

**ORIGINAL**

BEFORE THE  
ILLINOIS COMMERCE COMMISSION  
STATE OF ILLINOIS

In The Matter Of :  
:  
VILLAGE OF FRANKLIN PARK, ILLINOIS, :  
GRAND AVENUE RAILROAD RELOCATION :  
AUTHORITY, :  
Petitioner, :  
vs. :  
INDIANA HARBOR BELT RAILROAD :  
COMPANY, et al., :  
Respondents :

**RECEIVED**  
JUL 10 2003

Illinois Commerce Commission  
RAIL SAFETY SECTION

DOCKET #: T90-0022

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

The Staff of the Illinois Commerce Commission ("Staff") in response to  
Petitioner's Brief in Support of the Petition to Modify Previously Entered Orders  
states as follows:

**HISTORY**

On April 17, 1991, the Commission entered its original Order in this case,  
which, among other things, required the construction of a new underpass  
structure to carry the tracks of the Indiana Harbor Belt Railroad Company ("IHB")  
and the Wisconsin Central, Ltd. ("WC") over Grand Avenue, the relocation of IHB  
tracks with the removal of said tracks from six (6) crossings, and the closure of  
the Parklane Avenue and Chestnut Street grade crossings, all in the Village of  
Franklin Park ("Village"), Cook County, Illinois (the entire project will hereinafter  
be referred to as the "Project"). The Order further required that the Project be  
completed by September 30, 1994 and divided the cost among the parties and

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the Grade Crossing Protection Fund ("GCPF"). The Village and railroads were also ordered to submit Project progress reports on a regular six-month basis.

The estimated total cost of the Project at that time was \$16,971,000. The Commission's April 17, 1991 Order directed the GCPF to pay a maximum of \$10,182,600 of the total cost of the Project, but limited said contribution from the GCPF to the Project in that Order to \$3,394,200. Per the order requirements, it was the Commission's intent to issue further Order(s) increasing the amount to be paid toward the Project from the GCPF to the maximum of \$10,182,600 by the completion of the Project or earlier, either in a single increase or multiple increases equal to the initial limiting amount. The total GCPF contribution amounted to 60% of the estimated cost of the Project at that time. The remaining costs of the Project were to be borne by the IHB, the SOO Line Railroad ("SOO"), the WC, the Village, and the Illinois Department of Transportation ("IDOT").

On February 11, 1992, the Commission entered its first Supplemental Order in this case increasing the maximum amount by \$3,394,200 to be paid toward the Project from the GCPF to \$6,788,400. That Order also ordered that "all other requirements of this Supplemental Order and the original Order entered in this case shall remain in full force and effect except as herein modified." The September 30, 1994 completion date and the six-month progress report requirements remained in full force per this supplemental order.

On March 24, 1993, the Commission entered its second Supplemental Order in this case increasing the maximum amount by \$3,394,200 to be paid toward the Project from the GCPF to \$10,182,600. That Order also ordered that

“all other requirements of this Supplemental Order and the original Order entered in this case shall remain in full force and effect except as herein modified.” The September 30, 1994 completion date and the six-month progress report requirements remained in full force per this supplemental order.

The Illinois General Assembly passed Public Act 89-134, the Grand Avenue Railroad Relocation Act (the “Act”) (70 ILCS 1915/1 *et seq.*), effective July 14, 1995. The Act created the Authority and, among other responsibilities, gave the Authority “quick take” powers for 36 months from July 14, 1995. Those powers expired on July 14, 1998. Section 110 of the Act states,

[U]pon order of the Illinois Commerce Commission, the Authority shall succeed to and assume the performance and actions of the represented persons under the terms of the order and amending orders previously entered relative to the Grand Avenue railroad grade separation project and consistent with the objectives of the Authority.

70 ILCS 1915/110

No motions for an extension of time in which to complete the Project and no formal reports regarding the Project’s progress were submitted from March 24, 1993 until Staff filed a motion for a hearing to obtain the status of the Project in February, 1997. A hearing was held regarding Staff’s motion for status.

