

**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

ILLINOIS COMMERCE  
 COMMISSION  
 2003 DEC - 1 P 3:00  
 TRANSPORTATION DIV

**PETITIONER'S BRIEF ON EXCEPTIONS TO THE PROPOSED THIRD  
SUPPLEMENTAL ORDER**

The Petitioner, the Grand Avenue Railroad Relocation Authority, pursuant to Section 200.830 of the Illinois Commerce Commission's Rules of Practice (83 Ill. Adm. Code, Sect. 200.830), does hereby cite and state the following exceptions to the Hearing Examiner's Proposed Third Supplemental Order and supplies suggested replacement statements. In support of its exceptions the Petitioner states as follows:

1. The order fails to set forth the fact of the Illinois General Assembly's passage of the Grand Avenue Railroad Relocation Act (the "Act") (735 ILCS 1915/1 et. seq.). 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 project which is the subject of the April 17, 1991 order in this case. The Authority filed a petition to intervene in this case and the petition was granted. The relationship of the intervener to the other parties subject to the order should be, but is not, set forth in the order.

**DOCKETED**

21

**Suggested Replacement Statement:** (to be inserted as a new paragraph following the sentence, “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” on page 3 of the proposed order.)

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.

2. The sentence on page 3 of the proposed order that states, “A status hearing was held on March 20, 1997” is redundant. Language that is substantially the same appears in first sentence of the section of the proposed order entitled “**MARCH 20, 1997 HEARING**” on page 4 of the proposed order.

**Suggested Replacement Statement:**

The sentence should be deleted from the Third Supplemental Order.

3. The paragraph on page 3 of the proposed order which states:

“On December 31, 1998, a 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” was filed by counsel for the Transportation Division of the Commission. A response was filed on behalf of Petitioner on January 19, 1999. The motion was granted by an Administrative Law Judge (“ALJ”) on February 25, 1999. The ALJ issued a Ruling that reduced the amount authorized to be paid toward the Project from the GCPF to \$1,376,114.22. Said amount was limited to reimbursement for preliminary engineering only. IDOT was advised that the amount of approximately \$8,806,485.78 remaining in the GCPF for the Project was deobligated.”

substantially duplicates the the section of the proposed order entitled “**STAFF’S DECEMBER 31, 1998 MOTION**” on page 7 of the proposed order.

**Suggested Replacement Statement:**

The paragraph should be deleted from the Third Supplemental Order.

4. The sentence on page 4 of the proposed order that states, “Subsequent hearings were held on November 20, 2002, December 11, 2002, May 28, 2003 and July 16, 2003” is out of chronological sequence and out of context. These subsequent hearings are detailed in the proposed order beginning on page 7.

**Suggested Replacement Statement:**

The sentence should be deleted from the Third Supplemental Order.

5. The proposed order fails to set forth the fact that on January 19, 1999 the Authority filed a Petition to Intervene and that the Petition was granted on February 25, 1999.

**Suggested Replacement Statement:** (to be inserted following the sentence, “Staff filed a “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” on page 7 of the proposed order.)

On January 19, 1999 the Authority filed a Petition to Intervene. On February 25, 1999, the Hearing Examiner granted the Authority’s Petition to Intervene.

6. The proposed order fails to set forth the fact that on January 19, 1999 the Authority filed 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 and the substance of the response.

**Suggested Replacement Statement:** (to be inserted following the sentence, “Staff filed a “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.” on page 7 of the proposed order.)

On January 19, 1999 the Authority filed 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.

7. Three of the twelve pages of the proposed order are devoted to a summary of excerpts from a March 20, 1997 status hearing. The hearing took place over six years ago and did not result in a Commission order. The hearing took place approximately five years prior to the present Petition for which the current hearings were conducted. The summary of excerpts from the hearing includes a discussion of the status of the GCPF from 1994 to 1997. The discussion lacks relevancy to the

present Petition since the balance and funding of the GCPF have substantially changed in the ensuing six years. The summary of excerpts from the hearing includes a statement that the quick take powers of the Authority would expire in 1998. The statement was true at that time but is currently inaccurate since the Illinois General Assembly has renewed the Authority's quick take powers which now extend into 2004 and substantially all of the property interests required for the project have to date either been acquired or condemnation lawsuits have been filed with quick take hearings pending.

