

ORIGINAL

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

VILLAGE OF FRANKLIN PARK, ILLINOIS,)
)
) Petitioner,)
) vs.)
) INDIANA HARBOR BELT RAILROAD COMPANY,)
) SOO LINE RAILROAD CO., WISCONSIN CENTRAL,)
) LTD., and STATE OF ILLINOIS DEPARTMENT OF)
) TRANSPORTATION,)
) Respondents,)
)
) GRAND AVENUE RAILROAD RELOCATION)
) AUTHORITY,)
) Intervenor.)
)
) PETITION FOR AN ORDER REGARDING A)
) OF GRADES AND OF A BRIDGE CARRYING THE)
) TRACKS OF THE INDIANA HARBOR BELT)
) RAILROAD COMPANY, SOO LINE RAILROAD)
) COMPANY, WISCONSIN CENTRAL, LTD., OVER AN)
) UNDERPASS AT GRAND AVENUE IN THE VILLAGE)
) OF FRANKLIN PARK, COOK COUNTY, ILLINOIS,)
) APPORTIONING THE COSTS THEREOF AND)
) DIRECTING AN APPROPRIATE PORTION THEREOF)
) TO BE BORNE BY THE GRADE CROSSING)
) PROTECTION FUND.)

No. T90-0022

PETITIONER'S BRIEF IN SUPPORT OF THE
PETITION TO MODIFY PREVIOUSLY ENTERED ORDERS

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ILLINOIS COMMERCE
COMMISSION

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Protection Fund. The Indiana Harbor Belt Railroad Company (“IHB”), Wisconsin Central, Ltd. (“WC”), Soo Line Railroad Company (“SOO”), and the Illinois Department of Transportation (“IDOT”) were named as parties respondent therein.

On June 21, 1990, the IHB and the WC filed a Joint Cross Petition requesting that the Chestnut Street grade crossing with the WC main track (DOT# 689 634C) be closed and barricaded. The Village's Petition envisioned that this crossing would remain open with two IHB tracks being placed immediately west of and adjacent to the WC main track.

On September 7, 1990, the IHB and the WC filed a Joint Cross Petition requesting that the Parklane Avenue grade crossing with the WC main track (DOT# 689 635J) be closed and barricaded. The Village's Petition envisioned that this crossing would remain open with two IHB tracks being placed immediately west of and adjacent to the WC main track.

On September 26, 1990, the Village filed an Amended Petition modifying its original petition which essentially updated its proposal.

Hearings were held before a Hearing Examiner of the Commission at its offices in Chicago on June 6, July 17, September 26, and December 4, 1990. At the conclusion of the hearing on December 4, 1990, the matter was marked “Heard and Taken.”

A proposed Order was submitted to the parties on February 22, 1991. Exceptions and replies to exceptions were received and noted. A second proposed Order was submitted to the parties on March 22, 1991. Exceptions and replies to exceptions were received and noted.

On April 17, 1991, the Commission entered its original order, which among other things, required and directed the Village to relocate the IHB tracks, to remove the tracks from the former IHB right of way, to construct an underpass structure to carry the tracks of the IHB and the WC over Grand Avenue and to close, abolish, and barricade, six at grade crossings in the Village.

The Commission further ordered that the cost of making the improvements, which was then estimated to be \$16,971,000, be divided among the IHB, the SOO, the WC, the Village, the IDOT and the Grade Crossing Protection Fund. The Grade Crossing Protection Fund was to pay

60% of the project cost, however not to exceed \$3,394,200 until further ordered by the Commission. It was the Commission's intent to issue further orders increasing the maximum amount payable from the Grade Crossing Protection Fund to \$10,182,600. The Commission also ordered that the Village, the IHB, the SOO and the WC complete the project by September 30, 1994. The Commission retained jurisdiction to enter further orders.

On February 11, 1992, the Commission entered a supplemental order increasing the total amount to be paid from the Grade Crossing Protection Fund to \$6,788,400.

On March 24, 1993, the Commission entered a second supplemental order increasing the total amount to be paid from the Grade Crossing Protection Fund to \$10,182,600.

The Illinois General Assembly passed Public Act 89-134, the Grand Avenue Railroad Relocation Act (the "Act") (735 ILCS 1915/1 *et. seq.*), effective July 14, 1995. The Act created the Grand Avenue Railroad Relocation Authority (the "Authority") and charged it with the objective of the relocation of the railroads from the right of way of Grand Avenue and the grade separation of the railroads from the right of way of Grand Avenue. The Act among other things authorized the Authority to acquire property, accept grants, loans and appropriations, to borrow money and issue bonds but prohibited the Authority from levying taxes. Section 110 of the Act provided that upon order of the Commission the Authority shall succeed and assume the performance and the actions previously ordered by the Commission relative to the Grand Avenue grade separation project.

On December 31, 1998, a Motion for a Hearing Examiner's Ruling Decreasing the Amount to be Paid from the Grade Crossing Protection Fund Until Further Order of the Illinois Commerce Commission was filed by the staff of the Transportation Division of the Commission. On January 19, 1999 the Authority filed a Petition to Intervene and a Response to the Motion for a Hearing Examiner's Ruling Decreasing the Amount to be Paid from the Grade Crossing Protection Fund Until Further Order of the Illinois Commerce Commission. The response detailed that the Authority lacked taxing power but had applied for a Congestion Mitigation and

Air Quality Improvement Program grant. The response advised that, at the time of the filing, the Authority was without sufficient funds to undertake the project based upon its then projected cost. On February 25, 1999, the Hearing Examiner granted the Authority's Petition to Intervene and the staff's motion. The ruling de-obligated the sum of \$8,806,485.78 thereby reducing the amount to be paid from the Grade Crossing Protection Fund to \$1,376,114.22 and restricting it to pay for preliminary engineering only.

