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BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

**IN RE PENALTY ASSESSMENT:
TR-121921**

)
) DOCKET NO. TR-121921
)
) BNSF RAILWAY COMPANY'S
) RESPONSE TO PENALTY
) ASSESSMENT AND REQUEST FOR
) HEARING AND PRE-HEARING
) SETTLEMENT CONFERENCE
)

I. INTRODUCTION

BNSF Railway Company ("BNSF") submits the following response to the Washington Utilities and Transportation Commission ("WUTC") Notice of Penalties, Penalty Assessment: TR-121921.

Penalty Assessment TR-121921 alleges defects at seven crossings in violation of WAC 480-62-225. WUTC alleges that it initially notified BNSF of defects at the seven crossings by defect notice, that BNSF failed to correct the defects, and that reinspections in November 2012 and January 2013 revealed uncorrected defects at those crossings.

In the case of six of the seven defect notices, BNSF Roadmaster Robert Owen received the initial notice and took appropriate action by (1) inspecting the crossing and making necessary repairs; (2) inspecting without the need for repairs; or (3) communicating to

1 WUTC that the defects were the responsibility of the appropriate road authority. (Declaration
2 of Robert Owen (“Owen Decl.”) ¶ 2). In the case of defects that were not BNSF’s
3 responsibility, Mr. Owen communicated that determination to WUTC staff. (*Id.*). As was his
4 custom, Mr. Owen usually communicated this type of information with WUTC staff – Kathy
5 Hunter, Bob Johnston, Lori Halstead, or Debbie Thome – by telephone. (*Id.*). As to the
6 seventh defect notice, BNSF was partially mistaken in believing the defect was the road
7 authority’s responsibility. BNSF is now taking responsibility for the defects identified insofar
8 as they are located between the two tracks and will commit to promptly repairing these
9 defects. (*Id.* ¶ 3).

10 It is unclear whether WUTC staff reinspected the crossings following the repairs or
11 conversations with Mr. Owen in which Mr. Owen explained that no defects existed or that the
12 defects were the responsibility of the road authority. What is clear is that, in November 2012
13 and in January 2013, WUTC staff reinspected all seven crossings. By that time, between
14 eighteen and forty-five months had elapsed since the initial defects were issued. Given that
15 time frame, the potential certainly exists for recurring or new defects to develop at those
16 crossings.

17 WUTC Director David Pratt wrote to Mr. Owen in November and December 2012,
18 asking BNSF to address the alleged defects. Mr. Pratt apparently copied Northwest Division
19 North Division Engineer Chad Scherwinski on these letters. Neither Mr. Owen nor Mr.
20 Scherwinski saw the letters. (Owen Decl. ¶ 4; Declaration of Chad Scherwinski
21 (“Scherwinski Decl.”) ¶ 2-3). In November and December of 2012, a rash of mud slides
22 profoundly affected BNSF freight service and Amtrak commuter service. In fact, 112 mud
23 slides occurred between Seattle and Everett from November 6, 2012 to January 12, 2013.
24 (Owen Decl. ¶ 5). This was (by far) a record number of slides, as has been widely reported by
25 the press. (*Id.*). Responding to them required an extraordinary amount of both Mr. Owen’s
26 and Mr. Scherwinski’s time. (Scherwinski Decl. ¶4; Owen Decl. ¶ 5). That neither saw Mr.
27 Pratt’s letters is regrettable but not surprising. (Scherwinski Decl. ¶4; Owen Decl. ¶ 5).

1 With that introduction, BNSF now addresses the seven defect notices at issue, and
2 BNSF's responses thereto.

3 **II. BNSF'S CROSSING-BY-CROSSING RESPONSE**

4 **I. Siper Road**

5 **A. Defect Allegation**

6 On February 19, 2009, WUTC issued a defect notice for the Siper Road crossing,
7 United States Department of Transportation ("USDOT") 084907V, located in BNSF Sumas
8 Subdivision in Whatcom County.

