

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

BNSF Railway Company and Dunlieth Township in Jo Daviess County, Illinois, Petitioners,

v.

T07-0091

Chicago, Central & Pacific Railroad Company, the City of East Dubuque, Illinois and State of Illinois Department of Transportation, Respondents.

Petition for an Order of the Illinois Commerce Commission authorizing the establishment of grade crossings inventoried as DOT #306 915E (M.P. 181.66) and DOT #306 916L (M.P. 181.62), at what is commonly known as Barge Harbor Road near East Dubuque, Jo Daviess County, Illinois, as public grade crossings, at their intersection with the main line tracks of BNSF Railway Company and CCP, and for determination by the Illinois Commerce Commission of the appropriate level of warning devices and division of the costs among the Parties.

ORDER

By the Commission:

PROCEDURAL HISTORY

On October 23, 2007, the BNSF Railway Company ("BNSF" or "Railroad") and Dunlieth Township ("Township"), filed a verified Petition in the above captioned matter regarding the Barge Harbor Road highway-rail grade crossings of the BNSF's tracks near East Dubuque, in Jo Daviess County, Illinois, designated as crossings AAR/DOT #306 915E, railroad milepost 181.62-W and AAR/DOT #306 916L, railroad milepost 181.66-W. The Petitioners requested the Illinois Commerce Commission ("Commission") to approve the reclassification of the subject grade crossings from private to public, determine the appropriate warning devices for each of the two crossings, establish an appropriate division of cost for installation of the warning devices, and establish a time frame for any ordered improvements.

Pursuant to notice given in accordance with the Law and the rules and regulations of the Commission, evidentiary and status hearings on the Petition were held before a duly authorized Administrative Law Judge ("ALJ") of the Commission at the Commission's Springfield and Chicago offices on December 4, 2007, February 7, 2008, October 17, 2008, and December 2, 2008. The Petitioners appeared by counsel. Respondents Chicago, Central and Pacific Railroad Company ("CCP") and the Illinois Department of Transportation ("IDOT") also appeared by counsel. Counsel for Respondent City of East Dubuque entered a written appearance in the matter. Joe VonDeBur, Railroad Safety Specialist, appeared on behalf of Commission Staff ("Staff"). At the conclusion of the December 2, 2008 hearing, the record was marked "Heard and Taken" after the Parties

advised the ALJ that an agreement on the issues raised in the Petition was forthcoming. Leave was granted the Parties to file an agreement covering the scope and responsibility for the proposed project. On April 15, 2009, IDOT filed the Agreement that had been executed by BNSF, CCP, the City of East Dubuque and IDOT. Thereafter, Staff filed a draft agreed Order in the docket. This Order incorporates the substance of the draft agreed Order, and any comments or suggestions filed thereto in the docket.

PETITIONER'S EVIDENCE

BNSF presented evidence that Barge Harbor Road is a public roadway, therefore the crossings should be reclassified as public at-grade crossings as opposed to private crossings, and proper warning devices should be provided at the public roadway rail crossings to ensure the safety of the travelling public. Craig Rasmussen, BNSF Manager of Public Projects, testified that the crossings in question are public highway-rail grade crossings used by both the BNSF and the CCP railroads. Barge Harbor Road is a two-lane, two-way, asphalt roadway that runs in a mainly north-south direction adjacent to the four lane US Route 20 in the northwestern corner of Jo Daviess County, Illinois, and carries approximately 150 vehicles per day, ninety percent of which are heavy trucks. The roadway is the only access from US Route 20 at its north end to the I.E.I. Barge facility located at its south dead-end. The I.E.I. Barge facility is a transloading facility involving train, truck and marine (Mississippi River) transportation. The BNSF sponsored as Exhibits documents from Dunlieth Township and the Jo Daviess County Highway Department establishing that Barge Harbor Road is a public roadway under the jurisdiction of Dunlieth Township. The City of East Dubuque ("City") on September 2, 2008, filed an Appearance and a Response to the Petition in this Docket therein stating that the City now has jurisdiction of Barge Harbor Road subsequent to annexing the area into the City and that the City supports the Petition.

There are two sets of tracks that intersect Barge Harbor Road, the northernmost set of tracks is identified as Main 1 and that crossing is identified as DOT #606915E (milepost 188.62-W). The southernmost set of tracks, located approximately 400 feet south of Main 1, is identified as Main 2, and that crossing is identified as DOT #606916L (milepost 188.66-W). The BNSF owns, maintains and operates Main 1 and has an agreement with the CCP to operate and maintain Main 2. The BNSF is also responsible for dispatching all trains on both lines. The two tracks carry a total combined traffic count of approximately fifty (50) freight trains per day at speeds up to 60 miles per hour. The trackage over Barge Harbor Road is also an alternate Amtrak route if necessary. Both crossings were classified as private at-grade at the time of the initial hearing on December 4, 2007; however, as noted above, the evidence clearly shows that the road is a public road thoroughfare. The Barge Harbor Road crossings are presently equipped with reflective crossbucks and stop signs and each has a concrete crossing surface. On June 19, 2008, BNSF filed an "Updated Crossing Inventory Form" reclassifying the subject crossings from private to public as of February 21, 2008.

