



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

ISSUED: October 10, 2001

IN REPLY PLEASE
 REFER TO OUR FILE
 C-00004204

ROBERT J POWELL SOLICITOR
 WHITE HAVEN BOROUGH
 123 WARRNE STREET
 WEST HAZELTON PA 18201

DOCUMENT
 FOLDER

White Haven Borough v. Reading, Blue Mountain and Northern Railroad Company

TO WHOM IT MAY CONCERN:

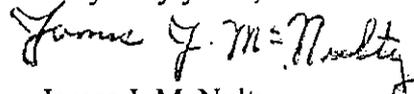
Enclosed is a copy of the Recommended Decision of Administrative Law Judge Richard M. Lovenwirth. This decision is being issued and mailed to all parties on the above specified date.

If you do not agree with any part of this decision, you may send written comments (called Exceptions) to the Commission. Specifically, an original and nine (9) copies of your signed exceptions **MUST BE FILED WITH THE SECRETARY OF THE COMMISSION, 2ND FLOOR, KEYSTONE BLDG, 400 NORTH STREET, HARRISBURG, PA OR MAILED TO P.O. BOX 3265, HARRISBURG, PA 17105-3265, within twenty (20) days of the issuance date of this letter.** The signed exceptions will be deemed filed on the date actually received by the Secretary of the Commission or on the date deposited in the mail as shown on U.S. Postal Service Form 3817 certificate of mailing attached to the cover of the original document (52 Pa. Code §1.11(a)) or on the date deposited with an overnight express package delivery service (52 Pa. Code 1.11(a)(2), (b)). If your exceptions are sent by mail, please use the address shown at the top of this letter. A copy of your exceptions must also be served on each party of record. 52 Pa. Code §1.56(b) cannot be used to extend the prescribed period for the filing of exceptions/reply exceptions. A certificate of service shall be attached to the filed exceptions.

Replies to exceptions, if any, must be served on the Secretary of the Commission, in the manner described above, within ten (10) days of the date that the exceptions are due.

Exceptions and reply exceptions shall obey 52 Pa. Code 5.533 and 5.535 particularly the 40-page limit for exceptions and the 25-page limit for replies to exceptions. Exceptions should clearly be labeled as "EXCEPTIONS OF (name of party) - (protestant, complainant, staff, etc.)". Any reference to specific sections of the Administrative Law Judge's Recommended Decision shall include the page number(s) of the cited section of the decision. All timely filed exceptions and replies thereto will be attached to the decision for consideration at Public Meeting. Late filed exceptions and/or late filed replies might not be considered by the Commission.

law
 Encls.
 Certified Mail
 Receipt Requested

Very truly yours,

 James J. McNulty
 Secretary

See attached list
 for additional parties
 of record.

REP

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

White Haven Borough	:	
	:	
v.	:	Docket No.
	:	C-00004204
	:	
Reading, Blue Mountain and	:	
Northern Railroad Company	:	

RECOMMENDED DECISION

Before
RICHARD M. LOVENWIRTH
Administrative Law Judge

DOCKETED
OCT 12 2001

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I. HISTORY OF THE PROCEEDING

This proceeding started when the Borough of White Haven (Borough) filed the Complaint at Docket Number C-00004204, on September 18, 2000. The Borough complained about two specific areas along the tracks of Reading, Blue Mountain and Northern Railroad Company (RBMNRR) in its Borough. The first area involved a collapsed retaining wall near the Berwick Street at-grade crossing. The second area involved the railroad trestle (bridge) over Susquehanna Street and the associated stone wing walls and retaining walls.

Answers to the Complaint were filed by RBMNRR on October 2, 2000, Luzerne County (County) on October 10, 2000 and Pennsylvania Department of Transportation (PennDOT) on October 10, 2000. By Hearing Notice of January 16, 2001, this proceeding was scheduled for a hearing on March 8, 2001 before

the undersigned in the Scranton State Office Building. The following parties were represented at the hearing: Borough, RBMNR, PennDOT, PA. PUC Bureau of Transportation and Safety (PUC BT&S), County and Dennison Township (Township). The hearing produced 148 pages of transcript from 4 witnesses and 7 exhibits from 4 different parties.

II. FINDINGS OF FACT

1. The area of concern involving the collapsed retaining wall near the Berwick Street at-grade crossing has been resolved. The RBMNR has removed the debris of the collapsed retaining wall and constructed a new concrete retaining wall in its place. The Borough is not seeking any further involvement, through its Complaint, with the Berwick Street at-grade crossing. N.T. 11, 16, 21, 22, 27-32, 40, 63, Borough Exh. 4 marked 3/7/01 3:21 PM (picture of reconstructed retaining wall at Berwick Street at-grade crossing).

