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Docket No.: TR-961183, et al

Company: Burlington Northern Railroad Company

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** This filing covers all of the following Dockets:

TR-961183, TR-961311, TR-961312, TR-961532, TR-970838, TR-970839, TR-970840, TR-970841, TR-970842, TR-970843, TR-970844, TR-970845, TR-970846, TR-970847, TR-970848, TR-970849, TR-970850, TR-970851, TR-970852, TR-970853, TR-970854, TR-970855, TR-970856, TR-970857, TR-970858, TR-970859, TR-970860, TR-970861, TR-970862, TR-970863, TR-970864, TR-970865, TR-970866, TR-970867, TR-970868, TR-970869, TR-970870, TR-970871, TR-970872

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May 22, 1997

Sharon Nelson, Chairman
Richard Hemstad, Commissioner
William Gillis, Commissioner
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Dr. S.W.,
P.O. Box 47250
Olympia, Washington 98504-7250

Re: Cause Numbers TR96-1183, TR96-1311, TR96-1312 and TR96-1532

Dear Chairman Nelson, Commissioner Hemstad, and Commissioner Gillis:

I represent The Burlington Northern and Santa Fe Railway Company, petitioners in the above-referenced Cause Numbers. The petitions request that the speed limits in Washington State be made consistent with federal law. The first group of cities will be discussed at the open docket meeting on May 28, 1997 at 9:00 am. Enclosed for your consideration is an legal opinion apprising you of the legal effect that the Federal Railroad Safety Act has on the existing orders, and the implications for the review and decision that the Commission will make on the above referenced petitions.

Thank you for your attention.

Very truly yours,

Larry E. Leggett

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION SPEED ORDERS AND THE FEDERAL RAILROAD SAFETY ACT

Larry E. Leggett

I. Executive Summary

In enacting the Federal Railroad Safety Act ("FRSA"), Congress intended to promote safety and reduce railroad related accidents by providing uniform, national safety standards. To that end, the Federal Railroad Administration("FRA") adopted regulations that set the maximum allowable speeds for various classes of track. The FRSA and ensuing regulations limit the states' jurisdiction to adopt more stringent regulations, unless it can show the regulations are (1) necessary to eliminate an essentially local safety hazard, (2) not incompatible with federal laws or regulations, and (3) not an undue burden on interstate commerce. An essentially local safety hazard cannot be of a statewide character, nor capable of being adequately encompassed within uniform national standards. Likewise, track conditions at intersections and the need for or type of automatic signals are encompassed within federal regulations and cannot be essentially local safety hazards.

II. Background

The Washington Utilities and Transportation Commission has in effect 80 orders restricting trains speeds through cities in Washington State. These orders exist in nearly every city through which The Burlington Northern and Santa Fe Railway Company and The National Railroad Passenger Corporation (Amtrak) operates trains. These orders comprise nearly half of the 162 municipally imposed speed restrictions on the 31,000 miles of BNSF track nationwide.

The majority of the orders in Washington State were issued during the late 1940's and early 1950's. In 1970, Congress enacted the Federal Railroad Safety Act to promote safety and reduce railroad-related accidents, by providing uniform, national safety standards. Pursuant to the Act, the FRA adopted a comprehensive framework of safety regulations, including the establishment of train speeds. The Act also limits the states' authority to restrict speed limits. A state may set lower limits only if it can show that more stringent regulations are needed to eliminate an essentially local safety hazard. The orders in Washington State do not contain any meaningful findings of fact or history about why they were issued; there is no expressed consideration given to track standards; and, overall, no consistency in the limits that were set. BNSF petitioned the Commission to make the orders consistent with federal law.

III. The Federal Railroad Safety Act

In 1970, Congress enacted the Federal Railroad Safety Act, 49 U.S.C. §§ 20101-20153 [1] to provide uniform, nationwide railroad safety standards, with the intent to reduce railroad-related accidents and deaths and to improve rail safety in general. Congress was responding to a task force report which noted the problems with the hodgepodge of state safety regulations and recommended a more comprehensive national approach to railroad safety.[2] Section 20106 provides:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A state may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law regulation, or order --
>
> (1) is necessary to eliminate or reduce an essentially local safety hazard;
>
> (2) is not incompatible with a law, regulation, or order of the United States Government; and
>
> (3) does not unreasonably burden interstate commerce.