9 The notice stated that the crossing surface "ha[d] potholes or raised, curled or
10 deteriorated asphalt or other materials" and that "the plane of the crossing [wa]s not level
11 with the roadway resulting in a rough crossing surface." BNSF cannot locate a copy of the
12 February 19, 2009 defect notice and relies on, and quotes, the two descriptions of the notice
13 provided by the WUTC in its December 21, 2012 letter and Attachment A to its November 6,
14 2012 letter.

15 **B. BNSF Response**

16 BNSF Roadmaster Robert Owen recalls receiving the original notice in February 2009
17 and believes that he responded in writing, indicating that appropriate repairs would be
18 completed in March 2009. (Owen Decl. ¶ 6).

19 Mr. Owen and BNSF employees working under his supervision, including Chris
20 Conover, completed the repairs in March 2009 by replacing a number of rubber pads at the
21 crossing. (Owen Decl. ¶ 5; Chris Conover Declaration ("Conover Decl.") ¶ 3). BNSF
22 employee James Densmore was aware of this work being performed in 2009. (Declaration of
23 James Densmore ("Densmore Decl.") ¶ 8). In 2010, when Mr. Densmore was a truck driver
24 for BNSF, he picked up the six to nine old rubber pads that had been removed in 2009 at
25 Siper Road, and noticed the new replacement pads in place there. (*Id.* ¶ 9).

1 The repairs at the Siper Road crossing eliminated warped rubber pads, making the
2 crossing surface, in Mr. Owen's judgment, convenient and safe for passage, and otherwise
3 complied with BNSF's obligations. (Owen Decl. ¶ 8).

4 C. Current Status of Crossing and Other Factors for Consideration

5 WUTC says that it reinspected the crossing almost three years later in November 2012
6 and again in January 2013 and found the defects remained outstanding. (Defect(s) to be
7 Corrected Notice, attached to Pratt Letter to Owen, Dec. 21, 2012; Penalty Assessment Letter,
8 Feb. 25, 2013).

9 Siper Quarry is located adjacent to the Siper Road crossing. (Owen Decl. ¶ 9;
10 Densmore Decl. ¶ 3). Mr. Owen believes that it began operations around 2008-2009. (Owen
11 Decl. ¶ 9). Fifteen to one hundred heavy gravel- and rock-filled trucks hitched to pigs
12 (trailers) coming to and from the Siper Quarry can traverse the Siper Road crossing on a daily
13 basis. (Densmore Decl. ¶ 4). Indeed, on one recent day, BNSF employee James Densmore
14 noticed ten trucks traversing the crossing in just a twenty minute period. (*Id.* ¶ 5).

15 The Siper Road crossing takes a hard beating from this truck and trailer traffic.
16 (Owen Decl. ¶ 9). The trucks going to and from the quarry can have a loaded weight in
17 excess of 100,000 pounds, and the loaded pigs can weigh between 40,000 and 45,000 pounds.
18 (Densmore Decl. ¶ 7). The trucks are usually hitched to a pig, and the hitches often hit the
19 approaches to the crossing, causing deterioration to the asphalt. (*Id.* ¶ 6). Thus, it comes as
20 no surprise that, even after the 2009 repairs, completed as required by the February 19, 2009
21 notice, the crossing would have again shown some damage by late 2012. (Owen Decl. ¶ 10).
22 Accordingly, Mr. Owen again supervised necessary repairs to the crossing on February 27,
23 2013. (*Id.*). Mr. Conover participated in these repairs and states that six pads were replaced.
24 (Conover Decl. ¶ 4).

25 In recognition of the unique and significant problems posed by maintaining a crossing
26 so heavily used by the Siper Quarry, BNSF has slated the Siper Road crossing for a full
27 rebuild and replacement, with an estimated cost in excess of \$100,000.00, on March 26-28,

1 2013. (Owen Decl. ¶ 11). This rebuild and replacement was scheduled prior to BNSF's
2 receipt of WUTC's Notice of Penalties. (*Id.*).