2. The Borough still has concerns for the safety of the railroad bridge over Susquehanna Street and the associated stone masonry wingwalls and stone masonry retaining walls. N.T. 32-36, 41-66, Borough Exh. 4 (19 pictures of various parts of the bridge and stone masonry retaining walls).

3. Ronald A. Sturgeon, an Engineer with the firm of Pennoni Associates, testified on behalf of the Borough. He stated that he took the pictures in Borough Exh. 4. Some pictures were taken on September 6, 2000 (ones with vegetation) others on March 7, 2001 (ones with snow and no green vegetation). N.T. 20, 39.

4. Mr. Sturgeon testified that in his opinion the railroad bridge over Susquehanna Street was generally "sound" but it had some safety problems with the plank walkway, hand railing, hole in bridge deck, and rotting timbers. In areas behind

the bridge abutments, the railroad ballast was being held in place by timber cribbing and the hand railing, both of which were leaning against and supported by large trees.

N.T. 63, 64, 66, 73, Borough Exh. 4, N.T. 42-54.

5. Mr. Sturgeon testified that in his opinion the stone masonry retaining wall, running from the bridge to the back of the G&A Hardware parking lot, had problems with areas where there were voids behind the stones, rock movements, trees growing out of the stone retaining wall and wall failure (the area at the back of the G&A Hardware parking lot). The wall failure occurred some 30 years ago and was "repaired" with steel I-Beams and railroad timbers to support the loose stone. Now the wooden railroad timbers are rotting and there is movement in the loose stone wall. N.T. 51-61, 65-66, Borough Exh. 4.

6. Borough Exh. 4, pictures marked 3/7/01 11:29 AM and 11:30 AM, shows the railroad bridge deck with one track removed, deteriorated condition of the cross ties of the out-of-service track, the bridge handrail and plank walkway. N.T. 42, 43, Borough Exh. 4.

7. Borough Exh. 4, picture marked 3/7/01 11:46 AM, shows the railroad bridge overpassing Susquehanna Street. The picture shows the low clearance underpass (8 feet 8 inches) with the heavy vegetation/trees growing around the bridge. N.T. 41, 83, Borough Exh. 4.

8. Borough Exh. 4, pictures marked 3/7/01 11:30 AM, 3/7/01 11:28 AM, 3/7/01 11:46 AM and 3/7/01 3:23 PM, show the various parts of the railroad bridge that are unsafe; i.e., deteriorated cross ties, hole in bridge deck, ballast can fall in hole in deck, broken hand railing, ballast being pushed against and supported by the hand railing, hand railing is leaning against and supported by the trees. N.T. 43-49, Borough Exh. 4.

9. Borough Exh. 4, pictures marked 3/7/01 11:47 AM, 3/7/01 3:24 PM, 3/7/01 11:45 AM and 3/7/01 11:31 AM, show the bridge stone wingwalls with trees growing out of the stone, track ballast supported by timber cribbing which is leaning against and supported by large trees. N.T. 50-54, Borough Exh. 4.

10. Borough Exh. 4, pictures marked 3/7/01 3:23 PM, 3/7/01 11:49 AM, 3/7/01 3:24 PM, 3/7/01 11:49 AM, 3/7/01 11:50 AM, 3/7/01 3:25 PM, 3/7/01 11:51 AM and 3/7/01 11:50 AM, show the stone retaining wall running from the bridge to the back of the G&A Hardware parking lot. The retaining wall supports the railroad embankment from spilling onto the G&A Hardware property. The pictures show trees growing out of the top of the stone wall; a bulge in the stone wall approximately 25 to 30 feet from the corner of the bridge; a major failure of the stone wall, some 30 years ago, with steel structure repair. There is structural loss in the retaining wall, a bulge with a void behind it, loss of mortar in stone joints and the steel structure repair to the wall is deteriorated. N.T. 54-61, Borough Exh. 4.

11. The average daily traffic on Susquehanna Street under the bridge is estimated to be 500-600 vehicles. N.T. 66.

12. The railroad bridge over Susquehanna Street is the only railroad bridge underpass in the Borough. There are two at-grade crossings in the Borough. N.T. 67.

13. Mr. Sturgeon acknowledged that the railroad bridge is a benefit to the traveling public. He had no opinion as to the cost to repair the safety problems with the bridge and associated retaining wall. He was of the opinion that it should be the railroads responsibility to do the work and bear the cost of those repairs. N.T. 67, 68.

14. There are several underground utility facilities beneath the Susquehanna Street underpass. On the south side is a 36-inch storm sewer that was installed in 1980 by the Borough; on the north side is an 8-inch sanitary sewer; in the center is an 8-inch water main; and right of center is a UGI 2-inch gas main. N.T. 70, 81.

