

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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|---|---|----------------|
| Joel Royer | : | |
| | : | |
| v. | : | C-2016-2580970 |
| | : | |
| Buffalo & Pittsburgh Railroad, Inc. | : | |
| Pennsylvania Department of Transportation | : | |
| Indiana Borough and Indiana County | : | |

RECOMMENDED DECISION

Before
David A. Salapa
Andrew M. Calvelli
Administrative Law Judges

INTRODUCTION

An individual filed a complaint concerning the uneven condition of the roadway of an at-grade crossing. This decision sustains the complaint and directs parties to perform work to smooth the roadway at the crossing.

HISTORY OF THE PROCEEDINGS

On December 22, 2016, Joel Royer (Complainant) filed a complaint with the Pennsylvania Public Utility Commission (Commission) against the Buffalo & Pittsburgh Railroad, Inc. (Railroad). The complaint alleges that the at-grade crossings where Oakland Avenue and Grant Street in Indiana Borough (Borough), Indiana County (County) cross the facilities of the Railroad are unsafe. According to the complaint, the crossings are not smooth due to an abrupt change in height where the streets intersect the Railroad's facilities. Attached to the complaint are several pictures showing the crossings and the change in height at the crossings. The

complaint requests that the Commission direct the Railroad to repair the crossings so that they are restored to a smooth and satisfactory condition.

Pursuant to 52 Pa.Code § 3.361(a), the Commission made the Pennsylvania Department of Transportation (DOT), the Borough, the County and the Railroad parties respondent and served copies of the complaint on those entities on December 22, 2016.

On January 11, 2017, DOT filed an answer in response to the Complainant's complaint. The answer admits that the crossings are no longer smooth. The answer requests that the Commission schedule a field conference in this matter.

On January 18, 2017, the County filed an answer with new matter in response to the Complainant's complaint. The answer asserts that Oakland Avenue and Grant Street are not owned or maintained by the County and that the County has no responsibility for the crossings.

The new matter incorporates the assertions set forth in the answer. The new matter asserts that none of the allegations in the complaint are directed against the County. The new matter concludes that the complaint fails to assert a cause of action against the County. The answer with new matter requests that the Commission dismiss the complaint as to the County.

On January 25, 2017, the Railroad filed an answer in response to the Complainant's complaint. The answer admits that the Railroad has facilities at the Oakland Avenue and Grant Street crossings. The answer indicates that the Railroad is without knowledge as to whether there is a significant difference in height between the roadway and the Railroad's facilities.

The answer further asserts that the crossings are safe for railroad operations. According to the answer, any difference in height is the result of vehicle traffic, not the result of railroad operations. The answer requests that the Commission not take any action until after the parties have an opportunity to determine whether repairs to the crossings are necessary.

By notice dated May 10, 2018, the Commission scheduled a telephonic prehearing conference for this matter on July 10, 2018 at 10:00 a.m. and assigned the case to Administrative Law Judge (ALJ) David A. Salapa. ALJ Salapa issued a prehearing conference order dated May 11, 2018.

On May 18, 2018, the Commission's Bureau of Investigation and Enforcement (I&E) filed a notice of appearance.

By notice dated June 19, 2018, the Commission rescheduled the telephonic prehearing conference for this matter on August 2, 2018 at 10:00 a.m.

ALJ Salapa conducted a telephonic prehearing conference in this case as scheduled on August 2, 2018 at 10:00 a.m. Participating were the Complainant and counsel for the Railroad, DOT, I&E, Borough and County.

As a result of the prehearing conference, ALJ Salapa issued Prehearing Order #2, dated August 3, 2018, which established a litigation and briefing schedule. By notice dated August 3, 2018, the Commission scheduled a hearing in this matter on November 13, 2018 at 10:00 a.m. in Hearing Room 2, Commonwealth Keystone Building in Harrisburg.

By notice dated September 14, 2018, the Commission notified the parties that ALJ Andrew M. Calvelli had been assigned to this proceeding as an additional presiding officer.

We conducted the hearing as scheduled on November 13, 2018. At the hearing, the Complainant appeared pro se and testified in support of his complaint. He also sponsored 38 exhibits. Mr. Royer's exhibits consisted generally of the following: 1) a number of photographs (mainly taken by Mr. Royer) of the railroad crossing, showing Mr. Royer's ruler measurements of the differences in grade between the crossing and surrounding surfaces; 2) videotapes made by Mr. Royer showing him travelling across the railroad crossing in his car; and 3) videotapes of other motorists travelling across the railroad crossing in their cars. Gina M. D'Alfonso, Esquire, represented DOT which presented one witness and four exhibits. Bradley R. Gorter, Esquire,

represented I&E which presented one witness. Eric M. Hocky, Esquire, represented the Railroad which presented one witness and four exhibits. Neva L. Stotler, Esquire, represented the Borough which presented one witness. Matthew T. Budash, Esquire represented the County which presented three witnesses.

The hearing resulted in a transcript of 64 pages, numbered 56-120. At the conclusion of the hearing, DOT, I&E, the Railroad, the Borough and the County requested the opportunity to file proposed findings of fact and conclusions of law and agreed to file them within thirty days of the date of the hearing. N.T. 113-117.

We offered the Complainant the opportunity to file proposed findings of fact and conclusions of law. N.T. 114-117. The Complainant did not file any proposed findings of fact and conclusions of law.

DOT, I&E, the Railroad, the Borough and the County filed proposed findings of fact and conclusions of law on December 12, 2018. The record closed on December 12, 2018, upon the filing of the proposed findings of fact and conclusions of law.

FINDINGS OF FACTS

1. Complainant is Joel Royer, who resides at 991 Barclay Road, Indiana, Pennsylvania, 15701. Tr. pp. 61, 62.
2. Mr. Royer is a retired electrical engineer. