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BEFORE THE WASHINGTON

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UTILITIES AND TRANSPORTATION COMMISSION

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CHELAN COUNTY,)
)Docket TR-061442

4

Petitioner,)
)Volume II

5

vs.)
)Pages 17-49

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THE BURLINGTON NORTHERN SANTA FE)

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RAILWAY COMPANY,)

8

Respondent.)

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Oral argument in the above-entitled

matter was held at 9:34 a.m. on Friday, July 20,

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2007, at 1300 South Evergreen Park Drive, S.W.,

Olympia, Washington, before Administrative Law Judge

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THEODORA MACE.

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The parties present were as follows:

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COMMISSION STAFF, by Jonathon Thompson,

Assistant Attorney General, 1400 South Evergreen Park

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Drive, S.W., P.O. Box 40128, Olympia, Washington,

98504-0128.

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CHELAN COUNTY, by Louis N. Chernak,

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Civil Deputy Prosecuting Attorney, 401 Washington

Street, Fifth Floor, P.O. Box 2596, Wenatchee,

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Washington 98807.

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BURLINGTON NORTHERN SANTA FE RAILWAY

COMPANY, by Bradley P. Scarp, Montgomery Scarp

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McDougall, 1218 Third Avenue, Suite 2700, Seattle,

Washington 98101.

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24 Barbara L. Nelson, CCR

25 Court Reporter

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1 P R O C E E D I N G S

2 JUDGE MACE: Let's be on the record in
3 Docket Number TR-061442. This is the case of Chelan
4 County against BNSF Railway Company. This matter
5 relates to the County's desire to alter the
6 under-crossing located at Chumstick Highway, at MP
7 1.83, and the issue before us today is the
8 Commission's jurisdiction to address this matter.

9 I have already received briefs from the
10 parties on jurisdictional issues, and we're here for
11 oral argument. I would assume that, Mr. Chernak,
12 that you would go first, but let me first take
13 appearances from Counsel.

14 If I didn't introduce myself on the record,
15 I'm Theodora Mace, the Administrative Law Judge who's
16 been assigned to this case, and today's date is July
17 20th, 2007. Your appearance, please.

18 MR. CHERNAK: My name is Louis, L-o-u-i-s,
19 N. Chernak. Do you need my WSBA number?

20 JUDGE MACE: No.

21 MR. CHERNAK: And I represent Chelan County.

22 JUDGE MACE: If this is the first time that
23 you've made an appearance on the record in this case,

24 I do ask you to give me your address, phone, fax and
25 e-mail information, if you would.

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1 MR. CHERNAK: Okay. Well, since we
2 generally operate out of a P.O. Box, I have to go
3 look at the pleadings, because I never remember it.
4 The secretary puts that on there. We're at P.O. Box
5 2596, Wenatchee, Washington, 98807, and this is the
6 Chelan County Prosecuting Attorney's Office at that
7 address. My telephone number at my particular
8 location is (509)667-6330.

9 JUDGE MACE: I have 6202 for you. Is that
10 not a valid number?

11 MR. CHERNAK: That's the general number for
12 the office. The civil office is at 6330.

13 JUDGE MACE: Okay. Then I have a fax number
14 for you of (509)665-0445.

15 MR. CHERNAK: It's now (509)667-6511.

16 JUDGE MACE: Thank you. And your e-mail is
17 LChernak@WAPA-Sep.wa.gov? Is that -- do you remember
18 --

19 MR. CHERNAK: Right.

20 JUDGE MACE: -- whether that's your e-mail
21 address?

22 MR. CHERNAK: Yes.

23 JUDGE MACE: Okay. Mr. Scarp.

24 MR. SCARP: Thank you, Judge Mace. My name
25 is Bradley, with an l-e-y, middle initial P., Scarp,

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1 S-c-a-r-p. My firm is Montgomery Scarp McDougall,
2 P.L.L.C. Our address is 1218 Third Avenue, Suite
3 2700, that's Seattle, Washington, 98101. Our office
4 phone is (206)625-1801, fax is (206)625-1807, and I
5 could be reached at e-mail at
6 Brad@MontgomeryScarp.com. We represent BNSF Railway
7 Company.

8 And with me today is Mr. John Li, last name
9 is L-i, and he is the Public Projects Manager for
10 BNSF Railway. Also in attendance is our law clerk,
11 Mr. Jay Spencer.

