

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

BNSF RAILWAY COMPANY, a Delaware Corporation,

Petitioner

vs.

CITY OF MOUNT VERNON

Respondent

DOCKET NO: TR-070696

**BNSF RAILWAY COMPANY'S
PETITION FOR ADMINISTRATIVE REVIEW**

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I. RELIEF REQUESTED

1 Pursuant to WAC 480-07-825, BNSF Railway Company (“BNSF”) seeks
Commission review of the initial order in Docket No. TR-070696, granting BNSF’s
petition to close the Hickox Road grade crossing subject to conditions. Several findings
in the initial order are erroneous. First, the dangers present at the “exceptionally
hazardous” crossing contravene the proposed use by Western Valley Farms. Second, the
final order should not circumvent a diagnostic recommendation as to the propriety of
certain warning devices at Hickox. And even if the Commission is qualified to order a
specific warning device configuration, the initial order’s mandate that the current two-
quadrant gates be maintained is manifest error. Third, the nature of Mr. Christianson’s
private crossing arrangement is not before this tribunal and the finding is erroneous.
Fourth, to the extent that the order requires BNSF to adjust its operations by notifying
Western Valley Farms (or any party) every time it intends to use the siding track and
predetermine the duration of that use, the order amounts to regulation of railroad
operations which is preempted by federal law.

2 Although the initial order properly reflects the safety problems created by the
dangerous conditions inherent at a crossing where trains will be stopped in the middle of
a siding track, the ruling ignores then those dangers when it attempts to provide partial
relief to an intervening party, Western Valley Farms. That incidental relief, however,
was neither requested nor supported by the record.

3 Accordingly, BNSF respectfully requests the specific modifications contained in
the Table below (see Section 5).

II. STATEMENT OF FACTS

4 Train traffic is increasing in Washington.¹ The efficient movement of goods and
people within the Northwest is crucial to the state’s ability to protect the environment,

¹ Schultz, Exh. No. 8 at p. 8:4-12.

compete in world markets, and to maintain a high quality of life.² WSDOT and BNSF are committed to improving rail infrastructure along the high-speed rail corridor between Eugene, Oregon, and Vancouver, British Columbia, Canada to help ease the region's growing pains in a cost-effective manner.³

5 Directing train operations, especially as rail traffic increases, is not simple. Freight and passenger trains weave in and out of siding tracks along the corridor in order to meet and pass one another.⁴ Some are headed north at any one time; some are headed south. If a train is too long for a particular siding, the train cannot use that siding, but must be directed to a siding it will fit into, thereby preventing a fluid flow of train traffic.⁵ One short siding can create a domino effect felt up and down the rail line. The current siding track in Mount Vernon it is too short for most freight trains and must be lengthened to improve overall rail operations.⁶

6 The siding project will provide a crucial piece of rail infrastructure by allowing freight and passenger trains of any length to meet and pass in Mount Vernon. It will also enable a commuter rail system to run from Bellingham to Tacoma.⁷ As WSDOT's highest-priority rail project, the siding's location was strategically selected by WSDOT and BNSF engineers.⁸ Once construction is finished, however, the siding track (and mainline track) will be bisected by Hickox Road, a low-traffic rural roadway sprinkled with several farms, fields, and some homes.⁹

² *Id.* at p.9:11-15; 21-22.

³ Schultz, Exh. No. 8 at p. 8:7-15.

⁴ Gordon, Exh. No. 1 p. 3:1-4.

⁵ Freight trains can measure up to nearly two miles long. McIntyre, Exh. No. 2 p. 3:1-4.

⁶ *See, e.g.*, McIntyre, Exh. No. 2 at p. 2:23-24.

⁷ Gordon, TR 721:21-722:5.

⁸ *See* Exh. No. 10 at p. "5-30"/Exhibit "5-12"; Schultz, Exh. No. 8 p. 11:11-23; Gordon, TR 702:1-8.

⁹ Initial Order ¶ 12.

7 BNSF petitioned to close the Hickox crossing because *no* FRA-approved warning devices (i.e., four-quadrant gates or median barriers) can make a crossing in the center of a siding track sufficiently safe or practical for public use. Siding tracks create an “exceptionally hazardous” situation due to decreased visibility (motorists and pedestrians cannot see the mainline track through a train parked on the siding), unpredictable wait times (from ten minutes up to several hours or longer), and the highest temptation for motorists to ignore the warning devices or try to “beat” an oncoming train to avoid waiting or rerouting.¹⁰

8 The Hickox crossing is not heavily used.¹¹ It has only 1.5% of the daily traffic of Mount Vernon’s busy Kincaid Street Crossing, approximately 3.4% of the daily traffic of the City’s North 4th Street Crossing, and only 9.4% of the traffic of its neighboring crossing to the north, the Blackburn intersection.¹² Closure would not cut off any residences or businesses, although Western Valley Farm is located to the west of the crossing and has claimed closure will increase its economic costs. BNSF has pledged to upgrade the nearby Stackpole crossing with electronic signal devices, and the Blackburn crossing is acceptably safe as-is.¹³ Active lights and gates make both adjacent crossings much safer than any type of warning devices at Hickox Road in the event Hickox was still allowed to cross the middle of the siding track.

9 Complete closure is appropriate and legally justified. Even so, BNSF stated it is amenable to entering into a private crossing agreement for *emergency-use only* with

¹⁰ Initial Order ¶ 101; *see* BNSF’s Post-Hearing Brief ¶¶ 16-28.

¹¹ *See generally* Exh. No. 102.

¹² Exh. No. 102, pp. 4-5. According to the FRA data, the Hickox crossing has an Average Annual Daily Traffic Count (“AADT”) of 391; comparatively, Mount Vernon’s Blackburn crossing has an AADT of 4,148, the Kincaid Street crossings (Crossing Nos. 084744N and 084759D) have AADTs of 17,000 and 26,000, and Mount Vernon’s North 4th Street crossing (Crossing No. 084754U) has an AADT of 14,400.

¹³ The initial order’s findings dispensed with Commission Staff’s initial concerns regarding the configuration of the Blackburn crossing. *See* Curl, TR 885:21-887:12; Initial Order ¶¶ 14, 26, 52, 74.

Skagit County and Mount Vernon for flood emergencies, and the rural fire district.¹⁴ On June 25, 2008, the administrative law judge granted BNSF's petition subject to several conditions, including converting the public crossing to a gated private crossing with a private crossing agreement between BNSF, Mount Vernon, Skagit County, and the fire district for emergency access.¹⁵ This was supported by the evidence in the record and testimony given at the hearing.

10 The administrative law judge then attempted to find a middle ground to accommodate farm use in an effort to alleviate Western Valley Farms' claimed economic damages and required BNSF to enter into a private crossing agreement allowing Western Valley Farms to use the Hickox crossing during "the harvest season."¹⁶ This condition is fundamentally inconsistent with the other findings related to safety, and came as a complete surprise not just to BNSF, but to the other parties as well. Such an arrangement was never raised or suggested by any party (let alone Western Valley Farms), either in prefiled testimony or at the hearing. The issue was not addressed in any party's post-hearing brief and BNSF did not have an opportunity to directly address the issue on the record. Even so, the evidence presented in this matter shows why the exceptionally hazardous conditions at the Hickox crossing, once the siding is extended, would necessarily preclude farm use.