On July 25, 2002, the Authority filed the instant Petition to Modify the Previously Entered Orders. The matter was assigned to a Hearing Examiner and evidence was presented at hearings before the examiner on November 20, 2002, December 11, 2002 and May 28, 2003.

PROJECT HISTORY

The Village has pursued this project's objectives since the 1950s. In 1991, following the original order in this case, the Village, its design engineer and the railroads determined there were significant environmental issues on one or more of the properties to be acquired. The preliminary environmental analyses and assessment between 1991 and 1995 determined this environmental issues might cost several million dollars in mitigation/removal costs under the environmental laws and regulations then in effect. These environmental remediation costs were not included in the original cost estimate because they were unknown at the time.

In 1995, the Illinois General Assembly created the Authority. Since the Authority was prohibited from levying taxes, the Authority worked from 1996 until 1999 on locating and applying for increased funding. In 1999 the Authority secured a Congestion Mitigation Air Quality (CMAQ) grant of \$11.5 million. This significant additional funding provided interim stability to the Authority's effort to fulfill its objectives.

The Authority, between 1999 and 2001, retained a value engineering consultant to review the existing plans for significant cost savings; revised the design engineer's contract and

authorized the completion of preliminary engineering; retained a program manager to attempt to ensure appropriate tasks were occurring and planned; and retained an appraiser, appraisal reviewer and negotiators and attorneys to conduct land acquisition. The Authority, following approval of its Plat of highways by the IDOT, commenced land acquisition activities. The Authority also caused the project to be defined in the IDOT's five year program. The Authority's design engineers have completed the engineering drawings and specifications. The project is scheduled for a bid letting in the fall of 2003 pending the Commission's order and the completion of land acquisition. (*Petitioner's Response to ICC Staff's Recommended Cost Distribution, Page 25-26*).

THE EVIDENCE

The IHB consists of two main tracks extending through the Village in a north-south direction from Norpaul Yard on the south terminating on a northwesterly alignment with a physical connection with the SOO (now Canadian Pacific) tracks on the north. The IHB main tracks cross at grade from south to north Grand Avenue (DOT#326 729H), Chestnut Street (DOT# 326 878J), and Franklin Street (DOT# 326 877C). An industrial spur track serving Jewel emanates from a main track in the vicinity of Norpaul Yard and extends southeasterly. (*Commission Order of April 17, 1999*). Daily rail traffic on the IHB main tracks through the Village consists of 27 to 30 freight trains (*Petitioner's Response to ICC Staff's Recommended Cost Distribution, Page 4 - Petitioner's Exhibit 23*) traveling at a maximum speed of 20 mph. (*Transcript of Proceedings, Page 116*). Simultaneous train movements over the aforesaid crossings are probable. The IHB conducts both day and night operations. (*Commission Order of April 17, 1999, Transcript of Proceedings, Page 115*).

The WC was acquired on October 9, 2001 by the Canadian National Railway and is now known as the Wisconsin Central Division of the Canadian National Railway. (*Transcript of*

Proceedings, Page 122). The WC consists of one main track extending in a general north-south direction through the Village, roughly parallel and approximately 800 feet east of the IHB tracks. The WC's main track crosses at grade from south to north Grand Avenue (DOT# 689 633V), Chestnut Street (DOT# 689 634C), and Parklane Avenue (DOT# 689 635J) before it also crosses at grade the METRA tracks (which generally parallel SOO's track) and continues northerly. The WC/METRA crossing is controlled by Tower B12. The WC owns a team track which is located on the west side of its main track between Chestnut Street and Parklane Avenue. An interchange track extends from the WC north of Parklane Avenue to the southwest and connects with the IHB at Chestnut Street. The interchange track crosses Commerce Street (DOT# 689 636R) and Parklane Avenue (DOT# 689 637X). The interchange track crosses Chestnut Street but is considered part of the Chestnut Street/IHB grade crossing (DOT# 326 878J). (*Commission Order of April 17, 1999*). Daily rail traffic on the WC main track through the Village consists of 16 to 20 freight trains (*Petitioner's Response to ICC Staff's Recommended Cost Distribution, Page 4 - Petitioner's Exhibit 23, Transcript of Proceedings, Page 125*) traveling at a maximum speed of 20 mph. The WC conducts both day and night operations. (*Commission Order of April 17, 1999, (Transcript of Proceedings, Page 125)*)

The SOO extends into the Village in a northwest to southeast direction from Bensenville Yard located northwest of the Village. The SOO and METRA operate adjacent facilities, with the SOO occupying the southern portion of the right-of-way, to a point approximately 70 feet westerly of the WC main track. At this point the SOO's ownership terminates and METRA owns the entire right-of-way easterly. (*Commission Order of April 17, 1999*)

Grand Avenue, Chestnut Street, and Parklane extend in a general east-west direction. Grand Avenue, with an average daily traffic count of 27,600, extends completely through the Village. Grand Avenue is located approximately 800 feet south of Chestnut Street. Chestnut Street has an average daily traffic count of approximately 3,000 and extends from Mannheim Road, located on the west side of the Village, easterly through the Village. Chestnut Street is

located approximately 400 feet south of Parklane Avenue. Parklane Avenue has an average daily traffic count of approximately 3,800 and extends from just east of the IHB easterly to Elm Street on the east edge of the Village. Parklane Avenue is located approximately 500 feet south of the Metra/SOO Line tracks. Commerce Street runs parallel to and approximately 125 feet west of the WC from Chestnut Street north to approximately 200 feet north of Parklane Avenue. At that point it turns to the northwest parallel to the METRA/SOO tracks and is known as Franklin Avenue. Franklin Avenue continues to the northwest and crosses the IHB main tracks. An offset of Commerce Street extends south of Chestnut Street but ends one block north of Grand Avenue. Birch Street extends northerly from Chestnut Street approximately 150 feet east of the WC main track and crosses Parklane Avenue before terminating at the METRA tracks. Birch Street also extends south from Chestnut Street but is offset 100 feet east and is only one block in length terminating at Cherry Avenue. Cherry Avenue extends to the east and does not cross any of the tracks in question. Edgington Street is a north-south roadway located two blocks west of the IHB and connects Grand Avenue, Chestnut Street and Franklin Avenue before crossing the METRA/SOO tracks. Grand Avenue, Chestnut Street, Franklin Avenue, and Edgington Street are designated truck routes in the project area. All roadways mentioned hereinabove are now or will be under the jurisdiction of the Village. (*Commission Order of April 17, 1999*).

