

60126-1

60126-1

83385-1

NO. 60126-1

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

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

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 MAY 29 AM 10:36

Alizon Veit,

Plaintiff/Appellant,

VS.

Burlington Northern Santa Fe Corporation, et al,

Respondents/Defendants.

BRIEF OF APPELLANT

Douglas R. Shepherd
SHEPHERD ABBOTT CARTER
1616 Cornwall Ave., Suite 100
Bellingham, WA 98225
(360) 733-3773 or 647-4567

May 27, 2008

ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENT OF ERROR.....	3
	A. Assignments of Error.....	3
	B. Issues Pertaining to Assignments of Error.....	7
III.	STATEMENT OF THE CASE.....	8
	A. The Train Speed Limit.....	8
	B. Event Data Recorders.....	9
	C. RCW 46.61.345.....	10
	D. Maintenance of Right of Way.....	12
	E. Duty to Design and Maintain.....	15
	F. Motions in Limine.....	15
	G. Procedural History.....	19
IV.	SUMMARY OF ARGUMENT.....	21
V.	ARGUMENT.....	22
	A. Standard of Review.....	22
	B. Summary Judgment.....	23
	C. Train Speed Limit.....	24
	D. Spoliation.....	30
	E. RCW 46.61.345.....	31
	F. Manual for Uniform Traffic Control Devices (MUTCD).....	34
	G. Maintenance of Right-of-Way.....	36
	H. Ayers.....	37

I. Basey’s Criminal Past and Accidents.....	40
J. Post Trial Motions.....	44
K. Joint Duty to Design and Maintain Crossing.....	44
VI. CONCLUSION.....	46
Appendix A.....	RCW 46.61.345
Appendix B.....	49 C.F.R. § 213.9
Appendix C	49 U.S.C.A. § 20106
Appendix D	49 C.F.R. § 213.57
Appendix E	MUTCD 1988 Edition, Part VIII

TABLE OF AUTHORITIES

United States Supreme Court

<i>CSX Transp., Inc. v. Easterwood</i> , 507 U.S. 658, 113 S.Ct. 1732 (1993).....	28, 29
--	--------

Washington Supreme Court

<i>Arkison v. Ethan Allen, Inc.</i> , 160 Wn.2d 535, 160 P.3d 13 (2007).....	46
<i>Barrett v. Lucky Seven Saloon, Inc.</i> , 152 Wn.2d 259, 96 P.3d 386 (2004).....	31
<i>Coppernoll v. Reed</i> , 155 Wn.2d 290, 119 P.3d 318 (2005).....	22
<i>Fenimore v. Drake Construction Co.</i> , 87 Wn.2d 85, 549 P.2d 483 (1976).....	41
<i>Goodner v. Chicago Milwaukee, St. Paul & Pac. R. Co.</i> , 61 Wn.2d 12, 377 P.2d 231 (1963).....	29
<i>Hubbard v. Spokane County</i> , 146 Wn.2d 699, 50 P.3d 602 (2002).....	24
<i>Karle v. Seder</i> , 35 Wn.2d 542, 214 P.2d 684 (1950).....	44
<i>Kirk v. WSU</i> , 109 Wn.2d 448, 746 P.2d 285 (1987).....	43
<i>Mathis v. Swanson</i> , 68 Wn.2d 424, 413 P.2d 662 (1966).....	23
<i>Mayer v. Sto Indus., Inc.</i> , 156 Wn.2d 677,	

132 P.3d 115 (2006).....	23
<i>Pier 67, Inc. v. King County</i> , 89 Wn.2d 379, 573 P.2d 2 (1977).....	30
<i>Preston v. Duncan</i> , 55 Wn.2d 678, 349 P.2d 605 (1960).....	24
<i>State v. Cauthron</i> , 120 Wn.2d 879, 846 P.2d 502 (1993).....	22, 39
<i>State v. Kelly</i> , 102 Wn.2d 188, 685 P.2d 564 (1984).....	41
<i>State v. Luvene</i> , 127 Wn.2d 690, 903 P.2d 960 (1995).....	23
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	41
<i>Tyler v. Pierce County</i> , 188 Wash. 229, 62 P.2d 32 (1936).....	42

Washington State Court of Appeals

<i>Davidson v. Metropolitan Seattle</i> , 43 Wn.App. 569, 719 P.2d 569 (1986).....	40
<i>Garcia v. Providence Medical Center</i> , 60 Wn.App. 635, 806 P.2d 766 (Div. 1, 1991).....	40, 42, 43
<i>Happy Bunch, LLC v. Grandview North, LLC</i> , 142 Wn.App. 81, 173 P.3d 959 (2007).....	23
<i>Henderson v. Tyrrell</i> , 80 Wn.App. 592,	

910 P.2d 522 (1996).....	30
<i>Kadmiri v. Claasen</i> , 103 Wn.App. 146, 10 P.3d 1076 (2000).....	44
<i>Krivanek v. Fibreboard Corp.</i> , 72 Wn.App. 632, 865 P.2d 527 (1993).....	44
<i>Ray v. King County</i> , 120 Wn.App. 564, 86 P.3d 183 (2004).....	40
<i>Ruff v. Dep't of Labor and Indus.</i> , 107 Wn.App. 298, 28 P.3d 1 (2001).....	39
<i>State v. Olmedo</i> , 112 Wn.App. 525, 49 P.3d 960 (2002).....	40
<i>Tortes v. King County</i> , 119 Wn.App. 1, 84 P.3d 252 (2003).....	40

Courts of Other Jurisdiction

<i>Frye v. United States</i> , 293 F. 1013 (D.C. Cir. 1923).....	39
<i>Missouri Pac. R.R. Co., v. Lemon</i> , 861 S.W.2d 501 (Tex. App. 1993).....	29

Statutes

RCW 35.21.310.....	37
RCW 36.86.100.....	36
RCW 46.61.050.....	33
RCW 46.61.340.....	32

RCW 46.61.345.....	32, 33
RCW 47.32.140.....	36
49 USC § 20106	26, 27, 28
WAC 308-330-408	31, 33
WAC 468-95-010.....	34
WAC 480-62-155 (Repealed 5/24/2007).....	27, 28

Codes and Ordinances

Bellingham City Ordinance 10282 (1992).....	37
Bellingham Municipal Code § 11.03.010.....	31, 33
Bellingham Municipal Code § 13.40.050(B).....	37
Bellingham Municipal Code § 13.40.080.....	37
Bellingham Municipal Code § 13.40.140.....	37

Rules

ER 401	42
ER 402.....	42
ER 403	42, 43

Other Authorities

<i>Manual for Uniform Traffic Control Devices</i>	34, 35, 45
---	------------

I - INTRODUCTION

Plaintiff Alizon Veit (Veit) appeals from a verdict that determined Defendant Burlington Northern Santa Fe Railroad Company (BNSF) was not negligent in the operation of its train, the design of its crossing, or the maintenance of its right of way.

On September 10, 2001, Veit left her home to drive to a luncheon appointment with a long time friend. Her route to the restaurant took her to a railroad crossing that had no active traffic control devices and seriously restricted sight distances to the south. At the bottom of a hill, as she approached the crossing from east to west. Veit stopped approximately 15 feet east of the first of two rails. Seeing no train she proceeded slowly to or upon the first track. At that point, she saw a train approaching from the south. The train was blowing a constant whistle.

Veit appeared unsure as to whether she should stay on the first track or continue off the first track. Veit's choice was to get off the first (east) track. As Veit drove off the first track the train turned left onto the second, west (main) track and crashed into her car.

As a result of the accident, the trial court determined that Veit was disabled and appointed guardians of her person and estate. Her claim was prosecuted by her court appointed guardian.

The day of the accident, the maximum train speed allowed at the crossing was 20 mph. The train was going much faster than 20 mph. The trial court, at summary judgment erred in determining that the federal speed limit at that crossing was 40 mph and erred in so instructing the jury. The trial court erroneously prohibited testimony related to the 20 mph train speed limit then in effect at the crossing. Prior to discovery, BNSF destroyed the two speed tapes in the two engines, which tapes would have conclusively established the train speed.

By statute and design standards, Veit was required to stop before proceeding forward no closer than 15 feet from the east track. Before trial, the trial court erred in determining which rule of the road, or duties, applied to Veit as she approached the crossing and attempted safely to travel over the crossing.

Defendant City of Bellingham settled with Veit before trial. At trial it was undisputed that the crossing as designed and maintained was not reasonably safe.

II - ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred when it entered an Order on Defendant BNSF Railway's Motion for Summary Judgment on February 2, 2007. CP 691.

2. The trial court erred in denying Veit's motion to reconsider Summary Judgment. CP 664.

3. The trial court erred when it entered the (Proposed Corrected) Order Denying Veit's Motion to Reconsider the February 2, 2007 Summary Judgment on May 11, 2007. CP 46.

4. The trial court erred when it granted BNSF's Motion in Limine number 23 regarding reference to the excessive speed of the train. CP 508. RP (03/06/07): 53-59.

5. The trial court erred when it granted BNSF's Motion in Limine number 25, which motion and trial court decision prohibited Veit from presenting any argument, comment, or testimony during trial regarding RCW 46.61.345. CP 508. RP (03/06/07): 60-73.

6. The trial court erred when it denied Veit's Motion in Limine number 5 regarding evidence or testimony regarding Robert

Basey's criminal history or sexual predator classification. CP 547-48. RP (03/06/07): 108-112.

7. The trial court erred when it denied Veit's Motion for a Mistrial based upon the questions during cross examination of Mary Wilder and answers given regarding the alleged reason for Veit's removal from the Basey house. RP (03/14/07):853-872.

8. The trial court erred when it denied Veit's Motion for a Mistrial based upon the repeated questions by BNSF witnesses as to whether they had ever had an accident or problem when crossing the tracks in violation of Veit's Motion in Limine 21 which prohibited any reference to the absence of previous accidents at the crossing. CP 550. RP (03/06/07): 139-143. RP (03/14/07): 868-870.