Based on the testimony elicited at that hearing, \$897,174 of the GCPF contribution had already been spent. The Administrative Law Judge ruled that no further expenditures would be eligible for reimbursement unless and until further order of the Commission. It was anticipated that an amended petition would be filed and a date would be set for a future hearing when that petition was filed.

The matter was continued generally to allow time for the filing of the amended petition.

The next action in this docket took place on December 31, 1998, when Staff filed a motion asking that the Hearing Examiner rule on decreasing the amount to be paid from the GCPF for the Project until further order of the Commission. Motions to intervene and responses were filed by the Authority. The Hearing Examiner, after considering the motion and the responses, on February 25, 1999, granted Staff's Motion reducing the amount to be paid toward the Project to \$1,376,114.22. That amount was to be limited to reimbursement for preliminary engineering only. The remaining \$8,806,485.78 from the GCPF that had been obligated for the Project was de-obligated and made available for other projects.

The next action in this docket took place in July, 2002. The Commission received the Authority's Petition to Modify the Previously Entered Orders on July 29, 2002, and hearings were scheduled on the Petition.

### **PROJECT HISTORY**

The Project has had an uneven history at best at the Commission. It began with an estimate that seemingly had not taken all of the elements of the Project into consideration. The ordered completion date passed without any construction having begun or any revision being made in the cost, scope, or Project completion date. It began again with changes in scope, increases in costs, some unsubstantiated estimates, and without the benefit of full funding.

The extent of the Village's knowledge of the environmental problems that

the Project would face is unknown. One of the major reasons cited for the increase in the estimated Project costs is the remediation costs associated with cleaning up the "Joslyn" property. The Authority claims that the Village pursued this Project since the 1950's. It is rather unconceivable that for approximately 40 years, with knowledge of the property and the operations that were conducted on the property, that the Village did not have at least some warning that the property would present environmental concerns. Staff testified during the March 20, 1997, hearing that the parties were aware of the contaminated property before the April 17, 1991 Order was entered (R pg 14).

The Village presented its original petition in this matter on April 5, 1990. The Commission's Order was entered on April 17, 1991. That order, among other things, directed the funding of the Project and required that the Project be completed by September 30, 1994. It was not. The Act creating the Authority became effective on July 14, 1995 and contained the provision that the Authority's quick take powers were to end July 14, 1998. The Authority "commenced land acquisition activities" in or between 1999 and 2001 (Authority Brief pg. 5).

### **EVIDENCE**

Staff accepts the Authority's recitation of the evidence with the following exceptions:

1. that the Order referred to as "Commission Order of April 17, 1999" is actually referring to the Commission's April 17, 1991 Order. In addition,

Staff states that it has no knowledge of a Commission Order issued on April 17, 1999 in this docket.

2. that Mr. Robert Plunk, IDOT's Chief of the Program Management Section within the Office of Planning and Programming - Bureau of Statewide Program Planning, testified during the March 20, 1997 hearing that the letter of intent signed by IDOT on September 27, 1990 was considered a proposal for IDOT's funding of this Project and that, as of March 20, 1997, IDOT had not entered into a joint agreement for construction of the Project (R pg. 51-52). Further, Mr. Plunk testified that IDOT had not obligated construction funds for the Project (R. 57).

**GRADE CROSSING PROTECTION FUND**  
**FUNDING OVERVIEW**

The Village had originally asked that the Commission distribute a maximum of \$10,182,600 from the GCPF to the Project. In 1991, that amounted to 60% of the estimated total cost of the Project. The Commission's April 17, 1991 Order directed \$3,394,200 from the GCPF to the Project with a maximum of \$10,812,600 eventually going toward the Project (April 17, 1991 Order). The Project was to have been completed by September, 1994 (April 17, 1991 Order).

Per the testimony elicited during the March 20, 1997, hearing called in response to Staff's motion for a status hearing on the Project, between April 17, 1991 and February 14, 1997, IDOT had paid approximately \$897,174 of the GCPF contribution toward the Project. However, no construction had begun, the Project certainly had not been completed, and no six-month progress reports had

been filed. The Hearing Examiner ruled that no further expenditures could be made from the GCPF until or unless there was another Commission order.

