



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

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February 19, 1998

In Re: A-001135⁸⁹~~98~~, C-00970106, C-00970107, C-00970126, A-00109901

(See letter dated 09/25/97)

A-001135⁸⁹~~98~~ Application of the County of Lebanon Transit Authority

For approval of the suspension of a series of crossings involving the Cornwall Industrial Track of Consolidated Rail Corporation located in the City of Lebanon, Lebanon County.

C-00970106 South Lebanon Township Board of Supervisors v. Consolidated Rail Corporation

Complainant states it has received numerous complaints about the crossing at South Lincoln Avenue, mainly regarding ruts and deep holes causing damage to vehicles.

C-00970107 City of Lebanon v. Consolidated Rail Corporation

Complainant is concerned about the condition of crossings on the Cornwall Industrial Track of CONRAIL at the following locations in the City of Lebanon: Willow Street; Cumberland Street; Chestnut Street; Walnut Street; 12th Street; 10th Street; 9th Street; 8th Street. Complainant states it has received complaints from the public that crossings are causing damage to their vehicles.

C-00970126 Pennsylvania Department of Transportation v. Consolidated Rail Corporation

Complainant concerned about the safety of at-grade crossing at State Route 2003., L.R. 38016 at State Drive. Complainant says crossing is sunken with rotting timbers breaking out. Due to location on an over vertical curb, a driver is not aware of the crossing's poor condition until it is too late.

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A-00109901 Application of South Lebanon Township

For approval of the alteration of the crossing (AAR 591 537 S) where Township Road 705 crosses below the grade of the tracks of the Consolidated Rail Corporation in South Lebanon Township, Lebanon County.

N O T I C E

This is to inform you that a Further Hearing on the above-captioned case will be held Thursday, April 16, 1998 at 10:00 a.m. in an available hearing room, Ground Floor, North Office Building, North Street and Commonwealth Avenue, Harrisburg, Pennsylvania.

Administrative Law Judge Herbert S. Cohen will be the presiding officer in this case. The judge can be contacted at P.O. Box 3265, Harrisburg, Pennsylvania, 17105-3265; telephone (717) 783-5452.

If you are a person with a disability, and you wish to attend the hearing, we may be able to make arrangements for your special needs. Please call Norma Lewis at the Public Utility Commission:

- Scheduling Office: (717) 787-1399
- AT&T Relay Service number for persons who are deaf or hearing impaired: 1-800-654-5988.

pc: Judge Cohen
John Frazier - BPL 101
John Wilson - T&S
Dave Hart - T&S Rail Division
Norma Lewis
Ann M. Humes, Scheduling Officer
Beth Plantz
Docket Section
Calendar File

ALJ APPEARANCE SHEET

ALJ Hearing Report

Docket No. A-00113589, C-00970106,
 C-00970107, C-00970126, A-00109901
 Case Name APP. COUNTY OF LEBANON
 TRANSIT AUTH.; S. LEBANON TWP. BD. OF SUPVS.,
 CITY OF LEBANON, PA. DEPT. TRANSP. v. CONRAIL;
 APP. OF SOUTH LEBANON TWP.
 Location HARRISBURG
 Date APRIL 16, 1998
 ALJ HERBERT S. COHEN
 Reporting Firm Holbert Associates

CHECK THOSE BLOCKS WHICH APPLY:

Prehearing Held YES NO
 Hearing Held YES NO
 Testimony Taken YES NO
 Transcript Due YES NO
 Hearing Concluded YES NO
 Further Hearing Needed YES NO
 Estimated Add'l Days _____
 RECORD CLOSED YES NO
 DATE _____
 Briefs to be Filed YES NO
 DATE _____
 BENCH DECISION YES NO
 PROTHONOTARY'S OFFICE
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 JUNE 30, 1998

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 PLEASE PRINT CLEARLY

Incomplete Information may Result in Delay of Processing

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Benjamin C. Dunlap, Jr. Newman, Smith, Shissler & Hall Telephone No. 717 236-3010	200 N. Third Street P.O. Box 840 City Harrisburg State PA Zip 17108	Consolidated Rail Corporation
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Check this box if additional parties or counsel of record appear on back of form.

[Signature]
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June 30, 1998

HAND DELIVERED

Jámes McNulty, Secretary
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17105-3265

ORIGINAL

RE: **South Lebanon Township v. Co. Of Lebanon**
C-00970106

City of Lebanon v. County of Lebanon
C-00970107

Commonwealth of Pennsylvania, Department
Of Transportation v. Conrail
C-00970126

Application of the County of Lebanon Transit Authority
for Approval of the Suspension of a Series of Crossings
Involving the Cornwall Industrial Track of Consolidated
Rail Corporation Located in the City of Lebanon,
Lebanon County
A-00113589

Application of South Lebanon Township for approval of the
alteration of the crossing (AAR 591 537 S) where Township Road
705 (Wilhelm Avenue) crosses below grade of the tracks of the
Consolidated Rail Corporation in South Lebanon Township,
Lebanon County
A-00109901

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EEF

Dear Sir:

I enclose an original and three (3) copies of the Supplemental Brief of Consolidated Rail Corporation for filing in the above matter. In accordance with the accompanying Certificate of Service

James McNulty
June 30, 1998
Page 2

we have provided copies of the Supplemental Brief to all active parties of record. Please timestamp the additional copy provided and return to our messenger. Thank you.

