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BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

BNSF RAILWAY COMPANY,)
)
Petitioner,)
) DOCKET TR-140382 and
vs.) DOCKET TR-140383
)
YAKIMA COUNTY,) (Pages 322-365)
)
Respondent.)

EVIDENTIARY HEARING, VOLUME V
ADMINISTRATIVE LAW JUDGE RAYNE PEARSON

April 29, 2015
8:30 a.m.
2403 South 18th Street
Union Gap, Washington

REPORTED BY:
PHYLLIS CRAVER LYKKEN, RPR, CCR NO. 2423

0323

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BNSF RAILWAY CO. vs. YAKIMA COUNTY

DOCKETS TR-140382 and TR-140383

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April 29, 2015

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T E S T I M O N Y

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KENNETH BEAR CHIEF

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1 BE IT REMEMBERED that on Wednesday, April
2 29, 2015, at 8:30 a.m., at 2403 South 18th Street,
3 Union Gap, Washington, the Evidentiary Hearing re
4 BNSF RAILWAY CO. vs. YAKIMA COUNTY was taken
5 before Phyllis Craver Lykken, Certified Court
6 Reporter. The following proceedings took place:

7

8 THE JUDGE: Good morning. Let's be on the record.
9 We're back on Wednesday, April 29, 2015 at
10 approximately 8:30 a.m. to continue the evidentiary
11 hearing in the petition filed by BNSF to close highway
12 rail grade crossings at North Stevens Road and Barnhart
13 Road.

14 And we already have our first witness on the stand
15 this morning. So if you could please stand and raise
16 your right hand, I'll swear you in.

17

18 KENNETH BEAR CHIEF, being first duly sworn to
19 tell the truth, the whole
20 truth, and nothing but the
21 truth, testified as follows:

22

23 THE JUDGE: If you could state your name, spelling
24 your last name for the record.

25 THE WITNESS: My name Kenneth Bear Chief. That's

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1 B-E-A-R capital C-H-I-E-F.

2 THE JUDGE: Thank you.

3

4 DIRECT EXAMINATION

5 BY MR. CHAIT:

6 Q. Good morning, Mr. Bear Chief. I'm handing you what's
7 been pre-marked Exhibit KB-1T, do you recognize that as
8 your pre-filed testimony in this matter?

9 A. I do.

10 Q. And is it complete and is that your signature on the
11 fourth page?

12 A. Yes, it is.

13 Q. Okay. Mr. Bear Chief, if I was to ask you the
14 questions in this exhibit, would these answers be the
15 same as your testimony here today?

16 A. Yes, they would.

17 MR. CHAIT: Thank you.

18

19 CROSS-EXAMINATION

20 BY MR. SEXTON:

21 Q. Good morning, Mr. Bear Chief. My name is Joe Sexton.
22 I represent the Yakama Nation in this matter as
23 intervenor.

24 I'd like to discuss a little bit about your
25 background and your testimony. You indicated you

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1 worked for, as an independent contractor, I believe,
2 for Tamaki Law Firm.

3 A. Yes.

4 Q. Can you describe your work as an independent
5 contractor?

6 A. Paralegal, general paralegal work. I do some
7 investigation, I'm also a victim liaison with the
8 Native American community that we represent clients, or
9 Tamaki does, in Washington, Oregon, Idaho, Montana,
10 South Dakota.

11 Q. Okay. And you did that for the past 20 years; is that
12 correct?

13 A. Well, since 1994, when I first began working with them.
14 And we've done a lot of native, we've always done work
15 with Native Americans through my involvement. And then
16 in 2008, we entered into a whole new area, which was
17 the child sexual abuses that occurred at the Native --
18 at the Indian missions, and of course that has been
19 what I've concentrated on since 2008.

20 Q. Do you still work for the law firms?

21 A. I'm retired.

22 Q. Okay.

23 A. Disability.

24 Q. Understood. Sounds like very important work. Aside
25 from working on the sexual abuse cases and other Native

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1 liaison, sounds like did you general work as a
2 paralegal for the firm; is that correct?

3 A. Yes.

4 Q. In those cases, at any time, I guess, in your work as
5 an independent contractor for Tamaki, have you worked
6 with respect to roads or highways or railroads?

7 A. Auto accidents.

8 Q. Auto accidents?

9 A. Train crossing accidents.

10 Q. How many train crossing acts have you worked on?

11 A. Two, I believe.

12 Q. You worked for Tamaki --

13 A. For Tamaki.

14 Q. -- with respect to two?

15 A. Yes.

16 Q. Do you remember where those accidents occurred?

17 A. Yeah, they were, one was on the old Track Road about a
18 mile or two down from Winnoway (phonetic) Highway. It
19 was a private railroad crossing. And I think the other
20 one was south of Wapato. It's been many years.

21 Q. Understood. So one was a private railroad crossing?

22 A. Railroad crossing.

23 Q. Can you, I guess I don't really understand that?

24 A. It's private railroad crossing because there was only
25 one home over there, and the rest of it was all park,

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1 so there was no, you know, it was just, that was their
2 egress to and from the property was that one railroad
3 crossing. Just before that specific farm and family
4 that lived there.

5 Q. Understood. Were there, do you understand the
6 difference between active and passive safety controls
7 with respect to railroad crossings?

8 A. Sure. Yeah.

9 Q. As far as I understand that, and I'm definitely not an
10 expert in this area, but as far as I understand it,
11 active includes the crossbars, lights, and bells?

