

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

BNSF RAILWAY COMPANY,

Petitioner,

v.

CITY OF MOUNT VERNON,

Respondent.

DOCKET NO. TR-070696

COMMISSION STAFF'S ANSWER
TO BNSF RAILWAY COMPANY
AND WESTERN VALLEY
FARMS, LLC'S PETITIONS FOR
ADMINISTRATIVE REVIEW

1 Commission Staff submits the following answer to the petitions for administrative
review filed by BNSF Railway Company and Western Valley Farms, LLC.

2 Staff generally supports BNSF's Petition for Administrative Review and opposes
Western Valley Farms' Petition.

I. Background

3 In its post-hearing brief, Staff proposed two alternative resolutions to BNSF's
petition for closure of Hickox Road at-grade crossing. Staff's default position was that the
Commission should grant BNSF's petition to close the Hickox crossing on condition that the
Company make various road improvements (to facilitate turning by motorists) and that it
install active warning devices at nearby Stackpole crossing to enable the safe diversion of
traffic from Hickox Road to that alternative crossing. As an alternative to this resolution,
Staff proposed that the Commission deny the petition to close Hickox crossing and instead
order an upgrade in protective devices at both Hickox and Stackpole crossings, but only on
condition that the road authorities (either the City or the County) pay their minimum 30
percent statutory allocation of the expense of upgrading the warning devices at Hickox Road

crossing.¹ Staff argued that it would be possible to make the Hickox Road crossing reasonably safe, following construction of the siding track, by installing either four-quadrant gates, or two quadrant gates with median barriers on the approaches, to discourage motorists from driving around lowered crossing gates and being struck by an oncoming train.²

4 Staff did not advocate for the requirement that Hickox crossing remain open under a private crossing agreement for flood and emergency access purposes.³ BNSF volunteered that condition through cross examination, re-direct examination, and in its post-hearing brief to address the concerns of the City, County, and Fire District witnesses. BNSF remains committed to that proposal in its petition for administrative review.⁴

5 The Initial Order would grant BNSF's petition to close Hickox Road crossing, subject to the flood and emergency access condition offered by BNSF, and subject to all⁵ of the requirements that Staff recommended as conditions of closure (and volunteered through WSDOT and/or BNSF witnesses). The Initial Order would also impose additional conditions which no party has either offered, or advocated. The additional requirements are (1) that two quadrant gates remain in place at Hickox Road to eliminate the need for flaggers when the crossing is in use for flood and emergency access, and (2) that BNSF negotiate a private crossing agreement with Western Valley Farms for that entity's use of the crossing

¹ RCW 81.53.271, .275; Post Hearing Brief of Commission Staff at ¶¶ 10-12.

² Post Hearing Brief of Commission Staff at ¶¶ 28-30.

³ *Id.* at ¶ 42.

⁴ BNSF's Petition for Administrative Review at ¶ 9; Staff understands from discussions with counsel for BNSF that the railroad agrees to access for fire district emergency purposes and flood-related purposes, not just the latter.

⁵ See Post Hearing Brief of Commission Staff at ¶ 31. Note that the Initial Order at ¶ 77 would only require BNSF to provide funding for the construction of *one* cul-de-sac turn around. This is inconsistent with the recommendation of the proponents (WSDOT and BNSF) as stated in the testimony of Mr. Norris. TR. 772:16-773:9. The Commission should correct the Initial Order to reflect a requirement that the proponents fund the construction of two cul-de-sac turnaround on both sides of the crossing.

during certain seasons. As part of this latter requirement, the Initial Order would require the railroad to communicate and/or coordinate its use of its mainline and siding track with Western Valley Farms during these periods.

II. BNSF's Petition for Administrative Review

6 In its Petition for Administrative Review, BNSF accedes to the Initial Order's condition (initially offered by BNSF to mitigate concerns raised by the local government opponents' objections) requiring it to negotiate an agreement for limited flood and other emergency use of the crossing.⁶ Given BNSF's acquiescence to this condition, and the fact that this condition would alleviate the local government parties' chief concerns about closure of the crossing, Staff agrees that the Commission should adopt this condition. The concerns that Staff expressed in its post-hearing brief about the lack of detail for such a condition⁷ are lessened by the specificity of requirements in the Initial Order⁸ (to which BNSF apparently agrees—minus the requirement that active warning gates remain in place).

7 BNSF objects to the Initial Order's requirement that the railroad retain two-quadrant gates at Hickox Road, even after the crossing is closed to use by the general public.⁹ However, BNSF would leave the level of protection to a diagnostic team.¹⁰ Staff agrees with BNSF that active warning gates *may* not be necessary for an emergency crossing and agrees that the question of the appropriate level of protection should be left to a diagnostic team. Staff supports BNSF's request that the final order reflect the diagnostic team requirement, in lieu of a requirement to retain active warning devices at the private crossing.

⁶ BNSF's Petition for Administrative Review at ¶ 9.

⁷ Post Hearing Brief of Commission Staff at ¶ 42.

⁸ Initial Order at ¶¶ 80-84.

⁹ BNSF's Petition for Administrative Review at ¶¶ 30-37.

¹⁰ *Id.* at ¶ 30-31.

Staff would also recommend that the diagnostic team included Commission Staff, as is generally the case with the diagnostic teams discussed in the portion of the *Railroad Highway Grade Crossing Handbook* quoted in BNSF's Petition for Administrative Review. Staff is open to the possibility of using flaggers at the emergency-only crossing instead of active warning devices.

8 BNSF's main objection to the Initial Order is to the requirement that it negotiate a private crossing agreement with Western Valley Farms.¹¹ Staff also objects to that requirement. The practicality of such a condition simply was not explored on the record and Staff shares many of BNSF's doubts about how a locked gate to keep out the general public could remain in place while still affording the trucks serving the farm a convenient means of access. The ability of railroad dispatchers to communicate the whereabouts of trains to West Valley Farms on an ongoing basis is also extremely doubtful, in Staff's view, and as a requirement imposed by this Commission begins to raise questions of federal preemption. While Staff disagrees with BNSF that access to a business does not weigh into the Commission's consideration of the "public convenience and necessity" for a crossing, Staff does agree with BNSF that the Commission should not seek to provide redress for any damage to private property rights that may result from closure of the public crossing. The private property owner's remedy, if any, lies through the courts. The courts have jurisdiction to determine compensation for inverse condemnation based on impairment of

¹¹ BNSF's Petition for Administrative Review at ¶¶ 17-29, 38-44.

reasonable access to property as a result of the actions of an entity with the power of eminent domain.¹²

III. Western Valley Farms Petition for Administrative Review

9 Western Valley Farms (WVF) asks the Commission to reweigh the evidence in favor of keeping the crossing open.¹³ Staff opposes this request to the extent that it is inconsistent with Staff's recommendations in its post-hearing brief, as well as with the emergency-access-only resolution discussed above.

10 In the alternative, WVF asks the Commission to clarify the condition that BNSF negotiate a private crossing agreement with WVF.¹⁴ Because Staff opposes the requirement of a private crossing for WVF, Staff opposes this request.

11 Finally, WVF asks that the Commission require BNSF to file with the Commission an order of the Surface Transportation Board "approving the location of the siding and reached after consideration of the alternative under NEPA" before the Commission enters a final order.¹⁵ There is no basis in the record for this request, nor is it clear what purpose it would serve. There is nothing in the record to indicate whether an order of the STB is even

¹² *Union Elevator & Warehouse Co. v. State ex rel. Dept. of Transportation*, 96 Wash.App.288 (1999)(owner of commercial property may have inverse condemnation claim based on substantial impairment of right of access to property); RCW 81.53.060 states "If the change petitioned for requires that . . . any portion of any existing highway be vacated and abandoned, twenty days' notice of the hearing shall be given to the owner or owners of the private lands, property, and property rights which it is necessary to take, damage, or injuriously affect, and to the owner or owners of the private lands, property, or property rights that will be affected by the proposed vacation and abandonment of the existing highway." RCW 81.53.180 then states that "In cases where new railroads are constructed and laid out by railroad company authorized to exercise the power of eminent domain, the right to take, damage, or injuriously affect private lands, property, or property rights shall be acquired by the railroad company by a condemnation proceedings brought in its own name and prosecuted as provided by law for the exercise of the power of eminent domain by railroad companies, and the right of eminent domain is hereby conferred on railroad companies for the purpose of carrying out the requirements of this chapter or the requirements of any order of the commission."

¹³ WVF Petition for Administrative Review at ¶ 5.

¹⁴ *Id.* at ¶ 7.

¹⁵ *Id.* at ¶ 12.

required for a siding construction project of this type. National Environmental Policy Act review may not even be triggered as a matter of federal law. In any event, WSDOT has reviewed the project under the State Environmental Policy Act. Federal preemption under the Interstate Commerce Commission Termination Act does not depend on specific action by the Surface Transportation Board—Congress expressly granted the STB *exclusive* jurisdiction over the construction of side track facilities.¹⁶

IV. Conclusion

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For the foregoing reasons, the Commission should grant the relief requested by BNSF Railway Company in its Petition for Administrative Review. The Commission should indicate that the protection to be afforded at the crossing will be left to the recommendations of a diagnostic team that should include Commission Staff, and the Commission should retain jurisdiction to ensure that the terms of the crossing agreement are consistent with the Commission's order.

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¹⁶ 49 U.S.C. § 10501(b) states:

The jurisdiction of the Board over—

(1) transportation by rail carriers, and the remedies provided in this part 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.

is exclusive. [Emphasis added.]

See also, *City of Auburn v. U.S. Gov't*, 154 F.3d 1025, 1029-1031 (9th Cir. 1998).

The Commission should deny the relief sought by Western Valley Farms in its
Petition for Administrative Review.

DATED this 25th day of July, 2008.

Respectfully submitted,

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