

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Riverwoods North Aurora, L.L.C. and
Village of North Aurora, Kane County,
Illinois,
Petitioners,

Vs.

T05-0013

Burlington Northern and Santa Fe Railway Company and State of
Illinois Department of Transportation,
Respondents.

Petition for an Order of the Illinois Commerce Commission
authorizing the improvement of the existing grade crossing at
Riverwoods Lane with the track of the Burlington Northern and
Santa Fe Railway Company, in the Village of North Aurora, Kane
County, Illinois, directing thereon the installation of automatic
protection devices and re-construction of the crossing proper and
dividing the cost among the parties herewith.

ORDER

By the Commission:



On March 3, 2005, Riverwoods North Aurora, L.L.C. ("Riverwoods" or "Petitioner") and the Village of North Aurora, Kane County, Illinois ("Village") filed a verified petition with the Illinois Commerce Commission (the "Commission") in this proceeding, naming as Respondents the BNSF Railway Company, formerly known as The Burlington Northern and Santa Fe Railway Company ("BNSF" or "Railroad"), and the State of Illinois Department of Transportation ("IDOT"). The petition seeks Commission authorization for the reconstruction and improvement of an existing grade crossing at Sperry Street with the track of the BNSF, in the Village, directing that automatic protection devices be installed thereon and re-construction of the crossing proper, and dividing the cost among the parties. The roadway/railroad crossing provides the traveling public access to a residential town home development, from Illinois Route 25 westerly across a mainline track of the BNSF and into the residential area, which itself is located on the east banks of the Fox River. No petitions to intervene were filed.

Pursuant to notice given in accordance with the law and the rules and regulations of the Commission, this matter came on for hearings before a duly authorized Administrative Law Judge ("ALJ") of the Commission at the Commission's offices in Springfield, Illinois, on May 3, 2005 and August 18, 2005. Petitioners were both represented by the same counsel and presented the testimony of David Faganel, owner of RNA Faganel Builders (the principal Manager of the town home development project), and Steve Heath, a licensed Professional Engineer employed by Patrick Engineering, Incorporated, Lisle, Illinois. The BNSF appeared by counsel and presented the testimony of Patricia Casler, Director of

Suburban Services for the Railroad. Brian Vercruysse, a rail safety specialist in the Commission's Transportation Bureau, appeared on behalf of Commission Staff. No Party vigorously contested the requests of the Petition, although the Railroad did submit that generally it does not favor new crossings, yet left the ultimate decision whether to grant the relief requested to the Commission's discretion. At the conclusion of the August 18, 2005 hearing, the record was marked "Heard and Taken."

EVIDENCE PRESENTED

The BNSF track runs in a generally north and south direction parallel to the Illinois Route 25 right-of-way through the Village. The low volume railroad traffic is comprised of freight only traveling at low speeds during hours of daylight and darkness. Riverwoods desires to establish the formerly private crossing of Riverwoods Lane as a public crossing, and make improvements thereto at the BNSF mainline track through construction of Sperry Street to provide public vehicular access to its North Aurora Riverfront Town home Development, currently under various stages of construction. The re-constructed public Sperry Street crossing will also allow secondary access through the development for municipal officials, employees, and public safety officers; provide an alternate entrance and exit for Police Officers entering and leaving the adjacent Police Department; and provide for the safety, convenience, and security of the traveling public.

Faganel testified that Riverwoods North Aurora, L.L.C. is constructing a residential development site consisting of approximately 4.3 acres as "high-end luxury Townhomes" with roadway access from Illinois Routes 25 and 56. The development site is immediately adjacent to the Fox River. The original rail/roadway crossing which is the subject of the Petition herein was a "public" at-grade crossing that led from Sperry Street, across the BNSF track, and onto what appeared to be a private street, Riverwoods Lane. When the issue of Commission jurisdiction over the private roadway was raised by the Railroad and the ALJ at the May 5, 2005 hearing, the Petition was held in abeyance until the "private street or lane" was dedicated by the Village as a public roadway. Riverwoods and the Village presented evidence at the August 18, 2005 hearing that this had been accomplished, and that the crossing is indeed now a public crossing and public streets over which the Commission unquestionably has jurisdiction.

In addition to requiring Riverwoods to secure Commission approval to construct the at-grade crossing improvements, the Illinois Commercial Transportation Law authorizes the Commission to require reconstruction, minor alteration or relocation, improvement, or maintenance of the crossing, and to apportion the costs between the affected parties. 625 ILCS 5/18c-7401(3).

Faganel testified that Riverwoods would fund the re-construction of the crossing, including installation of required warning devices and roadway improvements. Riverwoods also intends to install a fence segregating the development's residential units from the railroad right-of-way. The fence will extend the length of the residential units which will be

located both to the north and south of the proposed reconstructed crossing location, and will be installed in such a manner as to not impede motorists' visibility at the crossing location.