15. The railroad bridge over Susquehanna Street has a substructure of stone abutments and a superstructure of steel beams with wooden ties and a track on top of the beams. There is a plank walkway with a handrail on both sides of the bridge. The handrail extends off the bridge and along the active track. The bridge has a low under clearance of 8 feet 8 inches for vehicular traffic. N.T. 83, 86, 87, Borough Exh. 4, N.T. 46-49.

16. Mr. Wesley Westenhoefer, Chief Financial Analyst with RBMNR, testified that RBMNR owns the bridge over Susquehanna Street. The stone retaining wall along the track by the G&A Hardware parking lot is part of the railroad real estate. N.T. 90, 97.

17. Mr. Westenhoefer testified that RBMNR is willing to:

- A. remove the ties and timbers on the bridge of the abandoned track;
- B. will remove the walkway along the same side of the bridge as the abandoned track;
- C. will remove trees along the top of the stone wall;
- D. will agree to have an engineer investigate the stone wall to see what needs to be done;
- E. will place concrete "jersey barriers" at the bridge abutments on the abandoned track to prevent access to the bridge; and,

- F. investigate a method to control ballast spilling from the track.

N.T. 94-96.

18. There are four train movements per day over the rail line. Two trains are operated by C. P. Rail, present Owner of Delaware and Hudson Railway.

N.T. 90.

19. Mr. Westenhofer agrees with the testimony of Mr. Sturgeon as to the condition of the bridge and stone wall. N.T. 98.

20. The railroad bridge over Susquehanna Street is a benefit to RBMNR. N.T. 100. The railroad would look to the State or Borough for financial help if major repairs/new construction of the bridge or retaining wall are required. However, RBMNR is willing to do the work and bear the cost of minor work, such as that identified in Finding of Fact #17 above. N.T. 100-103.

21. Joseph Strok, an Engineer with PennDOT, testified that an engineering study is needed on the stone wall to see what is causing the failure and what can be done to rectify it. N.T. 125.

22. Section 130 Funds (PennDOT program) are used to improve safety at at-grade crossings. This program is not available for grade separated crossings such as is this crossing. N.T. 126-127.

23. Ron Hull, an Engineer with the Public Utility Commission's Transportation and Safety Bureau, Rail Safety Division, offered PUC Exh. 1. This is a copy of the Commission's Order at Docket Number A-00105685, which involves the

Susquehanna Street crossing. The proceeding at Docket Number A-00105685 was an Application by Consolidated Rail Corporation (Conrail), the then owner and operator of the subject rail line, to remove one track on the bridge. The Order directed Conrail to remove the track and to maintain its facilities at the crossing. N.T. 129-131.

24. Mr. Hull testified that the bridge consists of two separate steel superstructures supported on stone abutments. Wing walls/retaining walls run parallel to the tracks for several hundred feet in both directions. The walls support the railroad tracks.

25. Mr. Hull's testimony, as to the condition of the bridge and retaining walls, was similar to that of Mr. Sturgeon. He is concerned with:

- A. deteriorated timber ties on the bridge;
- B. trees growing on top of the retaining wall;
- C. bulging in the retaining wall;
- D. a failed section of the wall from 30 years ago needing more repairs; and,
- E. the timber cribbing wall holding the ballast.

N.T. 133-137.

26. Mr. Hull recommends the following:

- A. remove the timber railroad ties on the inactive track on the bridge;
- B. remove the bridge superstructure in its entirety on the inactive track;
- C. perform an in-depth load rating analysis of the bridge to verify its load carrying capabilities;

- D. cut down all the trees around the bridge and along the retaining wall;
- E. investigate wall failures by a certified engineer;
- F. perform remedial repairs to the wall;
- G. shore the timber crib wall with other supports than live trees; and,
- H. need to replace the bridge height clearance sign. The old sign is faded.

N.T. 133, 138, 134.

III. DISCUSSION

This proceeding began when the Borough of White Haven filed a complaint with the Pennsylvania Public Utility Commission on September 18, 2000. The Borough complained of a failed retaining wall near the at-grade crossing where Berwick Street crosses the tracks of the Reading, Blue Mountain and Northern Railroad Company. The Borough also complained of the unsafe conditions with the bridge carrying the railroad tracks of the RBMNR over Susquehanna Street as well as the associated stone wing walls and stone retaining walls supporting the railroad tracks.

The Borough's concern for the collapsed retaining wall at Berwick Street has been resolved. The railroad removed the collapsed retaining wall and constructed a new concrete retaining wall in its place. The Borough is not now seeking any further action by the Commission with the Berwick Street at-grade crossing.