12 JUDGE MACE: Thank you.

13 MR. THOMPSON: Good morning. I'm Jonathan
14 Thompson, Assistant Attorney General, representing
15 the Commission Staff, and I think we all actually
16 have given a prior appearance in the case, but --

17 MR. SCARP: Ah, okay.

18 JUDGE MACE: I'm sorry if that's the case.

19 MR. CHERNAK: We did, Your Honor. I think
20 we had --

21 MR. SCARP: Telephonically.

22 MR. CHERNAK: -- a telephone hearing some
23 time ago setting up a schedule.

24 JUDGE MACE: That may well be. I apologize.

25 MR. CHERNAK: That's okay.

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1 JUDGE MACE: Well, then, you don't need to
2 give your appearance. Sorry about that. Then let's
3 proceed to oral argument, unless the parties have

4 something else they want to address before we get to
5 that.

6 MR. CHERNAK: Well, actually, I think this
7 is more the Railroad's motion for a dismissal, so
8 that would probably be more the sequence.

9 JUDGE MACE: Go ahead, Mr. Scarp.

10 MR. SCARP: Thank you, Mr. Chernak. Your
11 Honor, our purpose, and especially for not waiving
12 oral argument, is to distinguish and explain our
13 position in light of both the Commission's attorney's
14 response brief and Chelan County's response, and a
15 fair amount of this is set forth in our reply brief,
16 but based on what seemed to be an overbroad position,
17 and I would say even perhaps understandably in our
18 initial brief, we want to clarify the basis that we
19 are here and regarding the nuances and the
20 distinctions in the jurisdiction argument, and in
21 fact, why we believe it's jurisdictional, as opposed
22 to a substantive argument, if you will, regarding
23 economic apportionment.

24 Essentially, as we set forth, in the
25 petition of Chelan County, they have stated that

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1 their understanding of this project, the funding or
2 the cost of the project is estimated at 1.75 million.
3 And as we set forth in our brief, that wouldn't even
4 cover the cost of the temporary track that would need
5 to be in place just while the project was done. And
6 the entire project, we have no idea what cost that

7 would be.

8 I explain that only by way of background,
9 because it goes to a question that's one of ripeness,
10 that this is not a petition that sets forth what
11 exactly is being asked of the Railroad from an
12 economic perspective or what the funding is that
13 we're being asked to contribute.

14 And so to simply ask the Commission, you
15 know, under the statute, to say, Well, please assess
16 an apportionment to the railroad, as an initial
17 matter, there's nothing, based on the petition
18 itself, to assess, because it doesn't even establish
19 a remotely representative cost of the project.

20 So with that in mind, the real
21 jurisdictional issue in the response briefs of both
22 opposition briefs focus on the Iowa and Chicago
23 Railway case out of the Eighth Circuit, which we
24 contend is very clearly distinguishable.

25 In that case, and I will only summarize

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1 briefly, the court selected the Federal Railway
2 Safety Act in its limited preemption that is
3 contained in that legislation and said that it
4 applies because there is an issue of safety invoked.

5 Well, first, the statute in -- that was the
6 state statute that was at issue there was clearly a
7 safety statute, and to the extent that the court
8 connected or correlated the FRSA with applying in its
9 -- its limited preemption in view of the state safety

10 regulation or statute, then arguably you could
11 utilize that rationale.

12 Here, the RCW in question is simply one of
13 economic apportionment. It does not invoke safety.
14 So we are contending that to use the rationale of the
15 Eighth Circuit case is different because, for one, we
16 simply don't have a safety statute which you are
17 trying to apply here.

18 Secondly, with regard to the Eighth Circuit
19 case, it is not an issue, and I think a careful
20 reading of that case will confirm that the court does
21 not even address the fact that that issue -- well, I
22 take that back. The court does address that the FRSA
23 issue and its application was *su esponde*, the parties
24 didn't even brief that. And the court acknowledges
25 it just decided that this was something that it

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1 should take up. So this issue was not briefed in
2 that case and the distinction that we're making here
3 was not part of that case.

4 The larger issue, third, with regard to
5 that, and the distinction of that case, is the
6 Supreme Court in the state of Washington in the BNSF
7 versus City of Seattle case, has stated that the
8 ICCTA, the Interstate Commerce Commission Termination
9 Act, and the FRSA, have to be given equal
10 application. One does not trump the other.

11 And that is essentially what the Eighth
12 Circuit case is trying to do. It says, Well, because

13 there's a safety issue, we have to apply the FRSA,
14 and since it has limited preemption, it does not
15 supersede the state safety statute in that case.

