

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

BNSF RAILWAY COMPANY,)	DOCKET TR-090121
)	
Petitioner,)	ORDER 04
)	
v.)	FINAL ORDER GRANTING
)	PETITION FOR
SNOHOMISH COUNTY,)	ADMINISTRATIVE REVIEW;
)	MODIFYING CONDITIONS IN
Respondent.)	INITIAL ORDER; DENYING
)	PETITION TO REOPEN THE
)	RECORD
.....)	

Synopsis: In this Order, we grant Burlington Northern Santa Fe’s petition for administrative review and modify the conditions in the Initial Order relating to the order in which the railroad must close the crossing, upgrade the 300th Street NW / Dettling Road crossing and construct the turnaround at Logen Road. We deny the railroad’s petition to reopen the record as unnecessary.

I. INTRODUCTION

1 **Nature of Proceeding.** Docket TR-090121 involves a petition by Burlington Northern Santa Fe Railway Company (Burlington Northern or BNSF) to close a railroad-highway grade crossing located at Logen Road, nearby to Stanwood, Snohomish County, Washington (US DOT #084713P) in accordance with Revised Code of Washington (RCW) 81.53.060.

2 **Appearances.** Bradley Scarp and Kelsey Endres, Montgomery Scarp MacDougall, PLLC, Seattle, Washington, represent Burlington Northern. Justin W. Kasting and Matthew A. Otten, Civil Division Deputy Prosecuting Attorneys, Everett, Washington, represent Snohomish County (County). Lynn F. Logen, *pro se*, Bellevue, Washington, represents himself and the interests of his family (Logen).

Jonathan Thompson, Assistant Attorney General, Olympia, Washington, represents the Commission's regulatory staff (Commission Staff or Staff).¹

3 **Initial Order:**² The Initial Order, entered on October 21, 2009, granted Burlington Northern's petition to close the Logen Road crossing, requiring the railroad to complete the following conditions prior to closing the crossing: (1) upgrade and update the active warning devices and signage at the 271st Street NW at-grade crossing and provide proportionate funding for pedestrian safety improvements (i.e., sidewalks) as directed by a diagnostic team; (2) work with Snohomish County to improve road conditions at the 300th Street NW / Dettling Road at-grade crossing; and (3) provide funding for and work with Snohomish County to construct a turnaround cul-de-sac on the approach to the railroad tracks on Logen Road.³

4 **Petition for Administrative Review and Petition to Reopen:** On November 12, 2009, Burlington Northern filed a petition to reopen the record and a petition for administrative review of the Initial Order. The railroad requests the Commission modify the Initial Order to allow the crossing to be closed before constructing the turnaround cul-de-sac at Logen Road. Burlington Northern requests the Commission reopen the record to admit an e-mail from a project engineer describing the operational issues that require a modification to the Initial Order.

5 **Commission Decision:** In this order, the Commission grants Burlington Northern's petition for administrative review, modifying the Initial Order to require the Logen Road crossing to be closed prior to construction of the turnaround cul-de-sac at the crossing. The Commission denies the railroad's petition to reopen the record, finding the additional information unnecessary in considering the petition for administrative review.

¹ In formal proceedings, such as this, the Commission's regulatory staff participates like any other party, while an administrative law judge (ALJ) and/or the Commissioners make the decision. To assure fairness, the Commissioners, the presiding ALJ, and the Commissioners' accounting and policy advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See RCW 34.05.455.*

² The procedural history of this docket is set forth in detail in the Initial Order, Order 03, and will not be repeated in this order.

³ Order 03, ¶ 74.

II. BACKGROUND

6 We repeat the relevant facts from the Initial Order, which facts remain uncontested:⁴

Burlington Northern runs a main line track, as well as various side tracks, north and south through Snohomish County and the City of Stanwood. There are several roads running east and west that cross the BNSF line as it runs northbound from Stanwood and into the county's unincorporated area. As pertinent to this matter, these roadways include 271st Street NW, Logen Road, and 300th Street NW (also known as Dettling Road).⁵

WSDOT's Amtrak division is constructing a new train station in Stanwood. As part of this project to expand existing passenger train service in this corridor, WSDOT is extending the existing BNSF siding above Stanwood from its present length of 6,800 feet to over 10,000 feet, enabling longer freight trains to meet and pass along BNSF's main line.⁶ The lengthened siding will add a second set of tracks to the existing grade crossing at Logen Road as well as the two grade crossings located immediately to the north.⁷ Therefore, citing the interests of safety and improved operations for both freight and passenger trains, BNSF seeks permission to close only the Logen Road grade crossing.⁸

The Logen Road grade crossing is located along a curved portion of track in a rural area north of Stanwood characterized by trees, agricultural use and some rural homes.⁹ Quite nearby to the west (where the roadway is also

⁴ *Id.*, ¶¶ 12-17.

