STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COUNTY OF LaSALLE, ILLINOIS, DEPARTMENT OF HIGHWAYS and CITY OF STREATOR, ILLINOIS, Petitioners,	)	ORIGINAL
v.	)	No. T04-0069
BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY and STATE OF ILLINOIS DEPARTMENT OF TRANSPORTATION, Respondents.	)	RECEIVED MAR 2 2005 Illinois Commerce Commission RAIL SAFETY SECTION
Petition for an order of the Illinois Commerce Commission authorizing the replacement of the structure where E. Broadway Street goes over the tracks of the Burlington Northern Santa Fe Railway Company and the SB Warehousing , Inc. in Streator, LaSalle County, Illinois apportioning costs thereof and directing an appropriate portion thereof to be borne by the Grade Crossing Protection Fund.	)	

RESPONDENT, THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY'S BRIEF ON ALLOCATION OF COSTS

Now comes respondent, The Burlington Northern and Santa Fe Railway Company ("BNSF"), by its attorneys, Kenneth J. Wysoglad & Associates and submits its brief on allocation of costs in support of BNSF's position that no costs or expenses relating to the proposed reconstruction or replacement of the East Broadway Street overpass structure can be assessed against BNSF as a matter of law.

FACTS

On September 30, 2004 petitioners, County of LaSalle, Illinois and City of Streator, Illinois filed their petition with the Illinois Commerce Commission seeking an order authorizing the replacement of the grade separation structure carrying East Broadway Street over the tracks of BNSF and S.B. Warehousing, Inc. in Streator, LaSalle County, Illinois. On January 26, 2005, public hearing on petitioners' petition was held before a duly

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authorized Administrative Law Judge at the offices of the Illinois Commerce Commission in Springfield, Illinois. At public hearing petitioners presented testimony and documentary evidence through petitioners' witnesses, Roger W. Wright, *petitioners' consulting engineer* and Lawrence Kinzer, County Engineer for LaSalle County, Illinois.

At public hearing it was established that petitioner City of Streator owns, maintains and has jurisdiction over the existing East Broadway Street overpass structure (T9, 17)

With respect to funding of the East Broadway Street overpass reconstruction project, petitioners' witness Lawrence Kinzer testified that petitioners applied for and were granted Federal-aid funds for use in paying for the project. (T 31, 32, 38, 39, 45) Specifically, petitioners have obtained Federal-aid Highway Funds[1] in the amount of $1,626,000 (referred to by petitioners as "Major Bridge" funds) and $988,000 in Federal Bridge Replacement and Rehabilitation Program funds.[2] (T31, 32, 38, 39, 45)

Moreover, at public hearing the Administrative Law Judge took administrative notice of petitioner, LaSalle County, Illinois' responses to BNSF's request for production of documents (T 65, 66; BNSF Exhibit 1). The documents produced by LaSalle County, Illinois in its responses to BNSF's production requests confirm that petitioners applied for and received Federal-aid Highway Funds in the form of $1,626,000 in Major Bridge Funds and $988,000 in Federal Bridge Replacement and Rehabilitation Program funds. Similarly, the Administrative Law Judge took administrative notice of LaSalle County, Illinois' responses to BNSF's first set of interrogatories (T 65,66; BNSF Exhibit 2). Again, in its answers to interrogatories, LaSalle County, Illinois specifically acknowledged that the City of Streator and LaSalle County, Illinois have applied for and received Federal-aid funding which will be utilized by petitioners to pay for a portion of the costs associated with

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1 *23 U.S.C. §101 et seq.*

2 23 U.S.C. .§144.

the removal of the existing East Broadway Street overpass structure and reconstruction of the replacement structure as described in petitioners' petition.

ARGUMENT

By statute, the State of Illinois has elected to accept Federal-aid funds and be bound by the provisions of the Federal-Aid Road Act, 23 U.S.C. §101 et seq. In making its election to accept Federal-aid funds, the Illinois legislature specifically stated:

> "The General Assembly, constituting the legislature of the State of Illinois, assents to the provisions, terms, conditions and purposes of the Federal-aid Road Act. . ."
>
> 605 ILCS 5/2-101

Federal-Aid Road Act funds specifically include Federal Highway Bridge Replacement and Rehabilitation Program funds, 23 U.S.C. §144, the type of funds applied for and received by petitioners for the at issue East Broadway Street grade separation reconstruction project.

