

1131

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1132

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2 INDEX OF EXAMINATION

3 -----

4 WITNESS: PAGE:

5 THOMAS R. ZEINZ

6	Direct Examination by Mr. Thompson	1140
7	Cross-Examination by Mr. Scarp	1141
8	Voir Dire Examination by Mr. Rogerson	1150
9	Examination by Judge Torem	1151
10	Cross-Examination by Mr. Scarp	1159
11	Examination by Judge Torem	1171
12	Cross-Examination by Mr. Scarp	1175
13	Redirect Examination by Mr. Thompson	1194
14	Cross-Examination by Mr. Jones	1200
15	Cross-Examination by Mr. Rogerson	1209
16	Recross-Examination by Mr. Scarp	1213
17	Redirect Examination by Mr. Thompson	1223
18	Recross-Examination by Mr. Jones	1224
19	Examination by Judge Torem	1224
20	Recross-Examination by Mr. Scarp	1225

21

22

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1133

1 -----
2 INDEX OF EXHIBITS
3 -----

4

5 EXHIBIT: MARKED: ADMITTED:

6 ALBERT LIOU

7 16 1138

8 17 1138

9 RICHARD H. SMITH

10 77 1138

11 78 1138

12 THOMAS R. ZEINZ

13 50 1141

14 51 1141

15 139 1135 1189

16 140 1135

17 141 1135

18 142 1135

19 143 1135 1218

20 144 1136 1157

21 145 1136 1173

22 146 1136

23

24

25

1 P R O C E E D I N G S

2 JUDGE TOREM: Good morning, this is Thursday,
3 January 31st, 2008, and this is Judge Torem, we're back
4 on the record in TR-070696 gathered in Seattle,
5 Washington. We have a number of witnesses on the docket
6 for this morning. Where we left off earlier this month
7 in Mount Vernon, three witnesses were scheduled. Albert
8 Liou and Richard Smith, yesterday there was an exchange
9 of E-mails among counsel indicating that BNSF and its
10 essential partner and proponent to the petition to close
11 Hickox Road would be waiving the right to cross-examine
12 these witnesses. I understand that by late in the day
13 and evening yesterday all the other parties confirmed
14 they had no cross-examination questions, so Mr. Liou and
15 Mr. Smith are not here today. The last remaining
16 witness is Thomas Zeinz, and he is seated to my right
17 and ready to testify as soon as we get to him.

18 Let me note that all of the counsel that were
19 previously present in Mount Vernon are here again except
20 for I don't see anybody here for the Fire District. I
21 did not expect to see them based on their previous
22 suggestion that if they did not have a witness that they
23 were directly interested in either presenting or
24 cross-examining they would waive their presence, and
25 yesterday also Skagit County waived its presence

1135

1 indicating that Mr. Rogerson would be representing their
2 interests today. So I believe other than that, all
3 others are present, all the same counsel, so we don't
4 need to take any further appearances and detail the
5 record again today.

6 Also we talked a little bit about how we were
7 going to number exhibits that were submitted by the
8 railway for its potential cross-examination of
9 Mr. Zeinz, and I can go through those and note them for
10 the record now.

11 First there are three WUTC responses to data
12 requests from BNSF, they were BNSF Data Request Number
13 29, 36, and 37. Those are all grouped together as
14 Exhibit 139.

15 There's a group of collision articles,
16 essentially 12 pages, those are Exhibit 140.

17 There are some Operation Lifesaver Crash
18 Statistics from Washington, 7 pages, and those have been
19 labeled as Exhibit 141.

20 Some Operation Lifesaver posters, a total of
21 5 pages, have been labeled as Exhibit 142.

22 There is a 2 page, at least the way it
23 printed out for me the updated version was 2 page
24 Railroaders Editorial, that's Exhibit 143.

25 There is a Driver Risk at Railroad Crossing

1136

1 Study that I have marked as Exhibit 144, and it's from
2 June of 1999 in North Carolina. I have not counted the
3 number of pages, but we have marked that as Exhibit 144.

4 There is a National Transportation Safety
5 Board Railroad Accident Report from Illinois or,
6 hesitate to say it, Bourbonnais, it's spelled
7 B-O-U-R-B-O-N-N-A-I-S, this is also from 1999, and it's
8 Exhibit 145. Again I did not count the pages.

9 Finally although it was submitted in two
10 parts I think mainly for the graphics and the electronic
11 submission, there is a Federal Highway Administration
12 Guidance on Warning Devices, both part 1 and part 2 are
13 Exhibit 146 taken together.

14 So those are the exhibits, I think,
15 Mr. Scarp, is that everything that we had extra
16 submitted since Mount Vernon?

17 MR. SCARP: That's correct, Your Honor.

18 JUDGE TOREM: All right, so those are at
19 least marked, not yet offered or admitted.

20 Also this morning we talked about the need
21 for post-hearing briefs, and just to be clear that
22 everyone was on the same page with what was in the
23 notice that went out January 14th, again two weeks from
24 tomorrow is the deadline for submitting post-hearing
25 briefs, and there's a mechanism for dates to request

1137

1 within a week after if there is a need to file
2 supplemental briefs and any time to respond to or object
3 to those requests and set appropriate dates as needed.

4 And hopefully by the end of the month we'll
5 have an idea, end of the month of February, have an idea
6 as to when those briefs would be coming in. Whether
7 there are post-hearing briefs or not, it looks like my
8 work schedule and some absences from the office starting
9 in mid April, I'm hoping to get this out before I
10 depart, so Friday, April the 4th I think is my last day
11 in the office until late April, so I'm hoping you will
12 see something at the end of March or early April on this
13 unless it takes me a lot longer to decide than I
14 currently anticipate based on the briefing schedule. So
15 I know a lot of people, I have seen the press clippings
16 that say this is going to the judge and going to the
17 Commission and when, just so you have an idea what my
18 target dates will be, end of March, beginning of April,
19 and if it doesn't happen by then, there will be two and
20 a half to three weeks of dead time.

21 All right, anything else before we turn to
22 the stipulations on Mr. Smith's and Mr. Liou's
23 testimony?

24 All right, first, Albert Liou, Mr. Rogerson,
25 your witness submitted Exhibit 16, which was his

1138

1 prefiled direct testimony, and Exhibit 17, which was his
2 curriculum vitae, and you have asked the parties if they
3 will stipulate to its admission. Are you going to offer
4 those at the same time?

5 MR. ROGERSON: That's correct, Your Honor,
6 the City would offer Exhibit 16, prefiled direct
7 testimony of Albert Liou, and Exhibit 17, Curriculum
8 Vitae of Albert Liou, into evidence.

9 JUDGE TOREM: Any party object to its
10 Admission?

11 MR. SCARP: No.

12 MR. THOMPSON: No.

13 JUDGE TOREM: All right, then that will be
14 admitted based on the parties' stipulation.

15 Turn to Exhibit 77 and 78, Mr. Jones, Richard
16 Smith was going to turn in his testimony prefiled
17 direct, and Exhibit 78 was a map of the railroad siding
18 extension that supported his testimony, I take it you
19 want to offer those into evidence at this time?

20 MR. JONES: Yes, I do.

21 JUDGE TOREM: Okay, that being done, is there
22 any objection to Mr. Smith's two exhibits coming in?

23 MR. SCARP: No objection.

24 MR. THOMPSON: No.

25 JUDGE TOREM: Okay, then those are admitted

1139

1 as well, and I will modify the comprehensive exhibit
2 list, and I will get that back out to all of you based
3 on these stipulations and whatever exhibits are offered
4 and admitted today, and we'll deal with objections to
5 any of those as they may come up here on the record.

6 All right, let me turn to where Mr. Zeinz'
7 testimony is, and for the record these are going to be
8 prefiled direct testimony Exhibit 50 and his biography
9 Exhibit 51 if you will get those in front of you, and
10 then Mr. Scarp's proposed cross-examination exhibits
11 that again I have numbered 139 through 146, and we'll
12 see how those go from here.

13 Mr. Zeinz, let me ask you to stand and raise
14 your right hand.

15 (Witness THOMAS R. ZEINZ was sworn.)

16 JUDGE TOREM: All right, have a seat, please.

17 Mr. Thompson.

18

19 Whereupon,

20

THOMAS R. ZEINZ,

21 having been first duly sworn, was called as a witness

22 herein and was examined and testified as follows:

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1140

1 D I R E C T E X A M I N A T I O N

2 BY MR. THOMPSON:

3 Q. Mr. Zeinz, would you please state your full
4 name and spell your last name for the record.

5 A. Thomas Zeinz, Z-E-I-N-Z.

6 Q. And did you prepare and cause to be filed the
7 written testimony that's premarked as Exhibit 50 and the
8 biography that is premarked as Exhibit 51?

9 A. Yes.

10 Q. And if I were to ask you the questions set
11 out in your prefiled testimony today, would your answer
12 be the same or do you have changes?

13 A. I would make one change in two places.

14 Q. Okay, if you would direct us to the page
15 where you would do that.

16 A. On page 7, lines 9 through 11, and on page
17 12, lines 10 through 12. In both cases I stated the
18 first instance and reference to Hickox Road or the
19 Hickox Road crossing and the second instance in
20 reference to the Blackburn Road crossing that in effect
21 if the State ever achieved its stated goal of 110 mile
22 an hour passenger operations on this line that the
23 Federal Railroad Administration will likely require
24 4-quadrant gates be installed. I would like to change
25 that from will likely require to could require.

1141

1 Q. Okay. With those changes to your answer in
2 those two instances, are your answers and your attached
3 exhibit true and correct to the best of your knowledge?

4 A. Yes.

5 MR. THOMPSON: Your Honor, I would offer for
6 admission the exhibits premarked as 50 and 51.

7 JUDGE TOREM: All right, I understand those
8 are to be modified to strike on page 7, line 10, the
9 words, will likely, and replace them with, could, and
10 have a similar striking and revision on page 12, line
11 11; is that correct, Mr. Zeinz?

12 THE WITNESS: Yes.

13 JUDGE TOREM: All right, with those
14 substitutions for his opinion as to the FHA requirements
15 in the future, are there any objections to the Exhibit
16 50 and also the biography Exhibit 51 coming in?

17 MR. SCARP: No.

18 JUDGE TOREM: All right, then those will be
19 admitted.

20 Mr. Scarp, cross-exam.

21 MR. SCARP: Thank you, Your Honor.

22

23 C R O S S - E X A M I N A T I O N

24 BY MR. SCARP:

25 Q. Mr. Zeinz, let me ask you what the difference

1142

1 is and the basis for the change in your testimony
2 between likely would and could?

3 A. A point of confusion on my part at the time.
4 The Federal requirement for active devices with full
5 barrier protection, which is kind of a euphemism for
6 4-quadrant gates or similar, applies to where train
7 speeds are higher than 110, so under the current Federal
8 Railroad Administration Regulations, they're technically
9 not required. There is as far as I know, however, only
10 one instance so far where passenger rail operations
11 above 100 miles an hour has been approved, and that's
12 the extension of the Northeast corridor between New York
13 and Boston. And in that instance, there were some
14 number of crossings that Federal Railroad required
15 4-quadrant gates with presence detection if train speeds
16 were going to be more than 80 miles an hour. In fact,
17 they prohibited train speeds in excess of 95 miles an
18 hour even at those crossings. So I can't say for sure
19 the FRA would require them, but they could, and past
20 history shows that they have.

21 Q. And would I be correct in characterizing your
22 change that you have articulated on the record and just
23 explained as being a very cautious characterization of
24 your testimony?

25 A. Yes.

1143

1 Q. Okay. And, in fact, it would kind of
2 surprise you if they didn't require that based on what
3 you have seen so far, if they didn't require that kind
4 of protection?

5 A. Yes, it would.

6 Q. All right.

7 Mr. Zeinz, I'm going to switch gears a little
8 bit. Let me ask you as a general matter, first of all I
9 apologize, I just introduced myself before the hearing,
10 my name is Bradley Scarp, and Ms. Endres and I represent
11 BNSF Railway, and I appreciate your coming all the way
12 out here, and I will try to do this as expeditiously as
13 possible, but I want to take you through some of the
14 exhibits that we have provided to prepare for your
15 cross-examination. And as we discussed off the record
16 before, part of the purpose for all these documents is
17 to, from our perspective, to confirm the opinions and to
18 kind of test the practicality, if you will, or the
19 factual basis for your opinions and testimony instead of
20 a more technical description, which is my
21 characterization. And so with that in mind, I'm going
22 to take you through those and try to do it somewhat
23 quickly in relation to your prefiled testimony. And I
24 also apologize that those exhibits aren't going to be in
25 the same order that they are numbered, which is our

1144

1 fault.

