



Rob McKenna

ATTORNEY GENERAL OF WASHINGTON

Utilities and Transportation Division

1400 S Evergreen Park Drive SW • PO Box 40128 • Olympia WA 98504-0128 • (360) 664-1183

November 20, 2006

Carole J. Washburn, Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Dr. SW
P. O. Box 47250
Olympia, Washington 98504-7250

Re: *City of Kennewick v. Union Pacific Railroad*, Docket No. TR-040664, and
City of Kennewick v. Port of Benton and Tri-City & Olympia Railroad,
Docket No. TR-050967 (Consolidated)

Dear Ms. Washburn:

Enclosed for filing in the above-referenced docket are the original and 3 copies of Parties' Joint Initial Post-Hearing Brief, and Certificate of Service.

Sincerely,

JONATHAN C. THOMPSON
Assistant Attorney General

JCT:tmw
Enclosures
cc: Parties



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

CITY OF KENNEWICK,

Petitioner,

v.

UNION PACIFIC RAILROAD,

Respondent.

DOCKET NO. TR-040664

CITY OF KENNEWICK,

Petitioner,

v.

PORT OF BENTON AND TRI-CITY &
OLYMPIA RAILROAD,

Respondents.

DOCKET NO. TR-050967

(Consolidated)

PARTIES' JOINT INITIAL BRIEF
ON LEGAL ISSUE

1 The parties jointly submit the following briefing in response to Administrative Law Judge Patricia Clark's requirement that the parties submit legal briefs addressing "an apparent conflict in law" that arose during the cross-examination hearing.

Question presented:

- 2 Whether, under state law, active warning devices (*i.e.*, crossing gates) must be disengaged during certain switching operations to allow the unimpeded flow of vehicular traffic and, if so, whether that law conflicts with Federal Railroad Administration (FRA) requirements for approval of silent, at-grade crossings that active warning devices be fully engaged during switching operations.

Answer:

- 3 It is incorrect that Washington law requires crossing gates to be raised during switching operations to allow the unimpeded flow of vehicular traffic. Washington law merely provides that a stopped train may not occupy a crossing from more than ten consecutive minutes, if reasonably possible. WAC 480-62-220. The rule does not apply to trains in motion, such as trains that are being moved for switching purposes, though it likely would apply to train cars left standing for more than ten minutes for pickup by another locomotive. In such a case, the commission staff ordinarily would expect that the railroad would clear the crossing of train cars, breaking the train (*i.e.*, separating the cars) if necessary.

- 4 It also is incorrect that FRA rules for approval of quiet zones (that eliminate the need to sound the train horn at road crossings) require active warning devices to be engaged during switching operations even when, for example, the train has moved more than 250 feet clear of the crossing or when train cars are left standing the same distance clear of the crossing. The opposite is likely true. Although there is general agreement in the record that four quadrant gates would be required at the crossing for approval of a quiet zone, there is

only speculation regarding how those gates would be activated or what else the FRA might require for approval of a quiet zone under the particular circumstances.

5 As such, there is no conflict between the state rule and any condition the FRA might impose on Kennewick obtaining approval for a quiet zone.

Discussion:

6 There is no state statute that prohibits railroads from blocking road crossings for more than a given period of time. There is, however, a WUTC rule, WAC 480-62-220 that provides that a stopped train (moving trains are not covered) may not occupy a crossing for more than ten consecutive minutes, if reasonably possible.

7 WAC 480-62-220 is very similar to Union Pacific and BNSF's own rules under the General Code of Operating Rules. See GCOR 6.32.6.¹

8 The GCOR contains a number of other requirements with regard to operations at crossings in addition to the prohibition on blocking. For example, the rules provide that train cars be left at least 250 feet away from a crossing when practical, and that automatic warning devices at crossings not be unnecessarily triggered. Part 217 of the Federal Railroad Administration's rules, 49 CFR §§ 217.1 – 217.13, requires the railroads to file copies of their operating rules with the FRA, to conduct tests and inspections to determine compliance with their operating rules, to keep records of those tests and inspections, and to train their employees periodically in those operating rules. The FRA does not regulate the content of the railroads' operating rules, except to the extent that the railroad's internal rules track a specific FRA rule. An FRA inspector can "file a deficiency" against a railroad for failing to comply with an internal operating rule. However, civil penalties only arise if a

¹ http://www.bnsf.com/ttc/Timetable/pdfs/gcor_edition_5_04-03-05.pdf While it appears from this document that UP and BNSF have adopted the GCORs, it does not appear that Tri-City & Olympia has adopted the GCORs.

railroad “fails to promote and require compliance with its operating rules in the spirit intended by the regulation.” See *Union Pacific Railroad Company v. California Public Utilities Commission*, 346 F.3d 851, 863-64 (9th Cir. 2003).

9 Train engineers are required by FRA rule to sound the locomotive’s horn when approaching an at-grade crossing to warn motorists or pedestrians of the train’s approach. Communities sometimes regard this as noise pollution and have sought ways to eliminate the need for this practice. The idea behind the Federal Railroad Administration’s quiet zone rules is to allow local governments to install supplemental protective devices at crossings within a “quiet zone” so that railroads will not be required to sound their horns at the crossings.