**Suggested Replacement Statement:** (the entire section of the proposed order entitled "**MARCH 27, 1997 HEARING**" on pages 4 through 7 of the proposed order should be deleted and replaced with the following:)

A status hearing was set and held on March 20, 1997 at which time the Hearing Officer received testimony regarding the then current status of the project.

8. The proposed order fails to set forth the fact that the Authority introduced into evidence 17 exhibits at the hearing on November 20, 2002.

**Suggested Replacement Statement:** (to be inserted preceding the sentence, "The matter was continued to December 11, 2002." on page 9 of the proposed order)

The Authority, through its witnesses, introduced 17 exhibits into evidence at the hearing on November 20, 2002. The Authority entered into evidence a summary and a graphic illustration of the changes to the project since the April 17, 1991 as Petitioner's Exhibits 8 and 9 respectively. The Authority entered into evidence an updated project schedule as Petitioner's Exhibit 10. The Authority entered into evidence a current estimate of project costs, a basis for the increase in cost since 1991, a proposed cost distribution and a benefit analysis as Petitioner's Exhibits 13, 14, 19 and 20. The Authority entered into evidence as Petitioner's Exhibit 21 a cash flow estimate for the project. The Authority entered into evidence as Petitioner's Exhibit 22 a letter of support for the project from the local state representative.

9. The proposed order fails to set forth the fact that the Authority introduced into evidence two exhibits at the hearing on May 28, 2003.

**Suggested Replacement Statement:** (to be inserted preceding the last paragraph of the section entitled "**MAY 28, 2003 HEARING**" on page 11 of the proposed order.)

The Authority entered into evidence Petitioner's Response to ICC Staff's Recommended Cost Distribution as Petitioner's Exhibit 23 and a Supplemental Response to ICC Staff's Recommended Cost Distribution as Petitioner's Exhibit 24.

10. The proposed order fails to set forth the fact that the Staff entered into evidence a spreadsheet of the projected five year income and expenditures of the GCPF as Staff Exhibit 2.

**Suggested Replacement Statement:** (to be inserted preceding the last paragraph of the section entitled "MAY 28, 2003 HEARING" on page 11 of the proposed order.

The Staff entered into evidence a spreadsheet of the projected five year income and expenditures of the GCPF, Staff Exhibit 2.

11. The proposed order fails to set forth the fact that the Grade Crossing Protection Spending Outlook - March 31, 2003 (*ICC Staff Exhibit Number 2*) 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.

**Suggested Replacement Statement:** (to be inserted preceding the last paragraph of the section entitled "MAY 28, 2003 HEARING" on page 11 of the proposed order.

The Grade Crossing Protection Spending Outlook - March 31, 2003, ICC Staff Exhibit Number 2, 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.

12. The proposed order fails to set forth the fact that Mr. Stead testified 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. The proposed order also fails to set forth the fact that Mr. Stead further testified 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*). The proposed order further fails to set forth the fact that Mr. Stead also testified that if projects do not get built as anticipated, that adjustments to the five-year plan are made. The proposed order also fails to set forth the fact that 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*). Since the issue in this case is not where to find the funds to pay for this project, but 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 this fact is of critical importance to the determination of the proper amount to be paid from the GCPF.

**Suggested Replacement Statement:** (to be inserted preceding the last paragraph of the section entitled "MAY 28, 2003 HEARING" on page 11 of the proposed order.

Mr. Stead testified 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 testified 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. Mr. Stead testified 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.

13. The proposed order fails to set forth the fact that on June 18, 2003, the Authority filed a Petitioner's Brief in Support of the Petition to Modify Previously Entered Orders, fails to set forth the fact that on July 2, 2003, the Staff filed the Staff's Response to Petitioner's Brief in Support of the Petition to Modify Previously Entered Orders, and fails to set forth the fact that on July 11, 2003, the Authority filed a Petitioner's Reply to the Staff's Response to Petitioner's Brief in Support of the Petition to Modify Previously Entered Orders, a Proposed Interim Order and a Proposed Final Order.