The Village called three witnesses and submitted 29 exhibits at the original hearings. The evidence included testimony describing the surrounding area including roadways, railroads, grade crossing protection, and residential and commercial areas which would be affected by its proposed project.

The Village at the hearings on the original petition, presented evidence describing the nature of the traveling public utilizing Grand Avenue, Chestnut Street, and Parklane Avenue, including statewide and regional traffic. The accident history of the Grand Avenue and the Chestnut Street grade crossings of both the IHB and WC as well as the Parklane Avenue/WC and the Franklin Avenue/IHB grade crossings were presented in evidence. The Village witnesses

described railroad operations in the Village, including stopped and slow moving IHB trains merging onto the SOO tracks toward Bensenville Yard and WC trains slowed or stopped by the WC/Metra interlocking plant at Tower B12, which have caused numerous delays to vehicular traffic at the grade crossings of the IHB and WC, particularly at Grand Avenue because of the extremely heavy traffic volume (27,600 ADT). (*Commission Order of April 17, 1999*).

The Village also presented Exhibits and testimony describing the proposed project, including the grade separation structure, the railroad relocation, roadway construction and modifications, and right-of-way requirements. Testimony was provided describing the estimated cost and scheduling of the proposed project as well as its safety and economic benefits. The Village also presented testimony opposing the closure of Chestnut Street or Parklane Avenue grade crossings with the WC, citing economic hardship to the surrounding area and increased vehicular travel that would occur due to the proposed closures. (*Commission Order of April 17, 1999*).

At the hearings on the original petition, a witness for the IHB presented evidence and submitted an exhibit supporting the Cross Petitions to close the Chestnut Street and Parklane Avenue crossings. This evidence included testimony describing the accident histories of the crossings, benefits that could be accrued from the closure, including economic and safety, and alternative routes available. (*Commission Order of April 17, 1999*).

A witness for the WC provided testimony concerning the WC team track relocation necessary to accommodate the IHB track relocation and associated costs as well as the coordination of the project schedule with the WC. (*Commission Order of April 17, 1999*).

An IDOT witness presented evidence and submitted IDOT Exhibit #1. This evidence included testimony describing a letter of intent between IDOT and the Village whereby jurisdictional transfer from IDOT to the Village of Grand Avenue between Mannheim Road and the east Village limits, including the location of the proposed underpass structure, will occur. The letter from the Village was dated August 2, revised September 20, and was executed by IDOT on

September 27, 1990. (*Commission Order of April 17, 1999*).

The Authority called seven witnesses and submitted 19 exhibits at the hearings on the most recent petition. (*Transcript of Proceedings*). A witness for the IHB presented evidence concerning the operations of the IHB and the agreements of the IHB concerning the project. (*Transcript of Proceedings, Page 112-120*).

A witness for the WC presented evidence concerning the operations of the IHB and the agreements of the IHB concerning the project. (*Transcript of Proceedings, Page 121-127*).

The President of the Village presented evidence concerning the Village's need for the project, the Village's efforts to obtain funding for the project and the impact on the Village if funding from the Grade Crossing Protection Fund is not granted. (*Transcript of Proceedings, Page 128-128*).

A witness for the Authority presented evidence concerning the changes in the design of the project and the construction schedule since the April 17, 1999 Commission order. (*Transcript of Proceedings, Page 149-163*). Another witness for the Authority presented evidence concerning the estimated cost of the project, the increases in cost since the Commission's previous orders, the Authority's ongoing activities in furtherance of the project and the project's benefits. (*Transcript of Proceedings, Page 164-198*).

A witness for IDOT testified concerning the cash flow estimate for the project and IDOT's administration of the project. (*Transcript of Proceedings, Page 199-219*).

The Commission Staff's (the "Staff") entered into evidence a Recommended Cost Distribution. (*ICC Staff's Recommended Cost Distribution, Staff Exhibit 1*). The Authority reviewed that recommendation and entered into evidence Petitioner's Response to ICC Staff's Recommended Cost Distribution (*Petitioner's Response to ICC Staff's Recommended Cost Distribution - Petitioner's Exhibit 23*) and a Supplemental Response to ICC Staff's Recommended Cost Distribution (*Supplemental Response to ICC Staff's Recommended Cost Distribution - Petitioner's Exhibit 24*).

GRADE CROSSING PROTECTION FUND FUNDING OVERVIEW

In its Petition to Modify the Previously Entered Orders the Authority proposes a total distribution from the Grade Crossing Protection Fund of \$18,371,061. (*Authority's Petition filed July 25, 2002*). The Petition estimated the total cost of the project to be \$37,530,675. (*Authority's Petition filed July 25, 2002, Exhibit C*). John Mick, the Authority's Program Manager verified this estimated project cost. (*Transcript of Proceedings, Page 176*). The Authority also however has recognized that the estimated project costs have increased since the November 2002 hearing by approximately \$1,000,000 due to ongoing land acquisition. (*See Petitioner's Response to ICC Staff's Recommended Cost Distribution, Page 3 - Petitioner's Exhibit 23*) Additional funding from the Grade Crossing Protection Fund to a level of \$18,371,061 is needed to complete funding for the project's estimated cost. The IHB has agreed to increase its funding of the project by \$103,135 to bring the total IHB allocation to \$678,094. (*Transcript of Proceedings, Page 117*). The WC has agreed to increase its funding of the project by approximately \$131,000 to bring the total WC allocation to \$484,420. (*Transcript of Proceedings, Page 126*).