3 Based on this record, no justification exists for any penalty assessment with regard to
4 the Siper Road crossing.

5 **II. Massey Road**

6 A. Defect Allegation

7 On May 17, 2011, WUTC issued a defect notice for the Massey Road crossing,
8 USDOT 084915M, located in BNSF Sumas Subdivision in Whatcom County.

9 The notice purportedly stated that the plane of the crossing was not level with the
10 roadway surface; a later notice (November 26, 2012 Inspection Date) elaborated that the
11 problem was caused by a drop-off in the asphalt by about two inches on the east side and an
12 even larger drop-off on the west side of the crossing, resulting in a rough crossing surface.
13 (Defect(s) to be Corrected Notice, attached to Pratt Letter to Owen, Dec. 21, 2012).

14 WUTC says it reinspected the crossing two and a half years after the original notice
15 (in November 2012 and again in January 2013) and found the defects remained outstanding.
16 (Penalty Assessment Letter, Feb. 25, 2013;(Defect(s) to be Corrected Notice, attached to Pratt
17 Letter to Owen, Dec. 21, 2012). The reinspection report notes that repair of the defect "may
18 require coordination with the road authority." (Defect(s) to be Corrected Notice, attached to
19 Pratt Letter to Owen, Dec. 21, 2012).

20 B. Applicable Law and Analysis

21 WAC 480-62-225 allocates responsibility for crossing surfaces between railroads and
22 highway authorities. It specifies:

23 Highway authorities must maintain and keep in repair the surfaces and the
24 subgrades of the roadway approaches up to one foot from the outside of either
25 rail at a grade crossing with one track. . . . At a grade crossing with one track,
26 railroad companies must maintain and keep in repair the crossing surfaces
27 between the rails and for a distance of one foot on the outside of either rail.

WAC 480-62-225(1)(a)-(b).

1 A photograph taken on February 26, 2013 demonstrates a drop off in the asphalt,
2 however, the drop off is more than one foot from the outside of the rail on either side. (Owen
3 Decl. ¶ 13, Exhibit 1). Accordingly, the highway authority, not BNSF, is responsible for this
4 defect. (*Id.*)

5 C. BNSF Response

6 BNSF Roadmaster Robert Owen recalls receiving the original notice in May 2011 and
7 inspecting the crossing. (Owen Decl. ¶ 12). Consistent with his long-standing practice, Mr.
8 Owen informed WUTC staff via telephone (he believes but is not positive it was then-
9 Inspector Bob Johnston) of BNSF's position that the defect was not the railroad's
10 responsibility. (*Id.*). Mr. Owen discussed the road authority's responsibility with the WUTC,
11 noting that the road authority should be notified about the defect and that when the road
12 authority fails to repair such defects, the railroad surface is degraded at an accelerated rate.
13 (*Id.*)

14 Mr. Owen had also told WUTC staff on numerous occasions that, in his experience,
15 vehicle traffic at various grade crossing routinely exceeded the posted speed limit, which
16 added to the degradation of roadway surface, and that he believed that the WUTC should
17 encourage the local authority to enforce speed limits. This observation applied to the Massey
18 Street crossing as well. (*Id.*)

19 WUTC's notice of defect (an exemplar is attached hereto as Exhibit A) gives only two
20 options for BNSF's response:

21 **Responsible party to enter either date:**

22 Correction was completed on: _____
23 (Date)

24 Correction will be completed by: _____
25 (Date)

26 Neither response option was appropriate in this case because BNSF was not and is not
27 responsible for the defect at the crossing at Massey Road. (Owen Decl. ¶ 15). Given the

1 format of the notice and its response requirement, Mr. Owen's phone call to WUTC staff was
2 an appropriate method to communicate about the defect notice. (*Id.*).

3 BNSF maintains its position that the defects shown in the February 26 photos are not,
4 under applicable law, BNSF's responsibility. (*Id.*).

