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BURLINGTON NORTHERN RAILROAD COMPANY, Petitioner, v. CITY OF
FERNDALE, WASHINGTON, Respondent

DOCKET NO. TR-940330

Washington Utilities and Transportation Commission

1995 Wash. UTC LEXIS 10

March 31, 1995

[*1]

APPEARANCES: Rexanne Gibson, attorney, Bellevue, represents the petitioner, Burlington Northern Railroad Company (Burlington or the railroad). Jeanne A. Cushman, assistant attorney general, Olympia, represents the Washington State Department of Transportation (DOT). Gary Cuillier, attorney, Ferndale, represents the respondent, City of Ferndale (Ferndale or the City). Ann Rendahl, assistant attorney general, Olympia, represents the Washington Utilities and Transportation Commission (Commission Staff).

PANEL:

Sharon L. Nelson, Chairman; Richard Hemstad, Commissioner; William R. Gillis, Commissioner

OPINION: COMMISSION DECISION AND ORDER DENYING REVIEW; AFFIRMING INITIAL ORDER GRANTING PETITION TO CLOSE A RAIL CROSSING

NATURE OF PROCEEDINGS: This is a request by Burlington Northern Railroad Company for permission to close the Thornton Road railroad crossing in the City of Ferndale. The City opposes the proposed closure.

INITIAL ORDER: An initial order entered on November 18, 1994, by Administrative Law Judge Lisa Anderl would grant the petition. It would conclude that public safety concerns outweigh the public convenience and need for the crossing. It would deny a petition by the City to reopen to [*2] examine alternative placement for a siding track.

ADMINISTRATIVE REVIEW: The City seeks administrative review. It contends that a signalized gate and crew member to flag traffic over the crossing while the train is split will alleviate any safety concerns, and that the crossing needs to remain open so that the City may construct a planned Thornton Road connector. The Commission Staff filed, then withdrew, a motion to reopen the docket to allow the Commission to comply with the requirements of the State Environmental Protection Act.

COMMISSION: The Commission will not grant review. It affirms the initial order. The hazards at the crossing outweigh any present need for it to remain open.

[1]* The Commission generally will grant a petition to close a grade crossing unless the public need for the crossing outweighs the hazards that result from the crossing. RCW 81.53.020.

* Headnotes are provided as a service to the readers and do not constitute an official statement of the Commission. That statement is made in the order itself.

MEMORANDUM

This is a request by Burlington for permission to close the Thornton Road railroad crossing [*3] in the City. Burlington petitioned for closure, stating that the proposed Amtrak (passenger train) service through Ferndale will require an extension to the siding track at Thornton Road. The extended siding would be used to store freight trains while the passenger trains pass on the main track, and the crossing could be closed or blocked for up to an hour during these movements. The petition further stated that the property which is accessed by Thornton Road is being acquired by the State of Washington, and that the crossing will no longer be necessary to serve those properties. The Commission Staff supports closure of the crossing, claiming it is required for public safety.

The closure was protested by the City and the matter was set for hearing. On October 3, 1994, the Commission consolidated this case for hearing with Docket No. TR-940308, the joint petition of Burlington, Amtrak, and the Department of Transportation for an increase in passenger train speed limits through the City. Hearings were held in Ferndale on October 12 and 13, 1994, at which all of the parties and members of the public testified. The matters were not consolidated for decision and order.

The parties filed [*4] briefs by November 7, 1994. The petitioner requested that separate orders be entered in these dockets, and that request was granted.

The City filed, along with its brief, a petition to reopen the record to permit additional evidence for the purpose of determining whether an alternative location for the proposed siding exists, and should be considered by the petitioner. The City submitted an affidavit from Stan Strebel, the City Manager, in support of the petition. In general, the affidavit suggests that there is another location to the north of the city which would be suitable for an 8500' siding track, and that this location should be considered.

Burlington and the Commission Staff filed answers to the petition on November 10, 1994, opposing the request to reopen. No request to file a reply was made or granted.

