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STATE OF WASHINGTON
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NO. 60126-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

(Whatcom County Court Case No. 03-2-02056-3)

Alizon Veit, an individual, by and through David M. Nelson, the guardian of her estate,

Petitioner/Appellant,

vs.

Burlington Northern Santa Fe Corporation, a Texas corporation; Michael S. Burks and Jane Doe Burks, husband and wife, and the marital community composed thereof; and a number of unnamed Jane Does and/or John Does,

Respondents/Defendants.

FILED
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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

PETITION FOR REVIEW

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July 1, 2009

ORIGINAL

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A. IDENTITY OF PETITIONER

Alizon Veit (Veit), by and through David M. Nelson as guardian of her estate, asks the Court to grant review of the Court of Appeals decision terminating review identified in Part B.

B. COURT OF APPEALS DECISION

The Court of Appeals in *Veit v. Burlington Northern Santa Fe Corporation*, Washington State Court of Appeals No. 60126-1-I (June 1, 2009) affirmed the jury verdict and entry of the judgment on the verdict in which the jury found no negligence on the part of the defendant BNSF. A copy of the opinion is in the Appendix at pages A-1 through A-27.

C. ISSUES PRESENTED FOR REVIEW

1. Whether significant questions of great public importance and constitutional law require review here, where the appellate opinion and the trial court's rulings on train speed create an unpublised standard that preempt local Washington officials and courts from protecting citizens at Washington's railroad crossings and deprives those citizens of due process?

2. Whether *Easterwood* preempts this Court's *Goodner* decision, where *Easterwood* is readily distinguishable, and *Goodner* is on all fours with this case?

3. Whether the appellate opinion, in holding that a trial court's erroneous rulings regarding Veit's duty at the crossing applied only to the issue of her contributory negligence and therefore any trial court errors related to Veit's duty need not be addressed on appeal, is in conflict with this Court's opinions in *Bordynoski*, *Gaines,* and *Farrow* which hold that issues of negligence and contributory negligence are too intertwined to separate them as a matter of law?

D. STATEMENT OF THE CASE

The Court of Appeals opinion creates a novel legal theory: i.e., in Washington, federal law pertaining to train speeds is found in the mind of Burlington Northern Santa Fe Corporation (BNSF) employees and not in published Timetables. The Court of Appeals legal theory is contrary to published decisions in other jurisdictions, including federal and state courts. This is an issue of substantial public interest. Safe crossings cannot be designed or constructed by Washington jurisdictions (such as Bellingham) to adequately protect Washington citizens when federal law related to train speed limits exists in the mind of railroad employees and not in published documents.

A speed limit, federal or state, is a rule of law. The Court of Appeals opinion, in violation of the Constitution of the State of Washington and the United States Constitution, determined that a rule of law can be created and thereafter remain only in the mind of the railroad employees.

The Court of Appeals opinion incorrectly and inappropriately resolved the trial court's errors related to BNSF's main duty, to operate the train at a safe speed, and Veit's main duty, where she was required by law to stop her car before proceeding with caution, in two footnotes: footnotes 6 and 10, at pages 18-19 and 27 of the opinion. Both footnotes are misleading and in conflict with decisions of this Court.

The Court of Appeals, in footnote 6, mistakenly states that Veit first raised the issue or argument that the federal speed limit was as published in the Timetables in her reply brief. In footnote 10, without argument or authority and contrary to well established decisions of this Court, the Court of Appeals determines that the negligence decision, which requires the jury to determine proximate cause, was made without consideration of Veit's conduct.

1. The appellate opinion omits key facts regarding the summary judgment on train speed.

The trial court and appellate opinion remarkably rely on the testimony of three employees of BNSF for federal law while ignoring the following key facts.

- For years, BNSF has operated its train at speeds pursuant to published Timetables: at the crossing the Timetables never allowed a speed in excess of 20 mph. Ex. 36, Ex. 48. Appendix A-28-29. CP 1076 at 1219-1220. CP 953, at 1005.

- The City of Bellingham police understood and believed that the speed limit was 20 mph at the time of the accident. CP 685.

- BNSF, in answer to Veit's interrogatory asking the speed of the train at the accident scene, answered: "Objection . . . Train was traveling in compliance with federal law." CP 954-55.

- The BNSF engineer, at his deposition, pre-trial, testified that at the Pine Street crossing, the Timetables had a speed limit of 20 mph, so he "had to be at the 20 miles per hour at the time you get to the crossing." CP 965; CP 981.

- BNSF, in answers to pre-trial requests for production of documents, when asked to produce, a ten-year history of maximum track speed for the railroad in the accident vicinity, responded: "See Attachment 22." CP 1005. Ex. 48.

- Attachment 22 to BNSF's document production was a series of Timetable publications. Ex. 36, Ex. 48. Those Timetables had the following train speed limits for the Pine Street crossing: April 7, 1991 to August 1, 1996, 10 mph; August 1, 1996 to September 11, 2001, 20 mph. Ex. 48; Ex. 31 to CP 1387.

- The metal sign posts, on the track, just before the Pine Street crossing, had posted signs for a 20 mph speed limit for passenger and freight trains. CP 696. This same track was and continues to be used by Amtrak.

- As of August 25, 2006, it was undisputed that the BNSF train was going faster than 29.5 mph at the time of the accident. CP 834.

- The train crew reported to BNSF employee Nies that the train was going 18-20 mph. Dep of Nies, CP 300, page 32-33. Nies, pre-trial, testified that the maximum speed was determined by the Timetable. CP 300, pages 17-18

- Burks, the BNSF engineer, testified, in his deposition that the maximum speed at the crossing was "20 MPH." CP 301, page 121.

- After the discovery cut off, Veit moved for court approval of a settlement for an incapacitated person with defendant Bellingham. CP 1360. In her motion Veit argued that damages exceeded $4,700,000.00 but a settlement with Bellingham for $400,000.00 should be approved because Veit's liability claim was based, in part, upon "excessive speed" by the BNSF train. CP 1362.

- Veit represented to the trial court that the Bellingham settlement should be approved because "Defendant BNSF claims that the speed limit at the crossing was 20 MPH." CP 1373.

- In its response to Veit's Motion for Approval of Settlement, BNSF did not challenge or dispute Veit's representation to the settlement judge that BNSF claimed the speed limit at the crossing was 20 mph. CP 1248.

Although all discovery up to settlement with Bellingham had consistently represented the speed limit to be 20 mph, BNSF's position on speed changed after all disclosed experts' preliminary

opinions had the train travelling in excess of 30 mph. CP 834 at 836. BNSF offered the declarations of three employees, Leeper, Johnson and Franco, to claim that the track class at the crossing was Class 3, and therefore, the federal speed limit was 40 mph. The argument requred the court to assume the Timetables contained both federal and "internal" speed limits.

2. The appellate court's opinion omits key facts regarding BNSF's motion in limine regarding documents or testimony regarding the Timetables.

In accepting BNSF's argument that the federal speed limit was different than the limit found in published documents or speed posts on the track, both the trial court and the appellate opinion overlooked or omitted the following key facts also kept from the jury by pre-trial and trial decisions in limine. CP 508 at 517. RP 50-54.

- The BNSF official accident report, completed the day of the accident, disclosed that the FRA Track Class at the crossing was a Class 2 Track. Ex. 35 to CP 1387. Ex. 52.

- At their depositions, the three BNSF employees testified, in part, as follows:

  Leeper, in response to a question regarding where BNSF designated the track class and speed, responded: "I think I was looking at that document (Pacific Division, Timetable Number 3). . . . (and the Timetable) is BNSF's designation of maximum allowable speeds for its segments of its tracks." CP 682-683. See Appendix, at pages A-28 through A-29. Ex. 10 to CP 1067.

Johnson, in response to the question asking where he obtained the federal speed limit, said: "I would have to look on the profile or the timetable to see what the speed is." CP 676.

Franco, in response to the question, before signing your declaration, what document did you read, answered: "I did review the Pacific Division timetable Number 3 that was in effect in 1999." CP 678.

- The train had two engines, both of which had operating event data recorders. CP 1035. When asked to produce the recordings of speed, BNSF responded: "None available." CP 1002. Kime provided "evidence" only related to the alleged handling and destruction of the speed tape from the lead engine. CP 652.

- At trial, and before the trial court entered its Order on Veit's motion for reconsideration of the Summary Judgment Order on train speed, Veit offered the following testimony from the BNSF engineer, which testimony was rejected by the trial court:

  Question: Again, what do you mean speed limit?
  Answer: The maximum speed a train could be going when the front end of The engine was heading into the Pine Street crossing was 20 miles per hour.
  Question: When you were asked in Interrogatory No. 32 to "State how many miles per hour you were traveling at the time of the impact described in plaintiff's Complaint for Personal Injury," why did you respond: "Speed at all times were in compliance with federal laws."
  Answer: Because I understood and believed that the federal speed limit south of the crossing was 30 miles per hour and I understood and believed that the federal speed limit at the crossing was 20 miles per hour.
  Question: Why did you believe those were the federal speed limits on September 10, 2001?
  Answer: Because those were the speed limits described on the July 19, 1999 Timetable No. 3, which speeds I was told by BNSF supervisors were the maximum speeds allowed by federal law and therefore understood and

believed 30 and 20 were the maximum speeds allowed by federal law.
Question: Was Timetable No. 3, trial Exhibit No. 36, the Timetable in effect on September 10, 2001?
Answer: Yes. CP 130-133. See Appendix, page A-30 through A-33.

3. The appellate court incorrectly holds that Veit did not argue that the published Timetable was the federal speed limit until her reply brief on appeal.

The appellate opinion's footnote 6 incorrectly states that Veit argued that the published Timetable was the federal speed limit first in her reply brief on appeal. On the contrary, Veit raised and argued this issue before trial, during trial, and in her opening appeal brief:

- "Defendant BNSF claims that the speed limit at the crossing was 20 MPH." CP 1373.
- History of maximum speed: "See Attachment 22 (Timetable)." CP 953, at 1005.
- "Speed Regulations . . . Bellingham . . . Pine Street Crossing, 20 MPH." CP 1387 at 1706. Exhibits 36, 37, 48.
- When offering exhibit 36, Veit argued: "Your Honor, Plaintiff's Exhibit Number 36 is a Pacific Division Timetable Number 3 as presented to us during the initial discovery which has the speed restrictions and the speed limits for this train on the day in question. I would offer Exhibit Number 36." RP 801.
- When offering exhibit 48, Veit argued: "Plaintiff's Exhibit 48, Your Honor, if I could hand it up to the Court, and I'll just

offer it briefly as a request for production number 22. If the Court remembers, we asked them what the speed limits were. They answered that it was controlled by federal speed, and then I asked them to produce the documents for the past 10 years regarding maximum track speed, and they said, "See attachment 22," and I've attached attachment 22, which indicates from April 7th of 1991 through a period of time which would be January 1 of 1993, the maximum speed was 20 miles per hour, and at the crossing over Bellingham was 10 miles an hour." RP 1128.

- "The day of the accident, the maximum train speed allowed at the crossing was 20 mph. The trial court erroneously prohibited testimony related to the 20 mph train speed limit then in effect at the crossing." Veit's Opening Brief, page 2.

- "The trial court erred in rejecting Veit's Trial Exhibit No. 36 (and) . . . Trial exhibit No. 37: re train speed limits." Veit's Opening Brief, page 5.

- "The BNSF Pacific Division Timetable No. 3, in effect on the day of the accident, described the speed limit for the BNSF work train as 20 mph at the Pine Street crossing. Ex. 36 . . . During discovery Veit asked BNSF to produce the prior ten-year history of maximum track speed for the crossing. In response, BNSF produce trial exhibit 36. Ex. 48 . . ." Veit's Opening Brief, page 8.

- "Clearly, the 20 mph speed limit was not an 'internal BNSF' limit as alleged." Veit's Opening Brief, page 28.

- "BNSF's summary judgment motion was contrary to the statements and documents provided during discovery, which statements and documents demonstrated a speed limit of 20 miles per hour." Veit's Opening Brief, page 25.

4. The appellate court, in footnote 10, resolves one of Veit's main appellate arguments by ignoring the issue.

When approaching the crossing, by statute, Veit was required to

stop no further than 50 feet and no closer than 15 feet from the nearest rail. RCW 46.61.345. The Manual for Uniform Traffic Control Devices (MUTCD) required any stop bar associated with the stop sign to be placed no closer than 15 feet from the nearest rail. RP 391. Ex. 12. The appellate court's footnote 10 neglects to address the significance of Veit's duty and the erroneous testimony regarding how a proper understanding of her duty impacts proximate cause by incorrectly arguing that any misunderstanding of Veit's duty goes only to contributory negligence. This conclusion ignores:

- BNSF's Answer included the following affirmative defense: "2.2 Whatever injuries and damages plaintiff sustained, if any, were caused in whole or in part by her own negligence and her recovery of damages, if any, must be denied or diminished in proportion to her negligence. CP 2337, 2342.
- The jury was instructed that during its "deliberations, you must consider the instructions as a whole." Instruction. 1, CP 144.
- The jury was instructed that BNSF claimed that Veit's "conduct was a proximate cause of Plaintiff's own injuries." Instruction 11, CP 154.
- The jury was instructed that proximate cause was a proposition Veit needed to prove in her negligence claim against BNSF. Instruction 13, CP 156.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This court should accept review under RAP 13.4(b)(3) and (4) because the appellate court's decision raises significant questions of law under the Washington Constitution, Due Process, and involves an issue of substantial public interest: public safety at railroad crossings.

a. The Timetable, as a matter of law, sets the federal speed limit.

Contrary to BNSF's argument, there is no separate "internal" speed limit:

> Under the current Track Safety Standards, FRA has only an indirect role in determining speed limits. **Railroads set train speed in their timetables or train orders.** Once a railroad sets a train speed, it must then maintain the track according to FRA standards for the class of track that corresponds to that train speed. . . Notwithstanding some of the language in *Easterwood* that a cursory reading may otherwise indicate, FRA has never assumed the task of setting train speed. Rather, the agency holds railroads responsible for minimizing the risk of derailment by properly maintaining track for the speed they set themselves.

FRA Track Safety Standards, 63 Fed.Reg. 33992 (1998). Railroads are consequently required to file the speed limits in their timetables with the FRA. 49 C.F.R. § 217.7.

After the above regulation clarification that "railroads set speed limits in their timetables," other courts have looked to the railroads' timetables to determine the federal speed limit under 49

CFR § 213.9. *Hargrove v. Missouri Pacific R.R. Co.,* 888 So.2d 1111, 1114 - 1115, (La.App. 2004). The Oklahoma Supreme Court affirmed summary judgment in favor of the railroad on speed when the trial court relied upon a declaration with a timetable attached showing that the railroad had set the speed limit at 40 miles per hour in the timetable. *Myers v. Missouri Pacific R. Co.,* 2002 Ok 60, 52 P.3d 1014, 1024 (2002). "Railroads set train speed in their timetables or train orders." *Id.,* at 1023, citing *Track Safety Standards, 63 Fed.Rg.* 33992, 33998 (1998) in fn 29.