**Suggested Replacement Statement:** (to be inserted immediately preceding the sentence, "A proposed order was served on the parties on November 19, 2003." on page 11 of the proposed order.)

On June 18, 2003, the Authority filed a Petitioner's Brief in Support of the Petition to Modify Previously Entered Orders. On July 2, 2003, the Staff filed the Staff's Response to Petitioner's Brief in Support of the Petition to Modify Previously Entered Orders.

On July 11, 2003, the Authority filed a Petitioner's Reply to the Staff's Response to Petitioner's Brief in Support of the Petition to Modify Previously Entered Orders, a Proposed Interim Order and a Proposed Final Order.

14. The proposed order fails to set forth the fact that the matter was set for a status hearing on July 16, 2003 and at the conclusion of the hearing that the matter was marked as "Heard and Taken."

**Suggested Replacement Statement:** (to be inserted immediately preceding the sentence, "A proposed order was served on the parties on November 19, 2003." on page 11 of the proposed order.)

On July 16, 2003 the matter came on to be heard for status and at the conclusion of the hearing was marked "Heard and Taken."

15. The proposed order fails to set forth the fact that the findings made on April 17, 1991 continue to be supported by evidence and fails to adopt those findings of fact by reference to the extent that they are supplemented or modified by the proposed order.

**Suggested Replacement Statement:** (to be inserted as the first sentence of the section entitled, "FINDING" in place of the sentence "The Commission having given due consideration to the entire record herein and being fully advised in the premises, is of the opinion and finds that:" on page 11 of the proposed order.)

The Commission, after reviewing the entire record and being fully advised in the premises, finds that the findings made on April 17, 1991 continue to be supported by evidence of record and are hereby adopted as findings of fact except as supplemented or modified as follows:

16. The proposed order fails to find that the Illinois General Assembly passed the Grand Avenue Railroad Relocation Act (735 ILCS 1915/1 et. seq.). It also fails to find that the Act created the Grand Avenue Railroad Relocation 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 project which is the subject of the April 17, 1991 order in this case. The Authority filed a petition to intervene in this case and the petition was granted. The relationship of the intervener to the other parties subject to the order should be, but is not, set forth in the order.

**Suggested Replacement Statement:** (to be inserted as a new paragraph as finding number (1) on page 11 of the proposed order.)

- (1) 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 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.

17. The proposed order fails to find that the recitals of fact set forth in the prefatory portion of the proposed order are supported by evidence of record and are adopted as findings of fact.

**Suggested Replacement Statement:** (to be inserted as a new paragraph as finding number (2) on page 12 of the proposed order.)

- (2) the recitals of fact set forth in the prefatory portion of this order are supported by evidence of record and are hereby adopted as findings of fact;

18. The proposed order fails to find that changes to the project have occurred and were detailed by the evidence introduced at the hearings.

**Suggested Replacement Statement:** (to be inserted as new paragraphs as finding number (3), (4) and (5) on page 12 of the proposed order.)