9. The trial court erred in allowing the opinion testimony of Bruce Ayres. RP (03/20/07): 1434-1437.

10. The trial court erred in the giving of jury instruction number 30: re speed limit of train. CP 173.

11. The trial court erred in not giving Veit's proposed jury instruction no. 18: re spoliation. CP 326.

12. The trial court erred in not giving Veit's proposed jury instruction no. 29: re train speed limit. CP 202.

13. The trial court erred in rejecting Veit's Trial Exhibit No. 36: re flashing light signals.

14. The trial court erred in rejecting Veit's Trial Exhibit No. 37: re train speed limits.

15. The trial court erred in rejecting Veit's Trial Exhibit No. 52: BNSF accident report.

16. The trial court erred in rejecting Veit's Trial Exhibit No. 53: Police Report re speed.

17. The trial court erred in admitting Trial Exhibit 63A for illustrative purposes.

18. The trial court erred in admitting Trial Exhibit 63B for illustrative purposes.

19. The trial court erred in admitting Trial Exhibit 64.

20. The trial court erred in admitting Trial Exhibit 64A.

21. The trial court erred in admitting Trial Exhibit 65.

22. The trial court erred in admitting Trial Exhibit 65A.

23. The trial court erred in admitting Trial Exhibit 66.

24. The trial court erred in admitting Trial Exhibit 66A.

25. The trial court erred in admitting Trial Exhibit 67.
26. The trial court erred in admitting Trial Exhibit 67A.
27. The trial court erred in denying the testimony of Burks regarding speed and post accident movement of the train. CP 130. RP (03/19/07): 1131. RP (03/21/07): 1694-1695.
28. The trial court erred in denying the offered testimony of Rosenberg. Ex. 50. RP (03/19/07): 1130-1133.
29. The trial court erred in denying the offered testimony of Williams. Ex. 51. RP (03/19/07): 1130-1133.
30. The trial court erred in denying the offered testimony of Nies. Ex. 54. RP (03/19/07): 1144-1147.
31. The trial court erred in not giving Veit's proposed jury instruction No 36. CP 182, 184.
32. The trial court erred in denying Veit's motion for a directed verdict on BNSF's negligence. RP (03/21/07): 1710-1713.
33. The trial court erred in entering its order denying Veit's Motions for JNOV or New Trial on May 11, 2007. CP 120, CP 40.
34. The trial court erred in entering judgment in favor of BNSF on May 11, 2007. CP38.

B. Issues Pertaining to Assignments of Error

1. What was the speed limit for the BNSF train at the Pine Street crossing on September 10, 2001? (Assignments of Error Numbers 1-4, 10-16, 27, 30-34.)

2. Was Veit prejudiced by the trial court's errors in properly instructing the jury? (Assignment of Error Numbers 10-12, 31-34.)

3. Was Veit required by law to stop within fifty feet but not less than fifteen feet from the nearest rail and thereafter proceed with due care? RCW 46.61.345. (Assignments of Error Numbers 5, 33, 34.)

4. Was the trial court's order in limine, prohibiting any argument, comment or testimony during the trial regarding RCW 46.61.345, prejudicial legal error? (Assignments of Error Numbers 5, 33, 34.)

5. Whose duty was it to design and maintain the crossing? (Assignment of Error Numbers 31-34.)

6. How many feet was the BNSF right of way to the southeast and at the crossing? (Assignments of Error Numbers 9, 17-26, 28, 29, 31- 34.)

7. Did the trial court's various evidentiary rulings prohibit Veit from fairly presenting her case requiring a new trial? (Assignments of Error Numbers 4-9, 13-30, 32-34.)

III - STATEMENT OF THE CASE

A. The Train Speed Limit.

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: Rejected by the trial court at RP (03/14/07); 801, 803, 810. During discovery Veit asked BNSF to produce the prior ten-year history of maximum track speed for the crossing. In response, BNSF produced trial exhibit 36. Ex. 48: Rejected by the trial court at RP (03/19/07); 1114, 1130. BNSF's discovery responses disclosed no claim of a federal speed limit of 40 mph at the crossing. Ex. 2.

At the time of the accident, BNSF told the Bellingham Police investigating the accident that the speed limit was 20 mph and that the train was traveling 20 mph at the time of the accident. Ex. 53: Rejected by the trial court at RP (03/19/07); 1133. Burks, the train engineer, in testimony which was offered but excluded, would have testified that 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.” CP 131. Further, Burks would have admitted that he answered, during discovery, that his “speed was at all times . . . in compliance with federal law” because he “understood and believed that the federal speed limit at the crossing was 20 miles per hour.” CP 132. Finally, Burks would have testified, if allowed, that he was told by BNSF supervisors that the speed limit contained in the timetables, was “the maximum speeds allowed by federal law and therefore (he) understood and believed (that at the crossing) . . . 20 (was) . . . the maximum speed allowed by law.” CP 132.

At the time of the accident, at the moment of impact, the BNSF work train was going at least 25.7 mph and could have been going as fast as 33.2 mph. RP (03/13/07): 763-764.

B. Event Data Recorders.

Two engines were driving the work train. Ex. 1. Both engines had working event data recorders. RP (03/19/07): 1211-1212. Normally, determining the speed of the train in a train crash is easy: you review the speed recorder tape. RP (03/13/07): 700. Event data recorders record certain train data including speed of

the locomotive. RP, id. In 2004, by way of response to a discovery request, BNSF responded that the locomotives were equipped with speed tapes and that BNSF did not know where the tape(s) were and that they would supplement their answer. Ex. 2. RP (03/20/07): 1398-1400. BNSF later supplemented its answer by providing information from the wrong event data recorder. Exhibit 3 to CP 953.

At trial, BNSF in an attempt to explain why the speed information was missing, presented the testimony of a retired employee. Kime testified that the recorder information was on his personal laptop computer which had been stolen from his vehicle in 2001. RP, id., 1398-1403.

C. RCW 46.61.345.

As designed, a stop bar was placed approximately 8 feet from the first track. Ex. 11. The location was significantly closer than what safety design standards required, which was 15 feet. RP (03/12/07): 378, 391. A driver, crossing east to west, and stopping 15 feet from the nearest rail would have a severely limited sight line to the south. Id. The stop bar was improperly placed. RP, id., 517. Its placement too close to the track allowed a driver to stop

at or on the stop bar and not know if the driver was clear of an oncoming train. RP, id., 481. The 15 feet stop requirement is a safety envelope, developed to make sure a car, when stopped, is clear of any train. RP, id., 436.

Veit stopped between the stop sign and before the stop bar. RP (03/13/07): 524, 531-532. As she proceeded slowly onto the first track, a witness called 911 because she believed Veit was going to be hit by the train. RP (03/13/07): 524-525. At this point, Veit looked scared to death. Id.

Pursuant to a BNSF motion and trial court order in limine, Veit was prohibited, during trial, from presenting any argument, comment, or testimony related to RCW 46.61.345. CP 508 (Nos. 24 and 25, CP 519-520). RP (03/06/07): 59-75.¹

However, after the close of the evidence the trial court reversed its order in limine and the jury was instructed that RCW 46.61.345 was the applicable rule of the road related to Veit's stop

¹ Veit argued, during pretrial motions, in opposition to BNSF's motion that: "If this Court thinks that this statute, RCW 46.61.190 applies to this crossing, and RCW 46.61.345 doesn't apply to this crossing, we are being led into error which is going to require a second trial in this case." RP (03/06/07): 69.

before, and attempt safely to cross, the two tracks. CP 159 (Inst. 15).²

D. Maintenance of Right of Way.

During discovery, Veit asked BNSF to produce copies of all right-of-way plans for the BNSF tracks at the accident site. BNSF said it searched and could not locate any right-of-way plans for the accident area. Ex. 6.

At the crossing, the southeast side of the crossing had a bank, brush and trees which restricted Veit's view of the oncoming train. Ex. 1; Ex. 7. The bank, brush, track curve and existence of two tracks created sight line problems for Veit. RP (03/08/07): 236-244. Ex. 1, Ex. 7. When Veit stopped 15 feet short of the first track, she would have no ability to see the approaching train. RP, id., p. 237. The City of Bellingham was prohibited for safety purposes from going onto BNSF right-of-way, without BNSF permission to do any work. RP, id., 239-240. Previous to the accident, any problems with vegetation or sight lines at any crossing in the City of Bellingham would be solved by the City of

² When the trial court decided that RCW 46.61.345 was the proper instruction, BNSF objected and argued: "[y]ou've had multiple witnesses testify that the duty is to stop at the stop bar, and I think that makes that a confusing instruction . . ." RP (03/20/07): 1342.

Bellingham notifying BNSF and BNSF would remove the vegetation. RP, id., p. 241.

Pursuant to established design criteria, if the maximum speed for the train was 20 mph, the crossing needed to be designed and maintained so that Veit could see 422 feet to the south, when stopped. RP (03/12/07): 416-417. As the crossing was designed and maintained, the maximum safe speed for a train, a was 14 mph. RP, id., 423. Ex. 11, Ex. 13A. The minimum sight distance, to safely cross, required for a train going 30 mph was 634 feet and for a train going 40 mph was 845 feet. Ex. 13A. On the day of the accident, if she had stopped at the stop bar, Veit could see no more than 200 feet to the south. RP (03/13/07): 651-652.

In moving for summary judgment, Bellingham provided the declaration of Rosenberg, its City Engineer, stating that the embankment to the south of the crossing was located in the Burlington Northern right-of-way. CP 2124. BNSF joined in Bellingham's motion for summary judgment and adopted Rosenberg's declaration as its own. CP 2031. Before Bellingham's summary judgment motion was heard, Veit and Bellingham settled. In Veit's pleadings, asking the trial court to approve the settlement,

Veit represented to the trial court that the defendant primarily responsible for maintenance of the crossing as regards visibility was BNSF. CP 1360, CP 1365, CP 1379, and CP 1382. BNSF provided no argument or pleading to the contrary at the settlement hearing.

After the accident, BNSF removed brush and cleared the hillside of vegetation. Ex. 1(41); Ex. 50(6). At trial, Veit offered the testimony of Bellingham agents regarding after accident removal of obstructions to sight in the southeast portion of the crossing. Ex. 50, Ex. 51. The trial court rejected the offered testimony. RP (03/19/07): 1130-1131.