In *Anderson v. Wisconsin Cent. Transp. Co.,* 327 F.Supp.2d 969 (E.D. Wis., 2004) the federal court explained:

> The FRA does not classify particular segments of track. Rather, railroads identify desirable speeds for stretches of track and designate such speeds in their timetables and train orders. Once they do so, they must maintain the track so as to satisfy FRA standards for the class of track corresponding to that train speed or be subject to a penalty. Track Safety Standards, 63 Fed.Reg. at 33998.

Id, at 976.

The Court of Appeals, in footnote 6, avoids deciding the legal force of the published timetables by incorrectly claiming this Court's decisions in *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) and *Dickson v. U.S. Fidelity & Guaranty Co.*, 77 Wn.2d 785, 878-88, 466 P.2d 515 (1970)

require Veit's argument to be silenced or ignored. The Court of Appeals, in not deciding, is incorrectly applying the *Cowiche* holding: "[a]n issue raised and argued for the first time in a reply brief is too late to warrant consideration." *Cowiche*, at 809.

b. Washington citizens have a substantial public interest in the issue of whether federal train speed limits must be published for comment, review, and action, or whether they can exist only in the mind of a railroad employee.

Allowing the appellate court's opinion to stand would tie Washington's hands, prevent Washington and its citizens from meaningfully addressing crossing safety, and would lead to more injuries and deaths at Washington crossings. Congress had crossing safety in mind as one of its concerns in setting the federal train speed limit. 49 U.S.C.A. § 20103(a); 49 U.S.C.A §§ 20101 – 40. Congress envisioned state authorities would be able to participate in monitoring the conduct of railroads and their compliance with safety regulations such as speed limits. 49 U.S.C.A. § 20103(e). Indeed, Congress anticipated that state authorities would, where necessary, adopt or continue in force its own laws regarding crossing safety, or bring a civil action to enjoin railroad violations of federal regulations. 49 U.S.C.A. § 20106(2)(a); 49 U.S.C.A. § 20113(a).

Publication of the decision making process regarding rules and regulations enforcing Congress's intentions is necessary for state authorities to have meaningful participation. 49 U.S.C.A. § 20103(e). In promulgating regulations, such as the track class and speed regulations, the Federal Railroad Administration recognized congress's intent that state authorities (including Bellingham), and individuals would be able to know and understand the safety regulations that affected them, including speed limit. 49 C.F.R. § 217.7; 49 C.F.R. § 212.101(d); 49 C.F. R. § 5.5(a); 49 C.F.R. § 5.11(a).

The above statutory and regulatory scheme[1] is not surprising. If speed limits were not published, and existed only in the mind of a railroad employee, the state authority (Bellingham) would have no way of performing its obligations to the public. The appellate court decision has placed the burden of implementing and maintaining traffic control at the crossings on the city. Op., at 26 (MUTCD 8A-1).

[1] See text of statutes and regulations in Appendix, Page 56.

2. The appellate court opinion violates the due process rights of Veit under the federal and state constitutions.

The above statutory and regulatory scheme obviously requires that speed limits be published. However, even if the scheme did not require it, constitutional due process would still require some kind of "ascertainable standard" and process for review of the agency decision. *Holmes v. New York City Housing Authority*, 398 F.2d 262, 265 (C.A.N.Y., 1968). A regulatory scheme that allows for a unpublished decision related to rule making that deprives those affected of the opportunity to seek review is unconstitutional. *Id.* Amendment 14 of United States Constitution; Constitution of the State of Washington, Section 3.

3. This court should accept review under RAP 13.4(b)(1) because the appellate court's decision assumes, incorrectly that *Easterwood* overruled or preempted *Goodner.*

Even assuming the track class was 3 and not 2, there is a strong presumption against federal preemption of state law or orders imposing duties on railroads, essential to "avoiding unintended encroachment on the authority of the States." *CSX Transp. Inc. v. Easterwood,* 507 *U.S.* 658, 664 (1993). The FSRA does not preempt state law requiring railroads to comply with their

own internal rules. *Union Pacific* R. *Co. v .California Public Utilities Com'n,* 346 F.3d 851, 858 (9th Cir., 2003). Under Washington law, "A violation by railroad employees of a regulation adopted by the railroad itself with respect to the speed of a train may be considered in determining the due care of the railroad company in an action for injury to persons or property at a highway crossing, but it must appear that such regulation was adopted to secure the safety of persons using the highway crossing." *Goodner v. Chicago, M., St. P.& P. R. Co.,* 61 Wn.2d 12, 19, 377 P.2d 231 (1963).

The appeals court cited *Easterwood*, *supra*, as authority for the proposition that Veit's speed claims are preempted. Op. at 13. The U.S. Supreme Court, however, recognized in *Easterwood* that a state may "adopt or continue in force an additional or more stringent law . . . related to railroad safety . . . when the law . . . is necessary to eliminate or reduce an essentially local safety hazard." *CSX Trasp., Inc. v. Easterwood*, 507 U.S. at 675, fn. 15. Additionally, the Court declined to address the preemptive effect of a "suit for breach of related tort duties, such as the duty to slow or stop a train to avoid a specific individual hazard." *Id.* However, other courts have addressed that exception.

The realization that **his view of one side of the crossing**

> **was obstructed, coupled with his knowledge of this crossing, triggered a duty for Johnson to slow his train as he approached the MLK crossing.** These illegally and improperly parked tank cars created a specific, individual hazard which required Johnson to continue to slow his train until he had a clear view of both sides of the intersection at MLK and the railroad tracks. **His failure to slow the train under these conditions is evidence he was operating his train at an excessive rate of speed and is a claim that is not pre-empted by federal law.** The improper parking of tank cars which obstruct the view of a crossing is not a hazard which the Secretary took into consideration when determining train speed limits under the FRSA. *See* Easterwood 507 U.S. at ----, 113 S.Ct. at 1742, 1743. (Emphasis added.)

Missouri Pac. R. Co. v. Lemon, 861 S.W.2d 501, 510 (Tex.App. 1993). Prior to *Easterwood* the Washington Supreme Court held that a railroad has the duty to exercise due care to slow the train to a speed sufficient to make the crossing reasonably safe for persons using the highway crossing. *Goodner*, at 19. In *Goodner,* foliage and a warehouse obstructed the view of the motorists. *Id.,* at 15. The *Goodner* Court held that violation of the railroad's internal speed limits was evidence of negligence if those speed limits were adopted for "the safety of persons using the highway crossing." *Id.,* at 19. This holding is consistent with the *Easterwood* holding.

4. The appellate court's decision that Veit's duty or conduct at the crossing goes only to contributory negligence is in direct conflict with *Bordynoski, Gaines* and *Farrow.*

This Court has repeatedly stated that "issues of negligence and contributory negligence are so intertwined that they cannot realistically be dealt with as separate issues." *Bordynoski v. Bergner*, 97 Wn.2d 335, 341, 644 P.2d 1173 (1982). *See also, Gaines v. Northern Pac. Ry. Co.,* 62 Wn.2d 45, 48-49, 380 P.2d 863 (1963); *Farrow v. Ostrom*, 10 Wn.2d 666, 667, 117 P.2d 963 (1941). Proximate cause is so fundamental to either or both negligence and contributory negligence that a jury cannot be expected to separate the two. *Bordynoski.*, at 341.

An incorrect ruling regarding contributory negligence in a motor vehicle collision prevents a jury from properly considering the question of negligence, and requires a new trial. *Id.*, at 343.

BNSF incorrectly, but successfully argued pretrial and up to instructing and closing, that "RCW 46.61.345 is inapplicable to the Pine street crossing and plaintiff should be prohibited from mentioning, referencing, or presenting any argument relating to its requirements." CP 520. RP 59-75. At trial, four witnesses were allowed to testified incorrectly that Veit was required to stop at the stop bar. RP 235, 247, 317-318, 366; and 1177. Because of the trial court's ruling in limine, Veit was prohibited from cross examining or impeaching this testimony by use of RCW 46.61.345.

Veit did not have a duty to stop at the improperly placed stop bar. RCW 46.61.050. Pursuant to the MUTCD, the stop bar was unlawfully placed too close to the track. WAC 468-95-010. CP 299. Inst. 19 and 21; CP 141. RP 391.

Where a trial court grants a motion in limine that prejudices a party by excluding evidence which would allow her to properly present and argue her theory of the case the matter must be remanded for a new trial. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 263 – 264, 274, 279, 96 P.3d 386 (2004).

F. CONCLUSION

This Court should accept review, reverse the Court of Appeals and remand this matter to the trial court for a new trial consistent with this Court's opinion. Costs on this appeal should be awarded to Veit.

RESPECTFULLY SUBMITTED this 1st day of July, 2009.

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Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

ALIZON VEIT, Appellant, v. BURLINGTON NORTHERN SANTA FE CORPORATION, a TEXAS CORPORATION, Respondent.	)	No. 60126-1-I PUBLISHED OPINION IN PART FILED: June 1, 2009

SCHINDLER, C.J.—Alizon Veit was seriously injured when a Burlington Northern Santa Fe Railroad freight train collided with her car at the Pine Street crossing in Bellingham. Veit sued the City of Bellingham (the City) and the Burlington Northern Santa Fe Railroad Corporation (BNSF) for damages. Veit alleged that the City and BNSF negligently designed and maintained the Pine Street crossing. Veit also alleged that the BNSF engineer negligently operated the train at an unreasonable and excessive speed. The trial court denied the railroad's motion to dismiss Veit's negligent design and maintenance claims on summary judgment, but granted the motion to dismiss her excessive speed claims. There was no dispute that the train was traveling at a speed that was less than 40 miles per hour. Because the court concluded that the track was designated as Class 3 with a federally imposed speed limit of 40 m.p.h., the court ruled that under CXS Transp., Inc. v. Easterwood, 507 U.S.

658, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993), Veit's excessive speed claims were preempted by the Federal Railroad Safety Act of 1970 (FRSA). After a three week trial, the jury returned a verdict in favor of BNSF. On appeal, Veit contends the trial court erred in dismissing her excessive speed claims and excluding evidence of the railroad's internal speed limits. Veit also contends that the exceptions to preemption that the Supreme Court noted in Easterwood apply. In addition, Veit claims that the trial court erred in denying her request for a jury instruction on spoliation, allowing witnesses to testify about driving across the railroad tracks at the Pine Street crossing, and refusing to instruct the jury on the duty to have flashing lights at the crossing.

If a train is traveling at or below the maximum speed prescribed by the FRSA, state law claims based on excessive speed are preempted unless the State adopts a more stringent speed limit in order to eliminate "an essentially local safety hazard" or the train was traveling too fast to avoid a "specific, individual hazard." Because reasonable minds could only conclude that the track at the Pine Street crossing was designated as Class 3, with a maximum speed limit of 40 m.p.h., and there was no evidence that the crossing was either designated as a local safety hazard or that there was a specific individual hazard, we affirm summary judgment dismissal of the excessive speed claims and the court's decision to exclude evidence of the railroad's internal speed limits. We reject Veit's other claims of error, affirm the jury verdict, and entry of the final judgment.

FACTS

At approximately 11:40 a.m. on September 10, 2001, Alizon Veit drove her manual transmission Mercedes Benz west on Wharf Street toward the Pine Street railroad crossing (Pine Street crossing). Wharf Street curves right before becoming Pine Street. At the Pine Street crossing there is a two lane paved asphalt roadway with two sets of railroad tracks. The track closest to the Pine Street crossing is a railroad yard or "spur" track. The second track is the main railway line. The two tracks are located approximately 30 feet apart. To the south of the Pine Street crossing is an embankment with vegetation on it. There were seven different signs and markings at the Pine Street crossing to warn westbound vehicles. The warnings included a round "RXR" sign, an "X" with lines painted on the street, a Highway Rail Grade Crossing ("crossbuck")[1] sign, a smaller sign that says "2 TRACKS," a sign that says "NO STOPPING ON TRACKS," a "STOP" sign, and painted pavement markings including a crossbuck and a stop line.

The weather was clear and the roadway was dry. The engineer of the BNSF train, Michael Burks, first sounded the train whistle approximately a quarter mile south of the Pine Street crossing. One eyewitness testified that Veit slowed down, but did not completely stop, and drove slowly, in a "hesitant . . . kind of jerking with the car," eventually stopping on the second set of tracks in the path of the moving train. Burks testified that he first saw Veit's car when it was about 150 feet away from the Pine Street crossing. Because it appeared that Veit was going to drive across the tracks.

[1] Crossbucks are "black-and-white, X-shaped signs that read 'RAILROAD CROSSING.'" See Norfolk S. Ry. Co. v. Franklin, 529 U.S. 344, 350, 120 S. Ct. 1467, 1466, 146 L. Ed. 2d 374 (2000).

Burks said that he sounded a long whistle signal, hit the emergency brakes, and attempted to make an emergency stop. Burks testified that the train was traveling at approximately 20 m.p.h. when it hit Veit's car.

When the police arrived, Veit was unconscious and unresponsive, but still breathing. Veit's car was heavily damaged from the impact. The left front door was crushed inward and the windows were shattered. The manual transmission of the car was in third gear. When an officer replaced the batteries in Veit's portable radio, classical music began to play at level three. Veit suffered head and chest injuries, as well as multiple leg fractures.

In September 2004, Veit's court appointed guardian sued the City, BNSF, and the BNSF train engineer for damages. Veit alleged that the City and BNSF breached their duty to adequately design the Pine Street crossing and negligently maintained the right-of-way.[2] Veit alleged that the placement of the stop bar and the vegetation on the embankment created a hazard that prevented a driver from seeing the approaching train. Veit also alleged that the BNSF engineer negligently operated the train at an unreasonable and excessive speed.

The City filed a motion for summary judgment asserting there was no evidence that the Pine Street crossing was negligently designed or maintained, and the City did not have notice that the vegetation on the embankment impaired a driver's ability to

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[2] Veit also alleged that because the crossing was "extrahazardous," the City and BNSF were strictly liable for her injuries. A railroad crossing is extrahazardous when a prudent driver, operating at a reasonable speed, is unable to avoid a collision due to the inability to timely observe the train. Cain v. St. Louis-San Francisco R. Co., 293 P.2d 355 (Okla. 1956) (holding that a crossing was not extrahazardous when the railroad failed to give warning signals, use lights, despite the curvature of the tracks and vegetation). Veit does not appeal the court's summary judgment dismissal of her extrahazardous claim.

see an approaching train. BNSF joined in the City's motion for summary judgment. BNSF also argued there was no evidence that the crossing was negligently designed or that the vegetation blocked a driver's line of sight and that the embankment was not part of the BNSF right-of-way.

In addition, BNSF argued that Veit's excessive speed claims were preempted by federal law. There was no dispute that the train was traveling far below 40 m.p.h. when it collided with Veit's car. BNSF presented evidence establishing that under federal law, the track at the Pine Street crossing, which is located at milepost 96.2, was designated as Class 3 with a speed limit of 40 m.p.h.

John Leeper, the BNSF Director of Engineering Planning, stated that on the date of the accident, "the segment of track where the incident occurred was designated Class 3 . . . ."

