

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 ANSWER  
TO INTERVENER WESTERN VALLEY FARM'S  
PETITION FOR ADMINISTRATIVE REVIEW**

**July 25, 2008**

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## I. RELIEF REQUESTED

1 Pursuant to WAC 480-07-825, BNSF Railway Company (“BNSF”) answers  
intervener Western Valley Farm’s *Petition for Administrative Review* of the Initial Order in  
Docket No. TR-070696. Western Valley’s legal position is not entirely clear, except to assert  
that the Hickox Road crossing should be left open to the public, but it is evident they have  
cherry-picked the facts and that their analysis disregards the weight of contradictory evidence  
and the findings by the administrative law judge. BNSF further incorporates by reference its  
*Petition for Administrative Review* in support of its position here and requests the  
Commission reject Western Valley’s request for relief. BNSF further requests that the  
Commission modify the Initial Order to reflect that the public crossing will be closed  
conditioned upon a private crossing agreement that will provide for access during emergency  
response and flood-related operations.

2 If public use – especially including a seasonally high volume of farm trucks and  
equipment – is allowed over what is now characterized as an “exceptionally hazardous”  
crossing, it will not only create an unacceptable safety risk but will undermine the WSDOT  
siding project which will in turn create broad ramifications for railroad passenger and freight  
movement throughout the entire railway corridor.<sup>1</sup>

## II. STATEMENT OF FACTS<sup>2</sup>

3 Public safety is the primary consideration in the Commission’s decision whether to  
close an at-grade rail crossing, however, Western Valley has consistently disregarded the  
evidence about public safety in this case. Remarkably, the farm has never acknowledged that  
at-grade railroad crossings are dangerous, let alone that the Hickox Road public crossing

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<sup>1</sup> See, e.g., Gordon, TR 721:21-722:14.

<sup>2</sup> For a more comprehensive summary of the facts, see *Petitioner BNSF Railway Company’s Post-Hearing Brief* ¶¶ 1-5 (“BNSF’s Post-Hearing Brief”) and *BNSF Railway Company’s Petition for Administrative Review* ¶¶ 30-35 (“BNSF’s Petition for Review”).

would be “exceptionally hazardous” once the siding track project is complete.<sup>3</sup> Second, Western Valley determinedly maintains, notwithstanding the traffic impact study, witness testimony, and the tribunal’s findings to the contrary, that there will be some appreciable traffic increase at Blackburn from closing Hickox.<sup>4</sup> Third, the farm ignores the testimony and findings distinguishing the Blackburn crossing (end of the siding; no blockage or obstructed vision; supplemental traffic control) from the Hickox crossing (middle of the siding; frequent, unpredictable blockage and obstructed vision for potentially long periods of time).<sup>5</sup>

### III. STATEMENT OF ISSUES

4 Whether the Commission should deny Western Valley’s *Petition for Administrative Review* for the reasons set forth herein?

### IV. EVIDENCE RELIED UPON

5 BNSF relies upon the pleadings, transcripts, exhibits and Initial Order contained in the record, and incorporates by reference the related analysis set forth in *BNSF Railway Company’s Petition for Administrative Review*.

### V. AUTHORITY AND ARGUMENT

6 Western Valley broadly asserts that: “WVF would like to have ‘veto’ power over crossing closure” and “[t]he best solution . . . would be to leave Hickox Road open as a single track crossing with gates and lights already in place.”<sup>6</sup> Unfortunately, its petition is another attempt to filibuster the siding project, and its arguments regarding federal jurisdiction,

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<sup>3</sup> See, e.g., *Petition for Administrative Review by Western Valley Farms LLC, Intervener* (“WVF’s Petition for Review”); see also *Mount Vernon, Skagit County, Western Valley Farms, and Fire Proection [sic] District No. Three’s Post Hearing Brief*.

<sup>4</sup> See generally *WVF’s Petition for Review*.

<sup>5</sup> See, e.g., Initial Order ¶ 14.

<sup>6</sup> *WVF’s Petition for Review* ¶¶ 9, 14.

Commission involvement in private crossings, and potential impact on a nearby crossing are simply without support.