An initial order would grant the petition. It would conclude that public safety concerns outweigh the public convenience and need for the crossing. It would deny a petition by the City to reopen to examine alternative placement for a siding track.

The City seeks administrative review. It contends that a signalized gate and crew member to flag traffic over the crossing [*5] while the train is split will alleviate any safety concerns, and that the crossing needs to remain open so that the City may construct a planned Thornton Road connector. Alternatively, the City seeks permission to reopen the record to permit additional evidence for the purpose of determining whether an alternative location for the proposed siding exists and should be considered by the petitioner.

On February 27, 1995, the Commission Staff moved to reopen the docket to allow the Commission to comply with the requirements of the State Environmental Policy Act (SEPA). On March 20, 1995, the DOT and Burlington answered the Commission Staff motion. On March 24, 1995, the Commission Staff and Burlington replied to the answer.

THE MOTIONS TO REOPEN SHOULD BE DENIED

The Commission will not reopen the record to receive new evidence. The motion to reopen by the City repeats a motion it made prior to entry of the initial order. The City sought to reopen the record to permit additional evidence for the purpose of determining whether an alternative location for the proposed siding exists and should be considered by the petitioner.

Reopening is authorized under RCW 81.04.160 [*6] and WAC 480-09-820(2). The rule states that reopening may be granted in contested proceedings to permit receipt of evidence which is essential to a decision and which was unavailable and not reasonably discoverable at the time of the hearing, or for any other good and sufficient cause. WAC

480-09-820(2)(b). The Commission agrees with the administrative law judge that the evidence proposed for receipt into the record is neither essential to the decision, nor was it unavailable at the time of hearing. The evidence concerns whether there are other viable sites for a siding/passing track. The Commission does not require such information to decide whether Thornton Road should be closed. Indeed, the City has not presented any argument or citation to establish that this issue is properly within the purview of the Commission in this type of proceeding. As discussed below, the issues in this case concern whether there are alternative means of public access if the crossing is closed, not whether the railroad has alternatives to constructing the siding track in a particular location.

Finally, the City does not offer any reasons why this information, even if it were relevant, was not presented [*7] at the hearing. The railroad's decision to site the siding track in Ferndale was discussed extensively on the record. The City had the opportunity to subpoena witnesses. WAC 480-09-475. Burlington presented detailed testimony on the various factors, including environmental and economic considerations, which influenced the choice of location. The evidence proposed by the City in response to the railroad's testimony was both available and discoverable at the time of hearing in this matter and, thus, does not support reopening. The City's motion to reopen is denied.

The Commission Staff motion to reopen the proceedings was premised on a concern that the Commission should have, but had not, complied with the requirements of the State Environmental Policy Act (SEPA) prior to taking action on the petition to close the Thornton Road crossing. In answer, Burlington and the DOT state that the DOT is the lead agency for SEPA compliance, that it conducted a SEPA review, that the City commented on the impact of closing the Thornton Road crossing in that review, and that all of the requirements of SEPA have been met. In reply, the Commission Staff withdrew its motion to reopen. The reply states [*8] that the Commission Staff has reviewed the documentation prepared by the DOT pursuant to SEPA, and that the Commission Staff is assured that the DOT has complied with SEPA requirements concerning the closure of the Thornton Road crossing. Burlington also replied, agreeing with its answer. Permission to withdraw the motion is granted.

THE CROSSING SHOULD BE CLOSED

A. The Legal Standard

Chapter 81.53 grants the Commission the authority to regulate the safety of railroad grade crossings. RCW 81.53.020 states a legislative preference for overcrossings and undercrossings where practicable, and prohibits the construction of a crossing at grade without prior Commission approval.

All crossings at grade are dangerous, and the policy of the law is strongly against the allowance of such crossings. *Reines v. Chicago, Milwaukee, St. Paul & Pacific R.R.*, 195 Wash. 146, 80 P.2d 406 (1938); *State ex rel. Oregon-Washington Railroad & Navigation Co. v. Walla Walla County*, 5 Wn.2d 95, 104 P.2d 764 (1940).