12 A. Uh-huh, right.

13 Q. And passive was a stop sign, crossbucks, just a sign
14 indicating it's a railroad. With respect to these two
15 crossings, and I understand the one is a private
16 crossing that you just described, and the other one
17 you're not sure, you think occurred in and around?

18 A. Yeah. The other one was just one of the general
19 railroad crossings that had the stop signs on each side
20 of the railroad. You know, as you pull up to it. And
21 that was the only controls.

22 Q. Which one was that?

23 A. That's the other one that was south of Wapato.

24 Q. South of Wapato?

25 A. Yeah.

0330

1 Q. So there was no -- you know for a fact that there was
2 no --

3 A. There were no up and down and no flashing lights, it
4 was just a, if this was the roadway there would be a
5 stop sign here and a stop sign here. As you pulled up
6 to the railroad, you're required to stop, look both
7 ways before you stop.

8 Q. Just to be clear for the record, we're talking about
9 the accident that correct occurred south of Wapato?

10 A. Yes.

11 Q. You're not sure where the crossing is; is that right?

12 A. Sure, right.

13 Q. And your recollection, your testimony today is that
14 they only had stop signs, no crossbars, no bells or
15 lights?

16 A. Yeah.

17 Q. Is that correct?

18 A. Yes.

19 Q. Okay. Can you describe what happened at that accident?

20 A. At the private crossing railroad where the family lived
21 in the farmhouse and they leased that farmhouse from
22 the farmer, at that incident, she pulled up to the
23 railroad crossing with her infant child, she looked
24 down the road, didn't see the railroad -- the train
25 coming, and thought she had more than enough time to

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1 get across, but what had happened is her car stalled
2 right in the middle of the railroad crossing, and as
3 she kept trying to start it and start it, it wouldn't
4 start and the train hit them, you know, broadside.
5 Drug them a quarter of a mile down the highway.

6 They were both ejected out. She was in a coma for
7 11 days. The baby was miraculously uninjured, just
8 laying there, not 25 feet from its mother. The woman
9 was in a coma for 11 days and suffered brain damage and
10 never recovered.

11 Q. Did she pass away, sir?

12 A. No, she's still living.

13 Q. Okay.

14 A. But, you know, I know the, I know the family, and, you
15 know, I can tell you, I can't recall her name right at
16 this moment, but I know that because of her brain
17 damage and other issues, you know, she eventually lost
18 her children and her husband divorced her. You know,
19 she lives with her family.

20 Q. Okay. That's, if I'm understanding correctly, that's
21 one of the accidents you reference in your testimony
22 that occurred in the 1990s; does that sound correct?

23 A. Yeah, that occurred back in the 1990s, mid 1990s. Both
24 of those occurred in the mid 1990s.

25 Q. You say specifically, In the mid 1990s a friend of mine

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1 was crossing at an at-grade crossing when her car
2 sputtered. She and her son were both ejected from the
3 car. She suffered brain trauma, he was miraculously
4 okay.

5 A. Uh-huh.

6 Q. That's what we're talking about right now, the
7 residence and the private crossing?

8 A. Uh-huh.

9 Q. And then the other accident south of Wapato occurred in
10 the 1990s as well?

11 A. Yeah. I didn't work on that one as the paralegal
12 specifically, although it was, I was aware of it,
13 working through the office, and that was a fatality.

14 Q. Okay. So talking about the one at the residence with
15 the private crossing, that was a subject of litigation?

16 A. We investigated it and we were not able to determine
17 what the actual cause of the accident was, because I
18 said the vehicle sputtered out, the victim claimed that
19 the boards on the railroad crossing that are this way,
20 that they were so loose as they popped up and prevented
21 her front wheel from going over. And that's the actual
22 testimony of the person as to what she recalled before
23 the moment of impact.

24 Q. This is the victim, the mother with the child in the
25 car?

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1 A. Yes.

2 Q. Okay. And based on that --

3 A. I wouldn't, from my own investigation I went out there
4 and I took photographs, we found that the boards jumped
5 up and down, they were very loose. About within three
6 weeks of the accident the railroad company went out
7 there and completely replaced everything.

8 Q. Okay. And I'm sorry if you answered this already
9 before, but was there -- there was no litigation with
10 respect to that?

11 A. No, no, because we weren't actually able to determine
12 whether or not that could actually happen that way.
13 Like I said, I went out and did a quick initial,
14 driving my car across there and then watching somebody
15 else drive back and forth and taking photographs and
16 just trying to determine whether or not what she said
17 was possible. And we couldn't determine whether that's
18 what happened or did not happen, and so we eventually
19 just closed it out.

20 Q. Closed it out. Did you -- was there a settlement of
21 any sort?

22 A. No.

23 Q. So she received no money --

24 A. No.

25 Q. -- from the railroad?

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1 A. No.

2 Q. Okay. But it sounds, if I understand your testimony
3 correctly today, that, according to the person who was
4 involved in this accident, she claims there was a
5 problem with the tracks that caused her car to stop --

6 A. Yes.

7 Q. -- on the track; is that right?

8 A. Uh-huh. Yeah.

9 Q. Okay. And it sounds like to me that had that problem
10 not occurred, at least according to her testimony, she
11 would have been able to safely --

12 A. She would have been able to just proceed across the
13 railroad tracks.

14 Q. Right. Okay. Thank you. Do you recall what happened
15 at the accident moving to the south Wapato accident?

16 A. No. I was not the paralegal assigned to that case. I
17 only mentioned it because I recalled that. There were
18 other accidents that I can also recall that I know from
19 family and friends that were injured at railroad
20 crossings along the old Track Road.