The original orders for this project allocated 60% of the estimated cost to be paid from the Grade Crossing Protection Fund. It has been past practice for staff to recommend the Commission authorize the Grade Crossing Protection Fund be used to pay up to 60% of the cost of eligible work items associated with highway/rail grade separation structures. The \$18,371,061 requested by the authority is less than 50% of the total project cost.

The Commission Staff's Recommended Cost Distribution provided that assistance from the Grade Crossing Protection Fund for this project is included in the Commission's Crossing Safety Improvement Program for fiscal year 2003-2007. \$8,806,485.78 of additional funding from the Grade Crossing Protection Fund has been programmed for this project. The amount remaining obligated after the Hearing Examiner's ruling was \$1,376,114.22. The Commission

Staff has indicated that as of September 1, 2002, \$73,943 of that amount remained unclaimed. The Commission Staff's Recommended Cost Distribution also provided that the Commission's fiscal year 2003- 2007 program included two (2) Grade Crossing Warning Device improvements in Franklin Park at an estimated cost of \$300,000. Improving safety at those two grade crossings is being addressed as part of the Grand Avenue Project and will not have to be undertaken separately. This additional funding would raise the Grade Crossing Protection Fund participation to \$10,482,600. (*Staff's Recommended Cost Distribution, Page 1 - ICC Staff Exhibit Number 1*).

The Authority has actively sought and in 1999 obtained additional funding including an \$11,500,000 (Federal) Congestion Mitigation Air Quality (CMAQ) Grant. The Authority has also obtained commitments for additional funding through negotiations with the WC and the IHB, the two principal railroads involved in the project as reflected in Exhibit C of the Authority's Petition. (*Authority's Petition filed July 25, 2002, Exhibit C*).

PROJECT SUMMARY

The Grand Avenue Grade Separation Project differs from typical grade separation projects in that it involves construction at eight grade crossings, the closing or elimination of seven of those at-grade crossings, four (4) of which are on mainline tracks, and the relocation of railroad tracks of two (2) separate mainline railroads to combine two separate grade separations into a single grade separation. It also includes one (1) active warning upgrade at a mainline grade crossing. The project is forecast to provide benefits of \$74 million overall, or about \$2 million per year.

- Grand Avenue at the IHB – 28,000 vehicles/day, 27 trains/day, at-grade crossing is eliminated due to IHB relocation to new grade separation at Grand Avenue and CN Railroad
- Grand Avenue at the CN (WC) – 28,000 vehicles/day, 16 trains/day, at-grade crossing

eliminated due to construction of grade separation and Grand Avenue. The proposed improvement will include the construction of a grade separation between existing Grand Avenue and the existing IHB and the WC. In order to eliminate the need for a two railroad underpasses, the IHB will be relocated onto a joint alignment immediately adjacent and parallel to the existing WC right of way to create a single point of crossing over Grand Avenue.

- Chestnut Avenue at the IHB – 3,000 vehicles/day, 27 trains/day, at-grade crossing is eliminated due to IHB relocation
- Commerce Street at the CN (WC) – 6,500 vehicles/day, 27 trains/day, at-grade crossing eliminated due to IHB relocation
- Franklin Avenue at the IHB – 6,500 vehicles/day, 27 trains/day, at-grade crossing eliminated due to IHB relocation
- Chestnut Avenue at the CN (WC) – 3,000 vehicles/day, 16 trains/day, at-grade crossing improved with current ICC criteria signaling, IDOT geometrics, MUTCD traffic control
- Parklane Avenue at the CN (WC) – 3,800 vehicles/day, 16 trains/day, at-grade crossing eliminated due to closure, local traffic re-routed to Chestnut Avenue
- Parklane Avenue at IHB/CN (WC) Connection – 500 vehicles/day, 27 trains/day, at-grade crossing eliminated due to IHB/CN (WC) connection relocation

Several other crossings near the project area: METRA/CN at Belmont Ave; IHB/METRA at 25th Avenue; and, IHB/METRA at Edgington Street will also benefit from the project – reducing delay, increasing safety and improving air quality because of modified railroad track locations and geometrics. (*Petitioner's Response to ICC Staff's Recommended Cost Distribution, Page 4-5 - Petitioner's Exhibit 23*).

ONGOING ACTIVITIES/IMPLEMENTATION

The Commission's order of April 17, 1991 in this case found that public safety, convenience and necessity required the project to be built. The Hearing Examiner's ruling of February 25, 1999 which de-obligated Grade Crossing Protection Funds for this project did not negate the requirement that the project be built. Therefore, the Village, the railroads and IDOT were required to continue their efforts to complete this project. Subsequently, the Authority by virtue of the passage of the Act was also under a legislative requirement to proceed with the project. All of the parties involved have diligently proceeded to do so. The Authority has undertaken considerable engineering, legal, and land acquisition activities and expenses in relation to the current at-grade crossings of the IHB and the WC, the SOO (now CP) at Grand Avenue for purposes of evaluation, design and impact of the proposed improvements. The analysis and evaluation is being undertaken in conjunction with the Illinois Department of Transportation, and numerous other parties/agencies.

