

COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P. O. BOX 3265, HARRISBURG, Pa. 17120

April 28, 1982

IN REPLY PLEASE  
REFER TO OUR FILE

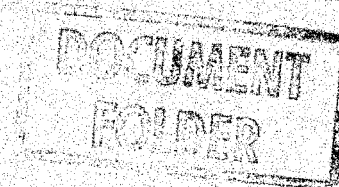
C-79081404

Francis X. O'Connor, Esquire  
Main Street  
Great Bend, PA 18821

Great Bend Township

v.

Consolidated Rail Corporation, Pennsylvania Department of  
Transportation, County of Susquehanna, Pennsylvania Electric  
Company and Commonwealth Telephone Company



To Whom It May Concern:

Enclosed is a copy of a proposed Initial Decision prepared by  
Administrative Law Judge Thomas J. Jones.

An original and nine (9) copies of exceptions to the decision,  
if any, must be filed in the Secretary's Office and a copy to each party  
of record within 15 days of the date of this letter.

Replies to the exceptions, if any, must be filed within 20 days  
of the date of this letter.

Exceptions should be clearly labeled as "EXCEPTIONS OF (name of  
party) - (protestant, complainant, staff, etc.)". Do NOT label exceptions  
as a "Brief" or "Brief on Exceptions".

All timely filed exceptions and replies thereto will be attached  
to the decision for consideration at Public Meeting. Late filed exceptions  
and late filed replies will not be attached.

Very truly yours,

*Jenice M. Zurat*  
for Jerry Rich  
Secretary

fao  
Enclosures  
Certified Mail  
Receipt Requested

cc: ALJ Jones / Bigelow / Bureau of Rail Transportation / OSA/  
Mr. Bramson / Chairman / Commissioners

Similar letter list attached.

Similar letters to:

Joel E. Mazor, Commerce Counsel  
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1138 Six Penn Center Plaza  
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PENNSYLVANIA PUBLIC UTILITY COMMISSION

Great Bend Township

v.

Consolidated Rail Corporation, Pennsylvania  
Department of Transportation, County of  
Susquehanna, Pennsylvania Electric Company  
and Commonwealth Telephone Company

C-79081404

Before:

Thomas J. Jones  
Administrative Law Judge

Appearances:

Francis X. O'Connor, Esquire  
Main Street  
Great Bend, Pennsylvania 18821  
For Great Bend Township

Joel E. Mazor, Esquire  
1138 Six Penn Center Plaza  
Philadelphia, Pennsylvania 19104  
For Consolidated Rail Corporation

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Office of Chief Counsel  
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For Pa. Dept. of Transportation

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For Pa. Public Utility Commission

Robert G. Dean, Esquire  
Box 97  
Montrose, Pennsylvania  
For County of Susquehanna

DOCKETED  
APR 30 1982

INITIAL DECISION

(On Remand)

Date: April 1, 1982

## HISTORY OF PROCEEDING

This proceeding began on September 6, 1979 when Great Bend Township filed a formal complaint against Consolidated Rail Corporation (ConRail), the Pennsylvania Department of Transportation and Susquehanna County, alleging that Respondents had failed to properly maintain a bridge carrying Township Road 821 (old U. S. Route 11) over and above the tracks of ConRail, situated in Great Bend Township, Susquehanna County, located approximately two (2) miles south of the Hallstead - Great Bend Township border. The complaint alleged that the southwest wing wall of the bridge had a shearing and horizontal crack and that a spalling of the wall had occurred.

Hearings on this matter were held at Montrose, Pennsylvania on November 1, 1979 before this Administrative Law Judge, who, by Initial Decision issued February 14, 1980, directed ConRail to prepare at its initial cost and expense, and submit to the parties of record and to the Commission for approval, within six (6) months of the date of service of the Commission order, detailed plans for reconstruction of the southwest wing wall of the bridge, which will eliminate a horizontal crack and concrete spalling condition, and to remove any unsound concrete in the lower portion of the wing wall. This Administrative Law Judge directed that the repairs be completed on or before December 31, 1981. By order of March 28, 1980, the Commission adopted the presiding officer's Decision, except that the time period for submitting of plans was reduced from six months to three months, and the completion date was moved up to July 1, 1981. The Commission was persuaded to change the dates by the Exceptions of the PUC Staff, which argued that the repairs were of a minor nature, but that the wing wall was in danger of failing.

