



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

REFER TO OUR FILE

MARCH 18, 1997

A-00112266

C-00957144, C-00957165

C-00957168, C-00957285

DOCKETED
APR 8 1997

STEPHEN H SHOOK ESQUIRE
CSX TRANSPORTATION INC
500 WATER STREET J150
JACKSONVILLE FL 32202

Application of CSX Transportation, Incorporated, for approval of the abolition of two crossings, at-grade, where the tracks of said railroad company cross Diamond Alley (AAR 145 456 P) and Liberty Alley (AAR 145 458 D), in the borough of Dawson, Fayette County.

Jane A. Sebeck, Debra A. Pyda, et al.
Lois S. Turney, and Donald E. and Elizabeth Newell
v.
CSX Transportation, et al.

To Whom It May Concern:

This is to advise you that an Opinion and Order has been adopted by the Commission in Public Meeting on March 13, 1997, in the above entitled proceeding.

An Opinion and Order has been enclosed for your records.

Very truly yours,

**DOCUMENT
FOLDER**

John G. Alford, Secretary

smk
Encls.
Cert.Mail

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
HARRISBURG, PA. 17105-3265

Public Meeting held March 13, 1997

Commissioners Present:

John M. Quain, Chairman
Lisa Crutchfield, Vice Chairman
John Hanger
David W. Rolka
Robert K. Bloom

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grade, where the tracks of said railroad company
cross Diamond Alley (AAR 145 456 P) and Liberty
Alley (AAR 145 458 D), in the Borough of
Dawson, Fayette County.

A-00112266

Jane A. Sebeck

C-00957144

v.

CSX Transportation, Incorporated, et al.

Debra A. Pyda, et al.

C-00957165

v.

CSX Transportation, Incorporated.

Lois S. Turney

C-00957168

v.

CSX Transportation, Incorporated, et al.

Donald E. and Elizabeth Newell

C-00957285

v.

CSX Transportation, Incorporated.

OPINION AND ORDER

BY THE COMMISSION:

Before us for disposition are the Exceptions filed by the Borough of Dawson (hereinafter Borough) on October 28, 1996, to the Recommended Decision (R.D.) of Administrative Law Judge (ALJ) James D. Porterfield issued on October 7, 1996. No replies to the Exceptions have been filed.

History of the Proceeding

On June 23, 1995, CSX Transportation, Incorporated (CSX or Applicant) filed the Application captioned above at Docket No. A-00112266. The Application requested our approval for the abolition of two crossings, at grade, where its tracks cross Diamond Alley (AAR 145 456 P) and Liberty Alley (AAR 145 458 D) in the Borough, which is located in Fayette County.

The following formal Complaints were filed on the dates indicated: Jane A. Sebeck (Sebeck) filed the Complaint at Docket No. C-00957144 on August 28, 1995; Louis S. Turney (Turney) and Debra A. Pyda (Pyda) filed separate Complaints at Docket Nos. C-00957168 and C-00957165, respectively, on September 5, 1995; and Mr. and Mrs. Donald E. Newell (Newell) filed the Complaint at Docket No. C-00957285 on September 22, 1995. The Complaints opposed the proposed abolition of the two crossings on the grounds that closing the crossings would create public hazards in the event of fire, flood or medical emergencies. The Borough filed an Answer to the Application on September 22, 1995, opposing the closing of the crossings. (R.D., pp. 1-2).

Following a field conference, the proceedings were consolidated for hearing purposes. Evidentiary hearings were held, resulting in the issuance of the ALJ's Recommended Decision which recommended that the Application be granted. Thereafter, the Borough filed the Exceptions now before us.

Discussion

As a preliminary matter, we note that any issue or Exception which we do not specifically address has been duly considered and will not be further discussed. It is well settled that we are not required to consider expressly or at length each contention or argument raised by the parties. Consolidated Rail Corporation v. Pa. P.U.C., 155 Pa. Commonwealth Ct. 537, 625 A.2d 741 (1993); also see, generally, University of Pennsylvania v. Pa. P.U.C., 86 Pa. Commonwealth Ct. 140, 485 A.2d 1217 (1984).

We further note that the ALJ made specific Findings of Fact and Conclusions of Law (I.D., pp. 6-18, and 30-31, respectively). We adopt those herein by reference, unless modified or reversed, expressly or by necessary implication, by this Opinion and Order.