16 And I guess, finally, with regard to that
17 issue, there is just simply a bootstrapping of a
18 highway safety issue, which is what Chelan's petition
19 here raises, a question of highway safety. There is
20 no factor, no issue in their petition or in anything
21 that they've briefed which addresses railway safety.
22 There is no railway safety component even invoked or
23 -- in any way, shape or form.

24 Therefore, to apply the Federal Railway
25 Safety Act for purposes of a limited preemption

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1 function in that statute requires some -- there isn't
2 anything in that statute that says, you know, if you
3 have a highway safety issue, you just, you know,
4 bring in the FRSA, and that's what we're contending
5 is going on here.

6 Now, that would put us back in the
7 preemption factor, which is what we contend is the
8 ICCTA, which provides to the Surface Transportation
9 Board jurisdiction over economic regulation of
10 railroads, is in fact where this case belongs.

11 And economic regulation is something that
12 the Congress decided that every county and
13 municipality and state throughout a railroad's
14 right-of-way cannot simply require the railroad to
15 make payments for whatever projects those local

16 municipalities may want.

17 Now, we're not here -- and this is really
18 one of the fundamental purposes for oral argument --
19 to challenge the overall jurisdiction of the
20 Commission. There are situations where funding is
21 exclusively local, where there are grade crossing
22 issues. The railroad has been before this Commission
23 and doesn't, you know, take the position, Well, you
24 know, we don't belong here at all. But this is
25 solely an economic regulation that is being imposed

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1 or sought to be imposed on the railroad.

2 So in our reply brief, we also addressed the
3 Code of Federal Regulation 23 CFR 646.210 (B)(2),
4 that the jurisdiction is -- just, it is solely in the
5 Surface Transportation Board, but the specific
6 regulation that I cited provides that, in an instance
7 where there's any federal funding, the railroad's
8 portion shall be zero.

9 That's because these things are regulated
10 federally, and you can't have someone tapping another
11 source, which is what the -- what that regulation
12 provides. You can't have them tap the railroad,
13 because the railroad is already regulated through
14 federal funding.

15 The regulation that I cited makes clear, it
16 expressly states that a separated crossing or grade
17 separation, as we refer to it, that is replaced is of
18 no value to the railroad. That is solely a highway

19 benefit or a state benefit. So that's why it says --
20 that's another reason why the regulation says the
21 railroad's portion will be zero.

22 So I guess that what we're trying to bring
23 back is, in part, the ripeness. If there is no
24 acknowledged funding or source of funding and only an
25 estimate that doesn't even cover, you know, maybe not

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1 even half of a temporary track, let alone an entire
2 overpass project that could be -- well, you know, we
3 don't know what the County has planned at this point,
4 but it could be ten million or whatever.

5 So until that is there and we can ascertain
6 what the funding is, we're just sort of leaping in a
7 hypothetical instance, and I guess that would be our
8 argument.

9 Your Honor, if you have specific questions,
10 or after Counsel responds, I may have a couple other
11 points, but I think I've made the primary points I
12 wanted to make.

13 JUDGE MACE: Thanks. Mr. Chernak.

14 MR. CHERNAK: Thank you.

15 JUDGE MACE: I guess, Mr. Chernak, I'm
16 looking through your filing to see if there is any
17 cost estimate. That may be something you want to
18 point out, if there is one.

19 MR. CHERNAK: I think it would be -- I think
20 that you would find that at the exhibit, if I'm not
21 mistaken, that would have been attached. I think

22 there's a letter from Burlington Northern.

23 JUDGE MACE: Oh, I see. I see something
24 that says BNSF has provided the County with a
25 preliminary estimate of \$1.75 million to alter this
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1 area. Okay.

2 MR. CHERNAK: Right. I don't know, without
3 looking further, I don't know if we included an
4 exhibit that had a letter with correspondence or not,
5 but that was the number we had.

6 JUDGE MACE: Go ahead.

7 MR. CHERNAK: Thank you. Well, just by way
8 of background, this trestle was built apparently in
9 the early 1930s, about the same time that the highway
10 was built. There was an exchange of properties
11 between the Railroad and the County.

12 JUDGE MACE: Can you speak directly into the
13 mike and just a little slower?

14 MR. CHERNAK: Thank you. One of the things
15 that you'll note in our petition is that the County
16 alleges this underpass has very short sight
17 distances, limited clearance, the roadway's narrow.
18 I might add it effectively has no shoulder between
19 the -- or under the trestle, where the supporting
20 piers are.