21 Q. We'll get to the other ones in a minute. But I want to
22 focus and finish up the questions on the south Wapato
23 accident.

24 You were not the paralegal, I understand. You do
25 not recall exactly what happened; is that correct?

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1 A. Right.

2 Q. I know you don't recall the names of the individuals at
3 the residence with the private crossing. Do you recall
4 the names of the individuals involved?

5 A. No.

6 Q. Do you recall whether that accident was the subject of
7 any litigation?

8 A. Again, I know it was investigated and it was a lawsuit
9 that was initiated by the family. That's all I can
10 tell you. Because it was a traffic fatality.

11 Q. Okay.

12 A. But I can't tell you who it was or what the results
13 were or whether a lawsuit was ever filed.

14 Q. Okay. And you remember that it was in the 1990s?

15 A. Yeah.

16 Q. Do you remember what year?

17 A. Mid '90s, around '95, '96, somewhere around there.

18 Q. And you do recall there was as fatality involved in
19 that?

20 A. Yeah, there was, because I used to, because of my own
21 personal history, I used to do a lot of auto accident
22 investigations back in those days, and work on those
23 for the office. And most all of them, because I'm from
24 the Lower Valley, were for tribal members.

25 Q. Okay. So we talked about two accidents so far. Your

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1 testimony references a third accident in the 1970s; is
2 that right?

3 A. Yeah, well, one was from the '60s, and it was my
4 stepfather and his first -- second wife were crossing
5 at McDonald Road about at the edge of the city limits
6 south of Toppenish, and that was at that McDonald Road
7 crossing back in the days when it was not patrolled
8 like it is now. They didn't have the up and down bars,
9 the flashing lights, and all of that.

10 It was late at night. He didn't see the train and
11 he started to go right across and they were broadsided
12 and he was permanently disfigured with a scar that ran
13 from the back of his head all of the way to the corner
14 of his mouth, facially disfigured. His wife suffered
15 several broken bones and suffered from a limp for the
16 rest of her life until she died of cancer. And he
17 later became my stepfather through marriage to my
18 mother.

19 Q. Your stepfather?

20 A. I had a friend named Ron Maldonado who was engaged and
21 they had an engagement party and they were crossing the
22 same intersection I'm talking about at McDonald Road,
23 they were hit by a train and she died and Ron suffered
24 permanent brain injury.

25 Q. Okay. So now we have --

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1 A. Two at the same intersection.

2 Q. We have two at the same intersection.

3 A. And there are many more that people, you know, if I
4 wanted to ask, you know, local people, they would start
5 just telling me, you know, because of the notorious
6 crossing. You have three crossings I think are
7 probably the most notorious: The one at McDonald Road,
8 the one that runs right through Toppenish down at
9 Donald Road in Wapato, and the one down in Parker were
10 primarily high traffic.

11 Q. Okay.

12 A. And back in those days they were not controlled
13 intersections.

14 Q. Did you ever use those?

15 A. But they are now.

16 Q. Did you ever use those?

17 A. Yeah.

18 Q. And you've never been involved in an accident?

19 A. I've never been involved in an accident. Although when
20 I was 18 years old when you go there straight down
21 Donald Road you reached the Old Valley Highway, there
22 was a railroad spur that went through there, and I
23 pulled off of the old highway and there was no stop
24 sign there in those days, and I just went across. And
25 right as I crossed the train went behind me. I didn't

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1 see it, I didn't hear it, I came within an inch of my
2 life, and it taught me a lesson. Always stop. Always
3 look. You know. That was my only one close, close
4 call, and it scared me to death because I had other
5 people with me, you know.

6 Q. Understood.

7 A. You know.

8 Q. Sounds like a scary situation.

9 A. Yeah.

10 Q. So I don't want to get confused, but we've talked in
11 your testimony you reference your stepfather's accident
12 in the 1970s, if I understood your testimony today, you
13 indicated that that was in the 1960s?

14 A. Yeah, late '60s, somewhere around there.

15 Q. Late '60s. Do you remember the year?

16 A. No, I do not.

17 Q. Okay. But the testimony that, the written testimony
18 where you say this was in the '70s, that's inaccurate
19 now that your memory has been refreshed?

20 A. Yeah. When -- you mean from when, you mean what
21 happened to Matt Shiloh (phonetic), who I was talking
22 to, the one that was disfigured, my stepfather?

23 Q. I hadn't asked?

24 A. That was his name, was Matt Shiloh, and his wife
25 Gloria.

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1 Q. Understood. You say my stepfather and his wife were
2 gravely injured at a crossing one mile south of
3 Toppenish, this is in the 1970s, bottom of page 2.

4 A. I may have been incorrect. You know, it's hard to
5 recall --

6 Q. Sure.

7 A. -- specific dates. This was before he was married to
8 my mother and he told me about it and they were married
9 in 1978. So this could have happened ten years before,
10 it could have happened eight years before.

11 Q. Understood.

12 A. I'm not sure, so I can't tell you --

13 Q. Okay.

14 A. -- specific dates.

15 Q. His name, you mentioned his name, his name is Matt
16 Shiloh; is that correct?

17 A. Yes, it was.

18 Q. What's your, who else was with Mr. Shiloh at the time
19 of the accident?

20 A. Pardon me?

21 Q. Who else?

22 A. Wife Gloria.

23 Q. His wife Gloria. And the information that you have and
24 that you're testifying about, you learned about this
25 accident from Mr. Shiloh?