Before addressing any of the specific Exceptions or arguments contained therein, we note that the Exceptions, as a whole, contest the ALJ's recommendation to grant the Application to abolish these two crossings. The Exceptions challenge many of the ALJ's specific findings and conclusions, as well as his weighing of the evidence. A number of Exceptions deal with essentially the same issues, and we will, where we deem it appropriate, discuss those together. As stated above, it is not necessary for us to address every issue or exception raised by a party.

Furthermore, we note that, at numerous places in the Exceptions (pp. 2-18), the Borough contends that the ALJ's findings or conclusions are not based on substantial evidence of

record, a proper weighing of the evidence, or the appropriate resolution of conflicting evidence. We observe that the Commonwealth Court has stated, regarding such arguments:

This Court may not substitute its judgment for that of the Commission or engage in the process of weighing evidence or resolving conflicting testimony. *Philadelphia Electric Co. v. Pennsylvania Public Utility Commission*, 61 Pa. Cmwlth 325, 433 2d 620 (1981). Because the Commission's decision is just and reasonable and supported by substantial evidence, its order requiring [Bell Atlantic-Pennsylvania, Inc.] to bear its costs of relocating its facilities and to reimburse [the Pennsylvania Department of Transportation] for expenses incurred on Bell's behalf must be affirmed.

(Bell Atlantic-Pennsylvania, Inc., v Pennsylvania Public Utility Commission, 672 A.2d 352, 356 (1996))

In its Exception No. 1, the Borough contends that the ALJ's recommended Finding of Fact No. 5 is not supported by substantial evidence of record and contrary to the photographic evidence submitted by CSX at the evidentiary hearing. According to the Borough, the CSX evidence shows that there is a clear and unobstructed view for vehicles traveling east or west on Railroad Street to see oncoming trains in either direction without the necessity of "edging" into the crossing to look for oncoming trains. (Exc., p. 2).

In considering this matter, we note that, in Finding of Fact No. 5, the ALJ stated:

5. There is not enough space for an automobile traveling on Railroad Street to turn onto either Diamond Alley or Liberty Alley (without remaining on Railroad Street) if there is a train on the crossing or sufficient space to stop and look for oncoming trains; for an automobile traveling east on Railroad Street, the driver of the automobile would have to edge into the oncoming or westbound lane of

Railroad Street in order to turn south on to the crossings at either Diamond Alley or Liberty Alley; there is no crossing protection to the motoring public (in respect of Diamond Alley or Liberty Alley) along Railroad Street. (Tr. 100-101, 105; CSX Exh 4A).

(R.D., p. 7).

We have examined the photograph at CSX Exhibit No. 4A, as well as the Situation Survey contained at CSX Exhibit No. 1. The photograph establishes that there is almost no approach roadway at all on the northern approaches of Diamond Alley and Liberty Alley. This observation is supported by the engineering drawings of the crossings on the Situation Survey at CSX Exhibit No. 1, as well as the testimony of Wayne Martin, CSX' project engineer for its Cumberland Division. Mr. Martin stated that the distance from the southern curb line of Railroad Street (S.R. 189) to the center line of the number one railroad track is six feet, six inches, so that a car traveling on S.R. 819 and turning onto either Diamond Alley or Liberty Alley "would not have sufficient room to stop for trains," without its rear end remaining in the traffic lane of S.R. 819. (Tr., pp. 100-101).

Based on our review of the photograph at CSX Exhibit No. 1, it appears that the Borough is correct in its contention, at Exception No. 1, that there is a "clear and unobstructed view for vehicles traveling east or west on Railroad Street to see oncoming trains in either direction without the necessity of edging into the oncoming or west bound lane of Railroad Street." (Exc., p. 2).

While this statement is true, it overlooks the fact that, in order to remain on Railroad Street and view the approaching trains, the motorist, at either the Liberty Alley or the Diamond Alley crossing, would be required to come to a complete stop on the state highway and observe for oncoming trains from the rail lines approaching from directly in front of him or her, and then turn completely around and observe the trains approaching from behind him or her. This could be a dangerous situation, particularly for the motorist traveling west on State Route

(S.R.) 819, who, in order to turn left onto either alley, must cross over the oncoming lane of highway traffic, then immediately cross over the railroad tracks. We find this to be a dangerous situation, the elimination of which would be in the interest of increasing public safety.