11 It is too dangerous to operate the siding track if the WUTC allows other motorists to use the crossing in a non-emergency setting. The administrative law judge ruled that "[a]dding the siding tracks will magnify the potential dangers" such that the crossing "becomes exceptionally hazardous."¹⁷ A private crossing for the high volume

¹⁴The Commission has previously ruled than an "argument that [a] . . . crossing should remain open because it allows faster response in the event of fire and other emergency does not justify leaving the crossing open. Access via a safer route is readily available, and the need for additional access does not outweigh the dangers posed by the crossing." *Burlington Northern R.R. Co. v. Skagit County*, Docket No. TR-940282 at page 7.

¹⁵ See Initial Order pp. 35-36.

¹⁶ Initial Order ¶ 87.

¹⁷ Initial Order ¶¶ 66, 101.

farm use contradicts these findings and is directly at odds with witness testimony about slow-moving, over-sized trucks.¹⁸ Infrequent government access for a crisis (up to four times per year for the fire district, and *maybe* once every few years for flood response) fundamentally differs from permitting semi trucks and other large farm equipment to lumber across the tracks up to three hundred times per day at the peak of the “harvest season.”¹⁹ Conversely, the initial order even recognizes that the fire district may never need to use the Hickox crossing once it is closed to public use.²⁰

12 The private crossing will have a locked gate.²¹ The order fails to consider the extent that farm use of the crossing would entail. For example, for each trip a large semi-truck or trailer will rumble up to and stop at the crossing; while the truck idles its driver must get out to unlock the gate; then climb back in and steer the truck across the tracks; the driver would then have to stop the truck again; get out of the truck and walk across the tracks; slide the gate closed and lock it; then walk across the tracks a second time to return to the truck; climb in and continue on his way. This could involve *three* separate crossings each time a truck needs to traverse the tracks depending on the direction: once by the truck, and once or twice by the driver to open or close the gate. Since the gate must remain locked when not in use in order to prevent public travel, up to three hundred truck crossings per day conceptually means either a vehicle or pedestrian could cross the tracks up to *900 times* in one day. Although this was not addressed at the hearing because this proposed remedy was not contemplated, that process cannot reasonably save more time than driving the mile or 1.5 miles in either direction to a public crossing. Of course, the proposal also assumes the Hickox crossing is not already blocked by a train on the siding which would require the farm trucks and equipment to

¹⁸ See Exh. Nos. 70, 74; Jeffrey Boon, TR 112:14-15.

¹⁹ David Boon, Exh. No. 67 p. 5.

²⁰ Initial Order ¶ 82.

²¹ See Initial Order ¶ 80.

reroute anyway. The crossing will be blocked – multiple times per day at varying intervals and for extended periods of time.²²

13 Nobody wants to imagine what could happen if a passenger train approaches the tracks at speeds up to 79 m.p.h. during that process or if a driver tries to “beat” an oncoming freight train to avoid a wait or having to detour. The reality is that trucks and tractor-trailers are involved in 76.67% of private crossing injuries.²³ They are involved in 68.11% of private crossing collisions and 51.43% of fatalities.²⁴ And the result of a train-truck collision, especially with a passenger train, can be catastrophic.²⁵

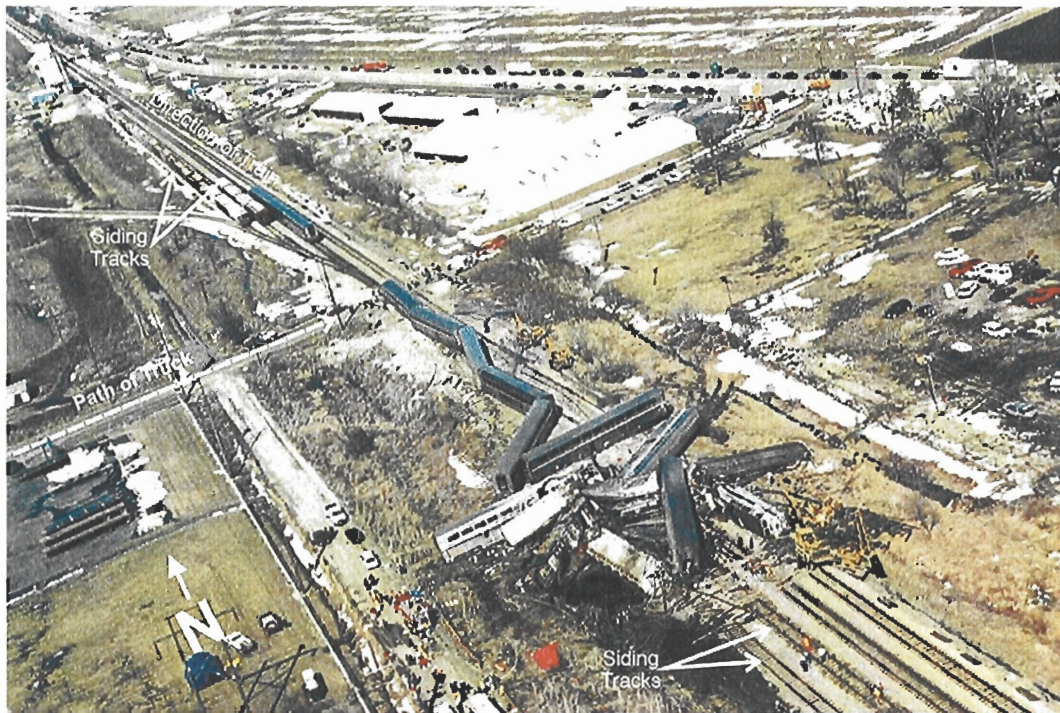


Figure 1 (Exh. No. 145 p. 3).

²² McIntyre, Exh. No. 2 at p. 3:24-4:6.

²³ Exh. No. 101 p. 192. Compared to automobiles, busses, pedestrians, and “other.”

²⁴ *Id.*

²⁵ The Bourbonnais, Illinois Amtrak/semi-trailer grade crossing collision is a tragic example of the catastrophic consequences of a passenger train fatality collision. On March 15, 1999, an Amtrak train carrying 228 passengers and employees struck a tractor-semitrailer that was trying to cross the tracks before the arrival of the train. The locomotives and many of the cars derailed, and the derailed Amtrak cars struck several freight cars standing on an adjacent siding. Eleven people were killed, and 122 people were transported to hospitals. The truck driver stated that the crossing lights started flashing when he was “right on top of the track” and that he “didn’t think the train was moving that fast.” Exh. No. 145 at pp. v, 3, 5.

Put simply, it is not worth incurring the risk at an “exceptionally hazardous” crossing when two much safer crossings exist nearby.

III. STATEMENT OF ISSUES

14 Whether the Commission should grant BNSF’s Petition for Administrative
Review and modify sections of the initial order as specifically requested below?

