

SERVICE DATE

JAN 09 2001

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of the)	
WASHINGTON STATE)	
DEPARTMENT OF)	DOCKET NO. TR-940288
TRANSPORTATION, BURLINGTON)	
NORTHERN RAILROAD)	
COMPANY and THE NATIONAL)	ORDER GRANTING MOTION
RAILROAD PASSENGER)	TO MODIFY PRIOR ORDER;
CORPORATION, for Modification of)	DENYING MOTION TO
Order regulating the Speed of)	RESCIND PRIOR ORDER
Passenger and Freight Trains in)	
Edmonds, Washington)	
)	
.....)	

1 **Synopsis:** The Commission in this Order grants a request to modify a prior order and approves in principle an agreed proposal by the parties. The result is substitution of a natural (vegetation) barrier for a fence previously ordered by the Commission as a condition to increasing train speed through a portion of the City of Edmonds. The Commission rejects a request by the railroad and the state Department of Transportation that the Commission rescind the earlier order for lack of jurisdiction.

Procedural History

2 This docket was originally brought on by the request of three petitioners -- the railroad (now the Burlington Northern Santa Fe Railroad, or BNSF), the state Department of Transportation (WSDOT), and the National Railroad Passenger Corporation (AMTRAK) -- to increase the speed limit for trains through the City of Edmonds, Washington. AMTRAK was not represented in this request for modification or rescission.

3 The Commission ordered in April, 1995, in this docket that the train speed petition should be granted. It also found the existence of unique local conditions and approved a request by the City of Edmonds to require fencing at two locations to prevent trespassing as a condition of the speed increase.¹

4 On August 30, 2000, the petitioners asked the Commission to rescind or modify the order, asking that the Commission allow the parties to substitute a natural vegetation barrier for the fencing required in the prior order. The City filed a request to join the

¹ "Fences should be constructed on the bluff parallel to Sunset Avenue and the parking area on Ocean Avenue." Commission Decision and Order of April 12, 1995, Page 8.

petition on the following day, asking that the Commission reopen the proceeding and modify the prior order to allow the natural barrier.

5 The Commission convened a prehearing conference on October 26, 2000, before Administrative Law Judge C. Robert Wallis at which the parties made representations of fact and arguments of law, accepted the opportunity to file additional arguments, and agreed to submit the matter directly to the Commission on the pleadings, the transcript of the prehearing conference, and the prior record.

6 The parties appeared as follows: Burlington Northern Santa Fe, by Robert Walkley, attorney, Sammamish; Washington State Department of Transportation, by Jeff Stier, asst. attorney general, Olympia; City of Edmonds, by W. Scott Snyder, Ogden, Murphy, Wallace, Seattle; Teresa Vehey, intervenor, by Bradford Cattle, attorney, Everett; and the Washington State Utilities and Transportation Commission, by Jonathan Thomas, asst. attorney general, Olympia.

Background

7 The Commission has twice rejected or conditioned an increase of train speeds within the City of Edmonds, Washington, because of unique local circumstances at the site.

8 In 1990, the Commission denied an AMTRAK petition to increase speeds at this location, citing unique local circumstances rendering the increased speed a hazard. In its July 23, 1990 Commission Order in consolidated dockets TR-2311 and TR-2248, the Commission stated,

Edmonds is a major Puget Sound port. Over 8.3 million gallons of refined fuel are delivered monthly by tankers to the Edmonds terminal dock. The second-largest ferry terminal in state, used annually by more than one and one-half million passengers, is in the City of Edmonds. Over 800 private boats are moored at the Edmonds Marina, and over 200,000 people per year use Edmonds waterfront facilities, including beaches and fishing piers.

* * * *

Members of the public use the beach area in Edmonds next to the track and north of the ferry dock The area is not, for the most part, a public area. However, public use is substantial, numbering in the hundreds each day during nice weather. People generally gain access to this area by crossing the tracks. In addition, people using the beach may be trapped by a high tide and are forced to walk along the tracks to return to town. . . .

41

Just south of MP 18 is Bracketts Landing, a public beach and underwater park which is heavily utilized. . . . A fence separates the park from the railroad right of way, although some trespassing still occurs there.

The Washington State Ferry dock is south of the park. The ferry holding lanes are one block from the railroad track, and the traffic signals and the dock are coordinated with the train signals. Nearly all ferry traffic uses the Main Street railroad crossing.

The Amtrak depot, at which passenger trains stop, is just north of MP 17.50. Across the tracks, on the waterfront, is another commercial complex, developed with public funds. Also in that area is a public fishing pier and restaurants, as well as public beaches. These waterfront amenities are on Port of Edmonds's property.

