

BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

BNSF RAILWAY COMPANY,)	
)	DOCKET NO. TR-090121
Petitioner,)	
)	PETITIONER BNSF'S
vs.)	POST-HEARING BRIEF
)	
SNOHOMISH COUNTY,)	
)	
Respondent.)	

TABLE OF CONTENTS

INTRODUCTION	1
FACTUAL BACKGROUND	2
ARGUMENT	4
The legal test—public safety versus convenience and necessity.	4
Safety concerns require closure.	5
All railroad crossings are inherently dangerous.	5
The Logen Road crossing will be exceptionally hazardous as a matter of law once BNSF completes the siding extension.	7
No warning devices can make the Logen Road crossing acceptably safe.	8
Using nearby, safer crossings will mitigate the closure’s minimal impact on public convenience and necessity.	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES

<i>BNSF Ry. Co. v. City of Mount Vernon</i> , Docket TR-070696 (Nov. 4, 2008)	4, 7
<i>BNSF v. City of Ferndale</i> , TR-940330 (March 31, 1995)	5, 7
<i>BNSF v. City of Sprague</i> , Docket TR-010684 (Jan. 10, 2003)	7
<i>BNSF v. Skagit County</i> , TR-940282 (December 13, 1996)	5, 7
<i>Dep't of Transp. v. Snohomish County</i> , 35 Wn.2d 247, 212 P.2d 829 (1949)	4, 6
<i>Reines v. Chicago, Milwaukee, St. Paul & Pac. R. Co.</i> , 195 Wn. 146, 80 P.2d 406 (1938)	6
<i>Spokane County v. Burlington Northern</i> , Cause No. TR-1148 (Sept. 1985)	7
<i>State ex rel. Oregon-Washington R.R. & Nav. Co. v. Walla Walla County</i> , 5 Wn.2d 95, 104 P.2d 764 (1940)	6
<i>Union Pac. R.R. v. Spokane County</i> , TR-950177 (July 3, 1996)	5

STATE STATUTES

RCW 81.53.020	6
RCW 81.53.060	4
RCW 81.53.080	6

INTRODUCTION

1 BNSF's petition to close the Logen Road public crossing presents the WUTC
with one straightforward issue:

- 2
- In Washington, closure of a public railroad crossing is proper when the crossing's hazards outweigh the need for it to remain open to public travel. The Logen Road crossing will become exceptionally hazardous once BNSF completes the Stanwood siding project; Logen Road has a low traffic volume, and suitable alternate crossings exist nearby. In light of these undisputed factors, should the WUTC grant BNSF's closure request?

3 BNSF, WSDOT, Snohomish County, and WUTC Staff each answer "yes."¹
The only opposing party, Mr. Logen, argues that crossing facilitates his family's
private farming practices on either side of their namesake road.²



Exh. 17 p. 2.

¹ Bloodgood, TR 135:17-23; Jeffers, TR 53:9-11; Hunter, TR 241:14-23.

² See *Petition for Intervention of Lynn F. Logen* at 2:10-15.

FACTUAL BACKGROUND

4 Logen Road is a little-used rural road north of the Stanwood city limits in Snohomish County, Washington.³ The surrounding area is almost entirely farmland.⁴ BNSF's railroad tracks cross Logen Road at a public crossing near the road's east end.⁵ The nearest neighboring crossings are within a half-mile to the north—300th St./Dettling Road—and one-and-a-half miles to the south—271st St. in Stanwood.⁶ On average, 142 motorists drive on Logen Road per day, a very low rate when compared to 300th St./Dettling Road (800 vehicles) and 271st St. (7800 vehicles).⁷ The seven single family residences whose driveways connect to Logen Road generate approximately 50% of Logen Road's traffic.⁸

5 The tracks running across Logen Road make up part of the mainline rail for freight and passenger trains primarily traveling to and from Seattle, Vancouver B.C., and the towns and cities in between.⁹ Thirteen trains—nine freight and four passenger—travel through the Logen Road crossing every day.¹⁰ The trains travel as fast as 79 m.p.h.¹¹

³ See Exh. 16.

⁴ *Id.*

⁵ *Id.*; see also Exh. 17 pp. 1-2.

⁶ Exh. 7 pp. 3-4.

⁷ Exh. 10 p. 4.

⁸ Exh. 10 p. 4. One of those seven residences also has direct access to Pioneer Highway. *Id.*

⁹ Wagner, TR 11:18-22.

¹⁰ Exh. 1 p. 3; Wagner, TR 11:23-12:5.

¹¹ Exh. 3.