However, in some cases the public convenience or need [*9] for the crossing outweighs the inherent danger, and in that case a crossing may remain open. The test was stated by the court in *Department of Transportation v. Snohomish County*, 35 Wn.2d 247, 254 (1949) as follows:

Having found that the grade crossing herein is dangerous and unsafe, we must also consider 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.

The Commission follows the same balancing process.

The question, then, is whether the public convenience and need outweighs the danger of the crossing so that it should nonetheless remain open. Factors to consider in this regard include the availability of alternate crossings, the ability of those crossings to handle the additional traffic, and the number of people affected by the closure.

B. The Current Situation

The crossing at Thornton Road is a double set of tracks, protected by stop signs and crossbucks. Thornton Road runs east/west and crosses the north/south tracks at right angles. The tracks run west of and parallel to I-5 through this area of town. Thornton [*10] Road currently dead-ends shortly after crossing the tracks, west of I-5. The crossing currently serves two residences. The petitioner proposes to either build an access road for those properties, or to allow access through the crossing only for the property owners. Under this latter situation, Thornton Road would be gated to the west of the tracks and only property owners would have access.

The tracks at Thornton Road are a mainline track and a siding track. Burlington proposes to extend its existing siding track north another 3,631 feet, to a total length of 8,600 feet. This length is necessary for the track to be used as a passing track when passenger trains come through. Burlington will store its freight trains on this siding track to allow the Amtrak to come through on schedule. Freight trains are generally about 7,000 feet long and could not be stored on the existing siding. The extended siding will be long enough that a freight train could be pulled far enough north to be out of the grade crossings in the main part of town -- Washington Street and Second Avenue. A freight train could be on the siding for one hour or more.

If Thornton Road remains open as a public crossing, [*11] the railroad would have to split the train while it waits on the siding. This is a time consuming process and presents an additional hazard at the crossing because of train movements across the tracks at grade and because a stopped train can impair sight distance, already limited at this crossing. A vehicle, after stopping, would have to creep out towards the tracks to see if a train was coming. Train speeds, especially with fast trains viewed head on, are extremely difficult to judge and a passenger train approaching at 79 m.p.h could be a significant hazard at an unprotected crossing.

Thornton Road is a 25 m.p.h. city street, with one lane of travel in each direction and no curbs or sidewalks. West of the crossing, it is the main east/west street in the north part of the city, and it serves many residents who have settled in the subdivisions which are growing rapidly in the northwest part of the city. Using Thornton, they are able to access Vista Drive or Malloy Drive and travel south into the business district. The portion of Thornton Road which crosses the Burlington tracks is a dead end which only provides access to two residences. The routes south on Vista Drive or Malloy Drive [*12] are the main access to I-5, for both north and southbound traffic. Closure of the crossing would not affect the current traffic patterns.

C. Public Need for the Crossing

The City is in the process of planning for growth and development over the next 15-20 years. The City has a draft transportation plan which will likely be submitted to and acted on by the City council this year. The plan contains several options for improving traffic flow through town. One of those options is the construction of an extension to Thornton Road southbound to connect with Portal Way near the southbound ramps to and from I-5. This proposal is illustrated in exhibit #4. This option has been in the City's plans for many years, often as a high priority item. The City has never been able to obtain any funding for this project and does not have good prospects of obtaining such funding in the future. The City would like to see Thornton Road remain open because it believes that this project is the least expensive option and because the project could be completed incrementally, without a large expense all at once.

Members of the public spoke in favor of keeping Thornton Road open as one of the City's [*13] main options for improving traffic flow within the city limits. The residents believe that the future proposed use of Thornton Road is critical to draw traffic onto I-5 without first going through the center of town, which is already fairly congested during peak traffic times. Most public witnesses favored a grade crossing at Thornton, but some had no preference between a grade crossing or an over crossing.

