

1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
2 COMMISSION

3 THE BURLINGTON NORTHERN AND)
4 SANTA FE RAILWAY COMPANY,)

5)
6 Petitioner,)

7)

8 vs.)

9)

10 SNOHOMISH COUNTY,)

11)

12 Respondent.)

13 -----

14
15 A settlement conference in the above matter
16 was held on January 15, 2002, at 1:33 p.m. at 1300
17 South Evergreen Park Drive Southwest, Olympia,
18 Washington, before Administrative Law Judge MARJORIE
19 SCHAER.

20 The parties were present as follows:
21 THE BURLINGTON NORTHERN AND SANTA FE RAILWAY
22 COMPANY, by ROBERT E. WALKLEY, Attorney at Law, 20349
23 Northeast 34th Court, Sammamish, Washington 98074.

24 SNOHOMISH COUNTY, by JASON J. CUMMINGS,
25 Deputy Prosecuting Attorney, 2918 Colby Avenue, Suite
203, Everett, Washington 98201.

THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION, by JONATHAN THOMPSON, Assistant Attorney
General, 1400 South Evergreen Park Drive Southwest,
Post Office Box 40128, Olympia, Washington 98504.

THE WASHINGTON STATE DEPARTMENT OF
TRANSPORTATION, by JEFFREY D. STIER, Assistant Attorney
General, 905 Plum Street, Building 3, Post Office Box
40113, Olympia, Washington 98501.

24 Kathryn T. Wilson, CCR
25 Court Reporter

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INDEX OF EXHIBITS

EXHIBIT:	MARKED:	OFFERED:	ADMITTED:
65	804	804	804

1

P R O C E E D I N G S

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JUDGE SCHAER: Let's be on the record. We are here today for a presentation of a proposed settlement in Docket No. TR-010194, which is a filing by Burlington Northern and Santa Fe Railway Company seeking permission to close a railroad crossing at 156th Street Northeast in Marysville, Washington. I'm going to ask for appearances by counsel at this point, and we already have most of your details in the record, so unless you have something new -- a phone number or fax number -- just go ahead and just give your name and who your client is, please.

14

MR. WALKLEY: Thank you, Your Honor. My name is Robert E. Walkley, and I'm appearing for the Burlington Northern Santa Fe Railway Company, and the data you have in the record is accurate.

18

MR. STIER: I'm Jeff Stier, assistant attorney general, representing intervenor Washington State Department of Transportation.

21

MR. THOMPSON: I'm Jonathan Thompson, assistant attorney general, representing the Commission staff.

24

MR. CUMMINGS: I'm Jason Cummings, deputy prosecuting attorney, on behalf of Snohomish County.

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1 JUDGE SCHAER: So what we have before us
2 today is a hearing that was set on the record the last
3 time we got together in this matter, which was on
4 December 10th, 2001, and prior to this hearing, there
5 was filed with the Commission a letter from Mr. Stier
6 which attaches a draft order granting petition and a
7 draft settlement agreement, which is not yet in the
8 copy I have been signed by the parties.

9 So the first thing I need to tell you is that
10 I would like to be able to get a copy of this proposed
11 order electronically, so whoever has this in your
12 computer, have your support staff e-mail it to my
13 support staff or to the commission so that if we want
14 to use this as a starting point for an order, we can do
15 that without having to retype everything. I could tell
16 you that if this order is used, the word "proposed" on
17 the first page will come out. There are some minor
18 changes that would have to be made before this could be
19 a Commission order.

20 MR. STIER: Actually, I did circulate one
21 without the "proposed," and I can't remember what
22 happened to that, but I guess it was decided that we
23 would just sign the settlement agreement, so that order
24 fell by the wayside, but I do have an original without
25 the "proposed" on it, Your Honor.

1 JUDGE SCHAER: Of the order?

2 MR. STIER: Of the order, if you need that.

3 JUDGE SCHAER: I think I would rather have it
4 electronically.

5 MR. STIER: I'll get that over today.

6 JUDGE SCHAER: That would be wonderful, and
7 then looking at Attachment A, the settlement agreement,
8 do you have a copy of that that's been signed by all
9 the parties?