Sincerely yours,

A handwritten signature in cursive script that reads "Barbara Drake".

Barbara Drake, Secretary to
Benjamin C. Dunlap, Jr., Esquire

/bmd

Enclosures

cc: All Parties of Record (w/encl.)
ALJ Herbert S. Cohen (w/encl. via Hand Delivery)
Scott K. Wasserkrug, Esquire (w/encl.)
Mark Sawyer (w/encl.)

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

IN RE: : Docket No. A-00113589
APPLICATION OF THE COUNTY :
OF LEBANON TRANSIT AUTHORITY :
FOR APPROVAL OF THE :
SUSPENSION OF A SERIES OF :
CROSSINGS INVOLVING THE :
CORNWALL INDUSTRIAL TRACK :
OF CONSOLIDATED RAIL :
CORPORATION LOCATED IN THE :
CITY OF LEBANON, LEBANON :
COUNTY :

CITY OF LEBANON, :
Complainant : Docket No. C-00970107
vs. :
CONSOLIDATED RAIL :
CORPORATION, et al :
Respondent :

COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF TRANSPORTATION :
Complainant : Docket No. C-00970126
vs. :
CONSOLIDATED RAIL CORPORATION :
Respondent :

SOUTH LEBANON TOWNSHIP, :
BOARD OF SUPERVISORS :
Complainant : Docket No. C-00970106
vs. :
CONSOLIDATED RAIL :
CORPORATION, et al :
Respondent :

APPLICATION OF SOUTH LEBANON :
TOWNSHIP FOR APPROVAL OF THE :
ALTERATION OF THE CROSSING :
(AAR 591 537 S) WHERE TOWNSHIP :
ROAD 705 (WILHELM AVENUE) :
CROSSES BELOW GRADE OF THE :
TRACKS OF THE CONSOLIDATED :
RAIL CORPORATION IN SOUTH :
LEBANON TOWNSHIP, LEBANON :
COUNTY : Docket No. A-00109901

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SUPPLEMENTAL BRIEF OF CONSOLIDATED RAIL CORPORATION

SUPPLEMENTAL STATEMENT OF THE CASE

Consolidated Rail Corporation ("Conrail") filed its Main Brief in the above proceedings on December 29, 1997. Main Briefs were also filed by South Lebanon Township ("Township"), the Pennsylvania Department of Transportation ("PennDOT") and the County of Lebanon Transit Authority ("COLT"). Conrail filed a Reply Brief on January 8, 1998.

By Order dated January 29, 1998, the Honorable Herbert S. Cohen, Administrative Law Judge, granted Conrail's Amended Petition to Reopen the proceedings to receive additional evidence regarding Conrail's conveyance of the line to R.J. Corman Railroad Company/Allentown Lines, Inc. ("Corman"). While granting Conrail's petition to that extent, ALJ Cohen also ordered a further hearing to receive evidence regarding Corman's intent and ability to operate on the line, to comply with the terms and conditions of the Indenture between it and Conrail, and to operate and maintain any and all railroad facilities at each of the crossings involved in the consolidated proceedings.

A further hearing was held on April 16, 1998, at which the outstanding issues regarding all involved crossings, except the Wilhelm Avenue crossing in South Lebanon Township, were resolved. A Stipulation and Proposed Order regarding all the involved crossings, except Wilhelm Avenue, was filed with the Commission on June 1, 1998. ALJ Cohen set June 30, 1998, as the deadline for the filing of Supplemental Briefs, and this is the Supplemental Brief of Conrail.

SUPPLEMENTAL PROPOSED FINDINGS OF FACT

13. Corman is the owner of the rail line at all the involved crossings in the consolidated proceedings, except for the Willow Street crossing in the City of Lebanon, pursuant to an Indenture dated October 14, 1997. N.T. 270-272, 329-330; RJC Exhibit No. 1; Conrail Exhibit No. 3.

14. Corman has experience in the aluminum industry and currently transports approximately 400 million pounds of aluminum annually. N.T. 273-274.

15. Corman intends to work with Norfolk Southern, the new interchanging carrier, which currently has a good working relationship with Alcoa Aluminum at other plants, to obtain Alcoa business on the involved line and provide service to Alcoa. N.T. 272-276; RJC Exhibit No. 2; Conrail Exhibit No. 4.