**1. The Surface Transportation Board Has Exclusive Jurisdiction Over Railroad Operations, But It Does Not Have Regulatory Authority Over Siding Tracks.**

7 Western Valley’s arguments about Surface Transportation Board (“STB” or “the Board”) involvement and National Environmental Policy Act (“NEPA”) review are legally incorrect. The STB has regulatory authority over rail line constructions under 49 U.S.C. § 10901, and, as it has stated, “as part of our regulatory review of such proposals, we conduct an environmental review of such activities under NEPA and adopt appropriate environmental mitigation.”<sup>7</sup> Congress in the ICCTA went out of its way, however, both to give the STB “exclusive” *jurisdiction* over “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities” *and* to confirm that “The Board does not have *authority* . . . over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.”<sup>8</sup>

8 The law explicitly provides under 49 U.S.C. § 10906 that no authority from the STB is required to construct “side tracks.”<sup>9</sup> Where “no license is required, there is no environmental review conducted by the Board.”<sup>10</sup> And the “absence of environmental review

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<sup>7</sup> *Friends of the Aquifer – Pet. for Dec. Order*, STB Fin. Dkt. 33966, 2001 WL 928949 at \*4 (Aug. 2001); *see* 49 C.F.R. § 1105.6.

<sup>8</sup> 49 U.S.C. § 10501(b)(2) (emphasis added); 49 U.S.C. § 10906; *see also Friberg v. Kansas City Southern Ry. Co.*, 267 F.3d 439, 443 FN 13 (Ct. App. TX 2001) (Although railroad siding tracks are under the exclusive jurisdiction of the STB, “rail carriers do not need prior STB approval to construct and operate those tracks.”).

<sup>9</sup> *See also Friends of the Aquifer* at \*5 (“nothing in the Act requires Commission authorization of railroad construction projects solely because such projects are costly. It is the purpose and not the cost, of such projects which determines whether Commission approval is required.”) (quoting *Nicholson v. ICC*, 711 F.2d 364, 369 (1983), *cert. denied*, 464 U.S. 1056 (1984)).

<sup>10</sup> *Friends of the Aquifer* at \*4 (“Because we lack licensing authority over the project, the environmental review provisions of NEPA do not apply.”); *see also* 49 C.F.R. § 1105.5(b) (“A finding that a service or transaction is not within the STB’s jurisdiction does not require an environmental analysis under the National Environmental Policy Act. . .”).

by the Board does not mean that the project is open to environmental review at the state or local level.”<sup>11</sup> In other words:

the Board may not have regulatory authority under 49 U.S.C. 10901 or 49 U.S.C. 10906 but state and local activity is preempted under 49 U.S.C. 10501(b) because of the Board’s exclusive jurisdiction over rail transportation.<sup>12</sup>

9 The argument that Western Valley is making here is substantially the same argument that the Friends of the Aquifer made with respect to the Hauser locomotive fueling facility in Spokane, which is located in a rail yard, and accordingly was not subject to the STB’s regulatory authority.<sup>13</sup> The Friends argued that construction of the facility was subject to the STB’s jurisdiction, so NEPA review was required.<sup>14</sup> BNSF argued, first, to the district court that there is a clear distinction between the STB’s exclusive jurisdiction and its regulatory authority.<sup>15</sup> Its exclusive jurisdiction meant that no one else could regulate construction of the fueling facility. The lack of regulatory authority meant that it could not regulate construction of the facility.<sup>16</sup> The court agreed.<sup>17</sup> The Friends then took their case to the STB, which confirmed that no STB approval or NEPA review was required.<sup>18</sup>

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<sup>11</sup> *Friends of the Aquifer* at \*4.

<sup>12</sup> *Id.* “[N]othing in section 10501(b) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes such as the Clean Air Act . . . unless the regulation is being applied in such a manner as to unduly restrict the railroad from conducting its operations or unreasonably burden interstate commerce.” *Id.* (citing *Joint Petition for Declaratory Order – Boston and Maine Corporation and Town of Ayer, MA*, STB Finance Docket No. 33971 (May 2001)).

