

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

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|---------------------------|---|---------------------|
| CHELAN COUNTY, |) | DOCKET TR-061442 |
| |) | |
| Petitioner, |) | |
| |) | ORDER 02 |
| v. |) | |
| |) | |
| THE BURLINGTON NORTHERN |) | INITIAL ORDER |
| SANTA FE RAILWAY COMPANY, |) | DENYING PETITION TO |
| |) | DISMISS FOR LACK OF |
| Respondent. |) | JURISDICTION |
| |) | |
| |) | |

SUMMARY

1 **Synopsis:** *This is an Administrative Law Judge’s Initial Order that is not effective unless approved by the Commission or allowed to become effective pursuant to the notice at the end of this Order. If this Initial Order becomes final, the Commission will exercise its jurisdiction to approve the reconstruction of the Chumstick Highway railroad undercrossing and to allocate its cost to Chelan County and the Burlington Northern Santa Fe Railway Company.*

1 **Nature of Proceeding.** Docket TR-061442 involves Chelan County’s assertion that the Washington Utilities and Transportation Commission (Commission) has jurisdiction over its petition to allow the alteration and relocation of a highway-rail undercrossing on Chumstick Highway in Chelan County, Washington and to allocate its cost between the county and the railroad.

2 **Appearances.** Louis Chernak, Deputy Prosecuting Attorney, Wenatchee, Washington, represents petitioner Chelan County (Chelan). Bradley Scarp, attorney, Seattle, Washington, represents Burlington Northern Santa Fe Railway Company (BNSF). Jonathan Thompson, Assistant Attorney General, Olympia, Washington, represents the Commission’s regulatory staff (Commission Staff or Staff).

3 **Background and Procedural History.** On September 11, 2006, Chelan County filed a petition under RCW 81.53.110 requesting that the Commission authorize the alteration and relocation of the Chumstick Highway railroad undercrossing at mile post 1.83 of the highway. BNSF owns and operates the railroad that crosses over Chumstick Highway at that point. Under RCW 81.53.110,¹ the Commission is authorized to allocate the cost of the project between Chelan and BNSF.

4 Chelan's petition alleges that the posted speed limit on Chumstick Highway at mile post 1.83 is 50 mph. Chelan claims that approximately 2,800 vehicles pass under the railway there, on average, daily and that Chumstick Highway is one of the most heavily traveled roads in the county. Chelan further states that the undercrossing and highway were built in the early 1930's.²

5 Chelan alleges that the undercrossing has the following negative safety factors: 1) limited sight distances; 2) narrow roadway width; 3) sharing the underpass with Chumstick Creek; and, 4) limited trestle height.³ Chelan included with the petition photocopies of accident reports associated with the undercrossing.⁴ Chelan contends that improving the underpass to current grade separated crossing design standards will improve public safety because it will ameliorate these negative safety factors. Chelan states that BNSF has made a preliminary estimate of the cost of the proposed alterations of \$1,750,000.

6 BNSF requests that the petition be dismissed on grounds that the Commission is preempted by federal law from approving this project or allocating the costs of the project and that jurisdiction lies with the federal Surface Transportation Board rather than with the Commission. BNSF also alleges that the petition is not ripe for decision because Chelan has submitted no cost estimates for the project.

¹ RCW 81.53.110 reads in pertinent part: "Whenever, under the provisions of this chapter, a new highway is constructed across a railroad, or an existing grade crossing is eliminated or changed (or the style or nature of construction of an existing crossing is changed), the entire expense of constructing a new grade crossing, an overcrossing, under-crossing, or safer grade crossing, or changing the nature and style of construction of an existing crossing, including the expense of constructing approaches to such crossing and the expense of securing rights of way for such approaches, as the case may be, shall be apportioned by the commission between the railroad, municipality or county affected...in such manner as justice may require..."

² See Chelan Petition at 2 and photos attached to petition.

³ *Id.*

⁴ *Id.*

7 Both Chelan and Commission Staff argue that jurisdiction lies with the Commission.

8 All parties have filed briefs on the threshold issue of jurisdiction which is resolved in this initial order.

MEMORANDUM

9 **Standards for Decision.** The Commission rules on dispositive motions under WAC 480-07-380 and may grant a motion to dismiss for failure to state a claim for relief, taking into consideration the pleadings and evidence filed by the parties. Washington statutes require the Commission to regulate railroads in the public interest under RCW 80.01.040. The Commission apportion the cost of changes to a railroad-highway undercrossing “in such manner as justice may require, regard being had for all facts relating to the establishment, reason for, and construction of said improvement.” *RCW 81.53.110*.