Carl Johnson, the full time track inspector for the BNSF Northwest Division in Bellingham, FRSA explained the difference between the mandated speed limit and the internal speed limits set by BNSF: "The [FRSA] maximum allowable speed limit for freight trains traveling on Class 3 track is 40 m.p.h. The BNSF maximum authorized speed for freight trains on the track segment between MP [mile post] 93.6 to 96.7 is 30 m.p.h., with a 20 m.p.h. head end restriction at MP 96.2 (Pine Street crossing)."

Alex Franco, Jr., the BNSF Northwest Division Roadmaster, also stated that the Pine Street crossing at "milepost 96.2 had a head-end timetable speed restriction of 20 m.p.h." and that "BNSF typically sets its internal speed limits lower than federal law requires." Franco stated that the head-end restriction imposed by BNSF "means a

BNSF train must travel at or below the indicated speed when the front of its head locomotive first enters the crossing."

In opposition, Veit relied on a report that was prepared after the accident by BNSF trainmaster Terrence Nies, to argue that because the track was designated as a Class 2 track with a speed limit of 25 m.p.h., federal law did not preempt her excessive speed negligence claims. Veit also argued that violation of BNSF's internal speed limits was evidence of negligence. As to the negligent design and maintenance claims, Veit asserted that under the Manual on Uniform Traffic Control Devices published by the United States Department of Transportation Federal Highway Administration (the MUTCD), BNSF and the City had a duty to provide adequate warning signals and were jointly responsible for the right-of-way.

In reply, BNSF submitted a declaration from Nies. Nies testified that the statement in the accident report that the track at the Pine Street crossing was designated as Class 2 track was a mistake, and the track designation at the Pine Street crossing "was, and still is, Class 3." Nies also stated that the 20 m.p.h. head-end restriction was "not a speed limit, but the speed that BNSF dictates the 'head end' of the train must go only as it enters the crossing."

The City settled with Veit before the summary judgment hearing. The trial court denied the railroad's motion to dismiss Veit's negligent design and maintenance claims because there were disputed issues of material fact. However, the court concluded that because the track at the Pine Street crossing was designated as Class 3 with a

speed limit of 40 m.p.h., Veit's excessive speed claims were "preempted by federal law."[3]

For the first time in the motion for reconsideration, Veit argued that because her excessive speed claims were based on "obstruction to view," the "essentially local safety hazard" or the specific individual hazard exceptions noted in Easterwood precluded summary judgment. The court denied Veit's motion for reconsideration, but allowed her to present evidence at trial to seek to establish that the exceptions under Easterwood applied and the crossing was a local safety hazard or a specific individual hazard. Before trial, the court granted the railroad's motion to exclude evidence of negligence based on the BNSF internal speed limits.

Over the course of the three week jury trial, lay and expert witnesses testified about the accident, the Pine Street crossing, and Veit's condition before and after the accident. Veit claimed BNSF was negligent in (1) failing to exercise reasonable care in designing the railroad crossing, (2) failing to exercise reasonable care in maintaining the right-of-way, (3) failing to exercise reasonable care in providing warnings, and (4) failing to exercise reasonable care in operating the train given the hazardous conditions at the crossing.

Veit has no recollection of the accident and did not testify. Two women, who work in the building across the street from the Pine Street crossing, saw the accident from an office on the second floor of their building. Jennifer Hendricks said that she heard the train whistle and was "pretty sure" Veit stopped at the stop sign. Hendricks

[3] The court also dismissed the claims against the train engineer, Burks, with prejudice.

said that Veit slowly drove over the first track and stopped on the second track. At that point, Hendricks called 911 because she knew the train was going to hit Veit's car. Hendricks testified that, before the train hit the car, Veit looked "scared to death."

LaDawn Ramsey testified that as the train approaches the Pine Street crossing, the train whistle is very loud. Ramsey said Veit slowed down before crossing the tracks, but "was not completely stopped." Ramsey testified that Veit drove across the tracks very slowly and was "jerking with the car." Ramsey also said that Veit seemed "confused." According to Ramsey, after Veit hesitated, she drove her car onto the second track, and then stopped.

Veit's friend and neighbor, Grant Wilder, testified that the car had a manual transmission and that Veit may have stalled the car while driving across the railroad tracks. Wilder said that Veit was "a terrible driver." Wilder testified that after Veit's husband died, he had to help Veit back her car out of the driveway because otherwise "she would always go in the bushes."

Another witness who had carpooled with Veit, also testified that Veit was "not a smooth driver" and "was a little bit jerky when she passed gears[.]" Veit's human factor expert testified that "when the vehicle was, was examined, it was found to be in third gear. That did not seem to be a rational gear for someone who is trying to get off the track quickly."

The highest speed that any witness estimated the train was traveling was 33 m.p.h. The brakeman on the train, William Davis, testified that at the time of the accident, the train was traveling at or near 20 m.p.h. Consistent with the pretrial ruling,

that the track was designated Class 3 with a speed limit a 40 m.p.h., the court denied Veit's request to present Burks's testimony that he believed the federal speed limit at the crossing was 20 m.p.h.

The crux of Veit's negligent design and maintenance claims was that the painted stop bar violated the MUTCD and was located too close to the tracks for a driver to safely see a train approaching from the south and the vegetation on the embankment next to the crossing blocked the driver's line of sight. Veit also presented testimony seeking to show that the Pine Street crossing was hazardous and the crossing was "extremely dangerous or inherently dangerous."

Veit's transportation engineering expert, Edward Stevens, testified that the City and BNSF were jointly responsible for the markings and the signals at the Pine Street crossing and the crossing was inherently dangerous. Stevens stated that the location of the stop bar violated the MUTCD and the vegetation on the embankment prevented a driver from seeing a train approaching from the south. However, Stevens admitted that the placement of the stop bar was the sole responsibility of the City and the railroad had no responsibility for the markings at the crossing.

Thomas Rosenberg, an engineer with the City of Bellingham Public Works Department, also testified about the location of the stop bar and the embankment at the Pine Street crossing. Rosenberg testified that the City, not BNSF, was solely responsible for placement of the stop bar. Rosenberg said that he had "no idea" who owned the embankment but that the property owner was responsible for cutting down the vegetation near the crossing. Rosenberg also testified that the State had not

designated the Pine Street crossing as a local safety hazard or as extremely dangerous.

Veit also asked a number of lay witnesses about driving across the tracks at the Pine Street crossing and whether the crossing was dangerous. On cross examination, the witnesses testified about their experiences in safely crossing the railroad tracks at Pine Street crossing.

Mary Wilder, a close friend of Veit's, testified that after the accident Veit was a "whole different person" and she had to learn how to do everything again, including how to swallow and eat. Veit required 24 hour care, physical therapy, psychotherapy, occupational therapy, and a number of medications. The jury also watched a DVD showing Veit's condition.

A professional land surveyor, Bruce Ayers, testified on behalf of BNSF. Ayers testified that the BNSF right-of-way consisted of a 14 foot strip that extended seven feet from the center line of the first set of tracks. Toward the end of the trial, Timothy Wahl, a City Parks and Recreation Department employee, testified that upon further investigation, the City, not BNSF, owned the embankment at the Pine Street crossing.

The court instructed the jury on negligence, contributory negligence, and the requirements of the MUTCD concerning traffic controls, the location of the stop bar, and the duty of the railroad to maintain the right-of-way. The court also instructed the jury that "the applicable train speed limit at the Pine Street crossing on September 10, 2001 was 40 miles per hour." In the special verdict form, the jury found that BNSF was not negligent. As directed, the jury did not answer the questions as to

contributory negligence or damages. The court entered a final judgment on the jury verdict dismissing Veit's lawsuit against BNSF. The court denied Veit's motion for judgment notwithstanding the verdict or a new trial. Veit appeals.

ANALYSIS

Excessive Speed

Veit contends that the trial court erred in ruling on summary judgment that the Pine Street crossing was designated as a Class 3 track with a speed limit of 40 m.p.h. Veit also contends that the court erred in excluding evidence of the internal speed limits as set forth in the BNSF timetable and the testimony of the train engineer that he believed that the internal speed limits were "the maximum speeds allowed by federal law."

We review summary judgment de novo and engage in the same inquiry as the trial court. Heath v. Uraga, 106 Wn. App. 506, 512, 24 P.3d 413 (2001). Summary judgment is proper if the pleadings show the moving party is entitled to judgment as a matter of law or in view of all the evidence, reasonable persons could reach only one conclusion. CR 56(c); Hansen v. Friend, 118 Wn.2d 476, 485, 824 P.2d 483 (1992). Whether federal law preempts Veit's claim that BNSF negligently operated the train by traveling at an unreasonable and excessive speed is a question of law that we review de novo. Berger v. Sonneland, 144 Wn.2d 91, 26 P.3d 257 (2001).

Congress enacted the Federal Railroad Safety Act of 1970 (FRSA), 49 U.S.C. §§ 20101-40, "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. The FRSA provides a

comprehensive system to regulate railroads and gives the Secretary of Transportation broad authority to adopt regulations and issue orders for "every area of railroad safety." 49 U.S.C. § 20103(a). The FRSA also directs the Secretary to "develop and carry out solutions to the railroad crossing problem." 49 U.S.C. § 20103(a).

The FRSA also contains an express preemption provision that displaces State authority to regulate railroad safety when the Secretary of Transportation adopts a regulation or an order covering the subject matter of the state's requirements. However, the preemption provision allows a state to adopt or continue in force a more stringent law or regulation if it is necessary to eliminate or reduce "an essentially local safety hazard" as long as it is not incompatible with "a law regulation, or order if the United States Government." 49 U.S.C. § 20106(a)[(1)-(2)]. The FRSA preemption provision provides:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement.[4]

As part of the regulatory system under the FRSA, the Secretary of Transportation issued regulations establishing the maximum allowable speeds for freight trains and passenger trains based on the designated class of track. 49 C.F.R. § 213.9(a). 49 C.F.R. § 213.9 codifies requirements and maximum allowable speeds for Class 1 to Class 5 railroad tracks. The class of a track is determined by a number

[4] In August 2007, Congress amended the FRSA to clarify the preemptive effect of the FRSA and state causes of action. 49 U.S.C. § [20106(b)-(c)]. The amendment is not raised by the parties and is not pertinent to the analysis in this case.

of factors including the gage of the alignment, curvature, and uniformity. 49 C.F.R. § 213.9.

In Easterwood, the United States Supreme Court held that 49 C.F.R § 213.9 "cover[s] the subject matter of train speed with respect to track conditions, including the conditions posed by [railroad] crossing." Easterwood, 507 U.S. at 675. After her husband was killed while driving across the tracks at a railroad crossing, Easterwood sued, alleging that the railroad failed to maintain adequate warning devices at the crossing and the railroad breached its duty to operate the train "at a moderate and safe rate of speed." Easterwood, 507 U.S. at 661. The Court held that Easterwood's negligence claims as to the warning devices at the crossing were not preempted, but her excessive speed claims were preempted by the regulations adopted by the Secretary of Transportation under 49 C.F.R. § 213.9. Easterwood, 507 U.S. at 673-74.

The Court rejected Easterwood's argument that the state law speed restrictions continued in force under the "essentially local safety hazard" language.

> The state law on which respondent relies is concerned with local hazards only in the sense that its application turns on the facts of each case. The common law of negligence provides a general rule to address all hazards caused by lack of due care, not just those owing to unique local conditions. Respondent's contrary view would completely deprive the Secretary of the power to pre-empt state common law, a power clearly conferred by § 434.

Easterwood, 507 U.S. at 673-74.

The Court concluded that the regulations and orders issued by the Secretary of Transportation to enforce the FRSA "should be understood as covering the subject

matter of train speed with respect to track conditions, including the conditions posed by grade crossings" and were only adopted "after the hazards posed by track conditions were taken into account." Easterwood, 507 U.S. 674

> On their face, § 213.9(a)'s provision address only the maximum speeds at which trains are permitted to travel given the nature of the track on which they operate. Nevertheless, related safety regulations adopted by the Secretary reveal that the limits were adopted only after the hazards posed by track conditions were taken into account. Understood in the context of the overall structure of the regulations, the speed limits must be read as not only establishing a ceiling, but also precluding additional state regulation of the sort that respondent seeks to impose on petitioner.

Easterwood, 507 U.S. at 674. However, the Court also expressly noted that "related tort law duties, such as the duty to slow or stop a train to avoid a specific, individual hazard" might not be preempted. Easterwood, 507 U.S. at 675 n 15.[5]

In short, if a train is involved in a collision while traveling at the speed limit prescribed under C.F.R. § 213.9, state law negligence claims based on excessive speed are preempted unless the crossing is designated by the State as an essentially local safety hazard or the conditions create a specific individual hazard.

Veit concedes there is no evidence that the BNSF freight train was traveling in excess of 40 m.p.h., but argues there are material issues of fact about whether the track at the Pine Street crossing was designated as a Class 2 or a Class 3 track. 49

[5] Courts have consistently followed Easterwood in holding that excessive speed negligence claims under state law are preempted by federal law. See e.g., Michael v. Norfolk Southern Ry. Co., 74 F.3d 271, 273 (11th Cir. 1996) ("Any state law claim based on the train's alleged excessive speed is preempted by federal law, specifically the train speed regulations set out in 49 C.F.R. § 213.9."); Waymire v. Norfolk and Western Ry. Co., 218 F.3d 773, 776 (7th Cir. 2000) ("Waymire's negligence claim based upon the speed of the train is superseded by FRSA and the regulations promulgated thereunder"); Hargrove v. Missouri Pac. R.R. Co., 888 So.2d 1111, 1114 (La. App. 3 Cir. 12/1/04) (under Easterwood, federal regulations preempt "state law negligence claims based on excessive train speed.")

C.F.R. § 213.9 provides that the maximum allowable speed for a freight train for a Class 2 track is 25 m.p.h. and the maximum allowable speed for a Class 3 track is 40 m.p.h.

The trial court ruled that based on the evidence at summary judgment, reasonable minds could only conclude that the track at the Pine Street crossing was designated as Class 3: "All the competent evidence I have is that it was a Class 3 track and has a 40 mile an hour speed limit." The trial court relied on the declaration of BNSF trainmaster Nies in rejecting Veit's reliance on the misstatement in his accident report that the track designated as was Class 2.

> [T]here was always a very clear declaration that indicated that was an error. It doesn't matter whether BNSF makes an error in the report or not. What the federal government determines that to be the speed limit [sic] there is what counts and . . . the only competent evidence I have is that it is, in fact, a Class 3 track. I have no evidence from anybody else that says it's not."

Veit's argument that the report creates a material issue of fact as to the classification of the track ignores Nies's declaration retracting his statement that the crossing was Class 2. In the declaration, Nies testifies that his statement about the track classification was a mistake and the crossing "was, and still is, Class 3."

Veit also argues that the declarations of Leeper and Johnson stating that the crossing was designated as a Class 3 track lack foundation because the witnesses addressed the classification of the track in 2006 and not at the time of the accident. But Leeper specifically states, "On the date of the accident in this case, the track segment was Class 3." And Johnson states "On the date of the accident in this case, I verified the Bellingham subject track segment was within FRA Class 3 standards."

Based on the evidence at summary judgment, reasonable minds could only conclude that the track at the Pine Street crossing was a designated as a Class 3 track, not Class 2.