We realize, of course, that the same danger exists at the other six crossings along this stretch of rail line. However, the elimination of these two crossings will reduce the overall danger of accidents in the area. Accordingly, we determine that the public safety will be enhanced by the abolition of these two crossings by eliminating a dangerous situation regarding the northern highway approaches on Railroad Street (S.R. 819). While there is no record of any accidents occurring because of this situation, the situation is dangerous nonetheless. It is not necessary for us to wait until an accident happens in order to take corrective measures to if we believe that unsafe conditions exist. (Pennsylvania Railroad Company v. Pennsylvania Public Utility Company, 202 Pa. Super. 114, 195 A.2d 162 (1963))

The record in this proceeding also establishes that there are two main tracks running through each of these crossings. These tracks carry both freight (24 to 36 trains per day) and passengers (two trains per day) operating 30 miles per hours, although the Federal Railroad Administration (FRA) has authorized freight trains to travel 50 miles per hour and passenger trains to travel at a maximum speed of 79 miles per hour through these crossings. (Tr. 18-19, 99) This is further evidence of the danger present at these crossings. Furthermore, CSX expects an increase in the number of freight trains using this crossing, and the Borough expects an increase in the number of vehicles using its streets and roadways. (Tr. 23, 186-189). Accordingly, based on our discussion above, we will grant Exception No. 1, in part, consistent with this Opinion and Order.

In its Exception Nos. 2 and 3, the Borough contends that the ALJ erred in Findings of Fact Nos. 6 and 9 by inferring or concluding that the elimination of the two crossings will increase public safety or eliminate redundancy. Regarding Finding of Fact No. 9, the Borough argues that there is “no evidence of record indicating or supporting the finding that ‘by

reducing the number of grade crossings, as a general matter, there is a reduced risk of injury to the public and to trainmen, specifically.” (Exc., p. 3)

The Borough submits, at Exception No. 2, that the overwhelming weight of the evidence submitted at the time of the hearing, supports the opposite conclusion, namely, that the elimination of these two crossings will increase the danger to the public using the crossings in this area . The Borough provides no specific cites to the evidence of record in this proceeding to support its argument regarding Exceptions Nos. 2 and 3.

In examining these issues, we note that Wayne Martin, witness for CSX, testified that there is a federal program to eliminate 25 percent of the redundant at-grade rail crossings by the year 2000. (Tr., pp. 25, 26). We further note that the testimony of our Bureau of Transportation and Safety’s (BTS’) witness David Fischer establishes that the daily motor vehicular traffic using these crossings is, at most, 100 for Diamond Alley, and unknown for Liberty Alley. Mr. Fischer further testified that the Federal Railroad Administration (FRA) has issued policy statements regarding the elimination of at-grade crossings, and will consider the possibility of redundancy if there are more than four crossings within one mile of a mainline track or a highway has an average daily traffic count (ADT) of less than two thousand. The record in this proceeding also establishes that there are eight at-grade crossings within eight-tenths of a mile of each other on this rail line. (Tr., pp. 29-30, 49 and CSX Exhibit No. 3).

Mr. Fischer further noted that these criteria established by the FRA are also supported by the Federal Highway Administration, the National Association of Regulatory Commissions, and the American Association of State Highway Transportation Officials. To be sure, we are not bound by these criteria. However, we generally accept and use as guidance the policies and positions of other agencies and governmental entities, so long as the criteria are appropriate for the circumstances of our proceeding. In this proceeding, we conclude that applying those criteria will result in generally safer conditions for the traveling public. In this proceeding, there are eight crossings within eight-tenths of a mile of each other, which clearly

exceeds the federal standard of four crossings per mile. Furthermore, the highest estimate of daily traffic count is well below the federal minimum of 2000 vehicles per day. Accordingly, we determine that the Diamond Alley and Liberty Alley crossings are redundant and that the Borough's Exceptions Nos. 2 and 3 are denied.