2 Your opinions, Mr. Zeinz, factor in that
3 drivers, automobile vehicle drivers, play a significant
4 part in grade crossing accidents; is that accurate?

5 A. That's correct.

6 Q. And are you familiar with studies, is it part
7 of the analysis you do to review studies regarding
8 driver behavior?

9 A. From time to time, yes.

10 Q. And you have done so over the course of your
11 consulting practice?

12 A. And my career with the railroad prior to
13 that, yes.

14 Q. Would you agree that some drivers are risk
15 prone?

16 A. Yes.

17 Q. And in considering your analysis and opinions
18 regarding grade crossings, you rely on that factor of
19 driver, the risk associated with driver behavior?

20 A. I understand it exists.

21 Q. Okay. And let me ask you this, could you
22 take driver behavior out of the equation?

23 A. No.

24 Q. Now are you familiar with the study that was
25 provided, it's been premarked as Exhibit 144, and I'm

1145

1 looking at the North Carolina Department of
2 Transportation Rail Division, it's entitled Driver
3 Performance and Expressed Attitudes Toward Risk as
4 Factors Associated with Railroad Grade Crossing
5 Violations.

6 A. I have perused that report, I can't say I'm
7 intimately familiar with it.

8 Q. It's also dated June of 1999. When did you
9 -- did you receive that report from counsel?

10 A. I downloaded it from the WUTC web site within
11 the last week.

12 Q. Okay. And when you say you perused it, was
13 there anything in it that you found inconsistent with
14 other studies that you have seen or reviewed?

15 A. No.

16 Q. Would you say that the material and the
17 component parts of the study are consistent with other
18 studies that you have reviewed, and does it support the
19 conclusions that you have reached in your opinions?

20 A. Yes.

21 Q. Okay. I would like you to take a look at
22 page 13 if you could. The section 2 on that page
23 involves a section involving the perceived risk of grade
24 crossing incident being fatal, and it says that:

25 Drivers in general perceive the

1146

1 likelihood of a crash between a train
2 and a vehicle as somewhat less than 4
3 chances in 10. Drivers less than chance
4 estimates of how often a grade crossing
5 crash was fatal is surprising given that
6 86% indicated that they correctly
7 perceived the force of a train when
8 striking a car to be the equivalent of
9 that of an automobile running over a
10 soda can.

11 I would like to ask you, does that sort of
12 study regarding driver perceptions surprise you?

13 A. No, it doesn't surprise me.

14 Q. Were you going to elaborate?

15 A. No.

16 Q. Okay, I just couldn't tell from your answer
17 if you had another thought there.

18 Is it safe to say that in your experience you
19 find that a lot of people just don't appreciate what the
20 likelihood of the result would be of a collision between
21 a vehicle and a train?

22 A. I think they comprehend what the likely
23 result could be. I think they underestimate the risk of
24 it occurring.

25 Q. Okay. Meaning they're not going to get hit?

1147

1 A. Right.

2 Q. All right. On page 14 under the driver's
3 perceptions of train operations, the middle of that
4 paragraph, in the middle it says that:

5 Approximately 1 out of every 4 believe
6 there to be a full 60 seconds between
7 the time when the gates go down and the
8 train actually arrives.

9 Leaving aside that particular study and
10 analysis, have you found in your experience that people
11 have misguided or misconceptions about the timing of
12 gates and the arrival of passing trains?

13 A. Yes.

14 Q. And does that factor in to your analysis of
15 the risk and danger associated with such at-grade
16 crossings?

17 A. In a roundabout way, yes.

18 Q. Okay. One of the things that you mentioned
19 in your testimony was the particular danger posed of a
20 siding track, one where there is a train parked and a
21 vehicle potentially confusing that with another train
22 that might activate the warnings or confusing that
23 parked train as being the what activated the warnings
24 when in fact there is another one in route; do you
25 recall that in your --

1148

1 A. Yes, I recall that.

2 Q. And on that note, is there a similar concern
3 or safety problem posed by what, as this study points
4 out, drivers who don't perceive the full threat or risk
5 of a slow moving train? I didn't see that addressed in
6 your testimony.

7 A. I do know that there are a number of drivers
8 who perceive that the train is going to stop for them.

9 Q. Okay.

10 A. And they're often mistaken.

11 Q. And that takes me to lower down on that page,
12 it says:

13 14% of drivers believed it was possible
14 for a fully loaded train traveling at 55
15 miles an hour to come to a complete stop
16 in 300 feet or less, in approximately
17 the same distance required for a fully
18 loaded tractor trailer to come to a
19 complete stop on dry pavement.

20 Do you see that?

21 A. Mm-hm.

22 Q. Is that what you're talking about when you
23 say that drivers misinterpret or mistakenly believe --

24 A. Yes.

25 Q. -- that a train will stop for them?

1149

1 A. Yes.

2 Q. I don't want to belabor any more the
3 specifics, but if we are to go through, is there
4 anything in this study in this analysis, I think I asked
5 you if you disagreed with it and you said no, but do you
6 generally agree with me that these risk factors as
7 outlined in here provide essentially the same basis that
8 you relied upon in forming your opinions of drivers'
9 risky behavior?

10 A. Yes.

11 MR. SCARP: Your Honor, we would move to
12 admit Exhibit 144.

13 MR. THOMPSON: I guess I would have, well, I
14 have a concern about it seems like this is not offered
15 as actually truly a cross-exhibit to challenge something
16 in Mr. Zeinz's prefiled testimony. I don't, I guess I
17 don't have a major problem with it in that it seems like
18 it's, you know, a study that I think is probably fairly
19 objective, and I guess I see where the railroad is going
20 and how they might use this in their brief. But one
21 thing that, one problem with this kind of friendly cross
22 is I don't get a chance to see what it is that they
23 would use this for in terms of their own testimony and
24 possibly cross-examine a witness as to what the point
25 is. So I do have some concerns about this and as well

1150

1 as some other items that I think are going to be
2 offered, so.

3 JUDGE TOREM: I will take that as an
4 objection to its admission.

5 MR. THOMPSON: Yes.

6 JUDGE TOREM: I will ask first if you want an
7 opportunity to ask the witness some more questions about
8 his opinion about the report, or I will do that as
9 needed, because I have some of my own questions about
10 how this work was done and what Mr. Zeinz thinks of the
11 statistical data gathering that is or isn't in it.

12 Are there any other counsel that wish to make
13 an objection about Exhibit 144 at this time?

14 MR. ROGERSON: Your Honor, the City would
15 make an objection and ask for the opportunity to voir
16 dire the witness.

17 JUDGE TOREM: All right, you get first crack.

18

19 V O I R D I R E E X A M I N A T I O N

20 BY MR. ROGERSON:

21 Q. Mr. Zeinz, did you review this as part of the
22 basis for your prefiled testimony?

23 A. No.

24 Q. What is your opinion regarding the relevancy
25 of this report in terms of your prefiled opinions on the

1151

1 safety of Hickox Road and Blackburn or Hickox Crossing
2 and Blackburn Crossing?

3 A. It substantiates my opinion that even with
4 the current protection or 4-quadrant gates that that
5 does not preclude that there could still be an accident
6 at that crossing.

7 Q. Does this study relate to drivers'
8 perceptions in Washington state?

9 A. On the face of it, no.

10 Q. Are there any criticisms you may have
11 regarding flaws or weaknesses to this study in terms of
12 drivers' perceptions?

13 A. I have not thoroughly reviewed the study
14 methodology or how the data was gathered, so I can not
15 comment on that.

16 MR. ROGERSON: No further questions.

17 The City renews its objection, this is not
18 the basis of what forms the basis of the testimony of
19 Mr. Zeinz that was offered and admitted.

20 JUDGE TOREM: Any other counsel wishing to
21 make an objection or voir dire the witness at this time?

22

23 E X A M I N A T I O N

24 BY JUDGE TOREM:

25 Q. Mr. Zeinz, can you look at the executive

1152

1 summary on Roman Numeral page VI and VII. When I looked
2 at this and then started to page through the study when
3 it came to my attention when it was filed last week, it
4 appeared to me that the purpose of the study was to
5 figure out why people try to beat the train or run the
6 gates. Is that how you interpreted this study?

7 A. Yes. And if you wish, I could elaborate on
8 that.

9 Q. If you wish, go ahead.

10 A. North Carolina has a rail corridor that is
11 actually an extension of the Washington-Richmond line,
12 which is the extension of the Northeast corridor where
13 they have been developing higher speed passenger train
14 traffic. And in the portion of North Carolina, they
15 have adopted what they call a sealed corridor concept.
16 Their goal was to close, grade separate, or put
17 4-quadrant gates at all of the crossings on that
18 passenger train route. The gentleman who's in charge of
19 that program is a gentleman by the name of Paul Wartley
20 with North Carolina DOT, and I'm personally acquainted
21 with Mr. Wartley. After completing their sealed
22 corridor, they started to realize that they were still
23 having accidents despite the fact that all of the
24 crossings that remained open had 4-quadrant gates, and
25 this was an attempt on their part to try and determine

1153

1 why is it that they were still having accidents.

2 Q. Now when you look at the first sentence in
3 the executive summary, second paragraph, apparently
4 there was a questionnaire that asked the drivers to
5 voluntarily submit their driver history as to violations
6 and perhaps tendencies to speed or get infractions, and
7 they found that violators were overrepresented it says
8 here in age ranges 16 to 30 and 31 to 60, and my initial
9 note here says, well, who's left. And then when I
10 looked at the rest of the report to determine what
11 number of questionnaires might have been filled out in
12 total for statistical significance and what number of
13 them fell into each of these categories and I looked
14 back in the report, I remember the tables having a
15 different number like 31 to 50. And I could find that,
16 but I didn't see anything including the appendix that
17 gave me a clue as to what number of surveys were out
18 there, how reliable they thought the surveys might be
19 for selfreporting and those sorts of issues given this
20 broad range of drivers from age 16 to 60. With those
21 concerns, I wanted to know if you had any similar
22 concerns about the methodology of this study from the
23 review you have done. And if you haven't reviewed it
24 sufficiently, so much for me stating my concerns, and
25 those can be taken up by counsel later in letting me

1154

1 know where to find things. And I know Ms. Endres has
2 some pages she might on further questions point out.

3 A. I did not really get into studying the study
4 methodology, so I really can't comment on that.

5 JUDGE TOREM: Ms. Endres, was there a
6 particular page that you thought I, because I know I
7 didn't read it cover to cover, is there something that I
8 missed?

9 MS. ENDRES: Just about the number of people
10 who took the survey.

11 JUDGE TOREM: Where is that found?

12 MS. ENDRES: It's at the bottom of page 3 in
13 the last paragraph, and I think it explains the
14 questioning of violators and non-violators in that last
15 paragraph.

16 JUDGE TOREM: So am I to understand that
17 1,127 surveys were sent out, and 137 came back, and
18 that's what the basis of this study is, is what how you
19 understand it, Ms. Endres?

20 MS. ENDRES: That appears to be the case.

21 BY JUDGE TOREM:

22 Q. And when you look at that, Mr. Zeinz, on the
23 bottom of page 3, is that how you would interpret this?

24 A. Yes.

25 Q. And so despite their indication they offered

1155

1 free round trip tickets on Amtrak to those who completed
2 and returned the questionnaire, they didn't get but
3 about 10% or less response?

4 A. 11%, 12%, somewhere in that range.

5 Q. All right, and that may not be given how many
6 surveys we're all asked to take a poor response or not.

7 A. Unfortunately that's common in these kinds of
8 studies.

9 JUDGE TOREM: All right, well, I don't know
10 how state departments of transportation could increase
11 their captive audiences as to who they get to take
12 surveys and increase it, but I just wanted to note my
13 concern with the validity of this. And if there is
14 going to be argument made if this is admitted, and I
15 want to give Mr. Scarp a chance to respond to the
16 objections that have been stated before I make a ruling,
17 that those questions have been raised now, at least you
18 know where I initially sit, and if it's to be used to
19 support a brief in the long run that those questions may
20 be or limitations may be acknowledged and points made.

21 Mr. Scarp, what's the, having heard my
22 questions and Mr. Rogerson's questions, and,
23 Mr. Thompson, do you have anything further?

24 MR. THOMPSON: No.

25 JUDGE TOREM: And his objection, what else

1156

1 does the railway have to offer on this?