<sup>13</sup> *See Flynn v. BNSF Corp.*, 98 F.Supp.2d 1186 (E.D. Wa. 2000); *Friends of the Aquifer*, 2001 WL 928949 (August 2001).

<sup>14</sup> *Flynn* at 1197.

<sup>15</sup> *See id.* at 1188-90 (“*Railroad Regulatory Scheme*”) (emphasis in original).

<sup>16</sup> *See also Cities of Auburn & Kent, WA – Pet. for Decl. Judg.*, 2 S.T.B. 330, 1997 WL 362017 at \*7 (July 1997) (“When sections 10906 and 10501(b)(2) are read together, it is clear that Congress intended to remove [STB] authority over the entry and exit of these auxiliary tracks, while still preempting state jurisdiction over them, leaving the construction and disposition of auxiliary tracks entirely to railroad management.”).

<sup>17</sup> *Flynn*, 98 F.Supp.2d at 1189-90; *see also Port City Prop. v. Union Pac. R.R. Co.*, 518 F.2d 1186, 1189 (10<sup>th</sup> Cir. 2008); *Cities of Auburn & Kent* at \*7 (“Thus, although we may not regulate the construction and disposition of spur and switching tracks, it is equally clear that state and local authorities may not regulate those activities either.”).

<sup>18</sup> *See generally Friends of the Aquifer*, 2001 WL 928949.

10 Even though no environmental review was required in this case, WSDOT voluntarily conducted a 14-page SEPA environmental checklist in February 2007 and made a Determination of Nonsignificance.<sup>19</sup> WSDOT also prepared a NEPA Documented Categorical Exclusion (“DCE”).<sup>20</sup> This does not salvage Western Valley’s NEPA argument, however, since “there is no authority for the proposition that BNSF [or WSDOT] is precluded from voluntarily complying with local [or federal] permitting regulations.”<sup>21</sup>

**2. The Commission Lacks Authority To Intervene In the Private Agreements of the Parties.**

**A. Private Crossings and Private Crossing Agreements Are Not Subject To Commission Regulation.**

11 In Washington, there is no statute that authorizes WUTC involvement in or regulation of private crossings or private crossing agreements. BNSF’s private crossing agreements allow a party to cross its tracks, and include general terms of use including maintenance, indemnity and permitted access.<sup>22</sup> It is outside the authority of the WUTC to dictate the terms of a private crossing agreement.<sup>23</sup> Other tribunals have held the same:

[W]here said matter in controversy is a private matter merely between the company and the individual, then the same become [sic] a private matter between the corporation and the individual and not a public concern, and, not being of public concern, the . . . Commission does not acquire jurisdiction thereof.<sup>24</sup>

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<sup>19</sup> See *Joint Response in Opposition to the City’s Motion in Limine and Motion for Summary Judgment* (dated September 12, 2007); *Declaration of Elizabeth Phinney in Support of Joint Response in Opposition to the City’s Motion in Limine and Motion for Summary Judgment* and exhibits attached thereto. The opponents contested the SEPA review; and although WSDOT defended its propriety, the agency agreed to issue a new SEPA determination. The record in this case closed before WSDOT’s *second* Determination of Nonsignificance was completed.

<sup>20</sup> *Declaration of Jeffrey T. Schultz in Support of Joint Response In Opposition To The City’s Motion In Limine and Motion for Summary Judgment* ¶ 28; see 23 C.F.R. § 771.117(d).

<sup>21</sup> *Flynn*, 98 F.Supp.2d at 1189.

<sup>22</sup> See, e.g., *Ploegman v. Burlington Northern and Santa Fe Ry. Co.*, 112 Wash. App. 1101, Not Reported in P.3d (2002).

<sup>23</sup> *Curl*, TR 887:23-25 (“the Commission would retain no jurisdiction if it were determined that it was a private crossing”); see, e.g., *Chicago, R. I. & P. Ry. Co. v. State*, 158 Okla. 75, 75, 12 P.2d 494 (1932) (“The . . . Commission does not have jurisdiction to order a railway company to maintain a private crossing, because no such grant of power has ever been given to said . . . Commission.”).

<sup>24</sup> *Chicago*, 12 P.2d at 497.



