



Travis Owsley  
Assistant  
General  
Attorney

**BNSF Railway Company**  
Law Department  
PO Box 961039  
Fort Worth, TX 76131

Tel 817-352-2255  
[travis.owsley@bnsf.com](mailto:travis.owsley@bnsf.com)

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February 20, 2020

Rayne Pearson  
Director, Administrative Law Division  
Washington Utilities and Transportation Commission  
621 Woodland Square Loop S.E.  
Lacey, WA 98504-7250

State Of WASH.  
UTIL. AND TRANSP.  
COMMISSION

**RE: Penalty Assessment TR-191025 — BNSF Railway Company**

Dear Judge Pearson:

Please find enclosed the response of BNSF Railway Company in the above-referenced matter. A courtesy copy of BNSF's response along with payment of the penalty will follow by U.S. mail.

Sincerely,

A handwritten signature in blue ink that reads "Travis Owsley".

Travis Owsley  
Assistant General Attorney

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION  
PENALTY ASSESSMENT TR-191025

**PLEASE NOTE:** You must complete and sign this document, and send it to the Commission within 15 days after you receive the penalty assessment. Use additional paper if needed. I have read and understand RCW 9A.72.020 (printed below), which states that making false statements under oath is a class B felony. I am over the age of 18, am competent to testify to the matters set forth below and I have personal knowledge of those matters. I hereby make, under oath, the following statements.

1. **Payment of penalty.** I admit that the violation occurred and enclose \$100 in payment of the penalty.

2. **Contest the violation(s).** I believe that the alleged violation(s) did not occur for the reasons I describe below (**if you do not include reasons supporting your contest here, your request will be denied**):

a) I ask for a hearing to present evidence on the information I provide above to an administrative law judge for a decision.

OR  b) I ask for a Commission decision based solely on the information I provide above.

3. **Application for mitigation.** I admit the violations, but I believe that the penalty should be reduced for the reasons set out below (**if you do not include reasons supporting your application here, your request will be denied**):

See attachment.

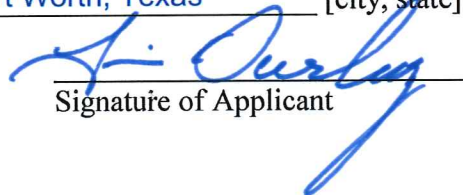
a) I ask for a hearing to present evidence on the information I provide above to an administrative law judge for a decision.

OR  b) I ask for a Commission decision based solely on the information I provide above.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing, including information I have presented on any attachments, is true and correct.

Dated: February 20, 2020 [month/day/year], at Fort Worth, Texas [city, state]

BNSF Railway Company  
Name of Respondent (company) – please print

  
Signature of Applicant

## ATTACHMENT

BNSF Railway Company ("BNSF") does not contest the assessed penalty and is not seeking any mitigation of the penalty amount; however, BNSF wishes to record its objections to the penalty assessment on the grounds that the reporting requirement as currently codified in WAC § 480-62-310 is likely preempted by federal law. Railroad accident and incident reporting is subject to the exclusive jurisdiction of the Federal Railroad Administration pursuant to the Federal Railroad Safety Act of 1970 ("FRSA"). The FRSA express provides that laws, regulations, and orders related to railroad safety and security shall be national uniform to the extent practicable and further provides that a state may only adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation covering the subject matter of the state requirement. 49 U.S.C. § 20106.

Here, the FRA has promulgated comprehensive regulations covering the subject matter of railroad accident and incident reporting. *See* 49 C.F.R. pt. 225. Included within these regulations is Section 225.9, which requires railroads to immediately report to the National Response Center when a train incident at a highway-rail grade crossing results in a fatality within 24 hours of the incident. 49 C.F.R. 225.9(a)(2)(iii). Unlike the Washington regulation, Section 225.9 does not establish a prescriptive time interval during which the report must be made but rather requires that the report be made as soon as possible following the time that the relevant fact determination is made, taking into consideration the health and safety of those affected by the incident, including actions to protect the environment. *Id.* To the extent that Washington's requirement is inconsistent with the federal requirement, it is likely preempted by federal law.

Notwithstanding any questions regarding preemption, BNSF understands the State's interest in receiving timely information about fatalities and sees the value in communicating this information to the Commission as soon as possible, which is why BNSF has an established record of making these reports to the Commission in compliance with WAC § 480-62-310. In order to avoid a lengthy dispute over the matter, BNSF will pay the penalty amount assessed.

**CERTIFICATE OF SERVICE**

This is to certify that on February 20, 2020, a true and correct copy of the foregoing was served via e-mail to the parties' representatives as follows:

The WUTC: Assistant Attorney General Sally Brown  
sally.brown@utc.wa.gov



Travis Owsley  
Attorney for Respondent BNSF Railway Company