2 MR. SCARP: Only that Mr. Zeinz said that he
3 is familiar with similar studies, and they confirm or
4 verify the basis of his opinions. Taken separately, the
5 percentages that may be represented aren't of particular
6 importance, and we don't intend to use them to
7 substantiate a likelihood or a percentage of times, you
8 know, that an accident may occur at Hickox Road. What
9 we're talking about and we're trying to give some
10 illustration to Mr. Zeinz' prefiled testimony and to
11 show that there is a basis independent, similar studies
12 if not the one that he -- ones that he has reviewed in
13 his experience with the railroad or as a consultant.
14 This is very similar and one that we had that shows sort
15 of categorically and succinctly the types of risky
16 behavior and which I think he has testified that they're
17 very consistent with his opinions. And again not unlike
18 the videos that were or the pictures from the videos
19 that were shown of the types of risky behavior that
20 people do, it illustrates it, it gives it something that
21 can be understood and appreciated as opposed to just a
22 statement that this is what occurs. And I don't mean to
23 diminish Mr. Zeinz' or anyone else's experience in that,
24 but there's a flesh and blood, you know, basis for this,
25 and that's the only purpose for which we seek to admit

1157

1 it.

2 JUDGE TOREM: Okay, well, as I have noted, I
3 have some questions about the weight of the actual
4 methodology and the conclusions, but despite those I do
5 agree with what you said, Mr. Scarp. Mr. Zeinz has said
6 that this is consistent, and although, Mr. Rogerson, he
7 didn't use this obviously in preparation for his direct
8 testimony, and even though it's possible that this could
9 have been offered by any number of the BNSF Railway
10 witnesses, Mr. Thompson, I will overrule those
11 objections. I think both of you have heard my concerns
12 as to weight of this exhibit. If it turns out that this
13 is used to your surprise, Mr. Thompson, in a way in a
14 brief that needs to be rebutted, there is that
15 opportunity we discussed earlier, and I would entertain
16 your request for a chance to respond, and you could
17 certainly confer with your witnesses and the rest as to
18 the appropriate way to file a responsive brief if that
19 proves necessary, but I will admit Exhibit 144.

20 MR. ROGERSON: Your Honor, I understand the
21 Judge's ruling, for the record, to preserve the record,
22 the City's objection includes the fact that any exhibit
23 offered for illustrative purposes is not an exhibit
24 offered for terms of evidence, it's not relevant to the
25 tendency of making a fact more or less likely, exhibits

1158

1 are not evidence, they don't go back into a jury room in
2 trial, and as such the judge should not use this as a
3 determination on whether or not a statement of fact is
4 more or less likely and probable, and that's a part of
5 our objection.

6 JUDGE TOREM: All right, I will note that.
7 I'm not certain with the time that my brain has to
8 machinate around here in discussing it that I fully
9 agree, but this is offered at least to make it more
10 likely than not I think, Mr. Scarp.

11 MR. SCARP: Yes.

12 JUDGE TOREM: That drivers do have risky
13 behavior. It's a very general proposition, but I think
14 that's the purpose of why this is being offered. It's
15 not for any specific fact, it's certainly not for any
16 specific driver behavior in Washington, let alone in
17 Skagit County. But I think the general proposition the
18 exhibit is being offered for does meet the rather wide
19 range of is this evidence or not. And the weight of
20 this, if I was having a jury here I may have to worry
21 about those concerns, I'm not, although maybe I do have
22 12 different personalities, only 1 of them will be
23 making the decision here.

24 All right, further questions?

25 MR. SCARP: Not with regard to that exhibit.

1159

1 JUDGE TOREM: All right, then let's move on
2 to the next line of questioning.

3

4 C R O S S - E X A M I N A T I O N

5 BY MR. SCARP:

6 Q. Mr. Zeinz, with regard to driver behavior in
7 general, and I think you mentioned that one of the
8 concerns if I recall correctly, or I could be wrong, are
9 you familiar with the notion of follow the leader gate
10 running?

11 A. Absolutely.

12 Q. Can you explain that?

13 A. Sometimes there will be a situation where the
14 gates are down, lights are flashing, it may or may not
15 be apparent that there is a train approaching the
16 crossing. For some reason, the first driver in a queue
17 decides that he or she is going to drive around the
18 gates, does so, gets across the crossing safely. The
19 person sitting behind them sees what happened, decides,
20 well, if they can get through, I can get through, so
21 they go around the gates and go across the crossing.
22 And the next person and the next person, and it becomes
23 a follow the leader. And usually if and when the train
24 shows up and an accident occurs, often it's not the
25 first car that gets hit, it's typically the second or

1160

1 third or fourth car that goes through that gets hit.

2 Q. And is that just simply another manner by
3 which drivers fail to perceive the risk; is that how you
4 would characterize that?

5 A. Yes.

6 Q. Okay.

7 I have another question about your prefiled
8 testimony, you talked about concerns where drivers are
9 familiar with the location of the crossing; do you
10 recall that?

11 A. Yes.

12 Q. And how does that differ from an area where
13 you would have a larger percentage of I will call it
14 transients, maybe that's the wrong term, out of the area
15 traffic? Let's say for example down the street here
16 you've got freeway off ramps and large stadiums where
17 people from Olympia and Cle Elum and Portland may drive
18 to go to a Seahawks game, I'm asking you to contrast
19 that if you can with a place like Hickox Road and what
20 it was that you meant when you talked about local area
21 people with familiarity.

22 A. Okay. I believe it's a common accident
23 statistic that the vast majority of accidents typically
24 occur, I'm talking highway accidents but this is a form
25 of highway accident, typically occur within 25 miles of

1161

1 the driver's home or place of work. You have heard the
2 expression familiarity breeds contempt, and in this area
3 it's more like familiarity breeds complacency. If you
4 had a situation where people observe a certain
5 occurrence on a regular basis and they have done a
6 certain action one time and gotten away with it, there's
7 more of a tendency to believe that they can get away
8 with that same action again in the future.

9 Q. Kind of like running the stop sign right
10 there at the corner next to your house?

11 A. Yes.

12 Q. And would you in analyzing the risk posed at
13 a grade crossing consider higher risk when people
14 believe that they're very familiar or have a better
15 appreciation of the risk than someone else?

16 A. Well, I go back to the expression a little
17 bit of knowledge is dangerous. When people are familiar
18 or think they're familiar with a situation, sometimes
19 they make assumptions that in a situation they're not
20 familiar with they might not be so inclined to make the
21 same assumption.

22 Q. With regard to Hickox Road, and I want to use
23 the scenario whereby the crossing is not closed but left
24 open with some sort of protective cantilevered gates or
25 other devices perhaps, based on what you understand the

1162

1 use of that siding and especially if there's a train in
2 the area close to the siding but not completely blocking
3 it, would you see a particular risk there?

4 A. Yes.

5 Q. Can you elaborate?

6 A. Again, this is only extrapolation to Hickox
7 Road per se, it's based on my awareness and statistics
8 of similar incidents and similar locations. But there
9 seems to be a tendency that when a train is stopped or
10 parked in close proximity to a crossing and the lights
11 are activated and the gates are deployed, the conclusion
12 that many drivers make is, well, that train sitting
13 there is the reason why the lights are active and the
14 gates are down. And when they see that train sitting
15 there for a long period of time and it's not moving,
16 after a while they get the notion, well, that's why
17 these gates are down, and he's not moving, so obviously
18 it should be safe for me to cross, so that's partly when
19 they make the decision to drive around the gates.

20 Q. All right.

21 A. That's a fact.

22 Q. You're familiar with the Hickox Road area,
23 and you have been there and inspected the area, the
24 adjacent crossing south at Stackpole and north at
25 Blackburn?

1163

1 A. Yes.

2 Q. Are you familiar with the or do you have an
3 understanding of the amount of farm trucks, delivery
4 trucks, farm equipment, that do utilize that crossing?

5 A. Not so much from personal observation, but I
6 am aware of some of the other documents and evidence
7 that's been posted on the WUTC's web site.

8 Q. And you drove west of the crossing past
9 Mr. Boon's farm?

10 A. Yes.

11 Q. And so you would anticipate a fair amount of
12 farm trucks and farm equipment traversing that crossing?

13 A. Seasonal, but yes.

14 Q. Okay. Does that play any role in your
15 analysis of the types of risk presented at that
16 crossing?

17 A. Not especially.

18 Q. Okay.

19 A. In rural areas it's understood that there's
20 going to be seasonal increases or peaks of different
21 kinds of traffic, but those are going to occur on the
22 roadway system in general in any event.

23 Q. Would you agree with me that it would be
24 difficult to drive a truck eastbound toward the freeway
25 if you will from the floodplain down on the west; do you

1164

1 have that in mind?

2 A. Okay.

3 Q. And toward the crossing and then to see those
4 lights start flashing and the gates start to come down,
5 would you anticipate a problem in backing up a big truck
6 or farm equipment?

7 A. Yes.

8 Q. And if put in that position, could you see an
9 increased risk or an increased threat of risky behavior
10 for someone that was faced with that situation?

11 A. Possibly, depends in part on what other
12 supplemental devices might be there.

13 Q. Okay, let's talk about those for a minute,
14 and I would like you to take a look at Exhibit 139 if
15 you will. There's some responses to data requests, and
16 there's three different ones, and they have all been
17 premarked together as Exhibit 139. And I'm first
18 interested in Data Request Number 29, and our question
19 was:

20 Is it Mr. Zeinz' opinion that it's
21 practical to install a raised median
22 barrier at a crossing even if wide
23 trucks frequently drive at least partly
24 across the center line due to the width
25 of the roadway?

1165

1 Did you review this request and contribute to
2 the response?

3 A. Yes.

4 Q. Your short answer is, no, it is not. Can you
5 explain, whether it's using Exhibit 139 or your
6 rationale to explain the difficulties with medians here?

7 A. Well, I considered that as an option, one of
8 the improvements that could be made at that crossing if
9 the decision was made to leave it open. And my
10 assessment is that yes, it's an option, but I don't
11 think it's a very good one for a couple of reasons. And
12 that is that where you have particularly large
13 agricultural equipment, center medians or center curb
14 with raised delineators or something like that could
15 interfere with that type of equipment being able to get
16 across the crossing. The other thing is we were talking
17 about this in the context of a crossing that could be
18 blocked by a standing train very possibly for an
19 extended period of time where a vehicle that's stopped
20 at the crossing might decide to want to turn around and
21 seek another route, and I felt that these raised medians
22 or delineators would interfere with a vehicle's ability
23 to turn around so that they could seek another route.

24 Q. Right.

25 A. So that's why I tended to discount those type

1166

1 of supplemental devices as being terribly viable at this
2 location.

3 Q. Okay. In your answer there you, down at the
4 bottom of the response to Number 29, you say, other
5 strategies such as installing 4-quadrant gates. I have
6 a question about 4-quadrant gates specifically at the
7 Hickox Road crossing as a possible alternative, and I --
8 you just testified, and I will make sure I understand,
9 that your understanding if the siding project is
10 extended south its proposed extension, that it will go
11 from where it currently switches back into the main
12 line, which is north of Hickox, and it will extend
13 across Hickox in a certain considerable distance down
14 toward Stackpole before it joins the main line again, is
15 that --

16 A. That's correct.

17 Q. Okay.

18 A. I understand that.

19 Q. And your understanding regarding the length
20 of that siding is that longer freights will be able to
21 be accommodated for meet and pass, either meet and pass
22 or just simply passing in the same direction whether it
23 be passenger trains or other freights?

24 A. Correct.

25 Q. And so your understanding is that those

1167

1 freight trains could be there depending on the traffic
2 system an hour, two hours, whatever the situation may
3 be?

4 A. I understand that.

5 Q. All right. And so are you aware of any place
6 in Washington where 4-quadrant gates are utilized as a
7 barrier for, and I use the word barrier, correct me if
8 you have another term, are you aware of any place in
9 Washington where 4-quadrant gates are used as a barrier
10 at a crossing that is intended or would be intended to
11 be blocked for hours at a time?

12 A. No.

13 Q. You mentioned earlier that in like a North
14 Carolina high speed corridor, and I'm sure you're
15 familiar much more than I am of many high speed
16 corridors, is that primarily where you see 4-quad gates,
17 where trains are coming fast and they wanted to make --
18 they take an extra measure of precaution to make sure
19 that people don't engage in that risky behavior or to
20 preclude it?

21 A. Yes, the idea behind that is that in those
22 types of situations it's not necessarily that the risk
23 of accident is greater, but the potential consequences
24 of an accident could be considerably greater.

25 Q. Especially if it's passenger train?

1168

1 A. Exactly.

2 Q. Okay.

3 A. And so it's an added measure to try and
4 further reduce the likelihood of an accident at those
5 locations, particularly where there's high speed rail.

6 Q. All right.

7 Exhibit 145 is a National Transportation
8 Safety Board Railroad Accident Report of Bourbonnais,
9 Illinois, March of 1999, are you familiar with that
10 accident?

11 A. Yes, I am.

12 Q. Can you explain?

13 A. That accident occurred on my railroad.

14 Q. For the record, can you give us some
15 background?

16 A. I was Public Project Manager for the Illinois
17 Central Railroad at the time that incident occurred, and
18 that incident occurred on my territory.

