

1 BEFORE THE WASHINGTON UTILITIES AND
2 TRANSPORTATION COMMISSION

3 In the Matter of the)
4 Petition of the Burlington) Docket No. TR-990656
5 Northern Santa Fe Railway) Volume II
6 (BNSF) to Increase Passenger) Pages 24 to 39
7 and Freight Train Speeds to)
8 BNSF's Railroad Between the)
9 Southernmost Boundary of)
10 Seattle's City Limits to the)
11 Northernmost Boundary of the)
12 City of Tacoma.)
13 _____)

9 A prehearing conference in the above matter
10 was held on February 26, 2001, at 1:50 p.m., at 1300
11 South Evergreen Park Drive Southwest, Room 108, Olympia,
12 Washington, before Administrative Law Judge DENNIS MOSS.

13 The parties were present as follows:

14 THE COMMISSION, by JONATHAN THOMPSON,
15 Assistant Attorney General, 1400 South Evergreen Park
16 Drive Southwest, Olympia, Washington 98504-0128.

16 BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY,
17 by ROBERT E. WALKLEY, Attorney at Law, 20349 Northeast
18 34th Court, Sammamish, Washington 98074-4319.

18 CITY OF PUYALLUP, by W. SCOTT SNYDER, Attorney
19 at Law, 1601 Fifth Avenue, Suite 2100, Seattle,
20 Washington 98102.

20 WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,
21 by JEFF STIER, Attorney at Law, Office of the Attorney
22 General, 5035 Laura Street Southeast, Olympia,
23 Washington 98501.

22 SOUND TRANSIT, via bridge line, by ELIZABETH
23 THOMAS, Preston Gates and Ellis, 701 Fifth Avenue, Suite
24 5000, Seattle, Washington 98104.

24 Joan E. Kinn, CCR, RPR
25 Court Reporter

00025

1

P R O C E E D I N G S

2

JUDGE MOSS: Good afternoon, everyone. My
3 name is Dennis Moss. I'm an Administrative Law Judge
4 for the Washington Utilities and Transportation
5 Commission. We are convened in a prehearing conference.
6 The style of our case is in the Matter of the Petition
7 of the Burlington Northern Santa Fe Railway to Increase
8 Passenger and Freight Train Speeds to BNSF's Railroad
9 Between the Southernmost Boundary of Seattle's City
10 Limits to the Northernmost Boundary of the City of
11 Tacoma. It's Docket Number TR-990656.

12

Our basic agenda today will be to take
13 appearances of counsel, or in the case of any party
14 appearing without counsel, the representative of that
15 party. I want to have a discussion of the status of
16 this case. I will note that it has been continued on a
17 number of occasions at the request of certain parties to
18 the case without opposition in order to permit the
19 parties to pursue settlement discussions, and I
20 understand that those have borne fruit to one degree or
21 another. Once we determine the current status of the
22 case, then I want to discuss what process may be
23 required to go forward and establish a procedural
24 schedule for doing that, and we will take up any other
25 business that the parties feel is pertinent and

00026

1 appropriate to take up at the prehearing conference.
2 So the first order of business will be to
3 take appearances, and I will ask who is here for the
4 Railroad.

5 MR. WALKLEY: My name is Robert E. Walkley,
6 and I represent the Burlington Northern and Santa Fe
7 Railway Company. My address is Robert E. Walkley,
8 W-A-L-K-L-E-Y, Attorney at Law, 20349 Northeast 34th
9 Court, Sammamish, S-A-M-M-A-M-I-S-H, Washington
10 98074-4319. My telephone and fax numbers are (425)
11 868-4846, and my E-mail is rewalkley@earthlink.net.

12 JUDGE MOSS: Okay, why don't we just for ease
13 go around the table. For Staff.

14 MR. THOMPSON: Jonathan Thompson, Assistant
15 Attorney General, on behalf of Commission Staff. My
16 address actually is the same as on my initial appearance
17 in the case, but it's 1400 South Evergreen Park Drive
18 Southwest, P.O. Box 40128, Olympia 98504, and my
19 telephone number is (360) 664-1225, fax is (360)
20 586-5522. And E-mail is jthompso@wutc.wa.gov.

21 JUDGE MOSS: Okay, thank you. Next around
22 the table, counsel, party representatives, City.

23 MR. SNYDER: City, W. Scott Snyder, Ogden
24 Murphy Wallace, Seattle. My information and mailing is
25 the same. I'm here today with Tom Heinecke, Public

00027

1 Works Director for the City of Puyallup, the gentleman
2 at the end of the table.

3 JUDGE MOSS: All right.

4 And Ms. Thomas.

5 MS. THOMAS: Liz Thomas representing Sound
6 Transit. My mailing address is Preston Gates and Ellis,
7 701 Fifth Avenue, Suite 5000, Seattle, Washington 98104,
8 telephone number (206) 623-7580, fax number (206)
9 623-7022, E-mail address ethomas@prestongates.com, and I
10 believe present in the hearing room is Melissa Flores
11 with Sound Transit.