The activities include:

1. the completion of design engineering and preparation of the construction documents (plans, specifications and cost estimate) by CTE Engineers under a contract with the Authority;
2. land acquisition of 76 properties involving 109 actions. To date, the Authority has acquired or approved purchases involving 33 parcels of real estate and 50 different actions (fee simple, temporary easement, permanent easement). The Authority has paid or approved payment to land owners of over \$3 million. In addition, the Authority, with the concurrence of the WC, the IHB, METRA and the Canadian Pacific Railroad (which is required by the Grand Avenue Railroad Relocation Act), has instituted sixteen actions to acquire that could not be acquired by negotiation property by eminent domain;

3. the design of the railroad signaling facilities, in coordination and cooperation with the IHB, CN, CP and METRA;
4. discussions with METRA concerning the design and possible funding of certain signal improvements;
5. the commencement by SBC Ameritech of the relocation of their facilities, as necessary, in coordination with the final plan(s) development. SBC and their contractors have incurred approximately \$2 million of their own costs on facility relocation involving construction from October 2002 thru March 2003.
6. inclusion of the project in IDOT's official five year project program;
7. the convening, in coordination with IDOT and the Illinois Roadbuilders Association, of a contractor awareness meeting in February, 2003 that generated additional contractor interest and allowed the construction industry to recognize this project's uniqueness, size and schedule.

(Petitioner's Response to ICC Staff's Recommended Cost Distribution, Page 5-8 - Petitioner's Exhibit 23).

PROJECT BENEFITS

The Commission in 1991 determined that public safety, convenience and necessity required that the project be undertaken. Michael Stead, Chief of the Commission's Rail Safety Section testified in 2003 that the benefits of the project are safety related. Specifically, the closure of seven rail highway grade crossings, the creation of an underpass that will provide direct access at all times for traffic in the area of the Village. *(Transcript of Proceedings, Page 290).*

The two Grand Avenue grade crossings that will be eliminated by the proposed improvements suffer approximately 250 hrs/day of motorist delay which represents almost 2% of the vehicle delay experienced in the entire Chicago region on a daily basis. The IHB grade crossing suffers 171 hrs of motorist delay per day. The CN (WC) grade crossing suffers 70 hrs of motorist delay per day. According to the Commission's Research and Analysis Section of the Transportation Division, the IHB Grand Avenue grade crossing is the fifth worst in vehicles delayed and the sixth worst in amount of delay in northeastern Illinois. (*Motorist Delay at Public Highway - Rail Grade Crossings in Northeastern Illinois, Illinois Commerce Commission, Research and Analysis Section, Transportation Division Working Paper 2002-03 July, 2002*).

The benefits of the project are estimated to be worth over \$74 million or about \$2 million per year (*Transcript of Proceedings, Page 181*):

- Eliminating the conflict between traffic on Grand Avenue and the railroads will relieve congestion, and, eliminate delays
- The grade separation of Grand Avenue and the two railroads' crossing(s) will eliminate motor vehicle/trains conflicts, and reduce overall accident rates, and the number of accidents.
- Five other grade crossings will be eliminated – eliminating accidents and improving air quality due to delay elimination.
- Emergency vehicles will have access to the existing area between the two railroads' tracks on Grand Avenue.
- A new street in the former IHB right-of-way will provide access to Grand Avenue for residents and industries in the project area.
- Railroad freight operations of the CN, Canadian Pacific, IHB and four other railroads, will be improved due to better track alignment, reduced conflicts and improved signaling.
- METRA operations, on the North Central service and the West Line service, will

be improved due to reduced conflicts and improved switching.

- The enhanced rail service will be an economic enhancement for rail users at both ends of the rail trip. The ongoing congestion of rail/street traffic in Chicago will be reduced measurably by these improvements.

(Petitioner's Response to ICC Staff's Recommended Cost Distribution, Page 35 - Petitioner's Exhibit 23)

The specific benefits to public safety include:

- Less delay to emergency service providers who are attempting to serve an incident on the "other side of the tracks."
- Less delay to motorists, non-motorized vehicles and pedestrians, at project and near project grade crossings including: CN, METRA at Belmont; IHB, METRA at 25th and IHB, METRA at Edginton.
- Less incidents of motorists attempting to "run the crossing" because of "gate-down" history; over time, there will be less of this unsafe behavior.
- Air quality will be improved in the vicinity of the remaining at-grade crossing and near - project grade crossings.
- Less chance for vandalism and "train hopping" since trains operating at 30 mph are much harder to hop on or be an attractive nuisance.
- Less delay to METRA's operations on the West line and North Central line via the B-12 Interlocking.

(Petitioner's Response to ICC Staff's Recommended Cost Distribution, Page 19 - Petitioner's Exhibit 23).

DELEGATION OF POWERS TO THE DIRECTOR OF THE REVIEW AND EXAMINATION PROGRAM PURSUANT TO SECTION 625 ILCS 5/18C-1203 OF THE ILLINOIS COMMERCIAL TRANSPORTATION LAW

On February 18, 1999 the Commission passed a resolution pursuant to Section 625 ILCS 5/18c-1203 of the Illinois Commercial Transportation Law delegating to the Director of the Review and Examination Program the power to de-obligate amounts set aside in the Grade Crossing Protection Fund in two specified circumstances, when a project has been completed or when authorization has expired for the completion of the project. When a project under Commission order has been completed or when the specific terms of the order condition it upon the satisfaction of a the condition, de-obligating amounts set aside in the Grade Crossing Protection Fund by the at the Director of the Review and Examination Program does not present a problem. For example, if permission was granted for a new at grade crossing on the condition that a set number of houses were to be built in a subdivision. If the requisite number of houses are never built the condition set forth in the order is not satisfied and the order would by its own terms would be null and void.

However, when a Commission order makes a finding that public convenience, necessity and safety requires the construction of an underpass structure, divides the cost of the improvements and establishes a time for the project to be completed, as it did in the order entered April 17, 1991 in this case, the failure to complete the project within that time does not constitute "authorization expiring for completion of the project". Rather, it merely puts the party required to perform the work in violation of the order and makes them subject to enforcement action by the Commission. As an example, where a railroad is required to install automatic warning devices at a crossing within one year from the order date, and if it is not completed within one year and one day or even years later the Commission would certainly not determine that "authorization has expired for completion of the project", and the project was null and void. The Commission would likely enforce the order or if the Commission wanted to nullify such an order, it would enter an order nullifying the original order.