10 **Contested Issues.** BNSF states two reasons why the Commission should dismiss Chelan County’s petition. BNSF first contends that the Commission is preempted from taking any action on the petition because jurisdiction lies with the federal Surface Transportation Board. Secondly, BNSF claims that the county has not provided any estimates for the cost of the project and therefore it is premature for the Commission to apportion costs under RCW 80.53.110.

I. Preemption

11 BNSF contends that state regulatory authority over railroad operations is expressly preempted under the Commerce Clause of the Constitution and the Interstate Commerce Commission Act (ICCTA) which passed into law in 1995.

12 BNSF cites Article 1, section 8, of the U.S. Constitution which gives Congress plenary authority to legislate with regard to activities that affect interstate commerce. BNSF claims that Congress’s plenary authority is reflected in 49 U.S.C. 10501(b)(2) of the ICCTA which grants jurisdiction to the Surface Transportation Board (STB):

(b) The jurisdiction of the [Surface Transportation] Board over –
(2) the construction, acquisition, operation, abandonment or discontinuance of spur, industrial, team, switching, or side track

facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

- 13 BNSF claims that this provision invests the STB with exclusive jurisdiction and that it expressly preempts states from exercising any authority over all matters related to the railroads.
- 14 BNSF argues that the Washington Supreme Court and the Ninth Circuit Court of Appeals have upheld the broad preemptive power of the ICCTA in cases related to rail transportation. BNSF points out that in *Seattle v. Burlington Northern Railroad Company*⁵ the Washington Supreme Court found that a city ordinance prohibiting switching movements across a main thoroughfare during peak traffic hours was preempted by the ICCTA.
- 15 BNSF further points out that in *City of Auburn v. United States Government*⁶ the Ninth Circuit upheld an STB decision preempting local environmental permit requirements that affected the reopening of an existing railroad line through the city of Auburn, Washington. The Court found that such permitting requirements constituted economic regulation of the railroads preempted under the ICCTA. BNSF also cites an STB decision ruling that state or local permitting or preclearance requirements of any kind would affect rail operations and thus would be preempted.⁷
- 16 BNSF argues that Chelan's proposal to alter the Chumstick Highway undercrossing would interfere with BNSF's ability to operate its railway line, because it would disrupt mainline operations and would necessitate the construction of a temporary by-pass track during construction. Furthermore, BNSF contends that the project will be very costly and that allocation of that cost to BNSF constitutes preempted economic regulation under the ICCTA.

⁵ 105 Wn. App. 832 836, 22 P.3d 260 (2001), *aff'd* 145 Wn.2d 661 (2002).

⁶ 154 F.3d 1025, 1029 (9th Cir. 1998).

⁷ *City of Creede, Co-Petition for Declaratory Order*, STB Finance Docket No. 34376, May 3, 2005.

- 17 Chelan and Commission Staff contend that the STB's jurisdiction is not exclusive and that certain areas of railroad operations are not federally preempted, including rail safety⁸, labor⁹, and homeland security.¹⁰
- 18 Chelan and Commission Staff focus on rail safety as one area not preempted by federal law and the STB. They claim that in passing the ICCTA, Congress intended to preempt states from the economic regulation of railroads, but that the states retained the police powers, including public safety, reserved to them by the Constitution.¹¹
- 19 Chelan and Commission Staff contend that for this reason, the ICCTA is silent on safety issues and that none of the preemption cases cited by BNSF are related to state safety regulation of railroads. They claim that the only recent court authority directly analogous to the facts in this case is a 2001 Eighth Circuit Court of Appeals case, *Iowa, Chicago & Eastern Railroad Corp. v. Washington County*¹² In the *Iowa* case, the Eighth Circuit addressed a county petition to the Iowa Department of Transportation for an order requiring replacement of four bridges, two of which were rail lines that crossed above county highways. Chelan and Staff assert that the Eighth Circuit found that the ICCTA and the Federal Railroad Safety Act (FRSA) must be read *in pari materia*¹³ and that the FRSA does not require preemption of state authority to regulate on issues of rail/ highway safety.
- 20 Chelan and Commission Staff contend that under the reasoning in the Eighth Circuit *Iowa* case, the Commission's authority to regulate railroads pursuant to RCW 81.53.100 is not preempted because it constitutes a legitimate exercise of state authority over highway and railroad safety. Chelan claims that fixing the Chumstick Highway undercrossing is a public safety concern which the Commission may rightly address under the FRSA.