The City has other options to developing Thornton Road at grade, including an over-grade crossing which would also cross over I-5 and connect with Newkirk Road to the east of the freeway. The City's transportation consultant recommends the Thornton Road extension as the least expensive option, although perhaps not the best for long term growth and traffic needs. Costs of the various options are uncertain, with an overpass estimated at \$ 6 million and the

extension at \$ 4 million (\$ 2 million for construction and \$ 2 million in mitigation costs). The City has no money for any of the options, but hopes to eventually fund construction with a combination of State/Federal highway funds, and money it is now collecting in growth mitigation fees. Some type of extension of Thornton Road, [*14] either to the south or the east, has been in the City's plans since at least 1972.

Much time at the hearing was spent discussing the various options for restructuring traffic flow through the city. In addition, various expert opinions were offered on the Thornton Road extension, including the opinion that the resulting intersection with Portal Way would be unworkable because of the proximity to the freeway ramps. However, this order does not need to decide the best plan for the City to follow -- that is uniquely the domain of the City government. This order considers traffic flow options only to the extent that they are relevant to the public need for the crossing.

D. Policy Considerations

In 1992, the Federal Railway Administration designated a high speed rail corridor between Eugene, Oregon and Vancouver, British Columbia. The petitioners argue that the crossing will become even more dangerous with the operation of a high-speed passenger train service between Seattle and Vancouver, B.C. This service is proposed to start in 1995, and it is because passenger trains will have the right of way on the track that Burlington must use the siding track for its freight trains.

State [*15] policy supports the operation of the passenger service. In 1993 the Washington State Legislature enacted Chapter 47.79 RCW which established a high-speed ground transportation program. The program's stated goals include the implementation of high-speed ground transportation service offering top speeds over 150 m.p.h. between Everett and Vancouver, B.C. by 2025. RCW 47.79.020(2). In addition, as discussed above, public policy disfavors crossings at grade.

Finally, petitioners argue that closing the crossing is consistent with the policy contained in the Federal Railroad Administration's Rail-Highway Crossing Safety / Action Plan Support Proposals (Exhibit 12). That document notes that the following criteria have been useful in determining when crossings should be consolidated: consolidate where there are more than four per mile in urban areas and one per mile in rural areas and alternate routes are available; consolidate crossings with fewer than 2000 vehicles per day and more than two trains per day and an alternate route is available; link construction work with eliminations, especially when upgrading rail corridors for high speed trains; [*16] when improving one crossing, consider eliminating adjacent crossings and rerouting traffic; eliminate complex crossings where it is difficult to provide adequate warning devices or which have severe operating problems (e.g. multiple tracks, extensive switching operations, long periods blocked, etc.) The Petitioners state that these conditions are all present at the Thornton Road crossing and support an order to close the crossing.

E. Commission Decision

The Commission agrees with the initial order's finding that there is no present public need or convenience which is served by the grade crossing at Thornton Road. At most there is a private need for access to the residences on the east side of the tracks, and Burlington will allow those property owners to continue to use the tracks as a private crossing. n1

n1 Commission Staff supports the railroad's petition, but on brief suggests that a crew member flag traffic at the crossing when a train is split to allow access to the private properties. Since a crew member will have to be at the crossing to split and reconnect the train, this is a reasonable additional safety precaution.

The Commission agrees with the initial order's [*17] conclusion that only the present public need should be considered in determining whether to close a crossing. Where the legislature has considered future need to be a relevant consideration, that has been stated. See, for example, RCW 81.80.070 in which the Commission was directed to consider the present or future public convenience and necessity in a grant of motor carrier authority. In addition, as pointed out by Commission Staff, the City is always entitled to petition the Commission to open a grade crossing,

should the public need for it arise.

Finally, even if future need for the crossing were a relevant consideration, the Commission would not be persuaded that the likely future use of the at grade crossing is anything more than speculative and highly uncertain. n2

n2 If this order were to consider future use of this crossing, with Thornton Road as a through street, higher traffic volumes would have to be assumed. Higher traffic volumes would increase the danger at Thornton Road, as the crossing has neither lights nor gates and has limited sight distance.