10 The question raised by Mr. Peterson’s testimony was whether the FRA would approve a quiet zone at the proposed location if the gates were in the down position only when the train was 250 feet or less from the road crossing. (Tr. at 349:16 – 350:9) Mr. Peterson speculated that this kind of active warning would not be sufficient to obtain quiet zone approval from the FRA. Rather, he suggests that the FRA would require that the gates be activated during the entire switching movement, not just while the train was within 250 feet of the crossing. The City of Kennewick has not applied to the FRA for approval of a quiet zone. The City’s witnesses testified that, while they expected four quadrant gates would be required, they had not considered the specifics of how the gates would be activated. (Tr. at 195:23 – 197:18; 147:2 – 149:10)

11 The FRA’s amended final rule, effective September 18, 2006, gives a great deal of site-specific latitude on what kind of “Supplemental Safety Measures” and “Alternative Safety Measures” may be sufficient for quiet zone approval. There are few absolute

requirements for quiet zones. Not even four quad gates are required in all instances.² However, one requirement for all new quiet zones is that the crossings be equipped with flashing lights and gates and that constant warning time circuitry be used to activate those warning devices, unless conditions at the crossing would prevent the circuitry from operating properly. Constant warning time circuitry gauges the speed of the train and its distance from the crossing and causes the gates to lower when the train is certain amount of time, e.g., twenty seconds, away from the crossing. The circuitry also causes the gates to rise and the lights to stop flashing after the train has passed over the crossing. Thus, it is unlikely the FRA would require gates to remain down when no train or cars were in the immediate vicinity of the crossing.

12

There is no conflict between the FRA's quiet zone rules and the GCOR/WUTC requirement that a standing train not occupy a crossing for more than ten minutes, when practical.

DATED this 20th day of November, 2006.

Respectfully submitted,

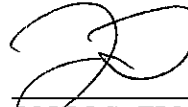
ROB MCKENNA
Attorney General




JONATHAN C. THOMPSON
Assistant Attorney General
Counsel for Washington Utilities and
Transportation Commission Staff
1400 S. Evergreen Park Dr. SW
P.O. Box 40128
Olympia, WA 98504-0128
(360) 664-1225

² http://www.fra.dot.gov/downloads/safety/trainhorn_2005/amended_final_rule_081706.pdf


DATED this 20th day of November, 2006.

 per email approval for


JOHN S. ZIOBRO
City Attorney
Counsel for City of Kennewick
210 West Sixth Avenue
Kennewick, WA 99336
(509) 585-4272

 per email approval for

CAROLYN LARSON
Attorney at Law
Counsel for Union Pacific Railroad
Dunn Carney Allen Higgins & Tongue LLP
851 SW Sixth Avenue, Suite 1500
Portland, OR 97204
(503) 224-6440

 per email approval for

BRADLEY P. SCARP
Attorney at Law
Counsel for BNSF Railway Company
Montgomery Scarp
1218 3rd Avenue
Seattle, WA 98101
(206) 625-1801

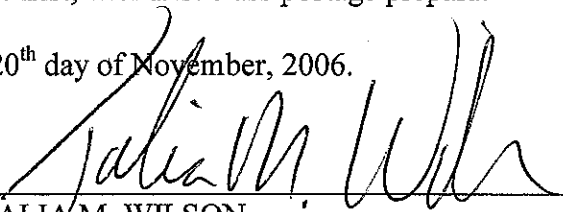
 per email approval for

BRANDON L. JOHNSON
Attorney at Law
Counsel for Tri-City & Olympia Railroad
Minnick-Hayner, P.S.
249 West Alder
P.O. Box 1757
Walla Walla, WA 99362
(509) 527-3500

Docket Nos. TR-040664/TR-050967 (consolidated)
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the persons and entities listed on the Service List below by depositing a copy of said document in the United States mail, addressed as shown on said Service List, with first class postage prepaid.

DATED at Olympia, Washington this 20th day of November, 2006.


TALIA M. WILSON

For City of Kennewick:

John S. Ziobro
City Attorney
210 West Sixth Avenue
Kennewick, WA 99336
Fax: (509) 585-4424
Phone: (509) 585-4272
E-mail: John.ziobro@ci.kennewick.wa.us

For Union Pacific Railroad:

Carolyn L. Larson
Dunn Carney Allen Higgins & Tongue LLP
851 SW Sixth Avenue, Suite 1500
Portland, OR 97204
Fax: (503) 224-7324
Phone: (503) 224-6440
E-mail: cll@dunn-carney.com

For Port of Benton:

Tom A. Cowan
Cowan Moore Stam & Luke
503 Knight Street, Suite A
P.O. Box 927
Richland, WA 99352
Fax: (509) 946-4257
Phone: (509) 943-2676
E-mail: tcowan@cowanmoore.com

For Tri-City & Olympia Railroad:

Brandon L. Johnson
Minnick-Hayner, P.S.
249 West Alder
P.O. Box 1757
Walla Walla, WA 99362
Fax: (509) 527-3506
Phone: (509) 527-3500
E-mail: bljohnson@my180.net

For BNSF Railway Co.:

Bradley Scarp
Montgomery Scarp
1218 3rd Avenue
Seattle, WA 98101
Fax: (206) 625-1807
Phone: (206) 625-1801
E-mail: brad@montgomeryscarp.com