- (3) public convenience, necessity and safety requires the construction of an underpass structure to allow Grand Avenue to cross under the relocated WC and IHB tracks generally at the place and the manner as shown and described in Petitioner's Amended Petition, Petitioner's Petition to Modify Previously Entered Orders and Petitioner's Exhibit #1 submitted September 26, 1990, Petitioner's Exhibits 23, 24, 25, 26, 27, and 28, submitted December 4, 1990, as modified by Petitioner's Exhibits 6, 8 and 9 submitted November 20, 2002 and Petitioner's Exhibits 23 and 24 submitted May 28, 2003 all admitted into evidence;
- (4) public convenience, necessity and safety requires the relocation of the IHB tracks to accommodate the construction of the underpass structure, said relocation to be generally in the manner as shown in Petitioner's Exhibit #1 submitted September 26, 1990 and Petitioner's Exhibits 23, 24, 25, 26, 27, and 28, submitted December 4, 1990, Petitioner's Exhibits 6, 8 and 9 submitted November 20, 2002 and Petitioner's Exhibits 23 and 24 submitted May 28, 2003 all admitted into evidence, which will include the removal of the existing IHB tracks from a point approximately 1800 feet south of Grand Avenue to the CP right-of-way including surfaces and warning devices at the Franklin Avenue, Chestnut Street, and Grand Avenue grade crossings, removal of the interchange track including surfaces and warning devices of its crossings at Parklane Avenue and Commerce Street, the realignment of the WC main track easterly and the removal of the WC team track;
- (5) in connection with the project, public convenience, necessity and safety requires the construction of a new access roadway on the existing IHB right-of-way from approximately 1750' south of Grand Avenue to Franklin Avenue and construction of local roadway improvements to replace access lost due to the construction of the grade separation structure in the manner generally as shown in Petitioner's Exhibit #1 submitted September 26, 1990 and Petitioner's Exhibits 23, 24, 25, 26, 27, and 28, submitted December 4, 1990, Petitioner's Exhibits 6, 8 and 9 submitted November 20, 2002 and Petitioner's Exhibits 23 and 24 submitted May 28, 2003 all admitted into evidence;

19. The proposed order finds that it is fair and reasonable that the revised actual cost of the Grand Avenue underpass structure project be divided among the Indiana Harbor Belt Railroad Company, the SOO Line Railroad Company, the Wisconsin Central Division of the Canadian National Railroad Company, the Grand Avenue Railroad Relocation Authority, the Illinois Department of Transportation, and in the interest of the statewide traveling public, the Grade Crossing Protection Fund of the Motor Fuel Tax Law. The Grand Avenue Railroad Relocation Act (735 ILCS 1915/1 et. seq.), effective July 14, 1995 prohibits the Authority from levying taxes. The Authority therefore

has no means to raise revenue other than to receive grants from other agencies. Since the proposed order does not fully fund the estimated cost of the project, the Authority can only be found to assume the portion of the revised actual cost of the project for which it receives grant funds. In addition in the original order in this matter and in each of the subsequent orders, the SOO Line Railroad Company was not ordered to participate in the project. Appendix A of the original order and the subsequent orders allocated the participation of the SOO Line Railroad Company at \$0 and 0%. Finally, the Wisconsin Central Division of the Canadian National Railroad Company should be designated as the Wisconsin Central Ltd.

**Suggested Replacement Statement:** (to be inserted as a new paragraph as finding number (6) on page 12 of the proposed order.)

- (6) it is fair and reasonable that the amount of \$8,806,485 be re-obligated to be paid by the GCPF, that the additional amount of \$8,188,461 be obligated to be paid from the GCPF for the Grand Avenue underpass structure project, that Appendix A of the Second Supplemental Order entered in this case be stricken and that the actual cost of the Grand Avenue underpass structure project, be divided among the IHB, the WC, the Village, the IDOT, and in the interest of the statewide traveling public, the GCPF of the Motor Fuel Tax Law as set forth in Appendix A attached to this order;

20. The proposed order finds as Finding (2) that the "Staff's Recommended Cost Division be adopted as Appendix A of this Order" Staff's Recommended Cost Division is not however attached to the proposed order. Finding (3) of the proposed order finds that, "Appendix A of this Order should state that the amount to be paid by the GCPF toward the Grand Avenue relocation project will be a maximum of \$10,482,600". The proposed order is conflicting, vague and confusing in its reference to Appendix A. Assuming that Appendix A referred to in Finding (2) is Staff's Recommended Cost Division that was introduced into evidence as Staff Exhibit Number 1 that document as introduced states that the amount to be paid by the GCPF toward the Grand Avenue relocation project will be a maximum of \$10,482,600 making Finding (3) redundant. However, to attach Staff's Recommended Cost Division as Appendix A of the proposed order makes the proposed order unnecessarily confusing since Staff's Recommended Cost Division contains on pages 3 through 6 numerous issues that were either resolved or clarified by subsequent testimony or exhibits produced by the Petitioner. On page 2 of Staff's Recommended Cost Division, there is a reference to the purported Commission policy "that limits maximum Fund participation on any grade separation project at \$12,000,000." This statement is in clear conflict with Finding (5) of the proposed order which purports to find that "The \$12,000,000 level is merely an amount at which the Commission has clearly stated that Staff is to involve the Commission before proposing a project should be recommended for even partial funding."