IV. EVIDENCE RELIED UPON

15 BNSF relies upon the pleadings, transcripts, exhibits and initial order contained
in the record.

V. AUTHORITY AND ARGUMENT

16 The commission “may by final order adopt, modify, or reject an initial order after
considering the pleadings and the record.”²⁶ BNSF respectfully request the Commission
modify the initial order to correct its errors as follows.

1. A Private Agreement With Western Valley Farms is Unwarranted.

17 The order accurately reflects the safety problems and dangerous conditions
inherent at a crossing where trains will be stopped on a siding track for extended periods
of time. It properly grants the petition to close the public crossing with allowances for
use under rare emergency conditions, consistent with the testimony and evidence in the
record. However, the analysis gets off the track by attempting to provide partial relief to
an intervening party that was neither requested, explored, nor supported by the record.

18 The initial order: (1) fails to recognize the fundamental difference between (rare)
emergency-only use and heavy seasonal farm use; (2) overlooks crucial facts about the
siding track’s impact on the farm’s operations even if the crossing was left open; (3)
improperly considers potential financial impact on the farm; (4) incorrectly presumes
freight trains run on schedules; and (5) imposes a condition that likely interferes with rail

²⁶ WAC 480-07-825(9).

operations. Each of these errors adversely affects BNSF and the order should be modified accordingly.

a. **There Is A Fundamental Difference Between Infrequent Emergency-Only Use and Allowing Large Farm Equipment To Cross The Tracks Hundreds of Times Per Day.**

19 The FRA’s discussion of farm private crossings does not address private crossings in the middle of active siding tracks.²⁷ A farm private crossing on a single mainline track is one thing; a farm private crossing at an “exceptionally hazardous” siding track is quite another. In this instance there will be a locked gate to prevent public use and eliminate the public safety hazard. Operating farm equipment and trucks across the tracks (when not blocked or partially blocked) would create other logistical nightmares. Does every trucker has a key? Or would it be more efficient to just leave it open? Given that the nearby neighbors would still want to use Hickox when not blocked, there is nothing to prevent other drivers and neighbors from following the farm equipment across or swerving around them.

20 The Commission should give discretion to the railroad witnesses with respect to safety concerns. Other tribunals have recognized their expertise:

We think a very wide discretion should be recognized in the railroad company upon the question of the proper operation of its business, and the movement and management of its trains, and that *a court should not lightly regard the judgment and opinion of experienced and responsible employees of the company as to what constitutes proper operation under a given set of circumstances.*²⁸

21 Here, BNSF’s Engineering Manager Mr. MacDonald made it very clear that his “experience says yes, drivers become frustrated with extended periods of down crossing gates and tend to make decisions that either at their next crossing they may attempt to beat the train because they don’t want to wait or they don’t want to do the other route.”²⁹

²⁷ See Initial Order ¶ 85.

²⁸ *Matoza v. Southern Pac. Co.*, 59 Cal.App. 636, 640-641, 211 P. 252 (Cal. App. 1922) (emphasis added).

²⁹ MacDonald, TR 304:4-15.

Every one of Western Valley Farms's trucks would have incentive to disregard the warning devices. After all, the chopper has to keep going and the farm has a limited number of trucks.³⁰

22 WSDOT Rolling Stock Manager Mr. Schultz, who has also held positions of Rail Planning Specialist and Rail Operations and Technical Expert, testified that "safety [is] best served by closing the at-grade crossing and redistributing traffic throughout the network."³¹ He described a "very similar situation to this [north of Marysville] where there was a [sic] at-grade crossing at the end of the [English] siding, and it was petitioned to be closed as part of the siding extension. Same safety rationale, same circumstances if you will."³² The Commission granted that petition for closure.³³

23 A private crossing does not outweigh the "exceptionally hazardous" risks at the Hickox crossing except in the most pressing crisis. The Railroad-Highway Grade Crossing Handbook states that "[a]s with public crossings, the first consideration for improving private crossings is closure. Adjacent crossings should be evaluated to determine if they can be used instead of the private crossing. *Every effort to close the crossing should be made.*"³⁴

b. The Initial Order Ignores How the Siding Would Affect the Farm's Operations Even If The Crossing Did Remain Open.

24 BNSF does not argue that closure will not affect Western Valley Farms by adding some measure of travel inconvenience but disputes that the farm will become "financially landlocked".³⁵ Even so, the Commission has recognized that "[c]onsolidation of crossings necessarily inconveniences those whose crossing is

³⁰ Jeffrey Boon testified "in order to get things harvested in a timely fashion, we need to be able to continuously go, and our harvester can't stop." Jeffrey Boon, TR 1110:11-13.

³¹ Schultz, Exh. No. 8 p. 2:2-3; 16-18; TR 508:16-18.

³² Schultz, TR 508:10-16.

³³ *Burlington Northern Santa Fe Railway v. Snohomish County*, Docket No. TR-010194 (March 2002).

³⁴ Exh. No. 101 p. 192 (emphasis added).

³⁵ See Initial Order ¶ 85.

eliminated in favor of adjacent crossings.”³⁶ West Valley Farms contends that it uses the crossing three hundred times per day during the harvest season.³⁷ The WUTC has ruled that an “argument that [a] crossing is busy does not justify leaving the . . . crossing open.”³⁸ The WUTC has also held that “[c]onsolidating crossings when practical and improving the remaining crossings promotes the public safety” and has closed at least one railroad crossing where the nearest crossing was more than a mile away.³⁹

25 The initial order further disregards the ultimate concession of Mr. Jeffrey Boon’s testimony. Mr. Boon testified that time is of the essence during the harvest season; that the farm has access to a limited number of trucks; and that his trucks must be able to continuously traverse the railroad tracks between the two farms. Yet Mr. Boon admitted that it would be “a problem” for the trucks to turn around if stopped for a train parked on the siding track, and that *Western Valley Farms will plan to use the Stackpole crossing because of the risk of blockage even if Hickox access is available:*

Q. Okay. Now I want you to assume that somebody comes out of your farm and takes a right and goes down, and as they approach the railroad tracks at the Hickox Road crossing that the gates come down and that that 3-axle rig or something is rolling up and the gates come down and sit there and stop and the lights are flashing and a big train rolls up and stops, what do you think you would tell your driver to do knowing that this thing could be sitting there for hours?

A. . . . I would probably have to tell him to try to turn the truck around and go around, and *then that stops the whole process.*

Q. Okay. Would that be a problem with some of that equipment?

A. Yes.

Q. All right.

³⁶ *Burlington Northern R.R. Co. v. Skagit County*, Docket No. TR-940282 at p. 7.

³⁷ David Boon, Exh. No. 67 at page 5.

³⁸ *Burlington Northern R.R. Co. v. Skagit County*, Docket No. TR-940282 at p. 7 (citing *Whatcom County v. Burlington Northern R.R. Co.*, Docket Nos. TR-1725 and TR-1726 (January 1985); *Spokane County v. Burlington Northern, Inc.*, Cause No. TR-1148 (September 1985)).

³⁹ *Id.*; *Burlington Northern Santa Fe Railway v. Snohomish County*, Docket No. TR-010194 at ¶ 8.

- A. Because it's not just 3, only 3-axle machines, we have some semis also.
- Q. Okay. And that's not a terribly wide, wide road, and it's slightly elevated there as it gets close to the crossing, isn't it?
- A. Mm-hm.
- Q. That was a yes?
- A. Yes.
- Q. . . . It would be problematic if that was an ongoing from an economic standpoint to have a driver sit there in your truck and wait hopefully for that train to move soon, wouldn't it?
- A. Yeah. But I mean if the crossing is closed, we probably wouldn't be sending them on a right-hand turn.
- Q. But I'm talking about if the crossing had gates that allowed it to be open but you could run up there and have to face that, it would cause similar economic problems?
- A. Yes.⁴⁰

Mr. Boon also discussed the issue with the administrative law judge:

- Q. So if I'm understanding you correctly, even if the crossing was left open, because of the possibility of blockage, economically you might have to plan to go around even if that was an option?
- A. *Yeah, I guess we would -- it would always have to be in the back of our mind because being so unpredictable.*⁴¹

Although the initial order says "continued use" of the Hickox crossing is important for Western Valley Farms, no "continued" use would be available since the crossing will be frequently blocked at unpredictable intervals for indeterminate lengths of time.⁴²

26 Without access to the Hickox crossing, Western Valley Farm's trucks will have to drive a mile or a mile and one-half to the nearest crossings in either direction. On the other hand, if they tried to use Hickox its trailers and other farm equipment would have to wait for a train on the siding track to resume its journey any time the crossing was

⁴⁰ Boon, TR 1111:21-1112:2; 1112:24-1113:10.

⁴¹ Boon, TR 1115:1-7 (emphasis added).

⁴² See Initial Order ¶ 104.

blocked. This would happen to trucks and trailers traveling east or west, and it would happen unpredictably. And a truck that decided to roll the dice at Hickox could be forced to park (running the meter at its hourly rate) at the crossing for up to several hours or longer, depending on the train on the siding track, rather than take the few extra minutes and miles to use the Stackpole crossing. This does not make business sense, and Mr. Boon acknowledged as much at the hearing.⁴³ While the initial order presumes that leaving the crossing open for the farm would provide a necessary financial benefit, it fails to consider that the farm trucks will frequently take the alternate route *even if the Hickox crossing remains open*.

c. Complaints About Financial Damage to Western Valley Farms, If Any, Are For a Separate Legal Proceeding.

27 Although the initial order is based on concern for potential damage to Western Valley Farms' economic livelihood, the WUTC "has no jurisdiction to consider damage to property as such."⁴⁴ A contrary holding in this proceeding could certainly be seen as arbitrary and capricious. The Commission may "only consider whether or not convenience and necessity justifies the closing of the crossing."⁴⁵ A property owner potentially shows necessity for a crossing when he or she would become *geographically* landlocked if access is denied. Here, the property leased by the Boons would not be geographically landlocked; their farm equipment would have the Stackpole crossing for (much safer) access.⁴⁶ It is important to note that they plan to use the Stackpole crossing *anyway* due to the fact that Hickox will be blocked by trains stopped on the siding track for extended periods of time.⁴⁷

⁴³ Boon, TR 1115:1-7.

⁴⁴ *Snohomish County*, 35 Wn.2d 247 at 255. The court noted that "[o]ther remedies may be provided by law to compensate owners for damage to property, if any."

⁴⁵ *Id.*

⁴⁶ The Boons/Western Valley Farms do not own the land west of the tracks; they lease the property from Mr. Alerd Johnson. Johnson, TR 401:11-14.

⁴⁷ Boon, TR 1115:1-7

The test to determine whether a crossing should be closed is *not* based on a potential economic effect to those who lease neighboring lands. In *Department of Transp. of State v. Snohomish County*, residents made a similar argument that a crossing closure would damage business:

It is contended by residents of Mukilteo that the closing of this crossing would damage business property due to the fact that the closing of the crossing would result in making the north portion of Park Avenue a dead end street.⁴⁸

The court held the Commission had

no jurisdiction to consider damage to property as such. Other remedies may be provided by law to compensate owners for damage to property, if any. The department may only consider whether or not convenience and necessity justifies the closing of the crossing. It would be convenient for the residents of Mukilteo for this crossing to remain open. However, because of the overpass there is no necessity for it to remain open.⁴⁹

In determining whether public convenience and need outweigh the danger of the crossing, the Commission is to consider:

the amount and character of travel on the road and on the highway, the availability of alternate crossings, whether the alternate crossings are less hazardous, and ability of alternate crossings to handle any additional traffic that would result from the closure, and the effect of closing the crossing on public safety factors such as police control.⁵⁰

Nowhere does this test state “potential economic effect based on the neighboring land-leasers’ increased inconvenience.”

d. Freight Trains Do Not Run On Set Schedules Like Amtrak Trains.

The initial order also states that BNSF should communicate its schedule to Western Valley Farms and “minimize disruptions to Western Valley Farms.”⁵¹ Freight trains do not run on set schedules. AMTRAK trains run on schedules, so “BNSF trains

⁴⁸ *Department of Transp. of State v. Snohomish County*, 35 Wn.2d 247, 255, 212 P.2d 829, 834 (1949).

⁴⁹ *Id.*

⁵⁰ *Burlington Northern R.R. Co. v. Skagit County*, Docket No. TR-940282 at p. 4 (citing *Burlington Northern Railroad Company v. City of Ferndale*, Docket No. TR-940330 (March 1995)).

⁵¹ Initial Order ¶ 88.

kind of work around their set schedule on a daily basis.”⁵² Mr. Schultz explained that freight and passenger trains have “two distinct operational needs. . . . Freight trains . . . may have a number of different operational needs, and a meet and pass with another freight train may be 10 minutes, 15 minutes, 2 hours, it would be in some cases longer than that based on unusual operating circumstances in the railroad environment.”⁵³

Additionally, there was no evidence at the hearing to support the contention that it is either feasible or reasonable for the railroad to notify Western Valley Farms every time it intends to pull a train on to the siding track. To the extent the order attempts to regulate BNSF’s train schedules or otherwise adjust its operations to “minimize disruptions to Western Valley Farms,” the order is preempted under the Interstate Commerce Commission Termination Act (“ICCTA”) (see Section 4 below).

2. BNSF Should Not Be Ordered To Maintain The Current Safety Devices at Hickox Once The Crossing Is Closed to Public Travel.

a. A Diagnostic Team Should Determine the Applicability of Warning Devices.

30 The initial order states that “the safety measures in place at the Hickox crossing must now remain in place.”⁵⁴ It is improper for the judge or commission to *sua sponte* unilaterally order a specific warning device configuration, without diagnostic input from the affected parties.⁵⁵ The importance of obtaining diagnostic input from the parties involved is so high that the *Railroad Highway Grade Crossing Handbook* devotes a relatively comprehensive section to its analysis in the context of public crossings:

31 **1. Diagnostic Team Study Method**

The procedure recommended in earlier editions of this handbook, adopted in FHWA’s *Highway Safety Engineering Study Procedural Guide*, and adopted in concept by several states is the diagnostic team study approach. This term is used to describe a simple survey procedure utilizing experienced individuals from several sources. The procedure involves the

⁵² McIntyre, TR 679:11-14.