In the alternative, Veit relies on Missouri Pac. R. Co. v. Lemon, 861 S.W.2d 501 (Tex. App. 1993), to argue that her excessive speed claims were not preempted because the train engineer had a duty to slow or stop to avoid a "specific, individual hazard. " Easterwood, 507 U.S. at 675 n.15.

Courts have defined a specific individual hazard as "a person, vehicle, obstruction, object, or event which is not a fixed condition or feature of the crossing and which is not capable of being taken into account by the Secretary of Transportation in the promulgation of uniform, national speed regulations." Myers v. Missouri Pac. R.R. Co., 52 P.3d 1014, 1027 (Okla. 2002). A specific individual hazard is a unique occurrence rather than a generally dangerous condition.

Veit's reliance on Lemon is unpersuasive. In Lemon, a line of tank cars were improperly parked within 105 feet of the crossing. Even though the tank cars obstructed the engineer's view of the intersection, the engineer did not slow down the train. Lemon, 861 S.W.2d at 510. The jury found the railroad was negligent based on the engineer's failure to reduce the train's speed even though the "illegally and improperly parked tank cars" obstructed his view of the crossing. Lemon, at 509-10. The court held that the illegally parked tank cars created a specific, individual hazard because "[t]he improper parking of tank cars which obstruct the view of a crossing is not a hazard which the Secretary took into consideration when determining train speed

limits under the FRSA." Lemon, 861 S.W.2d at 510. Here, unlike in Lemon, the evidence established that BNSF was not responsible for the vegetation on the embankment. And the evidence did not establish "a unique occurrence which could lead to a specific and imminent collision and not to allegedly dangerous conditions at a particular crossing." Meyers, 52 P.3d at 1027 (Okla. 2002).

Veit also appears to argue that the "essentially local safety hazard" exception noted in Easterwood applies. As interpreted by the Ninth Circuit, an essentially local safety hazard is a local safety concern "which is not 'adequately encompassed within national uniform standards.'" Union Pac. R.R. Co. v. Cal. Pub. Utils. Comm'n, 346 F.3d 851, 860 (9th Cir. 2003). Veit cites a former Washington Administrative Code (WAC) provision in support of her argument that the Pine Street crossing was designated as an essentially local safety hazard. Former WAC 480-62-155 required the City to determine whether a lower speed limit than the federal speed limit was necessary to eliminate or reduce an essentially local safety hazard. But even if WAC 480-62-155 applied, the testimony at trial established that the City had not designated the Pine Street crossing as a local safety hazard.

Citing a Washington Supreme Court case decided thirty years before Easterwood, Goodner v. Chicago, M., St. P. & P. R. Co., 61 Wn.2d 12, 19, 377 P.2d 231 (1963), Veit also contends that the trial court erred in excluding evidence of the internal speed limits set in the BNSF timetables. In Goodner, the court held that violation of a railroad's internal speed limit was evidence of negligence. Goodner, 61 Wn.2d at 19. While a violation of the railroad's internal speed limits may be evidence

of negligence under state law, under Easterwood, the federal regulations which specify the speed limits for different types of track preempt state law negligence claims based on excessive speed. Easterwood, 507 U.S. at 673-74; See also St. Louis Soutwestern Ry. Co. v. Pierce, 68 F.3d 276, 278 (8th Cir. 1995) (railroad's self-imposed speed limit of 45 m.p.h. was preempted by the Federal Safety Act speed limit of 60 m.p.h.); Mott v. Missouri Pac. R. Co., 926 S.W.2d 81, 85 (Mo. App. W.D. 1996) ("The railroad's alleged violation of a self-imposed speed limit should not have been submitted to the jury.").[6]

We affirm the trial court's decision that the Pine Street Crossing was designated as a Class 3 track with a speed limit of 40 m.p.h., and that under Easterwood, Veit's excessive speed claims were preempted. We also affirm the trial court's decision to exclude testimony of the internal speed limits in the BNSF timetables.

The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with the rules governing unpublished opinions.

Spoliation Jury Instruction

Veit asserts the trial court abused its discretion by refusing to give a spoliation instruction to the jury that the missing event recorder data would have established the speed of the train. A "spoliation instruction" is appropriate under the narrow circumstances in which a party cannot offer a "satisfactory explanation" for the loss of

[6] For the first time in her reply brief, Veit cites Anderson v. Wisconsin Cent. Transp. Co., 327 F. Supp.2d 969 (E.D. Wis. 2004) and a provision in 49 C.F.R. § 213.9, to argue that railroads establish track classification and speed limits in the timetables. We do not consider arguments made for the first time in a reply brief. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). See also Dickson v. U.S. Fid. & Guar. Co., 77 Wn.2d 785, 787-88, 466 P.2d 575 (1970) ("Contentions may not be presented for the first time in a reply brief.").

information under its control. Pier 67, Inc. v. King County, 89 Wn.2d 379, 385, 573 P.2d 2 (1977). In deciding whether to give a spoliation instruction, the court must take into consideration "(1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the adverse party." Henderson v. Tyrrell, 80 Wn. App. 592, 607, 910 P.2d 522 (1996). The court may also consider whether the party acted in bad faith and whether there was some innocent explanation for the loss of evidence. Henderson, at 609.

BNSF presented evidence, both before and during trial, explaining why the event recorder data no longer existed. The event recorder for the BNSF train was an eight-track tape that ran on a continuous loop and recorded for approximately 48 hours. Jim Kime, the BNSF employee who was responsible for analyzing the event recorder data in the event of an accident, said that he downloaded the data from the tape to his laptop computer shortly after the collision. After downloading the information, Kime discovered that the eight-track tape did not properly record the data and the data was unusable. Kime destroyed the tape to prevent it from being used again. On November 16, 2001, someone broke into Kime's van and stole the laptop computer that contained the data he had downloaded from the eight-track tape. Kime reported the theft, but did not recover the laptop. Approximately two years later, Veit filed her lawsuit against BNSF. Because BNSF presented a satisfactory explanation for the loss of the event recorder data, the trial court did not abuse its discretion in denying Veit's request for a jury instruction on spoliation.

Lay Witness Testimony about the Safety of the Pine Street Crossing

Veit contends the trial court abused its discretion by allowing a number of lay witnesses to testify on cross examination about safely crossing the tracks at the Pine Street crossing. Veit argues the testimony violated the court's ruling that prevented BNSF from presenting evidence of prior accidents at the crossing.[7]

On direct examination, Veit's lawyer asked several witnesses about the conditions and safety of the crossing. On the first day of testimony, the attorney asked Albert Froderberg whether he was "concerned about the condition of the crossing." Froderberg responded, "[Y]eah, I thought it was pretty bad. It was overgrown with blackberry bushes . . . and there's no signal." But on cross examination, Froderberg testified that despite the blackberry bushes, he safely drove across the tracks because he was careful.

Veit's attorney also asked Officer Chad Christelli about the vegetation, and the ability to see an approaching train at the time of the accident. On cross examination, Officer Christelli testified that if a driver stopped at the stop bar and proceeded with caution, the driver could see a train approaching and safely drive across the tracks.

During direct examination, Veit's attorney asked Hendricks about how long she had worked in the building across the street from the railroad tracks. On cross examination, Hendricks testified that she had to drive across the tracks to get to work and had always been able to safely do so. Hendricks' coworker, Ramsey also testified

[7] Before trial, the court ruled in limine that evidence of prior accidents at the crossing was inadmissible.

on cross examination that she had to drive across the tracks to get to work and had done so safely.

On direct examination, Veit's attorney also asked David Nelson several questions about the condition of the tracks at the time of the accident and his ability to see an approach train from the stop line. On cross examination, the BNSF attorney asked,

> Q. Now, you personally have used that crossing as a driver frequently, haven't you?
> A. Yes, I -- probably once a month.
> Q. And you personally have been able to come down, stop at or near the stop bar and ascertain safely whether or not a train was coming?
> . . .
> A. I've never encountered a train going down the hill, so, you know, obviously I made it across safely.

When a party opens up a subject by questioning a witness on direct examination, the opposing party will be permitted to cross examine within the scope of the direct examination. Ang v. Martin, 118 Wn. App. 553, 562, 76 P.3d 787 (2003). "The trial court has considerable discretion in administering this open-door rule." Ang, 118 Wn. App. at 562. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. Wick v. Clark County, 86 Wn. App. 376, 382, 936 P.2d 1201 (1997). Because the questions on direct examination permitted cross examination about crossing the railroad tracks at Pine Street, we conclude the trial court did not abuse its discretion in allowing witnesses to testify about safely driving across the railroad tracks.

Expert Surveyor Testimony

Veit also asserts that the trial court abused its discretion in admitting expert surveyor testimony regarding the boundaries of the BNSF right-of-way on the 1918 station map. Veit also contends the court abused its discretion in admitting two photographs of the 1918 station map, exhibits, Exhibits 63A and 63B, for illustrative purposes.

We review the trial court's evidentiary rulings for manifest abuse of discretion. Allen v. Asbestos Corp., Ltd., 138 Wn. App. 564, 570, 157 P.3d 406 (2007). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. Wick, 86 Wn. App. at 382.[8]

If technical knowledge will assist the trier of fact to understand the evidence, a witness qualified as an expert may testify about his technical knowledge in the form of an opinion. ER 702. "We review a trial court's evidentiary rulings for an abuse of discretion." Saldivar v. Momah, 145 Wn. App. 365, 394, 186 P.3d 1117 (2008). ER 703 allows an expert to rely on information generally relied on in the expert's field. Reese v. Stroh, 128 Wn.2d 300, 309, 907 P.2d 282 (1995). Under ER 703,

> A trial court may allow the admission of otherwise hearsay evidence and inadmissible facts for the purpose of showing the basis of the expert's opinion. . . . The admission of these facts, however, is not proof of them.

[8] Veit's argument that a de novo standard of review applies is unpersuasive. Courts routinely allow expert surveyor testimony. See, e.g., Proctor v. Huntington, 146 Wn. App. 836, 192 P.3d 958 (2008) rev. granted, No. 36087-0 (Wash. April 1, 2009) (each party hired a surveyor to determine claims in an adverse possession case); Sparks v. Douglas County, 39 Wn. App. 714, 717, 695 P.2d 588 (1985) (relying on evidence that a surveyor could not locate the property). Veit also relies on Ray v. King County, 120 Wn. App. 564, 571, 86 P.3d 183 (2004), to argue that the existence of a right-of-way is a question of law. Ray is distinguishable. In Ray, the parties disputed the interpretation of a deed, which is a question of law.

> If an expert states the grounds upon which his opinion is based, his explanation is not proof of the facts which he says he took into consideration. His explanation merely discloses the basis of his opinion in substantially the same manner as if he had answered a hypothetical question.

Allen, 138 Wn. App at 579-80.

Bruce Ayers testified that he had done approximately 2700 surveys. Ayers testified that when BNSF asked him to determine where the right-of-way was located in relation to the tracks, he researched deeds dating back to 1890, and displayed the boundaries on a certified map. Ayers testified that he had obtained information from the Public Land Office website, which contains a large number of maps and surveys. Ayers also testified that other land surveyors in Washington also rely on the information provided by the Public Land Office website.

When BNSF moved to admit a photograph of a 1918 station map, Exhibit 63, Veit objected on the ground that the map could not be admitted as a business record. The court sustained the objection, but admitted two photographs of the 1918 station map, Exhibit 63A and Exhibit 63B, for illustrative purposes. Veit's attorney engaged in an extensive cross examination of Ayers about the 1918 station map and the basis of Ayer's opinion about the location of the right-of-way. Because the record shows that the 1918 station map is the type of information reasonably relied on by experts in the field, the trial court did not abuse its discretion by allowing Ayers to testify about the boundaries of the BNSF right-of-way or in admitting Exhibits 63A and 63B for illustrative purposes.

Jury Instruction on Joint Responsibility for the Embankment

Veit asserts that the court erred in failing to instruct the jury that BNSF was jointly responsible for exercising reasonable care in maintaining the vegetation on the embankment next to the crossing based on the doctrine of judicial estoppel. In a declaration submitted as part of the City's motion for summary judgment, the Assistant Director of Public Works for the City, Rosenberg stated that the embankment was located in the "the Burlington Northern right-of-way." When BNSF joined in the City's motion for summary judgment, it adopted the City's evidence. Veit contends that the trial court should have precluded BNSF from later taking the position that it did not own or have control over the embankment under the doctrine of judicial estoppel.

The equitable doctrine of judicial estoppel precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position in another court. Bartley-Williams v. Kendall, 134 Wn. App. 95, 98-99, 138 P.2d 1103 (2006). We review the trial court's application of the doctrine of judicial estoppel to the facts of the case for abuse of discretion. Cunningham v. Reliable Concrete Pumping, Inc., 126 Wn. App. 222, 227, 108 P.3d 147 (2005).

While BNSF joined in the summary judgment motion and adopted the City's evidence, BNSF clearly took the position that there was no evidence that it owned the embankment, "Veit offers no evidence to prove that the particular allegedly overgrown vegetation is on BNSF property." And contrary to the declaration that Rosenberg submitted as part of summary judgment, Rosenberg later testified at trial that he did not know who owned the embankment next to the Pine Street crossing, "I have no

idea whether it's [a] railroad right-of-way or not. I don't understand or . . . claim to understand who owns the property out there." Later in the trial, another city employee, Tim Wahl, unequivocally testified that the City not BNSF owned the embankment.

Veit's argument that BNSF had "joint responsibility" with the City under MUTCD 8A-1 for clearing vegetation on the right-of-way is also unpersuasive. MUTCD 8A-1 provides in pertinent part that:

> [T]he highway and the railroad company are entitled to jointly occupy the right-of-way in the conduct of their assigned duties. This requires joint responsibility in the traffic control function between the public agency and the railroad.[9]

Under the plain language of the MUTCD, "joint responsibility" only applies to the "traffic control function," not to clearing vegetation. The evidence at trial was that the City as owner of the right-of-way had the responsibility to clear the vegetation. On this record, we conclude the doctrine of judicial estoppel does not apply and the court did not abuse its discretion in refusing to instruct the jury that BNSF was jointly responsible for exercising reasonable care in maintaining the vegetation on the embankment.

Proposed Instruction No. 36

Veit also asserts the court erred by refusing to give her proposed jury instruction based on the MUTCD 8C-5. Proposed Instruction No. 36 states, "On tracks where trains operate at speeds of 20 m.p.h. or higher, circuits controlling automatic flashing light signals shall provide for a minimum operation of 20 seconds before arrival of any train on such track."

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[9] Emphasis added.

We review a trial court's decision to reject a jury instruction for abuse of discretion. Stiley v. Block, 130 Wn.2d 486, 498, 925 P.2d 194 (1996). The refusal to give an instruction warrants reversal only if a party cannot argue its theory of the case or if the instructions as a whole are misleading or does not inform the jury of the applicable law. Hill v. Cox, 110 Wn. App. 394, 407, 41 P.3d 495 (2002).

MUTCD 8C-5 only applies when "active control systems," such as flashing light signals, are installed at a crossing. There is no dispute that at the time of the accident, the Pine Street crossing was controlled by seven passive traffic controls. Because there were no active control systems at the Pine Street crossing, the court did not abuse its discretion in refusing to give Veit's proposed instruction No. 36.