⁸ 49 U.S.C. §§ 20101, *et seq.*

⁹ 45 U.S.C §§ 151, *et seq.*

¹⁰ Homeland Security Act of 2002, §§ 401-402.

¹¹ *See* Chelan Brief on Jurisdictional Issues (Chelan Brief), p. 4, citing H.R. Rep. No. 104-311, 104 Cong., First Sess. At 95-96 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 807-808.

¹² 384 F.3d 557 (2004) [Hereinafter *Iowa*].

¹³ [Latin, upon the same subject] Statutes *in pari materia* must be interpreted in light of each other since they have a common purpose or address comparable events or items. American Law Encyclopedia, Vol. 5.

- 21 BNSF disagrees with the analysis offered by Chelan and Commission Staff, contending that 1 *Iowa* is not dispositive of the issues in this proceeding; 2) there is no component of rail safety in Chelan’s petition; and 3) the project is so costly as to constitute a barrier to interstate commerce.
- 22 **Discussion.** The Commission agrees with Chelan and Commission Staff that the Commission is not preempted from addressing Chelan’s petition. The reasoning in *Iowa* is persuasive on the issue of preemption. While no Ninth Circuit cases address the exact issues raised in *Iowa*, the facts in *Iowa* are almost identical to the facts in this case, and the Court provides a well-reasoned decision that covers point for point many of the objections raised by BNSF in this case.
- 23 In *Iowa*, the county asserted that the railroad bridge overcrossings did not provide sufficient vertical clearances for highway traffic and that one of them was too narrow, similar to the physical parameters of the undercrossing at Chumstick Highway in this case.
- 24 Similarly, in *Iowa*, the railroad argued, as it does in this case, that: 1) the ICCTA preempted state jurisdiction over the project because the cost to the railroad of replacing the four bridges was expressly preempted economic regulation; 2) replacement of the bridges was expressly preempted as regulation of facilities essential to the railroad’s service; and 3) Congress, in the ICCTA, fully occupied the field of economic and facilities regulation of railroads.
- 25 The Court of Appeals found that the ICCTA and the FRSA should be construed *in pari materia* and that the FRSA, as opposed to the ICCTA, determines whether state authority is preempted when safety is at issue. The Court determined that the FRSA provides for only limited preemption of state tort law regulation of rail crossings when federal funds are used to install warning devices.
- 26 The Court rejected the railroad’s argument that the county could not rely on the FRSA’s rail safety provisions to bootstrap its concerns about highway safety – the purported reason for the county’s proposed improvements. The Court called the railroad’s argument in that regard “cramped” and found that it was necessary to look to the FRSA rather than the ICCTA to address the concerns raised by the county’s undercrossing improvement project, stating:

But our brief review does establish that Congress for many decades has forged a federal-state regulatory partnership to deal with problems of rail and highway safety and highway improvement in general, and the repair and replacement of deteriorated or obsolete railway-highway bridges in particular. ICCTA did not address these problems. Its silence cannot reflect the requisite “clear and manifest purpose of Congress” to preempt traditional state regulation of public roads and bridges that Congress has encouraged in numerous other statutes.¹⁴

- 27 The court pointed out that the U.S. Department of Transportation and the Surface Transportation Board each supplied amicus briefs agreeing with the Court’s conclusion that broad preemption under the ICCTA is “unsound.”
- 28 Similarly in this proceeding, the Commission rejects BNSF’s argument that Chelan’s road improvement project is about highway safety, not railway safety, and therefore the FRSA limited preemption does not apply. BNSF ignores the Eighth Circuit’s finding that highway and rail safety are intertwined, particularly where the court pointed out that insufficient clearance under a rail overcrossing might cause a school bus to bottom out on a highway bridge¹⁵ – thus implicating both highway and rail safety. The Chelan petition shows that the Chumstick undercrossing was constructed in the 1930’s. The photos submitted with the petition attest to the age, narrow vertical and horizontal clearances, and general ill-condition of the undercrossing. Clearly, in such an instance highway safety and rail safety are identical issues.
- 29 BNSF further argues that *Iowa* is distinguishable because Iowa statutes and the statutory provisions in this case are different. BNSF asserts that the statute at issue in *Iowa* made the railroad responsible for maintaining safe bridge crossings. BNSF claims that in this case, RCW 81.53.110 covers only cost allocation for construction at grade highway crossings of the railroad and does not mention safety.