6 An existing siding track just south of Logen Road, in Stanwood, helps dispatchers control train traffic through the area.¹² Siding tracks parallel the mainline track at periodic intervals and allow trains to weave past and around one another as they journey up and down the rail corridor.¹³ If a long freight train cannot fit into a particular siding track, however, that train must continue to the next long-enough siding before it can pull off the mainline.¹⁴ This can cause delays for faster passenger trains and higher-priority freight trains needing to pass low-priority trains.¹⁵ To minimize rail congestion, then, each siding track should be long enough for the longest trains.¹⁶ BNSF set its minimum standard length for new and extended sidings at 8,500 feet, since freight trains measure up to 8,000 feet or more.¹⁷ The usable siding at Stanwood currently measures 4,800 feet.¹⁸

7 Train traffic between Seattle and Canada grows more and more congested, with projected future increase in the number of freight and passenger trains.¹⁹ WSDOT will complete a new Amtrak station in Stanwood this summer, which would backlog train traffic even more as passenger trains stop at the station instead of traveling past the town.²⁰ In order to minimize bottlenecks near the Amtrak station and help smooth rail traffic along the entire line, BNSF plans to lengthen the existing

¹² Wagner, TR 11:12-14.

¹³ *Id.* at TR 13:1-15.

¹⁴ *See id.* at TR 14:10-15:2.

¹⁵ *Id.* at TR 13:1-15; Jeffers, TR 51:12-21.

¹⁶ Wagner, TR 14:19-15:6.

¹⁷ Wagner, TR 11:5-8.

¹⁸ *Id.* at TR 14:14-16; 14:19-15:6.

¹⁹ *See id.* at TR 12:2-15; Jeffers, TR 50:1-19.

²⁰ Jeffers, TR 50:22-51:2.

Stanwood siding track to the north by more than a mile.²¹ The extended siding will then run through the Logen Road crossing.²²

8 Once BNSF completes the siding project, parked freight trains may stretch up to 1/2 mile north of Logen Road and all the way south into the Stanwood city limits.²³ Because passenger trains can accelerate quickly, they will still travel across Logen Road at speeds up to 79 m.p.h., even after a stop at the Amtrak station.²⁴ Logen Road will bisect the siding as extended, so BNSF petitioned to close the crossing as too dangerous for public travel.²⁵

ARGUMENT

9 **1. The legal test—public safety versus convenience and necessity.**

10 RCW 81.53.060 allows railroad companies to petition the WUTC when the railroad believes “that the public safety requires” the “closing or discontinuance of an existing highway crossing, and the diversion of travel thereon to another highway or crossing.”²⁶ The WUTC then determines “the convenience and necessity of those using the crossing and whether the need of the crossing is so great that it must be kept open notwithstanding its dangerous condition.”²⁷ The WUTC considers the levels of motor vehicle and train traffic; the number of people closure would affect; whether

²¹ Jeffers, TR 52:6-10; *see* Exh. 4.

²² *See* Exh. 4.

²³ *See id.* Freight trains cannot be parked within 50' of the Wolfkill spur track or 250' of 300th/Dettling Road. Wagner, TR 28:2-16. A 1,203' Amtrak “pocket” siding will be located between 300th/Dettling Road and 102nd St. *Id.* at TR 22:10-24:13. The Amtrak pocket is too short for typical freight train use. *Id.* at 24:8-24.

²⁴ Jeffers, 54:22-55:9.

²⁵ *See* Exh. 1.

²⁶ RCW 81.53.060.

²⁷ *Dep't of Transp. v. Snohomish County*, 35 Wn.2d 247, 254, 212 P.2d 829 (1949). *See also BNSF Ry. Co. v. City of Mount Vernon*, Docket TR-070696, Final Order on Review, Granting Administrative Review; Modifying Initial to Close Hickox Road Grade Crossing Subject to Conditions (Nov. 4, 2008) ¶ 60.

alternative, safer crossings nearby; and whether those crossings can absorb the additional traffic.²⁸

11 **A. Safety concerns require closure.**

12 Generally speaking, “in the interest of motor vehicle safety it is recommended
13 that at-grade railway crossings be eliminated whenever possible.”²⁹

13 **(1) All railroad crossings are inherently dangerous.**

14 As Operation Lifesaver presenter and rail safety expert Mr. Agee explained,
“people are more likely to die in a vehicle/train collision at the rate of about 20 times
more likely than they would be with a vehicle/vehicle incident.”³⁰ The force of a train
striking a car equals that of an automobile running over a soda can.³¹

15 A number of drivers misperceive the risk of a grade crossing incident being
fatal.³² Some incorrectly estimate the time between when the gates go down and when
a train arrives at the crossing.³³ Too many people believe that trains can stop
quickly.³⁴ Drivers can also misperceive the threat of a slow-moving train.³⁵ Some
motorists even drive into the sides of trains.³⁶ In short, too many drivers and
pedestrians ignore warning devices—either because they’re confused, impatient, risk-

²⁸ See *BNSF v. City of Ferndale*, TR-940330 (March 31, 1995); *BNSF v. Skagit County*, TR-940282 (December 13, 1996); *Union Pac. R.R. v. Spokane County*, TR-950177 (July 3, 1996).