10 MR. STIER: I sent this out electronically to
11 Mr. Walkley, and he just got it back from his client
12 today, and unfortunately -- excuse me. Jason, who
13 signed it for you on behalf of your client?

14 MR. CUMMINGS: Executive director for the
15 County.

16 MR. STIER: So it went to you first, or
17 Mr. Walkley and then to you?

18 MR. CUMMINGS: Mr. Walkley and then to me.

19 MR. STIER: We haven't gotten it back, so we
20 need to have the head of the rail division sign it. We
21 can get that signed today, Your Honor.

22 MR. WALKLEY: The Railroad has signed it,
23 Your Honor.

24 JUDGE SCHAER: Has Commission staff signed
25 it?

1 MR. THOMPSON: We are not actually a party to
2 the settlement agreement itself.

3 JUDGE SCHAER: I couldn't tell. The copy I
4 have has just a place for the Railroad and Snohomish
5 County, so I assumed there was a another signature page
6 that went beyond this, which is fine at this point, but
7 I didn't know whether you were in or out, Mr. Thompson,
8 whether your client was in or out.

9 What I would like to do at this point in the
10 hearing is have each of you call your witness and
11 perhaps describe for the record who they are, just
12 briefly, and then I do have a few questions about the
13 settlement agreement, primarily for Commission staff,
14 perhaps, reflecting that they may not have been
15 involved in writing this, but I need to ask them about
16 this in light of their testimony at the hearing to make
17 sure I've got a complete record on that, and if any of
18 you have questions for any of the members of the panel,
19 we can take that up as well.

20 I had considered just calling all four
21 witnesses as a panel so if there was a question raised
22 that more than one wanted to respond to, that could
23 happen, but I do want to ask counsel if that's
24 something you are comfortable with doing or if you
25 prefer to have them appear one at a time?

1 MR. STIER: I have no objection to that, Your
2 Honor.

3 MR. WALKLEY: No objection, Your Honor.

4 JUDGE SCHAER: At this point, why don't I
5 have you call your witnesses, and then we will go
6 forward with the questions, and then perhaps we can
7 recess, Mr. Stier, and let you contact your client to
8 see where we are with getting a copy that's been signed
9 and whether that can be delivered this afternoon or
10 whether you can represent it's been signed on the
11 record and we can go forward from there.

12 MR. STIER: I would have to physically
13 adjourn for half an hour, at least, to get Mr. Schultz
14 over to DOT to have Mr. Slakey sign it. However, we
15 could give him a call and confirm that he's there. I'm
16 sure there would be no problem if he's physically
17 present.

18 JUDGE SCHAER: Why don't we take that up when
19 we get to a break, unless you would like to take it up
20 now and let Mr. Schultz call and see if Mr. Slakey is
21 there and perhaps sign and have someone deliver it to
22 you later or have you go get it --

23 MR. STIER: We have to take it to him. They
24 are sitting right here. We didn't get it back until
25 today.

1 JUDGE SCHAER: Let's take a 10-minute recess
2 and let you work out some of your logistics just so we
3 know where we are going today, and if there is
4 something that needs to happen when we are doing
5 questioning, that can happen. We are off the record.

6 (Recess.)

7 JUDGE SCHAER: Let's be back on the record
8 after a brief recess in which Mr. Schultz was able to
9 contact his office regarding obtaining a final
10 signature that's needed on the settlement agreement,
11 and at this point, I would like to mark the settlement
12 agreement as an exhibit. I believe the next exhibit
13 number in order is Exhibit 65, and I'm going to mark
14 right now the draft copy of that agreement that I have,
15 and we will receive a final copy of that agreement as
16 filed by the Department of Transportation sometime
17 today or tomorrow, and that final copy will be the copy
18 that's part of the official record in this matter. Is
19 there any objection to admission of Exhibit 65 into the
20 record?

21 MR. WALKLEY: No objection, Your Honor.

22 MR. STIER: No objection.

23 JUDGE SCHAER: Then I'm going to ask you to
24 call your witnesses, please.

25 MR. WALKLEY: Your Honor, this is Robert

1 Walkley. My witness today is Mr. Michael Powrie, who
2 is the project engineer and testified at the hearing,
3 and possibly each person could introduce their witness
4 and then they would all be introduced and could take
5 questions then from Your Honor or from the attorneys.