16. The R.J. Corman family of companies have annual gross revenues of approximately \$58 million. N.T. 297-300.

17. The rail line at the subject crossing is an operating line under an acquisition and operation exemption issued by the Surface Transportation Board under STB Finance Docket No. 33302, and Corman is obligated to provide service on the line for a customer which desires such service. N.T. 313; RJC Exhibit No. 2; Conrail Exhibit No. 4.

18. At no time did Corman believe that it would be without a bridge over Wilhelm Avenue should it obtain Alcoa's business. N.T. 312-313.

19. Corman was aware of Conrail's obligations regarding the Wilhelm Avenue bridge prior to conveyance, and obligated itself in the Indenture between Conrail and Corman conveying the line to assume any costs or other responsibilities imposed on Conrail by the Pennsylvania Public Utility Commission ("Commission") for any bridge or crossing on the line. N.T. 312-313, 329-331; RJC Exhibit No. 1 at 3-4; Conrail Exhibit No. 3 at 3-4.

20. If Corman does not obtain Alcoa's business, it has agreed to remove the Wilhelm Avenue bridge. N.T. 325.

21. Corman has obligated itself to petition the Commission to either reactivate all other crossings on the line or abolish them by April 16, 2000. Stipulation filed June 1, 1998, at ¶ 2(d).

22. Temporary measures are available to increase safety at the current Wilhelm Avenue crossing, such as blinking lights, speed bumps, decreasing the speed limit, and installing signage regarding conditions at the crossing in poor weather. N.T. 352-355.

SUMMARY OF ARGUMENT

Conrail should not be ordered to perform any work, nor should it be allocated any costs for any work ordered by the Commission in regard to the Wilhelm Avenue bridge. Corman was aware of Conrail's obligations in regard to the crossing prior to purchasing the line, and obligated itself to assume any costs or responsibilities imposed by the Commission in regard to the crossing in the Indenture conveying the line.

The Commission's Order dated September 15, 1993, in Docket No. A-00109901, regarding the Wilhelm Avenue crossing, should be held in abeyance until a determination is made as to the resumption of rail operations on the conveyed portion of the Cornwall Industrial Track. Corman has obligated itself to make such a determination by April 16, 2000. Temporary safety measures can be put in place until a determination regarding future use of the line is made. This course would ensure the availability of the bridge if needed for railroad purposes and would likely save tax dollars if a new bridge could be reconstructed within a time frame meeting Corman's needs on the present right-of-way alignment.

ARGUMENT

Conrail should not be ordered to perform any work nor should it be allocated any costs in regard to the Wilhelm Avenue crossing, as it no longer owns the line of railroad located at the crossing. Corman is the owner of the line located at the crossing pursuant to an Indenture dated

October 14, 1997. N.T. 270-272, 329-330; RJC Exhibit No. 1; Conrail Exhibit No. 3. Conrail has no ownership interest on the conveyed portion of the line and has no facilities at the Wilhelm Avenue crossing. *Id.* Corman is authorized to provide service on the line and as such is subject to the Commission's jurisdiction in regard to the crossings located on the line. 66 Pa.C.S. § 2702(a); Corman Exhibit No. 2; Conrail Exhibit No. 4.

The Commonwealth Court has held that "[i]t is the presence and ownership of the track involved, not any benefit conferred, which places liability on the railroad" for crossing repairs, reconstruction or maintenance. *Pa. Public Utility Commission v. Southeastern Pennsylvania Transportation Authority*, 21 Pa. Commw. 106, 343 A.2d 371, 374 (1975). In that case, a complaint regarding the condition of the crossing at issue was filed prior to the sale of the line, and an order allocating reconstruction costs to SEPTA, the acquiring railroad, was entered following the sale. *Id.* The court held that this was not improper, stating that the "fact that SEPTA acquired the ownership would suggest that they should be held liable in the first instance for they would normally assume the attendant obligations of ownership." *Id.*

The Commission has likewise held that it would be unreasonable to allocate any costs to a selling railroad, where the purchasing railroad had "every opportunity to observe the condition of the subject bridges, and that this presumably was accounted for in the bargain." *Re Pocono Northeast Railway Company*, 64 Pa. PUC 482, 483 (1987).

In the present case, Corman was aware of Conrail's obligations regarding the Wilhelm Avenue bridge prior to the conveyance, and obligated itself in the Indenture between Conrail and Corman conveying the line to assume any costs or other responsibilities imposed on Conrail by the Commission in regard to any crossing on the line¹. N.T. 312-313, 329-331; RJC Exhibit No. 1 at 3-4; Conrail Exhibit No. 3 at 3-4. Under these circumstances, it would be unreasonable for the Commission to order Conrail to perform any work or for Conrail to be allocated any costs for any work ordered to be performed at the Wilhelm Avenue crossing.