Pursuant to authority delegated to the U.S. Secretary of Transportation, regulations have been promulgated with respect to the expenditure of Federal-aid funds by the States and their political subdivisions. Specific regulations have been promulgated with respect to railroad-highway projects which delineate the terms under which Federal-aid funds can be expended. See: 23 C.F.R. Part 646, Subpart B, specifically 23 C.F.R. § 646.200 (a) ("The purpose of this subpart is to prescribe policies and procedures for advancing Federal-aid projects involving railroad facilities."); 23 C.F.R. §646.200(b)("This subpart, and all references hereinafter made to projects applies to Federal-aid projects involving railroad facilities, including projects for the elimination of hazards of railroad - highway crossings . . . "); 23 C.F.R. §646.206 ("Projects for the elimination of hazards, to both

vehicles and pedestrians, of railroad highway crossings may include but are not limited to: (2) Reconstruction of existing grade separations. . . ")

With respect to railroad participation in the cost of any project in which Federal-aid funds are used, Federal regulations specifically provide:

> "State laws requiring railroads to share in the cost of work for the elimination of hazards at railroad highway crossings shall not apply to Federal-aid projects."
>
> 23 C.F.R. §646.210(a)

Moreover, with respect to reconstruction of existing grade separations, Federal regulations provide:

> "Projects for the reconstruction of existing grade separations are deemed to generally be of no ascertainable net benefit to the railroad and there shall be no required railroad share of the costs, unless the railroad has a specific contractual obligation with the State or its political subdivision to share in the costs."
>
> 23 C.F.R. 646.210(b)(2).

As fully demonstrated above, and as specifically admitted to by petitioners, petitions applied for and received Federal-aid funds for use in reconstructing the East Broadway Street grade separation structure. Under Federal law, use of Federal-aid funds is specifically conditioned on the requirements that State laws requiring railroads to share in the cost of the work shall not apply, and with respect to reconstruction of grade separation projects, railroads shall not be required to share in the cost of any such project. 23 C.F.R. §646.210(a) and §616.210(b)(2). The State of Illinois, by legislative mandate has agreed to abide by these conditions. 605 ILCS 5/3-101.

Based on the law and the facts of this case, the Illinois Commerce Commission is precluded from entering any order requiring respondent BNSF from bearing the cost of any

aspect of the East Broadway Street overpass reconstruction project as proposed by petitioners.

CONCLUSION

The facts and the law in this case are clear. Petitioners have applied for and received Federal-aid funds in the form of $1,626,000 in Federal Highway Bridge Replacement and Rehabilitation Program funds. Federal law mandates that BNSF shall not be assessed a portion of any cost associated with reconstruction of the East Broadway Street railroad-highway grade separation. The State of Illinois, acting through its legislature agreed to this federal mandate. As such, any order entered by the Illinois Commerce Commission in this cause cannot and must not include any provision or requirement that respondent BNSF bear any portion of the cost associated with the reconstruction of the East Broadway Street railroad-highway grade separation.

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PROOF OF SERVICE

Michael L. Sazdanoff, being first duly sworn on oath, deposes and says that on the 24 day of FEBRUARY, 2005, he caused to be served, a true and correct copy of **RESPONDENT, THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY'S BRIEF ON ALLOCATION OF COSTS** upon:

Mr. Lawrence J. Kinzer
LaSalle County Highway Department
P.O. Box 128
1400 North 27th Road
Ottawa, IL 61350

Mr. Ray Schmitt
Mayor, City of Streator
204 S. Bloomington Street
Streator, Illinois 61364-2903

Ms. Pamela K. Leonard
Clerk, City of Streator
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Mr. Victor A. Modeer, Director of Highways
ATTN: Mr. Jeff Harpring
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2300 S. Dirksen Parkway, Suite 205
Springfield, IL 62764

Mr. Henry Humphries
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527 E. Capitol Avenue
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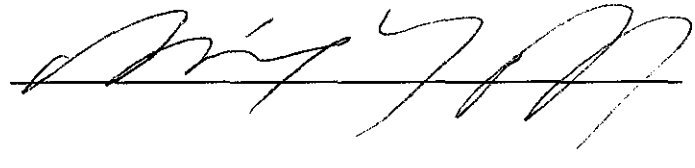
by depositing same in the U.S. Mail depository located at Adams and Clinton Streets, Chicago, Illinois in an envelope(s) with first-class postage, prepaid.