CONCLUSION

We affirm the jury verdict and entry of the judgment on the verdict.[10]

Schindler, C.J.

WE CONCUR:

Dwyer, A.C.J.

Ajid, J.

[10] Because the jury did not reach the question of Veit's negligence or damages, we need not address the assignments of error concerning contributory negligence or damages.

Division Managers

Bellingham

P.J. DIETZ	Trainmaster	625-6700
S.R. MORAN	Roadmaster	625-6701

Centralia

G.A. GOWER	Signal Supervisor	330-2525

Ellensburg

T.L. HESTERMANN	Roadmaster	625-6880
R.J. SUTTON	Signal Supervisor	625-6863

Everett

M.D. ANDERSON	Signal Supervisor	304-6687
K.A. BEALER	Terminal Trainmaster	304-6635
L.L. BRADEN	Terminal Trainmaster	304-6635
T.J. DRISCOLL	B&B Supervisor	304-6653
J.R. FRANZEN	Terminal Trainmaster	304-6635
L.G. HALL	Terminal Manager	304-6646
P.J. HAMELL	Terminal Trainmaster	304-6635
R.G. KAZEN	Roadmaster	304-6690
T.L. NIES	Division Trainmaster	304-6632
T.W. OUDEANS	Trainmaster	304-6699
B.K. POLNICKY	Asst. B&B Supervisor	304-6561

New Westminster, BC

K.J. ROYAL	Supt. Canadian Operations	520-5200
L.A. CREED	Trainmaster	520-5201

Seattle

R.A. BERTHOLF	General Foreman Cars	270-3665
T.L. DAVIS	Terminal Manager	270-3735
J.W. ELLSTROM	Superintendent Operations	625-6362
R.M. GAY	Terminal Trainmaster	270-3692
D.R. GILLIAM	Asst. Division Engineer	625-6065
S.A. GORDON	Terminal Superintendent	270-3719
D.N. HELBLING	Terminal Trainmaster	270-3692
G.S. HENNINGER	Terminal Trainmaster	270-3692
B.E. HIPOL	Roadmaster	625-6462
K.J. HORISZNY	Asst. Roadmaster	625-6087
L.D. HUNTER	Terminal Manager	270-3603
S.D. JOHNSON	Terminal Trainmaster	270-3692
J.L. KIME	Road Foreman	270-3770
S. KIPPERBERG	B&B Supervisor	625-6238
R.M. LINNANE	Terminal Manager	625-6072
J.A. LITTON	Road Foreman Engines	270-3620
T.E. MARTIN	Director Administration	625-6275
G.M. McNEIL	Asst. Terminal Superintendent	270-3663
J.S. SAWICKI	Terminal Trainmaster	270-3692
W. L. SCHROEDER	Manager Safety & Rules	625-6364
J.H. WILLIAMS	Terminal Manager	270-3602
L.D. WOODLEY	Division Engineer	625-6363
J.K. WOVCHA	Terminal Trainmaster	270-3692

Tacoma

S.L. BOATMAN	Terminal Trainmaster	591-2562
K.A. ESTERBY	Terminal Trainmaster	591-2556
R.L. HALL	Terminal Manager	591-2557
W.G. LONNGREN	Roadmaster	591-2563
D.N. MEYERS	Terminal Trainmaster	591-2556
J.R. NELSON	Terminal Trainmaster	591-2556

Wenatchee

D.B. FLYNN	Signal Supervisor	664-2267
G.H. RILEY	Road Foreman Engines	664-2248
J.S. SOLOMOU	Terminal Manager	664-2246
J. STROUP	Asst. Roadmaster	536-0102

Yakima

G.A. FILCHER	Trainmaster	546-3306

Superintendent's Hotline ..... (800) 834-5534

BNSF

Pacific Division

Timetable No. 3

IN EFFECT AT 0001
Pacific Continental Time

Sunday, July 18, 1999

Division Superintendent
Greg White
Seattle, Washington
(206) 625-6361

SOUTHWARD	Length of Siding (Feet)	Station Nos.	Mile Post	Bellingham Subdivision MAIN LINE STATIONS	Rule 4.3	Type of Oper.	Line Segment	Miles to Next Stn.	NORTHWARD
			119.6	USA CANADA BORDER	Y	ABS OCS	50	0.3	
	6,060	15088	119.3	BLAINE	BY			2.4	
	8,588		116.4	SWIFT		CTC		4.3	
		15081	112.1	INTALCO	JT			5.0	
	8,478	15075	106.3	FERNDALE				9.0	
		15067	97.0	BELLINGHAM	BY	ABS OCS		3.2	
	6,347	15062	92.9	SOUTH BELLINGHAM	Y	CTC		13.4	
	8,884	15049	79.7	BOW				7.4	
	4,635	15042	71.9	BURLINGTON to MT. VERNON 3.9	J				
WWD		15042	16.6Z	BURLINGTON	R		409	12.4	EWD
		66216	4.2Z	FIDALGO		TWC			
SWD	6,075	15038	66.8	to BURLINGTON 3.9 MT. VERNON	B	CTC	50	12.4	NWD
	6,381	15025	55.5	STANWOOD				9.7	
	6,846	15016	45.5	ENGLISH to KRUSE JCT. 3.6					
WWD		66023	6.9X	ARLINGTON		TWC	406	7.2	EWD
		15012	0.0X	KRUSE JCT.					
SWD		15012	42.2	to ENGLISH 3.6 KRUSE JCT.		CTC	50	3.4	NWD
	2,557	15009	38.8	MARYSVILLE				2.7	
			37.0 10.9	DELTA JCT.	BMTY			1.8	
		15005	9.1	DELTA	Y	ABS		1.9	
		02165	0.0	PA JCT.	JY			97.4	

Radio Channel No. 76 in service.

Bayside Yard at Everett is assigned Channel 14. All Bayside switch jobs and yardmasters will operate on this channel. Yardmaster will monitor Mainline Channel 1 and Seattle North Branch Channel 3. Delta Yard will operate on Channel 60.

Radio Call-In		
Everett - 37(X)	Burlington - 38(X)	Bellingham - 39(X)
Blaine - 41(X)	Seattle North Branch Disp. - Stanwood - 65(X)	
Emergency - Call 911		
For Dispatcher X=0, For Mechanical X=2, For Field Support X=3		

Train Dispatcher Telephone Number
(800) 789-0739. or 8-234-1607

1. Speed Regulations

1(A). Speed—Maximum

	Passenger	Freight
PA Jct. to Delta Jct.	35 MPH.	15 MPH.
MP 8.10 to MP 8.20	35 MPH.	25 MPH.
USA Canada Border to Delta Jct.	79 MPH.	50 MPH.
Loaded Coal Trains		40 MPH.
Delta Jct. to Everett Jct. via Bayside	15 MPH.	15 MPH.
Lowell to Sea Line Jct.		10 MPH.

1(B). Speed—Permanent Restrictions

MP 119.6 to MP 118.2	50 MPH.	30 MPH.
MP 118.2 to MP 108.7	79 MPH.	50 MPH.
MP 108.7 to MP 108.3	70 MPH.	50 MPH.
MP 108.3 to MP 106.2	79 MPH.	50 MPH.
MP 106.2 to MP 105.8	45 MPH.	40 MPH.
MP 105.8 to MP 103.4	70 MPH.	50 MPH.
MP 103.4 to MP 101.1	55 MPH.	50 MPH.
MP 101.1 to MP 100.2	40 MPH.	35 MPH.
MP 100.2 to MP 97.5	45 MPH.	35 MPH.
MP 97.5 to MP 96.7	20 MPH.	20 MPH.
MP 96.7 to MP 93.6	35 MPH.	30 MPH.
MP 93.6 to MP 90.45	40 MPH.	35 MPH.
MP 90.45 to MP 88.3	45 MPH.	35 MPH.
MP 88.3 to MP 87.2	40 MPH.	35 MPH.
MP 87.2 to MP 85.1	45 MPH.	35 MPH.
MP 85.1 to MP 82.5	40 MPH.	35 MPH.
MP 82.5 to MP 76.7	79 MPH.	50 MPH.
MP 76.7 to MP 76.5	60 MPH.	50 MPH.
MP 76.5 to MP 74.8	79 MPH.	50 MPH.
MP 74.8 to MP 74.5	45 MPH.	40 MPH.
MP 74.5 to MP 70.4	79 MPH.	50 MPH.
MP 70.4 to MP 67.9	50 MPH.	45 MPH.
MP 67.9 to MP 51.0	79 MPH.	50 MPH.
MP 51.0 to MP 49.5	65 MPH.	50 MPH.
MP 49.5 to MP 48.9	60 MPH.	50 MPH.
MP 48.9 to MP 47.9	70 MPH.	50 MPH.
MP 47.9 to MP 41.0	79 MPH.	50 MPH.
MP 41.0 to MP 38.7	50 MPH.	50 MPH.
MP 38.7 to MP 37.7	20 MPH.	20 MPH.
MP 37.7 to MP 37.2	35 MPH.	20 MPH.
MP 37.2 to MP 37.0	10 MPH.	10 MPH.
MP 10.9 to MP 10.7	10 MPH.	10 MPH.
MP 10.7 to MP 8.2	35 MPH.	15 MPH.
MP 8.2 to MP 8.1	25 MPH.	15 MPH.
MP 8.1 to MP 7.9	35 MPH.	15 MPH.
MP 0.8 to MP 0.0	30 MPH.	15 MPH.
Bellingham—over street crossings (HER)		
MP 96.2—Pine Street crossing	20 MPH.	20 MPH.
Burlington to Fidalgo		10 MPH.
Kruse Jct. to Arlington		10 MPH.
Delta Roundhouse/Rip Tracks		5 MPH.

1(C). Speed—Switches and Turnouts

Through dual control turnouts at the following locations:		
Bow, Ferndale, Swift	30 MPH.	30 MPH.

Trains over 100 TOB must not exceed 25 MPH through turnouts shown to exceed that speed.

1(D). Speed—Other

Sidings: Bow, Ferndale, and Swift	30 MPH.	30 MPH.
All other sidings	10 MPH.	10 MPH.
Bridges 105.8, 99.1, cars heavier than 136 tons.	25 MPH.	25 MPH.

See Item 1 of the System Special Instructions for additional speed restrictions.

2. Bridge and Equipment Weight Restrictions
Maximum Gross Weight of Car
USA Canada Border to PA Jct. ..... 143 tons, Restriction D
Burlington to MP 13 ..... 143 tons, Restriction D
MP 13 to Fidalgo ..... 134 tons, Restriction G
Kruse Jct. to Arlington ..... 136 tons, Restriction F

Everett—Six-axle locomotives not permitted on Mill A Track 104 or on Kimberly Clark Tracks 220 through 229.

Mt. Vernon—Cenex Spur MP 68.71 only one 4 axle locomotive permitted.

Arlington Spur—Six-axle locomotives in excess of 175 tons and six-axle derricks not permitted beyond MP 1.0X.

Burlington to Fidalgo—Six-axle locomotives and six-axle derricks not permitted.

3. Type of Operation
CTC—in effect:
North Swift MP 116.8 to Bellingham MP 98.7
South Bellingham MP 93.5 to Delta Jct. MP 37.0

FILED
COUNTY CLERK
2007 MAR 26 PM 3:45
BY

IN THE SUPERIOR COURT OF WASHINGTON FOR WHATCOM COUNTY

ALIZON VEIT, an individual, by and through DAVID M. NELSON, her power of attorney,

Plaintiff,

vs.

BNSF RAILWAY CORPORATION, a Texas corporation; et al,

Defendants.

Case No: 03-2-02056-3

PLAINTIFF'S OFFER OF PROOF REGARDING EXCLUDED TESTIMONY OF MICHAEL BURKS REGARDING SPEED

COPY

SHEPHERD ABBOTT CARTER
ATTORNEYS AT LAW
114 W. MAGNOLIA STREET, SUITE 300
BELLINGHAM, WASHINGTON 98225
PHONE (360) 647-4567 OR 733-3773
FACSIMILE (360) 647-9060

COMES NOW plaintiff, through counsel, and in accordance with the court's oral instructions and the agreement of BNSF, provides the following offer of proof regarding the court's denial of plaintiff's request to call Michael Burks to the stand to testify regarding the speed of the train before and at the time of the accident on September 10, 2001. If plaintiff had been able to examine Michael Burks as regards the speed of the train, his testimony would have been as follows:

Question: What did you tell the police officer was the speed of the train you were the engineer on when you were a half mile south of the crossing on September 10, 2001?

Answer: 30 miles per hour.

Question: Why did you tell the police officer you were going 30 miles per hour when you were south of the crossing on September 10, 2001?

Answer: Because that was the speed limit for the train until we reached the crossing.

Question: What do you mean speed limit?

Answer: I mean that I believed the maximum speed the train could travel for more than a mile south of the crossing was 30 miles per hour.

Question: Did you tell the police officer you slowed the train down before the crossing?

Answer: Yes.

Question: Why did you tell the police officer you slowed the train?

Answer: Because the speed limit for the train when the lead engine entered the Pine Street crossing was 20 miles per hour.

Question: Again, what do you mean speed limit?

Answer: The maximum speed a train could be going when the front end of The engine was heading into the Pine Street crossing was 20 miles per hour.

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Question: When you were asked in Interrogatory No. 32 to "State how many miles per hour you were traveling at the time of the impact described in plaintiff's Complaint for Personal Injury," why did you respond: "Speed at all times were in compliance with federal laws."

Answer: Because I understood and believed that the federal speed limit south of the crossing was 30 miles per hour and I understood and believed that the federal speed limit at the crossing was 20 miles per hour.

Question: Why did you believe those were the federal speed limits on September 10, 2001?

Answer: Because those were the speed limits described on the July 19, 1999 Timetable No. 3, which speeds I was told by BNSF supervisors were the maximum speeds allowed by federal law and therefore understood and believed 30 and 20 were the maximum speeds allowed by federal law.

Question: Was Timetable No. 3, trial Exhibit No. 36, the Timetable in Effect on September 10, 2001?

Answer: Yes.

Further, if plaintiff had been allowed to further examine Mr. Burks regarding his alleged movement of the train at the direction of the police, Mr. Burks would have admitted that he was making that story up and would have admitted that the attached testimony at his deposition, pages 35 and 45 through 46 as highlighted was true and correct when he made the answers and were true and correct at the time of trial.

Respectfully submitted this 26th day of March 2007.

///

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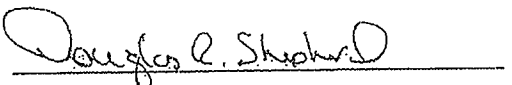
SHEPHERD ABBOTT CARTER



By Douglas R. Shepherd, WSBA # 9514
Of Attorneys for Plaintiff

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MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES

1988 EDITION

Part VIII. TRAFFIC CONTROL SYSTEMS FOR RAILROAD — HIGHWAY GRADE CROSSINGS

A. GENERAL

8A-1 Functions

Traffic control systems for railroad-highway grade crossings include all signs, signals, markings, and illumination devices and their supports along highways approaching and at railroad crossings at grade. The function of these systems is to permit safe and efficient operation of rail and highway traffic over crossings. Traffic control devices shall be consistent with the design and application of the standards contained herein. For the purpose of installation, operation, and maintenance of devices constituting traffic control systems at railroad-highway grade crossings, it is recognized that any crossing of a public road and a railroad is situated on right-of-way available for the use of both highway traffic and railroad traffic on their respective roadways and tracks.