Furthermore, the Commission has specifically held that future maintenance costs may not be allocated to a railroad which has sold its facilities at a crossing. *Application of the Department of Transportation*, A-00107589, 1991 Pa. PUC LEXIS 216 at *51 (Recommended Decision dated

¹The exact indenture provision is as follows:

(4) Grantee by the acceptance of this Instrument, does hereby accept all existing and prospective responsibility for removal and/or restoration costs for any and all railroad bridges and grade crossings and their appurtenances that may be located on, over or under the Premises; and Grantee further covenants and agrees that it will also assume any obligation and/or responsibility as may have been or may hereafter be imposed on Grantor by any Public Utility Commission or any other governmental agency having jurisdiction for any and all bridge structures and grade crossings and their appurtenances, including but not limited to the removal, repairing or restoration of same in accordance with the requirements of said Commission or other governmental agency; and Grantee further agrees to indemnify, defend and hold Grantor harmless against all costs, penalties, expenses, obligations, responsibility and requirements associated with said bridge structures and grade crossings and their appurtenances.

RJC Exhibit No. 1 at 3-4; Conrail Exhibit No. 3 at 3-4.

October 8, 1991) (Recommended Decision adopted by Commission Order dated March 19, 1992). It has long been the rule that a railroad's liability for crossing obligations stems from "the presence and ownership of the track involved." *Pa. Public Utility Commission v. Southeastern Pennsylvania Transportation Authority, supra.*, 343 A.2d at 374, citing, *Lehigh & New England Railroad Company v. Public Service Commission*, 126 Pa. Super. 565, 571, 191 A. 380, 383 (1937). Therefore, future maintenance obligations for the Wilhelm Avenue crossing may not be imposed on Conrail.

Under the record as developed in this case, Conrail asserts that the best course would be to hold in abeyance a final determination regarding the disposition of the Wilhelm Avenue bridge until such time as the need for a crossing structure at Wilhelm Avenue is determined. The Cornwall Industrial Track is an operating rail line under Corman's acquisition and operation exemption from the Surface Transportation Board, and Corman is obligated to provide service on the line for a customer who desires such service. N.T. 313; RJC Exhibit No. 2; Conrail Exhibit No. 4.

Corman has obligated itself to petition the Commission by April 16, 2000, to either reactivate or abolish the at-grade crossings on the conveyed portion of the line. Stipulation filed June 1, 1998, at ¶ 2(d). Corman should be provided the same period of time to ascertain the need for a bridge at Wilhelm Avenue. This course would ensure that a crossing is available if needed, and if the Township and PennDOT can reconstruct the crossing within the time frame necessary for Corman to begin operations, significant tax dollars could be saved by obviating the need to realign the railroad right-of-way as required under the Commission's Order entered September 15, 1993, at

Docket No. A-00109901. N.T. 314. Furthermore, if Corman does not obtain the Alcoa business, it has agreed to remove the Wilhelm Avenue bridge. N.T. 325.

In its supplemental brief, South Lebanon Township argues that there is no reasonable chance for the development of any business on the subject rail line. *Id.* at 10-11. However, the Township ignores the evidence of record regarding Corman's extensive experience in the aluminum industry, and that Norfolk Southern, which would be the new interchanging carrier, currently has a good working relationship with Alcoa Aluminum at its other plants. N.T. 273-274.

The Township also contends in its supplemental brief that the Commission may close bridges or crossings indefinitely, *citing Municipality of Monroeville v. Pa. Public Utility Commission*, 143 Pa. Commw. 668, 600 A.2d 655 (1991). *Id.* at 9. The *Monroeville* case, however, deals with the closure of a public roadway, not the closure of an operating rail line under a Surface Transportation Board acquisition and operation exemption. Therefore, the *Monroeville* case has no applicability to this proceeding.

Furthermore, while arguing for the immediate removal of the bridge, the Township ignores its own numerous delays and requests for extensions of time to file the bridge reconstruction plans while Conrail was still operating on the line. The Commission should therefore order that a final determination regarding the disposition of the Wilhelm Avenue bridge be held in abeyance until April 16, 2000.

CONCLUSION

For the foregoing reasons, any determination regarding the disposition of the Wilhelm Avenue crossing should be held in abeyance until April 16, 2000, at which time Corman has obligated itself to petition the Commission to either abolish crossings on the line or reactivate them. Furthermore, Conrail should not be ordered to perform any work nor be allocated any costs in regard to any work ordered at the Wilhelm Avenue crossing.