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1 A. Yeah.

2 Q. Okay.

3 A. Yes.

4 Q. Was that accident the subject of litigation?

5 A. Yes. I believe he got a settlement from that.

6 Q. A settlement. Who paid?

7 A. Railroad.

8 Q. Burlington Northern paid the settlement?

9 A. I believe so.

10 Q. Okay.

11 A. Either that or his auto insurance. I don't know.

12 Q. Okay.

13 A. But he did get a settlement. He did tell me that.

14 Q. Okay. You referenced, so, so far I think we have four
15 accidents that we've talked about?

16 A. Yeah.

17 Q. You indicated that you could talk about more. But I
18 guess my question is have you, you haven't been
19 involved in any train accidents directly?

20 A. No. No. The only active case that I was involved in
21 was the one that was involved with the railroad
22 crossing that was just below Winnoway Highway, and it
23 was on the west side of the railroad track. Because
24 the railroad track is on that side of the road going
25 north and it's on the same side going south, you know.

0341

1 Q. Sure.

2 A. On the side of the highway.

3 Q. You were involved in an accident on Winnoway Highway?

4 A. No. No. That's the only case I investigated
5 personally.

6 Q. That was the residence with the private crossing?

7 A. Yeah.

8 Q. Making sure I keep everything straight. But you were
9 not involved in that accident at the time it occurred?

10 A. No.

11 Q. Okay. Do you know of video or written testimony
12 regarding any of the accidents you have talked about?

13 A. Not that I'm personally aware of, no.

14 Q. Okay. And aside from the settlement that you seem to
15 recall about the accident that occurred in the 1960s,
16 none of the other accidents you've talked about were
17 the subject of litigation; is that correct?

18 A. That's correct.

19 Q. Okay. What formal training do you have in terms of
20 investigating --

21 A. I have a paralegal certificate through Eastern
22 Washington University.

23 Q. Okay. Is that an associate's degree?

24 A. No. It's just a --

25 Q. Certificate?

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1 A. -- certificate.

2 Q. Beyond that, what other degrees or education do you
3 have?

4 A. I have a, through business school I have an
5 administrative assistant diploma that I earned way back
6 in the early '70s, and then I had a second one in
7 accounting that I earned in 1988. After I was involved
8 in a motorcycle accident I had the opportunity to go
9 back to school and so I chose to take some accounting
10 training.

11 Q. So that was in accounting?

12 A. Yes.

13 Q. That's a diploma, you mentioned?

14 A. Yes. They were business schools here that were in
15 Yakima. The first one was called Yakima Business
16 School, which was later taken over by Trend Business
17 College, and I graduated from both programs.

18 Q. Okay. Do you have any degrees or education with
19 respect to civil engineering?

20 A. No, I do not.

21 Q. What about same question with respect to highways or
22 roads?

23 A. No, I do not.

24 Q. Okay. Aside from your work as a paralegal in the cases
25 you've just described with respect to railroads and

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1 investigating railroad accidents, do you have any other
2 work in your life that you've done regarding highway
3 safety?

4 A. No.

5 Q. What about railroad safety?

6 A. No.

7 Q. Okay. Have you ever testified before in any civil or
8 criminal matter?

9 A. No.

10 Q. Okay. So it's safe to say you've not testified as an
11 expert in any matter?

12 A. No.

13 Q. Okay. And you're not offering your testimony this
14 morning as an expert?

15 A. No, I'm not an expert witness.

16 Q. Okay. Thank you. Have you ever been an employee for
17 BNSF?

18 A. No.

19 Q. Okay. Have you ever done independent contracting work
20 for them?

21 A. No, not for them.

22 Q. Did Tamaki ever represent BNSF when you were working
23 for Tamaki?

24 A. No.

25 Q. No. Okay. Who asked you to testify in this matter,

0344

1 sir?

2 A. Pardon me?

3 Q. Who asked you to testify in this matter?

4 A. I was contacted by Bryan Smith, who is an attorney with
5 Tamaki Law, and he knows I'm from the Valley, I was
6 born and raised here, lived here all of my life, and he
7 called me up and asked me if I would be willing to talk
8 to these gentlemen about what my opinions were about
9 the railroad crossings. And I told him, I said, sure,
10 because I've had some family that have been affected
11 and friends that I would be willing to talk to them.
12 And just this testimony that I gave was a result of
13 that interview.

14 Q. Okay. That's Bryan Smith from Tamaki called you?

15 A. Yes.

16 Q. Are you being compensated for your time today?

17 A. No, I'm not.

18 Q. Have you received any compensation with respect to your
19 testimony in this case?

20 A. Pardon me?

21 Q. Have you received any compensation with respect to your
22 testimony in this case?

23 A. No, none. No, not in this case, no.

24 Q. I'd like to shift gears a little bit. I know your
25 testimony you indicate you are married to an enrolled

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1 Yakama, but you yourself are an enrolled Nooksack; is
2 that correct?

3 A. Yes, I am a Nooksack tribal member, both of my former
4 wives, and I have two children that are Yakama, three
5 that are Nez Perce, and they're three-eighths Yakama
6 themselves. Their mother was an enrolled Yakama. So I
7 have numerous relatives, cousins, aunts and uncles that
8 are Yakama tribal members.