19 Q. Are you familiar with the NTSB report?

20 A. Yes.

21 Q. And did the factors laid out in this report
22 contribute to your opinions regarding warning devices
23 and safety devices as you have expressed them in this
24 case?

25 A. It is illustrative of the potential

1169

1 consequences of an incident where someone who violated
2 the gates collided with a passenger train.

3 Q. And when you talk about the, my word, the
4 magnitude or the extent of the consequences, is that
5 Bourbonnais example one that you have in mind of what
6 happens when people cause a passenger train accident?

7 A. Yes.

8 Q. All right. What was the cause, if you will,
9 of that accident?

10 A. A semi tractor truck, flat bed truck carrying
11 a load of rebar, drove around the lower gates. Almost
12 made it across the crossing. The Amtrak train struck
13 the back of the truck, spilled rebar all over, the train
14 ran over some of the rebar on the tracks, and it
15 derailed the train.

16 Q. What was the damage that occurred, and I will
17 -- there is an executive summary right after the index
18 if it helps refresh your memory or if you know?

19 A. Well, I don't have a copy of the report in
20 front of me.

21 Q. Oh, I'm sorry.

22 JUDGE TOREM: That's been remedied.

23 Q. And I will at page 1, the synopsis --

24 A. I assume you're referring to the second
25 paragraph.

1170

1 Q. With regard to the part about cause, or I was
2 talking about the damage, because that was the topic
3 that we were on and what the --

4 A. All right:

5 Both the locomotives and 11 of the 14
6 cars in the Amtrak derailed. The
7 derailed Amtrak car struck 2 freight
8 cars that were standing on an adjacent
9 siding. The accident resulted in 11
10 deaths and 122 people being transported
11 to local hospitals.

12 Q. From a less important but monetary
13 standpoint, it says the total Amtrak equipment damages
14 were estimated at \$14 Million, and just the damage to
15 the track and structures was estimated at about
16 \$295,000; are those numbers that you're familiar with?

17 A. Yes.

18 Q. All right. Down below on the second
19 paragraph it talks about the truck driver's
20 inappropriate response to grade crossing warning devices
21 and his judgment likely impaired by fatigue that he
22 thought he could cross the tracks before the arrival of
23 the train. My question is simply, and I won't spend too
24 much of everyone's time further on this, did this
25 accident on your railroad play a part in forming your

1171

1 opinions about the importance of the safety and the
2 magnitude of damage that can occur if such accidents
3 happen?

4 A. Yes.

5 MR. SCARP: Okay, we move to admit Exhibit
6 145.

7 JUDGE TOREM: Any objections on this Exhibit
8 145?

9 MR. THOMPSON: Actually, I have no objection
10 to that one.

11

12 E X A M I N A T I O N

13 BY JUDGE TOREM:

14 Q. All right, I just have one question,
15 Mr. Zeinz. Do you know given what you have explained to
16 us about your familiarity with this particular railway
17 if this report contains any remedial steps to prevent a
18 future accident that were taken at this crossing or
19 other crossings along that line?

20 A. Yes, it did, not necessarily in the -- one of
21 the problems the NTSB had in coming to their conclusions
22 in this report is they were unable to get confirmation
23 from the recording devices on the crossing signals when
24 or in fact that the gates were fully deployed, because
25 we didn't have that type of monitoring equipment on

1172

1 those gates at the time. And their recommendation was
2 that in the future that such crossings include
3 monitoring capability so that it can be determined
4 exactly when the gates deploy. Beyond that, nothing
5 that was of any particular consequence that affected
6 that crossing or other crossings on that line. They did
7 issue a recommendation to a number of the other parties
8 as a result of that accident, but they didn't
9 particularly take issue with the fact that that crossing
10 only had 2-quadrant gates.

11 Q. So I'm looking at page 66 and 67 of the
12 report, which is labeled recommendations, and I see what
13 you mean about recommendations being made to various
14 bureaucracies or other groups, and the third one down
15 about class 1 railroads and regional railroads to
16 upgrade their warning systems, is that the
17 recommendation you're discussing?

18 A. Yes, that they be equipped with event
19 recorders, those that include crossing gates and are
20 equipped with event recorders capture the, by those
21 event recorders, the information that indicates the
22 position of the gates.

23 Q. But there's nothing in this report or
24 anything that you're aware of that the railroad did to
25 upgrade safety devices at crossings other than the event

1173

1 recording to see what happens when there already is an
2 accident?

3 A. Well, I am aware of the fact that since then,
4 since this report was issued, that crossing has been
5 closed.

6 Q. To the best of your knowledge, is that due to
7 this accident, or were there other factors?

8 A. I believe the fact that this incident
9 occurred was the major trigger behind it, but there was
10 another crossing approximately a mile away that was
11 improved, in conjunction with that improvement this
12 crossing was closed, is now closed.

13 Q. To the best of your knowledge, was there any
14 movement or thought to close this particular crossing
15 prior to the accident?

16 A. No.

17 Q. So there was none of this, I told you this
18 would happen, sort of mentality?

19 A. No.

20 JUDGE TOREM: Those are all the questions I
21 had, does that raise any additional questions in this
22 report or any objections to it?

23 All right, then Exhibit 145 is admitted.

24 MR. THOMPSON: I'm presuming I will have an
25 opportunity to do redirect on that exhibit at the end.

1174

1 JUDGE TOREM: You will, I'm sorry, I have
2 strayed into some redirect areas, but since we were on
3 this report, I've taken the liberty, what can you do.

4 All right, Mr. Scarp, how much longer do you
5 have, because we're at 10:00, and I know we have the
6 morning, but I want to make sure folks can take a
7 comfort break as needed.

8 MR. SCARP: I would like to think that I'm
9 more than half. I mean, I don't know, half hour, just
10 sort of depends. Based on what you have said, I can see
11 some places that I probably won't go.

12 JUDGE TOREM: Okay, well, why don't we go
13 ahead and take a break for 5 minutes, let everybody else
14 decide where they want to go on their redirect as
15 needed, and when we come back, hopefully within half an
16 hour you will be completed with your cross, we'll take
17 care of any other exhibits you want to offer, and then,
18 Mr. Thompson, you'll have redirect and we'll see if
19 there's any other questions from other counsel, and I'm
20 hoping by around 11:00 we'll be all set. So right now,
21 it's almost 10 after 10:00, and we'll take a break just
22 for 5 minutes, we'll come back on the record promptly at
23 10:15.

24 (Recess taken.)

25 JUDGE TOREM: All right, we're back on the

1175

1 record, it's now 10:15, and Mr. Zeinz is still answering
2 questions from Mr. Scarp, and we were just discussing
3 off the record we have not yet admitted Exhibit 139, but
4 I think the reason is we have only dealt with the first
5 data request, Number 29, and 36 and 37, pages 2 and 3 of
6 that exhibit, may yet be dealt with.

7

8 C R O S S - E X A M I N A T I O N

9 BY MR. SCARP:

10 Q. Mr. Zeinz, we sort of zigzagged in issues
11 from 4-quadrant gates into your explanation about what
12 they try to -- the types of dangers that they try to
13 preclude, and we got into the Bourbonnais accident. The
14 Bourbonnais accident had what you call just regular
15 2-quad or is that what you refer to them?

16 A. Standard 2-quadrant flashing lights and
17 gates.

18 Q. Okay. Was there a consideration, do you
19 know, of using 4-quadrant gates after that accident?

20 A. Well, I don't -- there wasn't a serious
21 consideration. There were center delineators installed
22 shortly after that accident, they were ordered in by the
23 Illinois Commence Commission. And then within a couple
24 years after that when they completed improvements at the
25 next crossing, that crossing was closed.

1176

1 Q. Okay. I notice in this drawing on page 25,
2 it shows that the direction of the truck -- I will wait
3 until you get there.

4 And it says, right where it says direction of
5 truck and the arrow points toward the cantilevered gate
6 it says break, do you see that?

7 A. Yes.

8 Q. Do you know what that refers to?

9 A. The tip of the gate arm was broken off. Now
10 it was unclear whether that was caused by the truck
11 striking it or if that was caused by the aftermath of
12 the train accident.

13 Q. Okay. It wasn't broken off prior to the
14 accident?

15 A. No.

16 Q. And then apparently part of the gate on the
17 other side was broken off, but that clearly would have
18 been a result of the collision. Is the damage or
19 breaking of gates a problem?

20 A. Yes.

21 Q. Can you clarify or elaborate what kind of a
22 problem it poses, how often, how they occur?

23 A. It's quite common for railroads to have to go
24 out and replace broken gate arms. Sometimes in longer
25 arms they can be broken by wind, but very often they can

1177

1 be broken by vehicles trying to drive around the gates
2 or trying to drive through the gates, or a vehicle will
3 be going across the crossing as the gate is coming down,
4 and it will get caught on the vehicle say between the
5 cab and a trailer on a tractor trailer, and that will
6 cause it to break off.

7 Q. Tell me to the best of your ability, not
8 perhaps necessarily as project manager but as having
9 experience in the operations end, which maybe this would
10 go under maintenance as much as operations, but how
11 quickly, you know, as a rule of thumb do gates get
12 replaced when they're broken?

13 A. Well, that would depend on how quickly the
14 railroad gets a report of the fact that they're broken.

15 Q. All right.

16 A. But whenever we got a report of a broken
17 gate, we would dispatch an engineer out there as soon as
18 possible and get it taken care of. Typically you're
19 talking, you know, a couple of hours.

20 Q. And when you say when you get a report, what
21 does that mean, you may not hear about it for a while?

22 A. We may not know about it until generally
23 either another train goes through that area and reports
24 it or someone from the public contacts the railroad and
25 submits a report.

1178

1 Q. Is there times when that's to your knowledge
2 taken days?

3 A. In a few instances, yes.

4 Q. Are trucks a pretty big problem as far as
5 breaking gates?

6 A. Yes.

7 Q. Okay. With regard to cantilevered gates and
8 including 4-quadrant gates, do you have information in
9 your experience that people have manually manipulated or
10 lifted gates?

11 A. I'm not sure I understand what you mean by
12 cantilevered gates.

13 Q. Well, just plain old 2-quad gates, isn't that
14 what they call them when they come down, isn't that
15 cantilevered?

16 A. No.

17 Q. Oh, I apologize.

18 A. Cantilever usually refers to the overhead
19 structure that supports additional sets of flashing
20 lights on multilane highways.

21 Q. Okay, I apologize for that, I had a
22 particular crossing in mind and that term stuck.

23 2-quadrant gates, 4-quadrant gates, can they
24 in your experience be moved or lifted manually?

25 A. Yes, the motors that drive the gates, they

1179

1 don't actually hold the gates down, they hold them up.
2 There's current to the gate motor holding the gate up,
3 and when there's a train activation, what it does is it
4 cuts the power to that motor, and the gate is counter
5 weighted, but it's counter weighted in a way that once
6 the power is removed, the gate will fall. And part of
7 that is so if you lose power to the crossing, you lose
8 battery to the crossing, the gates are going to fall.

9 Q. And that's a safety measure to make sure that
10 if that happens, power or if there's a failure, that
11 they fail in the down position?

12 A. Correct.

13 Q. Does that create a problem if you have gates
14 failing in the down position with regard to driver
15 behavior?

16 A. Yes.

17 Q. Can you explain?

18 A. It is not uncommon that when somebody
19 encounters a crossing that the gates are malfunctioning,
20 which means under their failsafe design they're going to
21 be in the down position, after they sit there for some
22 length of time and there's no apparent train movement
23 occurring, that after a period of time drivers will
24 start to drive around the gates.

25 Q. Okay. And if drivers have, let's say there

1180

1 isn't a -- let's say you've got 4-quad gates, have you
2 ever heard of a driver propping a gate up?

3 A. Oh, yes.

4 Q. How common is that or how --

5 A. It's hard to say. I would say there might be
6 a correlation between that and between say the frequency
7 that there is say a malfunction at that crossing.

8 Q. Okay.

9 A. Crossings where there are common reports of,
10 you know, signal malfunctions, that's going to tend to
11 happen more often than not.

12 Q. Is it also common that if there's two people
13 in the car, the passenger will jump out and hold the
14 gate open while the driver --

15 A. I wouldn't say it's common, but I have known
16 it to occur.

17 Q. Okay. It's a risk and it's a danger?

18 A. Yes.

19 Q. Okay. Would you expect that sort of behavior
20 to occur if there was a long delay as opposed to just a
21 what I will call an ordinary crossing like a single
22 track crossing where you've got a -- you wouldn't have
23 any blocking, where you just have an approaching train?