21 The highway and the Chumstick -- Little
22 Chumstick Creek share a narrow passage underneath
23 this trestle. There's also an abrupt change of
24 direction right at that point, and this probably is

25 the single most dangerous point in this highway.

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1 We've supplied some record of accidents that occur
2 there with some frequency. And so this is the reason
3 that the County is alleging that there's a safety
4 problem at this particular point.

5 And in looking at -- and I guess I may
6 address these issues out of sequence, but in looking
7 at RCW 81.53.060, the statute says this: That the
8 legislative authority of any county within which
9 there exists an under-crossing whose road is crossed
10 by any highway may file with the Commission their or
11 its petition in writing alleging that public safety
12 requires the establishment of an under-crossing or
13 over-crossing or an alteration in the method of the
14 crossing or approaches or the style or nature of
15 construction of an existing under-crossing, and
16 that's what we're looking at, is changing it
17 somewhat.

18 Basically, all we're looking at is trying to
19 get some more room to straighten the road out a
20 little bit and to not have traffic squeezed at this
21 point where there is a abrupt curve. And so people
22 come from highway speed down to, you know, having to
23 go almost at city speeds to get underneath there and
24 through, and so we want to try to eliminate that and
25 have it be a more modern and safer design. So we're

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1 relying on the statute.

2 JUDGE MACE: I understand you're relying on
3 the statute and you read it. I guess two things.
4 Well, let me just say there's two things I'm hoping
5 you'll focus on in your argument. One is how you tie
6 that safety argument to railway safety, which is one
7 of the things that Mr. Scarp mentioned, and then the
8 other thing is, again, to go back to this question of
9 cost, you did -- there was a figure that was placed
10 in your filing, that 1.75 million, and Mr. Scarp is
11 alleging that there isn't any kind of final figure or
12 estimate of what this would actually cost, including
13 a temporary track. And I'm wondering if the County
14 has a better -- well, if the County can say with some
15 certitude what the cost is that they're talking about
16 in this case.

17 MR. CHERNAK: No, we can't. We're trying
18 to, I think you'll see from our correspondence, we
19 were trying to work with the Railroad to figure this
20 out. We don't have, I think the engineers, nor do we
21 want to effect a project that would involve them,
22 because one of the things that is clear to me is that
23 any work that has to be done in the railroad
24 right-of-way has to be done by the railroad. So we
25 need to work collaboratively with them, as opposed to

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1 adversarially, we hope, and that's what we've been
2 hoping to do and did in the past. We brought this
3 petition because we've reached a stalemate.

4 But we don't have any good numbers, we don't

5 have more than some proposed plans that we gave to
6 the Railroad to see if we could have some discussion
7 or some, I guess, forecasting of what we could do.
8 We don't have it scoped out to the extent that we
9 have engineered an entire new trestle for them, and
10 we won't know until they help us on it.

11 JUDGE MACE: I guess my concern is if what
12 the Commission's authority is has to do with
13 apportioning the cost in some way to the Railroad,
14 what action would you have the Commission take in
15 that regard if you don't know the cost?

16 MR. CHERNAK: Yeah, if we don't know the
17 cost? Well, I think we're premature, because, one,
18 we haven't done discovery, we haven't done -- we
19 haven't even determined, I guess, if you have
20 jurisdiction to hear the matter at all. And once we
21 get beyond that, I think we need to set up a
22 schedule, as we have in the past, for supplying those
23 materials to the Commission so you can make a
24 decision on substantive matters if, in fact, we
25 prevail in this action, or in this motion.

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1 So right now, I think we're just looking at
2 seeing if we're going to go forward and trying to
3 plod through to the end and see if it's even going to
4 be, I guess, feasible ultimately. If the cost is so
5 high we can't afford it, we may or may not be able to
6 proceed.

7 The source of funding right now is just

8 state money and county money. We don't have any
9 federal money involved.

10 JUDGE MACE: Go ahead. I'm sorry I
11 interrupted, but I just wanted to make sure that you
12 covered those areas where I was concerned.

13 MR. CHERNAK: Okay. Well, I can talk about
14 apportionment of the cost, because Counsel raised
15 that, and I think the cases do address it. It will
16 just take a second, if you would indulge me. The --
17 I think RCW 81.53.130 talks about how, when there's a
18 state case such as the Commission has before it,
19 there's an apportionment of cost.