9 Q. Okay. Aside from your family connections to Yakama,
10 have you ever worked for the Yakama Nation?

11 A. Yes, I did. Back in, well, the late '60s to the 1978,
12 1976, somewhere around there.

13 Q. What did you do for the Nation?

14 A. Well, back in the days when I was very young I used to
15 work with a furniture factory. Everyone worked there.
16 It was an available job and paid better than farm work
17 or anything else.

18 And in my youth I used to work with my uncle on
19 the cattle ranch, so that was where I was growing up to
20 be a young cowboy. But I worked for Harry Kent and
21 Harry used to tell me, you know, your uncle's way of
22 life is ending and this is not going to be a life for
23 you. You're not going to be able to when have you a
24 young son, you know, and he told me the best things to
25 do were to try and find better avenues of work.

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1 So the furniture factory was owned by the Yakama
2 Nation, it was called White Swan Industries, and I went
3 to work there. And I went to work at the Northwest
4 Hardwoods, which is a company right next to it, it was
5 called the Yakama Nation Industrial Park, and there
6 were various employment opportunities there.

7 And then I worked for the tribe through the tribal
8 newspaper. I was the business manager there. And then
9 through a warehouse for the tribe, I was the manager
10 there. And then after 1978 I started working
11 elsewhere.

12 Q. Okay.

13 A. I'm not a tribal member. I'm not a tribal member and I
14 don't have first preference. And when I would work for
15 the tribe, I was always shadowed by someone who was
16 going to assume my job at a certain point. And after
17 working for the tribe for six years having that happen
18 to me twice, I just decided that I didn't want to put
19 in a lot of effort and be replaced.

20 Q. Understood. So since then you haven't worked formally
21 for the nation itself?

22 A. No.

23 Q. And if I understand your testimony earlier, was that
24 this is your personal opinion and so you're not putting
25 yourself out as a spokesperson?

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1 A. Yeah. This is my personal opinion about what I know
2 and that's all I'm testifying about.

3 Q. You're not holding yourself out as a spokesperson for
4 the Nation?

5 A. No.

6 Q. Do you attend longhouse on the reservation, sir?

7 A. I used to as child. I grew up here. My grandfather
8 and uncle are both Shakers and they used the longhouse
9 for all of our funerals and everything, we used either
10 the longhouse or the community centers, and so yes, I
11 did.

12 Q. Which longhouse did you attend?

13 A. Well, since I grew up in Wapato, Wapato was the primary
14 longhouse. And of course a lot of tribal members are
15 now shifting towards using the funeral homes in Wapato
16 and at Toppenish. But for Washat services and other
17 things they will use, for traditional funerals they
18 will use the longhouses, and they're in Satus,
19 Toppenish, Wapato, down at the Columbia River, and, you
20 know, and at White Swan.

21 And there are cemeteries all over the reservation,
22 tribal cemeteries, I mean, from this side of the ridge
23 running across the other side of -- what's this creek
24 that runs through here? Not --

25 Q. Satus?

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1 A. It's not Satus, no. Ahtanum Creek. Yeah, south of
2 Ahtanum Creek, that's the border. The northern border
3 of the Yakama Reservation. If you go up along the side
4 there, there are may be, all of the way up to as far
5 west as Tampico I think there are probably a half a
6 dozen various tribal member family plots in that whole
7 area.

8 Q. Have you ever been to a funeral service at the Satus
9 Longhouse?

10 A. Pardon me?

11 Q. Have you ever been to a funeral service at the Satus
12 Longhouse?

13 A. Yes.

14 Q. Do you recall what route you took from --

15 A. Yeah, we went down Indian Church Road.

16 Q. Okay.

17 A. And as you cross Schuster Road you can see the Satus
18 Longhouse right there.

19 Q. Sure.

20 A. I don't think it's a hundred yards down.

21 Q. There was a procession from the longhouse to the
22 cemetery?

23 A. There was a procession from the funeral home first, and
24 then to the longhouse.

25 Q. Okay.

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1 A. And then they held their three-day Washat services
2 there and then at the end of the conclusion of that,
3 then they had burial.

4 Q. Where was the burial?

5 A. It was at Smohalla, which is on the other side of
6 Highway 22.

7 Q. Sure.

8 A. Down Plank Road and you go up around and it's up on the
9 top of the hill. And that's also where my family plot
10 is. I have about a dozen family members who are all
11 buried there.

12 Q. Okay. Sounds like that was one service you attended at
13 Satus?

14 A. Well, yeah, that's the one that I did was for a friend
15 that I grew up with. He was, lived, his name was
16 Robert Strong, and he lived, if you turn left on
17 Schuster Road, the longhouse is here, you go down and
18 there's a road called Strong Road, and at the end of
19 it, that was their family home. That's the only house
20 there.

21 Q. Would it surprise you to know that there is testimony
22 in the record now that the Satus Longhouse elders find
23 the Barnhart Road crossing culturally important to
24 access the cemetery and the longhouse?

25 A. It wouldn't surprise me, but in, when the service that

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1 I went to, that was not the road that was used, you
2 know. So, you know, I've never used the Barnhart Road.

3 Q. Sure. But you're not an elder of the longhouse?

4 A. No, I'm not an elder of the longhouse or of the
5 community center that's over on Shaker Church Road.

6 Q. I'd like to turn back to the accidents that you know
7 of, the train-involved accidents on the reservation, or
8 anywhere, for that matter. As I understand it, you
9 did, all of the information you have regarding those
10 accidents you learned secondhand from someone else,
11 right?