The Borough's concerns for the railroad bridge over Susquehanna Street are:

1. deteriorated timber railroad ties on the bridge deck;
2. holes in the plank walkway and broken hand railing;
3. broken hand railing, off the bridge, along the tracks which are supporting the track ballast; and,
4. trees growing around the bridge and in the stone masonry wing walls.

The Borough is also concerned about the safety of the stone masonry retaining wall running from the bridge along and supporting the railroad tracks. This retaining wall runs along the track for several hundred feet. The Borough's concerns are:

1. trees growing through the stone wall causing bulges in the wall;
2. failure in the wall needing proper repairs; and,
3. timber cribbing for the ballast being supported by live trees.

The Borough requests the Commission take the necessary action to require the RBMNR to improve these unsafe conditions.

Commission Authority

The Commission has the exclusive authority, pursuant to 66 Pa. C.S.A. §2702 to order the construction, reconstruction, alteration, repair, protection, suspension or abolition of a rail highway crossing, as well as the exclusive authority to determine and order which party shall perform such work at the crossing and which party shall maintain

the crossing in the future, to prevent accidents and promote the safety of the public. SEPTA v. Pa. PUC, 140 Pa. Commw. Ct. 270, 592 A2d 797 (1991), alloc. denied, 611 A.2d 714 (1992). The Commission also is empowered, pursuant to 66 Pa. C.S.A. §2702(c), to order the work performed upon such reasonable terms and conditions as it prescribes. Pennsylvania Game Commission v. Pa. PUC, 651 A2d 596 (Pa. Commw. Ct. 1994), alloc. denied, 544 Pa. 649, 664 A2d 977 (1995). Additionally, the Commission, pursuant to 66 Pa. C.S. §2704(a), has the exclusive authority to assess the cost of any work it orders upon the concerned parties to this proceeding in such proper proportions as the Commission may determine. The Commission also determines which parties are concerned within the meaning of 66 Pa. C.S. §2704(a) and §2702(c). County of Chester v. Pa. PUC, 47 Pa. Commw. Ct. 366, 408 A2d 552 (1979). In apportioning costs in rail highway crossing cases, the Commission is not limited to any fixed rule but takes all relevant factors into consideration, the only requirement being that its order is just and reasonable. East Rockhill Township v. Pa. PUC, 115 Pa. Commw. Ct. 228, 540 A2d 600 (1988); Greene Township v. Pa. PUC, 668 A2d 615 (Pa. Commw. Ct. 1995); AT&T v. Pa. PUC, 737 A2d 201 (Pa. 1999).

Among the factors that the Commonwealth Court noted in the Greene Township case as relevant are the following: (1) Which party built the crossing; (2) Whether a roadway existed before or after the construction of the crossing; (3) Relative benefit conferred on each party with the construction of the crossings; (4) Whether either party is responsible for the deterioration of the crossing which has led to the need for its repair, replacement or removal; and (5) the relative benefit that each party will receive from the repair, replacement or removal of the crossing. While the Commission has considered these factors to be relevant in the past, this in no way limits the factors that the Commission can consider. Bell Atlantic-Pa., Inc. v. Pa. PUC, 672 A2d 3502 (Pa. Commw. Ct. 1996); AT&T v. Pa. PUC, 737 A2d 201 (Pa. 1999).

Commission Authority Over Railroad Facilities

There is no question that this Commission has jurisdiction over the rail-highway crossing at Susquehanna Street, pursuant to 66 Pa. C.S. §2702. The question is, however, whether the long retaining walls are part of the crossing. We find that they are. The stone retaining walls start at the corner of the bridge abutment and run parallel to the tracks approaching the bridge. The stone retaining walls support the railroad embankment and tracks as they approach the bridge. Consequently, the retaining walls are to be included with the crossing because they allow the tracks to be elevated to cross over the highway.

If the retaining wall were not part of the crossing, the Commission would still have jurisdiction over the wall to regulate the facilities of public utilities pursuant to 66 Pa. C.S.A. §1501. This section states in part:

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvement in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patroness, employees and the public...

In contrast to 66 Pa. C.S.A. §2702 and §2704 allowing the Commission to allocate the cost of construction or reconstruction of a rail-highway crossing among several parties, 66 Pa. C.S.A. §1501 provides that the Commission may only direct a public utility to repair its facilities. Therefore, in order for the Commission to exert jurisdiction over the retaining wall pursuant to 66 Pa. C.S.A. §1501, the Commission must first find: (1) there is a public utility, (2) that the retaining wall is a public utility facility and (3) that the retaining wall is unsafe and requires repairs for the safety of the public.