5 D. Current Status of Crossing and Other Factors for Consideration

6 In spite of the fact that the problem at Massey Road remains the road authority's legal
7 responsibility, approximately two weeks ago as a show of good faith BNSF completed repairs
8 to the crossing by cutting back the roadway and eliminating the roadway drop off to ensure
9 the plane of the crossing is level with the roadway. (Owen Decl. ¶ 16; Conover Decl. ¶ 8).

10 Based on this record, no justification for any penalty assessment exists with regard to
11 the Massey Road crossing.

12 **III. Front Street**

13 A. Defect Allegation

14 On July 18, 2011, WUTC issued a defect notice for the Front Street crossing, USDOT
15 084933K, located in BNSF Sumas Subdivision in Whatcom County. The notice purportedly
16 stated that a metal band on a concrete plank or planks was broken, loose, or missing. (Pratt
17 Letter to Owen, Dec. 21, 2012).

18 B. BNSF Response

19 BNSF Roadmaster Robert Owen recalls receiving the notice. (Owen Decl. ¶ 17). He
20 inspected the crossing, found a minor defect, and welded a metal band and replaced lags to
21 correct the defect. (*Id.*). Mr. Owen acknowledges that he probably neglected to notify
22 WUTC that the defect was corrected. (*Id.*). Regardless, the defect was corrected in 2011 as
23 required.

24 C. Current Status of Crossing and Other Factors for Consideration

25 WUTC says it reinspected the crossing again in November 2012 and January 2013 and
26 found the defect remained outstanding. (Defect(s) to be Corrected Notice, attached to Pratt
27 Letter to Owen, Dec. 21, 2012; Penalty Assessment Letter, Feb. 25, 2013).

1 BNSF has confirmed that, indeed, over a year and a half since the defect was first
2 noted and repaired, a weld has broken. (Owen Decl. ¶ 18). BNSF will repair this weld within
3 six weeks. (*Id.*). In the meantime, it is worth noting that this is an extraordinarily minor
4 defect that causes noise as a vehicle travels across the crossing, and in no way affects the
5 roadway surface. (*Id.*). This minor defect in no way detracts from the crossing surface being
6 “convenient and safe for passage” as required by WAC 480-62-225. (*Id.*).

7 Based on this record, no justification exists for any penalty assessment with regard to
8 the Front Street crossing.

9 **IV. Aldergrove Road**

10 A. Defect Allegation

11 On June 7, 2010 WUTC issued a defect notice for the Aldergrove Road crossing,
12 USDOT 096135W, located in BNSF Cherry Point Subdivision in Whatcom County. That
13 notice apparently stated that the crossing surface was rough because planks were broken and
14 many timbers were defective. WUTC states that BNSF committed to repairing this defect by
15 April 1, 2011. (Pratt Letter to Owen, Dec. 21, 2012).

16 B. BNSF Response

17 Robert Owen supervised the replacement of the worn planks. (Owen Decl. ¶ 19). He
18 believes he did so in April 2011, but it could have been as early as January 2011. (*Id.*). Mr.
19 Densmore was aware of the planks being replaced, and personally delivered planks to the
20 crossing for replacement. (Densmore Decl. ¶ 11). Mr. Conover participated in making these
21 repairs although he cannot recall the exact date. (Conover Decl. ¶ 6).

22 C. Current Status of Crossing and Other Factors for Consideration

23 Not directly relevant to the defect notice of June 7, 2010, for which the WUTC
24 assessed the penalty against BNSF, but worthy of mention to complete the picture, WUTC
25 says it reinspected the crossing again in November 2012 and January 2013 (many months
26 after the required repairs by BNSF) and found that the surface was rough and planks were
27

1 broken. (Defect(s) to be Corrected Notice, attached to Pratt Letter to Owen, Dec. 21, 2012;
2 Penalty Assessment Letter, Feb. 25, 2013).