12 A. Well, yeah. I mean, you read about them in the
13 newspaper, you know family or tribal members that have
14 been killed at the crossings, and there are funerals
15 for them. It's community knowledge, so yeah. That's
16 what I know.

17 Q. Right. But you've never been at --

18 A. No I wasn't there.

19 Q. -- the scene of an accident?

20 A. I didn't see them. I wasn't involved in them.

21 Q. And you have no basis to testify as to whether the
22 railroad or the train observed the proper safety
23 protocols or properly maintained their tracks --

24 A. No.

25 Q. -- with respect to any of that?

0351

1 A. No.

2 Q. Okay. And it sounds like you have a wide variety of
3 experience professionally. Have you ever worked as a
4 first responder, sir?

5 A. No.

6 Q. You don't have a basis to testify here as to whether
7 the closing of either the Barnhart or North Stevens
8 railroad crossings would impact --

9 MR. SCARP: Your Honor, if I may, this goes far
10 behind the pre-filed testimony.

11 THE JUDGE: I agree.

12 MR. SEXTON: In fact, Your Honor, respectfully, it
13 doesn't. He testified about there are safer ways, that
14 essentially these crossings are dangerous and it would
15 be safer to close these crossings. So I'm getting at
16 the foundation for his testimony.

17 THE JUDGE: I think it's well established that all
18 of his testimony is opinion at this point.

19 Q. (By Mr. Sexton) Okay. Sir, you testified that the
20 safety risks for leaving these crossings open is too
21 high; is that true?

22 A. Pardon me?

23 Q. You testified that the safety risks of leaving these
24 two crossings that are at issue here is too high; is
25 that true?

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1 A. I simply believe that they're redundant. If you go up,
2 there is another crossing on Barnhart Road further up,
3 there is a crossing there, and if you're familiar with
4 the area, you've probably gone up in the area south,
5 but if you look down from the longhouse down Indian
6 Church Road after you pass Schuster Road, it runs this
7 way, straight down is the intersection, which you can
8 take a left or you can go to Granger, or you can turn
9 left and go up to the stop sign to Highway 22, turn
10 left, go up a couple of miles, turn right on Plank Road
11 and go up to Smohalla, where there is the cemetery
12 there. Or you can take a right to Toppenish and go to
13 any of the other tribal cemeteries that may be in that
14 direction.

15 Q. Sure. I understand that we're dealing with a lot of
16 crossings here, but I guess I'm trying to get at, I
17 just have a couple more questions, and I'm looking at
18 your testimony and on page 3 you state the safety risk
19 of leaving these two crossings open is too high; is
20 that correct?

21 A. There are not, there are not that many deaths that are
22 occurring and to where the Satus Longhouse is the
23 primary longhouse being used, and it's infrequent and
24 because of the infrequency of the use it's also mostly
25 just a local, kind of like a dogleg crossing that goes

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1 over that.

2 And to me, in my opinion, and that's what I'm
3 testifying here, is that using Indian Church Road or if
4 you're at the community center and holding funeral
5 services there, two and a half, three miles up the
6 road, that's Shaker Church Road and you cross to
7 Highway 22. You can either go across the highway and
8 follow it around to Smohalla and be totally avoid
9 Highway 22, and all of those funeral processions are
10 accompanied by the Yakama tribal police front and rear
11 to block off the traffic and to maintain the safety of
12 all of the cars involved.

13 Q. Sure.

14 A. To me, these, in my own opinion, those are the
15 directions that I have been involved with when we've
16 used those, and to me, they're safer.

17 Q. Okay. But you know of no accidents that have occurred
18 at either of the two crossings at issue here; is that
19 true?

20 A. I'm not aware of at the crossings there, although if
21 you're interested in --

22 Q. I'm glad you mentioned that your believe that these
23 crossings are infrequently used. How many hours would
24 you say you've spent observing those crossings?

25 A. I go out there -- in that area?

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1 Q. Yeah.

2 A. My ex-wife and her family live out there on Shaker
3 Church Road, so I go down Indian Church Road and around
4 the Schuster Road over to Shaker Church to go there and
5 visit. Sometimes I go out at the other end and come
6 down Highway 22. But I've also used that to go across
7 in the past. Sixty-three years living here. I have
8 been everywhere on this reservation.

9 Q. So the basis of your testimony that these crossings are
10 infrequently used is based on just your traveling
11 around or near those crossings?

12 A. Yeah. Then also because of my, my recent activity out
13 there going out there because of my ex-wife and taking
14 my children out there or going out there with them for
15 different purposes and things, I have actually
16 witnessed how much the farm trucks use both Indian
17 Church Road and Shaker Church Road going this way
18 towards Granger or Toppenish or going out to
19 Highway 22. I mean, they're just going through there
20 all the time. And just from what I've witnessed, those
21 seem to be the primary routes.

22 Q. How many hours a week would you say you spend observing
23 the traffic in this area?

24 A. Well, I go there once or twice a week.

25 Q. So once or twice a week do you sit there and watch the

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1 traffic?

2 A. No. I don't count the traffic, but whenever I'm there,
3 you know, if it's the springtime, there has been a lot
4 of farm, farm truck use out there going across and
5 using those roads, the ones that I mentioned. Of
6 course I wasn't over on Buena Road watching to see how
7 much farm traffic was going across there. I can only
8 say what I witnessed on Shaker Church Road, Schuster
9 Road, and Indian Church Road.