- 9 The initial order in this docket references the provisions quoted above. Summarizing, the initial order notes that,

This record shows that the Edmonds waterfront, separated from the rest of town by the railroad tracks that run right along the shoreline, is still a hub of activity for the City. The Edmonds-Kingston ferry terminal is a point of departure and arrival for hundreds of passengers each day, all of whom must cross the railroad tracks. There are restaurants, an underwater dive park, a senior center, and many other facilities along the waterfront, all on the west side of the tracks, while the main part of town is to the east of the tracks.

- 10 The initial order in this docket found that the Commission had jurisdiction to entertain the issue, and proposed to grant the speed increase request. The City of Edmonds sought administrative review of the initial order, asking that the speed increase be conditioned on construction of fences to restrict pedestrian access to tracks. The Commission agreed and imposed the condition.

- 11 The parties have asked that the matter be reopened under RCW 80.04.200, Rehearing before commission. They have recounted a history of litigation involving the fencing requirement – a shoreline application for authority to build a fence was litigated to a judicial decision approving the application by neighbors who believed that the fence would impede their view. The parties in this matter disclose that an alternative to a fence has been agreed to by property owners near one of the proposed locations of the fence, as well as by the City, by the railroad, and by the Commission Staff.

- 12 The parties ask approval of the natural barrier alternative, in lieu of the fence mandated in the Commission order. BNSF, joined by the state Department of Transportation, also asks the Commission to find that the Commission has no authority under federal law to decide the question, and to rescind the order.

The Petition to Reopen and Modify the Prior Order

13 The parties ask reopening, in summary, because relevant parties have agreed that at one of the locations noted for barriers a natural barrier will likely be more effective than would a barrier engineered and constructed by humans.² A natural barrier, the parties urge, would also be less visually intrusive than a fence.

14 The Commission grants the request. We may take administrative notice of the commonly known fact in western Washington that certain natural flora, such as blackberry bushes, can be substantially more effective at impeding access than most fences of human construction. We do note that in the initial order in this docket the Administrative Law Judge found that existing vegetation – which included thorned berry bushes – was insufficient to impede pedestrian traffic. We trust and require that the parties will monitor the effectiveness of the barrier and will maintain it in a manner that will in fact prevent pedestrian access. The interest that the Commission acted in its order to protect was a reduction of the risk of injury and death to pedestrians in unique circumstances. The Commission accepts the parties’ proposal, which is agreed to be a reasonable and effective approach to accomplishing the goal of reduced risk.

15 Barriers are required at two locations. The parties may, at their option, install a natural barrier at both locations.

16 The railroad, the City, and the intervenor Verhey have entered a stipulation agreeing to the substitution of the term “fencing or vegetative barriers reasonably designed and installed to discourage trespass” for the term “fences” in the earlier order. The Commission declines to accept the stipulation. Other parties were not signatories and their absence raises questions. In addition, while not expecting the parties to be insurers and while understanding that people can overcome any barrier, the term “discourage” is less emphatic than the Commission believes appropriate.

The Motion to Rescind the Prior Order

17 BNSF and the Department of Transportation ask the Commission to rescind the prior order and dismiss this proceeding on the basis that federal law preempts state jurisdiction. The railroad cites 49 U.S.C. Sec. 20106, *et seq.* and 49 CFR Part 213.9. The Department of Transportation supports the railroad in its motion.

18 Among other things, the petitioners contend that the Federal Railroad Administration (FRA) clarified after the final order in this docket that local speed regulations are

² The parties were free in their praise of the railroad for developing the natural barrier proposal; the Commission also commends the railroad for creative thinking and the parties for their cooperation.

presumptively improper, that difficulty in securing permits which have already been granted was an unforeseen injurious result of the order, and that facts found in the 1990 order have no relevance to this docket.

- 19 Commission Staff opposes the rescission request. First, Staff notes that the law by its very terms provides for state review and action in the event of "essentially local safety hazards."³ Commission Staff cites judicial authority⁴ defining rather broadly the "essentially local" exemption from federal preemption.
- 20 The Commission declines to rule that it has been deprived of jurisdiction to address this matter at all. First, the issue of jurisdiction was clearly decided earlier in this docket.⁵ The petitioners bring no intervening change in circumstances to the Commission's attention that would alter its consistent prior analysis. A case they cite, *CSX Transportation v. Easterwood*, 507 U.S. 658 (1993), was decided a year before the entry of the Commission final order. They also cite to FRA interpretations of the law made after entry of the Commission order. Even if the FRA analysis were applied retroactively, the Commission believes that the local circumstances supporting the decision in this docket are sufficient to overcome a presumption against local authority.
- 21 Second, the department of transportation challenges the facts found in this initial and final orders in this docket. The parties had ample opportunity to contest the factual basis for the final order in this docket and failed to do so. Challenges are clearly inappropriate at this juncture. The nature of the facts found by the administrative law judge and the derivation of references to the prior order clearly indicate the continued existence of prior circumstances. Rehearing is an opportunity to address changed circumstances, not to relitigate matters that could and should have been litigated earlier. See, RCW 81.04.200.
- 22 Third, the Washington statutes give the Commission the responsibility to establish speed limits in cities and towns and at railway-highway crossings at grade. RCW 81.48.030 and -.040. This is a matter important to the public health, safety, and

³ 49 U.S.C. 20106.