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Although the Commission's order to close the public crossing can and presumably will be made *contingent on* such an agreement within a given time frame, the Initial Order oversteps that authority by requiring BNSF to "operate and maintain" the existing safety features (flashing lights and gates) for the ordered private crossing. First, as discussed more fully in BNSF's *Petition for Review*, the parties should address whether and/or which devices should be installed at the private Hickox crossing, and neither the City of Mount Vernon, Skagit County nor fire district have disputed that a diagnostic determination among the parties is appropriate.<sup>25</sup> Further, to the extent that the Initial Order requires BNSF to leave the flashing lights and gates in place without an access control gate, it will make this crossing a defacto public crossing, used by whoever wants to cross there. This conflicts with the evidence about the "exceptionally hazardous" crossing configuration once the siding track is operational and poses a tremendous safety risk.

**B. Western Valley's Concerns About Potential Impasse in Negotiations Should Be Moot.**

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Western Valley questions the ramifications if the parties cannot agree to terms in a private crossing agreement. BNSF first reiterates its contention that there is no basis in the law or in the record for the relief initially granted to the farm. As such, BNSF's request for relief in its *Petition for Review* addresses and opposes the farm's request for mediated negotiations. It should be pointed out that the City of Mount Vernon, Skagit County and the rural fire district have not requested that the private crossing proposal(s) be made part of the record or mediated.<sup>26</sup> BNSF does not anticipate that private crossing discussions will result in deadlock since the agreement should be straightforward for emergency use, and the city, county and fire district have agreed to negotiate in good faith.<sup>27</sup> Moreover, since the Commission has retained jurisdiction to "effectuate the terms" of the order, in the unlikely

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<sup>25</sup> See BNSF's *Petition for Review* ¶¶ 30-35; see also *Skagit County Fire Protection District No. 3, City of Mount Vernon and Skagit County's Joint Answer to BNSF's Petition for Administrative Review* ("Joint Answer").

<sup>26</sup> See generally *Joint Answer*.

<sup>27</sup> See *Joint Answer* Exhibit A ("Municipalities' Language if diagnostic team approach is approved by the Commission").

event that BNSF and the municipalities cannot agree to terms, the parties may approach the Commission at that time.<sup>28</sup>

**3. Western Valley's Arguments About the Nearby Crossings Are Erroneous.<sup>29</sup>**

**A. The Blackburn Crossing is a Red Herring.**

14 Western Valley again attempts to draw the Commission's focus away from the real safety issues at hand by concentrating on the peripheral Blackburn crossing.<sup>30</sup> The Initial Order properly recognizes that:

Blackburn Road already handles much more traffic than Hickox Road and has additional capacity to absorb all of the traffic diverted as a result of closing Hickox Road. The record contains no evidence to suggest that additional traffic at Blackburn Road, despite its less than ideal road-track intersection configuration, will alter the level of safety currently in place.<sup>31</sup>

15 The order describes Blackburn's configuration as "less than ideal."<sup>32</sup> At-grade crossings *are* "less than ideal." The "ideal" crossing is one that does not exist. The Hickox public crossing, however, would be "exceptionally hazardous" when the siding project is finished.<sup>33</sup> And although Western Valley attempts to characterize Blackburn as an example of a crossing through a siding track, the hazards that will exist at Hickox (if left open) do not exist at Blackburn.<sup>34</sup> The Blackburn crossing is not "exceptionally hazardous."

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<sup>28</sup> See Initial Order ¶ 116.

<sup>29</sup> See BNSF's Post-Hearing Brief at section F(1) (pages 45-46).

<sup>30</sup> See WVF's Petition for Review ¶ 14 ("This argument is supported by the evidence that traffic will be diverted from the Hickox Road crossing to the Blackburn Road crossing.") (no internal citation).

<sup>31</sup> Initial Order ¶ 93.

<sup>32</sup> *Id.*

<sup>33</sup> Initial Order ¶ 101.

<sup>34</sup> Although Western Valley attempts to characterize the Blackburn crossing as an example of a crossing through a siding track, the hazards that will exist at Hickox (if left open) do not exist at Blackburn. Mr. MacDonald testified that "Blackburn is at . . . the end of the siding. . . . It wouldn't be blocked." MacDonald, TR 344:19-22.