Heath testified that he is employed by Patrick Engineering, Incorporated, a consulting engineering firm with professional experience in crossing design and protection measures for public crossings. Heath further testified that through discussions with representatives of the Illinois Commerce Commission (Mr. Vercruysse), it was determined that the current, formerly private, now public Sperry Street crossing, was the desired location for public improvements for access to the development, based upon other site limitations. He further stated that the roadway profile was designed in accordance with the Association of American State Highway and Transportation Officials ("AASHTO") guidelines given the topography of the site and descending grade from Illinois Route 25 to the Fox River. In further testifying, Heath described the layout of the crossing and roadway improvements, the warning devices and the anticipated volume of vehicular and rail traffic through the Sperry Street improvements and crossing. The rail line is a secondary line, a local switching line, carrying rail cars four (4) times per day, two in the daytime, and two at night, to serve industries and industry switching in industries in the Aurora area. The road master for BNSF has indicated that the normal operating speed for trains at this location is generally ten (10) miles per hour.

According to Heath, the roadway improvements will include a paved two-lane (12' each lane) road with 3-lanes at the crossing and a three-foot raised median which will separate the one westbound lane and two eastbound lanes to provide a left-turn lane for access to Illinois Route 25. Heath further indicated that the road will have a 2-foot wide stop bar across the 2 eastbound lanes at the stop sign to Route 25, a 2-foot wide stop bar across the two eastbound lanes just west of the proposed railroad crossing, and a 2-foot stop bar across the westbound lane immediately east of the railroad crossing. Flashers and gates were also recommended for safety protection devices. Heath indicated that the proposed crossing has been designed to accommodate a 40' school bus, allowing sufficient distance for a school bus to stop at the stop bar to Illinois Route 25 and still be clear of the crossing. The signage plan for motorists traveling on Illinois Route 25 was designed in consultation with the IDOT District One Permitting Office.

RAILROAD COST ESTIMATES

Casler testified that the anticipated cost for automatic flashing light signals and gates with constant warning time circuitry for the crossing is \$178,000.00. Casler also presented an estimate for the grade crossing surface component of the project, including the physical crossing surface, any ancillary track or right-of-way work and separation for installation of the actual surface span, in the sum of \$53,912.00.

STAFF AND IDOT POSITIONS

Vercruysse represented that he spoke with Jeff Harpring from IDOT Central Office, Bureau of Local Roads prior to the hearing. Vercruysse reported that IDOT did not have any concerns with the proposal as presented. Upon inquiry, Vercruysse further reported that he had received an e-mail correspondence from Attorney Tom Benson (IDOT), who concurs that IDOT is not opposed to the proposal. Vercruysse also provided Staff's position and concurrence to the Petitioners' requests. Also, with the Fox River and Illinois Route 25 as control points, and the lack of a more suitable crossing location, Staff agrees with a waiver of the 5% maximum grade criteria for public crossings as set forth in 625 ILCS 5/18c-7401(3), and 92 Ill. Adm. Code 1535.204. Staff also concurs with the installation of an active warning system consisting of flashing light signals, gates, and bells controlled by constant warning time circuitry. Riverwoods should also be responsible for all costs associated with the crossing installation; and per current practice at other public crossings, the BNSF should be responsible for the maintenance of the crossing surface and warning devices. Vercruysse also noted that given the short distance from Illinois Route 25 to the BNSF tracks, other school bus routing options should be pursued as and if they become available.

Based on the totality of the evidence presented in this proceeding, the Commission finds that public convenience and necessity requires the proposed crossing improvements at Sperry Street. 625 ILCS 5/18c-7401(3); 92 Ill. Adm. Code 1536.40(b).

The Commission, having reviewed the entire record, finds that:

- (1) Petitioner, RIVERWOODS NORTH AURORA, L.L.C. ("Riverwoods") owns and is developing certain real property within the Village of North Aurora, Kane County, Illinois as a townhouse development consisting of 44 units;
- (2) Petitioner, VILLAGE OF NORTH AURORA, located in Kane County, Illinois, is a political subdivision of the State of Illinois;
- (3) Respondent, BNSF RAILWAY COMPANY ("BNSF"), 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 5/18c-1104(30);
- (4) The Commission has jurisdiction over the parties and the subject matter of this proceeding;
- (5) The recitals of fact and conclusions of law contained in the prefatory portion of this order are supported by the record and are hereby adopted as findings of fact and conclusions of law;
- (6) Petitioners have been granted leave to file their First Amended Petition herein and all references to "Riverwoods Lane" in the pleadings shall be stricken and replaced with references to "Sperry Street";

