

BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

BNSF RAILWAY COMPANY,

Petitioner,

vs.

SNOHOMISH COUNTY,

Respondent.

)
) DOCKET NO. TR-090121

)
) **BNSF RAILWAY'S PETITION TO**
) **REOPEN AND PETITION FOR**
) **ADMINISTRATIVE REVIEW**

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I. RELIEF REQUESTED

1 BNSF agrees to make the road improvements described in the conditions
attached to the initial order, but requests the Commission modify the timing in which
BNSF must satisfy Conditions (2)(b) and (2)(c)—improving road conditions at the
300th Street NW / Dettling Road grade crossing and constructing a turnaround on
Logen Road. The initial order requires BNSF to fulfill both conditions prior to
closing the crossing, however, that condition is impractical from a construction
standpoint.

2 Closing the Logen Road crossing, upgrading the signals at Dettling, and
constructing the turnaround are each individual components of the overall Stanwood
Siding project—and each will be completed before the siding track through Logen
Road becomes operational. But as a matter of operational issues and cost-efficiency,
BNSF must close the Logen Road crossing in order to construct the turnaround, and
before modifying the Dettling crossing.

3 BNSF also petitions to reopen the record to admit an email from BNSF Project
Engineer Enrique Mondragon, explaining the operational issues involved.

4 BNSF *does not* petition to change the initial order's conditions relating to 271st
Street in Stanwood; that condition can and will be met prior to closing the Logen
Road public crossing.

II. STATEMENT OF FACTS

A. The Logen Road crossing closure is just one piece of the entire Stanwood Siding project.

5 BNSF Manager Public Projects Rick Wagner explained how closing the Logen
Road crossing fits into the siding project:

Q. Mr. Wagner, how far is Dettling Road, is that another name for 300th?

A. Yes, sir.

* * *

Q. [I]s the petition to close Logen Road part of the overall plan for the project, the siding project extension?

A. Yes.

Q. And is there also a plan for any upgrades or any work on the other crossings, adjacent crossings?

A. Yes, at 300th/Dettling as well as at 102nd.

Q. Which is north of 300th?

A. Yes. And then back at 271st here in Stanwood.

Q. Okay. Can you just tell us what are the, to the best of your knowledge and understanding as part of - as project engineer, what are those upgrades to the two crossings to the north?

A. Well --

Q. The north of Logen?

A. To the north of Logen, to the north there's going to be some improvements to the approaches on either side. *Because as we add the new main on the outside, on the west side, that changes the geometry of the approaches. So your grades that bring you up to the level to make the crossing need to be adjusted, as well as the signals will need to be relocated, crossing arms, that sort of thing.*

Q. Those crossings have active warning devices?

A. Yes, sir.

Q. And are they expected to continue to have active warning devices?

A. Oh, yes, yes.¹

¹ Wagner, TR 29:14-30:7 (emphasis added).

B. BNSF must close the Logen Road crossing at the beginning of the siding construction project.

7 The Stanwood siding project first involves upgrading the devices at 271st, then constructing the turnaround at Logen Road/closing the Logen Road public crossing. As Project Engineer Mr. Mondragon explains in an email dated November 6, 2009:²

8 The bid package will allow the contractor to decide the method and means to do the constructions in order to give the BNSF the most cost effective bid. The crossing upgrade at 271st Street in Stanwood will not be part of the bid package. There is only signal work to do at this crossing and can be done by BNSF signal before any civil work is started. The Cul-de-Sac work on the east side of Logan Road crossing will be in the bid package. We will put in the bid package that the Cul-de-sac will have to be in service before Logan Road can be closed and removed for construction of the new grade on the west side of the existing mainline. When the Cul-de-Sac construction work begins the crossing will have to be closed to the public during construction. We estimate that the total Stanwood project civil work will take about 90 days to complete unless there are construction delays.

9 The next step is extending and grading the existing roadbed to accommodate two sets of tracks (both the mainline and siding) instead of just the existing mainline track, for which the Logen Road crossing must be closed:

10 The crossing upgrades at 300th & 102nd (Old Pioneer HWY) Streets will be done during the grading and track construction. The grading will start with the clearing, grubbing and removal of obstructions in the new grade alignment. We feel that the most cost effective starting point for the grading will be in the Logan Rd area. The contractor will begin by building the base and start bringing in fill material to grade and roll it in 4 to 6 inch lifts. This is the preferred method with the truck entrances at one end of the grade and an exit at the other end of the grade as the grade is extended. When the grade approaches 300th & 102nd street the contractor will close one crossing for 1 to 2 weeks to do the road approach and build the grade though the road. The track grade in the crossing will be covered and a temporary road surfaced will be replaced in order to reopen the crossing before starting the next crossing. During this time the BNSF signal people will be preparing the upgrades at each crossing. When the TLM³ starts laying track the crossing will be close for a day and

² Production of this email from Mr. Mondragon to counsel does not expressly or implicitly waive any broader attorney-client privilege.