The Secretary of Transportation ("Secretary"), acting through the FRA promulgated regulations establishing operating speeds in conjunction with the adoption of track, roadbed, and signal standards. The mainline track in Washington State is Class 4, which has an allowable FRA operating speed of 60 mph for freight and 80 mph for passenger. (The speeds may be adjusted downward based on the degree of curve and superelevation of the rails.) [3]

On April 21, 1993, the United States Supreme Court, in CSX Transportation, Inc. v. Easterwood [4], determined that the train speed regulations "should be understood as covering the subject matter of train speed with respect to track conditions, including the conditions posed by grade crossings . . . ."[5] and held that the Secretary's adoption of

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[1] previously codified at 45 U.S.C. § 421, *et seq.*

[2] H>Rep. No. 1194, 91st Cong. 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin.News 4104,4126-27

[3] 49 C.F.R. § 213.9(a)

[4] 113 S.Ct. 1732 (1993)

[5] 113 S.Ct. at 1743

the regulation preempts state law.[6] Cases decided after Easterwood have consistently held that state and local laws related to train speed are preempted by federal law.[7]

The most basic definition of "federal preemption" is when a state statute or regulation conflicts with or frustrates federal law, the state statute or regulation must give way. The Court recognized, however, that "[even] after federal standards have been promulgated, the States may adopt more stringent safety requirements [1]'when necessary to eliminate or reduce an essentially local safety hazard,' [2] if those standards are 'not incompatible with' federal laws or regulations and [3] not an undue burden on interstate commerce."[8] Under this saving provision, which is to be narrowly construed[9], the state has the burden of showing that the three requirements have been met before the state requirement can stand. [10]

The majority of the courts that have reviewed this issue have invalidated many state requirements or found that the character of the situation was not an essentially local safety hazard. Two principle tests have emerged for evaluating the character of the putative safety hazard. "First, an 'essentially local safety hazard' cannot be statewide in character."[11] The prime example is a blanket speed limit that applies to every crossing in a town, or, more broadly, to every city in the state.[12] Second, the safety hazard cannot be "capable of being adequately encompassed within uniform national standards."[13] For example, conditions listed in 23 C.F.R. § 646.214 related to the type or need for automatic gates and lights (high volumes of vehicular traffic, hazardous materials, restricted sight distances, accident history, etc.) cannot be essentially local safety hazards.[14] Nor can the transportation of hazardous materials by

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[6] Ibid

[7] See, e.g., Armstrong v. Atchinson, Topeka & Santa Fe Ry. Co., 844 F.Supp. 1152 (W.D. Tex. 1994); Michael v. Norfolk Southern Ry., 74 F.3d 217 (11th Cir. 1996); St. Louis Southwestern Ry. v. Pierce, 68 F.3d 276 (8th Cir. 1995); Williams v. CSX Transportation, Inc., 925 F. Supp 447 (S.D. Miss 1996); Herriman v. Conrail, Inc., 883 F.Supp. 303 (N.D. Ind. 1995).

[8] Easterwood, 113 S.Ct. at 1737

[9] Easterwood v. CSX Transportation, Inc., 923 F.2d 1458, 1553 n.3 (11th Cir. 1991) (citing H. Rep. No 1194, 91st Cong., 2d Sess. 11 (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 4117) aff'd, 113 S.Ct. 1732 (1993)

[10] Johnson v. Southern Ry. Co., 654 F.Supp 121 (W.D. N.C. 1987)

[11] Bowman v. Norfolk Southern Ry. Co., 832 F.Supp. 1014 (D.S.C. 1993); Easterwood, supra, 923 F.2d at 1553 n 3

[12] Johnson v. Southern Ry Co., 654 F.Supp 121, 123 (W.D.N.C. 1987)

[13] Easterwood, supra, 923 F.2d at 1553, n 3.

[14] Bowman, supra, 1014 F.Supp at 1019

the railroad, because the activity is regulated by the Hazardous Material Transportation Act of 1970.[15]

Finally, conditions at intersections, such as multiple tracks, or rail cars obstructing the view cannot constitute a local hazard.[16] The safety regulations setting the allowable operating speeds take into account the track gage, alignment, curvature, surface uniformity, and the number of crossties per length of track.[17] These regulations "should be understood as covering the subject matter of train speed with respect to track conditions, including the conditions posed by grade crossings." [18] Moreover, the conditions at crossings are not unique. They can and do happen at many intersections in the state. [19]

[15] Standford v. Burlington Northern RR Co., 845 F.Supp 392, mod. 845 F.Supp. 397; Missouri Pac. RR. Co. v. Railroad Com'n of Tx, 671 F.Supp. 466, (W.D. Tx), aff'd 850 F.2d 264, cert den, 109 S.Ct. 794 (1987).

[16] Earwood v. Norfolk Southern, Ry. Co., 845 F.Supp 880 (N.D. Ga 1993).

[17] See, 49 C.F.R. §§ 213.51-213.143

[18] Easterwood, 113 S.Ct. at 1743.

[19] Earwood, supra, 845 F.Supp at 888