Since the Grade Crossing Protection Funds for this project were de-obligated by the Hearing Examiner's ruling, presumably pursuant to this resolution, the Hearing Examiner must have concluded that authorization for the project had expired. Surely the Commission by its April 17, 1991 order did not intend for the authorization to expire if the project was not completed on time.

The passage of the Grand Avenue Railroad Relocation Authority Act by the Illinois General Assembly effective July 14, 1995 which specifically referenced the Commission's orders in this case and provided that the Authority would succeed and assume the performance and actions of the Village is further evidence the fact that the legislature contemplated that authorization for completion of the project had not expired.

The Hearing Examiner's ruling did not negate any other portions of the order, specifically that public safety, convenience and necessity required the project be built, that the Village, the railroads and the IDOT were required to proceed and participate in the cost of the project. The Hearing Examiner's ruling coupled with the lack of taxing power in the Act saddled the Authority and the other parties to this proceeding in an untenable position.

GRADE CROSSING PROTECTION SPENDING OUTLOOK - MARCH 31, 2003

The Commission staff called Michael Stead, Chief of the Commission's Rail Safety Section as a witness. (*Transcript of Proceedings, Page 259-291*). Mr. Stead testified concerning the five year plan for the Grade Crossing Protection Fund. Grade Crossing Protection Spending Outlook - March 31, 2003 (*ICC Staff Exhibit Number 2*). Mr. Stead initially testified concerning the Grade Crossing Protection Fund balance at the end of the five year plan. He testified that the projected fund balance at that time would be approximately \$1,500,000, excluding the additional funding requested by the Authority in the present Petition. He also testified hypothetically that, if the Authority's request for additional funding was granted and no changes were made to the

current five-year plan the fund balance at the end of the five years would show a deficit of \$6,500,000. (*Transcript of Proceedings, Page 261-262*). Mr. Stead admitted however that included in the five year plan was approximately \$148,000,000 of projects for which petitions before the Commission had not yet been filed but were merely anticipated. Mr. Stead further admitted that if one or more of the anticipated projects included in the five year plan totaling \$8,000,000 either were not filed with the Commission or were filed but were not built, there would be sufficient funds in the Grade Crossing Protection Fund to fund the Authority's request. (*Transcript of Proceedings, Page 268*). Mr. Stead also admitted that if projects do not get built as anticipated that adjustments to the five-year plan are made. He further testified that if the Commission were to order that the Authority's request be granted that adjustments to the five-year plan would be made to accommodate the project. (*Transcript of Proceedings, Page 284-286*).

The Grade Crossing Protection Spending Outlook - March 31, 2003 (*ICC Staff Exhibit Number 2*) also includes future spending of \$48,704,124 that can not be reasonably estimated for projects anticipated to be filed in fiscal years 2004 through 2007. The issue in this case is not where to find the funds to pay for this project, those funds reside in the Grade Crossing Protection Fund's five year plan. The issue is rather whether priority should be accorded to this project for which a petition has been filed and engineering completed over projects that have not yet been filed and for which engineering has not even begun.

THE \$12,000,000 CAP

The Staff in its Staff's Recommended Cost Distribution cites a policy purportedly enacted in September 2000 that limits Grade Crossing Protection Fund participation on any grade separation project to \$12,000,000 (*Staff's Recommended Cost Distribution - ICC Staff Exhibit Number 1*). The Staff's Recommended Cost Distribution inaccurately describes this "policy."

The “policy” arises from a meeting of the Commission’s Transportation Policy Committee.

According to the minutes of the Commission’s Transportation Policy Committee, on September 20, 2000, the committee met and discussed a staff concern that extremely expensive bridge projects could absorb a disproportionate share of the Grade Crossing Protection Fund. The Commission’s Transportation Policy Committee directed staff to impose a \$12,000,000 cap on all **new** bridge projects (emphasis added). The Commission’s Transportation Policy Committee further directed the staff that for projects costing more than \$12,000,000, staff was to bring the applications for those projects, along with background material, to the Commission’s attention and that the Commission would then consider and make a decision on whether the project merited more than \$12,000,000 from the Grade Crossing Protection Fund. Therefore, the “\$12,000,000” cap is not a limitation on the amount of funding available from the Grade Crossing Protection Fund, but rather a benchmark set to determine the level of decision making by which funds from the Grade Crossing Protection Fund are obligated.

Since the Grand Avenue Grade Separation Project was ordered by the Commission on April 17, 1999, it is not a “new” project occurring after September 20, 2000. Therefore, the \$12,000,000 cap should not be imposed in this case. Michael Stead, Chief of the Commission’s Rail Safety Section, the Commission staff’s witness admitted that the Transportation Policy Committee’s direction to staff to impose a \$12,000,000 cap applied only to new bridge projects and that the order for this project is not a new order. (*Transcript of Proceedings, Page 264*). Mr. Stead further admitted that the staff and the Commission contemplated projects coming before them that would exceed \$12,000,000 in Grade Crossing Protection Fund participation and made provision for those projects to be brought before the full Commission. (*Transcript of Proceedings, Page 265*). Therefore even if the \$12,000,00 would have applied to the Authority’s request, it would only require that the Commission rather than the staff determine the total commitment of the Grade Crossing Protection Fund.

This methodology is evidenced by the Commission's recent order of December 4, 2002 in *In the Matter of: City of Granite City, Petitioner v. The Department of Transportation of the State of Illinois, et. al. Docket No. T02-0067*. In *Granite City* the Commission entered an Interim Order requiring the Grade Crossing Protection Fund to fund not more than 70% of its estimated project costs not to exceed \$17,500,000.