PROPOSED CONCLUSIONS OF LAW

1. Corman is the sole owner of the rail line located at the Wilhelm Avenue crossing.
2. It would be unreasonable to hold Conrail liable for the performance of any work ordered or for it to be allocated any costs for any work ordered to be performed at the Wilhelm Avenue crossing, as Corman "would normally assume the attendant obligations of ownership" and was aware of Conrail's obligations in regard to the crossing prior to its purchase of the line. *Pa. Public Utility Commission v. Southeastern Pa. Transportation Authority*, 21 Pa. Commw. 106, 343 A.2d 371, 374 (1975); *Re Pocono Northeast Railway Company*, 64 Pa. PUC 482, 483 (1987).
3. Conrail may not be assigned any responsibility or costs for future maintenance of the Wilhelm Avenue crossing, as a railroad's liability for crossing obligations stems from "the presence and ownership of the track involved." *Public Utility Commission v. Southeastern Pa. Transportation*

Authority, 21 Pa. Commw. 106, 343 A.2d 371, 374 (1975); *Lehigh & New England Railroad Company v. Public Service Commission*, 126 Pa. Super. 565, 571, 191 A. 380 (1937). *Accord*, *Application of the Department of Transportation*, A-00107589, 1991 Pa. PUC LEXIS 216 at *51 (Recommended Decision dated October 8, 1991) (Recommended Decision adopted by Commission Order dated March 19, 1992).

PROPOSED ORDERING PARAGRAPHS

1. That the Commission's Order dated September 15, 1993, at Docket No. A-00109901, be held in abeyance until a determination is made as to the resumption of rail operations on the conveyed portion of the Cornwall Industrial Track.

2. That R.J. Corman Railroad Company/Allentown Lines, Inc., shall petition the Commission to either abandon the Wilhelm Avenue crossing or reconstruct it by April 16, 2000.

3. That South Lebanon Township and R.J. Corman Railroad Company/Allentown Lines, Inc., shall cooperate regarding the installation of any temporary safety signs or devices deemed necessary at the crossing until its removal or reconstruction, which safety signs or devices shall be installed by South Lebanon Township at its initial cost and expense, pending a final determination regarding the disposition of the Wilhelm Avenue crossing.

Respectfully Submitted,

NAUMAN, SMITH, SHISSLER & HALL

By *Benjamin C. Dunlap, Jr.*
Benjamin C. Dunlap, Jr., Esquire
Supreme Court I.D. #66283

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P. O. Box 840
Harrisburg, PA 17108-0840
717-236-3010
Attorney for Consolidated Rail Corporation

Date: June 30, 1998

CERTIFICATE OF SERVICE

I hereby certify that I served the within **Supplemental Brief of Consolidated Rail Corporation** this 30th day of June, 1998, by depositing the same in the United States mail, postage prepaid, addressed to the following:

Honorable Herbert S. Cohen
Administrative Law Judge
P.O. Box 3265
Harrisburg, PA 17105-3265
(Via Hand Delivery)

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South Lebanon Township
Board of Supervisors
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Lebanon, PA 17042

Rick Corman
R.J. Corman Railroad Company
PA Lines, Inc.
1 Jay Station
Nicholasville, KY 40356

Barbara Drake

Barbara Drake, Secretary to
Benjamin C. Dunlap, Jr., Esquire

Date: June 30, 1998

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

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June 30, 1998

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James J. McNulty, Secretary
Pennsylvania Public Utility Commission
North Office Building
P.O. Box 3265
Harrisburg, PA 17105-3265

RE: Docket Nos. A-00113589, C-
00970107, C-00970126, C-00970106
and A-00109901

Dear Secretary McNulty:

Enclosed herewith, please find the original and nine copies of the Pennsylvania Public Utility Commission, Bureau of Transportation and Safety's Brief in the above-captioned matter.

Copies have been served on the parties as stated on the Certificate of Service attached.

Very truly yours,

John Herzog
Assistant Counsel

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of the County of : Docket No. A-00113589
Lebanon Transit Authority for :
Approval of the Suspension of :
a Series of Crossings Involving :
the Cornwall Industrial Track of :
Consolidated Rail Corporation :
Located in the City of Lebanon, :
Lebanon County :

City of Lebanon, :
Complainant : Docket No. C-00970107

v.

Consolidated Rail Corporation, :
et al :
Respondent :

Commonwealth of Pennsylvania :
Department of Transportation :
Complainant :

v.

Consolidated Rail Corporation :
Respondent :

South Lebanon Township, :
Board of Supervisors :
Complainant :

v.

Consolidated Rail Corporation, :
et al :
Respondent :

Application of South Lebanon :
Township for Approval of the :
Alteration of the Crossing (AAR :
591 537 S) Where Township Road :
705 (Wilhelm Avenue) Crosses :
Below Grade of the Tracks of the :
Consolidated Rail Corporation in :
South Lebanon Township, Lebanon :
County :

Docket No. C-00970126

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Docket No. C-00970106

Docket No. A-00109901

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BRIEF OF THE BUREAU OF TRANSPORTATION AND SAFETY OF THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

John Herzog
Assistant Counsel

John B. Wilson
Counsel

P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 783-3713

Dated: June 30, 1998

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I. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On September 12, 1991, South Lebanon Township ("Township") filed an Application for approval of the alteration of a crossing where Wilhelm Avenue passes below the tracks of Consolidated Rail Corporation ("Conrail"). A field conference was held at the crossing on October 22, 1991. An evidentiary hearing on the Application was held before Administrative Law Judge (ALJ) Christianson on February 2, 1993. On July 1, 1993, ALJ Christianson issued a Recommended Decision, wherein he recommended reconstruction of the crossing. On September 15, 1993, the Commission entered an Order adopting the ALJ's recommendation. By Orders entered March 10, 1994, October 28, 1994, May 11, 1995, February 1, 1996, and February 14, 1997, the Commission granted extensions of time to the Township to file construction plans.