20 If we do get some federal money for this, it
21 may be that 23 CFR 646.210 does kick in. This is
22 what you would call the double dipping regulation
23 that talks about what happens if there's federal
24 involvement and not wanting the state agency or
25 entity or municipality to be compensated I guess

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1 twice for the same project, basically. That's why
2 that's in play.

3 I don't think that there's any indication
4 that that comes into play unless we get federal money
5 involved, and right now there isn't any. So I think
6 that particular provision is not applicable, at least
7 at this time yet. If we get some federal grants or
8 federal funding, we may be discussing this in a
9 further motion or in a hearing.

10 I can address the -- if you want, the

11 substance of why you can hear a case on construction.
12 I don't know if I've addressed the other questions
13 adequately for you.

14 JUDGE MACE: Well, I think the other issue
15 for me was whether -- how this ties into railway
16 safety, as opposed to highway safety?

17 MR. CHERNAK: Okay, okay. Well, again, if I
18 could take a second here. I'm looking at the Iowa,
19 Chicago and Eastern Railway Corporation case, again,
20 the Eighth Circuit case, the only case really that --
21 aside from the Tyrell case out of the Sixth Circuit,
22 the cases are the only ones on point in this sort of
23 situation, the same fact type pattern that the
24 tribunal now has before it.

25 Just quote this language directly out of the
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1 analysis in that Iowa case. And in this, I guess
2 Counsel was right, and I'll just bring this out, that
3 the FRSA was raised *su esponde*, but they do comment
4 on it extensively. It says, In this case, neither
5 the appellate briefs nor the district court's opinion
6 discuss the FRSA.

7 When we raised the issue before oral
8 argument, ICNE argued that the limited FRSA
9 preemption provision does not apply because the
10 County seeks to replace the bridges for reasons of
11 highway improvement, not rail safety.

12 This argument is unpersuasive. The reasons
13 for replacing bridges as they did in the stipulated

14 record clearly indicate the safety component. For
15 example, the risk to school buses and emergency
16 vehicles will bottom out on a highway bridge is a
17 safety issue, albeit a highway safety issue.

18 If ICNE is arguing that rail safety, for
19 purposes of FRSA preemption, does not include the
20 highway safety risk created at rail crossings, that
21 cramped reading of the FRSA is inconsistent with 49
22 USC Section 20134(a), with the Federal Rail Crossing
23 regulations discussed in Easterwood, and with common
24 sense.

25 More importantly, the argument ignores other
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1 federal statutes that specifically address the
2 problem of deteriorating or inadequate rail highway
3 bridges. And they go on to talk about Congress, for
4 decades, forging a federal-state regulatory
5 partnership to deal with problems of rail and highway
6 safety, and talking about replacement of obsolete
7 bridges and that the ICCTA does not address these
8 problems.

9 This silence cannot be reflected as a clear
10 and manifest purpose of Congress to preempt
11 traditional state regulation of public roads and
12 bridges that Congress has encouraged with numerous
13 other statutes.

14 There's also quite a bit of discussion in
15 cases about the police powers that are reserved to
16 the states if they aren't specifically preempted.

17 That's the other basis. I think we've probably
18 briefed all that and we have that.

19 JUDGE MACE: You don't have to go any
20 further into it. I just wanted you to address that.

21 MR. CHERNAK: Okay. So -- well, I don't
22 think we're bootstrapping the safety issues in here.
23 We wouldn't be doing this project if it wasn't a
24 safety issue, we wouldn't be planning for it. So --
25 and do you have other questions before I go further?

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1 JUDGE MACE: I don't.

2 MR. CHERNAK: Okay. A couple of other
3 points I want to make, because when you look at the
4 cases cited by BNSF in support of its analysis, we
5 see that they fall into several categories that are
6 areas that are covered by the ICCTA.

7 First, you have several cases they cite in
8 their several briefs involving rail service. They
9 cite the Chicago Northwestern Transportation and
10 KALO, K-A-L-O, case, which involved abandonment of a
11 rail line, CSX Transport case versus Georgia Public
12 Service, which was closing a local railroad agency or
13 office or cutting back on staff in the state of
14 Georgia, another service case.

15 Their operation cases, the City of Seattle
16 case versus BNRR and the CSX versus City of Plymouth
17 case out of Sixth Circuit, both of those cases talk
18 about or find that time limits set for blocking
19 crossings actually impairs service or operation of

20 the railroad by basically affecting speed limits and
21 operating times and all that.