10 MR. SEXTON: Okay. Thank you for your time, sir.
11 Appreciate it. That's all of the questions I have.

12 THE JUDGE: Mr. Plant, do you have any questions
13 for this witness?

14 MR. PLANT: No.

15 THE JUDGE: Thank you. You may step down.

16 THE WITNESS: Thank you.

17 THE JUDGE: You have Mr. Stephens next.

18

19 TERRY STEPHENS, being first duly sworn to tell
20 the truth, the whole truth,
21 and nothing but the truth,
22 testified as follows:

23

24 THE JUDGE: If you could take a seat and state
25 your first and last name, spelling your last name for

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1 the court reporter.

2 THE WITNESS: First name is Terry, last name is
3 Stephens, S-T-E-P-H-E-N-S.

4

5 DIRECT EXAMINATION

6 BY MR. CHAIT:

7 Q. Good morning, Mr. Stephens. Thanks for being here.

8 Can you just briefly state who you work for?

9 A. BNSF Railway.

10 Q. What's your position with BNSF?

11 A. Currently terminal train master.

12 Q. I'm going to hand you what's been marked as Exhibit
13 TS-1T, if you could briefly look through that. Is that
14 your signature on the last page there?

15 A. Yes, IT is.

16 Q. And is that your testimony in this case as if I were
17 asking it today and you were answering today?

18 A. Yes, it is.

19 MR. CHAIT: Thank you.

20 MR. PLANT: I have no questions.

21 MR. SEXTON: No questions, Your Honor.

22 THE JUDGE: Okay. I don't have any questions for
23 you, either. Thank you.

24 THE WITNESS: Thank you.

25 THE JUDGE: Do you have questions for Mr. Tycksen?

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1 I do have a couple of questions for him. So bring him
2 up here.

3

4 MICHAEL TYCKSEN, being first duly sworn to tell
5 the truth, the whole truth,
6 and nothing but the truth,
7 testified as follows:

8

9 THE JUDGE: If you could state your name, spelling
10 your last name for the record.

11 THE WITNESS: My name is Mike Tycksen,
12 T-Y-C-K-S-E-N.

13

14 DIRECT EXAMINATION

15 BY MR. CHAIT:

16 Q. Thank you for coming out this morning, Mr. Tycksen.

17 You work for BNSF?

18 A. That's correct.

19 Q. What's your position at BNSF?

20 A. Currently road foreman of engines.

21 Q. I'm going to hand you what's been pre-marked as MET-1T,
22 if you could briefly take a look at that. Is that your
23 signature on the last page?

24 A. That is my signature.

25 Q. This is your testimony in this case as though I were

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1 asking it and you were responding today?

2 A. That is correct.

3 MR. CHAIT: Okay. Thank you.

4

5 EXAMINATION

6 BY THE JUDGE:

7 Q. Good morning, Mr. Tycksen.

8 A. Good morning.

9 Q. On page 4 of your pre-filed testimony, beginning at
10 line 5, you stated that people are often injured or
11 killed in grade crossing accidents that you've
12 responded to, and you also talk about how throwing the
13 emergency brake can result in a derailment and the
14 casualties can be in the train or other bystanders on
15 the ground. My question is, do you have any data about
16 how many when and what type of crossing incidents have
17 occurred?

18 A. I don't have any actual data or statistics, no.

19 Q. Okay. It's just based on personal experience?

20 A. Yes.

21 Q. Okay. And of those incidents you've responded to, can
22 you tell me roughly how many have resulted in
23 fatalities and to whom?

24 A. In my current position, of the road crossing accidents
25 that I've responded to in the last five years and

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1 four months, approximately, the fatalities that have
2 occurred have all been the people who were in the
3 vehicles that were hit by the train. And I, I don't
4 have an actual amount, but I would estimate probably
5 between 15 and 20. Well, my territory covers other
6 than just the Yakima Valley, so I also work between
7 Pasco and Spokane. So that's all of those areas
8 included.

9 Q. And so what percentage would that represent?

10 A. Percentage of?

11 Q. The accidents that you've responded to where there were
12 fatalities.

13 A. Fatalities. Between 95 and 100 percent.

14 THE JUDGE: Okay. Thank you. That's all I have.

15 MR. CHAIT: I'll add one little thing for record
16 that might be helpful.

17 THE JUDGE: Okay.

18

19 REDIRECT EXAMINATION

20 BY MR. CHAIT:

21 Q. Can you tell us how many years of service you have?

22 A. I've worked for the railroad for 20 years.

23 Q. Okay. And can you estimate the number of miles of
24 track you've had?

25 A. I was an engineer for, from 1996 until January of 2010,

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1 and I didn't work as an engineer that entire time, my
2 seniority didn't allow me to, but I've worked between,
3 out of Spokane between Spokane and White Fish, Montana,
4 Spokane and Kettle Falls, Spokane and Wenatchee,
5 Spokane and Pasco, and then in my time working out of
6 Pasco I worked many local jobs, traveling 20 to
7 30 miles a day between Ellensburg and Pasco, and then
8 I, one of my primary duties in my current job is to
9 actually perform train ride evaluations on engineers,
10 so I ride trains three to four days a week, typically
11 50 to 60 miles per trip, hundreds of, hundreds of
12 thousands of miles in those years. Well, maybe that
13 might be a little excessive, but a lot of miles.

14 MR. CHAIT: Thank you. Appreciate it.

15 THE WITNESS: Thank you.

16 THE JUDGE: Thank you. Anything further for this
17 witness?

18 MR. PLANT: No, Your Honor.

19 THE JUDGE: You may step down. Thank you very
20 much.

21 Okay. So that concludes the evidentiary hearing
22 unless there is anything else that anyone wants to say
23 while we're still on the record and before I get to the
24 exhibit list. No? Okay.