3 Until very recently, the planks at this crossing were constructed of clear pine untreated
4 timbers. (Owen Decl. ¶ 20). Because the area of the crossing is damp, these planks can
5 deteriorate quickly. (*Id.*). If WUTC staff did not inspect the crossing until more than a year
6 and a half year after the repair – in November 2012 – the planks may well have deteriorated
7 again. (*Id.*).

8 Two weeks ago, every plank at this crossing was replaced with gumwood planks,
9 which are much more resistant to decomposition in a damp environment. (Owen Decl. ¶ 21).

10 Regarding WUTC's penalty assessment, WUTC has cited BNSF for 730 days of
11 violation, however, WUTC's November 6 letter to BNSF includes no mention of a defect at
12 this crossing, suggesting this defect did not exist in early November 2012. (Attachment A to
13 Pratt Letter to Owen, Nov. 6, 2012).

14 In any event, no justification exists for any penalty assessment with regard to the June
15 7, 2010 defect notice for Aldergrove Road. BNSF committed to repair the crossing, and it
16 did.

17 **V. Madison Street**

18 **A. Defect Allegation**

19 On July 18, 2011, WUTC issued a defect notice for the Madison Street crossing,
20 USDOT 084922X, located in BNSF Sumas Subdivision in Whatcom County. The notice
21 purportedly complained of "potholes, curled or deteriorated asphalt" and "raised . . . asphalt
22 or other materials." (Pratt Letter to Owen, Dec. 21, 2012; Attachment A to Pratt Letter to
23 Owen, Nov. 6, 2012). The reinspection notice states that "[t]he crossing has an outstanding
24 defect. WUTC reinspected on November 26, 2012 and found: Potholes forming outside field
25 side rubber panels." (Defect(s) to be Corrected Notice, attached to Pratt Letter to Owen, Dec.
26 21, 2012).

1 B. BNSF Response, Legal Analysis, and Other Factors for Consideration

2 The crossing at Madison Street has two tracks, the mainline and an industry track.
3 (Owen Decl. ¶ 22). The tracks are farther apart than usual – about forty feet separates them.
4 BNSF does not operate on (or maintain) the industry track. (*Id.*).

5 When BNSF Roadmaster Robert Owen received the defect notice, he focused only on
6 the mainline track that BNSF operates, considered it to be single track for purposes of the
7 Washington Administrative Code’s allocation of responsibility, and believed that the
8 WUTC’s defect notice mistakenly allocated responsibility to fix the asphalt to BNSF. (*Id.*).
9 Mr. Owen was half right: because the mainline is one of two tracks at Madison Street, the
10 approach outside one foot on the field side of the track is the responsibility of the road
11 authority, but the approach on the other side – between the tracks – is the railroad’s
12 responsibility. (*Id.* ¶ 23).

13 Mr. Owen believes he spoke to WUTC staff about this defect notice by phone,
14 explaining his position, (as he did with the Massey Road crossing), but he is unsure. (*Id.* ¶
15 24).

16 The reinspection notice, dated November 26, 2012, notes only defects forming
17 “outside field side rubber panels.” (Defect(s) to be Corrected Notice, attached to Pratt Letter
18 to Owen, Dec. 21, 2012). The original defect notice, issued in July 2011, did not, apparently,
19 indicate on which side of the tracks the potholes were found, and it is unclear whether the
20 potholes on the field side of the tracks were present in July 2011. (Pratt Letter to Owen, Dec.
21 21, 2012). Only in November 2012 does WUTC mention potholes between the mainline and
22 siding track. (Attachment A to Pratt Letter to Owen, Nov. 6, 2012). BNSF maintains its
23 position that the defects cited in the Madison Road notice, to the extent the defects are located
24 on the outside of either track (the field side), are not under applicable law BNSF’s
25 responsibility. However, having received the WUTC’s penalty assessment and discovering
26 its partial error, BNSF will promptly repair the asphalt approaches *between* the tracks. (Owen
27 Decl. ¶ 25).

1 Based on this record, and in view of the fact that BNSF's actions were not willful, no
2 penalty related to the Madison Road crossing is warranted, or any penalty should be nominal.