12 JUDGE MOSS: She is present, I can confirm
13 that for you.

14 MS. THOMAS: Thank you.

15 JUDGE MOSS: All right, are there any other
16 party representatives to enter an appearance?

17 MR. STIER: Jeff Stier, Office of the
18 Attorney General representing the Department of
19 Transportation. All of my information is the same as
20 before, and I am here with Jeff Schultz from Public
21 Transportation and Rail.

22 JUDGE MOSS: All right, thank you very much.

23 Anybody for the City of Auburn? I think
24 that's the only other party we have in the case.

25 MR. WALKLEY: I have one addition, Your

00028

1 Honor. I have two BNSF representatives present today,
2 Roger Jacobsen, who is Superintendent of Commuter
3 Operations, and Joseph Albinger, A-L-B-I-N-G-E-R, who
4 works with Roger in the Commuter Rail Group.

5 JUDGE MOSS: All right, then we will note
6 those appearances for the record as well. Thank you
7 very much for being here today.

8 Well, folks, it's time to bring me up to
9 speed. We have had several continuances, as I have
10 noted, and those were with the idea that you all were
11 working toward some sort of a settlement agreement, so
12 who wants to take the lead and tell me where we stand as
13 of today?

14 MR. SNYDER: I would be happy to, I believe
15 those were my continuance requests. We have been
16 working I think fairly productively with the Railroad to
17 bring a sort of a common sense resolution to the issues
18 between the Railroad and City to the end that the City
19 could then withdraw its adjudicative request and allow
20 the Staff and the Railroad to proceed with their
21 discussions that are underway, the normal process
22 through public hearing but without that adjudicative
23 request.

24 The basis for the type of agreement we have
25 been working on and recognizing settlement discussions

00029

1 would not be admissible, wanted to give some idea of the
2 framework, because we're about 99% there. What we have
3 been trying to do is to apply some common sense to the
4 speed increase request, recognizing, and this is one of
5 the values of a little initial discovery, of Sound
6 Transit trains stop at Puyallup, so their speed through
7 the City is under the law of physics not a problem.
8 They've got to stop, they've got to restart, they're
9 never going to be at the maximum speeds through the
10 City's Boundaries, and that's going to continue so long
11 as the current voter approved plan is in place. That's
12 the reality. Amtrak trains will go much faster, but
13 there are fewer of them, and they're not those which
14 really impact or create the issues that the City's been
15 concerned about in terms of the impacts.

16 It's the freight trains, they're long,
17 getting longer, and they're trying to balance a desire
18 to have them clear the intersections in town in a
19 reasonable manner while at the same time realizing one
20 of the other things the values of discovery is we have
21 determined that because of the physical nature of some
22 track configuration, they currently would not utilize
23 the maximum speeds requested. So we have tried to reach
24 an agreement which balances two factors.

25 One is phasing the train speed, and by that

00030

1 I'm really referring to freight train speed increases,
2 in a way that comports with the reality of the
3 improvement plan, that is until they get a curve fixed,
4 the freight trains aren't going to go at the maximum,
5 and to set some dates for that phase in so that we can
6 provide through head end and tail end restriction
7 changes, make sure that the trains clear intersections
8 in town in a timely manner.

9 And then phase -- have some notice provision
10 or phase in provision so that the City and school
11 district can better best advise their citizens and make
12 sure that improvements and education programs are all up
13 and working when any train speeds become a reality.

14 We've gotten an agreement which is about 90%,
15 I think we're saying 98%, some percentage in the 90's
16 complete. It's been approved by my client in an open
17 session and signed. There are three issues, one of
18 which involves a whereas clause, and just basically
19 since it doesn't go to the heart of the agreement is
20 something that I'm anticipating we can work out. One
21 involves the notification of the school district, who is
22 not a party to the agreement, so I think that again is
23 something that can be dealt with, although both issues
24 are important to my client.

25 The last issue, which is the one where we

00031

1 need a little bit more time to resolve, concerns the
2 second half. The City's interest is phasing the train
3 speeds in. The Railroad's been getting some assurance
4 that required improvements, some from past processes,
5 are in place on a schedule that they can count on.
6 These are requirements that the Staff has made. And in
7 working together, we have -- one of the initial phases
8 upon which future phases depend involves the
9 construction by the City of some improvements. Those
10 improvements are federally funded. That throws in a
11 number of permitting processes over which neither of us
12 have any control, one of them being ESA, the Endangered
13 Species Act, and the biological assessments that go with
14 it. And some are some other practical public bidding
15 requirements, when you can start that, what you have to
16 have done. We think that those can be resolved not at a
17 lawyer level but at an engineer's level in terms of
18 talking through what reasonable time frames are
19 necessary to get a date that we can put in that portion
20 of the agreement and give the Railroad the certainty
21 that it's looking for.