The deed under which BNSF obtained a portion of its right to the track described the right-of-way on the main track as being 18.5 feet on the bank side to the south. Ex. 18. There was no document found or produced describing the right-of-way related to the spur track. Photos and surveys demonstrated that BNSF had taken possession of right-of-way, in excess of 25 feet, to the east of the centerline to make improvements at the crossing. Ex. 1, pictures 23, 24, 31, 51; Ex. 10; Ex. 46.

BNSF called expert Ayers to testify that in his opinion the legal right-of-way at the crossing was 7 feet either side of

centerline. RP (03/20/07): 1413-1430. He was a professional land surveyor. RP, id., 1414. Ayers expert testimony was based exclusively on trial exhibit 63. The trial court rejected Exhibit 63 on foundational grounds. RP, id., 1426-1427. Veit objected to Ayers opinion testimony regarding BNSF's right-of-way based upon Ex. 63. RP, id., 1368-1371. RP, id., 1434-1437.

E. Duty to Design and Maintain.

BNSF argued that the crossing was negligently designed by Bellingham and that the right of way was negligently maintained by Bellingham. CP 155. Veit argued that the MUTCD was law in Washington. CP 163. The MUTCD placed joint responsibility on BNSF and Bellingham for any design defect. CP 183. RP (03/12/07): 421-423. Appendix E.

F. Motions in Limine.

Pat Basey was one of Veit's care takers. Pat Basey's husband, Robert Basey, was convicted of a sex crime and was a registered sex offender. The GAL assisted Veit in moving from the Basey home back to Bellingham. Veit requested the move as she thought the Basey home was too far from Bellingham. RP (03/21/07): 1648.

Veit moved in limine for the trial court to instruct BNSF not to mention, refer to, interrogate or attempt to convey to the jury Robert Basey's criminal history or record. CP 548. The trial court reserved its ruling on this motion. RP (03/06/07): 108-113.

Prior to the appointment of a GAL, Grant Wilder, by way of a power of attorney, made the care decisions for Veit. RP (03/14/07): 833-842. During cross examination, BNSF questioned Mary Wilder regarding Veit's moving from the Basey home back into Bellingham, Washington. Before the BNSF questions were asked, Veit asked for a side bar to discuss Veit's motion in limine related to Robert Basey. RP (03/14/07): 855-856.³ The trial court

³ 6 Q. (By Mr. Scarp) And that was not a decision that you
7 made to move her from the Maple Falls house; is that
8 correct?

9 A. That's correct.

10 MR. SHEPHERD: Your Honor, could we have a
11 sidebar, please?

12 (Counsel approach for a sidebar discussion off the record.)

13 Q. (By Mr. Scarp) I'm sorry, Ms. Wilder. That was not a
14 decision that you or your husband made to move her
15 from Maple Falls?

16 A. No, it was not.

17 Q. And do you know the reason why she was moved from
18 Maple Falls?

19 A. That -- I believe that was happening at the time that
20 she was getting the guardian, and we were transferring
21 the power of attorney to a guardian.

22 Q. Right, and do you know why the decision was made by
23 the guardians to move Ms. Veit?

24 A. I believe so.

25 Q. And what's that?

allowed the questions and answers and Veit moved for a mistrial. Veit's motion was denied. RP, id., 857-864. On redirect, Wilder admitted that she had no role in Veit's transfer from the Basey home back to Bellingham. RP, id., 874.

The move from the Basey home back to Bellingham had nothing to do with Robert Basey.⁴ RP (03/21/07): 1647-1648.

Veit also moved in limine to prohibit any testimony related to the absence of previous accidents at the crossing. CP 550. The

856

1 A. I believe they felt that Pat's home was not a safe
2 place for her.

3 Q. Why is that?

4 A. Because Pat's husband was a registered sex offender.

5 Q. Is that your understanding of the reason why she had
6 to move to Alabama Hills?

7 A. I believe so.

⁴ 18 Q. So if I was to ask you who made the decision to remove
19 her from the Basey home to the Alabama home, was it
20 you --

21 A. First off, no one removed her. No one had the ability
22 or authority to do that. Alizon requested that she
23 move because she thought Maple Falls was too far away.

24 Q. So there's been -- I want you to assume there's been
25 some testimony here about Pat Basey. I guess it says

1648

1 her husband, is a registered sex offender.

2 A. Yes.

3 Q. Were you aware of that?

4 A. Yes.

5 Q. Was the move related to that issue at all?

6 A. No.

trial court granted Veit's motion in limine related to prior accidents or lack thereof. RP (03/06/07): 143.

During trial, BNSF asked witnesses, in violation of the trial court's oral pretrial ruling on Veit's motion in limine, if they had ever been hit by a train crossing the tracks at that location, without any attempt to lay a proper foundation. Hendricks, RP (03/12/07): 528-529. Ramsey, RP (03/13/07): 594-595. Froderberg, RP (03/08/07): 261 – 262. When Veit objected outside the presence of the jury, the trial court ruled that:

I think that with regards to this issue it is relevant for anyone who has had experience driving across that intersection to be asked have you gone to that intersection. Have you -- and as I think the questions have been, did you stop, did you look, did you see, did you not proceed until you were sure there wasn't a train coming. It doesn't strike me as being evidence of the existence of or lack of prior accidents at this intersection. It strikes me as being evidence by people that have personal experience with the intersection of whether they believe whether they could stop and look and make a determination there was or was not a train coming and proceeding safely.

I think that's what the testimony has been about, and so I don't see it as any testimony about prior accidents. Nobody has been asked have you seen an accident there. Did you have one there? They're just asked were you able at this intersection to stop, to look, to listen, and to reasonably be sure that there was no train coming and proceed. That's essentially what's been asked, and I don't see a problem with that, and so I'll deny the motion for mistrial on that basis.

RP (03/14/07): 869-870.

G. Procedural History.

Veit was injured on September 10, 2001. Suit was commenced against BNSF on September 9, 2003. CP 2365. Bellingham was joined as a defendant in September 2004. CP 2351. The trial court approved Veit's settlement with Bellingham on September 1, 2006.

The trial court granted partial summary judgment in favor of BNSF, determining that the work train speed limit at the crossing was 40 mph. CP 691. Veit moved for reconsideration. CP 664. Orally, at the motion to reconsider the trial court said: "if they had a lower speed limit, and they were running faster than their own speed limit, then you can present that evidence to the jury. It's not something that's being precluded here. . . . You may claim that they had set a speed limit and didn't comply with their own speed limit."

RP (03/02/07): 11-12.

Trial began March 6, 2007. That morning, the trial court again changed its mind and determined: "there will be no evidence as to what BNSF's head-end restriction was there, or BNSF's speed

limit down the track, or BNSF' speed limit at that point . . ." RP (03/06/07): 54.

BNSF made no summary judgment motion related to Washington rules of the road or what specific statute or law applied to Veit's travel across the Pine Street crossing. The law as applied to Veit's duties was raised by BNSF in its motions in limine, filed and served eight days before trial. CP 508.

Veit objected to the matter being raised by a motion in limine and the absence of any legal authority to support the motion. The exchange, in part, was as follows:

MR. SHEPHERD: So you're saying that this statute doesn't apply, 46.61.345 doesn't apply?

THE COURT: Not to this intersection. . .

RP (03/06/07): 70.

MR. SHEPHERD: Your Honor, the statute says the driver shall stop no closer than 15 feet - -

THE COURT: No, it does not. The statute says - -

MR. SHEPHERD: Your Honor, I apologize for my lack of -

THE COURT: You're correct. You're correct. You're right. The driver of a vehicle must stop at that location.

Id.: 71.

MR. SHEPHERD: The Court has heard my argument. Clearly, one of these statutes applies, and one of them doesn't. I believe the Court has chosen the wrong statute.

Id.: 72.

MR. SHEPHERD: Your Honor, I'm troubled that these motions in limine are used for summary judgment motions.

THE COURT: It's not a summary judgment motion. It's a matter of what evidence can you present.

MR. SHEPHERD: You've determined what statute applies before you've heard any evidence. You've determined what statute applies before you've heard any evidence.

Id.: 73.

At the close of BNSF's case and after BNSF asked for and received an instruction claiming that Bellingham was negligent in the design and maintenance of the crossing, Veit moved for a directed verdict against BNSF and Bellingham on liability. RP (03/21/07): 1710-1711. The trial court denied Veit's motion. RP 1712-1713.

IV – SUMMARY OF ARGUMENT

This case seeks review of the trial court's pre-trial, trial, and post-trial decisions, and an erroneous jury verdict caused by those decisions.

The trial court misunderstood and erred, pre-trial, in determining the speed limit for the work train at the crossing (BNSF's duty as regards the operation of its train) and the statute that applied to Veit's attempt to cross the tracks safely. The trial

court erred in several critical evidentiary rulings, including allowing the opinion testimony of Ayers.

As a result of the trial court's errors, Veit was denied a fair trial and substantial justice has not been done.

V – ARGUMENT

A. Standard of Review.

The trial court's rulings related to summary judgment on the train speed limits, its evidentiary rulings consistent with the summary judgment, and its rulings on jury instructions consistent with the summary judgment are reviewed de novo. *Coppernoll v. Reed*, 155 Wn.2d 290, 296, 119 P.3d 318 (2005). (Assignment of Error numbers 1-4, 10-16, and 30-32.)

The trial court's rulings related to the testimony of Ayers and his trial exhibits are reviewed de novo. On appeal the trial court's decision to admit or exclude novel expert opinions is reviewed de novo. *State v. Cauthron*, 120 Wn.2d 879, 887, 846 P.2d 502 (1993). (Assignment of Error numbers 9, 17-26, 31-32.)

The trial court's rulings related to RCW 46.61.345 are reviewed de novo. (Assignment of Errors numbers 5, 31-34.) "We review questions of statutory interpretation and claimed errors of

law de novo." *Happy Bunch, LLC v. Grandview North, LLC*, 142 Wn.App. 81, 88, 173 P.3d 959 (2007).