The Parties propose that in the interests of public safety the Commission consider that automatic flashing light signals ("AFLS") and gates be ordered for both crossings. On April 15, 2009, IDOT filed the agreement executed by IDOT, BNSF, CCP and the City of East Dubuque, wherein IDOT agrees to pay for the installation of the AFLS and gates and

BNSF agrees to install and maintain the new warning devices at each crossing. No Grade Crossing Protection Funds were requested or are involved in this case.

RESPONDENT IDOT'S POSITION

IDOT has programmed the addition of automatic flashing light signals and gates at the Barge Harbor Road crossings into its Fiscal Year 2010 Safety Program utilizing Federal Highway Administration Funds. The referenced agreement between IDOT, BNSF, CCP and the City of East Dubuque was fully executed on March 11, 2009. IDOT reference numbers are Project RRP-0085(046) and Job No. C-92-035-09.

RESPONDENT CCP'S POSITION

The CCP offered no testimony and no objection to the Petition and has executed the IDOT agreement along with the other Parties.

STAFF'S POSITION

Staff has no objection to the reclassification of the crossings as public. Staff's investigation reveals that the crossings both meet the current minimum criteria established for the installation of automatic warning devices, and is of the opinion that AFLS with gates should be installed in the interests of public safety. Staff also believes that the terms of the March 11, 2009, agreement executed by IDOT, BNSF, CCP and the City of East Dubuque should be binding and recognized as such by a Commission Order. Under the terms of the agreement, the project should be completed within twelve (12) months of the execution of the contract. The agreement also contains a division of costs among the Parties and allocates maintenance responsibility for the new signals and gates. No Grade Crossing Protection Funds are involved in this case.

FINDINGS AND ORDERING PARAGRAPHS

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:

- (1) The Commission has jurisdiction of the subject matter hereof and the Parties hereto;
- (2) Petitioner, BNSF Railway Company is a rail carrier engaged in the transportation of either or both property and passengers for hire in the State of Illinois, as defined by the ICTL, 625 ILCS 5/18/c-110(30);
- (3) Petitioner, Dunlieth Township has transferred jurisdiction of the Barge Harbor Road roadway to the City of East Dubuque and is no longer a Party to this proceeding;
- (4) The City of East Dubuque is a political subdivision of the State of Illinois;

- (5) Respondent, Chicago, Central & Pacific Railroad Company, is a rail carrier engaged in the transportation of either or both property and passengers for hire in the State of Illinois, as defined by the ICTL, 625 ILCS 5/18/c-110(30);
- (6) Respondent, Illinois Department of Transportation, is a Department of the State of Illinois which exists by virtue of the laws of the State of Illinois;
- (7) The recitals of fact set forth in the prefatory portion of this Order are supported by the evidence of record and are hereby adopted as findings of fact;
- (8) In the interest of public safety and convenience, permission should be granted to the BNSF Railway Company and City of East Dubuque for the establishment of public grade crossings of Barge Harbor Road near East Dubuque, Jo Daviess County, Illinois as public grade crossings, at their intersection with main line tracks of BNSF Railway designated as DOT #306 915E and DOT #306916L;
- (9) In the interest of public safety, automatic flashing light signals and gates should be installed at both crossings;
- (10) The overall cost of the project is contained within the Agreement executed on March 11, 2009, by Illinois Department of Transportation, the BNSF Railway Company, the Chicago, Central & Pacific Railroad Company and the City of East Dubuque. The Parties agree to the cost being paid according to the terms of said Agreement utilizing federal funds made available through the Illinois Department of Transportation;
- (11) BNSF Railway Company shall, upon Order, according to the requirements contained therein, proceed toward the completion of the proposed improvements, accomplishing the work with its own forces or appropriate contracted services and agrees that an appropriate time for the completion of the proposed improvements should be on or before April 15, 2010;
- (12) 625 ILCS 5/18c-1701 and 1704 require each "person," as defined by Section 18c-1104, to comply with every regulation or order of the Commission. These sections further provide that any person who fails to comply with a Commission regulation or Order shall forfeit to the state not more than \$1,000 for each such failure, with each day's continuance of the violation being considered a separate offense. While the Commission expects all parties to comply with this Order in all matters addressed herein and in a timely manner, the Commission advises that any failure to comply may result in the assessment of such sanctions;

