

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

STATE OF ILLINOIS)	
DEPARTMENT OF TRANSPORTATION)	
)	
PETITIONER,)	
)	Docket No. T10-0027
v.)	
)	
BNSF RAILWAY COMPANY,)	
)	
RESPONDENT.)	

Petition for an order requiring the BNSF Railway Company to either replace the grade separation structure carrying IL Route 81 (FAP 611) near Lynn Center in Henry County, Structure Number 037-0126, DOT/AAR No. 065 636R or require the Railroad to reimburse the Department for the replacement of the grade separation Structure carrying Illinois Route 81 near Lynn Center in Henry County, Illinois.

BNSF RAILWAY COMPANY’S ANSWER TO PLAINTIFF’S PETITION

NOW COMES Defendant, BNSF Railway Company (BNSF), by its attorneys, DALEY MOHAN GROBLE, P.C., and for its answer to the Petition, states as follows:

1. The Commission has jurisdiction of the subject matter of this Petition and of the parties pursuant to Chapter 18 of the Illinois Commercial Transportation Law. (625 ILCS 5/18(c)-7401).

ANSWER: BNSF admits the allegations contained in paragraph 1 of the petition.

2. The grade separation structure of the existing Bridge carries Illinois Route 81.

ANSWER: Answering paragraph 2 of the petition, BNSF admits there is a bridge structure at the intersection of Illinois Route 81 and its railroad tracks in Henry County, IL, and Route 81 passes over the tracks at that location, but denies all other allegations contained in said paragraph.

3. Illinois Route 81 extends over the Railroad's single main line track and a subsidiary track by means of a highway overpass structure in the location commonly known as Lynn Center, in Henry County, at Railroad Mile Post 26.22 on the Barstow Subdivision, DOT/AAR No. 065-636R; hereinafter sometimes called the ("Bridge").

ANSWER: Answering Paragraph 3 of the Petition, BNSF admits Illinois Route 81 crosses over a single main line track of BNSF by means of a highway overpass structure at or near Lynn Center, Henry County, Illinois at or near Mile Post 26.22 at or near an industry track on the Barstow Subdivision, DOT/AAR No. 065-636R, but denies all other allegations contained in said paragraph.

4. The Bridge is in need of replacement due to the advancing deterioration of the existing structure. The structure is owned and maintained by the BNSF Railway Company. Illinois Route 81 at Railroad Mile Post 26.22 predates the Railroad or its predecessor railway's tracks. The original span structure was constructed by the Railroad or its predecessor in approximately 1916 and replaced in 1928.

ANSWER: Answering paragraph 4 of the petition, BNSF admits there is a bridge structure at the intersection of Illinois Route 81 and that BNSF agreed to perform certain maintenance on the bridge structure, but BNSF is without knowledge sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph, and neither admits nor denies those remaining allegations.

5. An agreement dated December 1, 1969, between the Department and the Chicago, Burlington & Quincy Railroad (C.B.&Q.) to replace the structure, wherein maintenance for the structure was assigned to C.B.&Q. is marked as Exhibit 1 attached hereto and made a part hereof. The current structure was then built pursuant to the executed ICC Order (55452) dated April 22, 1970, authorizing the Department to reconstruct the structure. This Order is marked as Exhibit 2; and is attached hereto and made a part hereof.

ANSWER: Answering paragraph 5 of the petition, BNSF admits that Exhibit 1 is a true and accurate copy of the agreement dated December 1, 1969 between the Chicago, Burlington & Quincy Railroad Company (C. B. & Q.) and the Illinois Department of Transportation (IDOT), and that the C.B. & Q. assumed certain maintenance

responsibility for the aforesaid bridge structure designed, built and paid for by IDOT, and further admits that Exhibit 2 is a true and accurate copy of the order of the Illinois Commerce Commission of April 22, 1970, which authorized IDOT to reconstruct the bridge structure, but BNSF denies all remaining allegations contained in said paragraph.