Another issue which the Borough raises on exception is that of the sight distances on the southern approaches (traveling northbound) of each of the crossings. Regarding the crossing at Diamond Alley, the Borough takes exception to the ALJ's Finding of Fact No. 18. The Borough argues that Finding of Fact No. 18 is contrary to the testimony of Complainants Donald Newell (Tr. 239) and Jane Sebeck (Tr. 144, 145), as well as that of Diane Carter (Tr. 159), a resident of Diamond Alley, and the evidence presented on Complainants' Exhibit Nos. 2A-2K. (Exc., pp. 3-4).

For purposes of our discussion later, we will present Findings of Fact 18 and 19 together, which state:

18. The sight distance for a motorist traveling north on Diamond Alley and attempting to cross the involved crossing is not good; a fence partially blocks the view of a motorist attempting to enter the involved crossing; the current standard for unrestricted sight distance at a crossing is a minimum of 500 feet (left and right) and 50 feet back from the crossing. (Tr. 36-37, 55-56, 69, 107-108, 111; CSX Exh. No. 4B; cf. 143-144, 147-148, 177-178).
19. CSX defines "critical area" (i.e., "something bad" could happen) as that part or area of a roadway 12 feet from the centerline of a track; a motorist traveling north of Diamond Alley and attempting to cross the involved crossing must move into the "critical area" in order to have proper sight distances for oncoming trains. (Tr. 109, 113-114).

(R.D., p. 10, emphasis in original).

In considering the proposed Finding of Fact No. 18 in light of the Exception, we have examined the evidence relied upon by the ALJ in reaching his determination, as well as that put forth by the Borough in its Exceptions to contest that determination. We note that CSX witness Martin testified that the sight distance at Diamond Alley on the southern approach to the crossing is not good. Mr. Martin stated, with respect to both the Diamond Alley and the Liberty Alley crossings:

To be truthful, there is no sight view. I had to physically put the front of the car onto the track to be able to see up or down the track because of a fence at Diamond Alley and some trees and bushes at Liberty Alley.

(Tr., p. 36).

This testimony is supported by the photograph at Exhibit No. 4-B (left photograph), which shows that there is a chain-link fence along the left (western) side of Diamond Alley as it enters the railroad track area of the crossing. At pages 69-70, Mr. Martin testified that the current federal standards require, at a minimum, a 500 foot sight distance from a minimum distance of 50 feet from the railroad track. Clearly, the evidence in this proceeding establishes that there is no such sight distance at a point 50 feet away from the railroad track.

In contesting the ALJ's proposed Finding of Fact No. 18, the Borough relies upon the testimony of the following witnesses: Newell (Tr. 239), Sebeck (Tr. 144-145), Carter (Tr. 159), as well as the Complainants' Exhibits 2A-2K. Mr. Newell testified that:

- A. The only thing that blocks your view is a little bit - - there's a metal box that the railroad has there which doesn't block much of anything.

Q. Can you see five hundred feet in either direction from the crossing?

A. Every bit of five hundred, plus.

(Tr., p. 239).

Miss Sebeck testified that she feels just as safe at the Diamond Alley crossing as at any other crossing in the Borough. (Tr., pp. 144-145). Mrs. Carter testified that she uses this crossing in the same manner she uses every other crossing in the Borough, by stopping her car about four to six feet from the crossing, and looking left and right, and being able to see the entire distance down the track in each direction. Mrs. Carter admitted that at that point she is within the "safe" zone, but contends that each crossing in the Borough requires the same near proximity on the approach. (Tr., pp. 158-159).

This evidence establishes that the sight distance at the southern approach of Diamond Alley to the crossing does not meet the federal standard of being able to see 500 feet from 50 feet from the nearest track. In our opinion, this is a significant factor in determining the degree of danger at the crossing. The testimony of witnesses Sebeck, Newall and Carter, while challenging the basic sight distance within the critical zone, failed to establish that the southern approach to this crossing meets the federal standards. This further demonstrates the danger at this crossing and supports the ALJ's determination at Finding of Fact No. 18. Accordingly, Exception No. 5 is denied.

In its Exception Nos. 6 and 7, the Borough takes similar exception to the ALJ's Findings of Fact Nos. 20 and 21 regarding the sight distance at the southern approach of the Liberty Alley crossing. In Exception No. 7, the Borough contends that the ALJ erred in Finding of Fact No. 6 in concluding that the sight distance for a north bound vehicle on the southern

approach of the Liberty Alley crossing is “not good” because trees and bushes partially block the view of a motorist attempting to enter the crossing area. (Exc., p. 4).