ConRail submitted the plans on March 20, 1981, with an estimated cost of work at \$103,200. After a meeting with PUC Staff engineers to find a less expensive alternative, ConRail submitted revised plans, which prevent subsidence of the roadway embankment without repairing the wing wall. The alternate method would cost approximately \$20,340. On September 25, 1981, the Commission adopted an order approving the alternate method of repair.

On November 9, 1981, ConRail filed a Petition for an Extension of Time, requesting that the deadline for completion of work set by Commission's Order of March, 1980 to be July 1, 1981, be changed to October 31, 1982. On January 27, 1982, this Administrative Law Judge issued an Initial Decision, granting that Petition. In ruling on the Exceptions to that Decision, the Commission, at its Public Meeting of March 12, 1982, established July 1, 1982 as the deadline for completion of work.

#### ISSUE

This Decision concerns two major issues involved in this proceeding. First, it concerns the issue of ConRail's Petition for Modification of the Commission's Order of August 14, 1980, filed on September 16, 1980. The Petition requests that ConRail be relieved of its obligation under the Order to prepare plans and repair the wing wall, as specified by the Commission in said Order, alleging that the rail line has now been sold to the Delaware and Hudson Railroad (D&H). Secondly, the Decision concerns and addresses the Commission's Order to Show Cause to Delaware and Hudson Railroad issued on September 16, 1980, which resulted from ConRail's Petition. That Order required D&H to show cause why it should not be made a party to these proceedings. A hearing in regard to said Petition was scheduled and held on July 29, 1981 at the Scranton State Office Building, Scranton,

SUMMARY OF TESTIMONY

(ConRail)

John A. Smith, Senior Civil Engineer appearing on behalf of ConRail, testified as follows. ConRail no longer operates over the line involved at this crossing. It is now operated by D&H. ConRail Exhibit 1 is a copy of Part VII of its Agreement of Sale with D&H, which grants D&H the right to operate the line and makes D&H responsible for operating and maintaining the line. ConRail still owns the line, inasmuch as title has not been transferred. (N.T. 15)

According to ConRail's attorney, Mr. Mazor, settlement for the transfer of ownership will be held after certain conditions are met, at a mutually agreeable time and place on or before December 31, 1982, at which time the Agreement will terminate.

(D&H)

Harry E. Shultz, Assistant Chief Engineer with D&H, testified as follows. D&H should not be determined to be an interested party responsible for performing any obligations imposed upon ConRail by the Commission's Order of August 14, 1980, either alone or jointly with ConRail. The agreement between the two railroads is an agreement of sale, and not the actual sale of the line. Title has not yet passed to D&H. (N.T. 21) There is no mention in the sales agreement of responsibility for reconstruction costs. The entire sales agreement, dated September 8, 1980, was entered as D&H Exhibit No. 1.

The witness further testified that D&H should not be required to pay any of the costs of plans, work, materials or flagmen because it is the public, not the railroad, which benefits most from the crossing. D&H suffered ordinary losses of \$8,697,000 for 1979; \$9,216,000

for 1980; and \$5,947,000 for the first five months of 1981. It does not have funds available to contribute to crossing reconstruction projects which primarily benefit the traveling public. D&H currently operates six trains per day through the crossing. The witness is unable to say whether D&H will meet the termination date of the sales agreement. The work to be performed is part reconstruction and part repair. D&H has forces assigned to maintain the line of track.

#### DISCUSSION

D&H argues that it should not be made a party to the proceeding and should not be ordered to assume ConRail's obligations primarily because it was not a party to prior hearings which resulted in the imposition of those obligations on ConRail.