6 JUDGE SCHAER: Mr. Powrie, I would remind you
7 you are already under oath in this proceeding.

8 MR. STIER: Intervenor Washington State
9 Department of Transportation would call Jeff Schultz,
10 and likewise, Mr. Schultz was called as a witness at
11 the hearing.

12 JUDGE SCHAER: Tell us a little bit about
13 Mr. Schultz, or should I have him do that?

14 MR. STIER: Jeff, I can't remember your
15 title.

16 JUDGE SCHAER: Mr. Schultz, let me remind you
17 you are already under oath in this proceeding as a
18 previous witness, but tell us your title and what your
19 role is in this.

20 MR. SCHULTZ: I'm Jeff Schultz, Washington
21 State Department of Transportation, rail office. I'm
22 the rail operations technical expert for the
23 Department, and my purview at the Department includes
24 grade crossing issues, working with the Washington
25 Utilities and Transportation Commission on grade

1 crossing issues, speed issues. I manage the Amtrak
2 agreements, the Talgo agreements, maintenance
3 agreement, and those are my primary duties, Your Honor.

4 JUDGE SCHAER: Mr. Thompson?

5 MR. THOMPSON: Staff would call Ahmer Nizam,
6 who also testified at the hearing, and I'll have him
7 just explain his position with the commission.

8 JUDGE SCHAER: Mr. Nizam, I'll remind you
9 also that you are still under oath in this proceeding.

10 MR. NIZAM: I'm Ahmir Nizam representing
11 Commission staff. My title is rail engineer, and do
12 you want me to elaborate on my duties?

13 JUDGE SCHAER: Maybe the 10-word explanation.

14 MR. NIZAM: I represent the rail section
15 staff in investigating petitions filed with the
16 Commission concerning closures of grade crossings or
17 upgrades of warning devices at crossings and basically
18 any alterations made to manual crossings.

19 JUDGE SCHAER: Mr. Cummings?

20 MR. CUMMINGS: I would like to call Mr. Steve
21 Thomsen, Snohomish County engineer. Mr. Thomsen is
22 previously sworn and testified at the prior hearing on
23 behalf of the County, and as the County engineer, he's
24 responsible for the County roads within Snohomish
25 County.

1 JUDGE SCHAER: I'll remind you also that you
2 remain under oath in this proceeding. Did any of the
3 counsel have questions for any of the panelists?

4 MR. WALKLEY: I don't, Your Honor.

5 MR. STIER: Not at this time.

6 MR. THOMPSON: No questions.

7 MR. CUMMINGS: No questions.

8 JUDGE SCHAER: I have just a few, and
9 primarily I'm going to address them to you, Mr. Nizam,
10 because from what I see, you are not a signatory to the
11 settlement agreement. It's my recollection that you
12 testified as an expert for the Commission at the
13 conclusion of the hearings that were held in Everett,
14 and at that time, it was your conclusion that it was
15 not appropriate to close this crossing unless certain
16 conditions were met; is that correct?

17 MR. NIZAM: That's correct.

18 JUDGE SCHAER: What were those conditions, if
19 you would remind me?

20 MR. NIZAM: Those conditions were the
21 construction of cul-de-sacs at the terminus points of
22 the crossing and also some sort of either agreement or
23 other mechanism between the County and the Railroad to
24 establish a temporary crossing in the event that the
25 176th Street grade crossing were closed by what we

1 termed during the hearing as a catastrophic event.

2 JUDGE SCHAER: Have you reviewed what's now
3 been admitted as Exhibit 65?

4 MR. NIZAM: Yes, I have.

5 JUDGE SCHAER: Are you satisfied that it
6 meets the conditions that you had outlined at the
7 hearing?

8 MR. NIZAM: Yes. After a review, it not only
9 meets the conditions but in some ways exceeds them.

10 JUDGE SCHAER: I noted when I read this
11 settlement agreement there was a certain amount of
12 money that was put forward to do certain tasks, and
13 there also appeared to me language that would allow the
14 County not to do some of the tasks if they had spent
15 all the money and it was gone. Did you read that as
16 well?