6. The Railway structure carrying IL 81 over the BNSF tracks, in the area known as Lynn Center, has the combined deck/superstructure design commonly known as Precast Prestressed Concrete Deck Beam (PPC-DB). In comparison to other structure types, PPC-DB bridges deteriorate at a relatively rapid rate and has a history of problems throughout the State. This structure has deteriorated to the point that it has become extremely dangerous and a major safety concern for the Department.

ANSWER: Answering paragraph 6 of the petition, BNSF admits there is a bridge structure at the intersection of Illinois Route 81 and BNSF's tracks at or near Lynn Center, but BNSF is without knowledge sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph, and neither admits nor denies those remaining allegations.

7. An Agreement dated February 20, 1998, between the Department and BNSF for drainage improvements along the roadway (IL 81) on both sides of the structure, reaffirms the Railroad's maintenance responsibility for the structure. Section 12 of the Agreement is attached as Exhibit 3 and made a part of this Petition.

ANSWER: Answering paragraph 7 of the petition, BNSF is currently without knowledge sufficient to form a belief as to the truth of the allegations contained in said paragraph, and neither admits nor denies those allegations.

8. In December of 2003, the structure was inspected and had a National Bridge Inspection Standard (NBIS) rating of 5, which is the lowest rating in the "Fair Condition" category. Any Department structure of the PPC-DB type requires an increased inspection interval when the NBIS rating is less than "Fair Condition". On December 3, 2006, a bridge condition report indicated that this Bridge is in "Serious Condition" which demands a special inspection every six (6) months. These first generation PPC-DB bridges have been shown to be inherently subject to deterioration at a rapid rate, with minimal visual indications to be observed during routine inspections.

ANSWER: Answering paragraph 8 of the petition, BNSF admits that the bridge structure is an IDOT structure, subject to IDOT inspections due to the interests of and benefits to the traveling public using Illinois Route 81, but is without knowledge sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph, and neither admits nor denies those remaining allegations.

9. Summary of Bridge Inspection Appraisal data from November 26, 2001 to September 30, 2009 notes the progressive deterioration and concern the Department has for the public's safety as a result of the deteriorated condition of this Bridge. This Data is attached as Exhibit 4 and made a part of this Petition.

ANSWER: Answering paragraph 9 of the petition, BNSF admits that the bridge structure is an IDOT structure, subject to IDOT inspections due to the interests of and benefits to the traveling public using Illinois Route 81, but is without knowledge sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph, and neither admits nor denies those remaining allegations.

10. Correspondence between the Department's District Two office and BNSF, from April 2005 to October 2006, regarding the condition of and responsibility for the railway structure carrying IL 81 over the BNSF tracks, in the area known as Lynn Center, is illustrative of the fact that this Bridge has been a subject of concern for the Department for the past several years due to the ongoing deterioration. While the Railroad is currently wholly responsible for the above referenced Bridge's maintenance and any resulting liability issues, the Department is always concerned over matters regarding public safety. The above referenced correspondence is attached hereto as Exhibit 5 and made a part hereof.

ANSWER: Answering paragraph 10 of the petition, BNSF admits that the bridge structure at the intersection of Illinois Route 81 at or near Lynn Center is an IDOT structure, subject to IDOT inspections and responsibility due to the interests of and benefits to the traveling public using Illinois Route 81, and further admits that BNSF had certain maintenance responsibilities under a 1969 agreement, but BNSF denies that it is

responsible to replace or reconstruct the bridge designed, built and paid for by IDOT and denies the remaining allegations contained in said paragraph.

11. Because the Bridge on IL-81 has been posted with a reduced load limit of 25 tons, semi-trailer and grain trucks will be forced to use an alternate route to travel around this structure. This alternate route will cause these trucks to travel a greater distance than they normally would. This adverse travel burden will add approximately 20 miles to their usual route. Only motorists driving cars, motorcycles, and buses will still be able to use the Bridge until its closure for repairs or eventual replacement.

ANSWER: BNSF is without knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph 11 of the petition, and neither admits nor denies those allegations.

12. The Department's Central Office Bureau of Bridges and Structures conducted a Damage Inspection Report/Rating on April 21, 2009, which includes comments on the deteriorating Bridge and photo copies of the structure's deteriorating components. This Report is attached hereto as Exhibit 6 and made a part hereof.