⁵ See Exh. Nos. 1, 16, and 17 (the latter two exhibits consist of photographs that provide a generalized overview of the relevant area and individual depictions of each grade crossing). Also peripherally relevant is the at-grade crossing near the intersection of 102nd Street and Pacific Highway, located another half-mile north of the 300th Street NW at-grade crossing.

⁶ Wagner, TR. 10:25 - 15:15; *see also* Exh. No. 4 and Exh. No. 5.

⁷ *Id.*, at 16:5-7 (second set of tracks at Logen Road) and Hunter, TR. 244:19 – 245:8 (second set of tracks at 300th Street NW and 102nd Street).

⁸ Exh. No. 1, Petition for the Closure of a Highway-Rail Grade Crossing (January 22, 2009), Section 5, ¶ 1.

⁹ Norris, TR. 79:25 - 80:14 and 88:18 - 89:5.

known as 292nd Street NW), Logen Road connects with the Old Pacific Highway; to the southeast, Logen Road connects with Pioneer Highway.¹⁰ Old Pacific Highway generally runs parallel alongside the portion of the BNSF main line north of Logen Road until it crosses the tracks (becoming 102nd Street) and intersects with Pioneer Highway. Pioneer Highway generally runs parallel to the BNSF main line on the east side of the tracks.¹¹

The active safety features currently installed at the Logen Road grade crossing include flashing light signals, automatic gates, and warning bells; passive safety features include a yellow highway-rail grade crossing advance warning sign, a white “crossbuck” highway-rail grade crossing sign on each side of the tracks, as well as painted pavement markers in advance of the intersection.¹²

The closest alternate crossing to Logen Road is located at 300th Street NW, also known as Dettling Road, approximately one-half mile to the north.¹³ The 300th Street NW grade crossing is currently a single-track crossing in a rural area surrounded by open farm fields. In its present configuration, its active safety features consist of multiple flashing light signals (including mast arms extending over and above the roadway), automatic gates, and warning bells; its passive safety features include a yellow highway-rail grade crossing advance warning sign, a white “crossbuck” highway-rail grade crossing sign on each side of the tracks, as well as painted pavement markers in advance of the intersection¹⁴ In BNSF’s request to close the Logen Road

¹⁰ Pioneer Highway was previously also known as State Highway 530 (Hwy 530); the traffic study relied upon in this case (Exh. No. 7) refers to both names. *See* Bloodgood, TR. 118:7-20.

¹¹ Exh. No. 7, *Logen Road Railway Crossing Closure – Traffic Impact Analysis*, at Figure 1; *see also* Exh. No. 16 and Exh. Nos. 17-18 (the T-intersection of Logen Road and Old Pacific Highway is visible in the background of Exhibit No. 18).

¹² Exh. No. 17, at 1-2; *see also* Hunter, TR. 247:12-14.

¹³ Norris, TR. 76:20-24; *see also* Exh. No. 7, at 3 and at Figure 1 (no scale on map). At hearing, the County Engineer noted another acceptable alternate crossing at 102nd Street and Pioneer Highway, located less than another half-mile to the north of Dettling Road. *See* Bloodgood, TR. 136:23 – 137:4.

