


Memorandum  
November 9, 2011

To: Steve King, Director, Safety and Consumer Protection

Thru: <sup>DP</sup> Dave Pratt, Assistant Director, Transportation Safety  
~~Kathy Hunter~~, Deputy Assistant Director, Transportation Safety

From:  Bob Boston, Rail Safety Program Specialist 5

Subject: Grade Crossing Protective Fund Application – TR-111859 from  
BNSF Railway Co. - Closure of a Private Crossing and Upgrade of an  
Alternate Route Private Crossing.

On October 26, 2011, BNSF Railway Co. (BNSF) filed a Grade Crossing Protective Fund (GCPF) application requesting a \$20,000 grant to improve safety through closure of a private crossing on the Bellingham Subdivision at milepost 59.68. In addition BNSF proposes to improve the skewed angle approach of the adjacent private crossing at milepost 59.90 which would be the alternate route if the other private crossing is closed. Both crossings serve the same farm and are used by automobiles, small farm trucks, large tractor-trailer trucks, and farm implements. The rail sits much higher than the parallel state highway resulting in steep or "humped" approach grades at approximately 25% for both crossings. There are four passenger trains and an average of 14 freight trains per day that travel over these crossings. Rail traffic is also predicted to increase in the future. The legal speed for passenger trains at this location is 79 miles per hour and freight is 60 miles per hour.

The closure of the private crossing will eliminate the chance of a collision between a train and vehicle at this crossing, thus improving safety. Improving the skewed crossing angle to 90 degrees and leveling the steep approach grade on the field side of the alternate crossing will significantly reduce the chance of a vehicle not seeing a train or getting high centered on the crossing. These upgrades will also improve safety for crossing users.

The total cost of the project is \$69,072, with UTC contributing \$20,000 and BNSF contributing \$49,072. The grant will cover the cost of materials and labor to remove and improve the remaining crossing.

A question was raised as to whether the use of GCPF monies to fund private rail safety projects would result in the unconstitutional lending of state credit. Greg Trautman, Assistant Attorney General at the UTC issued an informal AG opinion on this subject on May 21, 2010, which is attached. Mr. Trautman concluded that the use of GCPF funds for private rail safety projects did not result in unconstitutional lending of state credit.

Staff is recommending approval of the GCPF application filed by BNSF requesting \$20,000 to close a private crossing and improve the alternate route crossing.

If you have any questions or would like to discuss the GCPF application, please contact me.

Attachment

## MEMORANDUM

DATE: May 21, 2010

TO: Steve King, Director, Safety and Consumer Protection  
Utilities and Transportation Commission

FROM: Greg Trautman, Assistant Attorney General  
Utilities & Transportation Division

SUBJECT: Whether the use of Grade Crossing Protective Fund monies to fund private rail safety projects is an unconstitutional lending of state credit

You have asked whether the use of Grade Crossing Protective Fund (GCPF) monies to fund private rail safety projects is an unconstitutional lending of credit, in violation of Article 8, Section 5 of the Washington Constitution. I conclude that the answer is no, for the reasons stated below.

The Grade Crossing Protective Fund has been in existence since 1969. *See* Laws of 1969, c. 134, § 3. RCW 81.53.281 provides in relevant part:

There is hereby created in the state treasury a 'grade crossing protective fund' . . . for grants and/or subsidies to public, *private*, and nonprofit entities for rail safety projects authorized or ordered by the commission; and for personnel and associated costs related to supervising and administering rail safety grants and/or subsidies. . . [.]

The commission may adopt rules for the allocation of money from the grade crossing protection fund.

(Italics added). The language specifically authorizing grants to private entities for rail safety projects was added in 2003. *See* Laws of 2003, c. 190, § 3. At that time, the Legislature also stated:

The legislature finds that grade crossing, rail trespass, and other safety issues continue to present a public safety problem. The legislature further finds that with the increased importance of rail to freight and commuter

mobility, there is a direct public benefit in assisting local communities and railroads to work together to address rail-related public safety concerns.

See Laws of 2003, c. 190, § 1. Thus, it clear that the overriding purpose of the grade crossing protective fund is to promote and provide for public safety. The Legislature also made clear that rail safety projects for private entities present public safety concerns. The Commission's rules emphasize these same concerns. See WAC 480-62-400 (GCPF grants are made to public, private, or nonprofit entities to fund projects that reduce accident frequency or severity, or that reduce pedestrian, trespassing, or motorist deaths or injuries).

Article 8, section 5 of the Washington Constitution provides, "The credit of the state shall not, in any manner be given or loaned to, or in aid of, any individual, association, company or corporation." This provision prohibits gifts of public funds. However, the Washington Supreme Court has held that where public funds are used for a fundamental purpose of government, no gift occurs even if the recipient of the funds is a private entity. *Citizens for Leaders with Ethics and Accountability Now (CLEAN) v. State*, 130 Wn.2d 782, 797, 928 P.2d 1054 (1996). Measures taken for the preservation of the public health, safety, and welfare (also known as the "police power") are a fundamental purpose of government. *Hudson v. City of Wenatchee*, 94 Wn. App. 990, 995, 974 P.2d 342 (1999). The Commission's disbursements of funds from the GCPF clearly are measures designed to further public safety. Therefore, no gift of public funds arises even if those funds are awarded to private entities for rail safety projects.

The above is my analysis and conclusion regarding your question. It is not a formal opinion of the Attorney General. Please let me know if you have any other questions.

:kll

cc (via email):

Dave Danner  
Kathy Hunter  
Dave Pratt  
Sally Brown  
Betsy DeMarco