The remainder of the trial court evidentiary rulings are reviewed for abuse of discretion. (Assignment of Errors numbers 6-8, 11, 28-29.) "We review a trial court's evaluation of relevance under ER 401 and its balancing of probative value against its prejudicial effect or potential to mislead . . . using a 'manifest abuse of discretion' standard of review. *State v. Luvene*, 127 Wn.2d 690, 706-07, 903 P.2d 960 (1995). A trial court abuses its discretion if it relies on unsupported facts, applies a wrong legal standard, or takes a position no reasonable person would take. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

B. Summary Judgment.

A summary judgment cannot be granted if there is a dispute as to any issue of material fact. Nor can a summary judgment be granted if the facts are not in dispute, but reasonable minds might differ as to liability. *Mathis v. Swanson*, 68 Wn.2d 424, 426 – 427, 413 P.2d 662 (1966). "A court must consider all facts and any reasonable inferences in the light most favorable to the nonmoving party."

Hubbard v. Spokane County, 146 Wn.2d 699, 707, 50 P.3d 602 (2002). "A trial is not useless but absolutely necessary where there is a genuine issue as to any material fact." *Preston v. Duncan*, 55 Wn.2d 678, 681, 349 P.2d 605 (1960).

C. Train Speed Limit.

BNSF's motion for summary judgment was supported by four declarations: Leeper, CP 1909; Tamosiunas, CP 1913; Johnson, CP 1916; and Franco, CP 1922. All declarations were prepared and signed in 2006.

Franco disclosed that the head-end speed limit on the Pine Street crossing was 20 mph. His opinion was based on his review of Exhibit 37. Then, without the appropriate foundation he said: "It is my understanding that BNSF typically sets its internal speed limits lower than federal law requires." His understanding is not admissible. Importantly, Franco did not say that the 20 mph limit was an internal speed limit.

Johnson and Leeper, by declaration, claimed that the track class was 3. CP 1917; CP 1911. Johnson and Leeper, without the proper foundation, were allowed to provide

testimony on legal issues, federal rules and regulations. Importantly, the internal documents prepared by BNSF, at the time of the accident, describe the FRA track as class 2. Ex. 53.

Leeper's declaration, in key paragraphs talked about the present (2006): "I **am** familiar with federal track classification A maximum allowable speed for freight trains . . . **is** designated" CP 1910. Johnson's 2006 declaration was similarly defective: "The FRA maximum allowable speed limit for freight trains traveling on class 3 track **is** 40 m.p.h." CP 1917. In 2006, BNSF had made substantial changes to the crossing including lights and gates.

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.

The federal statutory scheme relied upon by BNSF was first enacted in 1994. In discovery, Veit asked BNSF to provide all records of the "maximum track speed" for freight at the crossing

from 1991 to 2001. BNSF answered: "Track speed is governed by federal law." Ex. 2.

In discovery, Veit asked BNSF to produce "a ten-year history of maximum track speed for the railroad as it passes through the accident vicinity. The time frame is September 2001 and back in time." BNSF responded: "See Attachment 22." Ex. 36; Ex. 37.

Officer Leake testified, at his deposition, that the speed limit was 20 mph. Page 32 of Leake's Deposition.

The BNSF engineer, Burks, at his deposition testified that the speed limit south of the crossing was 30 mph and the speed limit at the crossing was 20 mph. He further testified that: "You would never, under any circumstances, speed up." CP 301; Pages 121-124 of Burks' Deposition.

Terry Nies, the BNSF employee who investigated the accident and filed an accident report with BNSF, concluded that the FRA Track Class was a class 2 (20 mph). Ex. 53. CP 300; Page 28, 29 and 32 through 34 of Nies' Deposition.

49 USC § 20106 specifically and clearly provides that a law, regulation, or order (regarding speed) "would continue in force" if

the law, regulation, or order "is necessary to eliminate or reduce an essentially local safety or security hazard." Obviously, the 1994 restrictions to speed at the crossing were continued "in force" because of the restrictions to visibility at the crossing.

Because of 49 USC § 20106, in 1994, the State of Washington adopted a new regulatory scheme. This regulation continued in force all orders and regulations in effect and required a "railroad company" seeking to modify an existing limit to file a petition with the commission or a first class city. Further, the regulation then required the commission, or the first class city, to make a determination whether a speed limit lower than the federal limit was "necessary to eliminate or reduce an essentially local safety hazard." WAC 480-62-155 (repealed 5/24/07). The regulation provided guidance for the commission, first class cities, and a court to determine if the lower speed was necessary. The commission, and others dealing with the issue, was asked to consider, at a minimum:

1. Whether the local situation is one that is covered by or is capable of being adequately covered by uniform national standards;

2. Whether there exist unusual local geographic or other conditions which contribute to the existence of the hazard;
3. The history of accidents or potential for accidents at the location; and
4. Whether there exists alternate means to reduce or eliminate any hazard that can be included as conditions to an order setting a train speed.

WAC 480-62-155 (repealed 5/24/07).

Clearly, the 20 mph speed limit was not an "internal BNSF" limit as alleged. FRSA's "savings clause" allows states to "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 Transp., Inc. v. Easterwood*, 507 U.S. 658, 675, n. 15, 113 S.Ct. 1732 (1993); 49 U.S.C. § 20106. (Emphasis added.)

The Supreme Court in *Easterwood* explicitly 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.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 v. Chicago Milwaukee, St. Paul & Pac. R. Co.*, 61 Wn.2d 12, 19, 377 P.2d 231 (1963). 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.

D. Spoliation.

The spoliation inference is “uniformly applied by the courts and is an integral part of our jurisprudence.” *Pier 67, Inc. v. King County*, 89 Wn.2d 379, 386, 573 P.2d 2 (1977). The inference obliges potential litigants to preserve potentially important evidence when litigation is reasonably anticipated. *Henderson v. Tyrrell*, 80 Wn.App. 592, 607 – 608, 910 P.2d 522 (1996). To avoid the spoliation inference, a party must provide a satisfactory explanation for its failure to produce potentially important evidence. *Pier 67, Inc. v. King County*, 89 Wn.2d at 386. When a party fails to produce evidence “without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him.” *Id.*, 89 Wn.2d at 385.

Regardless of the intent of the party, spoliation of evidence occurs where the failure to produce potentially important evidence which results in an advantage for BNSF over Veit or Veit was not “afforded an adequate opportunity to examine the evidence.” *Henderson v. Tyrrell, supra*, at 607.

E. RCW 46.61.345.

The trial court abused its discretion in not allowing Veit to present evidence on her theory of the case and rebut insinuations from BNSF that the cause of the accident was Veit's driving ability or inability to obey traffic rules. Where a trial court grants a motion in limine that prejudices the plaintiff by excluding evidence which would allow her to properly argue her theory of the case under the law, the matter must be remanded for a new trial. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 263 - 264, 274, 96 P.3d 386 (2004).

In 2001, assuming no stop sign, Veit was required to stop no further than 50 feet and no closer than 15 feet from the first rail. Bellingham had adopted WAC 308-330-408. Bellingham, Wash., Code § 11.03.010. WAC 308-330-408 states: "Conduct of drivers of vehicles approaching grade crossings shall be governed by the rules set forth in RCW 46.61.340."

Therefore, a driver at a crossing without a stop sign could not stop closer than 15 feet from the nearest rail when a train is visible and hazardously close to the crossing.

Whenever any person driving a vehicle approaches a railroad grade crossing under any of the circumstances stated in this section, the driver of such vehicle shall stop **within fifty feet but not less than fifteen feet from the nearest rail** of such railroad, and shall not proceed until the crossing can be made safe. The foregoing requirements shall apply when . . . An approaching railroad train is plainly visible and is in hazardous proximity to such crossing. (Emphasis added.)

RCW 46.61.340(1)(c).

In 2001, with a stop sign, Veit was also required to stop no closer than 15 feet from the nearest rail:

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. (Emphasis added.)

RCW 46.61.345.

Veit was not required to stop at an improperly placed stop bar.

(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. . . . (Emphasis added.)

RCW 46.61.050.

RCW 46.61.050, incorporated in WAC 308-330-408, "is adopted by reference as the traffic code of the City of Bellingham . . ." Bellingham Municipal Code 11.03.010.

During the trial, at least three witnesses, two police officers, and Rosenberg, incorrectly testified that Veit had a legal duty to stop at the stop line. Rosenberg, RP (03/08/07): 235, 247. Officer Cristelli, RP 317-318. Officer Wong, RP (03/12/07): 366. BSNF's motion and the trial court's decision prohibited Veit from properly examining these three witnesses on their erroneous testimony that Veit's duty was to stop at the white stop bar.

When the trial court properly determined, after both parties rested, that RCW 46.61.345 was the proper rule of the road, BNSF correctly commented that the trial testimony was inconsistent with the instruction and that inconsistency created a problem. RP (03/20/07): 1342.

F. Manual for Uniform Traffic Control Devices (MUTCD).

The MUTCD is law in Washington. WAC 468-95-010. The existing stop bar was clearly placed improperly.

The Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD), 1988 edition, and future revisions approved by the Highway Administrator, except as modified by the Department of Transportation herein, as the national standard for all highways open to public travel, published by the U.S. Department of Transportation, Federal Highway Administration was duly adopted by Administrative Order No. . . . of the Secretary of Transportation dated . . . 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 illustration to the prescribed for and style of WAC and therefore excluded them from publication. . .

WAC 468-95-010.

Part 8 of the MUTCD requires stop bars to be placed approximately 15 feet from the nearest rail. See figure 8B-4 attached hereto as Appendix E. Part 8 of the MUTCD reads in part:

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 effect 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 describe

fully in section 1A-2. (Section 8A-2. Use of Standard Devices.)

.....
Stop line approximately 8' from gate if present (approximately 15' from nearest rail). (Section 8B-4, Figure 8-2.)

.....
The design of railroad crossing pavement markings shall be essentially as illustrated in figure 8-2." (Section 8B-4.)

.....
The use of the STOP signs at railroad-highway grade crossing 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. . . .

3. Line of sight to an approaching train is restricted by physical features such as that approaching traffic is required to reduce speed to 10 miles per hour or less in order to stop safely.
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. (Section 8B-9.)