With due regard for safety and for the integrity of operations by highway and railroad users, the highway agency and the railroad company are entitled to jointly occupy the right-of-way in the conduct of their assigned duties. This requires joint responsibility in the traffic control function between the public agency and the railroad. The determination of need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority. Subject to such determination and selection, the design, installation and operation shall be in accordance with the national standards contained herein.

8A-2 Use of Standard Devices

The grade crossing traffic control devices, systems, and practices described herein are intended for use both in new installations and at locations where general replacement of present apparatus is made, consistent with Federal and State laws and regulations. To stimulate effective reaction of vehicle operators and pedestrians, these devices, systems, and practices utilize the five basic considerations: design, placement, operation, maintenance, and uniformity employed generally for traffic control devices and described fully in section 1A-2.

8A-3 Uniform Provisions

All signs used in grade crossing traffic control systems shall be reflectorized to show the same shape and color to an approaching motorist

both by day and by night. Reflectorization may be by one of the methods described in section 2A-18.

Normally, where the distance between tracks, measured along the highway, exceeds 100 feet, additional signs or other appropriate traffic control devices should be used.

No sign or signal shall be located in the center of an undivided roadway except in an island with barrier curbs installed in accordance with the general requirements of Part V with minimum clearance of 2 feet from the face of each curb.

Where it is practical, equipment housing should provide a lateral clearance of 30 feet from the roadway. Adequate clearance should also be provided from tracks in order to reduce the obstruction to motorists sight distance and to reduce the possibility of damage to the housed equipment.

8A-4 Crossing Closure

Any highway grade crossing for which there is not a demonstrated need should be closed.

8A-5 Traffic Controls During Construction and Maintenance

Traffic controls for street and highway construction and maintenance operations are discussed in Part VI of this manual. Similar traffic control methods should be used where highway traffic is affected by construction and maintenance at grade crossings.

Public and private agencies should meet to plan appropriate detours and necessary signing, marking, and flagging requirements for successful operations during the closing. Pertinent considerations include length of time for crossing to be closed, type of traffic affected, time of day, materials and techniques of repair. Inconvenience, delay, and accident potential to affected traffic should be minimized to the extent practical. Prior notice should be extended to affected public or private agencies before blockage or infringement on the free movement of vehicles or trains.

Construction or maintenance techniques should not extensively prolong the closing of the crossing. The width and riding quality of the roadway surface at a grade crossing should, as a minimum, be restored to correspond with the approaches to the crossing.

8. SIGNS AND MARKINGS

8B-1 Purpose

Passive traffic control systems, consisting of signs, pavement markings, and grade crossing illumination, identify and direct attention to the location of a grade crossing. They permit vehicle operators and pedestrians to take appropriate action.

Where railroad tracks have been abandoned or their use discontinued, all related signs and markings shall be removed. A sign, TRACKS OUT OF SERVICE (R8-9) may be installed until the tracks are removed or covered (see Section 8B-10). VIII-18 (c) Rev. 6

8B-2 Railroad Crossing (Crossbuck) Sign (R15-1, 2)

The railroad crossing sign, a regulatory sign, commonly identified as the "crossbuck" sign, as a minimum shall be white reflectorized sheeting or equal, with the words RAILROAD CROSSING in black lettering. As a minimum, one crossbuck sign shall be used on each roadway approach to every grade crossing, alone or in combination with other traffic control devices. If there are two or more tracks between the signs, the number of tracks shall be indicated on an auxiliary sign of inverted T shape mounted below the crossbuck in the manner and at the heights indicated in figure 8-1 except that use of this auxiliary sign is optional at crossings with automatic gates.

Where physically feasible and visible to approaching traffic the crossbuck sign shall be installed on the right hand side of the roadway on each approach to the crossing. Where an engineering study finds restricted sight distance or unfavorable road geometry, crossbuck signs shall be placed back to back or otherwise located so that two faces are displayed to that approach.

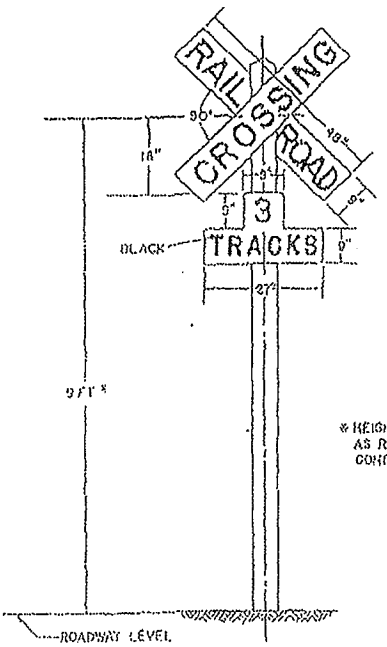
Crossbuck signs should be located with respect to the roadway pavement or shoulder in accordance with the criteria in sections 2A-21 through 2A-27 and figures 2-1 and 2-2 (pages 2A-9 and 2A-10) and should be located with respect to the nearest track in accordance with signal locations in figure 8-7, (page 8C-6). The normal lateral clearances (sec. 2A-24), 6 feet from the edge of the highway shoulder or 12 feet from the edge of the traveled way in rural areas and 2 feet from the face of the curb in urban areas will usually be attainable. Where unusual conditions demand, variations determined by good judgment should provide the best possible combination of view and safety clearances attainable, occasionally utilizing a location on the left-hand side of the roadway.

Appropriate details of R15-1 and R15-2 are available in Standard Highway Signs. *

* Available from GPO

R15-1
48" x 9"
(drilled for 90-degree mounting)

R15-2
9" x 9"
27" x 9"



* HEIGHT MAY BE VARIED AS REQUIRED BY LOCAL CONDITIONS.

Figure B-1. Railroad-highway crossing (crossbuck) sign.

8B-3 Railroad Advance Warning Signs (W10-1, 2, 3, 4)

A Railroad Advance Warning (W10-1) sign shall be used on each roadway in advance of every grade crossing except:

1. On low-volume, low-speed roadways crossing minor spurs or other tracks that are infrequently used and which are flagged by train crews.

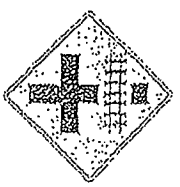
2. In the business districts of urban areas where active grade crossing traffic control devices are in use.

3. Where physical conditions do not permit even a partially effective display of the sign.

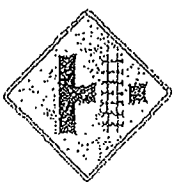
Placement of the sign shall be in accordance with Table II-1, Section 2C-3 and Sections 2A-21 to 2A-27, except in residential or business districts where low speeds are prevalent, the signs may be placed a minimum distance of 100 feet from the crossing. On divided highways and one-way roads, it is desirable to erect an additional sign on the left side of the roadway. VIII-12 (c) Rev. 5

The W10-2, 3, and 4 signs may be installed on highways that are parallel to railroads. The purpose of these signs is to warn a motorist making a turn that a railroad crossing is ahead. Where there is 100 feet or more between the railroad and the parallel highway, a W10-1 sign should be installed in advance of the railroad crossing and the W10-2, 3, or 4 signs on the parallel highway would not be necessary.

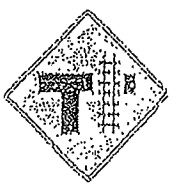
W10-1
36" Diameter



W10-2
30" × 30"



W10-3
30" × 30"



W10-4
30" × 30"

VIII-2 (a) Rev. 2

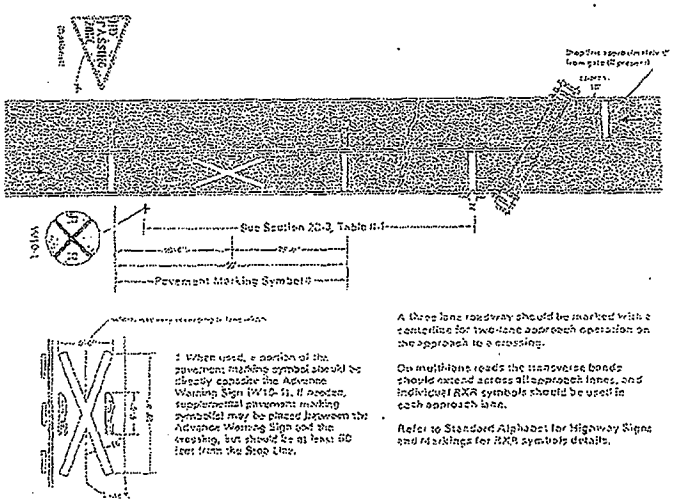


Figure 8-2. Typical placement of warning signs and pavement markings at railroad-highway grade crossings.

8B-4 Pavement Markings

Pavement markings in advance of a grade crossing shall consist of an X, the letters RR, a no passing marking (2-lane roads), and certain transverse lines. Identical markings shall be placed in each approach lane on all paved approaches to grade crossings where grade crossing signals or automatic gates are located, and at all other grade crossings where the prevailing speed of highway traffic is 40 mph or greater. When used, a portion of the pavement marking symbol should be directly opposite the advance warning sign. If needed, supplemental pavement marking symbol(s) may be placed between the advance warning sign and the crossing. VIII-12 (c) Rev. 5

The markings shall also be placed at crossings where the engineering studies indicate there is a significant potential conflict between vehicles and trains. At minor crossings or in urban areas, these markings may be omitted if engineering study indicates that other devices installed provide suitable control.

The design of railroad crossing pavement markings shall be essentially as illustrated in figure 8-2. The symbols and letters are elongated to allow for the low angle at which they are viewed. All markings shall be reflectorized white except for the no-passing markings which shall be reflectorized yellow.

8B-5 Illumination at Grade Crossings

At grade crossings where a substantial amount of railroad operation is conducted at night, particularly where train speeds are low, where crossings are blocked for long periods, or accident history indicates that motorists experience difficulty in seeing trains or control devices during the hours of darkness, illumination at and adjacent to the crossing may be installed to supplement other traffic control devices where an engineering analysis determines that better visibility of the train is needed. Regardless of the presence of other control devices, illumination will aid the motorist in observing the presence of railroad cars on a crossing where the gradient of the vehicular approaches is such that the headlights of an oncoming vehicle shine under or over the cars.

Recommended types and location of luminaires for grade crossing illumination are contained in the American National Standard Practice for Roadway Lighting, RP8.* In any event, luminaires shall be so located and light therefrom so directed as to not interfere with aspects of the railroad signal system and not interfere with the field of view of members of the locomotive crew.

8B-6 Exempt Crossing Signs (R15-3, W10-1a)

When authorized by law or regulation a supplemental sign (R15-3) bearing the word EXEMPT may be used below the Crossbuck and Track

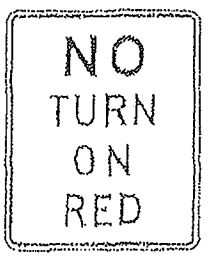
* Available from the Illuminating Engineering Society, New York, N.Y. 10017.

signs at the crossing, and supplemental sign (W10-1a) may be used below the railroad advance warning sign. These supplemental signs are to inform drivers of vehicles carrying passengers for hire, school buses carrying children, or vehicles carrying flammable or hazardous materials that a stop is not required at certain designated grade crossings, except when a train, locomotive, or other railroad equipment is approaching or occupying the crossing or the driver's view of the sign is blocked.

R15-3 White background
W10-1a Yellow background

8B-7 Turn Restrictions

At a signalized highway intersection within 200 feet of a grade crossing, where the intersection traffic control signals are preempted by the approach of a train, all existing turning movements toward the grade crossing should be prohibited by proper placement of a NO RIGHT TURN sign (R3-1) or a NO LEFT TURN sign (R3-2) or both. In each case, these signs shall be visible only when the restriction is to be effective. A blank-out, internally illuminated, or other similar type sign may be used to accomplish this objective. The signs shall be red and black on white and have a standard size of 24" × 24".



R10-11
24" × 30"

R8-8
24" × 30"

8B-8 Do Not Stop on Tracks Sign (R8-8)

VIII-11 (c) Rev. 6

Whenever an engineering study determines that the potential for vehicles stopping on the tracks is high, a DO NOT STOP ON TRACKS sign (R8-8) should be used. The sign may be located on the right side of

1988 MUTCD REVISION 2
March 17, 1992

TEXT CHANGES TO THE MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES DISCUSSED IN FINAL RULE DOCKET NO. 92-11.

Request VIII-X2(C) Stop or Yield Signs at Highway-Rail Grade Crossings.

Delete Section 8B-9 (page 8B-7) in its entirety and replace with the following:

8B-9 STOP or YIELD Signs at Grade Crossings (R1-1, W3-1, R1-2, W3-2)

STOP or YIELD signs may be used at highway-rail grade crossings, at the discretion of the responsible State or local jurisdiction, for crossings that have two or more trains per day and are without automatic traffic control devices.

For other crossings with passive protection, STOP or YIELD signs may be used after need is established by a traffic engineering study. The study should take into consideration such factors as volume and character of highway and train traffic, adequacy of stopping sight distance, crossing accident history, and need for active control devices.

For all highway-rail grade crossings where STOP or YIELD signs are installed, the placement shall conform to the requirements of MUTCD Section 2B-9 Location of Stop Sign and Yield Sign. STOP AHEAD or YIELD AHEAD Advance Warning signs shall also be installed.

the road on the near or far side of the grade crossing, whichever provides better visibility to the motorist to observe the sign and be able to comply with its message. On multi-lane roads and one-way roadways a second sign may be placed on the near or far left side to the grade crossing to further improve visibility. Placement of the R8-8 sign(s) should be determined as part of the engineering study. VIII-11 (c) Rev. 5

8B-9 STOP Signs at Grade Crossings (R1-1, W3-1)

The use of the STOP signs at railroad-highway grade crossings shall be limited to those grade crossings selected after need is established by a detailed traffic engineering study. Such crossings should have the following characteristics:

1. Highway should be secondary in character with low traffic counts.
2. Train traffic should be substantial.
3. Line of sight to an approaching train is restricted by physical features such that approaching traffic is required to reduce speed to 10 miles per hour or less in order to stop safely. VIII-6 (c) Rev. 2
4. At the stop bar, there must be sufficient sight distance down the track to afford ample time for a vehicle to cross the track before the arrival of the train.

The engineering study may determine other compelling reasons for the need to install a STOP sign, however, this should only be an interim measure until active traffic control signals can be installed. STOP signs shall not be used on primary through highways or at grade crossings with active traffic control devices.

Whenever a STOP sign is installed at a grade crossing, a Stop Ahead sign shall be installed in advance of the STOP sign.