³ TLM = Track Laying Machine.

the temporary road surface will be removed for the TLM. After the TLM clears the road crossing the track and signal people will put in a complete at grade crossing upgrade and in service by the end of the day. The same method will be done on the second crossing the next day or so, and both crossing will be in service for vehicle traffic with full upgrades. The new main line will still be under construction and cut over and placed in service for train traffic later.⁴

III. STATEMENT OF THE ISSUE

11 Whether the Commission should grant BNSF's Petition to Reopen and Petition for Administrative Review, and modify Conditions (2)(b) and (2)(c) of the initial order as specifically requested herein?

IV. EVIDENCE RELIED UPON

12 BNSF relies upon the pleadings, transcripts, exhibits and initial order contained in the record, as well as Mr. Mondragon's November 6, 2009 email, reproduced above and offered into the record in the instant petition to reopen.

V. ARGUMENT AND PROPOSED LANGUAGE

13 The commission "may by final order adopt, modify, or reject an initial order after considering the pleadings and the record."⁵ And any party may file a Petition to Reopen a contested proceeding to permit receipt of evidence essential to a decision for good and sufficient cause before entry of a Final Order.⁶ BNSF so petitions to reopen to present Mr. Mondragon's email dated November 6, 2009, which provides necessary explanation to this petition for review.

⁴ See Mondragon email, attached.

⁵ WAC 480-07-825(9).

⁶ WAC 480-07-830.

A. It will be reasonably safe to temporarily reroute Logen Road traffic to Dettling with its existing warning devices.

14 Minimal, if any, traffic is expected to reroute to Dettling Road once the Logen Road crossing is closed, so there is no pressing safety need to alter Dettling before closing Logen. Traffic expert Gary Norris testified as follows:

15 Q. If we -- if the tribunal orders that the Logen Road public crossing be closed, where will that traffic be diverted to between the two adjacent crossings?

A. *The majority of the traffic obviously as shown from the traffic counts itself are oriented to the south, as I stated, to the activity center in downtown Stanwood, so most of that traffic is coming either from or going to that area. Very little or a small percentage is going to the north which would use Dettling Road.* So the major focus would be down to 271st as an alternative crossing. . . .

Q. And when you say, and I'm looking at page 7 where I think you wrote what you just said, traffic diverted from Logen Road would not be of a magnitude to be detected by traditional traffic counting equipment, does that apply to the Dettling crossing as well?

A. You're talking about the magnitude of the traffic that would be diverted to Dettling Road being within the significance of the volume that currently exists on Dettling?

Q. Yes, you phrased that much better than I did.

A. I believe that's correct.⁷

16 And importantly, no party has ever rebutted the following facts:

17 1. There are only *seven homes* on Logen Road, one of which also has direct access to Pioneer Highway.⁸

2. Logen Road—with its 143 average daily traffic—has low significance in the overall transportation network in North Stanwood and Snohomish County.⁹

3. Closure will not significantly impact other roadways.¹⁰

⁷ Norris, TR 77:18–78:4, 78:24–79:9 (emphasis added).

⁸ Exh. 7 p. 4.

⁹ Exh. 7 p. 7.

B. The Commission lacks authority to interfere with railroad siding track operations or construction procedures.

18 The parties do not have the authority to prevent or regulate how BNSF and WSDOT extend the siding track through the Logen Road crossing to improve railroad operations. The WUTC has previously stated that a crossing “would interfere with the operation of [a] siding.”¹¹ To hold otherwise here would be deemed arbitrary and capricious.

19 Congress and the courts have “long recognized a need to regulate railroad operations at the federal level,” and “Congress’ authority under the Commerce Clause to regulate the railroads is well established.”¹² If the order attempts to regulate BNSF’s operations, preemption analysis is appropriate under the Interstate Commerce Commission Termination Act (“ICCTA”).¹³

20 The ICCTA contains a clear preemption clause, granting the Surface Transportation Board (“STB”) exclusive jurisdiction over nearly all matters of rail regulation.¹⁴ Under 49 U.S.C. § 10501(b), the STB has exclusive jurisdiction over:

21 (1) *transportation by rail carriers*, and the remedies provided in this part [49 USCS §§ 10101 et seq.] with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; *and*

(2) *the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely*

¹⁰ *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.”).

¹¹ *Burlington Northern Santa Fe Railway v. Snohomish County*, Docket No. TR-010194 at ¶ 7.