Staff presented its Motion for Hearing Examiner's Ruling Decreasing the Amount to be Paid from the Grade Crossing Protection Fund Until Further Order of the Illinois Commerce Commission on December 31, 1998. That motion was granted on January 19, 1999. The motion was granted to the extent of reducing the amount authorized to be paid toward the Project from the GCPF to \$1,376,114.22. The authorized amount was to have been limited to reimbursement for preliminary engineering only. No additional expenditures would be eligible for reimbursement unless authorized by a subsequent Commission order, and IDOT was advised that the amount of approximately \$8,806,485.78 remaining in the GCPF obligation for the Project was de-obligated.

The Commission was required to change GCPF accounting methods in January, 1997 to a cash accrual system. Previous to that, when money was ordered to be expended on a project, the money was already in the GCPF. Presently, the Commission is required to have the money in the GCPF when the bills are submitted. Mr. Bernard Morris testified that "for a short period of time, that's going to allow us to increase the obligations out of the Crossing Protection Fund to projects, but unless the amount that's going into the fund increases in about three years, we'll have to be obligating substantially less because we'll have to use the new money to pay the bills off that are coming in." (R 21-22 transcript of March 20, 1997 Hearing).

The Authority's present Petition to Modify the Previously Entered Orders was received by the Commission on July 29, 2002, which was two months shy of being 8 years past the required Project completion date. The Authority's petition includes an estimate that the total cost of the Project is now \$37,530,675, which is more than twice the original estimated total Project cost. The Authority is also asking that the GCPF contribute \$18,371,061 to the Project, which is 80% greater than the originally sought contribution of \$10,182,600.

The Commission adopted a policy for GCPF expenditures in September, 2000 that placed an upper limit of \$12 million on the GCPF participation in any new grade separation project. Under the policy, only the Commission can authorize obligations from the GCPF over \$12 million. Staff's Recommended Cost Distribution for the Project shows that \$8,806,485.78 is included in the Commission's Crossing Safety Improvement Program for fiscal years 2003-2007. That amount was de-obligated in the Hearing Examiner's February 25, 1999 ruling. In addition, Staff has recommended that \$300,000 from the GCPF that was to have been obligated to help pay for warning device improvements at two grade crossings in Franklin Park be obligated to the Project since the improvements will not be necessary if the Project is completed. Therefore, the total GCPF contribution to the Project would be \$10,482,600 (Staff's Recommended Cost Distribution).

Mr. Charles Broers testified that there were still some unresolved issues in the estimated Project costs as submitted by the Authority that would impact the level of GCPF participation. Those issues were the cost of the traffic signal

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installation since past practice has been not to participation in those costs, the construction of the south leg of Martens Street, and the changes in land acquisition costs. Per Mr. Broers, IDOT was to have reviewed the "100% contract documents" in May. (R pg 252-3).

**DELEGATION OF POWERS TO THE DIRECTOR OF THE  
REVIEW AND EXAMINATION PROGRAM**

The Commission passed a resolution in February, 1999 delegating the power to de-obligate amounts set aside in the GCPF when a project has been completed or when authorization for completion of a project has expired. The authorization for completion of this Project had expired on September 30, 1994. The Authority's "quick take" powers expired on July 14, 1998. The Authority had "quick take" powers for a period of 3 years from the effective date of this Act and continuing for any actions commenced during the 3 years." (70 ILCS 1915/25).

This scenario is exactly one that was envisioned by the Commission when it passed the February, 1999 resolution. A large amount of the GCPF had been obligated to a project for which a petition had been received in 1990. Progress reports were required to be filed every six months so that Commission Staff would know the status of the Project. There were no progress reports filed because there was no progress. The completion date came and went without a motion for an extension of time in which to complete the Project. Approximately 7 years after the petition was filed and approximately 6 years after the Commission entered its order regarding the Project, Staff had to present a motion asking for a status hearing on the Project.