3 **VI. S. Walnut Street**

4 A. Defect Allegation

5 On August 2, 2010, WUTC issued a defect notice for the S. Walnut Street crossing,
6 USDOT 092259B, located in BNSF Anacortes Subdivision in Skagit County. The notice
7 purportedly stated that a plank or crosstie was broken. More specifically, the notice
8 purportedly stated that several loose crossing surface planks were present at the crossing and
9 one plank was breaking apart and worn, creating potholes in the wooden surface. (Pratt Letter
10 to Owen, Dec. 21, 2012; Attachment A to Pratt Letter to Owen, Nov. 6, 2012).

11 B. BNSF Response

12 Initially, this crossing was thought to be the responsibility of a nearby industry, but
13 regardless of that, BNSF employee James Densmore removed the deteriorated plank and
14 filled the portion removed with rock. (Owen Decl. ¶ 26; Densmore Decl. ¶ 13). Mr. Owen
15 recalls coordinating this repair with the City of Burlington. (Owen Decl. ¶ 26). Mr. Owen
16 recalls this occurring in August 2011, admittedly two to three months – up to 82 days – after
17 BNSF committed to repair the crossing. (*Id.*). That said, the vehicle traffic at this crossing is
18 *extraordinarily* low, and the damage found was minor. (*Id.* ¶ 27).

19 Mr. Owen is unsure whether he talked to WUTC Inspector Johnston in August 2011
20 to advise him of the repairs. (*Id.* ¶ 28).

21 C. Current Status of Crossing and Other Factors for Consideration

22 Upon further investigation since August 2011, the S. Walnut Street crossing was
23 determined to be BNSF's responsibility, and recently certain defects, similar to those found in
24 2011, have appeared or recurred. (*Id.* ¶ 29). Accordingly, on March 5, 2013, BNSF
25 rehabilitated the crossing by removing all of the wood and installing pavement through the
26 approaches to the crossing on both sides. (*Id.*). BNSF notes that the mainline crossing, which
27 BNSF always knew to be its responsibility, was always maintained in good repair. (*Id.* ¶ 27).

1 In view of the foregoing, for the S. Walnut Street crossing no – or at most a nominal –
2 penalty is warranted.

3 **VII. Hawley Street**

4 A. Defect Allegation

5 On March 1, 2010, WUTC issued a defect notice for the Hawley Street crossing,
6 USDOT 396915A, located on BNSF's Lynden Spur in Whatcom County. WUTC allegedly
7 issued a second defect notice for the same crossing on November 6, 2010. The notice
8 purportedly stated that a plank or crosstie was broken. (Pratt Letter to Owen, Dec. 21, 2012;
9 Attachment A to Pratt Letter to Owen, Nov. 6, 2012). WUTC acknowledged, however, that
10 dirt and gravel repairs had been made. (Defect(s) to be Corrected Notice, attached to Pratt
11 Letter to Owen, Dec. 21, 2012).

12 B. BNSF Response

13 Mr. Owen recalls receiving the initial and/or subsequent notice and acknowledges that
14 he likely committed to making the repair by June 1, 2011, before he actually inspected the
15 crossing. (Owen Decl. ¶ 30). When Mr. Owen did inspect the crossing in June 2011, he
16 found no broken or missing crossties or planks. (*Id.*). He did notice some planks were worn
17 but observed that, at that time, no planks were in need of replacement. (*Id.*). Mr. Owen
18 acknowledges that he likely did not follow up with the WUTC to notify it of his conclusions.
19 (*Id.*).

20 C. Current Status of Crossing and Other Factors for Consideration

21 Apparently WUTC did not inspect the crossing again until late November 2012. At
22 that time, more than two years after the initial defect notice, WUTC staff found a plank or
23 crosstie was broken. (Pratt Letter to Owen, Dec. 21, 2012).