**Suggested Replacement Statement:**

Delete Findings (2) and (3) of the proposed order and substitute Finding (6) set forth above.

21. Finding (4) is not a finding of fact and is argumentative. Its inclusion in the proposed order makes the order vague and confusing. One is unable to discern from the proposed order whether the current project as described by the evidence introduced at the hearings is, “required by public convenience, necessity and safety” as required by statute.

**Suggested Replacement Statement:**

Delete Finding (4) of the proposed order.

22. Finding (5) is not a finding of fact and is argumentative. Further, it is contrary to law. Its inclusion in the proposed order makes the order vague and confusing. The Staff in its Staff’s Recommended Cost Distribution cited 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. 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 of 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.

By law, the Commission itself ultimately must make the determination as to which projects get funded with Grade Crossing Protection Funds.

**Suggested Replacement Statement:**

Delete Finding (5) of the proposed order.

23. The proposed order finds as its last unnumbered finding that “The Commission finds that \$10,482,600 is the maximum amount that can be allocated from the GCPF to this project.” This finding is contrary to the uncontroverted evidence produced at the hearings.

**Suggested Replacement Statement:**

Delete the unnumbered finding which reads, “The Commission finds that \$10,482,600 is the maximum amount that can be allocated from the GCPF to this project.”

24. The proposed order fails to find that requirements of the original Order, the Supplemental Order and the Second Supplemental Order entered in this case not inconsistent with the provisions of the Third Supplemental Order are to remain in full force and effect except as modified by the Third Supplemental Order.

**Suggested Replacement Statement:** (to be inserted as a new paragraph as finding number (7) on page 12 of the proposed order.)

(7) all other requirements of the original Order, the Supplemental Order and the Second Supplemental Order entered in this case not inconsistent with the provisions of this Third Supplemental Order should be affirmed.

25. The proposed order fails to order that the Authority shall succeed and assume the performance and the actions previously ordered by the Commission relative to the Grand Avenue grade separation project as required by Section 110 of the Grand Avenue Railroad Relocation Act (the “Act”)(735 ILCS 1915/110).

**Suggested Replacement Statement:** (to be inserted following the last finding of fact in the proposed order.)

IT IS HEREBY ORDERED that the Authority shall succeed and assume the performance and the actions previously ordered by the Commission relative to the Grand Avenue grade separation project.

26. The proposed order fails to clearly specify and incorporate the changes to the project that have occurred and were detailed by the evidence introduced at the hearings.

**Suggested Replacement Statement:** (to be inserted as the seventh to last paragraph of the proposed order.)

IT IS THEREFORE ORDERED that the Authority be, and it is hereby, required and directed, to the extent that it receives funds to do so, to construct the Project as previously ordered as modified as depicted in Petitioner's Exhibits 6, 8 and 9 submitted November 20, 2002 and Petitioner's Exhibits 23 and 24 submitted May 28, 2003 all admitted into evidence;

IT IS FURTHER ORDERED that the Authority be, and it is hereby, required and directed, to the extent that it receives funds to do so, to construct a new access roadway on existing IHB right-of-way from approximately 1750' south of Grand Avenue to Franklin Avenue, as shown in Petitioner's Exhibits 6, 8 and 9 submitted November 20, 2002 and Petitioner's Exhibits 23 and 24 submitted May 28, 2003 all admitted into evidence.

27. The proposed order fails to clearly specify the intent of the Third Supplemental Order and fails to obligate additional funds required to be obligated by the evidence introduced at the hearings.