By virtue of its operation of trains over the line at the crossing, D&H is an interested party subject to the jurisdiction of this Commission. Section 102 of the Public Utility Code defines a public utility as:

"any person or corporation now or hereafter owning or operating in the Commonwealth equipment or facilities for ... (iii) transporting passengers or property as a common carrier." (Emphasis added)

It defines common carrier as:

"any and all persons or corporations holding out, offering, or undertaking, directly or indirectly, service for compensation to the public for the transportation of passengers or property, or both, or any class of passengers or property, between points within this Commonwealth by, through, over, above, or under land, water, or air, and shall include forwarders, but shall not include contract carriers by motor vehicles, or brokers, or any bona fide cooperative association transporting property exclusively for the members of such association on a nonprofit basis." (Emphasis added)

Public Utility Code, 66 Pa. C. S. §102.

Under Section 2702(c), the Commission has exclusive power,

after hearing, upon notice to all parties in interest, to order, among other things, the alteration of a crossing, to determine plans and specifications. "The Commission may order the work of ... alteration ... to be performed in whole or in part by any public utility concerned ..." 66 Pa. C. S. §2702(c). Similarly, Section 2704(a) gives the Commission the power to allocate costs to said concerned public utilities.

Since the day it began operating over the rail line at the crossing under the terms of the sales agreement, D&H is a concerned public utility which should be a party to this proceeding. By virtue of the Rule to Show Cause and the hearing of July 29, 1981, it has been given ample notice and opportunity to be heard on that issue. This order shall serve as notice of its inclusion as a concerned public utility. Its argument that it has been denied due process concerning preparation of plans and allocation of cost and work is not compelling, since the Commission can always hold further hearings, upon its own motion or petition by the parties, to examine any further evidence regarding those matters.

ConRail's Petition to Modify the Commission's Order of August 14, 1980 argues that the sales agreement makes D&H responsible for maintenance and liability arising from the operation of the line. Thus, ConRail seeks to be relieved of the responsibilities put upon it by said Commission Order. Because of the terms of the sales agreement and the impending sale of the line, ConRail feels that D&H or some other party should be allocated its responsibilities.

ConRail's argument overlooks the obvious and admitted fact that ConRail still owns the rail line in question. The actual transfer has not taken place (N.T. 15). As owner of the line, ConRail remains

a concerned public utility to whom work and costs can be assigned, regardless of whether it operates its own trains over the line or not. Just because D&H is now operator of the line and an interested party does not mean that ConRail's responsibilities should be shifted to it. On the contrary, the fact that ConRail still owns the line and the possibility that the actual transfer may never take place leads to the conclusion that ConRail is the appropriate party to bear the responsibilities assigned to it by the Order of August 14, 1980. Therefore, the Petition will be denied. ConRail is held responsible for complying with that Order. However, this does not preclude it from recovering costs from D&H in accordance with any lawful agreement or any other party.

#### FINDINGS OF FACT

1. ConRail is the owner of the line of rail involved at the crossing.
2. A sales agreement between ConRail and D&H is currently in effect, but the actual transfer of the line has not taken place.
3. D&H operates trains over the line at the crossing.
4. ConRail operates no trains on the line.

#### CONCLUSIONS OF LAW

1. D&H should be made a party to this proceeding.
2. ConRail's Petition should be denied.
3. That ConRail should comply with outstanding Commission Orders.

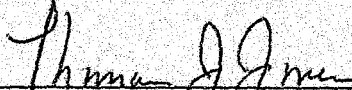
NOW, THEREFORE,

IT IS ORDERED as follows at C-79081404:

1. That Delaware and Hudson Railroad Company is determined to be an interested and concerned party to this proceeding.

2. That the Petition of Consolidated Rail Corporation for Modification of the Commission's Order of August 14, 1980, said Petition docketed on September 16, 1980, is hereby denied.

3. That all prior Commission orders in this procedure remain in full force and effect.

  
\_\_\_\_\_  
Thomas J. Jones  
Administrative Law Judge

April 1, 1982  
Date