24 A. Yes, there's been studies done on that, and I
25 believe the studies I have seen show that when the

1181

1 driver has to wait more than typically about 45 seconds
2 is where the incidents of gate running start to
3 increase.

4 Q. Okay, I want to ask you to take a look, if
5 you would, at Exhibit 141. They are the crash
6 statistics prepared it says through the Washington UTC
7 and Operation Lifesaver Crash Statistics.

8 A. Mm-hm.

9 Q. Have you reviewed this document prior to it
10 being submitted in this matter?

11 A. Quite frankly, no.

12 Q. Okay. And are you generally familiar with
13 these types of grade crossing trespass incidents or
14 collisions and injuries?

15 A. Well, I really can't say that, because I
16 really haven't reviewed it.

17 Q. Okay, so you haven't reviewed it at all?

18 A. No.

19 Q. Okay. Do you review these types of
20 documents, or excuse me, these types of statistics as
21 part of your job?

22 A. When I was employed as a public projects
23 manager, I always paid attention to crossing accident
24 statistics that occurred on my railroad.

25 Q. Okay. Let me make sure that this was not --

1182

1 you didn't review it at any time in any manner?

2 A. Not specifically. It just appeared to be
3 listings of various events, and I didn't understand the
4 point.

5 Q. Okay. Well, it was the point for that
6 purpose, but if you haven't read it, was just the number
7 of tractor trailers that are listed, the number of
8 commercial vehicles that are shown involved in grade
9 crossing accidents over the last ten years in
10 Washington.

11 Let me just ask you this, and then I will
12 move on from it, would you agree with me that a grade
13 crossing accident involving a commercial vehicle, a
14 tractor trailer, poses a greater risk than a passenger
15 car?

16 A. It poses a greater risk to the possibility of
17 causing injury or death on the train or derailing the
18 train.

19 Q. But not necessarily a greater risk to the
20 loss of life of the driver in the vehicle?

21 A. Not really, because an awful lot of those
22 incidents they hit the trailer, they don't hit the
23 tractor, and a lot of times the driver walks away. The
24 engineer and fireman may not, but the driver of the
25 vehicle walks away.

1183

1 Q. And in the case of an automobile, you're
2 pretty much assured that the car is going to get the
3 worst of it like a soda pop can?

4 A. Right.

5 Q. Okay, I will move on, I won't ask to admit
6 the crash statistics.

7 Let me just ask you what problems are posed
8 by the entrance and exiting at 4-quad, at crossings with
9 4-quad gates, if you understand my question? And I'm
10 asking generally to move along.

11 A. Like I say, the purpose of 4-quadrant gates
12 or the addition of the exit gates really is the best way
13 to put it is to in effect seal the crossing to
14 discourage, it doesn't totally prevent, but it's to
15 discourage a motorist from trying to drive around the
16 gates and try and get across the crossing. The way they
17 function is that normally the exit gates there is a
18 delay of typically 5 to 6 seconds. This can vary based
19 on the number of tracks in the crossing, but it's to
20 allow a vehicle who has gotten past the entrance gate to
21 get across the crossing before the exit gate lowers. So
22 there's additional amount of time involved, there's a
23 delay between when the entrance gates come down and when
24 the exit gate lowers. Typically that's added to the
25 total warning time of the crossing. There have been

1184

1 demonstrations of people who have tried to jump under
2 the exit gates before they go down. 4-quadrant gates
3 are not totally -- they're not going to solve all the
4 problems. They're a help, that's all.

5 Q. And is it -- and I guess my question is with
6 regard to the type of behavior that you just mimicked
7 with a hand gesture of people trying to get under the
8 exit gate before it comes down, is that a phenomena that
9 developed in response to the use of a 4-quadrant gate, a
10 driver behavior that developed in order to beat that
11 system?

12 A. Well, we've got a lot of drivers that are in
13 a hurry. If they approach a crossing that they're
14 familiar with and they know if they stop they could stop
15 for a long time, there's a greater tendency that they're
16 going to try to get across the crossing before the train
17 arrives. They're going to do it by whatever way they
18 can.

19 Q. Right. I want to ask you about, talk about
20 other signalization, and in conjunction with that I want
21 to get to the other crossings in the area of Hickox
22 Road, specifically Stackpole to the south and Blackburn
23 Road to the north. By the way, but before I get there I
24 want to ask you just so we can move through Exhibit 139,
25 the Data Request Number 36 is a question about driver

1185

1 behavior and whether some would recognize that lights
2 and gates are being activated by a train that's stopped
3 as opposed to a second train, and your portion of your
4 answer down there was:

5 Mr. Zeinz is of the considered opinion
6 and believes the preponderance of other
7 traffic engineers would concur that
8 there is also a higher likelihood of red
9 traffic signal violations when motorists
10 perceive they are being unduly delayed
11 or precluded from making certain
12 movements for no apparent reason.

13 Now we discussed that generally earlier in
14 your testimony today; do you recall that?

15 A. Not about traffic signals.

16 Q. Right, and that's -- but we talked about the
17 driver behavior in general with regard to being delayed
18 for no apparent reason?

19 A. Yes.

20 Q. Now with regard to traffic signals, what did
21 you mean there?

22 A. Drivers are not supposed to drive through red
23 lights, but we know it happens. It's a fact of life.
24 Traffic engineering where there are locations that have
25 been identified where those types of events occur with

1186

1 frequency, engineers are always looking to try and find
2 strategies to try and overcome it.

3 Q. Is there an application --

4 A. If --

5 Q. Go ahead, is there an application that you
6 had in mind with regard to this case for this answer?

7 A. Well, one of the things that concerns me
8 about Blackburn is that when the lights and gates are
9 activated, I understand that they are supposedly
10 interconnected with the traffic signals, and I
11 understand that basically they turn all the traffic
12 signals red. What happens in the case that you have a
13 malfunction of the crossing signals at Blackburn, the
14 gates are going to go down, the lights on the railroad
15 signals are going to activate, it's going to trigger a
16 preemption of the traffic signals, the traffic signals
17 are going to be red. So you've got this whole 4-way
18 intersection red for no apparent reason for an extended
19 period of time. Sooner or later somebody's going to
20 start making moves through that intersection including
21 across the railroad irrespective of the condition of the
22 gates or the traffic signals. They're not going to just
23 sit there and wait forever.

24 Q. And your scenario is one where there is a
25 malfunction in the -- such as if the power was lost to

1187

1 the gate or what type of malfunction did you have in
2 mind?

3 A. Railroad signals are designed to be failsafe,
4 meaning if there's any kind of system failure, they're
5 designed to go to their most restrictive condition,
6 which in the case of lights and gates is for the lights
7 to flash and the gates to lower. It could be for a
8 variety of reasons.

9 Q. Okay. And your concern in that situation is
10 that that could occur at Blackburn both with the red
11 traffic signals and the railroad signals based on
12 whatever it is that caused the malfunction?

13 A. When the gates activate, it's going to send a
14 preemption call. At least that's the way it should be
15 designed to operate. I can't say for sure that's the
16 way it does operate. But under normal design if the
17 gates failed, it would send a preemption call to the
18 traffic signal so that the traffic signals would also go
19 all red.

20 Q. You're not aware of that having happened at
21 Blackburn?

22 A. Not personally, no.

23 Q. Okay. Would that risk be present at any
24 crossing with those types of signals?

25 A. Well, it's highly unusual to have, you know,

1188

1 that type of an intersection where you've got two roads
2 that cross each other with traffic signals right on top
3 of a railroad crossing. I'm not saying they don't exist
4 in other locations, but it's a highly unusual geometry,
5 so it's somewhat unique in that regard.

6 Q. And I saw from your prefiled testimony that
7 you didn't think that was the best crossing that you
8 have seen because of that configuration?

9 A. Let's say I would call it less than ideal.

10 Q. All right.

11 Data Request Number 37 asks whether you claim
12 that citizens or drivers have gone around the lower
13 gates at Blackburn crossing, and the answer is, no, not
14 with regard to that particular crossing, but your
15 concerns are related to your experience at all
16 crossings; is that fair?

17 A. Yes.

18 Q. Okay. And I don't think you will get any
19 dispute certainly from us that bad driver behavior
20 occurs at crossings everywhere. BNSF is certainly aware
21 of that.

22 MR. SCARP: With that, Your Honor, I guess I
23 would move to admit Exhibit 139.

24 JUDGE TOREM: Any objection to these three
25 data requests being admitted?

1189

1 MR. THOMPSON: No objection.

2 MR. ROGERSON: No objection.

3 JUDGE TOREM: All right, 139 is admitted.

4 BY MR. SCARP:

5 Q. Your testimony, prefiled testimony,
6 Mr. Zeinz, and I'm looking at the last page, page 13,
7 and I will read the question:

8 In your opinion as between the following
9 alternatives, which would you deem
10 safer, (a) leaving Hickox Road crossing
11 open but with 4-quadrant gates, or (b)
12 closing the Hickox Road crossing and
13 diverting the traffic to Blackburn and
14 Stackpole crossings with, and the word
15 with is underlined, improvements being
16 made to both of these alternate
17 crossings?

18 Your answer is:

19 Under those circumstances, (b) closing
20 the Hickox Road crossing and improving
21 both adjoining crossings would be safer.

22 Did you review the analysis or prefiled
23 testimony of Gary Norris in this case, the analyst
24 retained by the State Department of Transportation and
25 his traffic study?

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1 A. Some time ago, yes, not real recently, but at
2 one point I did.

3 Q. Are you aware that he characterized the
4 impact or the increase in traffic to Blackburn due to
5 closure of Hickox, the potential closure, as
6 insignificant?

7 A. Yes.

8 Q. Did you accept or reject or have any
9 particular independent analysis of that?

10 A. I didn't do an independent analysis of that,
11 but I can understand how you would draw that conclusion.

12 Q. And why is that?

13 A. There are some number of trips that originate
14 let's say on Hickox Road west of the crossing that would
15 cross the railroad at Hickox, go up Old Highway 99, and
16 cross the railroad again at Blackburn to go into town.
17 So you've got two places along the railroad that the
18 same vehicle is crossing to get from somewhere to town.
19 If Hickox were closed, then that vehicle would have to
20 divert by way of Dike Road and Britt Road, and the net
21 result is they could get where they want to go without
22 having to cross the railroad at all. So not only in
23 that instance is it safer at Hickox, but there's one
24 less trip across the railroad at Blackburn. So I can
25 understand how by closing Hickox the peak traffic count

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1 at the Blackburn crossing could in fact be less.

2 Q. The conditions that you see in response to
3 the question in your testimony at page 13 is
4 improvements to both Blackburn and Stackpole crossings;
5 what did you have in mind for Stackpole?

6 A. My recommendation would be and I understand
7 the petition in effect stated that part of the proposal
8 was to install lights and gates at Stackpole, and I
9 agree with that. It has been my experience over the
10 years that it's not good practice to close a crossing
11 and then divert traffic to another crossing that has a
12 lower level of protection than the one that's being
13 closed. So if you're proposing to close a crossing that
14 has lights and gates, to me it's just good practice that
15 any crossing that you're diverting that traffic to
16 should also have lights and gates.

17 Q. All right. And I want you to leave aside the
18 issue of whether traffic will increase or not at
19 Blackburn Road based on Mr. Norris's analysis, but what
20 improvements would you recommend at that crossing if
21 Hickox is closed?

22 A. At Blackburn?

23 Q. At Blackburn.

24 A. Specifically one, and that is once the siding
25 is extended, the piece of that siding that extends north

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1 of Blackburn based on my experience with rail operations
2 really serves no good purpose. There's no in my opinion
3 clear and compelling need to keep that piece of the
4 siding north of Blackburn.

5 Q. Can I clarify, so in other words you would
6 say that where that siding is used to enter or exit the
7 main line and that portion which is north of Blackburn,
8 you would want to see the track enter or exit or switch
9 from the main line south of Blackburn; is that right?

10 A. Correct.

11 Q. Now how much track are you talking about?

12 A. It's my understanding we're talking about
13 somewhere in the neighborhood of about 1,500 to 2,000
14 feet of track.

15 Q. Okay. And what's your understanding of what
16 that would do to the overall use and length of the
17 proposed siding?

18 A. It's my understanding that the proposal is to
19 extend the siding a sufficient distance south of
20 Blackburn, south of Hickox, that the longest shall we
21 say design train for that district would be able to be
22 stored on that siding south of Blackburn, which again
23 only reinforces my notion that the piece of the siding
24 that's left north of Blackburn doesn't really serve any
25 useful purpose.