Further, the direction to the Staff from the Transportation Policy Committee to impose a \$12,000,000 cap on new bridge projects may not be lawfully imposed against the Authority until the "policy" has been formally proposed, published, adopted and filed as a rule in compliance with the Illinois Administrative Procedure Act. *Senn Park Nursing Center v. Miller, 104 Ill. 2d 169, 470 N.E. 2d 1029, 83 Ill. Dec. 609 (1984)*. Where rules are not adopted consistent with the statutory procedures, the rules are not valid. *Sleeth v. Illinois Department of Public Aid, 125 Ill. App 3d 847, 466 N.E. 2d 703, 81 Ill. Dec. 117 (1984)*.

Section 1-70 of the Illinois Administrative Procedure Act defines a rule as follows:

"Rule" means each agency statement of general applicability that implements, applies, interprets or prescribes law or policy, but does not include (i) statements concerning only the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency, (ii) informal advisory rulings issued under Section 5-150, (iii) intra-agency memoranda, (iv) the prescription fo standardized forms, or (v) documents prepared or filed or actions taken by the Legislative Reference Bureau under Section 5.04 of the Legislative Reference Bureau act. (5 ILCS 100/1-70).

Section 5-5 of the Illinois Administrative Procedure Act provides:

Applicability. All rules of agencies shall be adopted in accordance with this Article. (5 ILCS 100/5-5)

Illinois Administrative Procedure Act sets forth the notice, public hearing and public comment, publication and filing requirements applicable to the adoption of rules. The act requires, among other things, the filing of a certified copy of the rule with the Secretary of State who is required to keep an open register of the rules open to public inspection.

Section 5-10(c) of the Illinois Administrative Procedure Act provides:

(c) No agency rule is valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been made available for public inspection and filed with the Secretary of State as required by this Act. No agency, however, shall assert the invalidity of a rule that it has adopted under this Act when an opposing party has relied upon the rule. (5 ILCS 100/5-10(c)).

The discussion that took place at the Commission's Transportation Policy Committee meeting of September 20, 1999 failed to meet the requirements of the Illinois Administrative Procedure Act applicable to rulemaking. Therefore, the "policy" cited by the staff is invalid.

The total of \$18,371,061 in Grade Crossing Protection Funds requested for this project amounts to approximately 50% of the current estimated project cost. This amount is even less than the 60% directed in the original order in this case. The Staff's Recommended Cost Distribution of \$10,482,600 from the Grade Crossing Protection Fund amounts to less than 30% of the estimated project cost set forth in the Authority's Petition and testified to by the Authority's witnesses.

While the project has taken considerable time, that amount of time is comparable to a Springfield grade separation project (Stanford Avenue) which was ordered in 1991 and was only completed in 2001. The Springfield Project did not have nearly the number of complicating factors, particularly environmental, as this project.

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Review of all Commission orders utilizing Grade Crossing Protection Funds funding, between January 1, 2001, through March 1, 2003, particularly supplemental orders dealing with requests for additional Grade Crossing Protection Funds funds because of increased project costs, reveal that all were recommended for approval in full by staff. In some instances, staff acknowledged it had requested supported changes which caused costs to increase) except for three grade separation projects. These recommendations were adopted by the Commission in its supplemental orders. Full increased Grade Crossing Protection Fund participation was granted for projects as diverse as Automated Train Horns, Remote Monitoring of Warning Devices, and Four-Quadrant Gates. However, no grade separation project requests for additional Grade Crossing Protection Fund funding were granted in full. A reason given in two of the grade separation cases by staff was “this is all the fund money that is available”. By law, the Commission itself ultimately must make the determination as to which projects get funded with Grade Crossing Protection Funds. It can prioritize and delay planned projects until the next fiscal year to make funds available for any project it feels is worthy. If funds for the current fiscal year are, in fact, all obligated, the Commission could specify that funds be paid from the appropriations in future fiscal years.

REQUEST FOR ORAL ARGUMENT

The Authority pursuant to Section 200.850 of the Illinois Commerce Commission’s Rules of Practice (*83 Ill. Adm. Code, Sect. 200.850*) requests oral argument before the Commission. The Petitioner’s request is due to the unique nature of this project, the legislature’s creation of the Grand Avenue Railroad Relocation Authority with the objective to construct this project and due to the Petitioner requesting \$18,371,061 in participation from the Grade Crossing Protection Fund. Whether or not the Transportation Policy Committee’s direction of September 20, 2000 to bring the applications for projects costing more than \$12,000,000 to the Commission for decision

making applies to this case, this request is a substantial amount of the total appropriation to the Grade Crossing Protection Fund and should merit a oral argument before the Commission.

REQUEST FOR AN INTERIM ORDER

Provided that the land acquisition process has been completed and pending the Commission's order, the Authority, through the Illinois Department of Transportation, is tentatively planning for a letting of the construction contract for this project in the fall of 2003. To avoid additional costs associated with delay of the project and to permit the project to be let for construction at the earliest available date, the Authority requests that the Commission enter an interim order consistent with the Commission's staff recommendation to increase funding from the Grade Crossing Protection Fund to \$10,482,600 which is available after July 1, 2003. The Authority proposes that the Commission thereafter consider the Authority's request for additional funding up to a maximum contribution for the Grade Crossing Protection Fund of \$18,371,061.

CONCLUSION

For the reasons set forth herein, the evidence presented to the Hearing Examiner and the reasons cited in the Commission's original order, the Authority requests that the Commission modify the orders heretofore entered in this matter on April 17, 1991, February 11, 1992 and March 23, 1993 and the hearing examiner's ruling of February 25, 1999, to provide for the following:

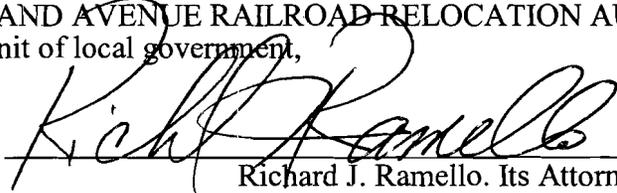
- A. the Authority's succession to and assumption of performance and of the actions of the represented persons under the Commission's prior orders;
- B. the design modifications which have been proposed by the Authority's consultants;

T90-0022

- C. the modification of the project schedule to reflect current time projections;
- D. the modification of the project cost estimate and the cost allocation to reflect current projected costs;
- E. the re-obligating the contribution to the project costs from the Grade Crossing Protection Fund which were previously obligated to the Project and subsequently de-obligated of \$8,806,485.78;
- F. the obligation of additional funds from the Grade Crossing Protection Fund for contribution to the project costs of \$8,188,461 to a total of \$18,371,061;
- G. such other and further relief as the Commission deems appropriate. 4.