On July 30, 1997, the Township filed a Petition to Reopen with the Commission, based on changed circumstances since the September 15, 1993 Commission Order directing reconstruction of the crossing. On August 21, 1997, the Commission adopted an Order granting the Township's Petition to Reopen and consolidating the Application with the complaint proceedings at

Docket Nos. C-00970106, C-00970107, C-00970126.¹ Hearings were held on October 8, 1997 and April 16, 1998.

¹ These complaint proceedings were initiated by the Township, the City of Lebanon, and the Pennsylvania Department of Transportation against Conrail. The complaints involved the condition of at-grade crossings located on the Cornwall Industrial Track, the same spur on which the Wilhelm Avenue bridge is located. The parties entered into a Stipulation which addressed the issues raised in the complaints. The only issue remaining in this case is the disposition of the Wilhelm Avenue crossing.

B. FACTUAL HISTORY

This case involves the disposition of a grade-separated crossing where Wilhelm Avenue crosses under the railroad tracks of R.J. Corman/Allentown Lines, Inc. ("R.J. Allentown") on the Cornwall Industrial Track.² It is undisputed that the crossing poses an immediate safety hazard to the traveling public. (N.T. p. 354). Traffic studies indicate that the crossing is used by more than 4,000 vehicles per day. (ALJ Recommended Decision, p. 5; N.T. p. 228). Wilhelm Avenue, a two-lane road, narrows to one lane at the crossing. (N.T. p. 229). The crossing poses a drainage problem as well as a close-clearance problem, both horizontal and vertical. (N.T. p. 349). The crossing's shortcomings can not be addressed with temporary repairs, and the crossing is in need of immediate, major repair. (N.T. pp. 354, 355). It is uncontested that the bridge must be removed. (N.T. p. 232). The only issue remaining is what is to be done in connection with the removal. (N.T. p. 232).

R.J. Allentown testified that it was contemplating contacting a potential shipper on the line (ALCOA) to determine if it could provide service. (N.T. p. 272). This was the only

² R.J. Allentown became a party to this proceeding by virtue of ALJ Cohen's January 29, 1998 Order in response to Conrail's Petition to Reopen. Conrail's Petition to Reopen was based on the conveyance of portions of the Cornwall Industrial Track to R.J. Allentown, including that portion at the Wilhelm Avenue crossing.

potential shipper identified. However, R.J. Allentown had not, as of the hearing date, actually contacted ALCOA. (N.T. p. 318). R.J. Allentown does not know what products the potential shipper produces and knows nothing of the potential shipper's transportation needs. (N.T. pp. 318, 319). R.J. Allentown has no idea how much revenue could result from any contract with the potential shipper nor does R.J. Allentown have any idea how much it would cost to rehabilitate the Cornwall Industrial Track so that it would be suitable for shipping. (N.T. pp. 321, 322).

R.J. Allentown did recognize that the crossing posed an immediate safety problem incapable of resolution without bridge removal. (N.T. pp. 320, 321, 354, 355). R.J. Allentown proposed tearing the bridge down and constructing concrete abutments based on the hope that it can secure a contract with ALCOA (N.T. p. 314). R.J. Allentown wants the abutments to be constructed so that if it would contract with the potential shipper, it could quickly construct a bridge. (N.T. p. 314). R.J. Allentown does not know how much abutment construction would cost, but did not dispute a cost of \$250,000.00. (N.T. pp. 322, 323). The cost of constructing the abutments is significantly more than if the bridge were simply demolished and a standard 2:1 grading slope was used. (N.T. pp. 358, 359).

STATEMENT OF QUESTIONS PRESENTED

1. Should the Commission order removal of the Wilhelm Avenue Bridge due to immediate safety concerns?

Suggested Answer: Yes.

2. Does the Commission have authority to order removal of an unsafe crossing, notwithstanding the action by the Surface Transportation Board exempting the sale of the line?

Suggested Answer: Yes.

SUMMARY OF ARGUMENT

The Wilhelm Avenue crossing poses an immediate safety hazard to the public. The Commission ordered the crossing reconstructed in September, 1993, due to safety concerns. To date, the crossing has not been reconstructed. No rail operations are currently conducted on the line where the crossing is located and any future operation is speculative, at best. Under the circumstances, removal of the crossing is necessary to protect the public.

