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January 17, 1995

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STATE OF WASH.
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Mr. Steve McLellan, Secretary
Washington Utilities and
Transportation Commission
1300 South Evergreen Park Drive SW
PO Box 47250
Olympia, WA 98504-7250

Re: Docket No. TR-940309

Dear Mr. McLellan:

Enclosed please find the original and three copies of the Post Hearing Brief of Commission Staff in the above-referenced matters. Please accept the same for filing.

Very truly yours,

Ann E. Rendahl
Assistant Attorney General

dc

Enclosures

cc\enc: Parties of Record

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of the
WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION,
BURLINGTON NORTHERN
RAILROAD COMPANY, and THE
NATIONAL RAILROAD PASSENGER
CORPORATION for Modification of
Order Regulating the Speed of Passenger
and Freight Trains in Marysville,
Washington.

DOCKET NO. TR-940309

POST HEARING BRIEF OF
COMMISSION STAFF

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COMMISSION

I.
SUMMARY OF ARGUMENT

In determining whether to grant or deny the petition requesting increased passenger and freight train speeds in Marysville, the Washington Utilities and Transportation Commission ("Commission") must consider whether the proposed speeds are "commensurate with the hazards presented and the practical operation of the trains". RCW 81.48.040. In balancing these factors, the Commission must consider whether any essentially local safety hazards exist which would justify establishing lower train speeds than the Petitioners have requested.

The railroad track through Marysville is maintained to Federal Railroad

Administration Class 4 standards over which passenger trains may travel up to 80 m.p.h. and freight trains may travel up to 60 m.p.h. The requested train speeds are within these limits. The Commission Staff has found no essentially local safety hazards in Marysville requiring lower train speeds. Although there are a large number of railroad grade crossings in Marysville and significant automobile traffic across the crossings, the number of accidents at these crossings is quite low. Increasing train speeds at these crossings will not create an unusually dangerous condition, as the warning time for vehicular traffic at these crossings will remain the same regardless of the train speed. The private crossings all have stop signs and adequate sight distances to see oncoming trains, and one private crossing has signals and gates. Thus, Staff recommends the petition be granted, but that the Commission condition any increase in train speeds on the construction of gates and signals at the 88th Street crossing, and the placement of "Do Not Stop on Track" signs to be posted in all four quadrants of the public grade crossings in Marysville.

II. STATEMENT OF FACTS

Burlington Northern Railroad Company, ("Burlington Northern") owns the mainline railroad track which runs through the City of Marysville, Washington ("the City" or "Marysville") from its southern city limits at mile post ("MP") 37.6 to the current northern city limits at approximately MP 43.3. Tr. 357, Ex. 22. On February 28, 1994, Burlington Northern, the Washington State Department of Transportation ("WSDOT"), and the National Railroad Passenger Corporation ("Amtrak") filed a joint petition with the Washington Utilities and Transportation Commission ("Commission") seeking to increase the maximum

passenger and freight train speed limits in Marysville.¹

The Petitioners seek to increase the maximum passenger train speed through Marysville from 25 miles per hour ("m.p.h.") to 30 m.p.h. between MP 37.8 and MP 38.5, from 25 m.p.h. to 50 m.p.h. between MP 38.5 and MP 41, and from 25 m.p.h. to 79 m.p.h. from MP 41 to MP 43.3. Tr. 175-176. Similarly, the Petitioners seek to increase the maximum freight train speed through Marysville from 25 m.p.h. to 50 m.p.h. between MP 38.5 and MP 43.3. Tr. 78. The single mainline track through Marysville meets Federal Railroad Administration ("FRA") standards for Class 4 track, over which passenger trains may travel at a maximum speed of 80 m.p.h. and freight trains may travel at a maximum speed of 60 m.p.h. Tr. 128.

The petition to increase passenger and freight train speeds through Marysville is a part of a program initiated by the State of Washington to reestablish passenger train service between Seattle, Washington, and Vancouver, B.C. Tr. 14-15, 18. This program is part of a larger project to establish high speed rail service along the Pacific Northwest Rail Corridor between Eugene, Oregon and Vancouver, B.C. Tr. 18-19. The Washington State legislature has appropriated \$24 million to WSDOT in order to upgrade the Burlington Northern tracks to allow for increased passenger train traffic and speeds. Tr. 39. WSDOT has entered into a contract with Burlington Northern to make these improvements. Tr. 23-24. Burlington Northern is contributing \$3 million for improvements in Canada. Tr. 45. Likewise, WSDOT and Amtrak have entered into a contract in which Amtrak will operate passenger

1. Burlington Northern, WSDOT, and Amtrak will be referred to collectively as the "Petitioners".

trains along this corridor, and WSDOT will pay for 70 percent of the operational costs in addition to the funds spent on upgrading the track. Tr. 23, 39.