⁵³ Schultz, TR 489:8-17.

⁵⁴ Initial Order ¶ 81.

⁵⁵ The decision to upgrade Stackpole’s warning devices was analyzed and agreed to by the parties involved.

diagnostic team's evaluation of the crossing as to its deficiencies and judgmental consensus as to the recommended improvements.

The primary factors to be considered when assigning people to the diagnostic team are that the team is interdisciplinary and representative of all groups having responsibility for the safe operation of crossings so that each of the vital factors relating to the operational and physical characteristics of the crossing may be properly identified. Individual team members are selected on the basis of their specific expertise and experience. The overall structure of the team is built upon three desired areas of responsibility:

- Local responsibility.
- Administrative responsibility.
- Advisory capability.
-

For the purpose of the diagnostic team, the operational and physical characteristics of crossings can be classified into three areas:

Traffic operations. This area includes both vehicular and train traffic operation. The responsibilities of highway traffic engineers and railroad operating personnel chosen for team membership include, among other criteria, specific knowledge of highway and railroad safety, types of vehicles and trains, and their volumes and speeds.

Traffic control devices. Highway maintenance engineers, signal control engineers, and railroad signal engineers provide the best source for expertise in this area. Responsibilities of those team members include knowledge of active traffic control systems, interconnection with adjacent signalized highway intersections, traffic control devices for vehicle operations in general and at crossings, and crossing signs and pavement markings.

Administration. It is necessary to realize that many of the problems relating to crossing safety involve the apportionment of administrative and financial responsibility. This should be reflected in the membership of the diagnostic team. The primary responsibility of these members is to advise the team of specific policy and administrative rules applicable to the modification of crossing traffic control devices.

To ensure appropriate representation on the diagnostic team, it is suggested that the team comprise at least a traffic engineer with safety experience and a railroad engineer. Following are other disciplines that might be represented on the diagnostic team:

- Railroad administrative official.
- Highway administrative official.
- Human factors engineer.
- Law enforcement officer.
- Regulatory agency official.
- Railroad operating official.

The diagnostic team should study all available data and inspect the crossing and its surroundings with the objective of determining the conditions that affect safety and traffic operations. . . .

After [a] questionnaire has been completed, the team is reassembled for a short critique and discussion period. Each member should summarize his or her observations pertaining to safety and operations at the crossing. Possible improvements to the crossing may include the following:

- Closing the crossing – available alternate routes for highway traffic.
- Site improvements – removal of obstructions in the sight triangle, highway realignment, improved cross section, drainage, or illumination.
- Crossing surfaces – rehabilitation of the highway structure, the track structure, or both; installation of drainage and subgrade filter fabric; adjustments to highway approaches; and removal of retired tracks from the crossing.
- Traffic control devices – installation of passive or active traffic control devices and improvement of train detection equipment.

The results and recommendations of the diagnostic team should be documented. Recommendations should be presented promptly to programming and implementation authorities.

Both government and railroad resources are becoming more limited. The *Highway Safety Engineering Studies Procedural Guide* suggests crossing evaluation by an individual, in lieu of the diagnostic team. The guide suggests that this individual be a traffic engineer with experience in highway-rail crossing and traffic safety. A background in signal control and safety program administration would also be advantageous.⁵⁶

Here, BNSF, WSDOT, and other party representatives should determine the applicability of specific devices, if any, needed for emergency use at the private crossing.⁵⁷ BNSF requests that the Commission's final order reflect this requested change.

b. BNSF, WSDOT and Staff Railroad Witnesses Agree There Are No Warning Devices Sufficient to “Fix” the “Exceptionally Hazardous” Conditions at Hickox.

32 Under Order (2)(e), the judge requires BNSF “*to operate and maintain the existing safety features at the Hickox Road crossing.*”⁵⁸ Although active warning devices may generally appear to make the closed crossing safer than without active devices, this

⁵⁶ Exh. No. 101 pp. 62-63; 70.

⁵⁷ See McIntyre, TR 601:12-18; 677:8-25; MacDonald, TR 350:6-13.

⁵⁸ Initial Order ¶ 116.

part of the order is clearly erroneous.⁵⁹ Even if the Commission is properly qualified to specify the type of warning devices at Hickox, which expertise it lacks, the railroad witnesses agreed that neither four-quadrant gates nor a raised median barrier are designed for, sufficient, or appropriate to make the crossing acceptably safe for motor vehicle or pedestrian travel.⁶⁰ None of the parties even attempted to assert that the *existing* two-quadrant gate configuration at Hickox would be proper or sufficient. Nevertheless, the judge ruled the existing two-quadrant warning devices provides adequate protection for trucks, trailers and heavy-duty farm equipment traversing the tracks hundreds of times per day during the “harvest season.” Though a relatively small traffic total compared to other crossings, farm vehicle and equipment trips would approach more than *three-quarters* of the *level of ordinary public traffic* on Hickox.

c. Requiring BNSF To Maintain The Current Two-Quadrant Gates at the Hickox Crossing Is Incompatible with the Planned Siding Extension.

33 There is no factual support for the judge’s finding that the existing safety features should be maintained at a private Hickox crossing. Such a requirement should be characterized as arbitrary and capricious for purposes of the Commission’s review.⁶¹ Much debate at the hearing centered around whether additional active devices would make Hickox acceptably safe for motor vehicle use. At the end of the hearing as manifested in BNSF/WSDOT/Staff briefs, all railroad and engineering witnesses agreed there is no warning device “band-aid” fix for this dangerous crossing. The parties certainly never considered maintaining the devices status-quo.

⁵⁹ “A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Skagit County v. State*, 93 Wn.2d 742, 748, 613 P.2d 115 (1980).

⁶⁰ Although the initial order states that Mr. Zeinz “contend[s] that installation of a four-quadrant gate system could mitigate the newly created hazards from the siding track,” Mr. Zeinz testified he was not familiar with any crossings with four-quadrant gates where trains frequently stop across the crossing for long periods of time. *See* Initial Order ¶ 54; Zeinz, TR 1195:14-17.

⁶¹ An agency decision is “arbitrary and capricious,” if it is “willful and unreasoning action in disregard of facts and circumstances.” *Skagit County v. State*, 93 Wn.2d at 749 (internal citations omitted).

Another reason why the initial order is improper is because at least one of the existing gates would be located between the siding and mainline tracks once the siding track extension is completed. To visualize that configuration it helps to view Exhibits 57, 58 and 60 (showing the Hickox crossing's current layout of one mainline track and two-quadrant gates). Next, visually superimpose the siding track extension to the east of the existing track and you can see that the position of the gate would end up between the tracks. Therefore, the judge's order requiring BNSF to maintain the current gates is manifest error.

d. It Is Erroneous And Beyond The Scope of This Proceeding To Determine That Flaggers Are Not “An Efficient Use Of Manpower” During a Flood-Related Emergency.