24 A recent inspection by BNSF found that some repairs are needed. (Owen Decl. ¶ 31).
25 At present, most paving companies are closed for the winter but are expected to reopen in the
26 next few weeks. (*Id.*). As soon as that happens, BNSF will repave the plane of the crossing
27 and all roadway surfaces on both crossings. (*Id.*).

1 The Hawley Street crossing is another crossing in an isolated area with very little
2 vehicle traffic. (*Id.* ¶ 32).

3 In view of the foregoing, no penalty is warranted for the Hawley Street crossing.

4 III. CONCLUSION

5 As demonstrated, BNSF responded to six of the seven defect notices by either
6 repairing the defect, inspecting the crossing and determining that no defect existed, or by
7 determining that responsibility for the defect properly lies with the road authority and
8 communicating that determination to WUTC staff. In a single case, BNSF was partially
9 mistaken in its determination that the responsibility for the defect lay with the road authority.
10 BNSF has since taken responsibility for that defect and committed to repairing it, to the extent
11 of BNSF's responsibility, promptly. Accordingly, remitting the penalties is appropriate.

12 As WUTC discusses in its Penalty Assessment, several factors are considered in
13 mitigating penalties: whether the violation is serious or harmful to the public; whether the
14 violation is intentional; whether BNSF self-reported the violation; whether BNSF was
15 cooperative and responsive; whether BNSF promptly corrected the violations and remedied
16 the impacts; the number of violations; the likelihood of recurrence; the company's past
17 performance; the company's compliance program; and the size of the company.

18 As WUTC readily acknowledges, "the defects noted by Commission staff at these
19 crossings do not pose imminent harm to the public."

20 BNSF does not believe it committed any violations, except insofar as the defect notice
21 for Madison Street addressed potholes between the tracks, but to the extent it did, it certainly
22 was not intentional. While regrettably neither Mr. Scherwinski nor Mr. Owen saw Mr. Pratt's
23 November and December 2012 correspondence, neither intentionally ignored any technical or
24 other assistance from the WUTC. Mr. Owen is in regular communication with WUTC staff.
25 He has communicated consistently with WUTC during the years the defects were issued. As
26 explained, BNSF has responded to every defect notice discussed in the Penalty Assessment.
27 This penalty assessment appears to have arisen largely because of miscommunication

1 between Mr. Owen and WUTC staff. BNSF is committed to ensuring that communication is
2 improved and suggests that the parties arrange for regular scheduled contact between WUTC
3 staff and BNSF to address any future outstanding concerns. (Owen Decl. ¶ 33).

4 WUTC contends that BNSF knows or should have known that the defects existed and
5 that, for three of the crossings, BNSF provided a specific commitment date for repairing the
6 defects, but failed to satisfy its commitment. On the contrary, BNSF made every repair it
7 committed to, aside from the Hawley Street crossing where Mr. Owen committed to repairing
8 the defect before he inspected it and determined that no defect existed and at Madison Street,
9 already addressed in detail.

10 Unfortunately, because WUTC apparently waited so long before reinspecting the
11 alleged defects, the potential certainly exists for new defects to have formed. Because
12 significant time had passed prior to reinspection, it may have incorrectly appeared to WUTC
13 that no repairs had been made. (Owen Decl. ¶ 34). As explained above, BNSF has
14 committed to repairing these defects again and in certain cases has already made the repairs
15 (and, indeed, has in a show of good faith made repairs it was not legally obligated to make).

16 WUTC contends that BNSF did not self-report the violations. While it is unclear to
17 what extent BNSF was aware of the defects when they first arose, the record demonstrates
18 that BNSF does identify defects on its own initiative. For example, in recognition of issues
19 posed by maintaining a crossing heavily used by the Siper Quarry, BNSF has slated the Siper
20 Road crossing for a full rebuild and replacement. BNSF planned this replacement of its own
21 accord and prior to BNSF's receipt of WUTC's Notice of Penalties. BNSF has also been
22 proactive at the Aldergrove Road crossing, determining that the clear pine planks were
23 unsuitable for the environment and beginning to use an improved surface in the form of
24 gumwood planks.