²⁹ Exh. 7 p. 7.

³⁰ Agee, TR 149:13-16.

³¹ *Id.* at TR 150:10-24.

³² *Id.* at TR 161:20-23.

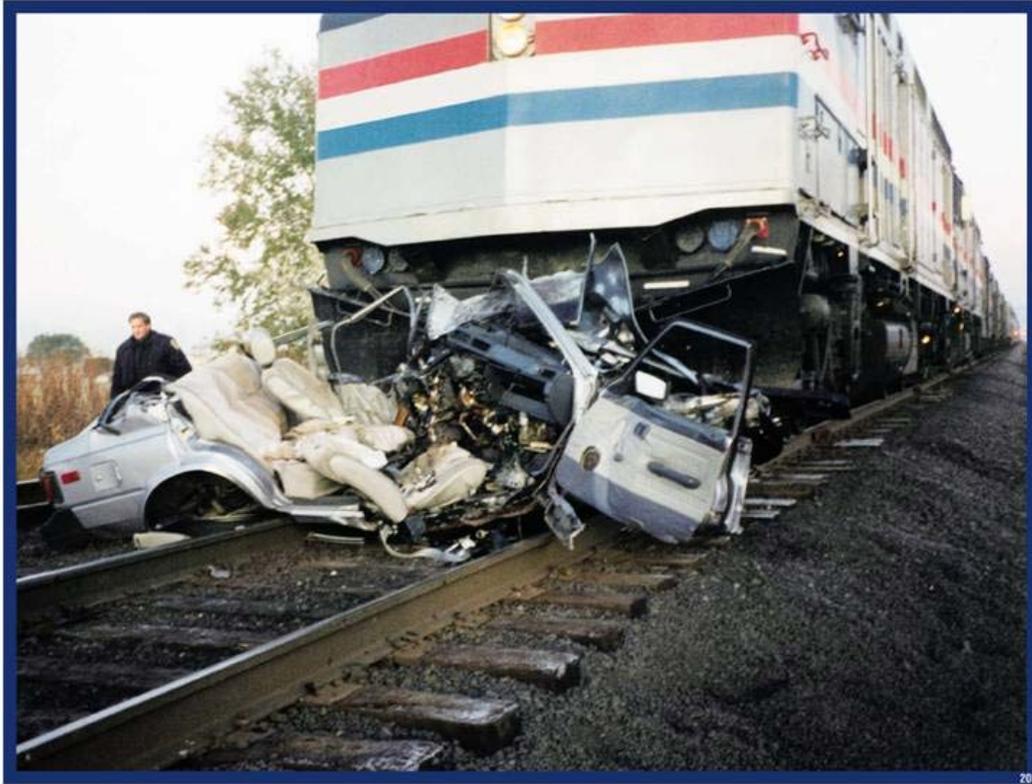
³³ *Id.* at TR 162:5-23.

³⁴ *Id.* at TR 163:16-164:6.

³⁵ *Id.* at TR 163:10-15.

³⁶ MacDonald, TR 217:8-21.

takers, or “following the leader.”³⁷ Train collisions can have devastating consequences.³⁸



Exh. 12 p. 11

16 Acknowledging that all grade crossings are inherently dangerous, Washington law states that railway-highway crossings must be overpasses or underpasses whenever possible.³⁹ The law also recognizes the need for clear visibility near grade crossings.⁴⁰

³⁷ Agee, TR 170:9-23; MacDonald, TR 207:15-208:6.

³⁸ See, e.g., Exh. 12 pp. 10-11; Exh. 14.

³⁹ RCW 81.53.020; see *Reines v. Chicago, Milwaukee, St. Paul & Pac. R. Co.*, 195 Wn. 146, 150, 80 P.2d 406 (1938); *State ex rel. Oregon-Washington R.R. & Nav. Co. v. Walla Walla County*, 5 Wn.2d 95, 104, 104 P.2d 764 (1940); *Snohomish County*, 35 Wn.2d at 250-51 and 257.