There should be no question that the RBMNR is a public utility. A public utility is defined at 66 Pa. C.S.A. §102 to include any person or corporation transporting passengers or property as a common carrier. Common carrier is defined at 66 Pa. C.S.A. §102 as any person or corporation holding out, offering or undertaking service for compensation to the public for the transportation of passengers or property.

Testimony presented by RBMNR's witness, Mr. Westenhoefer, indicates that there are 4 trains per day over the rail line running through the Borough of White Haven. RBMNR is offering service for compensation to the public for transportation of property. The RBMNR is acting as a common carrier and therefore a public utility as defined by 66 Pa. C.S. §102.

The retaining wall is a public utility facility since it is owned by the railroad. Mr. Westenhoefer, in his testimony, indicated that the railroad owns the retaining wall running parallel to the tracks and beside G&A Hardware. The statute at 66 Pa. C.S.A. §102 defines facilities as:

All the plant and equipment of a public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner, owned, operated, leased, licensed, used, controlled, furnished or supplied for, by, or in connection with the business of any public utility...

The appellate courts of the Commonwealth have construed railroad facilities under this definition to include privately owned and constructed sidewalks connected to railroad-owned property used in the public service. Lehigh Navigation and Coal Company v. Pa. PUC, 1 A.2d 540 (Pa. Super. 1938). In the past, the appellate courts of Pennsylvania have stated that 66 Pa. C.S.A. §1501 allows the Commission to regulate railroad operating practices, Erie and Lackawanna Railroad Company v. Pa. PUC, 205 Pa. Super. 291, 208 A2d 908 (1965); railroad equipment, Monongahela

Connecting Railroad Company v. Pa. PUC, 206 Pa. Super 17, 211 A2d 113 (1965); and track clearances, Reading Company v. Pa. PUC, 188 Pa. Super. 146, 146 A2d 746 (1958).

The Commission's authority to regulate safety of railroad facilities pursuant to 66 Pa. C.S.A. §1501 is limited only in certain areas of railroad safety pre-empted by federal legislation such as the Locomotive Inspection Act, Consolidated Rail Corporation v. Pa. PUC, 536 F. Supp. 653 (E.D. Pa. 1982); and the Federal Railroad Safety Act, Monongahela Connecting Railroad Company v. Pa. PUC, 45 Pa. Commw. Ct. 164, 404 A2d 1376 (1979); Bessemer and Lake Erie Railroad Company v. Pa. PUC, 28 Pa. Commw. Ct. 461, 368 A2d 1305 (1977).

Accordingly, we conclude that this Commission has subject matter jurisdiction over all concerns in the Borough's complaint.

Susquehanna Street Bridge

The Susquehanna Street Bridge is owned and maintained by RBMNR. N.T. 90, 97. The railroad will benefit from repairs which will make its facilities safe. The bridge is structurally sound as testified by the Borough Engineer and the PUC Staff Engineer. However, there are several areas of safety concerning the following:

1. holes in the plank walkway on the bridge;
2. deteriorated timber ties on the inactive track;
3. hand railing is in disrepair;
4. track ballast is spilling over and supported by the hand railing; and,
5. trees are growing around the bridge.

The railroad acknowledges these concerns and offers the following solutions/work:

1. remove the timber ties on the inactive track;
2. remove the plank walkway on the inactive track side of the bridge;
3. will place concrete “jersey barriers” at the bridge abutments on the inactive track to prevent access to the bridge; and,
4. investigate a method to control the ballast spilling from the track.

We are of the opinion that the work proposed by the railroad will resolve most concerns involving the bridge. We will direct that this work be performed by the railroad. The PUC Staff Engineer also recommended that the height clearance sign needs to be replaced because it is faded. We will also direct the railroad to do this.

There are two other areas of concern involving the bridge. First, the PUC Staff Engineer noted that the railroad should perform an In-Depth Investigation and Load Rating Analysis of the bridge. The bridge was constructed in the 1920s, thus the bridge is near 80 years old. Now would be a good time to determine and evaluate the soundness of the bridge. The investigation would determine if any minor deterioration is happening on the bridge or if any repairs are needed. We will direct the RBMNR to perform the investigation and analysis and provide a report of its findings. The report should also include any recommendation for repairs needed, if any. Second, with removal of the timber ties on the inactive track, the bridge superstructure would be open and dangerously inviting to a person crossing and/or falling through to the roadway below. In situations like this, it is best to remove the steel beam superstructure and barricade the abutments. At this bridge it is possible to remove half of the superstructure since the two tracks are supported on independent superstructures. This view is supported by the PUC Staff Engineer. N.T. 138. The Commission in 1988 by Order at A-105685 granted

Conrail's application to remove the inactive track at the crossing. There is no longer a need to keep the 80 year old bridge standing as it will slowly deteriorate and become a more serious problem. Therefore, we will direct RBMNR to do all work necessary to remove the steel superstructure of the inactive track and to construct a hand railing along the remaining active track.