The 1988, MUTCD required that on "tracks where trains operate at speeds of 20 mph or higher, circuits controlling automatic flashing light signals shall provide for a minimum operation for 20 seconds before arrival of any train on such tracks." MUTCD (1988, Rev.) Section 8c-5. Therefore, assuming the trial court was correct and the train speed limit at the crossing was 40 mph, the trial court erred in not giving the jury Veit's proposed instruction No. 36. CP182, 184. And, the trial court erred in not

granting Veit a directed verdict, consistent with the 1988 MUTCD.

CP 182. RP (03/21/07): 1710-1713.

G. Maintenance of Right-of-Way.

The common law duty of BNSF to keep its right-of-way clear of obstructions to sight has been codified in the case of crossings at state, county, and city roadways.

Each railroad company shall keep its right of way clear of all brush and timber in the vicinity of a railroad grade crossing with a county road for a distance of one hundred feet from the crossing in such a manner as to permit a person upon the road to obtain an unobstructed view in both directions of an approaching train.

RCW 36.86.100.

Each railroad company shall keep its right of way clear of all brush and timber in the vicinity of a railroad grade crossing with a state highway for a distance of one hundred feet from the crossing in such manner as to permit a person upon the highway to obtain an unobstructed view in both directions of an approaching train.

RCW 47.32.140.

Any city or town may by general ordinance require the owner of any property therein to remove or destroy all trees, plants, shrubs or vegetation, or parts thereof, which overhang any sidewalk or street or which are growing thereon in such manner as to obstruct or impair the free and full use of the sidewalk or street by the public; and may further so require the owner of any property therein to remove or destroy all grass, weeds, shrubs, bushes, trees or vegetation growing or which has grown and died, and to remove or destroy all debris, upon property owned or

occupied by them and which are a fire hazard or a menace to public health, safety or welfare.

RCW 35.21.310.

“The abutting property owner shall maintain trees and other vegetation on unimproved rights of way.” City of Bellingham Ordinance 10282 (1992); City of Bellingham Municipal Code, Title 13.40.050(B).

(An Obstructive Tree is) [a]ny tree or other vegetation which impedes vehicle . . . traffic or obstructs the vision of vehicle drivers or pedestrians of traffic control devices when traveling from one roadway to another. . . . If the obstruction is not located on the City Maintenance Responsibility List, the Public Works Department will notify the abutting property owner through the abatement process to have the obstruction removed.

Bellingham Municipal Code, Title 13.40.080.

Nothing in this chapter shall be deemed to impose any liability upon the city nor upon any of its officers or employees nor to relieve the owner or occupant of any private property from the duty to keep trees and other vegetation upon private property or property under his control in a safe condition.

Bellingham Municipal Code, Title 13.40.140.

H. Ayers.

When examined, Ayers lacked sufficient foundation to properly authenticate Exhibit 63. RP (03/20/07): 1426-1427. The

trial court properly excluded Exhibit 63. Exhibits 63A and 63B had the same defects. The trial court improperly admitted Exhibits 63A and 63B. Ayers apparently obtained the document off the internet, downloaded it and printed it out. *Id.* Ayers admitted he was unable to find a specific agreement, document or deed applicable to the crossing right of way. RP, *id.*, 1430-1435.

Ayers did not know when the spur track (the east track) was constructed. RP 1436. Ayers did not know the date of the document, the author of the document, or whether it applied to the existing tracks. RP 1436. Ayers never talked to any BNSF employees or agents. He never reviewed any document, except Exhibit 63, and he made no assumptions in rendering his opinion. RP 1450-1460. Exhibit 63 was not a business record of or document related to BNSF. RP 1455.

Ayers expressed a right of way opinion based on occupancy of an unknown track, at an uncertain location, by someone else other than BNSF. It was called an opinion of right of way by 1918 occupancy, incorrectly allowed to be expressed by an expert in present terms. Ayers admitted that he had received no

information, from anyone, regarding BNSF's occupancy of the right of way. RP 1459-1461.

Expert opinion testimony of present legal right-of-way rights or obligations, based solely on the alleged occupation of space found on an unauthenticated 1918 map of another railroad company is indeed novel. Whether it is of a type reasonably relied upon by experts in Ayers field, surveying, is preliminarily a legal issue. *State v. Cauthron, supra*, at 886-887. Use of information that is speculative or unestablished is not allowed. *Ruff v. Dep't of Labor & Indus.*, 107 Wn.App. 298, 304, 28 P.3d 1 (2001). Both *Cauthron* and *Ruff* applied the *Frye* test. Under *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) the trial court cannot allow an expert opinion unless the opinion has gained general acceptance in the expert's field. This determination is a legal decision to be made by the court.

Ayers reached his expert opinion by drawing inferences from a document not in evidence, and by assuming that the "occupation" by another railroad company in 1918 was of the same track and by assuming that the occupation was of the same right of way. Further, he apparently assumed that the occupation

remained the same for more than 80 years. However, the testimony, pictures, and actions of BNSF clearly conflicted with Ayers' assumptions. An expert opinion reached by "drawing inferences from facts not in evidence or by assuming facts actually conflicting with eyewitness testimony (is not admissible)." *Davidson v. Metropolitan Seattle*, 43 Wn.App. 569, 575, 719 P.2d 569 (1986).

In Washington, the existence and extent of a railroad right of way is a legal question. *Ray v. King County*, 120 Wn.App. 564, 587-88, 86 P.3d 183 (2004). "Experts may not offer opinions of law in the guise of expert testimony." *Tortes v. King County*, 119 Wn.App. 1, 12, 84 P.3d 252 (2003). "The opinion of an expert must pertain to the facts of the particular case." *Id.* Expert testimony giving improper legal conclusions are not admissible. *State v. Olmedo*, 112 Wn.App. 525, 532, 49 P.3d 960 (2002).

I. Basey's Criminal Past and Accidents.

A trial court's ruling on a motion in limine will be reversed where the trial court abused its discretion. *Garcia v. Providence Medical Center*, 60 Wn.App. 635, 806 P.2d 766 (Div. 1, 1991). "A trial court abuses its discretion when its ruling is manifestly

unreasonable or based on untenable grounds." *Id.*, at 641, *Citing, State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

When a trial court is able to determine the admissibility of the questioned testimony prior to its introduction at trial, it is appropriate to grant the motion in limine and thereby avoid prejudice before the jury. *State v. Kelly*, 102 Wn.2d 188, 192-193, 685 P.2d 564 (1984). The standards for granting a motion in limine are as follows:

[T]he trial court should grant such a motion if it describes the evidence which is sought to be excluded with sufficient specificity to enable the trial court to determine that it is clearly inadmissible under the issues as drawn which may develop during the trial and if the evidence is so prejudicial in its nature that the moving party should be spared the necessity of calling attention to it by objecting when it is offered during the trial.

Fenimore v. Drake Construction Co., 87 Wn.2d 85, 91, 549 P.2d 483 (1976).

The rule in Washington is that "unless the trial court indicates further objections are required when making its ruling, its decision is final and the party losing the motion in limine has a standing objection." *State v. Ramirez*, 46 Wash.App. 223, 229, 730 P.2d 98 (1986) (citing *State v. Kelly*, 102 Wash.2d 188, 685 P.2d 564 (1984)).

Garcia v. Providence Medical Center, 60 Wn.App. at 641.

Evidence of prior accidents or absence thereof was not admissible and served only to prejudice Veit. *Tyler v. Pierce County*, 188 Wash. 229, 62 P.2d 32 (1936). In *Tyler*, the plaintiff alleged the County was negligent because, among other reasons, "undergrowth should not have been permitted to obscure the 'Curve' sign." Evidence of prior accidents at the curve was "properly excluded" because admitting the evidence would simply introduce collateral issues and would not be relevant because the conditions would not be the same as they were for the accident at issue. The speed of the vehicles, the presence of a train, the care of the drivers, and the state of the undergrowth and vegetation would vary. *Tyler v. Pierce County*, 188 Wn. at 234.

Veit was clearly prejudiced the trial court's admission of testimony from several witnesses, in violation of its order in limine, and without a proper foundation.

ER 402 provides in part: "evidence which is not relevant is not admissible." Relevant evidence is defined by ER 401 as "facts of consequence to the determination of the action." ER 403 states

that "relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

In *Garcia v. Providence Medical Center*, 60 Wn.App. 635, 641-642, 806 P.2d 766, (1991), the trial court refused to exclude evidence of prior abortions on the mistaken belief it was relevant to Garcia's claim for emotional damages. In reversing, the court found that ER 403 requires the evidence be more probative than prejudicial. Citing *Kirk v. WSU*, 109 Wn.2d 448, 462, 746 P.2d 285 (1987), the court concluded that expert witnesses testimony that abortions were possibly a factor in the plaintiff's depression were not sufficiently relevant to outweigh the prejudicial nature of the evidence. *Kirk*, 109 Wn.2d at 462-463.

The *Garcia* court held that the "evidence adduced on this issue does not establish the relevance of Garcia's prior abortions to her present claims for emotional damages." *Id.* at 642.

BNSF made no attempt to demonstrate how Basey's criminal past was relevant. It was not. Even assuming some relevance,

BNSF made no attempt to demonstrate the value over the obvious prejudice. Finally, knowing it was not relevant, BNSF asked the question of a witness who lacked personal knowledge.

J. Post trial Motions.

In passing on a motion for a new trial, the trial court has wide discretion. *Karle v. Seder*, 35 Wn.2d 542, 214 P.2d 684 (1950). "A court abuses its discretion by denying a motion for a new trial where the verdict is contrary to the evidence." *Kadmiri v. Claasen*, 103 Wn.App. 146, 150, 10 P.3d 1076 (2000). A jury is bound by and required to accept unrebutted, uncontradicted evidence. *Krivanek v. Fibreboard Corp.*, 72 Wn.App. 632, 637, 865 P.2d 527 (1993).