⁴⁰ See RCW 81.53.080 (prohibiting visual obstructions within one hundred feet of a grade crossing).

17 (2) ***The Logen Road crossing will be exceptionally hazardous as a matter of law***
once BNSF completes the siding extension.

18 The WUTC emphasizes the dangers at railroad crossings in the middle of
siding tracks:

[A]t-grade crossings with more than one set of tracks are significantly more dangerous than at-grade crossings with only a single set of tracks. When a siding track creates the potential to obstruct a motorist's view of the main line track, the crossing becomes ***exceptionally hazardous***.⁴¹

19 The exceptional safety hazards at a crossing in the middle of a curved siding track include, but are not necessarily limited to:

- frequent crossing blockages for variable and sometimes extended lengths of time, at unpredictable intervals;⁴²
- warning device activation for varying lengths of time: this conflicts with the desire for uniform messages conveyed by those devices, and can result in crossing bells clanging continuously for as long as a train is parked through or near the crossing;⁴³
- trains stopped on the siding but not blocking the crossing, which can dangerously impede sight for motorists using the crossing;⁴⁴
- incentives for risky driver behavior, such as trying to beat a train before it parks and blocks the crossing—or, after one train passes, bypassing warning devices and being struck by an unexpected second train;⁴⁵
- temptations for pedestrians to climb over or under trains that are subject to slack action or movement without warning;⁴⁶ and

⁴¹ *Mount Vernon*, Docket TR-070696, Final Order on Review, Granting Administrative Review; Modifying Initial to Close Hickox Road Grade Crossing Subject to Conditions at ¶ 60 (emphasis added); see *BNSF v. City of Sprague*, Docket TR-010684, Fourth Supplemental Order ¶ 53 (Jan. 10, 2003); see also *Skagit County*, Docket TR-940282 (Dec. 13, 1996) at pg. 4; *Ferndale*, Docket TR-940330 (March 31, 1995); and *Spokane County v. Burlington Northern*, Cause No. TR-1148 (Sept. 1985).

⁴² See, e.g., Wagner, TR 16:5-24.

⁴³ MacDonald, TR 184:23-186:8.

⁴⁴ See, e.g., Jeffers, TR 53:20-54:7, 65:10-16; Agee, TR 168:19-169:5.

⁴⁵ Jeffers, TR 53:23-54:7; Agee, TR 152:25-153:10, 168:7-18; MacDonald, TR 194:15-23. Mr. Agee personally observed a motorist ignore the warning devices at Logen Road on March 30, 2009. See *id.* at TR 146:10-147:4.

⁴⁶ Agee, TR 153:13-155:4.

- the crew on a train parked at the siding may not be able to see back to the crossing because of the curve and/or distance.⁴⁷

20 In this case, Logen Road will experience each of those hazards after BNSF extends the Stanwood siding.⁴⁸ Neither Mr. Logen nor any other party contested these facts at the hearing.

21 **(3) *No warning devices can make the Logen Road crossing acceptably safe.***

22 The railroad safety experts testified that four-quadrant gates, extended two-quadrant gate arms, and median barriers would not be practical or satisfactory at Logen Road. Two-quadrant gate arms may trap motorists given the width of the road.⁴⁹ Four-quadrant gates are meant to temporarily seal crossings in quiet zones, are impractical given the width of the road, and would cost approximately \$300,000-\$350,000 to install.⁵⁰ Additionally, motorists can drive through the “exit” lane even after the “entrance” gate lowers.⁵¹ And pedestrians can easily lift the gate arms at either two-quad or four-quad gates.⁵² The roadway is too narrow for a median barrier.⁵³

23 **B. Using nearby, safer crossings will mitigate the closure’s minimal impact on public convenience and necessity.**

24 The safety risks eclipse the scope of the public’s need for the Logen Road crossing. In this case, both BNSF’s and the County’s traffic engineers concluded that

⁴⁷ Agee, TR 154:6-18.

⁴⁸ See Exh. 1; see also generally testimony of MacDonald, Agee, Jeffers, Hunter and Wagner.

⁴⁹ MacDonald, TR 202:18-23.

⁵⁰ *Id.* at TR 186:11-187:3, 200:4-203:8; Hunter, TR 237:18-238:16.

⁵¹ MacDonald, TR 206:3-207:2.

⁵² *Id.* at TR 187:4-14.

