

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

NOTICE OF PENALTIES INCURRED AND DUE FOR VIOLATIONS OF LAWS AND RULES

PENALTY ASSESSMENT: TR-121921
PENALTY AMOUNT: \$105,000

BNSF RAILWAY CO.
2454 OCCIDENTAL AVENUE SOUTH, SUITE 1A
SEATTLE, WA 98134

The Washington Utilities and Transportation Commission (Commission) believes that you have committed multiple violations of Washington Administrative Code (WAC) 480-62-225, Crossing surfaces, which requires railroad companies to maintain and keep crossing surfaces in repair. Revised Code of Washington (RCW) 81.04.405 allows penalties of one hundred dollars for every such violation. In the case of a continuing violation, every day's continuance is deemed to be a separate and distinct violation. As a result, the Commission hereby notifies you that it has assessed penalties against you in the amount of \$105,000, as described in this Notice.

On December 21, 2012, Commission staff sent a letter to Rob Owen, Roadmaster at BNSF Railway Co. (BNSF or Company), identifying seven crossings that Commission staff had previously notified the Company had defects requiring repair. The letter stated that BNSF either must correct each defect and provide Commission staff with a written response describing how the defect was corrected or provide a written response including a detailed plan for correcting each defect, including a specific completion date, by January 21, 2013. To date, Commission staff has received no response to this letter.

Rail Carrier Compliance Specialist Bob Johnston re-inspected each crossing on January 29, 2013. As of that date, the crossing defects had not been corrected.

BNSF's failure to correct the defects at these crossings violates WAC 480-62-225, and each crossing represents a separate violation. In addition, the Commission considers these to be continuing violations, giving rise to a violation for each day the Company did not correct the defects at each crossing since the date by which Commission staff first required BNSF to correct them. The following chart details the violations and the total penalty amounts the Commission may assess pursuant to RCW 81.04.405:

| USDOT No./ Street Name | Defect correction due date | Railroad commitment date | Re-inspection date | Number of days | Possible Penalty |
|----------------------------|----------------------------------|--------------------------------|-----------------------|-------------------|---------------------|
| 084907V- Siper Road | 3/21/2009 | | 1/29/2013 | 730* | \$73,000 |
| 084915M - Massey Rd | 6/16/2011 | | 1/29/2013 | 593 | \$59,300 |
| 084922X - Madison Street | 8/17/2011 | | 1/29/2013 | 531 | \$53,100 |
| 084933K - SR-9 Front 9747 | 8/17/2011 | | 1/29/2013 | 531 | \$53,100 |
| 096135W - Aldergrove Rd. | 7/7/2010 | 4/1/2011 | 1/29/2013 | 730* | \$73,000 |
| 092259B - S. Walnut Street | 9/1/2010 | 6/1/2011 | 1/29/2013 | 730* | \$73,000 |
| 396915A - Hawley St. | 3/31/2010 | 6/1/2011 | 1/29/2013 | 730* | \$73,000 |
| | | | | 4575 | \$ 457,500 |

*Based on the two-year statute of limitations for penalties, the number of days reflects two years from the re-inspection date.

Although authorized to assess \$457,500 in penalties, the Commission finds that a lesser penalty would be more appropriate based on consideration of the following factors:

1. **How serious or harmful the violation is to the public.** While a matter of public safety, the defects noted by Commission staff at these crossings do not pose imminent harm to the public.
2. **Whether the violation is intentional.** Considerations include:
 - Whether the Company ignored staff's previous technical assistance; and
 - Whether there is clear evidence through documentation or other means that show the company knew of and failed to correct the violation.

Here, BNSF has repeatedly ignored Commission staff's technical assistance, and the Company knows or should have known that these defects exist. For three of the defects (Aldergrove, S. Walnut, and Hawley), BNSF provided a specific commitment date for fixing the defects, yet failed to meet the date.
3. **Whether the company self-reported the violation.** BNSF did not self-report these violations.
4. **Whether the company was cooperative and responsive.** BNSF has been neither cooperative nor responsive to Commission staff's repeated attempts to address crossing surface defects at these railroad crossings over a period of several years.
5. **Whether the company promptly corrected the violations and remedied the impacts.** BNSF has neither corrected the violations nor remedied the impacts of the defects at these crossings.