The order states that “[u]se of flag men by either the local government(s) or the railway during such a crisis period [i.e., flood-fight activities] would not be an efficient use of manpower.”⁶² Both F.R.A. regulations and BNSF rules determine whether and when flaggers are required to warn motorists of oncoming trains.⁶³ If the tracks are still “live” (used by trains) when flood-fighting and evacuation require temporary use of the Hickox crossing, Mr. MacDonald testified that a flagger *must* be used to provide warning of trains for motorist traffic.⁶⁴ Further, to the extent that the order attempts to regulate or limit the use of flaggers, such is preempted under the Federal Railroad Safety Act (“FRSA”).⁶⁵

⁶² Initial Order ¶ 81.

⁶³ See 49 C.F.R. § 234.105; MacDonald, TR 349:20-15.

⁶⁴ *Id.*

⁶⁵ See, e.g., *CSX Transp. v. Easterwood*, 507 U.S. 658, 663 (1993) (“Where a state statute conflicts with, or frustrates, federal law, the former must give way.”).

3. Mr. Christianson’s Private Crossing Is Separate and Distinct From This Matter, and Legal Conclusions Relating To His Situation Are Erroneous and Outside the Scope of This Proceeding.

36 The order states that “a private crossing already exists north of Hickox Road for the benefit of David Christianson’s business, which would otherwise be geographically landlocked.”⁶⁶ At the public hearing, Mr. David Christianson expressed concern about his private crossing half a mile north of Hickox Road.⁶⁷ Since Mr. Christianson’s crossing is not the subject of this petition, any assertion or finding about his property being potentially or allegedly landlocked is immaterial to this petition for closure and outside the scope of the Commission’s review, not to mention erroneous.

Q. Mr. Christianson, who owns the property to the west of you between you and Britt Road?

A. Cadillac Ranches LLC.

Q. And how are they related to you, if at all?

A. I own that corporation.

Q. And does that property border Britt Road?

A. Yes, it does.⁶⁸

37 Although the administrative law judge properly acknowledged the order “does not address the modifications, if any, that might become necessary to the existing private crossing agreement between BNSF and Mr. Christianson once the siding project is complete,” it improperly addressed that issue in the initial order and concluded, incorrectly, that Mr. Christianson’s property is land-locked.⁶⁹ It is not.

4. The Commission’s Final Order On a Crossing Cannot Interfere With Railroad Siding Track Operations.

38 The parties do not have the authority to prevent BNSF and WSDOT from extending the siding track through the Hickox crossing to improve railroad operations.

⁶⁶ Initial Order at FN 143.

⁶⁷ Christianson, TR 413-415.

⁶⁸ Christianson, TR 415:3-9.

⁶⁹ Initial Order FN 143.

The WUTC has previously stated that a crossing “would interfere with the operation of [a] siding.”⁷⁰ To hold otherwise here would be deemed arbitrary and capricious.

39 Congress and the courts have “long recognized a need to regulate railroad operations at the federal level,” and “Congress’ authority under the Commerce Clause to regulate the railroads is well established.”⁷¹ If the order attempts to regulate BNSF’s operations, preemption analysis is appropriate under the Interstate Commerce Commission Termination Act (“ICCTA”).⁷²

40 The ICCTA contains a clear preemption clause, granting the Surface Transportation Board (“STB”) exclusive jurisdiction over nearly all matters of rail regulation.⁷³ Under 49 U.S.C. § 10501(b), the STB has exclusive jurisdiction over:

(1) *transportation by rail carriers*, and the remedies provided in this part [49 USCS §§ 10101 et seq.] with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; *and*

(2) *the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State. . . .*

Moreover, the ICCTA contains an express preemption clause which states:

Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation *are exclusive and preempt the remedies provided under Federal or State law.*⁷⁴

⁷⁰ *Burlington Northern Santa Fe Railway v. Snohomish County*, Docket No. TR-010194 at ¶ 7.

⁷¹ *City of Auburn v. U.S. Govt.*, 154 F.3d 1025, 1029 (9th Cir. 1998). “Regulation” is defined as the “act or process of controlling by rule or restriction; A rule or order, having legal force, usu[ally] issued by an administrative agency.” BLACKS’ LAW DICTIONARY at 1064 (8th Ed.).

⁷² *See* 49 U.S.C. § 10501(b).

⁷³ Congress enacted the Interstate Commerce Commission Termination Act (“ICCTA”) in 1995 to deregulate the railroad industry. *See* 49 U.S.C. § 10101 *et seq.*

⁷⁴ 49 U.S.C. § 10501(b) (emphasis added). The definition section of the ICCTA states “rail carriers” include persons providing “railroad transportation” for compensation, and that “railroad” includes a bridge used by or in connection with a railroad. 49 U.S.C. § 10102(5), (6)(A).

Congress “made no blanket exception for a state’s police power when describing the ICCTA’s preemptive scope.”⁷⁵

41 One of the first cases to analyze ICCTA preemption held “[i]t is difficult to imagine a broader statement of Congress’ intent to preempt state regulatory authority over railroad operations.”⁷⁶ Since then, the preemptive effect of the last sentence of section 10501(b) has been examined by courts in virtually every jurisdiction, which have consistently ruled that the ICCTA preempts state and local statutes, regulations and ordinances which “involve railway matters do not survive ICCTA preemption challenges.”⁷⁷

42 In *Maynard v. CSX Transp. Inc.*, plaintiffs argued that state law precluded CSX railroad from permitting a side track to be blocked by trains “for excessive time periods, sometimes in excess of six hours.”⁷⁸ The court granted CSX’s motion for summary judgment, explaining that “*regulations of . . . train operations, as well as the construction and operation of . . . side tracks*, [are] under the exclusive jurisdiction of the [Surface Transportation Board] unless some other provision in the ICCTA provides otherwise.”⁷⁹ The court went on to point out that

[b]ut-for the side track, a [freight] train . . . would have to stay on the mainline track, which would interfere with the movement of commerce.

⁷⁵ *A & W Properties, Inc. v. Kansas City S. Ry. Co.*, 200 S.W.3d 342, 347 (Tex. App. 2006).

⁷⁶ *CSX Transp., Inc. v. Georgia Pub. Serv. Comm.*, 944 F.Supp. 1573, 1581 (N.D. Ga. 1996). ICCTA preemption is not preconditioned on either an effect on interstate commerce or compelled capital expenditures by BNSF. See *CSX Transp. v. AEP Kentucky Coal*, 360 F.Supp.2d 836, 843 (E.D. Ky. 2004).

⁷⁷ *Maynard v. CSX Transp. Inc.*, 360 F.Supp.2d 836, 840 (D.C. Ky. 2004); see also *City of Auburn*, 154 F.3d at 1031 (ICCTA preempts state and local environmental review laws as applied to reopening of rail line); *City of Seattle v. Burlington N. R.R.*, 145 Wn.2d 661, 668, 41 P.3d 1169 (2002) (city’s anti-blocking statute preempted by ICCTA); *R.R. Ventures, Inc. v. STB*, 299 F.3d 523, 563 (6th Cir. 2002) (state statutes allowing towns to regulate land use and requiring public roads be kept open and nuisance-free preempted by ICCTA to the extend said laws impinge upon the STB’s exclusive jurisdiction over rail transportation); *Cedarapids Inc. v. Chicago, Cent. & Pac. R.R. Co.*, 265 F.Supp.2d 1005, 1015 (N.D. Iowa 2003) (state law providing for reversion of railroad right-of-way after railroad abandonment preempted).