¹⁴ *Iowa*, at 561, quoting from *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993) [Hereinafter *Easterwood*] at 664.

¹⁵ *Id.* at 560.

30 The Commission disagrees. BNSF's assertion ignores that RCW 81.53 addresses railroad cost responsibilities for construction and maintenance related to public safety and that the cost allocation provision is simply a method for better allocating the costs of such safety-related projects. Moreover, RCW 81.53.110 itself suggests that safety is the underlying concern when it states that "the entire expense of constructing ...an...under-crossing, or *safer* grade crossing" (emphasis added) may be allocated to the county and the railway. Even though the term "safer" applies to grade crossings rather than to under crossings, taking the statute as a whole, it is clear that safety is a primary underpinning of these projects.¹⁶

31 BNSF also faults the Eighth Circuit opinion because the court relied on 49 U.S.C. § 20134¹⁷ as part of its rationale for holding that the FRSA concern for rail safety encompasses highway safety. BNSF contends that section 20134 only addresses safety hazards for "at-grade" crossings.¹⁸ However, this argument again ignores the breadth of the FRSA in general "to promote safety in all areas of railroad operations."¹⁹ Furthermore, BNSF misses the point of the court's reliance on section 20134. The Court cited that section as part of its rationale for a broader "common sense"²⁰ reading of safety concerns than the railway advocated. The application of common sense in this proceeding leads to a conclusion that highway and rail safety are intermixed.²¹

¹⁶ In addition, RCW 81.53.100 makes railroads responsible for establishing new crossings over existing highways. RCW 81.53.090 makes railroads responsible for maintaining under and over crossings. RCW 81.53.271, 261 and 295 make railroads responsible for maintaining warning devices at crossings.

¹⁷ 49 U.S.C. § 20134 reads in pertinent part: "Grade crossings and railroad rights of way. (a) General. To the extent practicable, the Secretary of Transportation shall maintain a coordinated effort to develop and carry out solutions to the railroad grade crossing problem and measures to protect pedestrians in densely populated areas along railroad rights of way."

¹⁸ BNSF Reply Brief, at 4, n.1.

¹⁹ See *Iowa* at 559; see also 49 U.S.C. § 20101.

²⁰ *Iowa*. at 560.

²¹ BNSF also raised objections to the Eighth Circuit decision because it relied on *Easterwood*, which addressed whether the FRSA preempted negligence claims under Georgia state law. BNSF again misses the point that the issue *Easterwood* addressed was whether state safety is preempted, not whether the state law is related to negligence claims per se. The Eighth Circuit relied appropriately on *Easterwood* for its conclusions about preemption under the FRSA.

- 32 BNSF claims the Eighth Circuit decision is inapposite because the parties in *Iowa* did not raise the question whether the FRSA applied to the facts of the case. Rather, the court raised the FRSA *sua sponte*.²² This argument is equally unpersuasive, as BNSF cites no legal authority prohibiting the Commission's reliance on the Eighth Circuit's analysis in concluding that broad preemption under the ICCTA does not apply in this proceeding.
- 33 BNSF also asserts that Ninth Circuit courts have not adopted the Eight Circuit preemption analysis. BNSF cites the Washington Supreme Court case, *City of Seattle v. Burlington Northern Railroad*²³ where the court held that the FRSA and ICCTA read together preempt local regulation of railroads. However, BNSF fails to acknowledge that *City of Seattle* addressed a local ordinance regarding the length of time a train could block an intersection, not the type of safety concerns raised in this case, where Chelan attached to its petition several accident reports associated with the Chumstick Highway undercrossing.²⁴
- 34 Finally, BNSF argues that the cost of the project is so high as to constitute economic regulation, which is under the sole jurisdiction of the STB. BNSF points out that the track in question is a significant portion of the railway connecting Chicago and the northern Great Plains states with the west coast and that any disruption of the line would create a substantial economic burden on the company.²⁵ BNSF cites *City of Seattle* discussed above, where the state Supreme Court found that the local ordinance limiting the amount of time trains could block local thoroughfares was preempted economic regulation.
- 35 Again, BNSF's argument fails to acknowledge the legitimate safety concerns present in this case that were not associated with *City of Seattle*. Furthermore, while the Commission acknowledges the difficulty of teasing out the difference between safety regulation and economic regulation, the Commission is not persuaded that the cost of a safety improvement project automatically requires a finding that the project constitutes economic regulation. Taking the general intent of RCW 81.53 into account, the Commission finds that when safety is an important concern as in this case, the concern for safety must be balanced against the concern about economic

²² BNSF Reply Brief at 4. *Sua sponte* is a Latin expression meaning "on its own accord."