8B-10 Tracks Out of Service Sign (R8-9)

The TRACKS OUT OF SERVICE sign (R8-9) is intended for use at a crossing in lieu of the Railroad Crossing sign (R15-1, 2) when a railroad track has been abandoned or its use discontinued. This sign (R8-9) shall be removed when the tracks have been removed or covered. VIII-16 (c) Rev. 5

R8-9
24" x 24"

Amendment
Final Rule effective 1/9/97

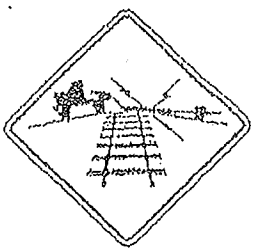
Request IX-1201(C)--Standard Warning Signs for Substandard Vertical Curves over Railroad Crossings (W10-5)

Add the following new section:

8B-11 Low Ground Clearance Crossings (W10-5)

Rail-highway grade crossings with a sharp rise or depression in the profile of the road near the rails may require additional signing. Whenever conditions are sufficiently abrupt to create a hang-up of long wheelbase vehicles or trailers with low ground clearance, the 'Low Ground Clearance' (W10-5) warning symbol sign shall be installed in advance of the crossing. New warning symbol signs such as this which may not be readily recognizable by the public, shall be accompanied by an educational plaque which is to remain in place for at least 3 years after initial installation (see section 2A-13). The appropriate color of this sign is yellow background with black symbol and border. A supplemental message such as 'Ahead,' 'Next Crossing,' or 'Use Next Crossing' (with appropriate arrows) should be placed at the nearest intersecting road where a vehicle can detour or at a point on the roadway wide enough to permit a U-Turn.

There are some rail-highway grade crossings where engineering investigation of roadway geometric and operating conditions confirm that vehicle speeds across the railroad tracks should be at least 10 mph below the posted speed limit. To insure that the vehicle driver does not lose control while using the crossing, word message signs such as 'Bump,' 'Dip,' or 'Rough Crossing' with an advisory speed plate is an appropriate installation treatment. Information on railroad ground clearance requirements is also available in the American Railway Engineering Association Section 8.1.2 or the American Association of State Highway and Transportation Official's Policy on Geometric Design of Highways and Streets.



W10-5

C. SIGNALS AND GATES

8C-1 Purpose and Meaning

Active traffic control systems inform motorists and pedestrians of the approach or presence of trains, locomotives, or railroad cars on grade crossings. The meaning of flashing light signals and gates shall be as defined in the Uniform Vehicle Code (secs. 11-701 & 11-703, Revised 1968). *

When tracks are not in service, the gate arms shall be removed. The signal heads shall be hooded, turned or removed to clearly indicate that they are not in operation. VIII-16 (c) Rev. 5

8C-2 Flashing Light Signal—Post Mounted

When indicating the approach or presence of a train, the flashing light signal, illustrated in figure 8-3, shall display toward approaching highway traffic the aspect of two red lights in a horizontal line flashing alternately. As shown in figure 8-3, the typical flashing light signal assembly on a side of the roadway location includes a standard crossbuck sign and, where there is more than one track, an auxiliary "number of tracks" sign, all of which indicate to vehicle operators and pedestrians at all times the location of a grade crossing. A bell may be included in the assembly and operated in conjunction with the flashing lights. Bells are a particularly suitable warning for pedestrians and bicyclists.

The flashing light signals should normally be placed to the right of approaching highway traffic on all roadway approaches to a crossing. They should be located laterally with respect to the highway in conformance with figure 8-6, (page 8C-5) except where such location would compromise signal display effectiveness. As stated in section 8A-3, if it is practical, equipment housings (controller cabinets) should have a lateral clearance of 30 feet from the roadway and adequate clearance from the tracks. Where conditions warrant, escape areas, attenuators, or guardrails should be provided.

Additional pairs of lights may be mounted on the same supporting post and directed toward vehicular traffic approaching the crossing from other than the principal highway route. Such may well be the case where there are approaching routes on roadways closely adjacent to and parallel to the railroad. At crossings of a highway with traffic in both directions, back-to-back pairs of lights shall be placed on each side of the tracks. On one way streets and divided highways, signals shall be placed on the approach

* Available from Northwestern University, P.O. Box 1409, Evanston, IL 60204.

side of the crossing normally on both sides of the roadway and may be equipped with back lights. Typical location plans for signals are shown in figure 8-7, (page 8C-6).

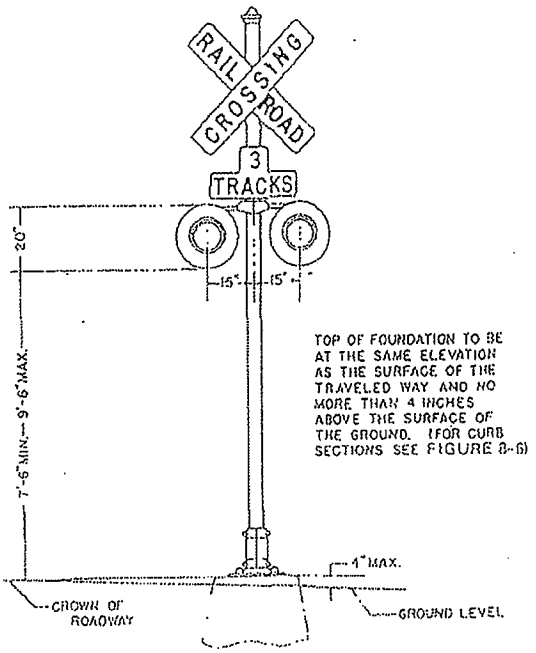


Figure 8-3. Typical flashing light signal—post mounted.

8C-3 Flashing Light Signal—Cantilever Supported

Where required for better visibility to approaching traffic, particularly on multi-lane approaches, cantilevered flashing light signals are used in the manner shown in figure 8-4. In addition to the flashing lights cantilevered over the roadways, flashing lights should usually be placed on the supporting post.

Although cantilever signals are more commonly used on multi-lane highways, they are also suitable for other locations where additional emphasis is needed. These locations may include high speed rural highways, high volume two-lane highways, or specific locations where there are distractions. If one pair of cantilever flashing lights would be visible to drivers in all approaching lanes, except the right lane which has a

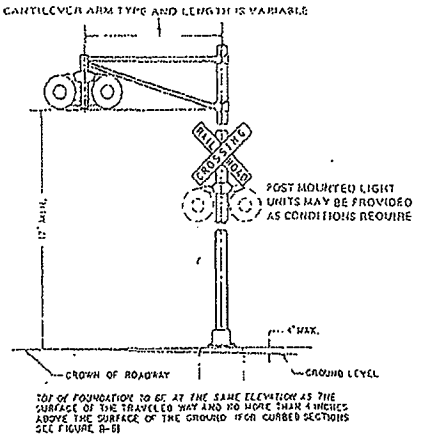


Figure 8-4. Typical flashing light signal—cantilever supported.

view of the post mounted signals, other flashing lights are not required on the cantilever arm. A pair of lights overhead for each approaching lane is not required, inasmuch as the warning aspect is at all times identical for all.

Breakaway or frangible bases shall not be used for cantilever signal supports. Where conditions warrant, escape area, attenuators, or properly designed guardrails should be provided.

8C-4 Automatic Gate

An automatic gate is a traffic control device used as an adjunct to flashing lights. The device consists of a drive mechanism and a fully reflectorized red and white striped gate arm with lights, and which in the down position extends across the approaching lanes of highway traffic about 4 feet above the top of the pavement. The flashing light signal may be supported on the same post with the gate mechanism or separately mounted. A schematic view of the gate arm in the down position is shown in figure 8-5. This view does not show any of the several mechanisms used to raise and lower the arm.

In its normal upright position, when no train is approaching or occupying the crossing, the gate arm should be either vertical or nearly so (fig. 8-6). Typical minimum clearance is 2 feet from face of vertical curb to closest part of signal or gate arm in its upright position for a distance of 17 feet above the crown of the roadway. Where there is no curb, a minimum horizontal clearance of 2 feet from edge of a paved or surfaced shoulder shall be provided with a minimum clearance of 6 feet from the

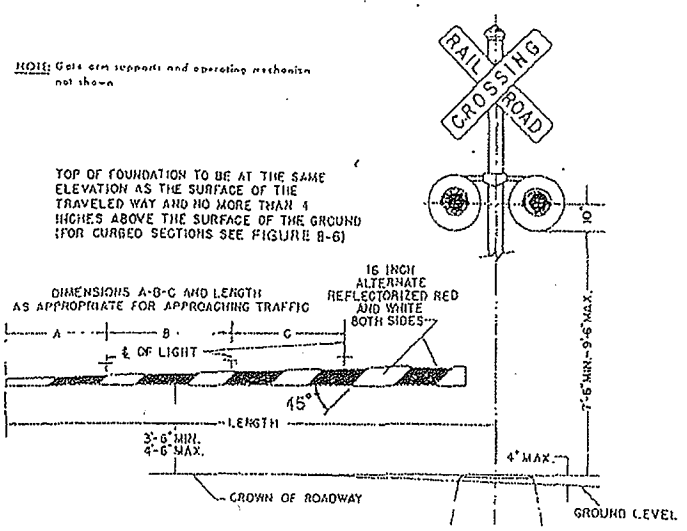


Figure 8-5. Schematic view of automatic gate.

edge of the traveled roadway. Where gates are located in the median, additional width may be required to provide the minimum clearance for the counterweight supports. Where conditions warrant, escape routes, attenuators, or guardrails should be provided.

In a normal sequence of operation the flashing light signals and the lights on the gate arm in its normal upright position are activated immediately upon detection of the approach of a train. The gate arm shall start its downward motion not less than 3 seconds after the signal lights start to operate, shall reach its horizontal position before the arrival of any train, and shall remain in that position as long as the train occupies the crossing. When the train clears the crossing, and no other train is approaching, the gate arm shall ascend to its upright position normally in not more than 12 seconds, following which the flashing lights and the lights on the gate arm shall cease operation. In the design of individual installations, consideration should be given to timing the operation of the gate arm to accommodate slow moving trucks. Timing the operation of the gate arm shall be coordinated with the pre-emption sequence of adjacent traffic control signals.

Typical location plans for automatic gates at crossings are shown in figure 8-7. Component details are described in section 8C-7.

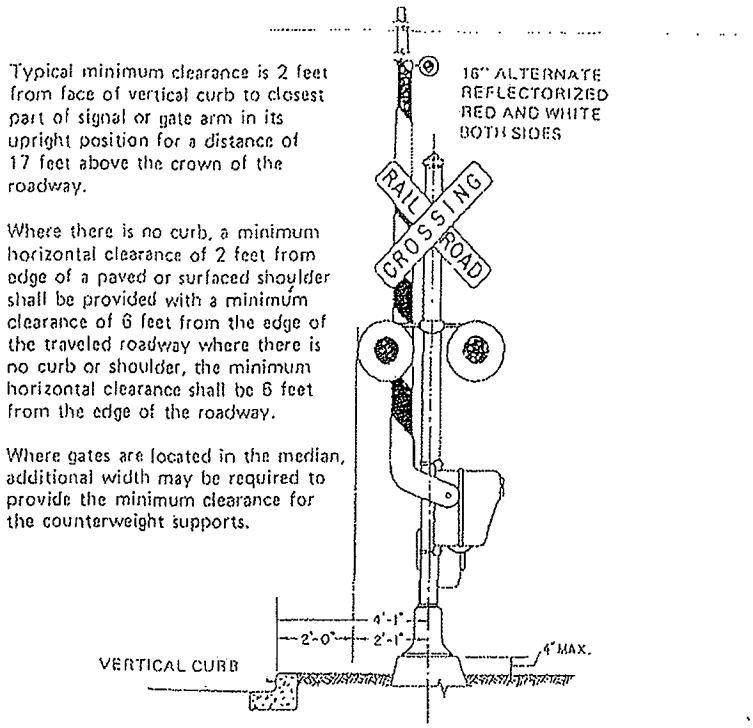


Figure 8-6. Typical clearances for flashing light signals and automatic gates.

8C-5 Train Detection

To serve their purpose of advising motorists and pedestrians of the approach or presence of trains, locomotives, or railroad cars on grade crossings, the devices employed in active traffic control systems shall be actuated by some form of train detection. Generally the method is automatic, requiring no personnel to operate it, although a small number of such installations are still operated under manual control. The automatic method currently uses the railroad circuit. *

Railroad circuits insofar as practical shall be designed on the fail safe principle, which uses closed circuits.

* Definition: "Railroad Circuit—A control circuit which includes all train movement detection and logic components which are physically and/or electrically integrated with track structures or associated manual control."

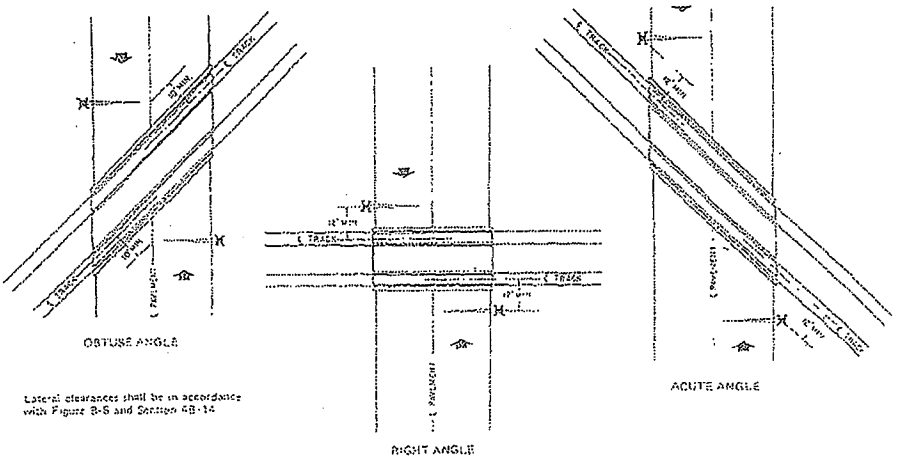


Figure 8-7. Typical location plan for flashing light signals and automatic gates.

On tracks where trains operate at speeds of 20 mph or higher, circuits controlling automatic flashing light signals shall provide for a minimum operation of 20 seconds before arrival of any train on such track. On other tracks used for switching and assembling trains a means shall be provided to warn approaching highway traffic. For automatic gate operation, circuits shall provide for the operating sequence described in section 8C-4.

Where the speeds of different trains on a given track vary considerably under normal operation, special devices or circuits should be installed to provide reasonably uniform notice in advance of all train movements over the crossing. Special control features should be used to eliminate the effects of station stops and switching operations within approach control circuits.

8C-6 Traffic Signals at or Near Grade Crossings VIII-18 (c) Rev. 5

When highway intersection traffic control signals are within 200 feet of a grade crossing, control of the traffic flow should be designed to provide the vehicle operators using the crossing a measure of safety at least equal to that which existed prior to the installation of such signals. Accordingly, design, installation, and operation should be based upon a total systems approach in order that all relevant features may be considered.