Stone Retaining Walls

The evidence presented by the Borough to support its complaint about the stone retaining walls is sufficient to sustain the complaint. The testimony and pictures offered by the Borough's witness and supported testimony by the PUC Staff Engineer enumerates the problems with the stone retaining walls. Their areas of concern are:

1. trees are growing along the railroad embankment and on top of the stone retaining walls;
2. the stone retaining wall on the west side of the crossing, toward Towanda Street, has problems with trees growing but to a lesser extent to the wall on the east side, the side facing and adjacent to the G&A Hardware;
3. the east retaining wall has problems with:
 - a. trees growing in, on and through the retaining wall;
 - b. a bulge in the wall directly under a large tree growing on top of the wall;
 - c. a complete failure in the wall, from 30 years ago, with a steel and wood tie support system placed in front of the loose rock to hold it in place. The wood

ties are deteriorated and the loose rocks are able to move.

4. stone ballast from the track are supported by wood tie cribbing which in turn are supported/held in place by live trees.

The trees growing along the east retaining wall are pushing the wall through its root system. The more the stones are moved the easier it is for rainwater runoff to infiltrate behind the wall. All of this causes further problems with the wall.

Mr. Hull recommends that:

1. all the trees around the bridge and along the retaining wall be cut out;
2. shore timber crib wall retaining the ballast with other than live trees;
3. investigate wall failures by a certified engineer; and,
4. perform remedial repairs to the wall as recommended by the engineer.

Mr. Strok, the Engineer with PennDOT, concurs that an engineering study needs to be performed on the stone wall to see what is causing the failures and what repairs are necessary. In light of the condition of the stone wall, Mr. Westenhofer testified that RBMNRR would:

1. remove the trees along the top of the stone wall;
2. investigate a method to control ballast spilling from the track; and,
3. agree to have an engineer investigate the stone wall to see what needs to be done.

As aforementioned, the Commission has authority over the facilities of public utilities pursuant to 66 Pa. C.S.A. §1501. The retaining walls that run parallel to the subject tracks in the Borough of White Haven at the Susquehanna Street crossing are a public utility facility as defined by 66 Pa. C.S.A. §102. The retaining walls are part of the railroad property that runs through the Borough of White Haven. In its current condition, the retaining walls and the vegetation growing directly behind or through the wall present a hazard to the general public.

We are of the opinion that the work proposed by the railroad will start the process of making the stone retaining wall a safer facility. Therefore, we will direct RBMNRRT to remove the trees and support the ballast along the track. As to the structural integrity of the stone retaining wall, we will direct RBMNRRT, through an independent consultant-engineer, to perform an in-depth inspection and investigation of the retaining walls along its tracks leading from the Susquehanna Street Bridge. Said investigation is to include an evaluation of the stability of the stone walls, location of failures or potential failures, reason for failures or bulges in the walls, recommendation(s) for prevention of further problems, recommendation(s) for repairs of current wall failures or bulges including cost estimates of said work/repairs. The independent consultant engineer is to provide a written report of the inspection and investigation with recommendations, and said report is to be filed with this Commission and all parties to this proceeding. The report and recommended necessary work to return the stone retaining wall to a safe condition will be the subject of a further hearing.

Assignment Of Work

The Commission has the exclusive authority, pursuant to 66 Pa. C.S.A. §2702(c) “to order the work ... of any crossing ... to be performed in whole or in part by any public utility or municipal corporation concerned or by the Commonwealth.” In a like manner the Commission has the authority to direct a public utility, such as RBMNR, to furnish and maintain safe facilities, 66 Pa. C.S.A. §1501.

The work herein ordered is on railroad property for railroad-owned facilities. In our opinion, it would be inappropriate to assign work involving railroad facilities to any party other than the railroad. RBMNR controls the operation of its trains and any work along its tracks, while the trains are running, should be under its control for safety reasons. Removal of the superstructure of the inactive track should be performed by the railroad. However, we would ask the Borough and PennDOT to cooperate with the railroad in the establishment of traffic controls and/or detours necessary to control vehicular traffic during removal of the bridge span. Cutting and removing of the trees around the bridge and along the railroad tracks should be performed by the railroad for safety of its train operations.

The in-depth inspection and investigation of the retaining walls should be performed by an independent engineer to remove any bias on the part of the railroad, Borough or the adjacent property owners. This responsibility will be assigned to the railroad, however, to hire the engineer and coordinate the inspection with train movements and review of railroad files and plans of the existing stone wall.