²³ 145 Wn.2d 661 (2002).

²⁴ See Exhibits 2-7, attached to Chelan petition.

regulation. Moreover, the Commission views the cost allocation provisions of RCW 81.53 as the best way to alleviate some of the burden on the railroad associated with making necessary safety improvements.

36 In conclusion, BNSF has failed to show that the Commission is preempted from acting under RCW 81.53.110 to allocate the costs for improving the Chumstick Highway undercrossing as proposed by Chelan County.

II. Ripeness

37 BNSF claims that Chelan is prematurely seeking an order from the Commission to apportion costs for the Chumstick Highway project when the full cost of the project is unknown.²⁶ BNSF asserts that Chelan has not provided a specific design proposal or solicited estimates for construction. BNSF further argues that Chelan's source of funding is unknown at this time and may well include federal support. BNSF points out that if the county uses federal money for the project then the Commission is preempted from allocating costs under RCW 81.53.110.²⁷

38 Chelan asserts that it has been engaged in negotiations on this project with BNSF and has been proposing plans since "at least" 2002.²⁸

39 The Commission concludes that BNSF's ripeness argument is without merit. With its petition, Chelan provided BNSF's preliminary estimate of the cost of construction.²⁹ Now that the Commission has resolved the jurisdictional issues over allocating costs, Chelan will have an opportunity to identify its own proposed costs. Needless to say, if it occurs that the county receives federal funds for the project, the Commission expects that the parties will file a motion to dismiss on preemption grounds. Until such federal funding materializes, the Commission retains jurisdiction and will establish a schedule of proceedings to address the cost allocation issue.

²⁵ BNSF Reply Brief at 5.

²⁶ Chelan Petition at par. 11.

²⁷ 23 C.F.R. section 646.210(a).

²⁸ Chelan Brief, p. 10.

²⁹ Chelan Petition at par. 11.

FINDINGS OF FACT

40 Having discussed above in detail the evidence provided in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary findings of fact, incorporating by reference pertinent portions of the preceding detailed findings:

41 (1) The Washington Utilities and Transportation Commission is an agency of the state of Washington, vested by statute with authority to regulate rates, rules, regulations, practices and accounts of public service companies, including electric companies.

42 (2) BNSF is a railroad that operates in the state of Washington.

43 (3) The county of Chelan is a municipality in the state of Washington and a government entity that plans and constructs highway improvement projects, including improvements to Chumstick Highway at milepost 1.83 where it crosses under the BNSF railway.

44 (4) The Chumstick Highway railway undercrossing at milepost 1.83 presents both highway and rail safety concerns that require amelioration.

CONCLUSIONS OF LAW

45 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law incorporating by reference pertinent portions of the preceding detailed conclusions:

46 (1) The Commission has jurisdiction over the subject matter of, and all parties to, these proceedings.

47 (2) The Commission may grant a motion to dismiss when the pleadings filed fail to state a claim for which relief may be granted.

- 48 (3) The pleadings demonstrate that Chelan has presented a claim for which relief may be granted.

ORDER

49 **The Commission Orders:**

- 50 (1) Burlington Northern Santa Fe Railway Company's petition to dismiss the proceedings on grounds of preemption is denied.
- 51 (2) The Commission will determine the appropriate cost allocation associated with the Chumstick Highway improvement project under RCW 81.53.110.
- 52 (3) The Commission retains jurisdiction to effectuate the terms of this Order.

Dated at Olympia, Washington, and effective August 20, 2007.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

THEODORA M. MACE
Administrative Law Judge

NOTICE TO THE PARTIES

This is an Initial Order. The action proposed in this Initial Order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial Order, and you would like the Order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order any party may file a Petition to Reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition to Reopen will be accepted for filing absent express notice by the Commission calling for such answer.

RCW 80.01.060(3), as amended in the 2006 legislative session, provides that an initial order will become final without further Commission action if no party seeks administrative review of the initial order and if the Commission fails to exercise administrative review on its own motion. You will be notified if this order becomes final.

One copy of any Petition or Answer filed must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An Original and three (3) copies of any Petition or Answer must be filed by mail delivery to:

Attn: Carole J. Washburn, Executive Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, Washington 98504-7250