6. **The number of violations.** Because of BNSF's failure to correct the crossing surface defects noted by commission staff, over time a significant number of continuing violations has accrued.
7. **The likelihood of recurrence.** Commission staff's records show that the majority of BNSF's unresolved crossing defects are in Mr. Owen's region. Once the company receives this penalty assessment, Commission staff believes BNSF will make necessary changes in its practices and procedures to ensure crossing defects are corrected in a timely manner.
8. **The company's past performance regarding compliance, violations, and penalties.** The Commission has not issued any penalty assessments to BNSF during at least the last 10 years. The Company has consistently demonstrated compliance with commission rules and regulations in the following areas:
 - annual reports
 - regulatory fees
 - reporting accidents and fatalities
 - filing grade crossing petitions, when appropriate
9. **The company's existing compliance program.** BNSF generally complies with Commission regulations, but the Company's failure to correct defective crossings is unacceptable. Ensuring public safety is the Commission's highest priority, and imposing significant penalties for violations of Commission safety rules is one means of furthering that goal.
10. **The size of the company.** BNSF is the largest railroad company operating in Washington with over \$103 million in revenues reported to the Commission in 2011.

The Commission has weighed these factors and determined that BNSF should be penalized \$15,000 for each crossing for a total of \$105,000.

The information provided in this Notice, if proved at a hearing and not rebutted or explained, is sufficient to support the penalty assessment.

Your penalty is due and payable now. If you believe the violations did not occur, you may request a hearing to contest the penalty assessment. If there is a reason for the violations that you think should excuse you from the penalty, you may ask for mitigation (reduction) of this penalty. *See* RCW 81.04.405.

You have the right to present your request for review or mitigation at a hearing, but you are not required to do so. If you do, the Commission will review the evidence supporting your request in an informal hearing, called a Brief Adjudicative Proceeding, before an administrative law judge. The administrative law judge will consider your plea and notify you of his or her decision.

You must act within 15 days after receiving this notice to do one of the following:

- Pay the amount due.
- Request a hearing to contest the occurrence of the violations.
- Request mitigation to contest the amount of the penalty.

Please indicate your selection on the enclosed form and send it to the Washington Utilities and Transportation Commission, Post Office Box 47250, Olympia, Washington 98504-7250, **within FIFTEEN (15) days** after you receive this notice.

If you do not act within 15 days, the Commission may refer this matter to the Office of the Attorney General for collection. The Commission may then file a lawsuit against you to collect the penalty.

DATED at Olympia, Washington, and effective February 25, 2013 .

GREGORY J. KOPTA
Director, Administrative Law Division

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
PENALTY ASSESSMENT TR-121921

PLEASE NOTE: You must complete and sign this document, and send it to the Commission within 15 days after you receive the penalty assessment. Use additional paper if needed.

I have read and understand RCW 9A.72.020 (printed below), which states that making false statements under oath is a class B felony. I am over the age of 18, am competent to testify to the matters set forth below and I have personal knowledge of those matters. I hereby make, under oath, the following statements.

1. **Payment of penalty.** I admit that the violation occurred and enclose \$_____ in payment of the penalty.
2. **Request for a hearing.** I believe that the alleged violation did not occur, based on the following information, and request a hearing, which is a process that allows an affected person to present argument to an administrative law judge for a decision by an administrative law judge:
3. **Application for mitigation.** I admit the violation, but I believe that the penalty should be reduced for the reason(s) set out below,
- a) I ask for a hearing for a decision by an administrative law judge based on the information presented above.
- OR b) I waive a hearing and ask for an administrative decision on the information I present directly above.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing, including information I have presented on any attachments, is true and correct.

Dated: _____ [month/day/year], at _____ [city, state]

Name of Respondent (company) – please print

Signature of Applicant

RCW 9A.72.020:

“Perjury in the first degree. (1) A person is guilty of perjury in the first degree if in any official proceeding he makes a materially false statement which he knows to be false under an oath required or authorized by law. (2) Knowledge of the materiality of the statement is not an element of this crime, and the actor’s mistaken belief that his statement was not material is not a defense to a prosecution under this section. (3) Perjury in the first degree is a class B felony.”