BNSF witness Mr. Gordon explained that because parked trains do not stop close to Blackburn crossing, it "significantly reduces the risk of: (1) blocked or partially blocked views of trains on the mainline track, (2) drivers trying to get through a partially-blocked crossing, (3) emergency personnel trying to negotiate the line of sight around a parked train, and (4) pedestrians using a crossing near parked trains." Exh. No. 95; Gordon, TR 688:14-18; 718:14-18.

16            Nevertheless, Western Valley posits that the impact area’s accident rate will increase once the crossing is closed.<sup>35</sup> Putting aside that the evidence shows traffic will actually decrease at Blackburn, the *Hickox Road Railway Crossing Closure Traffic Impact Analysis* directly refutes Western Valley’s concern:

Under the With Closure alternative, the study area traffic accident rate will remain essentially the same since the overall traffic volume for the study area is unchanged. Some intersections will experience an increase or decrease in traffic volume to accommodate the closure but these volumes are not large enough to result in the potential for measurable increased accidents.<sup>36</sup>

17            The Initial Order also properly notes that the “alternative crossings can absorb additional traffic diverted from Hickox Road for all normal transportation needs,” that “Stackpole Road will be as safe as the Hickox Road grade crossing in its present configuration,” and that “Blackburn Road . . . will certainly remain safer than the situation presented by the added siding at Hickox Road.”<sup>37</sup>

**B.        Western Valley Fails to Acknowledge the Stackpole Crossing.**

18            Western Valley’s brief does not address or even mention the Stackpole crossing, which is closer to Hickox than Blackburn. It is only one mile away. As the Initial Order properly ruled, “the Stackpole Road [crossing is] readily available and in reasonably close proximity” and, once upgraded to active warning devices, “will be as safe as the Hickox Road grade crossing in its present configuration.”<sup>38</sup> It is both safer and reasonable to divert Western Valley’s trucks to Stackpole, just like other farms and neighbors in the affected area.

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The Blackburn crossing also “has . . . traffic signals interconnected with the active protection at the crossing itself, and thus provides as much with any controlled traffic intersection.” Peterson, TR 596:4-9.

<sup>35</sup> See *WVF’s Petition for Review* ¶ 3 (“the safety of the public will be served by segregating the agricultural equipment and truck traffic which currently uses the Hickox Road crossing from the passenger cars and urban traffic which uses Blackburn Road”); ¶ 4 (“Blackburn crossing . . . should remain open without the added pressure of mixing agricultural use with urban traffic.”).

<sup>36</sup> Exh. No. 13 page 29.

<sup>37</sup> Initial Order ¶¶ 73, 74.

<sup>38</sup> Initial Order ¶¶ 73, 74.

## VI. CONCLUSION

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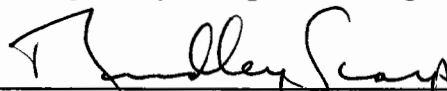
BNSF has made a concerted effort to address the parties' flooding and emergency response concerns. Those issues were raised by the municipalities as significant public safety issues that, if unresolved, presented an impediment to the closure of the Hickox crossing. An emergency-use-only locked gate has therefore been recommended to accommodate such emergency response and flood-related activities. However, by exceeding that specifically defined use, the crossing's exceptionally hazardous condition would unnecessarily threaten the safety of every neighbor, farmer, emergency responder, public motorist, pedestrian, train crew member, and rail passenger. Crossing safety is paramount, and as such it is much bigger than the marginal inconvenience alleged by Western Valley. The law is clear: public safety outweighs convenience.

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For the reasons set forth herein, BNSF respectfully requests that the Commission deny Western Valley's petition and amend the Initial Order as recommended in BNSF's own *Petition for Review*.

DATED this 25<sup>th</sup> 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 Answer to Intervener Western Valley Farms' 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 25<sup>th</sup> day of July, 2008 at Seattle, Washington.

  
\_\_\_\_\_  
Lisa Miller, Paralegal