**Suggested Replacement Statement:** (to be inserted as the sixth to last paragraph of the proposed order.)

IT IS FURTHER ORDERED that this Third Supplemental Order is being entered to re-obligate the funds originally obligated to this project from the GCPF by the Commission's prior Second Supplemental Order of March 24, 1993; to obligate the funds from the GCPF recommended by the Staff's Recommended Cost Division admitted into evidence as Staff Exhibit 1; and to obligate the voluntary contributions of the IHB and WC, to obligate the additional sum of \$8,188,461 from the GCPF toward the Project and to facilitate the letting of a contract for construction by the IDOT.

28. The proposed order provides that Appendix A of the original Order is hereby amended by changing the maximum amount to be paid from the GCPF to the Grand Avenue Relocation project to \$10,482,600. As shown on Appendix A of the original (April 17, 1991) order, which as attached hereto and incorporated herein, the additional amounts that the IHB and WC have agreed to contribute to the project and the acquisition by the Authority of the \$11,500,000 Congestion Mitigation Air Quality grant are not reflected therein. The proposed order also does not strike Appendix A of the Second Supplemental Order. In addition, the Petitioner takes exception to the maximum amount to be paid by the GCPF in the proposed order as not being supported by the evidence in the record.

**Suggested Replacement Statement:** (to be inserted in place of the paragraph that states, "IT IS THEREFORE ORDERED that Appendix A of the original Order is hereby amended by changing the maximum amount to be paid from the GCPF to the Grand Avenue Relocation project to \$10,482,600" as the fifth to last paragraph of the proposed order.)

IT IS FURTHER ORDERED that the amount of \$8,806,485 be re-obligated to be paid by the GCPF, that the additional amount of \$8,188,461 be obligated to be paid from the GCPF for the Grand Avenue underpass structure project, that Appendix A of the Second Supplemental Order entered in this case be stricken and that the actual cost of making the improvements hereinbefore required shall be divided among the IHB, the WC, the Village, the IDOT, and, the GCPF as set forth in Finding (6) herein and Appendix A attached hereto.

29. The proposed order requires and directs the Grand Avenue Railroad Relocation Authority to proceed with the work involved in the Project and mandates completion by a date to be inserted into the proposed order. The Grand Avenue Railroad Relocation Act (735 ILCS 1915/1 et. seq.), effective July 14, 1995 prohibits the Authority from levying taxes. The Authority therefore has no

means to raise revenue other than to receive grants from other agencies. Since the proposed order does not fully fund the estimated cost of the project the Authority cannot be ordered to perform work for which it does not have funds granted to it, but rather can only be ordered to perform work to the extent that it receives funds. In addition in the original order in this matter and in each of the subsequent orders, the SOO Line Railroad Company was not ordered to participate in the project. Appendix A of the original order and the subsequent orders allocated the participation of the SOO Line Railroad Company at \$0 and 0%. Finally, the Wisconsin Central Division of the Canadian National Railroad Company should be designated as the Wisconsin Central Ltd.

**Suggested Replacement Statement:** (to be inserted in place of the last paragraph of the proposed order as the fourth to last paragraph of the proposed order.)

IT IS FURTHER ORDERED that the Grand Avenue Railroad Relocation Authority, to the extent that it receives funds to do so, the Indiana Harbor Belt Railroad Company, the Illinois Department of Transportation, and the Wisconsin Central Ltd. be, and they are each hereby, required and directed to proceed with the work herein ordered and shall complete said work by December 31, 2007.

30. The proposed order fails to order that requirements of the original Order, the Supplemental Order and the Second Supplemental Order entered in this case not inconsistent with the provisions of the Third Supplemental Order are to remain in full force and effect except as modified by the Third Supplemental Order.

**Suggested Replacement Statement:** (to be inserted as the third to last paragraph of the proposed order.)

IT IS FURTHER ORDERED that all other requirements of the original Order, the Supplemental Order and the Second Supplemental Order entered in this case not inconsistent with the provisions of this Third Supplemental Order shall remain in full force and effect except as herein modified.

31. The proposed order fails to order that the Commission retains jurisdiction of this matter to make future orders as appropriate.