25 BNSF has either corrected each of the seven defects, determined and explained to
26 WUTC staff that certain defects are the responsibility of the road authority, or inspected the
27 alleged defect and determined that none existed. To the extent new or recurring defects have

1 arisen, BNSF has either repaired those defects again or has committed to repairing them in
2 short order.

3 As WUTC acknowledges, it has not issued any penalty assessments to BNSF in at
4 least the last ten years. The reason for this is that BNSF has respected and complied with
5 WUTC rules and regulations. Again, as WUTC acknowledges, BNSF has a record of
6 compliance and cooperation with WUTC. BNSF is committed to ensuring that the
7 miscommunication that resulted in this penalty assessment does not occur again.

8 As WUTC notes, BNSF is the largest railroad company operating in Washington.
9 BNSF transports more than fifty percent of the state's intermodal cargo handled by the state's
10 major ports and nearly seventy percent of its grain and industrial products to and from
11 national and international markets. BNSF alone employs more than 3,500 people within the
12 state and spends more than \$100 million annually to maintain and expand our rail
13 infrastructure – of critical importance to a leading trading state geographically remote from
14 major U.S. population centers and markets. BNSF's number one priority is the safety of its
15 employees, customers and members of the public coming into contact with its lines and
16 facilities. BNSF believes that in responding to the WUTC's original seven defect notices, it
17 has acted consistently with its commitment to safety.


18 RCW 81.04.405 provides:

19 The commission may, upon written application therefor, received within
20 fifteen days, remit or mitigate any penalty provided for in this section or
21 discontinue any prosecution to recover the same upon such terms as it in its
22 discretion shall deem proper, and shall have authority to ascertain the facts
upon all such applications in such manner and under such regulations as it may
deem proper.

23 BNSF respectfully requests that WUTC remit the penalties discussed herein or discontinue its
24 prosecution to recover the same. If WUTC will not, BNSF requests (1) a hearing; and (2) a
25 settlement conference well in advance of the hearing to determine whether the parties can
26 come to a mutually agreeable resolution, something BNSF believes WUTC has the authority
27 to do under the broad language of the statute.

1
2 DATED this 14 day of March 2013, at Seattle, Washington.

3 Montgomery Scarp, PLLC

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5 

6 Tom Montgomery, WSBA # 19998

7 Teresa Bryan, WSBA # 38588

8 1218 Third Ave., Ste. 2700

9 Seattle, WA 98101

10 Telephone: (206) 625-1801

11 Facsimile: (206) 625-1807

12 tom@montgomeryscarp.com

13 teresa@montgomeryscarp.com

14 Attorneys for Respondent BNSF

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CERTIFICATE OF SERVICE

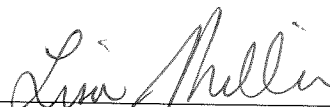
I am over the age of 18; and not a party to this action. I am the assistant to an attorney with Montgomery Scarp, PLLC, whose address is 1218 Third Avenue, Suite 2700, Seattle, Washington, 98101.

I hereby certify that COVER LETTER; WUTC PENALTY ASSESSMENT RESPONSE FORM; BNSF RAILWAY COMPANY'S RESPONSE TO PENALTY ASSESSMENT AND REQUEST FOR HEARING AND PRE-HEARING SETTLEMENT CONFERENCE; DECLARATION OF CHAD SCHERWINSKI; DECLARATION OF CHRIS CONOVER; DECLARATION OF ROBERT OWEN; DECLARATION OF JAMES DENSMORE have been electronically filed with the WUTC via its records center web portal and the original and one copy delivered via FED EX to the records center at the following address:

WUTC
Records Center
1300 S. Evergreen Park Drive SW
P.O. Box 47250
Olympia, WA 98504-7250

I declare under penalty under the laws of the State of Washington that the foregoing information is true and correct.

DATED this 14th day of March, 2013, at Seattle, Washington.


By: Lisa Miller, Paralegal