¹⁴ Exh. No. 17, at 5-6.

crossing, it pledged to work with Snohomish County to upgrade the 300th Street NW crossing to address any resulting increase in traffic.¹⁵

The closest alternate crossing south of Logen Road is located at 271st Street NW, approximately 1.5 miles to the south. The 271st Street grade crossing is within the City of Stanwood, has three sets of tracks, and experiences much greater traffic volume than either Logen Road or 300th Street NW.¹⁶ Active safety features at the 271st Street NW crossing include flashing light signals, automatic gates, and warning bells; passive safety features include a yellow highway-rail grade crossing advance warning sign, a white “crossbuck” highway-rail grade crossing sign on each side of the tracks also indicating “3 tracks,” as well as painted pavement markers in advance of the intersection.¹⁷

III. PETITION FOR REVIEW, MOTION TO REOPEN AND ANSWERS

A. Burlington Northern Petition and Motion.

7 In its petition for review, Burlington Northern requests that the Commission amend the Initial Order to modify the timing in which the railroad must satisfy two of the three conditions to closing the crossing. Specifically, Burlington Northern requests that the Commission direct the railroad to close the crossing before improving road conditions at the 300th Street / Dettling road crossing and before constructing the turnaround cul-de-sac at Logen Road. The railroad does not contest the outcome of the Initial Order, i.e., closure of the crossing, or the timing of the condition relating to improvements to the 271st Street crossing, as the railroad asserts the condition can be met prior to closing the Logen Road crossing.

8 Burlington Northern asserts that the Logen Road crossing closure, upgrading the signals at Dettling Road and constructing the turnaround are individual parts of the overall Stanwood Siding project: Each must be completed before the siding track through Logen Road becomes operational. Burlington Northern offers an e-mail by Burlington Northern Project Engineer Enrique Mondragon concerning the operational issues involved in the project to support its request to modify the conditions in the

¹⁵ Exh. No. 1 (Petition), Section 5, ¶ 1.

¹⁶ See Exh. No. 7, at 4-5 and Figure 2.

¹⁷ Exh. No. 17, at 3-4.

Initial Order.¹⁸ The railroad requests the Commission reopen the record to admit Mr. Mondragon's e-mail.¹⁹

9 Burlington Northern asserts that it will be reasonably safe to temporarily reroute Logen Road traffic to the Dettling Road crossing with its existing warning devices. The railroad argues that the majority of the traffic from Logen Road will be diverted to the 271st Street crossing in the south, and very little traffic will be rerouted to Dettling Road to the North.²⁰

10 The railroad also argues that the Commission is preempted from preventing or regulating how the railroad and the Washington State Department of Transportation (WSDOT) extend the siding track through Logen Road. Burlington Northern argues that the Interstate Commerce Commission Termination Act (ICCTA) "grants the Surface Transportation Board (STB) exclusive jurisdiction over nearly all matters of railroad regulation."²¹

B. Mr. Logen's Answer

11 In an e-mail dated November 12, 2009, and sent to the administrative law judge, the parties and the Commission's Records Center, Mr. Logen opposes the railroad's petition. Mr. Logen argues that the record shows that the crossings to the north of Logen Road are more dangerous to the public than the Logen Road crossing. Mr. Logen argues that closing the Logen Road crossing prior to improving the other crossings "will have the effect of forcing residents to use more dangerous crossings before there is any need for such closure."²²

¹⁸ Burlington Northern Petition, ¶¶ 3, 12.

¹⁹ *Id.*, ¶ 12-13.

²⁰ *Id.*, ¶¶ 14-17, citing Norris, TR 77:18-78:4, 78:24-79:9.

²¹ *Id.*, ¶ 20.

²² November 12, 2009, e-mail from Lynn Logen to Commission Records Center, Judge Torem and the parties.

12 Further, Mr. Logen states that he expects “the proposed cul-de-sac on Logen Road to be accessed during construction by using the crossing rather than from the east side where the cul-de-sac will be constructed showing the need to keep this crossing open.”²³ Mr. Logen argues that another option is for the railroad to withdraw its request to close the crossing and avoid the construction conflicts.

C. Commission Staff’s Answer

13 Commission Staff agrees with the changes that Burlington Northern proposes to the wording of the Initial Order. Staff is convinced that it would be impractical to keep the Logen Road crossing open to through traffic during the construction of the turnaround. If a motorist mistakenly drove down Logen Road during construction intending to go over the crossing, Staff is confident the motorist would be able to turn around at an existing driveway. Staff also agrees that the traffic analysis in the record demonstrates that, of the few motorists who use the Logen Road crossing, most will divert to the 271st Street crossing, and only a small number will use the Dettling Road crossing, or the 102nd Street crossing.²⁴