The Commission has exclusive jurisdiction over rail-highway crossings. Its jurisdiction to order the alteration of an unsafe crossing is not impeded by the Surface Transportation Board's exemption of the sale of the Cornwall Industrial Track from Conrail to R.J. Allentown.

ARGUMENT

A. THE WILHELM AVENUE CROSSING POSES A SIGNIFICANT AND IMMEDIATE THREAT TO THE PUBLIC SAFETY AND SHOULD BE REMOVED.

It is undisputed that the Wilhelm Avenue crossing poses an immediate safety hazard to the traveling public. Further, it is undisputed that the crossing should be removed. The only issue remaining in this case is how to accomplish removal.

All parties agree to removal of the structure and making necessary road improvements. The only disagreement lies in the extent of improvements. R.J. Allentown proposes construction of abutments for the purpose of carrying a rail bridge in the future, if need be. PennDot and South Lebanon Township oppose construction of the abutments based on the speculative nature of future need and the cost of construction. PennDot and the Township alternatively propose a standard 2:1 grade and construction of any structures in the future, if and when there is a definite need.

The Bureau of Transportation and Safety's primary concern is removal of the crossing to alleviate public safety concerns. The Commission determined that the crossing needed to be reconstructed in its September 9, 1993 Order. Nearly five (5) years have passed since the Commission adopted that Order, and

the crossing remains as it was. The time for action is now, and should not be delayed based upon speculation of future need. Further, given the speculative nature of R.J. Allentown's future need for the crossing, it hardly seems reasonable to spend public monies for the construction of abutments that may or may not be used. In any case, removal is the key issue and should be accomplished as soon as possible.

B. THE COMMISSION HAS AUTHORITY TO ORDER REMOVAL OF AN UNSAFE CROSSING REGARDLESS OF THE SURFACE TRANSPORTATION BOARD'S EXEMPTION OF THE SALE OF THE LINE.

Pursuant to Section 2702 of the Public Utility Code, 66 Pa. C.S. §2702, the Commission maintains exclusive jurisdiction to regulate the construction, alteration, maintenance and abolition of rail-highway crossings in Pennsylvania. In CSX Transportation, Inc. v. Pa. P.U.C., 558 A.2d 902, appeal denied 567 A.2d 654, (Pa. Commwlth. Ct., 1989), the Court determined that the Commission retained jurisdiction over the abandonment of the rail-highway grade-separated crossing despite the authorization of abandonment of the rail line by the Interstate Commerce Commission ("ICC"). In support of its Decision, the Court reasoned that the considerations the ICC examined (i.e., rural and community development) to determine whether to authorize abandonment of a line varied from the considerations the Commission examined (i.e., condition of crossing and public safety) to determine whether to authorize abandonment of a crossing. The Court found that removal of any tracks at a rail-highway crossing within Pennsylvania lies exclusively within the jurisdiction of the Commission.

In the present case, R.J. Allentown filed a Notice of Exemption pursuant to 49 U.S.C. §10502 with the Surface

Transportation Board ("STB")³ to acquire and operate the Cornwall Industrial Track. The STB granted the exemption on October 7, 1997, finding that the application was not necessary to carry out the transportation policy of 49 U.S.C. §10101, and that either the transaction was limited in scope or the application was not needed to protect shippers from the abuse of market power.

Notwithstanding the exemption granted by the STB, the Commission retains jurisdiction over the disposition of the crossing. The Commission does not need to order the crossing abolished at this time.⁴ Rather, the Commission can order the crossing deconstructed pending reconstruction if there is a future need. The situation is analogous to the Commission's crossing suspension authority provided at 66 Pa. C.S. §2702(g).⁵ Under this scenario, there is no conflict between the STB's grant of exemption and the Commission's disposition of the Wilhelm Avenue crossing. Further, as noted by the Court in CSX, the Commission has exclusive authority to regulate the construction and alteration of rail/highway crossings, notwithstanding action by the STB.

³ The STB is the successor to the duties of the ICC.

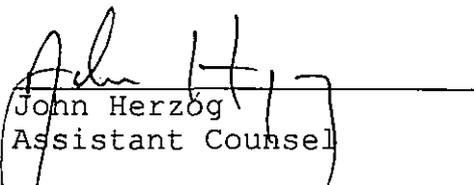
⁴ In fact, none of the parties have requested the crossing be abolished.

⁵ The Bureau notes that the parties have agreed to suspend the at-grade crossings on the line.

CONCLUSION

The Wilhelm Avenue crossing poses an immediate safety hazard to the public. Temporary repairs are insufficient to alleviate the safety concerns and the crossing should be removed. The Commission's authority to order the alteration of a crossing is exclusive and is not restricted by STB action.