K. Joint Duty to Design and Maintain the Crossing.

BNSF proposed and the jury received Instruction No. 11 regarding BNSF's claims against Bellingham. CP 155. In that instruction BNSF claimed that Bellingham was negligent in the design and maintenance of sight lines at the crossing. Veit moved for a directed verdict on liability and took exception to the court not giving its proposed instruction No. 36. CP 184; RP (03/21/07): 1615, 1695, 1710-1711. In Instruction No. 19 the trial court

properly instructed the jury that the MUTCD has the authority of law. CP 163. The MUTCD (1988) clearly stated that the duty to design the crossing was a joint responsibility between BNSF and Bellingham. MUTCD (1988), section 8A-1. See Appendix E. A directed verdict against BNSF was appropriate.

Clearly, before trial BNSF knew it had a duty to remove the excess vegetation from the hillside. When Bellingham moved for summary judgment, Rosenberg declared that the embankment to the south of the crossing was "located in the Burlington Northern right-of-way." CP 2122, 2124. Again, BNSF joined in Bellingham's motion and adopted Bellingham's evidence filed and arguments made "as its own." CP 2031. At trial, BNSF should have been judicially estopped from presenting evidence or argument to the contrary.

Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." Bartley-Williams v. Kendall, 134 Wash.App. 95, 98, 138 P.3d 1103 (2006). The doctrine seeks " 'to preserve respect for judicial proceedings,' " and " 'to avoid inconsistency, duplicity, and ... waste of time.' " Cunningham v. Reliable Concrete Pumping, Inc., 126 Wash.App. 222, 225, 108 P.3d 147 (2005) (alteration in original) (internal quotation marks omitted) (quoting Johnson v. Si-Cor, Inc., 107 Wash.App. 902, 906, 28 P.3d 832 (2001)). We review a

trial court's decision to apply the equitable doctrine of judicial estoppel for abuse of discretion. Bartley-Williams, 134 Wash.App. at 98, 138 P.3d 1103.

Three core factors guide a trial court's determination of whether to apply the judicial estoppel doctrine: (1) whether "a party's later position" is " 'clearly inconsistent' with its earlier position"; (2) whether "judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled' "; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." New Hampshire v. Maine, 532 U.S. 742, 750-51, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) (quoting Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir.1982)). These factors are not an "exhaustive formula" and "[a]dditional considerations" may guide a court's decision. Id. at 751, 121 S.Ct. 1808; see, e.g., Markley v. Markley, 31 Wash.2d 605, 614-15, 198 P.2d 486 (1948) (listing six factors that may likewise be relevant when applying judicial estoppel). Application of the doctrine may be inappropriate " 'when a party's prior position was based on inadvertence or mistake.' " New Hampshire, 532 U.S. at 753, 121 S.Ct. 1808 (quoting John S. Clark Co. v. Faggert & Frieden, P. C., 65 F.3d 26, 29 (4th Cir.1995)).

Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538-39, 160 P.3d 13 (2007).

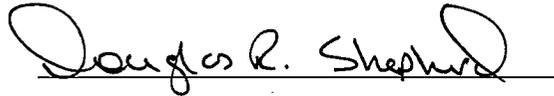
VI – CONCLUSION

For the reasons stated above, the Court should vacate the jury's verdict and remand the matter to the trial court for a new trial against BNSF on damages, with directions for the trial court to

entered a judgment of liability against BNSF, or the Court should vacate the jury verdict and remand the matter to the trial court granting Veit a new trial.

Respectfully submitted this 27th day of May 2008.

SHEPHERD ABBOTT CARTER

A handwritten signature in black ink that reads "Douglas R. Shepherd". The signature is written in a cursive style and is positioned above a horizontal line.

Douglas R. Shepherd, WSBA # 9514
1616 Cornwall Avenue, Suite 100
Bellingham, WA 98225
(360) 733-3773

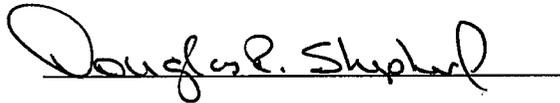
CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing BRIEF OF APPELLANT postage prepaid, via U.S. mail on the 27th day of May 2008, to the following counsel of record at the following address:

Counsel for Respondent:

Tom Montgomery, Esq.
Bradley Scarp, Esq.
Montgomery Scarp MacDougall, PLLC
Attorneys at Law
1218 Third Avenue, Suite 2700
Seattle, WA 98101

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 MAY 29 AM 10:37



Douglas R. Shepherd, WSBA # 9514

APPENDIX A

RCW 46.61.345

**All vehicles must stop at certain railroad
grade crossings.**

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.

APPENDIX B

49 C.F.R. § 213.9. Classes of track: operating speed limits.

(a) Except as provided in paragraph (b) of this section and §§ 213.57(b), 213.59(a), 213.113(a), and 213.137(b) and (c), the following maximum allowable operating speeds apply--

[In miles per hour]

Over track that meets all of the requirements prescribed in this part for--	The maximum allowable operating speed for freight trains is--	The maximum allowable operating speed for passenger trains is--
Excepted track	10	N/A
Class 1 track	10	15
Class 2 track	25	30
Class 3 track	40	60
Class 4 track	60	80
Class 5 track	80	90

(b) If a segment of track does not meet all of the requirements for its intended class, it is reclassified to the next lowest class of track for which it does meet all of the requirements of this part. However, if the segment of track does not at least meet the requirements for Class 1 track, operations may continue at Class 1 speeds for a period of not more than 30 days without bringing the track into compliance, under the authority of a person designated under § 213.7(a), who has at least one year of supervisory experience in railroad track maintenance, after that person determines that operations may safely continue and subject to any limiting conditions specified by such person.

APPENDIX C

49 U.S.C.A. § 20106

(a) National uniformity of regulation.--(1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.

(2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. 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;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

(b) Clarification regarding State law causes of action.--(1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party--

(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

(c) Jurisdiction.--Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

APPENDIX D

49 C.F.R. § 213.57 Curves; elevation and speed limitations.

(a) The maximum crosslevel on the outside rail of a curve may not be more than 8 inches on track Classes 1 and 2 and 7 inches on Classes 3 through 5. Except as provided in § 213.63, the outside rail of a curve may not be lower than the inside rail. (The first sentence of paragraph (a) is applicable September 21, 1999.)

(b)(1) The maximum allowable operating speed for each curve is determined by the following formula—

$$V_{\max} = \sqrt{\frac{E_a + 3}{0.0007D}}$$

Where--

V_{\max} = Maximum allowable operating speed (miles per hour).

E_a = Actual elevation of the outside rail (inches). [FN1]

[FN1] Actual elevation for each 155 foot track segment in the body of the curve is determined by averaging the elevation for 10 points through the segment at 15.5 foot spacing. If the curve length is less than 155 feet, average the points through the full length of the body of the curve.

D = Degree of curvature (degrees). [FN2]

[FN2] Degree of curvature is determined by averaging the degree of curvature over the same track segment as the elevation.

(2) Table 1 of Appendix A is a table of maximum allowable operating speed computed in accordance with this formula for various elevations and degrees of curvature.

(c)(1) For rolling stock meeting the requirements specified in paragraph (d) of this section, the maximum operating speed for each curve may be determined by the following formula—

$$V_{\max} = \sqrt{\frac{E_a + 4}{0.0007D}}$$

Where--

V_{\max} = Maximum allowable operating speed (miles per hour).

E_a = Actual elevation of the outside rail (inches). [FN1]

[FN1] Actual elevation for each 155 foot track segment in the body of the curve is determined by averaging the elevation for 10 points through the segment at 15.5 foot spacing. If the curve length is less than 155 feet, average the points through the full length of the body of the curve.

D = Degree of curvature (degrees). [FN2]

[FN2] Degree of curvature is determined by averaging the degree of curvature over the same track segment as the elevation.

(2) Table 2 of Appendix A is a table of maximum allowable operating speed computed in accordance with this formula for various elevations and degrees of curvature.

(d) Qualified equipment may be operated at curving speeds determined by the formula in paragraph (c) of this section, provided each specific class of equipment is approved for operation by the Federal Railroad Administration and the railroad demonstrates that:

(1) When positioned on a track with a uniform 4-inch superelevation, the roll angle between the floor of the equipment and the horizontal does not exceed 5.7 degrees; and

(2) When positioned on a track with a uniform 6 inch superelevation, no wheel of the equipment unloads to a value of 60 percent of its static value on perfectly level track, and the roll angle between the floor of the equipment and the horizontal does not exceed 8.6 degrees.

(3) The track owner shall notify the Federal Railroad Administrator no less than 30 calendar days prior to the proposed implementation of the higher curving speeds allowed under the formula in paragraph (c) of this section. The notification shall be in writing and shall contain, at a minimum, the following information--

(i) A complete description of the class of equipment involved, including schematic diagrams of the suspension systems and the location of the center of gravity above top of rail;

(ii) A complete description of the test procedure [FN3] and instrumentation used to qualify the equipment and the maximum values for wheel unloading and roll angles which were observed during testing;

[FN3] The test procedure may be conducted in a test facility whereby all the wheels on one side (right or left) of the equipment are alternately raised and lowered by 4 and 6 inches and the vertical wheel loads under each wheel are measured and a level is used to record the angle through which the floor of the equipment has been rotated.

(iii) Procedures or standards in effect which relate to the maintenance of the suspension system for the particular class of equipment; and

(iv) Identification of line segment on which the higher curving speeds are proposed to be implemented.

(e) A track owner, or an operator of a passenger or commuter service, who provides passenger or commuter service over trackage of more than one track owner with the same class of equipment may provide written notification to the Federal Railroad Administrator with the written consent of the other affected track owners.

(f) Equipment presently operating at curving speeds allowed under the formula in paragraph (c) of this section, by reason of conditional waivers granted by the Federal Railroad Administration, shall be considered to have successfully complied with the requirements of paragraph (d) of this section.