17 MR. NIZAM: Yes.

18 JUDGE SCHAER: Do you have any concern that
19 that condition could lead to a situation where
20 cul-de-sacs were not built or where there was not a
21 crossing made available at a catastrophic time?

22 MR. NIZAM: I don't think that would apply to
23 the second condition, that of the catastrophic event.
24 That would only apply to the new construction
25 activities that would be associated with the

1 conditions. I actually just spoke with Mr. Thompson,
2 and he suggested that rather than eliminating one of
3 the possible construction activities in the agreement,
4 they would be altered in such a way that all of them
5 would be feasible.

6 JUDGE SCHAER: Maybe I would like you,
7 Mr. Thomsen, just to say a little more on that on what
8 the County contemplates.

9 MR. THOMSEN: Sure. The thinking is that we
10 are planning to build a traffic signal in cul-de-sacs,
11 and that will fit within the \$400,000 lump sum
12 agreement. But, for example, if the ultimate
13 cul-de-sac is where you put 45-foot diameter cul-de-sac
14 wouldn't work because of an environmental impact or too
15 much of a property required, we could redesign some
16 other kind of turnaround. We do have options. We
17 might downscale it to some kind of what we call
18 hammerhead turnaround, which takes less property, less
19 pavement, less environmental impact, and that's just an
20 example of how you could scale it down to save dollars.

21 JUDGE SCHAER: So am I correct in
22 understanding it's the County's intention to have some
23 means for people to turn around, and that area may just
24 not be the cul-de-sac that was talked about at the
25 hearing?

1 MR. THOMSEN: That's correct, Your Honor.

2 JUDGE SCHAER: Thank you. Those were all the
3 questions I had. Is there something further you wanted
4 to add, Mr. Nizam?

5 MR. NIZAM: I just wanted to elaborate on one
6 thing. We're using the term "cul-de-sacs," plural,
7 where in fact, the agreement only calls for
8 construction of one cul-de-sac on the east side of the
9 crossing because the west side will be inaccessible due
10 to a steel locked gate placed at the intersection of
11 23rd Avenue and 156th, so motor vehicle traffic won't
12 even be able to get in the vicinity of the crossing.

13 JUDGE SCHAER: So describe that for me just a
14 little bit more.

15 MR. NIZAM: If you are traveling north on
16 23rd Avenue and you come to a T intersection with 156th
17 Street, if you take a right, you would hit the crossing
18 approximately 100 yards to the east. Well, there is
19 going to be a steel locked gate at the intersection.

20 JUDGE SCHAER: So there will not be any
21 ability to turn down the road after the cross street
22 towards the railroad track; is that what you are
23 telling me?

24 MR. NIZAM: Yes.

25 JUDGE SCHAER: Thank you. Does anyone else

1 have any questions for any of the witnesses?

2 MR. STIER: I have one question.

3 Mr. Schultz, there are various conditions or
4 improvements for mitigation that are addressed in the
5 settlement agreement, and there is various scenarios to
6 fund them, but is it your understanding that completion
7 or even commencement of those tasks is a condition
8 precedent or is not a condition precedent to the siding
9 construction activities?

10 MR. SCHULTZ: It's my understanding that
11 completion of those projects, the traffic signal, the
12 cul-de-sac, and the street improvements, are not a
13 condition precedent into the crossing closure, so the
14 siding work may begin. My understanding by reading the
15 agreement was that the only restriction was the end of
16 the school year, which was approximately June 16th, and
17 that was the key to closing the crossing, but the
18 siding work could begin.

19 MR. STIER: Thank you.

20 JUDGE SCHAER: Anything further? Thank you
21 for your testimony. Is there anything further to come
22 before the Commission in this matter? Let the record
23 reflect that an electronic copy of the proposed order
24 was filed with Mr. Stier's letter on January 9th. That
25 will be provided to the Commission, and that copy of

1 Exhibit 65, which has been signed by all of the
2 principles, will be signed by the Commission, I
3 believe, by the end of the day tomorrow; is that
4 correct, Mr. Stier?

5 MR. STIER: That is correct.

6 JUDGE SCHAEER: We are off the record.

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8 (Settlement conference concluded at 1:58 p.m.)

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