- (7) RIVERWOODS and the VILLAGE OF NORTH AURORA should be jointly and severally responsible for the costs associated with constructing the proposed Sperry Street highway-rail at-grade crossing and warning devices, including the installation of concrete crossing surfaces and automatic flashing light signals (with an eastbound cantilever due to the road profile and multi-lanes), gates, bells, signage, and pavement markings;
- (8) The BNSF should construct the proposed crossing surface and warning devices. Prior to construction, the BNSF should file Form 3 of Section 1535 of Title 92 of the Illinois Administrative Code showing details of the automatic warning devices required under this order, and shall receive approval by resolution of the Commission Transportation Bureau Rail Safety Program Administrator before installing the devices;
- (9) The BNSF should be solely responsible for maintaining and repairing the Sperry Street crossing surface and warning devices;
- (10) The VILLAGE OF NORTH AURORA should be responsible for the maintenance and jurisdiction of Sperry Street from Illinois Route 25 to Riverwoods Drive.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission, that the Petitioners RIVERWOODS NORTH AURORA, LLC and the VILLAGE OF NORTH AURORA jointly and severally are required and directed to proceed with the construction of Sperry Street from Illinois Route 25 west to Riverwoods Drive, and establish the new Sperry Street public crossing of the BNSF Railway Company's track in the Village of North Aurora, Kane County, Illinois.

IT IS FURTHER ORDERED that the BNSF RAILWAY COMPANY shall install the Sperry Street crossing surface with pre-cast concrete panels, and warning devices consisting of flashing light signals (with an eastbound cantilever), gates, and bells controlled by constant warning time circuitry. Prior to installation of the warning devices, the BNSF RAILWAY COMPANY shall file Form 3 of 92 Ill. Adm. Code 1535 showing details of the automatic warning devices, and shall receive approval by resolution of the Commission Transportation Bureau Rail Safety Program Administrator before installing the devices.

IT IS FURTHER ORDERED that RIVERWOODS NORTH AURORA, LLC and the VILLAGE OF NORTH AURORA shall be responsible for all costs associated with the crossing installation, including the installation of the crossing surface and warning devices.

IT IS FURTHER ORDERED that the BNSF RAILWAY COMPANY shall be responsible for the future maintenance and costs associated with the crossing surface and

warning devices.

IT IS FURTHER ORDERED that RIVERWOODS shall construct and thereafter maintain a fence segregating the residential units from the BNSF tracks and right-of-way. The fence is to extend the entire length of the development's residential units that are to be located both north and south of the proposed crossing. The fence shall be constructed in such a manner so as not to impede motorists' visibility at the crossing location.

IT IS FURTHER ORDERED that the VILLAGE OF NORTH AURORA shall be responsible for the maintenance of Sperry Street, including the approaches to the BNSF grade crossing.

IT IS FURTHER ORDERED that all parties in this proceeding shall take the actions required of them and complete all work within eighteen (18) months from the date of this order.

IT IS FURTHER ORDERED that RIVERWOODS NORTH AURORA, LLC and the BNSF RAILWAY COMPANY shall, at six-month intervals from the date of this order, file with the Director of Processing and Information of the Commission's Transportation Bureau written reports describing the progress it has made toward completion of the work required of it under this order. Each progress report shall include the docket number and date of this order, the project completion date deadline established by this 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 employee responsible for management of the project.

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 completing the work required of it under this order, a United States Department of Transportation Inventory Form (#6180.71) as notice of completion.

IT IS FURTHER ORDERED that any person requesting an extension of time of up to thirty (30) days to complete this project shall file a request with the Commission's Director of Processing and Information and Rail Safety Program Administrator no later than fourteen (14) days before the ordered deadline. A Commission Administrative Law Judge shall decide such requests.

IT IS FURTHER ORDERED that requests for extensions of time and petitions for supplemental orders shall include the reasons the additional time is needed to complete the work and the time within which the project will be completed.

IT IS FURTHER ORDERED that the Commission or its Administrative Law Judge shall deny petitions for supplemental orders and requests for extensions of time, if the reasons for the request are insufficient or where it appears the person has not made a

good-faith effort to complete the project within the ordered time. Failure of the Commission or the 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 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 \$1,000.00 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.

IT IS FURTHER ORDERED that this is a final order, in accordance with the Illinois Commercial Transportation Law, Chapter 625 of the Illinois Compiled statutes, Sections 18c-2201 and 18c-2206; and the Administrative Review Law, Chapter 735 of the Illinois Compiled Statutes, Section 5/3/101 et seq.

By order of the Commission this 5th day of April, 2006.

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

Charles E. Boy

Chairman