The April 17, 1991 Order found that the public convenience, necessity and safety required construction of the Project based on the evidence put forth by the Village of Franklin Park. The Village had the responsibility of seeing that the Project was completed within the time authorized by the Order. Not only was the Project not completed, but according to the testimony given during the March 20, 1997 hearing, the Project construction had not even been started, no six-month progress reports had been filed to indicate that the Project was going forward, and the project did not have sufficient funding.

The Authority asked for and was granted time in which to file a new petition. As of December 31, 1998, when Staff filed a motion asking that the amount to be paid from the GCPF be decreased, neither a new petition nor any progress reports had been filed by the Authority.

The de-obligation of GCPF participation in February, 1999 did not involve a project that had been delayed one or two-years as portrayed in the Authority's Brief. The Hearing Examiner's ruling did not put the parties in an untenable position. The lack of sufficient preliminary engineering for the Project and a failure to correctly estimate the costs associated with the Project placed the parties in that position. The ruling was correct based on testimony given during the March 20, 1997 hearing. There was no indication that any action would be undertaken, and, in fact, there was every indication that the Project could not be undertaken because the level of participation of the village, railroads, IDOT, and the GCPF did not equal the total estimated Project cost.

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The resolution's intent was correctly applied to the Project. The Project for which a substantial portion of the GCPF had been obligated had been dormant for almost 8 years and faced the very real possibility that construction would never begin let alone be completed. The funds needed to be de-obligated so that other active projects throughout the State could be funded.

### **GRADE CROSSING PROTECTION FUND SPENDING OUTLOOK**

The GCPF spending outlook as presented by Mr. Michael Stead of Staff, clearly shows the impact that another \$8 million would have on all grade crossing projects in the state through fiscal year 2008. The balance in the GCPF is an actual figure in the exhibit for fiscal years 1997 through 2002. For fiscal year 2003, of the total \$48,024,599 listed as "Actual and Estimated Spending" only \$9,734,191 is shown as being "Estimated" (Staff Exhibit #2).

According to Mr. Stead, the amount shown on the Exhibit did not take into account the extra \$8 million that the Authority is requesting in its present petition. He stated that if no changes were made to the five-year plan and the additional \$8 million was included in the program, that the fund would have a \$6.5 million deficit at the end of fiscal year 2008 (R pg 261-2). He also stated that it would be unlikely that \$8 million would be added to the GCPF and that Staff would have to push back or eliminate projects from the current five-year plan if the Authority's \$8 million request were granted (R 287).

Mr. Stead said that the GCPF balance will be uncertain over the next few years because the General Assembly redirected \$9 million from the GCPF to

help with the state's budget and that there was another proposal before the Assembly to redirect approximately \$6.5 million more from the GCPF (R 262-3).

Mr. Stead also testified that when funds are de-obligated they are made available for other projects currently being considered or authorized by the Commission (R 273). He stated that the amounts in Staff's Exhibit #2 were projections for projects and their costs that Staff anticipated being filed during the five-year plan. Staff had been required since fiscal year 1999 to prepare a five-year plan and Staff had developed a systematic approach of selecting projects, identifying projects and selecting those projects for the plan (R275-6). He also stated that the \$12 million cap on GCPF participation had developed because Staff decided that a limit needed to be placed on any particular project so that GCPF participation for one project would not be at the expense of multiple projects in a single year (R277).

Mr. Stead stated that enhancements had been made to the original Project that had caused extra expense and that had caused Staff to question the validity of the expenses and whether or not they related to safety issues. Those enhancements were the addition of Martens Street south of Grand Avenue, the Canadian National's ("CN") requiring new connections to the steel bridge, certain railroad signal improvements, CN's requiring 136-pound rail as opposed to 115-pound rail that was originally proposed, the use of No. 15 turnouts as opposed to No. 10 turnouts, six changes to the right-of-way, and environmental concerns and clean-up costs (R277-81).