The Petitioners anticipate running one round-trip Amtrak train daily through Marysville between Seattle and Vancouver in 1995, two round-trips in 1997, and possibly three round-trips by 1999. Tr. 46, 47. Fourteen freight trains presently run along the Burlington Northern track through Marysville each day. Tr. 76. There is currently no passenger train traffic through Marysville. To accommodate passenger freight traffic along its mainline, Burlington Northern alleges that it must increase its capacity by increasing freight train speeds. Tr. 42-43, 77-78.

The Petitioners determined through computer simulation that the minimum running time between Seattle and Vancouver, B.C. would be three hours and fifty-five minutes, factoring in such components as track conditions, locomotive power, train running time, the time trains are stopped at stations, and delay. Tr. 28, 70. The Petitioners determined that the three hour and fifty-five minute running time was necessary in order to be competitive with other modes of travel. Tr. 19-20, 54. The Petitioners maintain that the requested increases in both passenger and freight train speeds through Marysville are necessary to achieve the three hour and fifty-five minute running time. Tr. 28. The Petitioners estimate that increasing train speeds through Marysville will reduce the running time of passenger trains by seven minutes, and freight trains by approximately five and three-quarter minutes. Tr. 55.

Five and one-half miles of Burlington Northern track run through the City of Marysville. At the southern edge of Marysville at approximately MP 37.8 , the railroad

track crosses bridges over Steamboat Slough and Ebey Slough. Tr. 144. Train speeds over these bridges are currently limited to 20 m.p.h due to manual locking devices on the bridges. Tr. 170. Burlington Northern plans to upgrade the locking devices to allow passenger train speeds of 30 m.p.h. Tr. 171. For the next five miles, the track runs parallel to and between Interstate Highway 5 ("I-5") and State Street, one of the main arterial streets. Tr. 217.

The City of Marysville has a population of 16,000, with an additional 20,000 persons living in the nearby unincorporated areas. Tr. 241. The area south of First Street adjacent to the railroad tracks has been zoned for industrial use. Tr. 314. However, north of First, the City has zoned and planned for higher density land uses such as retail, professional, multifamily dwellings and commercial use. Tr. 314-317. North of 122nd Street, the City has zoned and planned for primarily industrial use. Tr. 317. New residential, commercial, and industrial development is planned for areas close to the railroad tracks. Tr. 316-17, 320-24.

There are ten public grade crossings, and seven private grade crossings in the City of Marysville. Ex. 15. All of the public grade crossings, with the exception of the 88th Street crossing, are protected by gates, signals, and activation equipment. Tr. 146-154. Burlington Northern plans to put gates and signals at 88th Street, as well as to upgrade or adjust the activation equipment for each crossing to allow for a minimum of twenty seconds of warning time before a train reaches the crossing, regardless of the speed of the train. Tr. 146-47. The crossings at 4th Street, 88th Street, and 116th Street are intertied with the traffic signals at the closest intersection to allow traffic to clear from the railroad tracks. Tr. 148, 151, 152, 296-298. All of the private crossings have stop signs on each side of the crossing and

have adequate sight distances to see oncoming trains. Tr. 227-228, 413-415. One private crossing, at 124th Street, has been equipped with gates and signals. Tr. 153.

A traffic study conducted at the direction of the City indicates that automobile traffic through intersections close to the railroad crossings varies from 3400 vehicles per day at 136th Street to 36,000 vehicles per day at 4th Street. Tr. 213-214; Ex. 16. By 2010, the City projects the traffic will vary from 3200 vehicles per day at 80th Street to 47,500 vehicles per day at 88th Street. Tr. 214; Ex. 16.

Even with the seventeen crossings in Marysville, the number of grade crossing and other rail accidents in the City of Marysville over the last six years is low: three grade crossing accidents and two pedestrian accidents. Tr. 84-86, 99, 101. Of the three grade crossing accidents, one involved a car breaking off the crossing gate arm to get off the crossing, and the other two involved trains hitting vehicles stopped on the tracks. Tr. 85-86, 101. There were no fatalities in any of the grade crossing accidents. Both of the pedestrian accidents were fatal: However, one was an apparent suicide, and the other involved a person sitting on the railroad tracks who did not move when the train blew its whistle. Tr. 84-85, 99-100. There have apparently been three derailments over the last 20 years which were not within the Marysville city limits. Tr. 102. A derailment in 1991 resulted in a fire, but apparently no other damage. Tr. 102.