22 The Railway Labor Act in the DeFord case
23 preempts the field of railroad labor law, and then
24 there are a series of, and I won't go through all the
25 cases, but a series of land use or environmental type
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1 cases where they are dealing with permitting or
2 environmental issues that are specifically dealt with
3 by the Surface Transportation Board.

4 So all the cases that have been cited I
5 guess in favor of depriving the state of jurisdiction
6 to deal with this matter have to do with matters that
7 really are regulated by the ICCTA.

8 On the other hand, the Iowa, Chicago and
9 Eastern Railroad Corporation case and the Tyrell case
10 both are cases that are fairly well on point that I
11 think give this, I guess, impetus for the WUTC to be
12 able to make a ruling in this matter.

13 I think, when you look at the subject matter
14 of all those cases that are cited, there are only --
15 really, only the Iowa case is clearly on point with
16 this type of situation.

17 Just a couple more points, then. One of the
18 things that we all have access to is the Web, and if
19 you look at the mission for the Surface
20 Transportation Board, as they describe it, they talk
21 about them being the economic regulatory agency, and
22 unfortunately, anything you do in life has to do

23 something with economics, but regulation is
24 different. And we aren't asking for regulation. We
25 know it has some impact, but it isn't a regulation.

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1 We're not affecting train speeds or routes or any of
2 that.

3 But they review things like railroad rate
4 and service disputes and proposed mergers. They talk
5 about, in their construction area of their Web site,
6 that they have authority to -- or they should be --
7 there should be an application in the request for an
8 extension of a rail line or to construct or operate a
9 new rail line. In all those cases, you must apply to
10 the STB, but here we're dealing with I think strictly
11 state issues, and there's a pretty well thought out
12 and pretty comprehensive state statutory scheme under
13 RCW 81.53, so we're, I think, within that realm of at
14 least powers that are reserved for states and not
15 addressed by ICCTA. I frankly don't think they want
16 to hear from us there.

17 The only place that they require
18 application, if there's an existing carrier, is there
19 must be approval to construct a new rail line or to
20 operate a line owned by a non-carrier, like a spur to
21 go off to somebody's lumber yard or something, and
22 that's at 49 CFR 1150.1(a).

23 So since the work is being done on the
24 tracks or on the area of an existing carrier,
25 provisions of RCW 81.53.130 mandate that, actually,

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1 that the work be done within that area by the
2 existing carrier, and I think that CFR provision 49
3 CFR 1150.1 applies.

4 JUDGE MACE: Thank you. Mr. Thompson, do
5 you have anything you want to add to this argument?

6 MR. THOMPSON: Well, just a little bit. Mr.
7 Chernak covered a lot of the legal issues, but I did
8 want to just step back a little bit and give my view
9 of what the Commission's role is under Chapter 81.53.
10 And I think it's similar to rules that other state
11 agencies have throughout the country to basically
12 hear disputes between road authorities and railroads
13 concerning the conditions that exist at railroad
14 highway crossings and to decide what those conditions
15 should be in the interest of public safety.

16 And that's safety not only from the
17 standpoint of say the railroad and the railroad's
18 crew, but also the highway users. I don't think it's
19 restricted to, for example, safety issues related to
20 cars and trains striking each other. It could also
21 include the possibility of highway traffic being --
22 highway safety being impacted by railroad structures,
23 such as a narrow under-crossing, as in this case.

24 That chapter, also, when dealing with the
25 conditions of crossings, it also deals with issues of

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1 who -- which party has a duty to maintain particular
2 surfaces or structures, and it allows the Commission

3 certain powers of apportioning costs, deciding what
4 the just allocation of costs for a particular design,
5 and when you think about it, it could hardly do
6 otherwise, because it would be one thing for the
7 Commission to decide what the conditions should be,
8 but I think it's obvious that the parties would still
9 be likely at impasse unless it was agreed who foots
10 the bill for whatever it is that the Commission
11 requires, because there's no other -- there's no
12 other authority that the parties can turn to to
13 resolve those kinds of disputes.

14 I see this petition as not simply being a
15 matter of cost allocation, but being a request by the
16 County for this Commission's determination as to
17 whether the change in the under-crossing should be
18 made and then, secondarily, what the just allocation
19 of costs for that should be.

20 As we stated in our brief, we think that the
21 Eighth Circuit case is -- was correctly decided on
22 the federal preemption issues and, in fact, is on all
23 fours with the facts here. In that case, the issue
24 was specifically the replacement of old railroad
25 over-crossings that were outdated from a road user's

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1 standpoint and not necessarily from the railroad's
2 operational perspective.