Several utility facilities have been noted as being located under the pavement for Susquehanna Street where it passes under the railroad bridge. The work that is contemplated by this order should not interfere with the underground utility facilities. We will direct, however, that the non-carrier utilities protect and/or relocate

their respective facilities, if necessary, to accommodate the work herein ordered. This is a precautionary measure. If the utilities incur any cost as a result of this order, their cost can be addressed at the further hearing.

Allocation Of Costs

The Commission has exclusive authority pursuant to 66 Pa. C.S.A. §2704(a) to assign cost of a project to be born and paid by the public utilities, municipal corporations or by the Commonwealth. Also in a like manner 66 Pa. C.S.A. §1501, the Commission shall assign costs to furnish and maintain reasonable and safe facilities.

Work involving the railroad crossing consists of removing the timber ties and steel superstructure of the inactive track, construction of a new hand railing along the active track, repairs to holes in the existing plank walkway, and repairs to the hand railing just off the bridge. All of this work involves railroad-owned facilities. The railroad has agreed to do all this work, excluding removal of the steel superstructure. We will assign cost of this work to RBMNR, first because they have agreed to bear most of the work at their cost. Second, because the railroad is the only party to benefit from this work. Most of this work is safety in nature to improve the railroad's long-term maintenance responsibility and somewhat of future liability.

The cutting and removal of trees around the bridge and along the track and/or retaining walls also benefit the railroad only. This improves the safety of the railroad's facilities. The cost of this work therefore should be assigned to the RBMNR, which it has agreed to bear.

The inspection and investigation of the stone retaining walls will benefit the railroad. The retaining walls are the facilities of RBMNR. The retaining walls support

the track embankment from spilling over onto private property. Failure of the retaining wall can cause damage to the railroad facilities but also to the adjacent property. On one side this involves the G&A Hardware Store which is very close to the wall. The retaining walls have had a failure and show signs of potential failure, for example, a bulge in the wall. It is the responsibility of the railroad to maintain its facilities in a safe condition. Therefore, we will assign to RBMNR the cost of the engineering inspection and investigation of the retaining walls.

IV. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties to and the subject matter of this proceeding. 66 Pa. C.S.A. §§2702, 2704.

2. The Commission has exclusive jurisdiction over the rail-highway crossings in the Commonwealth and the approaches thereto. 66 Pa. C.S.A. §2702; *Department of Transportation v. Pa. P.U.C.*, 440 A.2d 657 (Pa. Cmwlth 1982); *Springettsbury v. Pa. P.U.C.*, 289 A.2d 762 (Pa. Cmwlth 1972).

3. The Commission has the exclusive authority to order the construction, reconstruction, alteration, repair, protection or abolition of rail-highway crossings, as well as the exclusive authority to determine and order which parties should perform such work at the crossings and which parties shall maintain the crossings in the future, all to effectuate the prevention of accidents and to promote the safety of the public. 66 Pa. C.S.A. §§2702, 2704.

4. The Commission is empowered to order the alteration and reconstruction of rail-highway crossings upon such reasonable terms and conditions,

including the assignment of future maintenance of any portion of the crossing remaining in place, as it shall prescribe. 66 Pa. C.S.A.2704(a).

5. The Commission has the exclusive authority to assess the costs of the work ordered performed upon the parties to this proceeding in such proper proportions as it may determine. 66 Pa. C.S.A. §2704(a).

6. In apportioning costs in rail-highway crossing cases, the Commission is not limited to any fixed rule, but takes into consideration all relevant facts, the only requirement being that its Order must be just and reasonable. *Greene Twp. V. Pa. P.U.C.*, 668 A.2d 615 (Pa. Cmwlth. 1995); *Bell Atlantic-Pa., Inc. v. Pa. P.U.C.*, 672 A.2d 352 (Pa. Cmwlth 1996).

7. The Commission is empowered to order every public utility to furnish and maintain adequate, efficient, safe and reasonable services and facilities. 66 Pa. C.S.A. §1501.

V. RECOMMENDED ORDER

THEREFORE,

IT IS ORDERED (Subject to Commission Approval):

1. That the Complaint of the Borough of White Haven involving the rail-highway crossing at Berwick Street is dismissed for satisfaction of that part of the Complaint; and sustained as it relates to the Susquehanna Street below-grade crossing and associated stone retaining walls.

2. That Reading, Blue Mountain and Northern Railroad Company, having agreed to do so, at its sole cost and expense, within nine (9) months of service of the Commission Order, furnish all material and do all work necessary to cut and remove all trees growing around the Susquehanna Street Bridge and between its tracks and the retaining walls along the track approaching the bridge.