III. STATEMENT OF ISSUES

A. Does the Federal Railroad Safety Act preempt the Commission from setting train

speeds lower than the maximum speeds set forth in Federal Railroad Administration regulations?

B. Should passenger and freight train speed limits in Marysville be increased as requested by the Petitioners?

IV. ARGUMENT

A. The Federal Railroad Safety Act Does Not Preempt the Commission From Establishing Lower Train Speeds Where Necessary to Eliminate or Reduce Local Safety Hazards.

The Petitioners are likely to argue that the Federal Railroad Safety Act ("FRSA"), 45 U.S.C. § 421 et seq., preempts the Commission from regulating train speeds. The FRSA includes the following express preemption provision:

The Congress declares the laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulations, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. § 434 (Emphasis added). This provision preempts some, but not all, state regulation of railroad safety. A state may continue to regulate railroad safety if such regulation meets a three-prong test. The regulation or law must be "necessary to eliminate or reduce a local safety hazard," the regulation must not conflict with federal regulation, and

it must not create an undue burden on interstate commerce. This exception was intended to allow states "to respond to local situations which are not statewide in character and not capable of being adequately encompassed within uniform national standards." National Ass'n of Regulatory Util. Comm'rs v. Coleman, 542 F.2d 11 (3rd Cir. 1976).

Under RCW 81.48.030, the Commission has the exclusive right to set and regulate train speeds within the city limits of all cities, except first class cities. In setting and regulating train speeds, the Commission "may fix different rates of speed for different cities and towns, which rates of speed shall be commensurate with the hazard presented and the practical operation of the trains." RCW 81.48.040.

The Petitioners are also likely to argue that the FRA has preempted the field of train speed regulation by issuing regulations concerning train speeds. FRA regulations establish maximum passenger and freight train speeds according to the classification of the track. 49 C.F.R. § 213.9; See Ex. 11 at 9-10. However, these maximum speeds are set solely on the condition of the track, and do not consider the local conditions or safety hazards along the track. See Tr. 135.

If necessary to reduce or eliminate a local safety hazard, the Commission may, under RCW 81.48.040, establish a train speed lower than the maximum allowed under FRA regulations. Such regulation does not conflict with FRA regulations, as the latter do not consider local safety conditions as a factor in setting maximum speeds.

In CSX Transportation Inc. v. Easterwood, the United States Supreme Court held that a widow's negligence claim against a railroad asserting excessive speed was preempted as the common law of negligence is not compatible with the speed limits established by the FRA.

___ U.S. ___, 113 S. Ct. 1732, 1743, 123 L. Ed. 2d 387 (1993). A number of courts have followed the Supreme Court's decision in Easterwood concerning negligence claims for excessive speed. See Armstrong v. Atchison, Topeka & Santa Fe Railway Company, 844 F. Supp. 1152 (W.D. Tex. 1994); Bowman v. Norfolk Southern Railway Company, 832 F. Supp. 1014 (D.S.C. 1993); Earwood v. Norfolk Southern Railway Company, 845 F. Supp. 880 (N.D. GA 1993); Emery v. Southern Railway Company, 866 S.W. 2d 557 (Tenn. App. 1993). However, the Court stated that the FRA regulations "should be understood as covering the subject matter of train speed with respect to track conditions, including the conditions posed by grade crossings." Id. Thus, the Court left open the possibility that states would not be preempted where there are essentially local safety hazards not contemplated by FRA regulations.

Finally, states must also meet the third prong of the preemption provision. Whether a Commission order fixing train speeds lower than those specified in FRA regulations places an undue burden on interstate commerce is a matter of balancing the national and state interests. Under the test set forth in Southern Pacific Co. v. Arizona, the effect of a state statute in achieving safety is balanced against the national interest in keeping interstate commerce free from serious interference. 325 U.S. 761, 775, 776, 65 S. Ct. 1515, 89 L. Ed. 1915 (1944). In Southern Pacific, the Supreme Court held an Arizona statute limiting the number of cars in a train invalid as a violation of the commerce clause. The Court found that the actual safety benefits gained from the law were minimal, yet the effect on interstate commerce was great, as railroad companies would have to change the number of cars on trains before traveling within the state of Arizona. 325 U.S. at 773, 779, 783-784.