22 So again, we have three issues, I think two
23 of which can be lawyered, and one of which just needs to
24 be generally understood so that we can have a better
25 idea of what these time tables are.

00032

1 JUDGE MOSS: Okay. Before we talk a little
2 bit about what we might want to do in terms of this
3 proceeding and how to go forward or not, does anybody
4 have anything to add to Mr. Snyder's statement of the
5 status?

6 MR. WALKLEY: Your Honor, Robert Walkley. I
7 think that's a fair characterization of where we are
8 right now. I would only add that the Railroad is still
9 hopeful that this can be composed. We have worked very
10 hard with the City to try to compose the remaining
11 issues. We do not view, I might add, any of these as a
12 genuine essentially local safety hazard, but rather it's
13 more of a community relations effort to see if we can't
14 work together to phase in what we need at the same time
15 as working with the City in a phased and coordinated
16 approach. I might also add that we are in discussion
17 with WUTC Staff as well, anticipating that we may soon
18 be able to say that we have an agreement with the City.

19 What do we do at that point, because the
20 Railroad still has its position that nothing we're
21 talking about here amounts to an essentially local
22 safety hazard under 49 U.S.C. 20-106. Therefore, it's
23 hard to see jurisdiction here. Our thought right now is
24 that, taking Mr. Snyder's summary, that it will not
25 take very long to determine whether or not we, in fact,

00033

1 do have an agreement, and we would like the opportunity
2 to explore that, but for a relatively short time, and
3 then we would like to set the hearing.

4 If there is going to be a hearing and there
5 is no agreement, we would like to be able to set that
6 hearing fairly expeditiously. So I think what I would
7 suggest is that if it is acceptable to Your Honor as
8 well as to the other parties that we be given a period
9 of approximately three weeks, something of that nature,
10 to report back to you as to whether or not there is, in
11 fact, agreement as to how we ought to proceed. And at
12 that point, we could reconvene another prehearing
13 conference to place on the record at least what our
14 agreement or disagreement is and how we could proceed
15 forward. I think that would be the most efficient and
16 expeditious use of time, because if we were to sit here
17 today and come out with a very aggressive hearing
18 schedule, this would begin to divert resources from both
19 of us, because we have only limited resources, to what
20 may not be productive for an agreement.

21 JUDGE MOSS: All right. And I take it from
22 what I have heard that assuming that the parties do
23 achieve some sort of an agreement, part of that would be
24 a request to dismiss this proceeding and not go to
25 hearing.

00034

1 MR. WALKLEY: That's correct, and we need to
2 work with the Commission Staff, and I am working with
3 them, to determine how that might best be done. In
4 other words, perhaps some kind of agreed order that the
5 parties agree to would be presented to you, or we would
6 work with you on such an order perhaps that could go to
7 the Commission's open agenda docket at some point.

8 JUDGE MOSS: And there are a number of
9 procedural options available to us, including something
10 dismissing the proceeding on parties' motion.

11 Mr. Rowswell, are you shaking your head, or
12 is there a problem with that?

13 MR. ROWSWELL: Oh, I'm sorry, I didn't mean
14 to be that obvious. I guess that's a bone of
15 contention.

16 JUDGE MOSS: So the Staff takes a position
17 that the proceeding could not be dismissed?

18 MR. ROWSWELL: No, I don't know about not,
19 but we would prefer not. We have an agreement with
20 BNSF, and we would like to stick to it unless altered by
21 the City.

22 MR. SNYDER: And I think the City's position
23 is very similar. What we're proposing is that we
24 withdraw our adjudicative request. We think that there
25 are still issues, but they should be resolved in sort of

00035

1 the normal hearing track.

2 JUDGE MOSS: So, Mr. Thompson, the idea would
3 be to have some sort of substantive order out of the
4 Commission, but it might be the result of a process
5 other than a hearing process; is that the idea?

6 MR. THOMPSON: Yeah, I believe so. I'm not
7 entirely sure. I guess once a party has requested
8 adjudication, I think that party withdrawing a request
9 is no longer -- and that being the City, yeah, I guess
10 we would return to sort of informal process.

