, be a minimum of two feet in width, and be surfaced with asphalt, concrete, planking, grating, native material, crushed material, or other similar material;⁴ and
- Cross slopes for walkways may not exceed one inch of elevation for each eight inches of horizontal length in any direction.⁵ Cross slope of a walkway is the rate of change in elevation of the walkway with respect to the distance perpendicular to it.⁶

Maximum cross slope ratio under the bill is represented by this diagram:



³ R.C. 4907.70(C).

⁴ R.C. 4907.70(D)(1), (3), and (4).

⁵ R.C. 4907.70(D)(2).

⁶ Archtoolbox: Architect's Technical Reference, "Calculating Slope and Common Slopes in Architecture," Available at <https://www.archtoolbox.com/measurements/geometry/slope.html>, accessed March 24, 2017.

Crushed materials

When a railroad company uses crushed material for a walkway, the company must ensure that 100% of the material is capable of passing through a one and one-half inch square sieve opening and that 90% to 100% of the material is capable of passing through a one-inch sieve opening. Under the bill, a company is not in violation of the crushed materials requirement if there is a *de minimis* (minimal) variation of percentages and the company has made a good faith effort to comply.⁷

Walkway maintenance

A railroad company that constructs or modifies a walkway under the bill must keep the walkway in a safe condition and free of spilled oil, sand, posts, vegetation, nonballast rocks (rocks not used as ballast to support the track), debris, and other hazards and obstructions. This requirement does not apply during maintenance activities or any period of heavy rain or snow, derailments, rock and earth slides, washouts, and similar weather or seismic conditions. The requirement also does not apply for a "reasonable period" after such events.⁸

Complaint process

The bill permits a railroad company employee or a representative of the employee to file a complaint with PUCO alleging a violation of the walkway requirements. Along with the complaint, the employee or the employee's representative must submit written evidence that, prior to the filing, the employee or representative requested the company to address the circumstances for the complaint. Under the bill, PUCO must establish procedures for the filing of a complaint. The bill does not specify a time by which the procedures must be established and does not expressly require them to be adopted in PUCO rules.⁹

Penalty

The bill establishes a penalty for violating the walkway requirements. Whoever *recklessly* violates the requirements is subject to a fine of up to \$100. Each day that the violation exists constitutes a separate offense.¹⁰

⁷ R.C. 4907.70(D).

⁸ R.C. 4907.70(E).

⁹ R.C. 4907.71.

¹⁰ R.C. 4907.99(H).

Under continuing law, a person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that such circumstances are likely to exist.¹¹

Waiver

The bill allows a railroad company to petition the PUCO for a waiver from any of the bill's walkway requirements for good cause.¹² Under the bill, "good cause" includes a showing that compliance with the walkway requirements will impose an undue hardship on the company.¹³

Exceptions to walkway requirement

The bill's requirements that a railroad company construct or modify a walkway with respect to new or existing tracks do not apply to the company if both of the following apply:

- The area adjacent to the track in which the walkway is otherwise required to be constructed or modified is necessary, under federal law, for track stability or track support.
- The construction, or modification, in accordance with the bill's walkway standards will prevent the company from complying with federal law governing track stability or track support.¹⁴

Federal law and preemption

The Federal Railroad Safety Act (FRSA) contains an express preemption provision that allows states to adopt or continue in force railroad safety and security requirements until the "Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement." States may also have additional or more stringent railroad safety or security requirements, but only if it (1) is necessary to eliminate or reduce an essentially local safety

¹¹ R.C. 2901.22(C), not in the bill.

¹² R.C. 4907.70(F).

¹³ R.C. 4907.70(A)(3).

¹⁴ R.C. 4907.70(B)(1) and (2) and (C)(1) and (2).

or security hazard, (2) is not incompatible with a federal law, regulation, or order, and (3) does not unreasonably burden interstate commerce.¹⁵

Regulations adopted under FRSA address the type of ballast that may be used in a rail yard when the ballast surface provides stability and track support.¹⁶ However, courts have split on whether the ballast regulation preempts state walkway regulations.¹⁷ In *Nickels v. Grand Trunk W. RR.*, the federal Sixth Circuit court, which has jurisdiction in Ohio, has indicated that the ballast regulation does not deal with walkways, in denying a railroad employee's action for physical injury caused by years of walking on ballast.¹⁸ Because the walkway provisions under the bill address worker safety and not stability and track support, it may be that the bill's provisions would not be preempted.

HISTORY

ACTION

DATE

Introduced

03-07-17

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¹⁵ 49 United States Code § 20106(a).

¹⁶ 49 C.F.R. 213.103.

¹⁷ Compare *Missouri Pacific R. Co. v. Railroad Com'n of Texas*, 948 F.2d 179 (5th Cir. 1991) with *Norfolk Southern Ry. Co. v. Box*, 556 F.3d 571 (7th Cir. 2009).

¹⁸ *Nickels v. Grand Trunk W. R.R.*, 560 F.3d 426 (6th Cir. 2009).