The Court stated that "the case differs from those where a state, by regulatory measures affecting the commerce, has removed or reduced safety hazards without substantial interference with the interstate movement of trains." Id. at 779. In the present proceeding, no substantial interference with interstate commerce would occur should the Commission determine that local safety hazards in Marysville require a lower speed than that allowed under FRA regulations. Should the Commission deny the requested passenger or freight train speed increases through Marysville, the overall running time of the train would be reduced by only seven minutes. Tr. 55. The Petitioners maintain that speed increases are necessary in all of the communities in which they have requested train speed increases in order to reach the desired three hour and fifty-five minute running time. Tr. 28. In addition, Amtrak's representative asserted that if the train speed increases were not granted, Amtrak would not operate the passenger trains. Tr. 56. However, this same witness conceded that the three hour and fifty-five minute running time includes a delay of twelve minutes. Tr. 70. Thus, it appears that there is some flexibility in the proposed time schedule.

In determining whether to grant or deny the petition to increase train speeds, the Commission must determine whether local safety hazards exist along the track in Marysville. By statute, the Commission must set train speeds by balancing such hazards with the practical operation of the trains. A Commission order granting or denying the petition would not conflict with federal regulations, nor would it create an undue burden on interstate commerce. Thus, the Commission is not preempted under the FRSA from establishing train speeds in Marysville.

B. The Petition to Increase Passenger and Freight Train Speeds in Marysville Should be Granted on Condition that the 88th Street Crossing be Upgraded and "Do Not Stop on Track" signs are placed at all public crossings.

Under RCW 81.48.030, the Commission has the following authority:

The right to fix and regulate the speed of railway trains within the limits of any city or town other than a first class city, and at grade crossings as defined in RCW 81.53.010 where such grade crossings are outside of cities and towns . . .

In fixing train speed limits, the Commission must consider whether the proposed train speeds are "commensurate with the hazard presented and the practical operation of the trains."

RCW 81.48.040. The Commission has considered the following factors in prior orders establishing train speeds: (1) whether the requested speed is within the federal limits; (2) whether the speed change would create any unreasonably dangerous conditions, (3) whether the speed changes are commensurate with the hazard presented and the practical operation of the trains, (4) whether the speed increase is in the public interest and will assist in the speedy handling of traffic; and (5) whether any local safety hazard exists which would justify a different speed limit. See In Re Petition of National Railroad Passenger Corporation, Docket Nos. TR-2311, TR-2248, TR-2251 (July 1991). In considering these factors, the Commission has balanced the time savings gained by the requested speed increase with any additional safety risk presented by the increase.

The Staff supports the request to increase passenger and freight train speeds based on its investigation of the track structure, the grade crossings, the surrounding community, and the accident history in the City of Marysville. Tr. 420-22.

The testimony at the hearing clearly establishes that Burlington Northern's mainline

track through Marysville is maintained as Class 4 track in accordance with FRA standards. Under such standards, passenger trains may travel safely upon the track structure at up to 80 m.p.h. and freight trains may travel at speeds up to 60 m.p.h. Thus the speeds requested are clearly within federal limits. The evidence at the hearing shows that the track is well maintained, and is inspected twice a week at a minimum. Tr. 129. In addition, Commission track inspectors inspected the track and found it to meet Class 4 standards. Tr. 411-412.

The City of Marysville is opposed to the petition to increase passenger and freight train speeds. Eleven members of the public testified at the hearing: Four members of the public testified in favor of the petition while seven testified against it. Those opposed to the petition expressed concern primarily over the safety of train speed increases.

The City presented testimony that the number of public and private crossings through Marysville, and the amount of traffic over and the configuration of these crossings, creates a dangerous condition or local safety hazard. While every grade crossing creates a dangerous condition (See Reines v. Chicago, Milwaukee, St. Paul and Pacific R.R. Co., 195 Wn. 148, 150, 80 p.2d 406 (1938)), grade crossing warning signs, signals and gates reduce the danger at grade crossings. The private crossings in the City of Marysville have stop signs on each side of the crossing and have adequate sight distances to see oncoming trains. In fact, the private crossing at 124th Street is protected by crossing gates and signals. The public crossings in Marysville are all protected with gates, signals, and "state of the art" predictor

systems.² The predictor systems afford vehicles crossing the track at least 20 seconds of warning time prior to the train arriving at the crossing regardless of the speed of the train. The crossing signals at those crossings experiencing larger traffic counts are intertied with the nearest intersection signals to allow traffic on the crossing to clear before a train passes through the crossing. Some of these crossings, such as 4th Street, have a warning time of as long as 40 seconds to allow traffic to clear from the crossing. TR. 164. Upgrades and adjustments to the predictor systems will provide the same minimum 20 second warning time regardless of the speed of the train.

