

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

<p>In the Matter of a Penalty Assessment Against</p> <p>BNSF RAILWAY CO.</p> <p>in the amount of \$3,000</p>	<p>DOCKET TR-220802</p> <p>ORDER 01</p> <p>DENYING MITIGATION</p>
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**BACKGROUND**

- 1 On November 9, 2022, the Washington Utilities and Transportation Commission (Commission) issued a Penalty Assessment against BNSF Railway Co. (BNSF or Company) in the amount of \$3,000 for one violation of Washington Administrative Code (WAC) 480-62-225. The Penalty Assessment alleges that, despite repeated notifications from Commission staff (Staff), the Company failed to correct defects related to deteriorated asphalt, creating an uneven surface for roadway users at the 24<sup>th</sup> Street Southeast crossing near Sumner, Washington, identified as 085675L.
- 2 On December 2, 2022, BNSF filed an application for mitigation, requesting a decision based on the information provided. In its application, the Company acknowledged the violation and in support of its request, submitted proof that BNSF had corrected the defects.
- 3 On December 2, 2022, Commission staff (Staff) filed a response recommending the Commission deny the Company’s request for mitigation. Staff states that BNSF did not provide any new information or supporting evidence regarding its previous failure to correct the defects. Staff states that BNSF failed to correct the defect for 18 months despite two defect notices, two compliance letters, and extensive correspondence from Staff regarding how to comply with the rule.

**DISCUSSION AND DECISION**

- 4 Pursuant to WAC 480-62-160, the Commission encourages voluntary compliance with its rules, but may pursue administrative actions, including penalty assessments, for a company’s failure to comply with Commission rules. WAC 480-62-225 requires railroad companies to maintain highway-rail grade crossing surfaces in a state of repair.

5 The Commission considers several factors when entertaining a request for mitigation, including whether the company introduces new information that may not have been considered in setting the assessed penalty amount, or explains other circumstances that convince the Commission that a lesser penalty will be equally or more effective in ensuring the company's compliance.<sup>1</sup>

6 We find that BNSF failed to introduce any new information that would warrant mitigation of the penalty. BNSF is obligated to repair any defects in the crossing surface. In this instance, Staff provided BNSF ample notice and opportunity for BNSF to voluntarily comply with the requirement without incurring a penalty. The Penalty Assessment was not issued as a direct result of the defect, but as a result of BNSF's continued refusal to meet its obligations. The fact that BNSF now, only after incurring a financial penalty, performed as required does not excuse or explain the previous 18 months of noncompliance. We find that the \$3,000 penalty is reasonable, warranted, and presumably sufficient to persuade BNSF to timely comply with WAC 480-62-225 in the future to avoid further penalties.

### ORDER

#### THE COMMISSION ORDERS THAT:

- 7 (1) BNSF Railway Co.'s request for mitigation is DENIED.
- 8 (2) BNSF Railway Co. is assessed a penalty of \$3,000.

DATED at Lacey, Washington, and effective February 2, 2023.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

AMANDA MAXWELL  
Executive Director and Secretary

**NOTICE TO PARTIES: This is an order delegated to the Executive Secretary for decision. As authorized in WAC 480-07-904(3), you must file any request for**

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<sup>1</sup> Docket A-120061, Enforcement Policy for the Washington Utilities and Transportation Commission (January 7, 2013) at ¶19.

**Commission review of this order no later than 14 days after the date the decision is posted on the Commission's website.**