⁷⁸ *Id.* at 838.

⁷⁹ *Id.* at 842 (quoting *Friburg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 443-44 (5th Cir. 2001)) (emphasis added).

The side tracks allow the mainline track to be open for other rail travel, which enhances the movement of commerce on the rail lines. Because of their essential role, side tracks are a vital part of . . . railroad operations.⁸⁰

The *Maynard* court concluded that because the plaintiff's blocking claims involved the construction and operation of side tracks, the claims were clearly preempted by the ICCTA.

43 Similarly, it constitutes regulation of railroad operations to require a railroad to communicate with the neighbors every time a freight train (which, again, does not run on a set schedule) is going to pull into the siding track, or to alter its operations so as to "minimize disruptions" to the neighbor's own travel plans. At the hearing, the administrative law judge acknowledged that point when discussing the issue with West Valley Farms' Mr. Jeffrey Boon:

Q. All right, I understand your concerns, but if I understand correctly also you don't have a, assuming the siding is where it's going to be probably, you don't have a solution that I can make work for you whether it's open or closed, private or public?

A. Is there any way that they can tell us whether a train is going to sit there for 8 hours?

Q. That may be possible, but *I don't think that I as a judge for the Commission can condition an open or closed siding based on continual communications* from Mr. Scarp's client to the neighbors. It may possibly be that BNSF will seek to open a toll-free number for which you can call to see how long that train is planning on being there, but that would be up to railroad operations, and it may be something community relationswise that you seek to approach the railroad to consider. That's outside my jurisdiction as well.⁸¹

44 Mr. Gordon of BNSF also testified if the siding project is interrupted or compromised, the planned commuter rail project will be "held back."⁸² Accordingly, under the reasoning of *Maynard* and its progeny, an order regulating or preventing railroad operations would be preempted.

⁸⁰ *Id.*

⁸¹ Boon/Torem, TR 1116:8-24 (emphasis added).

⁸² Gordon, TR 721:21-722:14.

5. Proposed Language of Final Order.

45 BNSF respectfully requests the Commission amend the initial order to reflect the record and testimony and suggests the following changes and omissions.⁸³

| <i>Initial Order</i> | <i>Original Language</i> | <i>Proposed Language</i> |
|----------------------|---|---|
| ¶ 8 | . . . (4) BNSF negotiate and separately enter into two private crossing agreements for limited continued use of the Hickox Road grade crossing, the first with the local government entities . . . , and the second with Western Valley Farms in order to accommodate the seasonal harvesting and related cross-highway transportation of its corn or other feed crops. | . . . (4) BNSF negotiate and enter into a private crossing agreement for emergency use only of the Hickox Road grade crossing with the local government entities party to this case (City of Mount Vernon, Skagit County, and Skagit County Fire District No. 3 in order to accommodate response to emergencies affecting the health, safety, and welfare of the surrounding communities. |
| ¶ 45 | . . . If the Hickox Road crossing were closed, the trucks would be forced to use the Stackpole Road crossing, adding several minutes to each trip and a distance of about four miles each way, thus increasing costs. | When the Hickox Road crossing is closed, the farm trucks and equipment will have to use the Stackpole Road crossing, adding several minutes to each trip and a total distance of about four miles, thus increasing costs. However, the crossing will be blocked for indeterminate and sometimes lengthy periods of time each day and Jeffrey Boon testified it is very difficult to turn his large trucks (including semi-trucks) around. So even if the crossing remained open for Western Valley Farms' use, he would instruct the trucks not to use the Hickox crossing; at times so as to prevent them from getting stuck should a train stop on the siding and block the crossing during the truck's approach. The wait time would incur hourly costs and prevent that truck's use during the wait. For these reasons, closing the Hickox crossing will have little, if any real net effect to the farm operation once the siding track project is complete. |

⁸³ To the extent that additional modifications are necessary to make the rulings in the final order consistent with the findings, record and issues identified herein, BNSF requests that those appropriate changes be made.

| <i>Initial Order</i> | <i>Original Language</i> | <i>Proposed Language</i> |
|----------------------|---|---|
| ¶ 79 | <p>In this case, BNSF recognizes that it may be necessary to convert the existing public crossing at Hickox Road into a private crossing for emergency access use by local governmental authorities. However, the evidence in this case further suggests that a second private crossing agreement with local farming interests is also merited in order to accommodate transportation requirements associated with the late summer and early fall harvest seasons.</p> | <p>In this case, BNSF recognizes that it may be appropriate to convert the existing public crossing at Hickox Road into a private crossing for emergency access use by local governmental authorities.</p> |
| ¶ 81 | <p>In order to ensure the safety of crews fighting the rising river and any members of the public making use of the crossing to evacuate the area west of the railroad tracks, the safety measures now in place at the Hickox crossing must remain in place. Although BNSF may typically prefer to remove warning bells and gates from an active grade crossing converted to a private crossing, the potential for extended periods of flood-related emergency use at this private crossing mandates otherwise. When the locked gate at Hickox Road is opened for flood-fight activities, the multi-day nature of these operations suggests a high potential for collision between a train and motor vehicle traffic rushing to evacuate or attend to flood-fight responsibilities. Use of flag men by either the local government(s) or the railway during such a crisis period would not be an efficient use of manpower.</p> | <p>In a flood-related emergency, it is important to maximize the safety of crews fighting the rising river, any members of the public making use of the crossing to evacuate the area west of the railroad tracks, and persons traveling on trains along the tracks. A diagnostic team will be required to determine the warning devices, if any, to be appropriate when the crossing is converted to an emergency-access-only private crossing. Posting and use of flaggers shall also be addressed by the diagnostic team in accordance with FRA standards for situations that would require the crossing to remain open for major emergency response or flood fighting activities.</p> |

| <i>Initial Order</i> | <i>Original Language</i> | <i>Proposed Language</i> |
|----------------------|--|--|
| ¶ 85 | The evidence presented in this case also makes clear that special considerations are necessary when closing a road that provides the most direct access to a long established business that could be “financially landlocked” if existing access is eliminated. As noted above, the FRA specifically includes farm crossings within its listing of appropriate uses for private crossings. | [Entire paragraph omitted from final order]. |
| FN 143 | We note that a private crossing already exists north of Hickox Road for the benefit of David Christianson’s business, which would otherwise be geographically landlocked. This order does not address the modifications, if any, that might become necessary to the existing private crossing agreement between BNSF and Mr. Christianson once the siding project is complete. | We note that a private crossing already exists north of Hickox Road for the benefit of David Christianson’s business. This order does not address the modifications, if any, that might become necessary to the existing private crossing agreement between BNSF and Mr. Christianson once the siding project is complete. |
| ¶ 86 | Western Valley Farms’ need for the Hickox Road crossing is greater than and distinct from all other local agricultural businesses operating in the area west of the crossing. During most times of the year, the movement of farm equipment to fields bisected by I-5 is an annoyance that must be accomplished across whatever route is shortest and safest. Closure of the Hickox Road grade crossing will not alter this situation for Western Valley Farms, Mr. Smith, Mr. Devlieger, or any other agricultural concern. | During most times of the year, the movement of farm equipment to fields bisected by I-5 is an annoyance that must be accomplished across whatever route is shortest and safest. Closure of the Hickox Road grade crossing will not alter this situation for Western Valley Farms, Mr. Smith, Mr. Devlieger, or any other agricultural concern. |