(g) A track owner or a railroad operating above Class 5 speeds, may request approval from the Federal Railroad Administrator to operate specified equipment at a level of cant deficiency greater than four inches in accordance with § 213.329(c) and (d) on curves in Class 1 through 5 track which are contiguous to the high speed track provided that--

(1) The track owner or railroad submits a test plan to the Federal Railroad Administrator for approval no less than thirty calendar days prior to any proposed implementation of the higher curving speeds. The test plan shall include an analysis and determination of carbody acceleration safety limits for each vehicle type which indicate wheel unloading of 60 percent in a steady state condition and 80 percent in a transient (point by point) condition. Accelerometers shall be laterally-oriented and floor-mounted near the end of a representative vehicle of each type;

(2) Upon FRA approval of a test plan, the track owner or railroad conducts incrementally increasing train speed test runs over the curves in the identified track segment(s) to demonstrate that wheel unloading is within the limits prescribed in paragraph (g)(1) of this section;

(3) Upon FRA approval of a cant deficiency level, the track owner or railroad inspects the curves in the identified track segment with a Track Geometry Measurement System (TGMS) qualified in accordance with § 213.333 (b) through (g) at an inspection frequency of at least twice annually with not less than 120 days interval between inspections; and

(4) The track owner or railroad operates an instrumented car having dynamic response characteristics that are

representative of other equipment assigned to service or a portable device that monitors on-board instrumentation on trains over the curves in the identified track segment at the revenue speed profile at a frequency of at least once every 90-day period with not less than 30 days interval between inspections. The instrumented car or the portable device shall monitor a laterally-oriented accelerometer placed near the end of the vehicle at the floor level. If the carbody lateral acceleration measurement exceeds the safety limits prescribed in paragraph (g)(1), the railroad shall operate trains at curving speeds in accordance with paragraph (b) or (c) of this section; and

(5) The track owner or railroad shall maintain a copy of the most recent exception printouts for the inspections required under paragraphs (g)(3) and (4) of this section.

[63 FR 45959, Aug. 28, 1998; 63 FR 54078, Oct. 8, 1998]

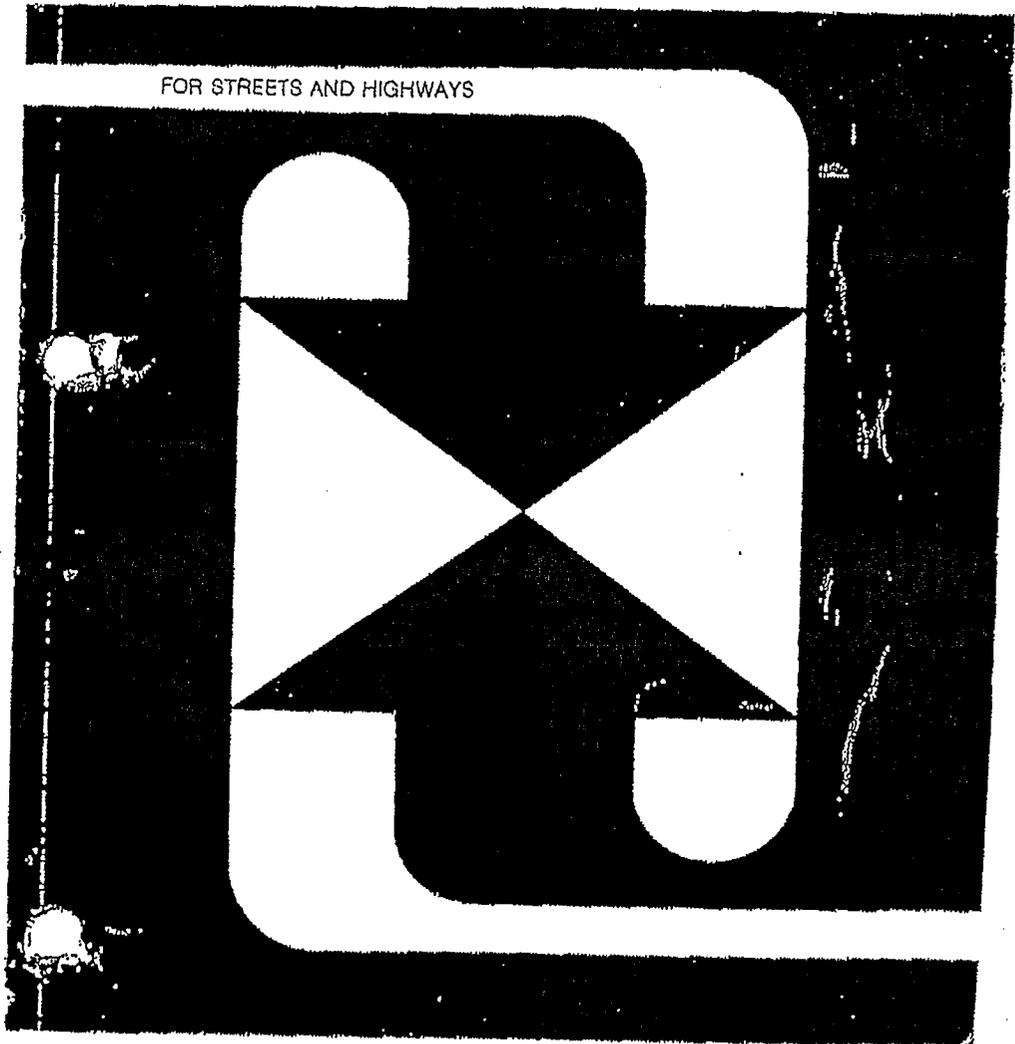
SOURCE: 63 FR 34029, June 22, 1998; 65 FR 52670, Aug. 30, 2000; 69 FR 30593, May 28, 2004, unless otherwise noted.

AUTHORITY: 49 U.S.C. 20102-20114 and 20142; 28 U.S.C. 2461, note; and 49 CFR 1.49(m).

APPENDIX E

MANUAL
ON
**UNIFORM
TRAFFIC
CONTROL
DEVICES**

1988 EDITION



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.

B. 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-16 (c)
Rev. 5

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. *

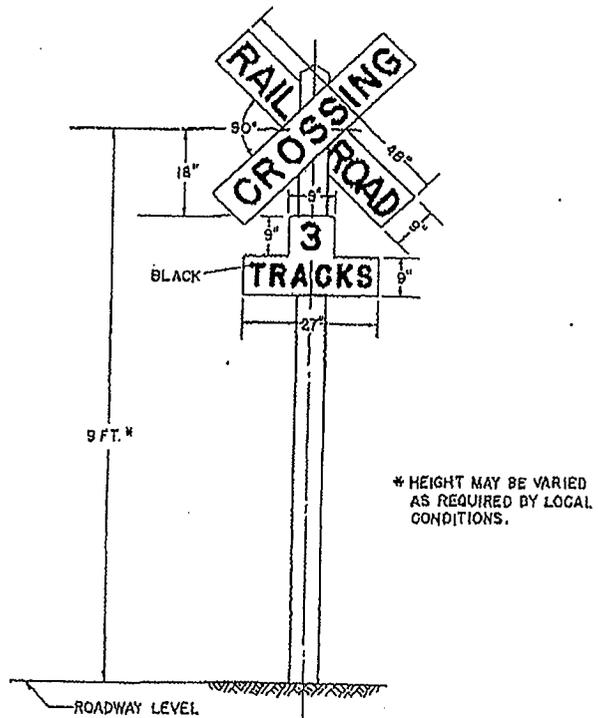
* Available from GPO



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.

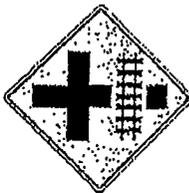
Placement of the sign shall be in accordance with Table II-1, Section 2C-3 and Sections 2A-21 to 2A-27, except in residential or business districts where low speeds are prevalent, the signs may be placed a minimum distance of 100 feet from the crossing. On divided highways and one-way roads, it is desirable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

VII-12 (c)
Rev. 5

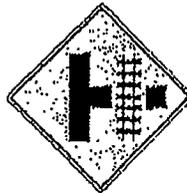
The W10-2, 3, and 4 signs may be installed on highways that are parallel to railroads. The purpose of these signs is to warn a motorist making a turn that a railroad crossing is ahead. Where there is 100 feet or more between the railroad and the parallel highway, a W10-1 sign should be installed in advance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



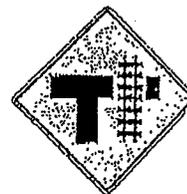
W10-1
36" Diameter



W10-2
30" x 30"

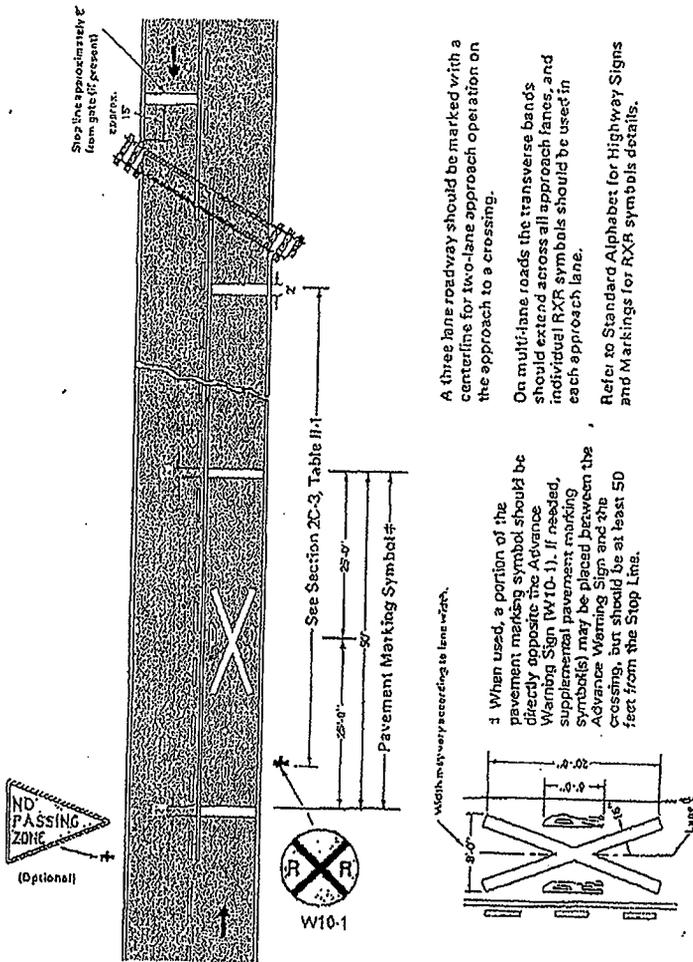


W10-3
30" x 30"



W10-4
30" x 30"

VII-2 (c)
Rev. 2



A three lane roadway should be marked with a centerline for two-lane approach operation on the approach to a crossing.