We note that Finding of Fact No. 20 states:

20. The sight distance for a motorist traveling north on Liberty and attempting to cross the involved crossing is not good; bushes and some trees partially block the view of a motorist attempting to enter the involved crossing; the existence of double tracks also increases the safety risk factor; the current standard for unrestricted sight distance at a crossing is 500 feet (left and right and 50 back from the crossing. (Tr. 36-37, 56, 69; cf., 239; CSX Exh. No. 4B)

(R.D., pp. 10-11).

The Borough further contends that the ALJ’s recommended Finding of Fact No. 20 is contrary to the weight of the evidence submitted at the hearing, as well as the testimony of Donald Newell (Tr., p. 239), who testified that, when sitting at that location, “you can see from one end of Dawson to the other left to right.” The Borough asserts that the ALJ’s recommended finding is contrary to the testimony of Patricia Lint (Tr., p. 195), who testified that the southern approach to the Liberty Alley crossing has a “good open view”. The Borough further relies of the photograph at Complainants’ Exhibit 2G which, it contends, clearly depicts the existence of a clear and unobstructed sight view at the Liberty Alley crossing. (Exc., pp. 4-5).

In its Exception No. 7, the Borough takes exception to the ALJ’s Finding of Fact No. 21, arguing that this Finding of Fact is not supported by any testimony on pages 158-159 and is contrary to the testimony of witnesses Newell and Lint, as well as the photographic evidence at Complainants’ Exhibit 2-G. (Exc., p. 5). Finding of Fact No. 21 states:

21. CSX defines a “critical area” (i.e., “something bad” could happen) as that part or area of a roadway 12 feet from the centerline of a track; a motorist traveling north on Liberty Alley and attempting to cross the involved crossing must

move into the "critical area" in order to have proper sight distances for oncoming trains, especially in an easterly direction. (Tr. 109-110; cf. 158-159)

(R.D., p. 11).

In considering the matters concerning the sight distance for a northbound vehicle approaching the crossing from the southern approach on Liberty Alley, we note that there is ample substantial evidence of record to support the ALJ's recommended Findings of Fact Nos. 20 and 21. The record establishes that the sight distance at the crossing does not meet the federal requirement of 500 feet at a point on the approach roadway which is 50 feet away from the nearest track. (Tr., pp. 68-69).

Furthermore, CSX witness Martin testified that it was necessary for him to place the front end of his car onto the track to be able to see up or down the track. (Tr., pp. 36-37). We are persuaded that this evidence, on balance, outweighs that put forth by the Complainants on this issue. Accordingly, we will deny the Borough's Exception Nos. 5 and 6.

Another issue raised by the Borough which we will address here is that of emergency response time. In its Exception No. 9, the Borough takes exception to the ALJ's Finding of Fact No. 25, which states:

25. Assuming River Road is open (i.e., not flooded), the closing or elimination of the involved crossings would add on a few minutes, at most, to the response time of emergency vehicles traveling to the involved parts of Diamond Alley and Liberty Alley. (Tr. 33-35; cf. 151-152, 185-186, 248)

(R.D., p. 12).

The Borough contends that this Finding is not supported by any competent evidence submitted or any testimony offered by any qualified emergency personnel which would

support this Finding. The Borough further contends that none of the references to the transcript made by the ALJ support the ALJ's conclusions concerning emergency response time. (Exc., pp. 6-7). The Borough further argues that the ALJ's Finding is contrary to the testimony of Frank Lamanna, of the Dawson Volunteer Fire Company, Mrs. Lint, the Borough Council President and the Complainants, all of whom indicated concern over the safety hazards created by the removal of the two crossings. (Exc., p. 7).

We note that Finding of Fact No. 25 is supported by the following evidence of record. The drawing at CSX Exhibit No. 1 shows the proximity between the Liberty Alley and Diamond Alley crossings and those adjacent to them. Furthermore, the testimony of Mr. Martin establishes that the closing of these crossings would add a couple of minutes, at best to the emergency response time, and that the approximate distance from the Diamond Alley crossing to the Galley Street crossing is approximately 170 feet, and from Liberty Alley crossing to the Galley Street crossing is approximately 175 feet.. (Tr., pp. 32-34).