3 So -- and the statute in that case, in fact,
4 apportioned the entire cost of that under state law
5 to the railroad. In this case, we actually have a

6 statute that's less favorable to the local
7 jurisdiction in that it allows the Commission to
8 apportion the cost as it sees fit. So just on the
9 abstract preemption issue, I think that there really
10 can be little question that that case deals with it
11 and addresses it.

12 It's also important that both the Surface
13 Transportation Board, which administers the laws
14 under the Interstate Commerce Commission Termination
15 Act, as well as the Federal Railroad Safety
16 Administration agreed that the similar arguments made
17 by the railroad in that case were too broad, too
18 sweeping. So the Railroad tries to distinguish that
19 case -- well, I think it is indistinguishable in its
20 facts, but there's also an attempt to distinguish it
21 based on a different rule in the Ninth Circuit or in
22 the state supreme Court here, but I think that that
23 fails, as well.

24 There's the City of Auburn case, which is a
25 Ninth Circuit case, and in that case, that case

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1 followed on a Surface Transportation Board preemption
2 order. In other words, the Surface Transportation
3 Board had said -- I think the City of Auburn was
4 preempted from imposing certain permitting or
5 environmental review requirements on the reopening of
6 a rail line in that case.

7 This is different, because in this case, the
8 Surface Transportation Board hasn't asserted that it

9 has a role or that the states are preempted. In
10 fact, in the Eighth Circuit case, it weighed in with
11 an amicus brief saying there was no preemption.

12 So the other case is the state Supreme
13 Court's BNSF versus City of Seattle, I might have the
14 parties backwards on that, but that case involved a
15 Seattle City ordinance where the City attempted to
16 control the amount of time that trains could occupy
17 certain crossings, surface crossings within the city,
18 and the court found that that got into matters of
19 controlling the switching operations of the railroad
20 and was preempted under the ICCTA for that specific
21 reason, based on that specific statutory language,
22 and also found that it got into matters regulated by
23 the Federal Railroad Administration because it dealt
24 with train speed, I believe, and perhaps some other
25 specific safety regulations promulgated by the

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1 Federal Railroad Safety Administration.

2 So neither of those cases, neither the Ninth
3 Circuit case or the City of Seattle state Supreme
4 Court case rejects the notion that safety matters are
5 generally outside of the purview of the Surface
6 Transportation Board and the ICCTA, and that
7 crossing, specifically crossing matters, are within
8 that safety sphere.

9 So I think that's about all I had to add,
10 unless you had any further questions.

11 JUDGE MACE: Thank you. Mr. Scarp, any

12 final words?

13 MR. SCARP: Can I respond to just a couple
14 of points in summary fashion, Your Honor?

15 I think both the County and Mr. Thompson,
16 for the Commission, have identified what we would
17 characterize as sort of a broad possibility of safety
18 issues, but there have been none identified that I've
19 heard that specifically address railway safety such
20 that would invoke the FRSA.

21 And I'm fully cognizant, Your Honor, of what
22 the Eighth Circuit said about that and their
23 rationale, again, with an issue that they raised
24 during oral argument that was never briefed and used
25 fairly sweeping language about their conclusions of

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1 how that should all work.

2 Another thing, and to distinguish Mr.
3 Thompson's characterization of the Iowa and Chicago
4 case, excuse me, Iowa, Chicago and Eastern Railroad
5 case, the Surface Transportation Board did, in fact,
6 file an amicus, and essentially what you have in that
7 opinion is the Court's characterization of what the
8 STB says, and again, a careful reading, the STB said
9 that the entire matter was premature and that it
10 hadn't weighed in, but it didn't take what I would
11 characterize as the Railway's broad jurisdictional
12 argument, which I might distinguish is why we're here
13 today, not to dispute the entire authority of the
14 Commission, but to distinguish what the Railroad may

15 not have distinguished there, I don't know.

16 But again, the Eighth Circuit just sort of
17 swept by and said, Well, gee, the STB has been here
18 and they're not agreeing with the Railroad's broad
19 argument, but what the STB, in fact, said was, you
20 know, this funding matter is premature and should be
21 considered. Well, the Eighth Circuit sort of swept
22 that aside and said, Oh, no, we've got a safety issue
23 here. You guys are out.

24 I still hear a lot about highway safety.
25 I've heard about how they'd like to increase speeds

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1 on the highway, and really what this boils down to is
2 a highway project that goes past our right-of-way or
3 under our right-of-way, and they would like us to pay
4 for it.