¹² *City of Auburn v. U.S. Govt.*, 154 F.3d 1025, 1029 (9th Cir. 1998). “Regulation” is defined as the “act or process of controlling by rule or restriction; A rule or order, having legal force, usu[ally] issued by an administrative agency.” BLACKS’ LAW DICTIONARY at 1064 (8th Ed.).

¹³ *See* 49 U.S.C. § 10501(b).

¹⁴ Congress enacted the Interstate Commerce Commission Termination Act (“ICCTA”) in 1995 to deregulate the railroad industry. *See* 49 U.S.C. § 10101 *et seq.*

in one State. . . .

22 Moreover, the ICCTA contains an express preemption clause which states:

23 Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation *are exclusive* and *preempt the remedies provided under Federal or State law*.¹⁵

And Congress “made no blanket exception for a state’s police power when describing the ICCTA’s preemptive scope.”¹⁶

24 One of the first cases to analyze ICCTA preemption held “[i]t is difficult to imagine a broader statement of Congress’ intent to preempt state regulatory authority over railroad operations.”¹⁷ Since then, the preemptive effect of the last sentence of section 10501(b) has been examined by courts in virtually every jurisdiction, which have consistently ruled that the ICCTA preempts state and local statutes, regulations and ordinances which “involve railway matters do not survive ICCTA preemption challenges.”¹⁸

25 In *Maynard v. CSX Transp. Inc.*, plaintiffs argued that state law precluded CSX railroad from permitting a side track to be blocked by trains “for excessive time periods, sometimes in excess of six hours.”¹⁹ The court granted CSX’s motion for

¹⁵ 49 U.S.C. § 10501(b) (emphasis added). The definition section of the ICCTA states “rail carriers” include persons providing “railroad transportation” for compensation, and that “railroad” includes a bridge used by or in connection with a railroad. 49 U.S.C. § 10102(5), (6)(A).

¹⁶ *A & W Properties, Inc. v. Kansas City S. Ry. Co.*, 200 S.W.3d 342, 347 (Tex. App. 2006).

¹⁷ *CSX Transp., Inc. v. Georgia Pub. Serv. Comm.*, 944 F.Supp. 1573, 1581 (N.D. Ga. 1996). ICCTA preemption is not preconditioned on either an effect on interstate commerce or compelled capital expenditures by BNSF. See *CSX Transp. v. AEP Kentucky Coal*, 360 F.Supp.2d 836, 843 (E.D. Ky. 2004).

¹⁸ *Maynard v. CSX Transp. Inc.*, 360 F.Supp.2d 836, 840 (D.C. Ky. 2004); see also *City of Auburn*, 154 F.3d at 1031 (ICCTA preempts state and local environmental review laws as applied to reopening of rail line); *City of Seattle v. Burlington N. R.R.*, 145 Wn.2d 661, 668, 41 P.3d 1169 (2002) (city’s anti-blocking statute preempted by ICCTA); *R.R. Ventures, Inc. v. STB*, 299 F.3d 523, 563 (6th Cir. 2002) (state statutes allowing towns to regulate land use and requiring public roads be kept open and nuisance-free preempted by ICCTA to the extent said laws impinge upon the STB’s exclusive jurisdiction over rail transportation); *Cedarapids Inc. v. Chicago, Cent. & Pac. R.R. Co.*, 265 F.Supp.2d 1005, 1015 (N.D. Iowa 2003) (state law providing for reversion of railroad right-of-way after railroad abandonment preempted).

¹⁹ *Id.* at 838.

summary judgment, explaining that “*regulations of . . . train operations, as well as the construction and operation of . . . side tracks*, [are] under the exclusive jurisdiction of the [Surface Transportation Board] unless some other provision in the ICCTA provides otherwise.”²⁰ The court went on to point out that

[b]ut-for the side track, a [freight] train . . . would have to stay on the mainline track, which would interfere with the movement of commerce. The side tracks allow the mainline track to be open for other rail travel, which enhances the movement of commerce on the rail lines. Because of their essential role, side tracks are a vital part of . . . railroad operations.²¹

26 The *Maynard* court concluded that because the plaintiff’s blocking claims involved the construction and operation of side tracks, the claims were clearly preempted by the ICCTA.

27 Similarly, it constitutes regulation of railroad operations to regulate or micro-manage the operational components of a siding track construction project. Should the Commission uphold the timing requirements of Conditions (2)(b) and (2)(c), that would constitute impermissible regulation of railroad operations. BNSF respectfully argues that such an order would be preempted.

C. Proposed language of final order.

28 BNSF requests the Commission amend the initial order to reflect the record and testimony and suggests the following changes:

²⁰ *Id.* at 842 (quoting *Friburg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 443-44 (5th Cir. 2001)) (emphasis added).