14 Similarly, Staff does not object to closing the Logen Road crossing prior to making the required improvements at Dettling Road. Staff notes that the primary reason for the improvements to the Dettling Road crossing is the construction of a new siding through the crossing, not to accommodate the additional traffic that may be diverted from Logen Road.²⁵ In response to Mr. Logen’s concerns about the safety of the Dettling Road crossing, Staff states that since the installation of lights and gates at the crossing, there have been no accidents.²⁶

15 Finally, Staff argues that Burlington Northern’s federal preemption argument is unnecessary and too broad in its implications. Staff asserts that state authority over conditions at railroad grade crossings is a well established carve-out from the ICCTA

²³ *Id.*

²⁴ Commission Staff’s Response, ¶¶ 2-3.

²⁵ *Id.*, ¶ 3.

²⁶ *Id.*

and the Federal Railroad Safety Act.²⁷ Staff argues that there may be circumstances where public safety would require improvements be made before a crossing is closed, such as if closing the crossing would result in substantial traffic being diverted to an adjacent traffic that is not adequate to handle the additional traffic.²⁸ Staff insists the Commission would not be preempted in such a case from requiring improvements to the adjacent crossing prior to closure of a crossing.

16 Staff does not address the railroad's petition to reopen.

IV. DISCUSSION AND DECISION

A. Petition to Reopen the Record

17 We first address Burlington Northern's request to reopen the record to admit an e-mail from its project engineer, Mr. Mondragon. The e-mail, dated November 6, 2009, was sent to Kelsey Endres, the railroad's counsel in this proceeding, after the Initial Order was entered. The e-mail describes the most efficient timing of construction at the Logen Road and Dettling Road crossings. Burlington Northern relies on Mr. Mondragon's statements to support its petition for administrative review.

18 Under the Commission's procedural rules, a party may seek to reopen the record "at any time after the close of the record and before entry of the final order."²⁹ The Commission has discretion to reopen the record "to allow the receipt of evidence that is essential to a decision and that was unavailable and not reasonably discoverable with due diligence at the time of the hearing or for any other good and sufficient cause."³⁰ Under the rule, the Commission will give each party an opportunity to respond to any new evidence, and then enter a final order or return the matter to the administrative law judge for further hearing or other process as appropriate.

²⁷ *Id.*, ¶ 4, citing *Iowa, Chicago & Eastern R.R. Corp. v. Washington County, Iowa*, 384 F.3d 557 (8th Cir. 2004); *Home of Economy v. Burlington Northern*, 694 N.W.2d 840, 846-47 (ND 2005).

²⁸ *Id.*

²⁹ WAC 480-07-830.

³⁰ *Id.*

19 We are concerned about reopening the record to admit additional evidence that was created after the Initial Order was entered, presumably to support the railroad's concerns about the timing of the recommended conditions. We find that there is sufficient evidence in the record and ambiguity in the Initial Order to justify granting the railroad's petition for review without reopening the record. We deny Burlington Northern's petition to reopen the record as unnecessary to our decision.

B. Petition for Review

20 Burlington Northern agrees with the result of the Initial Order in this proceeding, but requests the Commission change the timing in which it must satisfy certain conditions. The railroad requests the Commission modify the conditions to allow it to close the Logen Road crossing before constructing the turnaround cul-de-sac at the crossing, and before it makes road improvements at the Dettling Road crossing.

21 In reviewing the record, the Initial Order, and the parties' recent pleadings, we find it appropriate to modify the timing of the conditions imposed in the Initial Order.

22 In reviewing the Initial Order, it is not clear why the conditions in paragraph 74, other than improvements to 271st Street NW, must be met prior to closing the Logen Road crossing. The discussion section of the order, at paragraph 53, explains the need to make improvements to the 271st crossing before closure, but does not state the timing of the work the railroad must perform at Dettling Road or the construction of the cul-de-sac. Neither is there any conclusion that the safety benefits of the improvements require that the two conditions be met prior to closure. As Staff states, it would be impractical to keep the Logen Road crossing open while constructing the turnaround. It would be difficult for motorists to maneuver the crossing while construction is underway. We find reasonable the railroad's request to close the crossing before construction of the turnaround.