5 I have heard from Mr. Chernak that they
6 would like to work collaboratively with the Railroad,
7 but without some understanding of what this costs, we
8 have no way to collaborate. The railroad works with
9 the state, municipalities and counties all the time
10 in order to get the work done, because, yeah, when
11 you're on the right-of-way and you've got trains,
12 there are very, very specific rules governing how
13 work is done and it's done all the time.

14 But collaborating on who's going to pay for
15 this when all I've heard, in response to your
16 question about funding, and correct me if I'm wrong,
17 I haven't seen anything that says 1.75 million,

18 except in their petition. I've seen a letter which
19 addresses, from an engineering standpoint, different
20 structural issues, but, again, you know, Mr. Li here
21 can confirm, not that I think it's necessary, but
22 that -- this 1.75 million doesn't even begin to
23 address the temporary track, let alone the entire
24 project.

25 So we're still in a -- I think which was

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1 acknowledged -- perhaps a premature stage if we don't
2 know what we're talking about. This is all a
3 hypothetical. And the County says, well, they'd like
4 to go forward and find this out. Well, that's got
5 the cart before the horse. Typically, these projects
6 are -- there's a funding mechanism, there's
7 estimates, and then, you know, if there's still
8 issues, it might be before -- and again, this is
9 hypothetical, it would be before a tribunal to
10 discuss what's going to happen and what are these
11 issues.

12 I don't know what the funding is. There's a
13 statement that there's local and state funding. As a
14 practical matter, I've not seen much state funding
15 for projects like this, for highway projects that
16 don't have a federal component to them. Those funds
17 whittle through, and I'm not here to dispute Mr.
18 Chernak is wrong, but again, he's talking about
19 possible federal funding. All of this just sort of
20 supposes possibilities and asks the Commission to

21 just go ahead and move forward with the idea of
22 allocating something we don't know anything about.

23 I guess, in response to the, again, sort of
24 the broad or what I might call vague concepts of
25 safety, I'm still unaware of what would implicate the
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1 FRSA, notwithstanding the Eighth's Circuit's ability
2 to do so on their own, but to tear down an existing
3 mainline track to move and rebuild an existing
4 mainline track that, you know, runs all the way to
5 the Great Lakes, and then ask us to pay for it, I
6 would submit is complete economic regulation, and
7 that's what's at issue here.

8 And we don't have any problem with modern
9 highway safety speed or -- excuse me, highway speeds
10 or shortening their curve or straightening their
11 curve or whatnot, but it's a question of who does
12 that benefit. And you know, I think the CFR is
13 instructive here that replacing an existing separated
14 grade crossing -- or excuse me, not grade crossing,
15 but separated -- grade separation is no benefit here,
16 and I still have --

17 JUDGE MACE: So for example, if, for
18 whatever reason, let's say we could tie it to the age
19 and old-fashioned method of constructing that
20 overpass, some big truck ran into the -- ran into the
21 railway bed. Don't you think that would affect the
22 Railroad?

23 MR. SCARP: If some vehicle ran into the

24 bridge and caused damage?

25 JUDGE MACE: Right.

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1 MR. SCARP: Well, I think viewing the photos
2 of that particular site, it looks like somebody has
3 run into it. But insofar as like a hypothetical,
4 could somebody running into it cause damage to it?
5 Well, I suppose they could. And again, how does that
6 implicate rail safety?

7 JUDGE MACE: It doesn't -- I mean, there
8 would be an impact on the Railroad, I presume?

9 MR. SCARP: Well, it could cause the
10 Railroad to stop its operation until it was repaired.
11 That would be, you know, a cost, a repair issue.
12 Again, the stated reasons are highway safety, so I'm
13 -- those are really all the points we had to make.
14 And thank you, Your Honor.

15 JUDGE MACE: Okay. Thank you. I think that
16 should finish our argument today, and as I said, I
17 have read the briefs, and because I'm also in the
18 middle of writing another decision, I probably will
19 not get to this immediately, as I had hoped before.
20 I hope to have it done fairly soon. And at the point
21 I finish it, then I'll contact the parties, we'll see
22 where we are. Of course, you'll get the order and,
23 depending on the outcome, then we'll deal with
24 scheduling issues.

25 Is there anything else we need to address

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1 this morning? I thank you very much for your
2 arguments.

3 MR. SCARP: Thank you.

4 MR. CHERNAK: Thank you, Your Honor.

5 (Proceedings adjourned at 10:25 a.m.)

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