²¹ *Id.*


<i>Initial Order</i>	<i>Original Language</i>	<i>Proposed Language</i>
¶ 74 / Condition (2)	<p>Authority to close the Logen Road crossing is granted upon the following conditions, which must be met prior to closure:</p> <p>(a) First, BNSF shall upgrade and update the safety features at the 271st Street NW at-grade crossing in Stanwood and, as directed by a diagnostic team, provide proportionate funding for pedestrian safety improvements (i.e., sidewalks).</p> <p>(b) Second, BNSF shall work with Snohomish County to improve road conditions at the 300th Street NW / Dettling Road grade crossing.</p> <p>(c) Third, BNSF shall work with Snohomish County to construct a turnaround cul-de-sac on the approach to the railroad tracks on Logen Road.</p>	<p>Authority to close the Logen Road crossing is granted upon the following conditions:</p> <p>(a) First, BNSF shall upgrade and update the safety features at the 271st Street NW at-grade crossing in Stanwood and, as directed by a diagnostic team, provide proportionate funding for pedestrian safety improvements (i.e., sidewalks). This condition shall be fulfilled prior to closure.</p> <p>(b) Second, BNSF shall work with Snohomish County to improve road conditions at the 300th Street NW / Dettling Road grade crossing. This condition need not be fulfilled prior to closure, but shall be fulfilled during the siding track extension project.</p> <p>(c) Third, BNSF shall work with Snohomish County to construct a turnaround cul-de-sac on the approach to the railroad tracks on Logen Road. This condition shall be fulfilled simultaneously with closure to the extent reasonably possible.</p>

VI. CONCLUSION

29 For the foregoing reasons, BNSF petitions the Commission to admit Mr. Mondragon's email and modify Conditions (2)(b) and (2)(c) as specifically requested above.

DATED this 10th day of November, 2009.

Montgomery Scarp MacDougall, PLLC



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

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 11 copies of *BNSF'S PETITION TO REOPEN AND FOR ADMINISTRATIVE REVIEW* 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:

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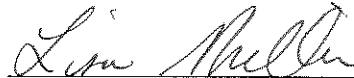
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I declare under penalty under the laws of the State of Washington that the foregoing information is true and correct.

DATED this 10th day of November, 2009 at Seattle, Washington.



Lisa Miller, Paralegal

Kelsey Endres

From: Mondragon, Enrique [Enrique.Mondragon@bnsf.com]
Sent: Friday, November 06, 2009 10:09 AM
To: Kelsey Endres
Subject: Stanwood Siding Extension Project

Kelsey

Per our phone conversation on Wednesday, here is an outline of the Civil Work for the Stanwood Siding Extension project.

The bid package will allow the contractor to decide the method and means to do the constructions in order to give the BNSF the most cost effective bid. The crossing upgrade at 271st Street in Stanwood will not be part of the bid package. There is only signal work to do at this crossing and can be done by BNSF signal before any civil work is started. The Cul-de-Sac work on the east side of Logan Road crossing will be in the bid package. We will put in the bid package that the Cul-de-sac will have to be in service before Logan Road can be closed and removed for construction of the new grade on the west side of the existing mainline. When the Cul-de-Sac construction work begins the crossing will have to be closed to the public during construction. We estimate that the total Stanwood project civil work will take about 90 days to complete unless there are construction delays.

The crossing upgrades at 300th & 102nd (Old Pioneer HWY) Streets will be done during the grading and track construction. The grading will start with the clearing, grubbing and removal of obstructions in the new grade alignment. We feel that the most cost effective starting point for the grading will be in the Logan Rd area. The contractor will begin by building the base and start bringing in fill material to grade and roll it in 4 to 6 inch lifts. This is the preferred method with the truck entrances at one end of the grade and an exit at the other end of the grade as the grade is extended. When the grade approaches 300th & 102nd street the contractor will close one crossing for 1 to 2 weeks to do the road approach and build the grade through the road. The track grade in the crossing will be covered and a temporary road surfaced will be replaced in order to reopen the crossing before starting the next crossing. During this time the BNSF signal people will be preparing the upgrades at each crossing. When the TLM starts laying track the crossing will be close for a day and the temporary road surface will be removed for the TLM. After the TLM clears the road crossing the track and signal people will put in a complete at grade crossing upgrade and in service by the end of the day. The same method will be done on the second crossing the next day or so, and both crossing will be in service for vehicle traffic with full upgrades. The new main line will still be under construction and cut over and placed in service for train traffic later.

I'm sorry that I couldn't put all of this in just a few sentences, must be the engineer in me. If you have any question please call me at the attached number.

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