**Suggested Replacement Statement:** (to be inserted as the last two paragraphs of the proposed order.)

IT IS FURTHER ORDERED that the Commission retains jurisdiction in this matter to enter further Orders in accordance with the evidence already presented or presented in supplemental hearings for the division of the cost of making the improvements herein before required among the IHB, the WC, the Village, the Authority, the IDOT, and the GCPF.

IT IS FURTHER ORDERED that the Commission retains jurisdiction in this matter to enter further Orders in accordance with the evidence already presented or presented in supplemental hearings in the event changes occur or disputes arise among the parties over the issues under the Commission's jurisdiction.

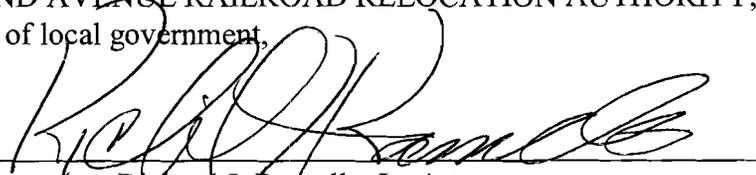
**WHEREFORE**, for the reasons set forth herein, the Petitioner requests that the Hearing Examiner amend and modify the Proposed Third Supplemental Order to incorporate the exceptions herein noted.

**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 oral argument before the Commission.

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  
32,232.1

<u>Improvement</u>	<u>Estimated</u>	<u>GCPF</u>	<u>IDOT</u>	<u>Village</u>	<u>IHB</u>	<u>WC</u>	<u>SOO</u>
Construct the	Cost						
Grand Ave.							
underpass							
structure pro-							
ject as							
described in							
Findings (5) (6)							
(7) (8) (9) (10)							
(11) (12) (13) (14)							
	\$16,971,000	(60%)					
			\$2,121,375##	\$2,121,375#	2.9165%	2.0835%	0%
					(\$494,959)	(\$353,591)	
			\$3,818,475	\$2,121,375	\$494,959	\$353,591	0

10%\*  
(\$1,697,100)

\*Voluntary contribution since jurisdiction of Grand Avenue has been transferred to the Village.  
 #Village funds and/or federal funds it has obtained.  
 ##Voluntary IDOT contribution to match the Village contribution (either federal funds it has obtained or Village funds).

the amount to be paid by the Grade Crossing Protection Fund for construction of the Grand Avenue underpass structure project, hereinbefore described in Findings (5), (6), (7), (8), (9), (10) (11), (12), (13) and (14) all estimated to cost \$16,971,000, should be 60% of the actual cost not to exceed \$3,394,200 until further order of the Commission (it is the Commission's intent to issue further orders increasing the maximum amount to be paid from the Fund to \$10,182,600 in annual installments or earlier); the amount to be paid by the IHB toward the underpass structure project should be 2.9165% of the actual cost not to exceed \$494,959; the amount to be paid by the WC toward the underpass structure project should be 2.0835% of the actual cost not to exceed \$353,591; IDOT, as it has voluntarily agreed to do, will bear 10% of the project cost in exchange for the jurisdictional transfer of Grand Avenue to the Village upon the issuance of this order; any remaining cost should be borne by the Village and IDOT equally (IDOT has also voluntarily agreed to pay 50% of this remaining cost); the cost of future maintenance of the new structure except for damage caused by railroad collision, derailment or operation shall be borne by the Village; the cost of future maintenance of the relocated and/or realigned tracks shall be borne by the respective railroad company; the IHB and WC shall each bear the cost of maintaining their respective track circuitry for the Chestnut Street warning devices; the cost of future maintenance and operation of the common equipment of the Chestnut Street grade crossing warning devices shall be borne equally by the WC and IHB.