ANSWER: BNSF is without knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph 11 of the petition, and neither admits nor denies those allegations.

13. Due to the history of potentially rapid deterioration of this PPC-DB structure design, the Department notified the Railroad in April of 2005 when the Bridge still had a "fair" rating so that the process of replacement could begin while the Bridge was still in fair condition. The structure is now rated "Serious Condition" and needs to be replaced on an urgent basis. The most recent inspection of the Bridge is attached hereto and marked as Exhibit 7 and made part of this Petition.

ANSWER: Answering paragraph 13 of the petition, BNSF admits that if replacement of the bridge is necessary, that the replacement is the responsibility of IDOT due to IDOT's obligation under 625 ILCS 7401(3) to pay for bridge replacements which

solely benefit the interests of the public, but is without knowledge sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph, and neither admits nor denies those remaining allegations.

14. In order to put the bridge in the "Serviceable Condition" category, a deck replacement, and slope wall repair is required at a minimum. This is estimated to cost approximately \$ 1-1.5 million dollars. A complete replacement of the Bridge would cost approximately \$3-3.5 million dollars. This would likely include adjusting vertical clearance to 23" and possible construction of an access road for Railroad maintenance.

ANSWER: Answering paragraph 14 of the petition, BNSF admits that IDOT's allegation are tantamount to reconstruction and/or replacement of the bridge, and that the replacement and/or reconstruction of the bridge structure is the sole responsibility of IDOT due to IDOT's obligation under 625 ILCS 7401(3) to pay for bridge replacements and/or reconstructions which solely benefit the interests of the public; further, BNSF is without knowledge sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph, and neither admits nor denies those remaining allegations.

WHEREFORE, BNSF prays that the petition be denied to the extent that IDOT seeks to pass its responsibilities for reconstruction and/or replacement of the bridge on to a private party who receives no benefit for the reconstruction or replacement of the bridge, and further requests that the Illinois Commerce Commission order that IDOT pay the costs of any reconstruction or replacement of the bridge pursuant to 625 ILCS 5/18c-7401(3), and for other just and appropriate relief.

AFFIRMATIVE DEFENSE

Without prejudice to and in addition to its denials, and other statements and prayers, BNSF asserts the following affirmative defense:

1. IDOT has the bridge inventoried as eligible of HBRRP funding, which is available to IDOT to fund the bridge replacement that it seeks for the structure in question, as set forth in 23 CFR sec. 650.401 et. seq.

2. BNSF has requested that IDOT apply and obtain HBRRP or similar funding to allow for reconstruction or rehabilitation of the bridge structure.

3. IDOT has rejected the request of BNSF, and sought rather to file the instant petition without obtaining or offering to join in the funding of the rehabilitation or replacement of the structure IDOT designed and built, and now states is inferior to other available designs and needs to be replaced prematurely.

WHEREFORE, IDOT has failed to mitigate the financial damages and situation it created by designing and building a bridge with a short life expectancy and has refused to obtain or offer federal funding that is available to IDOT under federal law that would mitigate the damages and costs it seeks from the Respondent, and IDOT has failed to mitigate the costs and damages as required under contract and transportation law.

DALEY MOHAN GROBLE, P.C.

By: s/Robert J. Prendergast
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VERIFICATION

Robert J. Prendergast certifies pursuant to Section 1-109 of the Illinois Code of Civil Procedure that he is one of the attorneys for the Defendant, that he has read the foregoing **ANSWER**, and the statements of want of knowledge therein contained are true.

s/ Robert J. Prendergast

Robert J. Prendergast

CERTIFICATE OF SERVICE

I, Robert J. Prendergast, an attorney, hereby certify that on the **22nd day of March, 2010**, I caused the foregoing **BNSF RAILWAY COMPANY'S ANSWER TO PLAINTIFF'S PETITION** to be served on attorneys/parties of record by e-filing the same with the Illinois Commerce Commission and by forwarding the same to the following at the email or street addresses listed below, before 5:00 p.m.:

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s/ Robert J. Prendergast

Robert J. Prendergast