GRAND AVENUE RAILROAD RELOCATION AUTHORITY,
a unit of local government,

By: _____



Richard J. Ramello. Its Attorney

Richard J. Ramello
STORINO, RAMELLO & DURKIN
Attorneys for Petitioners
9501 West Devon Avenue, Suite 800
Rosemont, Illinois 60018
(847) 318-9500

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

VILLAGE OF FRANKLIN PARK, ILLINOIS,)
Petitioner,)

vs.)

INDIANA HARBOR BELT RAILROAD COMPANY,)
SOO LINE RAILROAD CO., WISCONSIN CENTRAL,)
LTD., and STATE OF ILLINOIS DEPARTMENT OF)
TRANSPORTATION,)

Respondents,)

GRAND AVENUE RAILROAD RELOCATION)
AUTHORITY,)

Intervenor.)

PETITION FOR AN ORDER REGARDING A)
SEPARATION OF GRADES AND OF A BRIDGE)
CARRYING THE TRACKS OF THE INDIANA)
HARBOR BELT RAILROAD COMPANY, SOO LINE)
RAILROAD COMPANY, WISCONSIN CENTRAL,)
LTD., OVER AN UNDERPASS AT GRAND AVENUE)
IN THE VILLAGE OF FRANKLIN PARK, COOK)
COUNTY, ILLINOIS, APPORTIONING THE COSTS)
THEREOF AND DIRECTING AN APPROPRIATE)
PORTION THEREOF TO BE BORNE BY THE GRADE)
CROSSING PROTECTION FUND.)

No. T90-0022

NOTICE OF FILING

To: Mr. Michael Barron, General Counsel
Wisconsin Central Division, Canadian National Railroad
455 North Cityfront Plaza Drive
Chicago, IL 60611-5504

Mr. Paul LaDue
Canadian National Railroad
17641 South Ashland Avenue
Homewood, IL 60430

Mr. David N. Nelson, Superintendent
Indiana Harbor Belt, R.R.C.
2721 161st Street
Hammond, IN 46323-1099

TRANSPORTATION DIV

2003 JUN 18 P 1:31

ILLINOIS COMMERCE COMMISSION

Mr. Roger A. Serpe, General Counsel
Indiana Harbor Belt Railroad Company
150 North Wacker Drive
Suite 1500
Chicago, IL 60606

T90-0022

Ms. Nancy L. Magnus, P.E.
Illinois Department of Transportation
201 W. Center Court
Schaumburg, IL. 60196

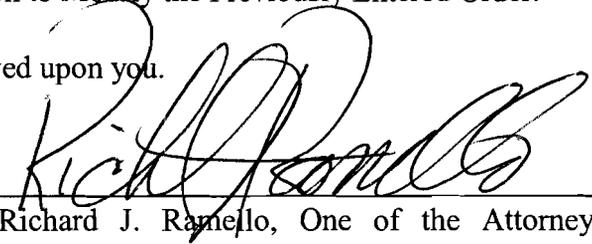
Mr. Victor Modeer, Director of Division of Highways
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Springfield, IL 62764

Ms. Diana G. Collins, Chief Trial Counsel
Illinois Commerce Commission
160 North LaSalle Street
Suite C-800
Chicago, IL 60601

Mr. Joseph O'Brien
Hearing Examiner
Illinois Commerce Commission
527 East Capitol
Springfield, IL 62794

PLEASE TAKE NOTICE that on June 18, 2003, I filed on behalf of Grand Avenue Railroad Relocation Authority and the Village of Franklin Park in the office of the Chief Clerk of the Illinois Commerce Commission, Leland Building, 527 East Capital Avenue, Springfield, Illinois, the Petitioner's Brief in Support of the Petition to Modify the Previously Entered Order.

Copies are attached and herewith served upon you.


Richard J. Ramello, One of the Attorneys for
Petitioners, the Grand Avenue Railroad Relocation
Authority and the Village of Franklin Park.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

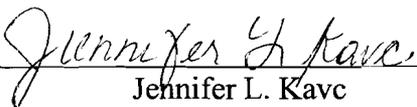
T90-0022

CERTIFICATE OF SERVICE

The undersigned certifies that she served the foregoing document by mailing a true and accurate copy of same to:

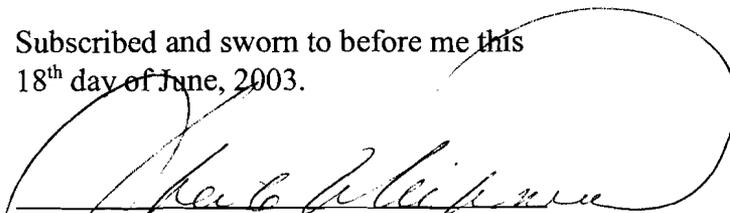
See attached Service List

and depositing same, proper postage prepaid, in the U.S. mail located at 9501 W. Devon Avenue, Rosemont, Illinois, at or before 4:00 p.m. on the 18th day of June, 2003.



Jennifer L. Kavc

Subscribed and sworn to before me this
18th day of June, 2003.



Notary Public



Richard J. Ramello
STORINO, RAMELLO & DURKIN
9501 West Devon Avenue, Suite 800
Rosemont, Illinois 60018
(847)318-9500

Service List

T90-0022

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