On multi-lane roads the transverse bands should extend across all approach lanes, and individual RXR symbols should be used in each approach lane.

Refer to Standard Alphabet for Highway Signs and Markings for RXR symbols details.

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 (a)
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.

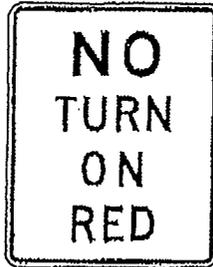
signs at the crossing, and supplemental sign (W10-1a) may be used below the railroad advance warning sign. These supplemental signs are to inform drivers of vehicles carrying passengers for hire, school buses carrying children, or vehicles carrying flammable or hazardous materials that a stop is not 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.



R16-3 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" x 24".



R10-11
24" x 30"



R8-8
24" x 30"

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

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

VII-11 (c)
Rev. 5

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-32(C) Stop or Yield Signs at Highway-Rail
Grade Crossings.

Delete Section 2B-9 (page 2B-7) in its entirety and
replace with the following:

2B-9 STOP or YIELD Signs at Grade Crossings (R1-1, W1-1, R1-2, W1-2)

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.
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.

VIII-6 (c)
Rev. 2

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
21" x 24"

8B-7

*Amendment
Final time effective 1/9/97*

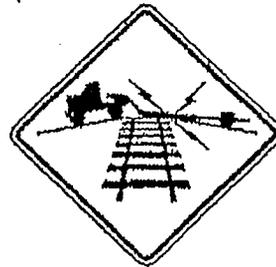
Request TT-120(C)--Standard Warning Signs for Substandard
Vertical Curves Over Railroad Crossings (W10-5)

Add the following new section:

SB-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 Officials' 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).

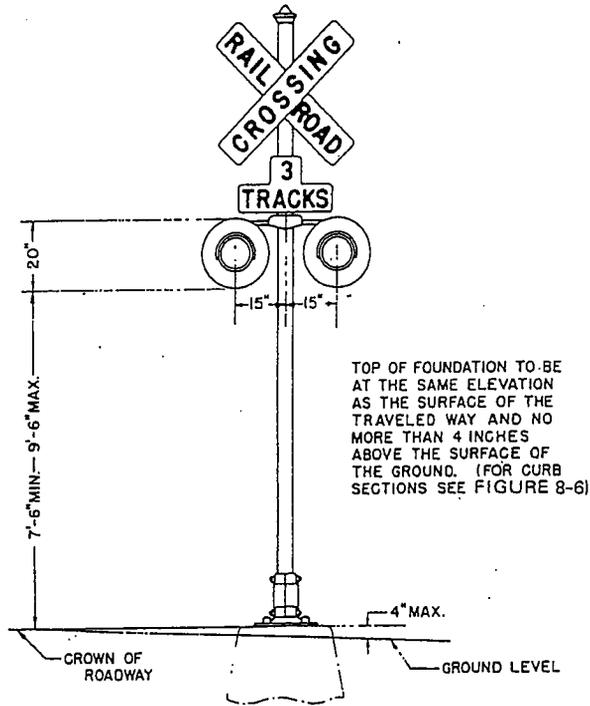


Figure 8-3. Typical flashing light signal—post mounted.

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

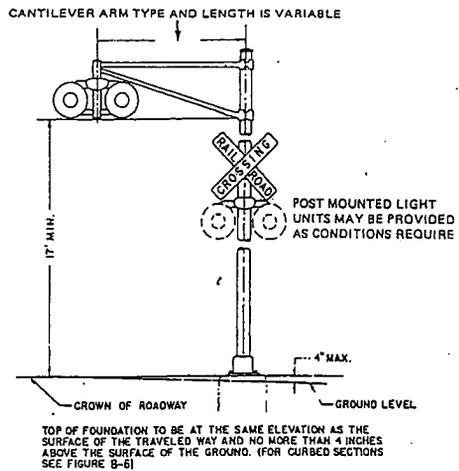


Figure 8-4. Typical flashing light signal—cantilever supported.

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

NOTE: Gate arm supports and operating mechanism not shown.

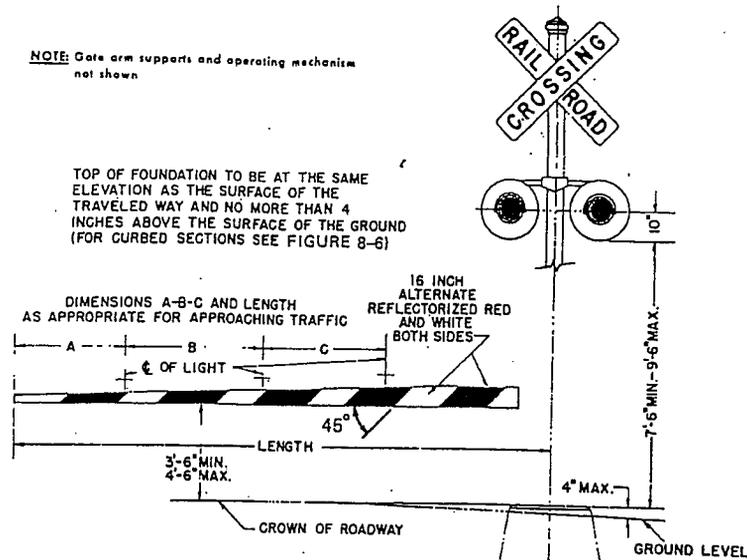


Figure 8-5. Schematic view of automatic gate.

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.

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 edge of the traveled roadway where there is no curb or shoulder, the minimum horizontal clearance shall be 6 feet from the edge of the roadway.

Where gates are located in the median, additional width may be required to provide the minimum clearance for the counterweight supports.

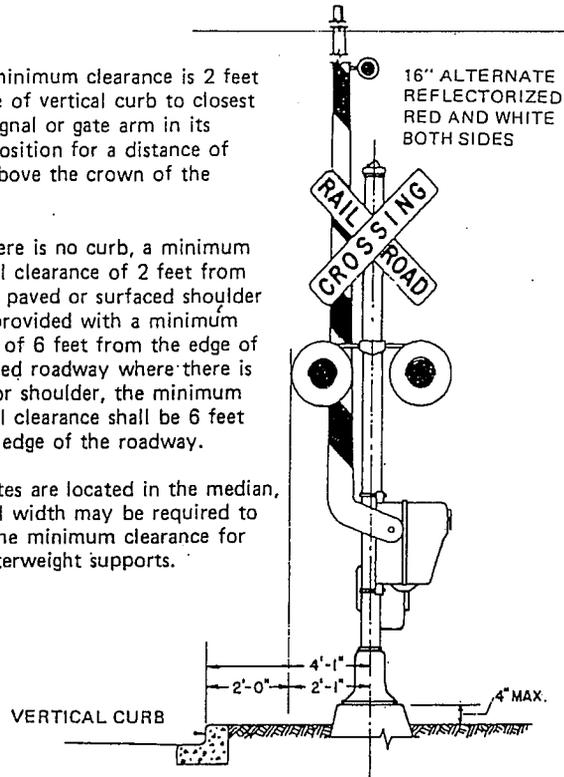


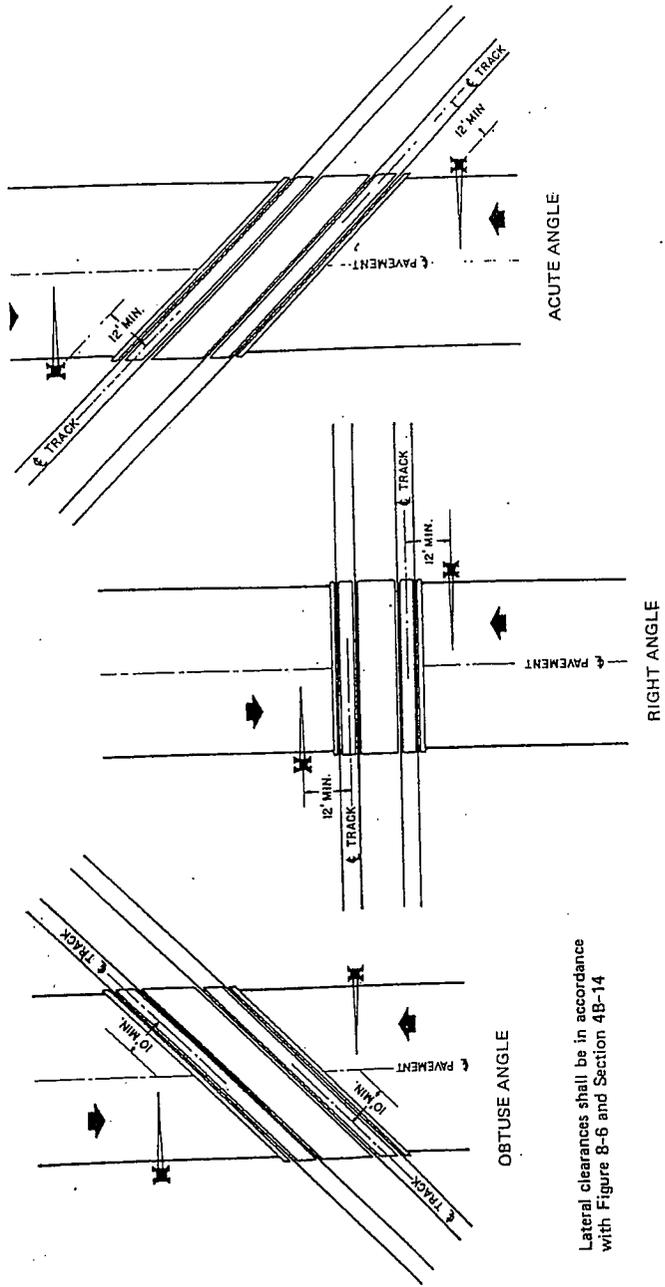
Figure 8-6. Typical clearances for flashing light signals and automatic gates.

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."



Lateral clearances shall be in accordance with Figure 8-6 and Section 4B-14

8C-6

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: