

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

BNSF RAILWAY COMPANY, a Delaware Corporation,

Petitioner

vs.

CITY OF MOUNT VERNON

Respondents,

SKAGIT COUNTY, WSDOT, and WEST VALLEY FARMS, LLC,

Intervenors.

DOCKET NO: TR-070696

PETITIONER BNSF RAILWAY COMPANY'S REQUEST TO FILE SUPPLEMENTAL BRIEF IF THE COMMISSION WOULD PREFER ADDITIONAL LEGAL ANALYSIS RE PETITION FOR NEW CROSSING

I. RELIEF REQUESTED

1 In the event that the Commission believes additional analysis will be helpful to assess the new issue raised in the City of Mount Vernon's post-hearing brief, whether the extension of a siding track creates a new crossing, then BNSF would respectfully request permission to file a concise supplemental brief to address that argument.

II. STATEMENT OF FACTS

2 The joint post-hearing brief filed by Mount Vernon, Skagit County *et al*
dedicated more than 25% of its entire analysis to an unforeseen argument: that “the creating of
the siding track is considered a new crossing under RCW 81.53.030”¹

III. STATEMENT OF ISSUES

3 Whether the Commission believes it would be helpful for BNSF to address the joint
brief’s assertion that BNSF was required to file a petition to construct a new grade crossing?

IV. EVIDENCE RELIED UPON

4 BNSF relies upon the pleadings and other documents that make up the record in Docket
No. TR-070696.

V. AUTHORITY

5 The *Notice of Deadlines Concerning Post-Hearing Briefs* (dated January 14, 2008)
states that the Commission

will entertain requests for responsive briefing upon the parties’ review of each
other’s post-hearing briefing. Any party wishing to submit a supplemental or
otherwise responsive brief shall submit its request, with appropriate explanation
and justification as to what unforeseen issues were raised, by [Friday, February 22,
2008].²

Here, it was unforeseen that the opposing parties would argue, in a petition brought under RCW
81.53.060 to *close* the Hickox Road crossing, that the extension of the existing siding track

¹ See *Joint Post-Hearing Brief* at pp 5-13 (“joint brief”).

² Notice of Deadlines Concerning Post-Hearing Briefs (dated January 14, 2008).

through that same crossing somehow creates a *new* crossing. BNSF is unaware of that argument having been made prior to the opponents' joint post-hearing brief.

6 BNSF clearly does not believe that the opposing parties' position is valid.³ There is no case law or statutory support for the argument, and other states' statutes and the record in this matter make it clear that the addition of trackage at an existing crossing does not create a new crossing.⁴ Again, BNSF has asked the Commission to *close* the Hickox Road crossing. Upon closure, the addition of a siding track would obviously not create a "new" crossing as there would no longer be a crossing. The joint brief, however, dedicated more than 25% of its analysis to the issue. Accordingly, should the Commission believe that the issue has any credence or that additional information would be helpful, BNSF would request to supplement its post-hearing brief to address the argument for the record and the tribunal.

VI. CONCLUSION

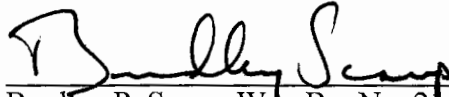
7 BNSF believes its petition to close the Hickox crossing was proper, and reiterates that mitigating the impact on flooding and emergency response with an emergency-use only locked gate is the only acceptable solution short of full closure. BNSF respectfully requests its motion to file supplemental briefing be granted, but only if the Commission desires additional argument to show why BNSF was not required to petition for a new crossing instead of petitioning for closure.

³ To their credit, Commission Staff apparently was able to anticipate that the opposing parties would raise the argument, however, the Staff likewise dismissed the issue in a footnote in its brief. *See Post-Hearing Brief On Behalf Of Commission Staff* at p. 6 n. 5.

⁴ BNSF specifically refers the Commission to ORC Ann. §§ 4957.30, 4957.33; NY CLS RR § 89; and Exh. No. 102 (twenty-two of the crossings in Skagit County have more than one set of tracks; Crossing No. 085093G has six tracks).

DATED this 22nd day of February, 2008.

Montgomery Scarp MacDougall, PLLC



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CERTIFICATE OF SERVICE

I am over the age of 18; and not a party to this action. I am the assistant to an attorney with Montgomery Scarp MacDougall, PLLC, whose address is 1218 Third Avenue, Suite 2700, Seattle, Washington, 98101.

I hereby certify that the original and 12 copies of *BNSF's Request to File Supplemental Brief* has been sent by FedEx to Carole J. Washburn at WUTC and a PDF version sent by electronic mail. I also certify that true and complete copies have been sent via electronic mail and U.S. Mail to the following interested parties:

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I declare under penalty under the laws of the State of Washington that the foregoing information is true and correct.

DATED this 22nd day of February, 2008 at Seattle, Washington.



Lisa Miller, Paralegal