T90-0022

<u>Improvement</u>	<u>Estimated</u>	<u>GCPE</u>	<u>IDOT</u>	<u>Village</u>	<u>IHB</u>	<u>WC</u>
Construct the Grand Ave. underpass structure project as described in Findings (5) (6) (7) (8) (9) (10) (11) (12) (13)	\$38,438,675	60%	10%* (\$1,697,100)	\$2,400,000#	2.9165%	2.0835%
	\$2,400,000##		\$2,400,000##			
	\$908,000####					
	<u>\$38,438,675</u>	<u>\$18,371,061</u>	<u>\$4,097,100</u>	<u>\$14,808,000</u>	<u>\$678,094</u>	<u>\$484,420</u>

- \* Voluntary contribution since jurisdiction of Grand Avenue has transferred to the Village - Village funds and/or federal funds it has obtained.
- ## Voluntary IDOT contribution to match the Village contribution (either federal funds it has obtained or Village funds).
- ### Congestion Mitigation Air Quality Grant
- #### Balance to be paid by Village funds and/or federal funds it has obtained..

The amount to be paid by the Grade Crossing Protection Fund for construction of the Grand Avenue underpass structure project, hereinbefore described in Findings (5), (6), (7), (8), (9), (10), (11), (12), (13) and (14) all estimated to cost \$38,438,675, should be 60% of the actual cost not to exceed \$18,371,061; the amount to be paid by the IHB toward the underpass structure project should be 2.9165% of the actual cost not to exceed \$678,094; the amount to be paid by the WC toward the underpass structure project should be 2.0835% of the actual cost not to exceed \$484,420; IDOT, as it has voluntarily agreed to do, will bear 10% of the project cost in exchange for the jurisdictional transfer of Grand Avenue to the Village upon the issuance of this order; any remaining cost should be borne by the Village and IDOT equally (IDOT has also voluntarily agreed to pay 50% of this remaining cost); the balance to be paid by the Village with Village funds or federal funds it may obtain; the cost of future maintenance of the new structure except for damage caused by railroad collision, derailment or operation shall be borne by the Village; the cost of future maintenance of the relocated and/or realigned tracks shall be borne by the respective railroad company; the IHB and WC shall each bear the cost of maintaining their respective track circuitry for the Chestnut Street warning devices; the cost of future maintenance and operation of the common equipment of the Chestnut Street grade crossing warning devices shall be borne equally the WC and IHB.

T90-0022

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  
Wisconsin Central Ltd.  
Canadian National Railroad  
17641 South Ashland Avenue  
Homewood, IL 60430

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

ILLINOIS COMMERCE  
COMMISSION  
2003 DEC - 1 P 3: 00  
TRANSPORTATION DIV

T90-0022

Mr. Roger A. Serpe, General Counsel  
Indiana Harbor Belt Railroad Company  
150 North Wacker Drive, Suite 1500  
Chicago, IL 60606-1606

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  
Illinois Department of Transportation  
2300 South Dirksen Parkway  
Springfield, IL 62764

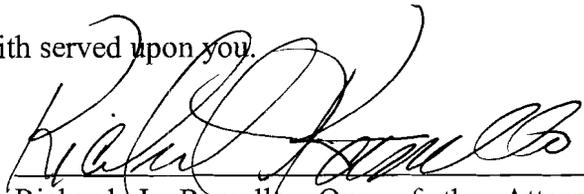
Ms. Diana G. Collins  
Illinois Commerce Commission  
Office of Transportation Counsel  
160 North LaSalle Street, C-800  
Chicago, IL 60601-3104

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

Soo Line Railroad Company  
CT Corporation System  
208 South LaSalle Street  
Chicago, IL 60604

**PLEASE TAKE NOTICE** that on December 1, 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, Petitioner's Brief on Exceptions to the Proposed Third Supplemental Order.

A copy is attached hereto 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 he 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 1<sup>st</sup> day of December, 2003.

  
Richard J. Ramello

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

Service List

T90-0022

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

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

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

Mr. Roger A. Serpe, General Counsel  
Indiana Harbor Belt Railroad Company  
150 North Wacker Drive, Suite 1500  
Chicago, IL 60606-1606

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  
Illinois Department of Transportation  
2300 South Dirksen Parkway  
Springfield, IL 62764

Ms. Diana G. Collins  
Illinois Commerce Commission  
Office of Transportation Counsel  
160 North LaSalle Street, C-800  
Chicago, IL 60601-3104

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

Soo Line Railroad Company  
CT Corporation System  
208 South LaSalle Street  
Chicago, IL 60604