When the grade crossing is equipped with an active traffic control system, the normal sequence of highway intersection signal indications should be preempted upon approach of trains to avoid entrapment of vehicles on the crossing by conflicting aspects of the highway traffic signals and the grade crossings signals. This preemption feature requires an electrical circuit between the control relay of the grade crossing warning system and the traffic controller. The circuit shall be of the closed circuit principle, that is, the traffic signal controller is normally energized and the circuit is wired through a closed contact of the energized control relay of the grade crossing warning system. This is to establish and maintain the preemption condition during the time that the grade crossing signals are in operation. Where multiple or successive preemption may occur from differing modes, train actuation should receive first priority and emergency vehicles second priority. VIII-14 (c) Rev. 5

Where a signalized highway intersection is adjacent to a grade crossing not provided with an active traffic control system, the possibility of vehicles being trapped on the crossing remains and preemption of the signal controller is usually required. However, at some locations, the characteristics of the crossing and intersection area along with favorable speeds of both vehicular and train traffic may permit alternate methods of warning traffic. Where preemption of the traffic signal control is determined to be desirable, consideration should be given to the installation of active traffic control devices at the grade crossing, inasmuch as the cost of the grade crossing devices would usually represent

a minor addition to the cost of the railroad circuits required for the preemption function.

Except under unusual circumstances, preemption should be limited to the highway intersection traffic signals within 200 feet of the grade crossing.

The preemption sequence initiated when the train first enters the approach circuit, shall at once bring into effect a highway signal display which will permit traffic to clear the tracks before the train reaches the crossing. The preemption shall not cause any short vehicular clearances and all necessary vehicular clearances shall be provided. However, because of the relative hazards involved, pedestrian clearances may be abbreviated in order to provide the track clearance display as early as possible.

To avoid misinterpretation during the time the clear-out signals are green, consideration should be given to the use of 12-inch red lenses in the signals which govern highway traffic movement over the crossing with adequately screened or louvered green lenses in the clear-out signals beyond the crossing.

After the track clearance phase, the highway intersection traffic control signals should be operated to permit vehicle movements that do not cross the tracks, but shall not provide a through circular green or arrow indication for movements over the tracks. This does not prohibit green indications for highway traffic movements on a roadway paralleling the tracks.

Where feasible, traffic control signals near grade crossings should be operated so that vehicles are not required to stop on the tracks even though in some cases this will increase the waiting time. The exact nature of the display and the location of the signals to accomplish this will depend on the physical relationship of the tracks to the intersection area.

Highway traffic control signals shall not be used on mainline railroad crossings in lieu of flashing light signals. However, at industrial track crossings and other places where train movements are very slow (as in switching operations), highway traffic control signals may be used in lieu of conventional flashing light signals to warn vehicle operators of the approach or presence of a train. The provisions of this part relating to traffic signal design, installation, and operation are applicable as appropriate where highway traffic signals are so used. Several typical railroad preemption sequences are fully illustrated in the Traffic Control Devices Handbook.

VIII-18 (c) Rev. 5

8C-7 Component Details

Gate arms shall be fully reflectorized having diagonal stripes alternately red and white at 16-inch intervals measured horizontally and shall have at least three red lights as indicated in figure 8-5 (page 8C-4).

When activated, the gate arm light nearest the tip shall be illuminated continuously and the other two lights shall flash alternately in unison with the flashing light signals.

Flashing light units shall flash alternately. The number of flashes per minute for each incandescent lamp shall be 35 minimum and 55 maximum. Each lamp shall be illuminated approximately the same length of time. Total time of illumination of each pair of incandescent lamps shall be practically the entire operating time.

Where local conditions will permit, a lateral escape route to the right of the highway in advance of the grade crossing traffic control device should be kept free of guardrail or other ground obstruction. Where guardrail is not deemed necessary nor appropriate, rigid non-yielding type barriers are not to be used for protecting signal supports. In industrial or other areas involving only low-speed highway traffic and where signals are vulnerable to damage by turning truck traffic, ring type guardrail may be installed to provide protection for the signal assembly.

The same lateral clearances and roadside safety features should apply to flashing light signal and automatic gate locations on both the right and left sides of the roadway.

Two sizes of lenses, 8-inch diameter and 12-inch diameter, are available for flashing light signal units. The larger lens provides somewhat better visibility. In choosing between the two sizes of lenses, consideration should be given to the principles stated in section 4B-8 for choosing between the 8-inch and 12-inch lenses for use in highway intersection traffic control signals.

The requirement for storage battery source of standard power for signal and gate operation during outages in the primary power source limits the operating voltage to 10 and the maximum lamp wattage is generally 25.

Many other details of grade crossing traffic control systems which are not set forth herein are contained in references in 1A-7.

8D-1 Selection of Systems and Devices

The selection of traffic control devices at a grade crossing is determined by public agencies having jurisdictional responsibility at specific locations.

Active grade crossing traffic control systems range from

1. post mounted flashing light signals to
2. automatic gates combined with
(a) post mounted flashing light signals,
(b) cantilever flashing light signals, or
(c) combination of the above

Any of the foregoing may or may not incorporate a bell.

Due to the large number of significant variables which must be considered there is no single standard system of active traffic control devices universally applicable for grade crossings. Based on an engineering and traffic investigation, a determination is made whether any active traffic control system is required at a crossing and, if so, what type is appropriate. Before a new or modified grade crossing traffic control system is installed, approval is required from the appropriate agency within a given State.

RCW 46.61.050:

(1) The driver of any vehicle, every bicyclist, and every pedestrian shall obey the instructions of any official traffic control device applicable thereto placed in accordance with the provisions of this chapter, unless otherwise directed by a traffic or police officer, subject to the exception granted the driver of an authorized emergency vehicle in this chapter.

(2) No provision of this chapter for which official traffic control devices are required shall be enforced against an alleged violator if at the time and place of the alleged violation an official device is not in proper position and sufficiently legible or visible to be seen by an ordinarily observant person. Whenever a particular section does not state that official traffic control devices are required, such section shall be effective even though no devices are erected or in place.

(3) Whenever official traffic control devices are placed in position approximately conforming to the requirements of this chapter, such devices shall be presumed to have been so placed by the official act or direction of lawful authority, unless the contrary shall be established by competent evidence.

(4) Any official traffic control device placed pursuant to the provisions of this chapter and purporting to conform to the lawful requirements pertaining to such devices shall be presumed to comply with the requirements of this chapter, unless the contrary shall be established by competent evidence.

RCW 46.61.345:

The state department of transportation and local authorities within their respective jurisdictions are authorized to designate particularly dangerous highway grade crossings of railroads and to erect stop signs at those crossings. When such stop signs are erected the driver of any vehicle shall stop within fifty feet but not less than fifteen feet from the nearest rail of the railroad and shall proceed only upon exercising due care.

RCW 46.61.190(2):

(1) Preferential right-of-way may be indicated by stop signs or yield signs as authorized in RCW 47.36.110.

(2) Except when directed to proceed by a duly authorized flagger, or a police officer, or a firefighter vested by law with authority to direct, control, or regulate traffic, every driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line, but if none, before entering a marked crosswalk on the near side of the intersection or, if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the roadway, and after having stopped shall yield the right-of-way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time when such driver is moving across or within the intersection or junction of roadways.

(3) The driver of a vehicle approaching a yield sign shall in obedience to such sign slow down to a speed reasonable for the existing conditions and if required for safety to stop, shall stop at a clearly marked stop line, but if none, before entering a marked crosswalk on the near side of the intersection or if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the roadway, and then after slowing or stopping, the driver shall yield the right-of-way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time such driver is moving across or within the intersection or junction of roadways: PROVIDED, That if such a driver is involved in a collision with a vehicle in the intersection or junction of roadways, after driving past a yield sign without stopping, such collision shall be deemed prima facie evidence of the driver's failure to yield right-of-way.

WAC 468-95-010:

> The 2003 Edition of the *Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD)*, published by the Federal Highway Administration and approved by the Federal Highway Administrator as the national standard for all highways open to public travel, was duly adopted by the Washington state secretary of transportation. Revisions are incorporated into the November 2003 Edition of the MUTCD, except as may be modified herein, when published by the Federal Highway Administration. The manual includes in part many illustrations, some of which depend on color for proper interpretation. The code reviser has deemed it inexpedient to convert these regulations and illustrations to the prescribed form and style of WAC and therefore excludes them from publication. The document is available for public inspection at the headquarters office and all region offices of the Washington state department of transportation. Further, each city, town, and county engineering office in the state will have a copy of the MUTCD, with revisions and modifications for Washington, in its possession.

49 C.F.R. 212.101(d):

> . . . The FRA encourages further State contributions to the national railroad safety program consistent with overall program needs, individual State capabilities, and the willingness of the States undertake additional investigative and surveillance activities.

49 C.F.R. § 5.5(a):

> Any person may participate in rule making proceedings by submitting written information or views. The Secretary may also allow any person to participate in additional rulemaking proceedings, such as informal appearances or hearings, held with respect to any rule.

49 C.F.R. § 5.11(a):

> Any person may petition the Secretary to issue, amend, or repeal a rule or for a permanent or temporary exemption from any rule.

49 C.F.R. § 217.7:

(a) On or before December 21, 1994, each Class I railroad, Class II railroad, the National Railroad Passenger Corporation, and each railroad providing commuter service in a metropolitan or suburban area that is in operation on November 21, 1994, shall file with the Federal Railroad Administrator, Washington, DC 20590, one copy of its code of operating rules, timetables, and timetable special instructions which were in effect on November 21, 1994. Each Class I railroad, each Class II railroad, and each railroad providing commuter service in a metropolitan or suburban area that commences operations after November 21, 1994, shall file with the Administrator one copy of its code of operating rules, timetables, and timetable special instructions before it commences operations.

(b) After November 21, 1994, each Class I railroad, each Class II railroad, the National Railroad Passenger Corporation, and each railroad providing commuter service in a metropolitan or suburban area shall file each new amendment to its code of operating rules, each new timetable, and each new timetable special instruction with the Federal Railroad Administrator within 30 days after it is issued.

(c) On or after November 21, 1994, each Class III railroad and any other railroad subject to this part but not subject to paragraphs (a) and (b) of this section shall keep one copy of its current code of operating rules, timetables, and timetable special instructions and one copy of each subsequent amendment to its code of operating rules, each new timetable, and each new timetable special instruction, at its system headquarters, and shall make such records available to representatives of the Federal Railroad Administration for inspection and copying during normal business hours.

49 U.S.C.A. § 20103(a):

The Secretary of Transportation, as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970.

49 U.S.C.A. § 20103(e). [Emphasis added]:

> **The Secretary shall conduct a hearing** as provided by section 553 of title 5 when prescribing a regulation or issuing an order under this part, including a regulation or order establishing, amending, or providing a waiver, described in subsection (d), of compliance with a railroad safety regulation prescribed or order issued under this part. An opportunity for an oral presentation shall be provided.

49 U.S.C.A. § 20105(a). [Emphasis added]:

> The Secretary concerned may prescribe investigative and surveillance activities necessary to enforce the safety regulations prescribed and orders issued by the Secretary that apply to railroad equipment, facilities, rolling stock, and operations in a State. **The State may participate in those activities when the safety practices for railroad equipment, facilities, rolling stock, and operations in the State are regulated by a State authority** and the authority submits to the Secretary concerned an annual certification as provided in subsection (b) of this section.

49 U.S.C.A. § 20106(2)(a). [Emphasis added]:

> . . . A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order (A) is necessary to eliminate or reduce an **essentially local safety or security hazard** . . .

49 U.S.C.A. § 20113(a). [Emphasis added]:

> (a) Injunctive relief.--If the Secretary of Transportation does not begin a civil action under section 20112 of this title to enjoin the violation of a railroad safety regulation prescribed or order issued by the Secretary not later than 15 days after the date the Secretary receives notice of the violation and a request from a State authority participating in investigative and surveillance activities under section 20105 of this title that the action be brought, **the authority may bring a civil action in a district court of the United States to enjoin the violation. . .**

COURT'S INSTRUCTION NUMBER 11 TO THE JURY:

Plaintiff claims that defendant was negligent in one or more of the following respects:

1. Failure to exercise reasonable care in designing the railroad crossing;
2. Failure to exercise reasonable care in maintaining proper visibility at the crossing;
3. Failure to exercise reasonable care in operating the train given all the conditions at the crossing;
4. Failure to exercise reasonable care in providing warning, in addition to sounding the horn, to traffic that a train was approaching;

Plaintiff claims that one or more of the above facts was a proximate cause of injuries and damages to plaintiff. The defendant denies these claims.

The defendant claims as an affirmative defense that the plaintiff was contributory negligent in failing to exercise due care.

1. She failed to use ordinary care in driving into the path of the oncoming train.
2. She failed to recognize from numerous signs, markings, and warnings that the railroad crossing was dangerous unless she took reasonable steps to avoid the danger, and she failed to take the reasonable steps necessary.
3. She failed to yield right of way to the train.
4. She failed to heed the warning of the oncoming train.

Defendant claims that one or more of the above acts was a proximate cause of injuries and damages to plaintiff. The plaintiff denies these claims.

The defendant claims that the plaintiff's conduct was a proximate cause of plaintiff's own injuries. The plaintiff denies these claims.

In addition, the defendant claims that the City of Bellingham was negligent in one or more of the following respects:

1. Failure to exercise reasonable care in designing the railroad crossing;
2. Failure to exercise reasonable care in maintaining proper visibility at the crossing.

Defendant claims that one or more of the above acts was a proximate cause of injuries and damages to plaintiff.

COURT'S INSTRUCTION NUMBER 13 TO THE JURY:

Plaintiff has the burden of proving each of the following propositions by a preponderance of the evidence on plaintiffs' claim of negligence:

First, that the defendant acted, or failed to act, in one of the ways claimed by the plaintiffs and that in so acting, or failing to act, defendant was negligent;

Second, that the plaintiff was damaged;

Third, that the negligence of defendant was a proximate cause of damage to plaintiffs.

Defendant has the burden of proving both of the following propositions:

First, that the plaintiff acted, or failed to act, in one of the ways claimed by defendant, and that in so acting or failing to act, the plaintiff was negligent;

Second, that the negligence of the plaintiff was a proximate cause of the plaintiff's own damage and was therefore contributory negligence.

Before a percentage of negligence may be attributed to the City of Bellingham, defendant has the burden of proving each of the following propositions:

First, that the City of Bellingham was negligent; and

Second, that the city of Bellingham's negligence was a proximate cause of the injury or damage to plaintiff.

COURT'S INSTRUCTION NUMBER 15 TO THE JURY:

A statute in Washington requires that when a stop sign is erected at a grade crossing of a railroad the driver of any vehicle shall stop within fifty feet but not less than fifteen feet from the nearest rail of the railroad and shall proceed only using due care.

COURT'S INSTRUCTION NUMBER 19 TO THE JURY:

An administrative rule in Washington provides that the *Manual on Uniform Traffic Control Devices for Street and Highways* (MUTCD), 1988 edition, and future revisions approved by the Federal Highway Administrator has the authority of law.

COURT'S INSTRUCTION NUMBER 20 TO THE JURY:

The MUTCD reads, in part, as follows:

With due regard for safety and for the integrity of operations by highway and railroad users, the highway agency and the railroad company are entitled to jointly occupy the right-of-way in the conduct of their assigned duties. This requires joint responsibility in the traffic control function between the public agency and the railroad. The determination of need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority. Subject to such determination and selection, the design, installation and operation shall be in accordance with the national standards contained herein.

COURT'S INSTRUCTION NUMBER 21 TO THE JURY:

The Manual on Uniform Traffic Control Devices at the railroad crossings recommends that the stop bar at railroad crossings be placed 15 feet from the nearest rail.