11 JUDGE MOSS: The Commission's historic
12 practice has been that when parties do seek to invoke
13 the adjudicatory processes of the Commission, then they
14 may certainly seek leave to withdraw. The Commission is
15 the ultimate decider of that, if you will. In other
16 words, once having submitted to the Commission's
17 jurisdiction for purposes of resolving a dispute, it is
18 ultimately the Commission's decision as to whether that
19 will be the course of resolution or some other course
20 will be followed. So formally, that is the way we
21 proceed.

22 Typically, I will say, when parties achieve a
23 settlement and seek leave to withdraw, it is granted,
24 and so that certainly I think is an option that you all
25 can consider. However, if there are reasons that some

00036

1 party, whether it be Staff or another party has, in
2 order to preserve the process and move forward to some
3 sort of a substantive order, then we can do that. I see
4 nothing that would -- nothing occurs to me as I sit here
5 today that would preclude some sort of an agreed order,
6 whether drafted by me or in consultation with me or some
7 other fashion, so we could do that.

8 So we have lots of options available, I
9 think, and I would not want to foreclose any of them
10 under the circumstances as I understand them to be.

11 I would like to provide, I think it's
12 appropriate, well, I should ask if anyone else has any
13 objection to the suggestion that we might continue for
14 another several weeks to provide the City and the
15 Railroad a further opportunity to conclude their
16 discussions with respect to the issues between them?
17 Does any party have an objection to that suggestion?

18 MR. WALKLEY: We would only ask, Your Honor,
19 that it not be several weeks, but that we can -- I think
20 we can know within let's say three weeks.

21 JUDGE MOSS: I think we're --

22 MR. WALKLEY: Whether or not, you know, we're
23 going to reach an agreement or whether we then need to
24 set an adjudicative hearing schedule.

25 JUDGE MOSS: Sure, and by several, I meant

00037

1 three.

2 MR. WALKLEY: All right.

3 JUDGE MOSS: So we meant the same thing.

4 MR. WALKLEY: Okay.

5 JUDGE MOSS: Just a question of semantics.

6 All right, well, there being no objection to
7 that, it would be my inclination then to grant that
8 request for a continuance and to set another prehearing
9 conference. And I notice that I did not bring my
10 calendar, so I'm going to step down the hall a couple
11 doors here and get that and come back and we will set
12 that. Give me just a minute. And we will be off the
13 record while I'm out of the room.

14 (Discussion off the record.)

15 JUDGE MOSS: All right, I have had an
16 opportunity during the brief recess to get my calendar,
17 and we have been talking in terms of about a three week
18 continuance until another prehearing conference, which I
19 might add we would need to hold no matter what happens,
20 if we have a settlement agreement, if we have some
21 indication at that time that the parties which to
22 proceed or would like to proceed in one fashion or
23 another, then we will need, of course, to establish the
24 exact nature of the process and dates and locations for
25 that process to occur. So whatever date we set, let's

00038

1 do plan to meet then. And looking about three weeks
2 out, that is the week of March 19th. Is Monday a good
3 day or Tuesday; what's better for the parties, let me
4 know.

5 MR. SNYDER: Monday works well.

6 MR. STIER: Mr. Schultz is off on Mondays.

7 MR. SCHULTZ: Monday is fine.

8 MR. STIER: All right.

9 JUDGE MOSS: In the afternoon, 1:30?

10 MR. STIER: All right.

11 MR. SCHULTZ: Thank you for thinking of me.

12 JUDGE MOSS: All right, well, we will

13 continue --

14 MS. THOMAS: This is Liz Thomas, I'm sorry,
15 the 19th doesn't work for me, I have another commitment
16 that afternoon.

17 JUDGE MOSS: Is there somebody who could
18 cover for you, Ms. Thomas? You all don't have a central
19 role here, so I'm hesitant to schedule on that basis.

20 MS. THOMAS: Yes, I think we could probably
21 arrange alternate coverage.

22 JUDGE MOSS: I think that would be best.

23 Since the principal parties would prefer to go ahead on
24 the 19th, let's go ahead and try to do that. As I
25 understood the earlier discussion, it's less of an issue

00039

1 for Sound Transit since its trains would be stopping in
2 Puyallup in any event.

3 MS. THOMAS: That's correct, we participated
4 in some but not all of the settlement discussions to
5 support the effort.

6 JUDGE MOSS: Okay, fine, well, then let's go
7 ahead and set March 19th at 1:30 in the afternoon for
8 our prehearing conference, and we will not set
9 additional procedural dates at this time, because we
10 really won't know the lay of the land until we have that
11 further conference.

12 Let me ask the parties if there is any
13 additional business we need to conduct on the record
14 today.

15 Hearing no indication that there is, we will
16 be in recess until Monday the 19th of March.

17 (Hearing adjourned at 2:20 p.m.)

18
19
20
21
22
23
24
25