3. That Reading, Blue Mountain and Northern Railroad Company, having agreed to do so, at its sole cost and expense, within nine (9) months of service of the Commission Order, furnish all material and do all work necessary to control, support or retain the track ballast from spilling from its intended location. This includes, but is not limited to, areas where existing timber cribbing is supported by live trees or areas where the ballast is supported by the hand railing which is leaning against live trees.

4. That Reading, Blue Mountain and Northern Railroad Company, having agreed to do so, at its sole cost and expense, within nine (9) months of service of the Commission Order, furnish all material and do all work necessary to repair and make safe the hand railing and plank walkway on the East side of the active track; this includes on the bridge and along the track approaches to the bridge.

5. That Reading, Blue Mountain and Northern Railroad Company, at its sole cost and expense, within nine (9) months of service of the Commission Order, furnish all material and do all work necessary to demolish and remove that portion of the superstructure of the Susquehanna Street Bridge which carried the inactive track of the railroad. Said work to include, but not be limited to, removing the timber ties, plank walkway and hand railing, and the steel beams. Also, to install concrete barriers, as it agreed to do so, at each abutment to effectively close off the area where the inactive track superstructure was removed. Also, as a safety measure, to construct a hand railing along the West side of the remaining bridge structure.

6. That Reading, Blue Mountain and Northern Railroad Company, at its sole cost and expense, within twelve (12) months from service of the Commission's Order: (1) perform an In-Depth Inspection and Load Rating analysis of the railroad bridge over Susquehanna Street in the Borough of White Haven; and (2) prepare and submit to this Commission and each party of record a written report of the In-Depth Inspection and Load Rating Analysis of the structural members with a recommended load carrying capacity of the subject bridge.

7. That Reading, Blue Mountain and Northern Railroad Company, at its sole cost and expense, with services of an outside consultant engineer, within twelve (12) months from service of the Commission's Order: (1) perform an in-depth inspection and evaluation of the stone retaining walls along its tracks leading from the Susquehanna Street railroad bridge; and (2) prepare and submit to this Commission and each party of record a written report of its in-depth inspection and evaluation of the retaining walls including an evaluation of the stability of the stone walls, locations of failures or potential failures, reasons for failures or bulges in the walls, recommendations for prevention of future problems and recommendations for any necessary repairs including cost estimates for said work.

8. That the Borough of White Haven, Pennsylvania Department of Transportation, County of Luzerne, and the non-carrier utilities involved cooperate with the Reading, Blue Mountain and Northern Railroad Company while it performs the work herein ordered.

9. That Reading, Blue Mountain and Northern Railroad Company, at its sole cost and expense, furnish and maintain flagmen, watchmen and construction inspectors and engineering services, as necessary, while work is being performed above, along and across its tracks in accordance with this Order.

10. That the non-carrier utilities involved, if any, each at its initial cost and expense, shall furnish all material and do all work necessary to alter, relocate or protect its facilities as necessary to accommodate construction of the work herein ordered.

11. That Reading, Blue Mountain and Northern Railroad Company, at its sole cost and expense, furnish all material and do all work necessary to establish and maintain traffic controls and/or traffic detours, if required, at the subject crossing to provide a safe condition for pedestrians, vehicular traffic, and construction workers in the crossing area, all in accordance with the Manual of Uniform Traffic Control Devices.

12. That Reading, Blue Mountain and Northern Railroad Company, at its sole cost and expense, furnish all material and do all work necessary to (1) determine the actual vertical clearance at the crossing upon removal of the inactive track superstructure, and (2) erect and maintain appropriate low clearance signs at the crossing indicating the proper clearance.

13. That upon completion of the removal of the inactive track superstructure, Reading, Blue Mountain and Northern Railroad Company, at its sole cost and expense, furnish all material and do all work necessary to maintain the remaining bridge substructure and superstructure, including any walkways and hand railings associated with the bridge, all in a safe and satisfactory condition.

14. That upon completion of the work herein ordered, Reading, Blue Mountain and Northern Railroad Company, report to this Commission the date of actual completion of the work.

15. That upon completion of the work herein ordered, the Borough of White Haven, at its sole cost and expense, furnish all material and do all work necessary thereafter to maintain Susquehanna Street at the subject crossing.

16. That this Order, insofar as it places costs on the various parties, is without prejudice to their rights to recover the said cost from others in accordance with any lawful agreement.

17. That upon the submission of the In-Depth Inspection and Load Rating Analysis Report of the bridge and the In-Depth Inspection and Evaluation Report of the retaining walls, a further hearing be held to consider the reports and their recommendations and any other issues involved.

Dated: September 13, 2001


RICHARD M. LOVENWIRTH
Administrative Law Judge