23 We also find it reasonable to modify the timing of the condition relating to improvements at Dettling Road. The improvements are road upgrades due to the construction of the siding track, not railroad signal upgrades as with 271st Street.³¹ The record reflects a small incremental traffic increase on Dettling Road after the

³¹ Order 03, ¶ 52.

Logen Road crossing is closed. Contrary to Mr. Logen's arguments, Staff asserts that the crossing is safe - there have been no accidents at the Dettling Road crossing since active warning devices have been installed at the crossing.³² Nothing in record demonstrates that public safety requires the improvements at Dettling Road be made prior to closing the crossing. As with the condition for constructing the turnaround, we find reasonable the railroad's request to close the crossing before completing the work at Dettling Road.

24 Given our decision on the railroad's petition, we find it unnecessary to reach the issue Burlington Northern raises concerning federal preemption.

FINDINGS OF FACT

25 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary findings of fact, incorporating by reference pertinent portions of the preceding detailed findings:

26 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate the placement and conditions of operation of crossings at grade of railroad tracks with public roadways within the State of Washington.

27 (2) The Burlington Northern and Santa Fe Railway Company petitioned on January 22, 2009, for authority to close the highway-railway crossing at Logen Road in Snohomish County, Washington.

28 (3) The Logen Road at-grade crossing is located to the north of the city limits of Stanwood. On an average day, four Amtrak passenger trains, eight to ten freight trains, and approximately 140 vehicles make use of the crossing.

29 (4) The Logen Road crossing is within one-and-one-half miles of a crossing to the south (271st Street NW) and approximately one-half mile of a crossing to the

³² Hunter, TR. 234:13-23; *see also* Exh. Nos. 11, 17 at 5-6, 21 at 7-8.

north (300th Street NW / Dettling Road). One or both of those crossings provide the general public with suitable alternative access across the tracks with a minimum of inconvenience during normal conditions.

- 30 (5) Closure of the Logen Road crossing will divert a majority of its current traffic southward to 271st Street NW in Stanwood with the remainder diverted northward to 300th Street NW / Dettling Road.
- 31 (6) Burlington Northern has committed to perform warning signal upgrades and updates at the 271st Street NW crossing, road improvements at the Dettling Road crossing, and to build a cul-de-sac at the Logen Road crossing, as a part of the siding project and in conjunction with the closure of Logen Road.

CONCLUSIONS OF LAW

32 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law incorporating by reference pertinent portions of the preceding detailed conclusions:

- 33 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of and the parties to this proceeding.
- 34 (2) Closure of the Logen Road crossing will result in inconvenience to some persons who now use the crossing. Mitigating measures, such as upgrading and updating the safety features at the 271st Street NW at-grade crossing, creation of a turnaround cul-de-sac on the easterly approach to the railroad tracks on Logen Road, and certain road improvements to the 300th Street NW crossing, can ameliorate concerns about closure of the Logen Road crossing.
- 35 (3) The public safety benefit of improvements at 271st Street NW crossing demonstrate the improvements should be made prior to closing the Logen Road crossing, and diverting traffic to the 271st crossing.
- 36 (4) While the road improvements at the Dettling Road crossing will improve the safety of the travelling public, the amount of additional traffic diverted after

closing the Logen Road crossing does not require the improvements be made prior to closing the crossing.

- 37 (5) Construction of a turnaround cul-de-sac at Logen Road would effectively close the crossing to through traffic, requiring the railroad to close the crossing prior to starting construction.

ORDER

THE COMMISSION ORDERS:

- 38 (1) Burlington Northern Santa Fe Railway Company's petition to reopen the record in Docket TR-090121 is denied.
- 39 (2) Burlington Northern Santa Fe Railway Company's petition for administrative review of the Initial Order, Order 03, in Docket TR-090121 is granted.
- 40 (3) The conditions in paragraph 74 of the Initial Order, Order 03 in this proceeding, are modified as follows:

Authority to close the Logen Road crossing is granted upon the following conditions:

- (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 the closure of Logen Road.
- (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 of the Logen Road crossing, but shall be fulfilled during the siding track extension project.
- (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 of the Logen Road crossing to the extent reasonably possible.

- 41 (4) The Commission retains jurisdiction over the subject matter and the parties to the proceeding to effectuate the terms of this Order.

Dated at Olympia, Washington, and effective November 30, 2009.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

JEFFREY D. GOLTZ, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.