| <i>Initial Order</i> | <i>Original Language</i> | <i>Proposed Language</i> |
|----------------------|--|---|
| ¶ 87 | <p>However, the uncontested evidence presented in this case shows that Western Valley Farms has become totally financially dependent on the existence of the Hickox Road crossing during the late summer harvest season. It is not merely a matter of inconvenience to require Western Valley Farms to hire several additional trucks and drivers to transport its corn harvest across I-5, but a question of threatening the financial health of a long-established family farm business. Therefore, BNSF shall be required to convert the public crossing into a gated private crossing for seasonal use by Western Valley Farms.</p> | <p>Western Valley Farms may have a financial interest in the existence of the Hickox Road crossing during the late summer harvest season. However, the evidence elicited at the hearing shows that, once the siding project is complete, Western Valley Farms will inevitably direct its trucks away from the Hickox crossing to avoid the risk of unpredictable closure due to blockage by trains and stranded farm equipment that would result. If closure potentially threatens the financial viability of the farm, Western Valley Farms has alternate avenues to seek potential redress.</p> |
| ¶ 88 | <p>During the existence of a private crossing, it will remain possible for BNSF freight trains to block the Hickox Road crossing and potentially interfere with Western Valley Farms' harvest operations, requiring trucks to detour around the blocked crossing and utilize Stackpole Road to access the farm's storage silos. However, BNSF and Amtrak cannot reasonably be expected to cease their operations to accommodate the Western Valley Farms harvest season. Instead, the parties should provide each other with sufficient advance notice of their schedules to minimize disruptions to Western Valley Farms and allow BNSF (and Amtrak) to advise its engineers of farm equipment temporarily making use of the crossing at Hickox Road.</p> | <p>During the existence of a private crossing, it will remain possible for BNSF freight trains to block the Hickox Road crossing and potentially affect Western Valley Farms' harvest operations by requiring trucks to utilize Stackpole Road to access the farm's storage silos. However, BNSF and Amtrak cannot reasonably be expected to cease or modify their operations or system wide communications policies to accommodate the Western Valley Farms harvest season.</p> |

| <i>Initial Order</i> | <i>Original Language</i> | <i>Proposed Language</i> |
|----------------------|---|--|
| ¶ 89 | BNSF shall promptly enter into negotiations with Western Valley Farms to draft an appropriate private crossing agreement that allows seasonal access across the tracks at Hickox Road for Western Valley Farms' harvest operations. This private crossing agreement shall include a requirement for Western Valley Farms to provide advance notice to BNSF of its harvest schedule and for BNSF to then provide Western Valley Farms applicable schedules for planned rail traffic, including any projected blockings of the Hickox Road crossing due to meet and pass or other operational requirements. | Freight trains do not operate on set schedules. Therefore, use of the siding track by trains and blocking of the Hickox Road (private) crossing therefore cannot reasonably be calculated and advance notice of trains blocking the crossing cannot be provided. Further, the Commission cannot condition an open or closed siding track based on continual communications from BNSF to the neighbors. |
| ¶ 104 | The Hickox Road crossing is critically located and its continued use is crucial for established harvest activities of Western Valley Farms, LLC. | Although the Hickox Road crossing has been utilized by Western Valley Farms, LLC, for harvest activities, the intended frequent use of the siding track by parked trains for unpredictable durations at any time renders the crossing constructively closed to use by semi-trucks, tractor-trailers, and other large farm equipment that cannot turn around once stopped at the crossing. The benefit of allowing Western Valley Farms to access the crossing will be outweighed by the crossing's exceptionally hazardous conditions. |
| ¶ 113 | The financial impact on Western Valley Farms from closing the Hickox Road crossing cannot be adequately mitigated without creation of a private crossing to permit continued seasonal use of the crossing for harvest activities. | The WUTC lacks authority to consider or evaluate damage to property associated with crossing closures. Other remedies may be available by law to compensate owners for damage to or devaluation of property, if any. |


| <i>Initial Order</i> | <i>Original Language</i> | <i>Proposed Language</i> |
|----------------------|--|--|
| ¶ 115(2)(c) | Third, BNSF shall enter into negotiations with the City of Mount Vernon, Skagit County, and Skagit County Fire Protection District No. 3 to draft a private crossing agreement that ensures continued access across the tracks for local emergency response to flood-related events as well as incidents where the health, safety, and welfare of local residents would be improved. BNSF shall submit this agreement to the Commission no later than seventy-five days after entry of a Final Order in this matter. | Third, BNSF, the City of Mount Vernon, Skagit County and Skagit County Fire District 3 shall negotiate in good faith and enter into a private crossing agreement that ensures continued access across the tracks for local emergency response and flood-related events. The private crossing agreement shall reflect a diagnostic team's determination as to the applicable warning devices, if any, to be implemented when the crossing is converted to an emergency-access private crossing. The private crossing agreement shall determine which party will undertake the work and cost of removal. BNSF shall submit this agreement to the Commission no later than seventy-five days after entry of a Final Order in this matter. |
| ¶ 115(2)(d) | Fourth, BNSF shall enter into negotiations with Western Valley Farms to draft a private crossing agreement that allows seasonal access across the tracks for the purpose of transporting its corn harvest from east of I-5 to the farm location at Hickox Road. BNSF shall submit this agreement to the Commission no later than sixty days after entry of a Final Order in this matter. | [Entire paragraph omitted from final order]. |
| ¶ 115(2)(e) | Finally, in support of these private crossing agreements and to ensure adequate safety at the private crossing, BNSF shall continue to operate and maintain the existing safety features at the Hickox Road crossing. | [Entire paragraph omitted from final order; see proposed ¶ 115(2)(c)]. |
| ¶ 116 | The Commission retains jurisdiction over the subject matter and the parties to the proceeding to effectuate the terms of this Order. | The Commission retains jurisdiction over the subject matter and the parties to the proceeding to effectuate the terms of this Order, unless and until the Order amounts to regulation of railroad operations, i.e., would constructively cause BNSF and WSDOT to halt the siding track project. |

VI. CONCLUSION

46 There is no need for this crossing that is so great that it must be kept open to semi-public use given the “exceptionally hazardous” conditions that will be created by the siding track operations. While the initial order reflected BNSF’s *emergency-only* compromise in order to protect public safety, it went well beyond what was requested by the parties or addressed in the record. In doing so the order disregarded those same public safety issues. The same principles that warrant closure of the crossing should also apply to prohibit the most dangerous type of crossing activity – slow-moving farm equipment and trucks – from crossing at that location. Therefore, BNSF respectfully requests the Commission revise the order’s errors.

DATED this 15th day of July, 2008.

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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 Petition for Administrative Review* 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 15th day of July, 2008 at Seattle, Washington.



Lisa Miller, Paralegal