The City also presented testimony indicating that vehicles frequently stop on the tracks when stopped at nearby intersections. In order to ensure that the crossings are as safe as they can be, Staff recommends that the Commission condition any increase in train speeds upon the construction of gates and signals at the 88th Street crossing, and upon the placement of "Do Not Stop on Track" signs in all four quadrants of the crossings to warn those travelling across the crossing of the danger presented by stopping on the crossing. While all persons will not obey such signs, Mr. Harder's testimony was clear that "There's no engineer that can design for that type of person driving an automobile." Tr. 437. To resolve this concern, the City, in conjunction with the state's Operation Lifesaver program can work with the public to make them aware of the importance of responding to warning signs, and crossing gates and signals. The City can also increase their enforcement of traffic

² The 88th Street crossing is currently signalized, but does not have gates. Burlington Northern has indicated it will construct gates. Tr. 151. Staff recommends that any train speed increases be granted upon condition that the crossing is fully gated, and signalized, and the minimum twenty second activation equipment be upgraded or adjusted.

safety laws at grade crossings to improve safety regardless of whether the train speeds are increased.

If the requested speeds increases are granted, the trains will pass through the City more quickly, creating less conflict between train traffic and automobile traffic through Marysville. However, the actual speed of the trains will not be as great as the petition implies. Although the Petitioners have requested increased train speeds of 50 m.p.h. for freight trains, and 50 and 79 m.p.h. for passenger trains, the trains will not actually travel at those speeds for the entire area of track requested. For both passenger and freight trains traveling northbound, the bridges over Ebey and Steamboat Slough will restrict the speed of the trains to 25 and 30 m.p.h. Northbound passenger trains would not reach the proposed speed of 50 m.p.h. until approximately Eighth Street, and would not reach 79 m.p.h. until the train is almost out of downtown Marysville at Kruse Junction, after the 116th Street crossing. Tr. 175-178. Travelling southbound, passenger trains would begin braking for the reduced speed approximately a quarter of a mile before. Tr. 179. Freight trains travelling northbound would not begin accelerating until the engine reached approximately 80th Street, and whether the train reaches the proposed speed of 50 m.p.h. by 136th Street depends on the weight of the train and horsepower of the engine. Tr. 81-82. Travelling southbound, the freight train will begin decelerating about two miles north of First Street, no later than the 116th Street crossing. Tr. 82-83.

Of the few accidents at the crossings and along the track, all of the accidents have been due to driver or pedestrian error, rather than train error. Over the last 20 years, there have been only three derailments in the area surrounding Marysville, but none within the city

limits. The number of derailments nationally has decreased over the same time period. See Ex. 9. In addition, Burlington Northern has taken steps to reduce the risk of derailments occurring in the Marysville area by placing several dragging equipment detectors and infrared heat detectors along the tracks. Tr. 155-156.

If the train speeds are increased, the running time of passenger trains will be reduced by seven minutes and the running time of freight trains by close to six minutes through Marysville. After investigation, the Staff finds that passenger and freight trains can safely travel over the track structure through Marysville at the speeds requested. The Staff has not identified any essentially local safety hazards justifying lower speeds. Although there are a large number of crossings in Marysville, the public crossings are signalized and gated, and the private crossings marked with stop signs. In balancing the potential safety risk of increasing train speeds with the practical operation of the trains, the Staff recommends that the Commission grant the petition to increase passenger and freight train speeds in Marysville, on condition that gates and signals are constructed at the 88th Street crossing and "Do Not Stop on Track" signs are placed in all four quadrants of the public crossings in the City.

V. CONCLUSION

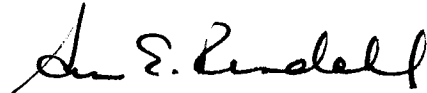
For the reasons discussed above, the Commission should grant the Petitioners' request to increase passenger and freight train speeds through the City of Marysville. However, the Commission should condition its grant of the petition on the construction of gates and

warning equipment at the 88th Street crossing and upon the placement of "Do Not Stop on Tracks" signs in all four quadrants of each public crossing in Marysville.

DATED this 17th day of February, 1995.

Respectfully submitted,

CHRISTINE O. GREGOIRE
Attorney General

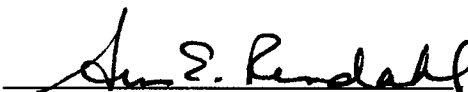
A handwritten signature in black ink, appearing to read "Ann E. Rendahl". The signature is written in a cursive style with a large initial 'A'.

ANN E. RENDAHL
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a true copy of the foregoing document upon the persons and entities listed on the Service List below by depositing a copy of said Post Hearing Brief of Commission Staff in the United States mail, addressed as shown on said Service List, with first class postage prepaid.

Dated this 17th day of February, 1995.


ANN E. RENDAHL

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