1193

1 Q. All right. And what is it about the siding
2 that crosses Blackburn or is north of Blackburn that
3 concerns you?

4 A. Whenever I have been on a diagnostic team or
5 whenever I have gone out to evaluate a crossing, and I
6 believe this is documented in much of the guidance
7 literature, the first question that should be asked is
8 can the crossing be closed. Now normally when we think
9 about crossing closure, we think about it in the context
10 of can the street be removed across the railroad tracks.
11 There's another side of that, and that is can the
12 railroad track be removed from the street. That's
13 another way to close a crossing. And if it's a multiple
14 track crossing and not all of the tracks can be removed
15 through the street, can the number of tracks through the
16 street be reduced. That's a form of closure, and it's
17 commonly accepted that the fewer the tracks you have in
18 a crossing, the safer that crossing is going to be.

19 Q. Okay.

20 A. The other reason is because in its current
21 configuration, there is a possibility, granted it may
22 not happen very often and I'm sure the railroad would
23 issue instructions to its crews and attempt to avoid it,
24 but there is a possibility that the Blackburn crossing
25 could also be blocked by a train. By removing the track

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1 through the crossing, you remove any possibility that
2 the Blackburn crossing would also be blocked by a
3 stopped or standing train that's waiting to meet or pass
4 another.

5 Q. You have indicated in your answer and your
6 prefiled testimony that you consider that alternative to
7 be the safer of the alternatives presented?

8 A. Yes.

9 Q. Which involves the closure and the
10 improvements at both Stackpole, closure at Hickox and
11 improvements at both Stackpole and Blackburn?

12 A. Yes.

13 MR. SCARP: I think those are all the
14 questions I had right now, thank you, Mr. Zeinz.

15 JUDGE TOREM: Mr. Thompson.

16 MR. THOMPSON: Just reviewing my notes here
17 to see if I have anything.

18

19 R E D I R E C T E X A M I N A T I O N

20 BY MR. THOMPSON:

21 Q. Mr. Zeinz, Mr. Scarp asked you at one point
22 if there is any place in Washington where there are
23 4-quad gates used as a barrier where the crossing would
24 be blocked frequently, and you said no. Can you offer
25 an opinion as to why that is or expand on your answer a

1195

1 little bit?

2 A. I can't speak specifically to why that is in
3 the state of Washington, but it's commonly accepted by
4 all the people in my profession from railroads, from
5 state highway departments, from regulatory agencies
6 where I have had experience, if you have a situation
7 where a crossing is going to be routinely blocked by a
8 train, generally the best practice is not to have a
9 crossing there at all, either try and close it or grade
10 separate it or something. There are a number of
11 corridors where 4-quadrant gates have been installed on
12 a number of crossings, North Carolina line sealed
13 corridor is one, the high speed corridor between Chicago
14 and St. Louis is another one. I'm not familiar of any
15 of those locations being locations where trains
16 frequently stop and hold a crossing for an extended
17 period of time, because it's generally been my
18 experience that those are the kinds of situations where
19 we really try to avoid having crossings.

20 Q. Well, let's assume in this case that a
21 crossing were to remain at the Hickox location, is there
22 anything about a 4-quadrant gate in particular that
23 would make it a less attractive choice as compared with
24 any other type of gate or supplemental safety device?

25 A. There are a variety of different supplemental

1 devices. Again going back to, you know, a different
2 requirement for Federal Highway and Federal Rail and
3 what should be at high speed railroad crossings and
4 everything else we know about this crossing, definitely
5 some kind of supplemental safety device should be
6 employed in addition to the gates that are there now.
7 Looking at the different choices and for reasons that I
8 have mentioned earlier, I would think exit gates
9 probably is the most reasonable choice. Is that going
10 to guarantee that there's not going to be any incidents
11 at this crossing? No. But I see that as the most
12 viable choice at this crossing if the crossing is left
13 open.

14 Q. What would you say to the possibility of
15 putting in a median barrier instead of 4-quadrant gates
16 but then having a turnaround removed some distance from
17 the crossing itself in order to allow people to still
18 get the benefit of the barrier but to allow people to
19 turn around either before getting there or to back out
20 into the turnaround?

21 A. It could be viable. I still think that the
22 exit gates would be a better choice, and the reason I
23 say that is because you would have the issue of wide
24 farm equipment that could have some conflicts with the
25 center medians, the center barriers. And some of that

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1 equipment that would use the crossing, the farm
2 equipment, the truck traffic, I'm not really sure how
3 you would back that up, you know, to be able to turn
4 around. I mean you could in theory, but is a truck
5 driver necessarily going to see that there's a small car
6 stopped behind him when he goes to back up, those kinds
7 of things.

8 Q. Let's see, one last area I wanted to ask you
9 about was the discussion you had with Mr. Scarp about
10 your recommendation to remove the siding track to the
11 north of Blackburn or through and to the north of
12 Blackburn, are you aware of arguments that the railroad
13 has made against doing that?

14 A. Some, yes.

15 Q. Okay. And what are those, and can you
16 comment on them at all?

17 A. The two that I noted was I believe in some of
18 the testimony it said, well, we will assure that our
19 trains will be at least 50 to 100 feet away from the
20 crossing. From the standpoint of the motorist possibly
21 misbelieving that a stopped or standing train is the
22 reason why the lights and gates are active, stopping a
23 train 50 to 100 feet from the crossing really does not
24 address that. Now by relocating the switch south of the
25 crossing, first of all most railroads have design

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1 requirements of the minimum distance that there can be
2 between the end of the crossing and the switch.
3 Typically that range is from 50 to 150 feet depending
4 upon the railroad. I tend to prefer the longer
5 distance, but whatever.

6 Also there are certain physical
7 characteristics of the geometry of the switch itself
8 that says it takes a certain amount of length along the
9 track depending upon the size of the turnout, the speed
10 of the trains operating through the turnout, there is a
11 certain length of track along the track itself where
12 from that point of switch before you achieve a point
13 where the two tracks are far enough apart that a train
14 stopped or standing on one is going to be clear of
15 another train passing on the other track. For a 20 mile
16 an hour siding operation, typically that's going to
17 require a number 15 turnout.

18 The geometrics of a number 15 turnout are
19 from the point of switch to where you achieve the
20 clearance point is typically going to be in the range of
21 about 250 feet. If you further have a separation of say
22 100 to 150 feet from the end of the crossing to where
23 that switch begins, that means that when a train stops,
24 that train is going to have to be at least 350 to 400
25 feet from the crossing in order to be clear of another

1199

1 train on the other track. To me it's forcing the trains
2 to be that 350 feet, 400 feet or more away from the
3 crossing when they stop that is what addresses or does a
4 better job of addressing this tendency that, oh, that
5 stopped train is why these signals are working, and
6 therefore it's okay for me to go around them.

7 Q. What about do you think there's any value to
8 the railroad in having a stretch of siding track within
9 which they can say accelerate to get up to the speed of
10 the main line before they actually enter the main line
11 or conversely that they can exit the main line at the
12 main line speed and then use that additional distance in
13 the siding to slow down?

14 A. None whatsoever, because the speed that the
15 train travels in the siding is dictated by the safe
16 speed at which they can go through the turnout, so a
17 train entering the siding has to reduce speed to that
18 turnout speed before it goes into the turnout, and a
19 train leaving the siding has to have the entire train
20 clear of that turnout and already occupying the main
21 track before they can resume their reacceleration at
22 main line speed. So by having an additional 1,500 to
23 2,000 feet of track there that a train has to be
24 traveling at essentially turnout speed or siding speed
25 is really causing say a southbound train that's going to

1200

1 enter the siding to have to decelerate sooner, and it's
2 going to cause a northbound train leaving the siding to
3 have to wait that much longer before it can start
4 accelerating.

5 Q. Okay. And what would a typical speed limit
6 be at a turnout point?

7 A. Assuming that's in the range of a number 15
8 turnout, in the realm of 20 miles an hour.

9 Q. Which is also the speed limit on the siding
10 itself?

11 A. I don't know that for a fact, but generally
12 that's the way it works.

13 MR. THOMPSON: Okay, thank you, that's all
14 the redirect I have.

15 JUDGE TOREM: Any additional questions?

16 MR. ROGERSON: Brief moment, Your Honor.

17 Your Honor, Mr. Jones will be conducting.

18

19 C R O S S - E X A M I N A T I O N

20 BY MR. JONES:

21 Q. Mr. Zeinz, are you familiar with an Exhibit
22 106 that was a Staff data request by the UTC directed to
23 the City of Mount Vernon which resulted in the
24 production of a set of -- it was Data request Number 3,
25 and it has a set of traffic impacts at Blackburn Road?

1201

1 I guess the question was, provide a summary of
2 complaints received by the City of trains blocking the
3 crossing at Blackburn -- South Second Street, Old
4 Highway 99, and then there was this -- I will show it to
5 you.

6 A. (Reading.)

7 MR. THOMPSON: Just for clarification, that
8 was in response to Data Request Number 3?

9 MR. JONES: That's correct.

10 MR. THOMPSON: Okay.

11 A. Okay, I don't recall previously seeing this
12 particular document, so I can't claim to be familiar
13 with it.

14 MR. JONES: I will move that it be admitted
15 if it hasn't previously been admitted. I guess I'm not
16 sure.

17 JUDGE TOREM: It has not been utilized or
18 admitted. It was not offered by Staff. It had been
19 intended for cross-examination of Foster Peterson and
20 perhaps other railway witnesses. First let me ask, is
21 there any objection to the City of Mount Vernon response
22 to Staff Data Request Number 3, it's a total of 5 pages,
23 it's been marked as Exhibit 106, it's being offered by
24 not the party who originally had it on their list, but
25 does the railway or Department of Transportation have

1202

1 any objection to these data request responses coming
2 into evidence?

3 MR. SCARP: Well, I do, there's no foundation
4 on the part of this witness to -- for what purpose.

5 MR. THOMPSON: It was my recollection, Your
6 Honor, that I discussed that with Mr. Norris, and I
7 thought I had offered it. I specifically remember
8 asking him whether this is the type of information that
9 he looked at in his line of work, and it's my
10 recollection he said yes. And that would you if you
11 were aware of this kind of information, would you follow
12 up on that, I thought I had offered it on that basis.

13 JUDGE TOREM: You think with Mr. Norris?

14 MR. THOMPSON: Yes.

15 MR. SCARP: I probably wouldn't have an
16 objection with regard to Mr. Norris, but I don't
17 remember that. I mean I can understand why there would
18 be some use for that in his testimony.

19 JUDGE TOREM: My notes, Mr. Thompson, do show
20 that Exhibit 106 was discussed. I don't have the
21 previous draft of the report, I don't remember it being
22 offered. It was definitely discussed though, I do have
23 notes about you and Exhibit 106 with Mr. Norris.

24 MR. THOMPSON: Well, I would offer it at this
25 time.

1203

1 JUDGE TOREM: Yeah, you certainly may do so,
2 I just want to make sure that --

3 MS. ENDRES: We have it checked off as
4 admitted.

5 JUDGE TOREM: Do you, it may be an error on
6 my part. You know, in fact it does show it's admitted
7 on Mr. Norris's, the fact it wasn't offered previously
8 is what I was referring to, so you're right. Exhibit
9 106 has already been admitted, Mr. Jones, so that takes
10 care of your purposes. Maybe what I should do is just
11 not make a note here under Foster Peterson that it
12 wasn't offered then, because that's apparently where
13 that notes comes from. The way this exhibit list goes,
14 obviously there's room for confusion, but you're right,
15 under witness Gary Norris 106 is indicated that it has
16 been offered and admitted.

17 MR. SCARP: Makes sense to me.

18 JUDGE TOREM: So no need to have that
19 reoffered and admitted. Does that satisfy the questions
20 you wanted to ask, Mr. Jones?

21 MR. JONES: No, I guess I would like to have
22 the witness look at the Request Number 3 and then the
23 data that was provided, the answer that was provided,
24 and ask him to consider how it might affect the opinions
25 that he has just expressed about Blackburn Road.

1204

1 JUDGE TOREM: And the opinion about Blackburn
2 Road was essentially that he wants those tracks removed.

3 MR. JONES: Right.

4 JUDGE TOREM: So you're asking whether it
5 reinforces or undermines essentially?

6 MR. JONES: Yes.

7 JUDGE TOREM: All right, I will give you a
8 couple minutes, Mr. Zeinz, to do that.

9 THE WITNESS: May I speak with counsel?

10 JUDGE TOREM: (Nodding head.)

11 BY MR. JONES:

12 Q. There are two years of reports we understand.

13 A. Okay.

14 Q. Do you follow what the data request was in
15 the first place?

16 A. Yes.

17 Q. Okay. And does the data that was provided by
18 the Mount Vernon Police Department support the
19 recommendations that you have made to the Administrative
20 Law Judge today concerning Blackburn Road and the siding
21 removal?