This order carefully considered the testimony presented by the City and by [*18] the members of the public in favor of keeping the crossing open. As noted above, the desire of the City to keep its options open for use of the crossing is not a present public need served by the crossing. Other options remain open to Ferndale regarding its traffic flow problems, and no change or disruption to present conditions will result from closure of the Thornton Road crossing.

[1] This Commission concludes that the at-grade crossing at Thornton Road in the City of Ferndale should be closed in the interest of public safety. This conclusion is based on the dangerous nature of grade crossings in general, the fact that this crossing will soon experience increased use as a passing track, the switching activity which will occur over the crossing, and the absence of present public need for the crossing.

Having discussed above in detail both the oral and documentary evidence concerning all material matters, and having stated findings and conclusions, the Commission now makes the following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings are incorporated herein by this reference.

FINDINGS OF FACT

1. On March 10, 1994, [*19] Burlington Northern Railroad Company (Burlington or the railroad) petitioned the Commission for closure of the Thornton Road crossing in the city of Ferndale. The grade crossing has two tracks, a mainline and a siding track. The siding track will be extended to the north and will see increased use as a passing track with the start of passenger train service between Seattle and Vancouver, B.C. in 1995.

2. The Thornton Road crossing is protected by stop signs and crossbucks. It currently sees freight train use, operating at maximum speeds of 50 m.p.h. By spring of 1995, two passenger trains per day will operate through the crossing at speeds up to 79 m.p.h. Thornton Road is an east/west street. The railroad tracks run north/south, roughly parallel, to and to the west of, I-5. Thornton Road dead-ends between the tracks and I-5. The crossing currently serves two residences. The petitioner will provide access to those residents if the petition is granted.

3. On October 3, 1994, this petition was consolidated for hearing with the joint petition of Burlington, Amtrak and the Washington State Department of Transportation for an increase in passenger train speed limits through Ferndale. [*20] The petition to close the crossing is tied to the increased speed limits, as passenger train operations on the Burlington tracks will affect the traffic over and use of the crossing.

4. The Thornton road crossing is hazardous because it is a grade crossing, it will soon experience increased use as a passing track, and switching activity can block the track for an hour or more.

5. There is not present public need or convenience which is served by the grade crossing at Thornton Road. At most there is a private need for access to the residences on the east side of the tracks, and Burlington will allow those property owners to continue to use the tracks as a private crossing. The desire of the City to keep its options open for the use of the crossing is not a present public need served by the crossing.

6. The closure should be conditioned upon the railroad providing access for properties which would be otherwise

landlocked, and providing a crew member to flag traffic over the crossing while the train is split.

CONCLUSIONS OF LAW

1. The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of and the parties to this application.

2. Pursuant [*21] to RCW 81.53.060, a railroad crossing at grade may be closed upon petition of the railroad company if the public safety requires such closure. Only present public need should be considered in determining whether to close a crossing.

3. The grade crossing at Thornton Road in the city of Ferndale is dangerous and is not required by the public convenience and necessity. The petition of Burlington Northern Railroad Company for closure of this crossing should be granted in the interest of public safety, on condition that the railroad provide access to those properties located to the east of the tracks which would be landlocked by the closure, including the use of a crew member to flag traffic across when a train is split at the crossing.

ORDER

THE COMMISSION ORDERS That the petition of Burlington Northern Railroad Company for closure of the at-grade crossing at Thornton Road in the City of Ferndale is granted, on condition that the railroad provide access to those properties located to the east of the tracks which would be landlocked by the closure, including the use of a crew member to flag traffic across when a train is split at the crossing. [*22]

DATED at Olympia, Washington, and effective this 31st day of March 1995.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SHARON L. NELSON, Chairman

RICHARD HEMSTAD, Commissioner

WILLIAM R. GILLIS, Commissioner