- (13) Any person making a Request for an Extension of Time up to 30 days to complete a project ordered by the Commission must file a request with the Director of Processing and Information no later than 14 days in advance of the scheduled deadline. An Administrative Law Judge will consider and decide the request;
- (14) Any person making a Request for an Extension of Time that exceeds 30 days must file a Petition for Supplemental Order with the Director of Processing and Information no later than 21 days in advance of the scheduled deadline. The Commission will decide Petitions for Supplemental Orders;
- (15) Requests for Extension of Time and Petitions for Supplemental Orders must include reason(s) the additional time is needed to complete the work and the time within which the project will be completed. Prior to submitting a Request for Extension of Time or a Petition for Supplemental Order, the person must notify the Commission's Rail Safety Program Administrator that it is unable to complete the project within the ordered timeframe;
- (16) The Commission or its Administrative Law Judge reserves the right to deny Petitions for Supplemental Orders and Requests for Extension of Time, if the reason(s) supporting the request is (are) insufficient or where it appears the person has not made a good faith effort to complete the project within the allotted time. Failure of the Commission or Administrative Law Judge to act on a pleading prior to the deadline means the originally ordered completion date remains in effect.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that the Petitioner BNSF Railway Company's request to classify the Barge Harbor Road highway-rail grade crossings of the BNSF Railway Company main lines designated as DOT #306 915E and DOT #306916L as public highway-rail grade crossings is hereby granted.

IT IS FURTHER ORDERED that the BNSF Railway Company is hereby directed to proceed immediately with the installation of automatic flashing light signals and gates at the Barge Harbor Road crossings and shall complete the work on or before April 15, 2010.

IT IS FURTHER ORDERED that the cost to install flashing light signal and gates be paid utilizing federal funds made available through the Illinois Department of Transportation according to the terms of the Agreement executed on March 11, 2009, by the Illinois Department of Transportation, the BNSF Railway Company, the Chicago, Central & Pacific Railroad Company and the City of East Dubuque. IDOT reference numbers are Project RRP-0085(046) and Job No. C-92-035-09.

IT IS FURTHER ORDERED that the BNSF Railway Company, its successors or assigns shall own, and be responsible for, all future maintenance of the new automatic warning devices according to the terms of the aforementioned Agreement.

IT IS FURTHER ORDERED that the BNSF Railway Company shall, at six (6) month intervals from the date of Commission Order, submit to the Director of Processing and Information, Transportation Bureau of the Commission, a Project Status Report, stating the progress it has made toward completion of the work herein required. Each Project Status Report shall include the Commission Order number, the Order date, the project completion date as noted in the Order, crossing information (inventory number and railroad milepost), type of improvement, and the name, title, mailing address, phone number, facsimile number, and electronic mailing address of the employee responsible for management of the project.

IT IS FURTHER ORDERED that the BNSF Railway Company is hereby required and directed to submit a Project Completion Report, to the Director of Processing and Information, Transportation Bureau of the Commission, stating that the work herein required of it has been completed. The Project Completion Report shall be submitted within five (5) days after the project completion date.

IT IS FURTHER ORDERED that the BNSF Railway Company shall file with the Transportation Bureau's Director of Processing and Information within five (5) days after the completion of the work required under this Order, a United States Department of Transportation Inventory Form (#6180.71).

IT IS FURTHER ORDERED that any person making a Request for an Extension of Time up to 30 days to complete a project ordered by the Commission must file a request with the Director of Processing and Information no later than 14 days in advance of the scheduled deadline. An Administrative Law Judge will consider and decide the request.

IT IS FURTHER ORDERED that any person making a Request for an Extension of Time that exceeds 30 days must file a Petition For Supplemental Order with the Director of Processing and Information no later than 21 days in advance of the scheduled deadline. The Commission will decide Petitions for Supplemental Orders.

IT IS FURTHER ORDERED that requests For Extension of Time and Petitions for Supplemental Orders must include the reason(s) the additional time is needed to complete the work and the time within which the project will be completed. Prior to submitting a Request for Extension of Time or a Petition for Supplemental Order, the person must notify the Commission's Rail Safety Program Administrator that it is unable to complete the project within the ordered timeframe.

IT IS FURTHER ORDERED that the Commission or its Administrative Law Judge reserves the right to deny Petitions for Supplemental Orders and Requests for Extension of Time, if the reason(s) supporting the request is (are) insufficient or where it appears the person has not made a good faith effort to complete the project within the allotted time. Failure of the Commission or Administrative Law Judge to act on a pleading prior to the deadline means the originally ordered completion date remains in effect.

IT IS FURTHER ORDERED that subject to Sections 18c-2201 and 18c-2206 of the Law, this is a final decision subject to the Administrative Review Law.

By Order of the Commission this 7th day of October, 2009.

JUDGE
SECTION CHIEF
<i>DWS</i> ORDERS SUPERVISOR



CHARLES E. BOX
CHAIRMAN