⁵³ *Id.* at TR 207:3-14.

using either of the adjacent crossings will mitigate the closure's minimal inconvenience to the public.⁵⁴ Both engineers recommended that the WUTC grant BNSF's petition to close the Logen Road crossing.⁵⁵

25 No party rebutted the following facts:

- There are only seven homes on Logen Road, one of which also has direct access to Pioneer Highway.⁵⁶
- Even if the Logen Road crossing were to remain open, its unscheduled blockages will discourage motorists traveling between Old Pacific Highway and Pioneer Highway from using the crossing.⁵⁷
- Logen Road—with its 143 average daily traffic—has low significance in the overall transportation network in North Stanwood and Snohomish County.⁵⁸
- Closure will not significantly impact other roadways.⁵⁹
- Significant impacts on emergency response times are not expected.⁶⁰
- The City of Stanwood's Fire Station is much closer to Logen Road than the North County Regional Fire Authority's station, and their mutual aid agreements provide that Stanwood can respond to Logen Road emergencies if necessary.⁶¹
- Future development at Logen Road is unlikely due to zoning and impractical because of the expense to reconfigure the roadway.⁶²

⁵⁴ Exh. 7 p.7; Norris, TR 73:16-17; Bloodgood, TR 136:17-137:17.

⁵⁵ *Id.*; see also Exh. 7 p. 8.

⁵⁶ Exh. 7 p. 4.

⁵⁷ *Id.* at p. 7.

⁵⁸ Exh. 7 p. 7.

⁵⁹ *Id.* (stating that the traffic diverted from Logen Road, when compared to existing traffic volumes on Dettling Road/300th St. and 271st St., “would not be of a magnitude to be detected by traditional traffic counting equipment.”).

⁶⁰ *Id.* at pp. 6-7; see also Hunter, TR 233:12-16.

⁶¹ See Exh. 29 (Mutual Aid Agreements); Exh. 7 p. 6.

⁶² Exh. 7 p. 7.

26 The overwhelming weight of testimony at the hearing—and the unanimous
opinion of rail safety experts—is that the exceptional safety hazards that will exist at
the Logen Road crossing simply outweigh the minimal impact on public travel.

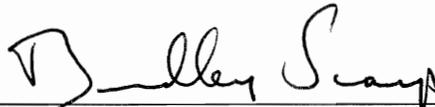
27 Logen’s private, family interest arguments do not pass statutory or regulatory
muster. Logen’s sole contention involves convenience in driving his tractor from one
side of the crossing to the other to facilitate his *private* farming practices.⁶³ From a
legal standpoint, this argument does not address or impact *public* safety. And as a
practical matter the argument lacks merit in light of his testimony that he has not
farmed the parcel east of Logen Road in over 15 years.⁶⁴ The crossing should be
closed.

CONCLUSION

28 Once BNSF completes the Stanwood siding project, the Logen Road crossing
will be exceptionally hazardous. Its dangerous conditions and increased risk to public
safety at the crossing far outweigh the public’s need for the crossing or convenient
access between Old Pacific Highway and Pioneer Highway. BNSF’s petition to close
the crossing should be granted.

DATED this 8th day of May, 2009.

Montgomery Scarp MacDougall, PLLC



Bradley Scarp, WSBA # 21453
Kelsey Endres, WSBA # 39409
Attorneys for Petitioner BNSF

⁶³ See *Petition for Intervention of Lynn F. Logen* at 2:10-15; Hunter, TR 239:9-25; Logen, TR 267:23-268:6.

⁶⁴ Logen, TR 288:24-289:1.

CERTIFICATE OF SERVICE

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

I hereby certify that the original and 12 copies of *PETITIONER BNSF'S POST-HEARING BRIEF* has been sent via FedEx to David W. Danner at WUTC and Word Perfect and PDF versions sent by electronic mail to records@wutc.wa.gov. I also certify that true and complete copies have been sent via Electronic mail and U.S. Mail to the following interested parties:

Adam E. Torem
1300 S. Evergreen Park Dr. SW
P.O. Box 47250
Olympia, WA 98504-7250

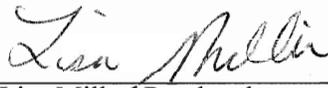
Jonathan Thompson
Assistant Attorney General
1400 S. Evergreen Park Dr. S.W.
PO Box 40128
Olympia, WA 98504

Justin Kasting
Deputy Prosecuting Attorney
3000 Rockefeller Avenue
M/S 504
Everett, WA 98201

Lynn Logen
15017 S.E. 43rd Place
Bellevue, WA 98006-2413

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

DATED this 8th day of May, 2009 at Seattle, Washington.



Lisa Miller, Paralegal