22 A. Well, what this appears to be is a, correct
23 me if I'm wrong, a police log of times that there were
24 reports of malfunctions of the signals at Blackburn.

25 Q. Right.

1205

1 A. Apparently there is no specific reports of
2 trains stopped blocking the crossing. I really can't
3 comment on why the signals malfunctioned. I'm inclined
4 to believe though that if the crossing were simplified
5 by removing the second track through the crossing, it's
6 entirely possible that the instances of the signals
7 malfunctioning might be less, because it would be less
8 complicated circuitry.

9 Q. Okay. One of the factors that we have heard
10 testimony about in this case involves the impacts on the
11 Mount Vernon Christian School located west on Blackburn
12 Road from this intersection. Is there anything about
13 your appraisal of the safety of the crossing that would
14 either add to or subtract from the concerns that people
15 at the Mount Vernon Christian School have about the
16 effect of directing traffic, particularly traffic from
17 farm and agricultural equipment, past their school
18 because of closing the Hickox Road crossing?

19 A. I would have to acknowledge that during
20 certain times of the day and during certain times of the
21 year it is going to cause maybe just a little bit of
22 added congestion in front of the school. Beyond that, I
23 don't see a whole lot of additional congestion anywhere
24 else, but yeah, that's one of the down sides.

25 Q. You did observe that there's a substantial

1206

1 acreage devoted to farming that lies west of the Britt
2 slough and along the Skagit River there on the Dike Road
3 when you were in the area?

4 A. Yes.

5 Q. And it would be necessary for people farming
6 that land to be able to get in and out of that area with
7 their soil preparation, planting, cultivation,
8 harvesting of crops?

9 A. Yes.

10 Q. So it's these seasonal uses that I just
11 described that would be the points of concern then as
12 far as adding?

13 A. Yes.

14 Q. Okay. Did your analysis consider the impact
15 of Interstate 5 on the choice of closing or not closing
16 Hickox Road?

17 A. For those people west of Hickox that need to
18 access I-5, particularly southbound, yeah, there's going
19 to be adverse travel. It's not as much with going
20 northbound, but.

21 Q. Right.

22 A. There will be adverse travel.

23 Q. So you did observe that both Anderson Road,
24 which is a freeway access, and Hickox Road, which is a
25 freeway access, has no rail crossing, no way of getting

1207

1 from the west side of the railroad tracks to those
2 freeway accesses directly as a result of the proposed
3 siding and crossing closure?

4 A. It would create some adverse travel, yes.

5 Q. So your analysis really isn't -- did not
6 attempt to weigh the public convenience that would arise
7 from keeping the Hickox Road open because of its
8 connection to Interstate 5 and the ability to cross
9 Interstate 5?

10 A. Well, I did, but not directly.

11 Q. Okay.

12 A. I mean I understand there is going to be some
13 added inconvenience to closing the crossing. That's a
14 factor whenever you close a crossing. It becomes a
15 judgment as to one outweighs the other, and that's
16 obviously the State's call, not mine.

17 Q. Did you consider the impact that flooding
18 would have on this crossing closure or vice versa, let's
19 say the reduction in the capacity of the street grid to
20 support rapid evacuations of people and animals from the
21 west side of the railroad tracks to high ground, which
22 would be east away from the tracks?

23 A. Yes, I did.

24 Q. Did you see Mr. Liou's testimony that was
25 admitted by stipulation today concerning the risk of

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1 flooding along that portion from Division Street Bridge
2 all the way down to Conway?

3 A. I'm familiar with the portions that were
4 posted on the WUTC's web site.

5 Q. Okay. Did it appear to you that the
6 Burlington Northern Santa Fe track is on a substantial
7 fill?

8 A. Yes.

9 Q. And does that fill lie between the Skagit
10 River and Interstate 5?

11 A. Yes.

12 Q. And did you observe any sort of means of
13 water to get --

14 JUDGE TOREM: Mr. Jones.

15 MR. JONES: Yes.

16 JUDGE TOREM: I want to interrupt you for two
17 reasons. One, this cross is well outside the scope of
18 any testimony delivered today.

19 MR. JONES: Right.

20 JUDGE TOREM: And certainly if it was within
21 the scope of testimony today, I would allow you to go on
22 for a while. So I want you to stop on that account,
23 because you didn't ask for separate cross-exam time for
24 this witness, and he wouldn't be prepared for this.

25 MR. JONES: Okay.

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1 JUDGE TOREM: But I also think that many of
2 the facts you're going through today are better placed
3 in your closing brief than to this particular witness.
4 I think most of those points have been made, and I
5 certainly understand it from the driving tour I did on
6 the Wednesday after the hearing, so making them again is
7 not doing more than extending our time today.

8 Within the scope of his comments today and
9 the cross-examination of the railway and the redirect by
10 UTC, do you have any more questions about those areas,
11 because we started with some of those clearly, but then
12 we got off in another direction?

13 Mr. Rogerson, did you have anything else with
14 Mr. Jones that you wanted covered within the scope of
15 today's testimony?

16

17 C R O S S - E X A M I N A T I O N

18 BY MR. ROGERSON:

19 Q. Mr. Zeinz, Mr. Scarp indicated and you spoke
20 in large measure regarding a specific event that
21 occurred in 1999 in which a train derailed in another
22 state. Are you aware of any such events that occurred
23 in the state of Washington?

24 A. Not personally, no.

25 Q. And can you just generally characterize the

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1 frequency of such events as the one that occurred in
2 1999 in another state?

3 A. Incidents like that typically get reported
4 every couple of years somewhere in the nation.

5 Q. Twice nationwide?

6 A. No, I'm saying about every other year there's
7 a report of something like that somewhere in the nation.

8 Q. All right, so nationwide once every two
9 years, is that fair to say as a general? I won't hold
10 you to it.

11 A. I mean it's not a one time occurrence in one
12 place. Incidents like that have reoccurred time and
13 time again in the country. There was another incident
14 I'm familiar with because I use it in classes I teach at
15 the University of Wisconsin of a train hitting a
16 gasoline tanker truck in Fort Lauderdale, Florida. So I
17 mean these things are -- fortunately they're not common
18 events, but they can and do occur.

19 Q. And did you weigh that frequency of such an
20 event when you formulated your opinion on page 7 of your
21 testimony that the crossing couldn't safely remain open
22 if 4-quadrant gates were installed, turnarounds were
23 provided on one or both sides of the tracks, and
24 Commission's crossing blockage rules were suspended or
25 waived at this location?

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1 A. That I believe was given in the context of a
2 specific scenario that there was no other improvements
3 being made at the other crossings. Now in the context
4 of that scenario, you do the best you can if you're
5 going to leave it open, and I think that's the best you
6 can do. But does that totally eliminate all the
7 problems, no. And in terms of the likelihood of
8 something like that happening, it only takes one.

9 Q. You had indicated when you answered that
10 question the need for the public to be made aware that
11 the crossing could be blocked by a stopped train for
12 extended periods of time. Are you aware of whether or
13 not there is an existing signage for that effect, for
14 that purpose?

15 A. There is no specific sign specified in the
16 MUTCD currently. There is latitude that allows for the
17 use of different signage for local purposes. The MUTCD
18 understands it can't show every sign that would ever
19 conceivably want to be used anywhere, it does allow
20 latitude that if you had a particular situation you
21 could use a sign specifically for that situation.

22 Q. What would you recommend in the specific
23 instance of Hickox Crossing should it remain open, what
24 type of signage?

25 A. Without, you know, really getting into any

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1 detail, just some form of a sign that informs people
2 that trains may block this crossing for an extended
3 period of time, and in that event they may wish to seek
4 an alternate route. That was the drift of what I was
5 trying to get at.

6 Q. You had a mention in your testimony that at a
7 minimum Blackburn for safety improvements removal of the
8 siding north of Blackburn would be a part of your
9 recommendation. You had also indicated in your
10 testimony that Blackburn's configuration was, I'm
11 struggling for the right term, I think it was unusual
12 geometry, and my question is would that -- is it your
13 opinion that removal of the siding would be sufficient
14 to alleviate those hazards caused by the unusual
15 geometry?

16 A. In and of itself, no. Given my preference, I
17 would prefer to see some additional geometric
18 improvements made, but that I see as something that is
19 really going to have to be done on its own merits. I'm
20 not sure that that would fall within the scope of this
21 proceeding. It would have to be, you know, funding
22 identified and designs improved and go through the
23 normal highway design process. Whether or not it's
24 justified and economical is what I'm trying to say, I
25 don't know. In an ideal world, yes, I would like to see

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1 it. Is it reasonable or realistic, I don't know.

2 JUDGE TOREM: Mr. Scarp, any further
3 questions?

4 We'll just take a brief pause and go off the
5 record.

6 (Recess taken.)

7 JUDGE TOREM: All right, after a brief break
8 we're back on the record.

9 Mr. Scarp, did you have any recross?

10 MR. SCARP: Just a couple of follow ups on a
11 couple of things that were raised.

12

13 R E C R O S S - E X A M I N A T I O N

14 BY MR. SCARP:

15 Q. Mr. Zeinz, you were asked to take a look at
16 what was previously admit as Exhibit 106 that appeared
17 to be a summary of reports to the police about signal
18 malfunctions over some period of time at Blackburn Road;
19 is that your understanding of that?

20 A. That's what I believe it to be.

21 Q. You haven't seen it before?

22 A. No, I had not.

23 Q. All right. Generally in your experience with
24 the railroad, are you familiar with reports of signal
25 malfunctions?

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1 A. Generally, yes.

2 Q. And do you know how such reports to police
3 are typically generated?

4 A. Usually calls from some member of the public.

5 Q. And some member of the public may have any
6 type of complaint about that signal malfunction or just
7 not working the way they want it?

8 A. This is true.

9 Q. Okay. That exhibit as you looked at it, and
10 I don't know that you still have it, you weren't aware
11 of any verification or confirmation of what signal may
12 have actually malfunctioned or what action was taken?

13 A. As pertains to this particular crossing, no.

14 Q. Okay. And in your experience, do reports of
15 malfunctions always translate into malfunctions?

16 A. Not always.

17 Q. Okay.

18 A. Not always.

19 Q. I want to ask you about the questions
20 Mr. Jones asked, to follow up on those about whether you
21 weighed the inconvenience, and what was the term you
22 used, not additional travel but?

23 A. Adverse travel.

24 Q. Adverse travel. Is that factor common in
25 every grade crossing closure?

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1 A. Yes.

2 Q. Do you necessarily weigh that in to an
3 opinion that you make or consideration?

4 A. Yes.

5 Q. Did you do so here?

6 A. Yes.

7 Q. Did you weigh safety against inconvenience in
8 reaching your opinions here?

9 A. Yes.

10 Q. And do you hold safety in high regard?

11 A. Yes, I do.

12 Q. You were asked by the City of Mount Vernon's
13 counsel about the Bourbonnais accident and the frequency
14 of that type of incident; do you recall that?

15 A. Yes.

16 Q. Would you characterize that as catastrophic?

17 A. Yes.

18 Q. Would you consider that kind of loss of life
19 and damage in that incident as about as bad as it gets?

20 A. Pretty close.

21 Q. There have been worse?

22 A. Yes.

23 Q. Are there a varying degree of such accidents
24 that occur in this country and in this state far more
25 frequently than the once every couple of years that you

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1 characterized the Bourbonnais accident?

2 A. I can't speak to this state, but nationally
3 yes.

4 Q. And included in that are almost daily grade
5 crossing accidents that involve loss of life?

6 A. Well, I hope that they're not almost daily,
7 but yes.

8 Q. All right, that was an overstatement, but far
9 more frequently than the railroads would like to see?

10 A. Far more frequently than anyone would like to
11 see.

12 Q. You talked about a collision in Florida with
13 a train and a gasoline tanker truck; do you recall that?

14 A. Yes.

15 Q. Let me ask you this, have you ever analyzed
16 or had any reason to consider the factor of what those
17 types of incidents, what kind of factors, excuse me,
18 what kind of impact that has on train crews?

19 A. I'm sure it must be devastating, but in terms
20 of how you factor, it's very difficult to quantify.

21 Q. Let me ask you, did you happen to read the
22 Railroaders Editorial?

23 A. Yes.

24 Q. Had you seen it before?

25 A. Yes.

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1 Q. And had you seen it before this particular
2 involvement that was provided to you in this case?

3 A. Yes.

4 Q. And do you review it or similar documents
5 routinely?

6 A. I see things like that from time to time,
7 yes.

8 Q. How did that affect your evaluation of
9 overall safety, if at all?

10 A. In this case?

11 Q. Yes.

12 A. Like I said, it's very difficult to quantify.
13 I am aware of, you know, the fact that the occupants of
14 the motor vehicles are not the only parties that are
15 involved in crossing collisions, and I am aware of the
16 devastating effects crossing collisions have on train
17 crew members. I just can't tell you how that gets
18 factored in, because it's very subjective, it's not
19 something that you can quantify.