**THE \$12,000,000 CAP**

The Authority's reliance on 5 ICS 100/1-70 nullifies its argument that the \$12 million cap policy adopted by the Commission in relating to the GCPF is not lawful. The policy is not a "Rule" but it involves "internal management of an agency" and it does not affect "private rights or procedures available to persons or entities outside the agency." The granting of GCPF contributions to a project is not a right. The policy is just that – a policy. It is not a "rule" requiring formal proposition, publication and adoption.

The policy is a course of action that the Commission has asked the Staff to follow in determining GCPF contributions. Each project must stand on its own merits in regard to GCPF participation. Each petitioner is responsible for submitting estimated costs, actual costs, and project progress reports to enable Staff to make a determination of GCPF participation.

The Village petitioned the Commission in April 1990 for approximately \$10 million from the GCPF for the Project that was estimated to cost approximately \$17 million. According to the Authority's Brief, it was "past practice" at that time for Staff to recommend that the GCPF contribute 60% of a project's costs. Twelve years later, the Authority presented a new petition to the Commission, which was operating under a new "practice" of Staff setting a \$12 million cap on projects. The Authority asked for new and additional GCPF participation, cited Project enhancements, new Project funding, and new participants.

CONCLUSION

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The impact of the additional funding required by the Authority would have a detrimental affect on the GCPF at least through fiscal year 2008. For all of the above reasons and based on the evidence presented in hearings, Staff respectfully requests that:

- A. the Authority continue to work with Staff to determine elements of the Project that are and are not eligible for GCPF participation;
- B. the \$8,806,485.78 of GCPF obligation that had been de-obligated in February, 1999 be re-obligated to the Project;
- C. the estimated cost of \$300,000 GCPF that has been obligated to pay for signal improvements at two Franklin Park crossings be applied to the Project;
- D. the total GCPF contribution to the Project in this order be limited to \$9,206,485.78;
- E. such further relief as the Commission deems appropriate.

Respectfully submitted,



Diana G. Collins  
Special Assistant Attorney General  
Counsel for the Illinois  
Commerce Commission

Diana G. Collins  
Special Assistant Attorney General  
Illinois Commerce Commission  
160 North LaSalle  
Suite C-800  
Chicago, Illinois 60601  
(312) 814-1930

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NOTICE OF FILING

TO: See Attached Service List

Please take notice that I have this 2<sup>nd</sup> day of July, 2003, forwarded to the Director of Processing, Transportation Division, Illinois Commerce Commission, 527 East Capitol Avenue, Springfield, Illinois 62701, for filing in the above-captioned docket Illinois Commerce Commission's Staff Response to Petitioner's Brief in Support of the Petition to Modify the Previously Entered Order, a copy of which is served upon you.



Diana G. Collins  
Special Assistant Attorney General  
160 North LaSalle Street #C-800  
Chicago, IL 60601-3104  
312/814-1930  
Attorney No. 99000

Counsel for the Illinois  
Commerce Commission

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Notice of Filing, together with the documents referred to therein, have been served upon the parties to whom this Notice is directed, by First Class Mail, proper postage prepaid, from Chicago, Illinois, on the 2<sup>nd</sup> day of July, 2003.



Diana G. Collins

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SERVICE LIST

Richard J. Ramello  
Storino, Ramello & Durkin  
9501 West Devon Avenue  
Suite 800  
Rosemont, Illinois 60018

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

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

Mr. David N. Nelson, Superintendent  
Indiana Harbor Belt Railroad Company  
2721 161<sup>st</sup> Street  
Hammond, Indiana 46323-1099

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

Ms. Nanch I. Magnus, P.E.  
Illinois Department of Transportation  
201 West Center Court  
Schaumburg, Illinois 60196

Mr. Victor Modeer, Director of Division of Highways  
Illinois Department of Transportation  
2300 South Dirksen Parkway  
Springfield, Illinois 62764

Mr. Joseph O'Brien  
Administrative Law judge  
Illinois Commerce Commission  
527 East Capitol  
Springfield, Illinois 62701  
[via agency mail]