25 MR. SCARP: What was the question?

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1 THE JUDGE: I said that concludes the evidentiary
2 portion of the hearing unless anyone has anything
3 further.

4 But the simultaneous post hearing briefs are due
5 on June 1st, according to the procedural schedule.

6 So now I'll go over the list for record to
7 document that all of the exhibits were stipulated to
8 for admission. With respect to the public comments
9 that were received, I have marked those as Exhibit B-1.

10 MR. SCARP: Your Honor, if I may, I think the
11 public comments by one of the witnesses that was
12 withdrawn, Mr. Sealock.

13 THE JUDGE: The phone call?

14 MR. SCARP: Yeah. I mean, the witness was
15 withdrawn, so I guess his testimony is withdrawn.

16 THE JUDGE: He can still make a personal comment.

17 MR. SCARP: That's fine.

18 THE JUDGE: Okay. Then David Agee, his exhibits
19 are marked DA-1T and then DA-2 through DA-4, DA-5T and
20 the cross exhibits that were admitted are DA-6CX and
21 DA-7CX.

22 For Ken Bear Chief, his direct testimony KB-1T.

23 For Terry Stephens, his direct testimony marked
24 TS-1T.

25 For Foster Peterson, his direct testimony marked

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1 FP-1T.

2 For Michael Tycksen, his direct testimony marked
3 MT-1T.

4 For Gary Norris, his direct testimony marked GN-1T
5 and the exhibits marked GN-2 through GN-10, his
6 rebuttal testimony marked GN-11T, and the exhibit
7 marked GN-12, and the cross-examination Exhibits
8 GN-13CX and GN-14CX.

9 For Kent McHenry, his pre-filed testimony marked
10 KM-1T and the exhibits attached to that marked KM-2
11 through KM-6, his rebuttal testimony marked KM-7T, and
12 the exhibits attached to that marked KM-8 through
13 KM-10, and the cross-examination exhibits numbered
14 KM-11CX through KM-33CX.

15 For Andy Curfman, his pre-filed testimony marked
16 AC-1T and the exhibits attached to that marked AC-2
17 through AC-5, and the cross-examination Exhibit AC- --
18 sorry, AC-6CX and AC-7CX.

19 For Curtis Parrish, direct testimony CP-1T, and
20 the exhibits attached to that CP-2 and CP-3, and one
21 cross-examination exhibit, CP-4CX.

22 For John Hood, his direct testimony marked JH-1T.

23 For Alex Zecchino, his direct testimony marked
24 AZ-1T and the exhibits attached to that AZ-2 through
25 AZ-4, and cross-examination exhibits AZ-5CX and AZ-6CX.

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1 For Ed Boob, his directed testimony, EB-1T, and
2 the cross-examination EB-2CX.

3 For David Trautman, his direct testimony marked
4 DT-1T and one cross-examination exhibit marked DT-2CX.

5 For Roy Dick, his direct testimony marked RD-1T,
6 and the cross-examination exhibit marked RD-2CX.

7 For Alvin Pinkham, his direct pre-filed testimony
8 marked AAP-1T and the exhibits attached to that marked
9 AAP-2 through AAP-8, his rebuttal testimony marked
10 AAP-9T, and the exhibit attached to that AAP-10, and
11 the cross-examination exhibits numbered AAP-11CX
12 through AAP-16CX.

13 And finally, Jonnson Meninick, his pre-filed
14 testimony marked JM-1T.

15 MR. PLANT: Your Honor, real quick for
16 clarification, public comments, was that B-1?

17 THE JUDGE: Yes. B for bench.

18 MR. PLANT: Thank you.

19 THE JUDGE: With respect to the bench requests I
20 made yesterday, we discussed off the record those will
21 be submitted to me by Friday.

22 MR. CHAIT: We'll do our best by Friday.

23 THE JUDGE: I'll accept them electronically, and
24 if you can file original plus one with the record
25 center, that would be great. And it's okay if they

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1 come to me electronically by Friday and come to the
2 record center the following week. That's fine as well.

3 Is there anything else before we conclude the
4 hearing? Okay. Thank you all very much for coming.
5 It's been a pleasure.

6 MR. SCARP: Thank you.

7 MR. PLANT: Thank you.

8 (HEARING CONCLUDED AT 9:25 A.M.)

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1 C E R T I F I C A T E

2 STATE OF WASHINGTON)

) ss.

3 COUNTY OF YAKIMA)

4

5 This is to certify that I, Phyllis Craver Lykken,
6 Certified Court Reporter in and for the State of
7 Washington, residing at Yakima, reported the within and
8 foregoing hearing; said hearing being taken before me on
9 the date herein set forth; that the witnesses were first
10 by the administrative law judge duly sworn; that said
11 proceedings was taken by me in shorthand and thereafter
12 under my supervision transcribed, and that same is a
13 full, true and correct record of the testimony of said
14 witness, including all questions, answers and objections,
15 if any, of counsel.

16 I further certify that I am not a relative or
17 employee or attorney or counsel of any of the parties,
18 nor am I financially interested in the outcome of the
19 cause.

20 IN WITNESS WHEREOF I have set my hand this
21 8th day of May, 2015.

22

23 PHYLLIS CRAVER LYKKEN, RPR,

CCR NO. 2423

24

25