Our review of the record indicates that, if these two crossings were closed, there would remain six other crossings within eight-tenths of a mile to access Diamond and Liberty Alleys via River Road (Tr., pp. 29-30, 49 and CSX Exhibit No. 3). While it is true that River Road is subject to flooding, the record demonstrates that flooding on River Road is a rare event, having occurred in the years 1936, 1941, 1954, 1972 (twice) and 1996. (Tr., p. 247). Accordingly, we conclude that the ALJ's Finding of Fact No. 25 is based on substantial evidence of record. Therefore, the Borough's Exception No. 9 is denied.

Conclusion

Based on our review of the record in this proceeding, including the ALJ's Recommended Decision and the Exceptions filed thereto, we conclude that the ALJ's Recommended Decision, as modified herein, is amply supported by substantial evidence in the record. We further conclude that the Exceptions of the Borough are meritorious, in part, and

they are therefore granted to the extent they are consistent with this Opinion and Order;

THEREFORE:

IT IS ORDERED:

1. That the Exceptions filed by the Borough of Dawson on October 28, 1996, to the Recommended Decision of Administrative Law Judge James D. Porterfield issued on October 7, 1996, are granted, in part, consistent with this Opinion and Order.
2. That the Recommended Decision of Administrative Law Judge James D. Porterfield is adopted, consistent with this Opinion and Order.
3. That the Application of CSX Transportation, Incorporated, for approval of the abolition of two crossings, at-grade, where the tracks of said railroad company cross Diamond Alley (AAR 145 456 P) and Liberty Alley (AAR 145 458 D), in the Borough of Dawson, Fayette County, at Docket No. A-00112266, is approved.
4. That the formal Complaints captioned and docketed as follows are dismissed: Jane A. Sebeck v. CSX Transportation, Incorporated, et al., C-00957144; Debra A. Pyda, et al. v. CSX Transportation, Incorporated, C-00957165; Lois S. Turney v. CSX Transportation, Incorporated, C-00957168; and Donald E. and Elizabeth Newell v. CSX Transportation, Incorporated, C-00957285.
5. That the CSX Transportation, Incorporated, at its sole cost and expense, within 150 days after the entry date of this Opinion and Order, shall furnish all material and do all work necessary to construct or erect permanent concrete barricades, consistent with the existing cartway and within the railroad right-of-way, along both the south curb of Railroad Street at the former intersections with Diamond Alley and Liberty Alley and on the former south roadway

approaches to the crossings on Diamond Alley and Liberty Alley, with adequate reflectorized markings and written notice to the public that the crossings are closed to vehicular traffic.

6. That the CSX Transportation, Incorporated, at its sole cost and expense, within 180 days after the entry date of this Opinion and Order, shall furnish all material and do all work necessary to remove the Diamond Alley crossing (AAR 145 456 P) and the Liberty Alley crossing (AAR 145 458 D) and to remove the existing cross bucks at the involved crossings.

7. That the CSX Transportation, Incorporated, upon completion of the work herein ordered, shall certify to this Commission that the work has been completed in a satisfactory manner pursuant to this Opinion and Order.

8. That before, during, and after completion of the project, the Borough of Dawson, at its sole cost and expense, shall furnish all material and do all work necessary to maintain the roadway or alley facilities and the south roadway or alley approaches to the former crossings, including any portion of the roadway or alleys formerly occupied by the railroad facilities removed in accordance with this Opinion and Order.

9. That upon certification to the Commission by the CSX Transportation, Incorporated, that the work herein ordered, has been completed in a satisfactory manner, pursuant

to this Opinion and Order, the at-grade crossings, identified as the Diamond Alley crossing (AAR 145 456 P) and the Liberty Alley crossing (AAR 145 458 D) situated in the Borough of Dawson and the County of Fayette are abolished, in accordance with the Application filed with this Commission on June 23, 1995, by the CSX Transportation, Incorporated.

BY THE COMMISSION



John G. Alford
Secretary

(SEAL) _____

ORDER ADOPTED: March 13, 1997

ORDER ENTERED: **MAR 18 1997**