Respectfully submitted,


John Herzog
Assistant Counsel
Counsel for Pennsylvania
Public Utility Commission

John B. Wilson
Counsel

P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 783-3713

Dated: June 30, 1998

PROPOSED FINDINGS OF FACT

1. This crossing involves a single railroad track which crosses over Wilhelm Avenue in South Lebanon Township, Lebanon County.
2. Wilhelm Avenue is a two-lane roadway but narrows into a one lane roadway at the crossing.
3. Wilhelm Avenue carries in excess of 4,000 vehicles per day.
4. The Wilhelm Avenue crossing is in substandard condition, with close clearance and drainage problems.
5. The Wilhelm Avenue crossing poses a hazard to the traveling public.
6. R.J. Corman Company/Allentown Lines, Inc. purchased the Cornwall Industrial Track from Consolidated Rail Corporation in October, 1997.
7. The Wilhelm Avenue crossing is located on the Cornwall Industrial Track.
8. The Cornwall Industrial Track is an active line, but currently is not in use.
9. R.J. Corman Company/Allentown Lines, Inc. expects to contact a particular shipper on the Cornwall Industrial Track, ALCOA, to determine if it can service it.
10. R.J. Corman Company/Allentown Lines, Inc. has not contacted ALCOA, does not know what ALCOA's shipping needs are, does not know what ALCOA produces at the plant, does not know what shipping arrangements ALCOA currently has, and does not know how much revenue it could expect from any contract with ALCOA.
11. R.J. Corman Company/Allentown Lines, Inc. does not know how much it would cost to rehabilitate the Cornwall Industrial Track so that it could serve ALCOA.
12. Following demolition of the bridge, building concrete abutments would cost approximately \$250,000.00.
13. Following demolition of the bridge, a standard 2:1 grade would cost approximately \$70,000.00-\$95,000.00.

PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and parties pursuant to 66 Pa. C.S. §§2702 and 2704.
2. The Wilhelm Avenue bridge poses an immediate safety hazard to the traveling public.
3. The Wilhelm Avenue bridge should be temporarily removed pending the result of R.J. Corman Company/Allentown Lines, Inc.'s negotiations with ALCOA. The removal should include a 2:1 grade.
4. Upon completion of R.J. Corman Company/Allentown Lines, Inc.'s negotiations with ALCOA, the bridge should either be rebuilt to accommodate service on the crossing or should be abolished.

CERTIFICATE OF SERVICE

I hereby certify that I am this date serving the foregoing document upon the persons and in the manner indicated below:

Service By First Class Mail Addressed As Follows:

Honorable Herbert S. Cohen
Administrative Law Judge
Pa. Public Utility Commission
P.O. Box 3265
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Timothy D. Sheffey, Esquire
Lebanon Transit Authority
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Lebanon, PA 17042-7460

Gina M. D'Alfonso, Esquire
Pa. Department of Transportation
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John B. Wengert
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278 Old Mt. Gretna Road
Lebanon, PA 17042

Benjamin C. Dunlap, Jr., Esquire
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Paul W. Kilgore
Spitler & Kilgore
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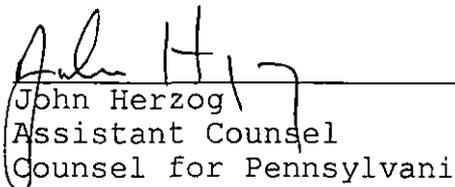
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Dated: June 30, 1998

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



155470

DOCUMENT
FOLDER

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DOCKETED

JUL 02 1998

June 30, 1998

Honorable Herbert S. Cohen
Administrative Law Judge
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

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Re: A-00109901, A-00113589, C-00970106, C-00970107, C-00970126

Dear Judge Cohen:

Please be advised that the Department of Transportation does not intend to file a brief in this matter. The Department of Transportation does, however, support South Lebanon Township in its request before the Commission as set forth in Department testimony which is part of the record.

I certify that those persons indicated in the parties of record, attached hereto, have been served with a copy of this letter.

Very truly yours,

Gina M. D'Alfonso
Gina M. D'Alfonso
Assistant Counsel in Charge

220/GMD:sls

cc: Prothonotary, Public Utility Commission
Parties of Record
William D. Pickering, P.E., Chief, Right of Way and Utilities Division, 7th Floor, Forum Place
Ray Britcher, Engineering District 8-0

EEF

PARTIES OF RECORD

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Reading, PA 19690-0001

DATE: August 19, 1998

SUBJECT: A-00113589, C-00970107,
C-00970126 & C-00970106

DOCUMENT
FOLDER

TO: Office of Administrative Law Judge
Annette Shelley

FROM: James J. McNulty
Secretary
NVL

DOCKETED
AUG 19 1998

APPLICATION OF THE COUNTY OF LEBANON TRANSIT AUTHORITY

Copies of the Recommended Decision have been served upon all parties.

Neither exceptions nor requests for review from the Commissioners have been received by the Commission. This matter is referred to your office for whatever action you deem necessary.

cc: Office of Special Assistants

P.S. Please note that exceptions or reply exceptions may come in timely with certificate of mailings. A second memo will not be released for these exceptions.

EEF