⁴ The case is *In the Matter of the Speed Limit for the Union Pacific Railroad through the City of Shakopee, State of Minnesota*, 610 N.W.2d 677 (Minn. Ct. App., May 2000). The railroad argues that it is not persuasive because it is a state and not a federal decision, but cites no federal decisions to the contrary. There, as here, a combination of factors that might individually be commonplace rendered the situation an essentially local safety hazard.

⁵ Mr. Walkley argued at the prehearing conference that the matter of jurisdiction was not addressed in the final order. While the Commission's jurisdiction to decide the matter was stated in the final order, parties' arguments were discussed in the initial order and resolved against challenges to jurisdiction. No party raised the jurisdictional issue in seeking administrative review of the initial order. The issue therefore was decided in this docket and appears to be foreclosed from consideration at this time.

welfare. RCW 81.48.040. We should not lightly choose to decline that responsibility because the safety of the public of the state may depend upon our decisions.

23 The federal law itself specifically provides for local decisions when needed to deal with essentially local safety hazards. We recognize the limited nature of such local circumstances, and do not lightly find that essentially local safety hazards have been shown. That is a different matter, however, from saying we are preempted from all jurisdiction as a matter of law. Our prior decisions regarding this law in effect hold that the Commission has jurisdiction to determine whether unique circumstances exist and, upon an affirmative answer to that question, to address those circumstances.

24 The Commission in entering its order in this docket acted responsibly and only to the extent necessary to address the unique local circumstances. The circumstances associated with the track in question are not a single factor that commonly occurs, as the railroad contends, but involve a number of factors that, in combination, demonstrate a uniquely site-specific circumstance. The circumstances include the existence of double main line track, a nearby rail curve, the separation of busy and attractive public facilities from the population they serve by the track, the lack of parking facilities at the site of the waterfront facilities, forcing a large population to walk between vehicles on one side of the tracks and the attractions on the other side; and a history of accidents and incidents at the site.⁶

25 The Commission found in light of all of those risk factors that the circumstances of this location are unique and justify Commission action. The Commission took only the action least intrusive on the operation of the railroad – it did not set a lower speed limit – but it did at the City's request take action that was necessary to protect the public by imposing a condition to mitigate the risks.

Conclusion

26 The Commission finds that a natural vegetation barrier, as proposed by the parties to this proceeding will, if properly monitored and maintained, be no less effective as a condition to increased train speeds than the fence previously ordered. The Commission concludes from that finding that the proposed natural barrier will adequately protect the public and that its construction will adequately protect the public health and safety and will satisfy the condition imposed by the Commission on increasing train speeds at the Edmonds, Washington location that is the subject of this proceeding. The Commission orders, therefore, that the prior order be modified pursuant to RCW 80.04.210 to provide that construction and maintenance of natural barriers as described will satisfy the conditions imposed in the prior order, and that

⁶ The initial order cites ten accidents or other incidents at the location in the five years prior to the hearing.

upon the completion and acceptance of natural barriers, train speeds may increase pursuant to the original request. The Commission declines to rescind its prior order, ruling that it does have jurisdiction to address unique local circumstances affecting train speed and to impose appropriate conditions on train speed increase requests in light of essentially local safety hazards.

ORDER

- 27 The Commission grants the request to modify the earlier Commission order. That order is hereby modified; construction of natural barriers consistent with the evidence and representations in this reopened matter, including the regular monitoring and maintenance of such barriers, will deter access to the rail right of way by trespassers at least as effectively as a fence and will satisfy the conditions imposed by the Commission for action prior to increase of train speed through the City of Edmonds, Washington.
- 28 The Commission denies the request that the Commission rescind the prior order in this docket and rules that it does have jurisdiction to address the issues.

DATED at Olympia, Washington and effective this ^{9th} day of January, 2001.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION


MARILYN SHOWALTER, Chairwoman


RICHARD HEMSTAD, Commissioner

NOTICE TO PARTIES: This is a final Order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this Order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).