20 Q. The exhibit that I'm talking about, Exhibit
21 143, just below the line in what would be the third to
22 the last paragraph, the writer, the train crew member,
23 says in the last sentence of that paragraph:

24 The reaction time was long enough to
25 think about some of the possibilities

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1 like, God, I hope that thing isn't
2 loaded with car batteries or Coleman
3 fuel, bricks, propane bottles, et
4 cetera, et cetera.

5 Do you consider all the possibilities of the
6 types of cargo the trucks, not just their own fuel, but
7 the types of things that commercial vehicles might be
8 carrying and the impacts that would have?

9 A. If this were a crossing were located next to
10 a gasoline storage tank farm or next to a chemical plant
11 or some, obviously that's something that you would pay
12 additional attention to. I operate on the assumption
13 that there is the likelihood of some vehicle carrying
14 some kind of hazardous material in virtually every
15 crossing, you know, even rural areas. It could be
16 fertilizer or ammonia nitrate or whatever, but I mean
17 the possibility of a hazardous vehicle collision can
18 occur at virtually any crossing.

19 Q. Would you expect there might be fuel
20 transported back and forth across that crossing to --

21 A. Fuel, fertilizer, chemicals, yes.

22 MR. SCARP: Your Honor, we would move to
23 admit Exhibit 143 as a basis of this witness's opinions.

24 JUDGE TOREM: Any objections, Mr. Thompson?

25 MR. THOMPSON: Well, I don't have an

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1 objection to it to the extent that it, you know, shows
2 that there's a psychological effect on crew members who
3 are involved in collisions, but I would hope that it
4 wouldn't be used in brief for some other purposes.

5 MR. SCARP: And I would clarify also only for
6 the types it explains beyond -- gives foundation to this
7 witness's testimony about the types of materials that
8 would be involved and the magnitude, which goes to the
9 cross-examination of the City's attorney about whether,
10 you know, what kind of incidents we're talking about
11 here. That's all I have, that's the only reason.

12 JUDGE TOREM: Mr. Rogerson, same question as
13 to the illustrative purposes?

14 MR. ROGERSON: This is an editorial, this has
15 no relevance to whether or not it's more likely or not
16 that a collision is going to occur. As to the
17 psychological effects of people, the issue is public
18 safety, whether or not fatalities or injuries will
19 occur, I don't know if that extends to actually
20 psychological damage, I think it's marginally at best
21 relevant.

22 JUDGE TOREM: Understood. I'm going to admit
23 this, but I'm going to indicate because it's editorial
24 and because of the nature of it that it's going to be
25 treated with the same weight essentially as a public

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1 comment that might come in. A number of public comments
2 probably could be classified as editorials similar to
3 this from a different perspective. This one though at
4 least is relevant to this witness based on prior review,
5 and some of the considerations raised by this train
6 engineer are similar to what Mr. Zeinz says he considers
7 in evaluating safety at crossings, so I will admit it
8 here, the weight won't be particular to address your
9 other concerns you have stated earlier.

10 MR. ROGERSON: For the record I will formally
11 raise an objection it's unfairly prejudicial, it's full
12 of anecdotal information regarding emotions, I think it
13 would unfairly prejudice the trier of fact if this was
14 allowed into evidence.

15 JUDGE TOREM: If it was a jury trial, I might
16 agree with you.

17 MR. ROGERSON: That's fine, Your Honor.

18 JUDGE TOREM: Okay.

19 BY MR. SCARP:

20 Q. Last area, Mr. Zeinz, you talked about
21 removal of the siding track as it exists north of
22 Blackburn and through that crossing, did you consider
23 the cost?

24 A. Yes.

25 Q. And what was your estimate if you arrived at

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1 one?

2 A. There could be a wide range of costs, but
3 that range of costs really is under the railroad's
4 control. We're talking about there's a switch existing,
5 moving a switch. We're talking about a control point
6 where the switch joins back into the main line, there
7 are signals, there's signal hardware, there's signal
8 housing, there are train control signals, all that would
9 need to be moved. If I could walk you through it, if
10 the railroad was to prepare an estimate on the basis of
11 we need to have a new control point.

12 Q. South of Blackburn?

13 A. South of Blackburn. In other words, we want
14 to buy all new signal equipment, a new signal bungalow,
15 new home signals, you're probably talking in the range
16 of about \$100,000 to \$150,000 in material costs. If the
17 railroad says we need to put in a brand new switch,
18 okay, you're probably talking about \$50,000 in costs for
19 the switch, so let's say \$200,000 for material costs.
20 In addition to that, you've got the labor to put in the
21 new switch, the labor to put in the new signal equipment
22 and so forth. There's going to be some work involved in
23 modifying the signal circuitry on the existing signals
24 at Blackburn to eliminate the circuits for the second
25 track. There's going to be a cost of removing the

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1 length of track. There's going to be a cost associated
2 with removing the track through the street and patching
3 the void in the highway. In round numbers I anticipate
4 the labor and additional material for all of that would
5 probably be in the range of about \$100,000. So you're
6 talking worst case scenario, and that's assuming the
7 railroad insists on a new switch and insists on a new
8 control point, of in the range of about \$300,000.

9 But the railroad could elect to relocate the
10 existing switch. As I understand, that switch was
11 recently replaced under the Siding Improvement Program,
12 so it ought to be a relatively new switch, there should
13 be no reason why that switch couldn't be relocated
14 rather than purchase a new one. The existing signal
15 equipment at the control point could be relocated if the
16 railroad chose to, so that means you don't have to spend
17 \$200,000 on all that new equipment and material. You
18 have now reduced the cost to essentially labor and
19 miscellaneous material, effectively \$100,000.

20 The next thing is that once that's done,
21 you're going to have about 2,000 feet of track, rail
22 material, rail OTM, that's going to be able, that's
23 going to be salvageable and able to be reused on the
24 siding extension project. The value of that material,
25 well, the cost of new rail today is in the neighborhood

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1 of about \$200,000 a track mile. You've got 4/10 of a
2 mile of track, that's probably about \$80,000 worth of
3 value of that material that could be reused on the
4 siding extension project. That's a material salvage
5 credit offset to the project. Net net the whole thing
6 could be done for probably somewhere in the neighborhood
7 of about \$25,000 if the railroad chose to.

8 MR. SCARP: Those are all the questions I
9 have.

10 JUDGE TOREM: All right, any other questions
11 for this witness?

12 Mr. Thompson.

13 MR. THOMPSON: I do have one redirect
14 question.

15

16 R E D I R E C T E X A M I N A T I O N

17 BY MR. THOMPSON:

18 Q. Talking about the cost of removing the
19 siding, would there be, you talked about the costs, the
20 net costs under the scenario, would there be benefit,
21 cost benefit, you know, would there be benefits to the
22 railroad that you might take into consideration as well?

23 A. Yes. For a train, northbound train leaving
24 the siding, they would be able to reaccelerate to main
25 line speed 4/10 of a mile sooner. For a southward train

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1 entering the siding, they could travel at main line
2 speed 4/10 of a mile longer before they had to start
3 reducing speed to go into the siding. So it would
4 contribute to a more efficient operation, a more
5 productive operation of the railroad. There are those
6 operating advantages, plus it would save the maintenance
7 on that 2,000 feet of track, plus it would save the
8 additional maintenance on that second crossing. So I
9 think there would be many advantages that would accrue
10 to the railroad by tearing that track out.

11 MR. THOMPSON: Thank you.

12 JUDGE TOREM: Mr. Jones.

13

14 R E C R O S S - E X A M I N A T I O N

15 BY MR. JONES:

16 Q. Is it clear that this change that you
17 proposed would not affect Stackpole, the next crossing
18 south?

19 A. No.

20

21 E X A M I N A T I O N

22 BY JUDGE TOREM:

23 Q. No it would not, or no it's not clear?

24 A. No, it would not impact Stackpole. We're
25 just talking about Blackburn.

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1 Q. So again to be clear for all the counsel and
2 myself, the proposed I think it's 12,000 foot total
3 siding that's being approved could fit between
4 Blackburn, cross Hickox, and extend but not all the way
5 to Stackpole?

6 A. No, I'm not talking about extending the
7 siding further. I'm saying if the design of the siding
8 is such that an 8,000 foot train or 9,000 foot train,
9 whatever the design train is, can already fit south of
10 Blackburn --

11 Q. Then you're saying there would be no further
12 impact?

13 A. There's no further need for that track north
14 of Blackburn, and it would not require the track south
15 of Blackburn to be extended a comparable distance. It's
16 just getting rid of a piece of track that's no longer
17 needed.

18 JUDGE TOREM: Okay, any other questions for
19 this witness?

20 MR. SCARP: Just for clarification.

21

22 R E C R O S S - E X A M I N A T I O N

23 BY MR. SCARP:

24 Q. So what you're saying is that under your
25 assumption that there is sufficient distance for that

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1 design train I think you call it is going to fit on the
2 what we're referring to as the extended siding which is
3 not yet completed, then the track north is not needed
4 and should be removed for safety reasons?

5 A. Yes, that's what I'm saying.

6 Q. All right. And to clarify regarding
7 Mr. Jones' question, you are not anticipating or
8 considering that this is somehow going to extend this
9 further and impact the Stackpole crossing?

10 A. It might cause the overall siding extension
11 to be increased maybe 300, 400 feet, that's the 300 or
12 400 feet we were talking about earlier, the separation
13 between the Blackburn crossing and where the train could
14 stop, it might cause you to have to extend it another
15 300 or 400 feet, but that's not going to affect or
16 involve Stackpole at all.

17 MR. SCARP: All right, that's all I had.

18 JUDGE TOREM: All right, Mr. Zeinz, thank you
19 very much for your testimony.

20 That's all the additional evidence we're
21 taking in today. Let me be clear then, Exhibit 139 was
22 offered and admitted. Exhibit 141 was mentioned but not
23 offered or admitted. Exhibit 143, 144, and 145 were all
24 offered and admitted. Let me clarify that Exhibit 106
25 had been offered and had been admitted, so that is also

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1 part of the record.

2 The only other items I see for today really
3 are just again a reminder that tomorrow really is the
4 deadline for submitting if you haven't done so already
5 those cross-exam exhibits that were brought up for the
6 very first time or any additional direct exam exhibits
7 brought up for the first time at the hearing January
8 7th, 8th, and 9th of this year. All the other prefiled
9 cross-exam exhibits are already with the Commission, all
10 the other prefiled direct are already there, but if
11 there is anything that you fail to submit by close of
12 business tomorrow, February 1st, it won't become part of
13 the record even if it had been admitted because it did
14 not comply with all of the submission requirements,
15 which again are just the original and 1 at this point,
16 original and 1 copy of any of these exhibits that fit
17 that description that were not previously filed
18 electronically or by hand with the Commission. Giving
19 me and the rest of the counsel a copy in Mount Vernon
20 did not meet that requirement. So double check, make
21 sure by close of business that the electronic copies
22 come in. I know there has been a flurry of activity,
23 but I can't say that I have babysat all the lists to
24 make sure they're all there, I'll leave that for you.

25 MR. THOMPSON: Your Honor, just one question

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1 about the public comment and hearing exhibits 200, 201,
2 and 202.

3 JUDGE TOREM: Yeah, my understanding is that
4 Exhibit 200 was all of the comments that had been
5 submitted previously. Most of those are already readily
6 available on the Commission's web site. And those that
7 were handed to Mr. Cupp on Monday afternoon or Tuesday
8 evening, January 7th or 8th, are to be compiled into one
9 group because they're not otherwise being submitted by
10 the commentators to the Commission, so Mr. Cupp had taken
11 on the responsibility of combining and collating them,
12 and he will submit them to records hopefully by close of
13 business tomorrow. He and I had some exchanges of
14 E-mails and I thought I had given him sufficient
15 direction in that regard. There were some other public
16 comments that are coming in this week, I think
17 Woodmansee Construction sent in a letter, so that will
18 become -- I will probably have to create an Exhibit 203
19 for exhibits that have come in afterwards, or I may just
20 group that all into Exhibit 200, I haven't really
21 decided how to redescribe that particular comments
22 submitted directly to the Commission, not through the
23 hearing process, but they will all be reviewed and
24 collated at some point.

25 Anything else for the record today?

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1 All right, then I will look forward to any
2 other submissions that come in tomorrow and briefs in
3 about two weeks, and we'll see if by the end of February
4 there is a need for response briefs or not.

5 Thank you, we are adjourned.

6 (Hearing adjourned at 11:45 a.m.)

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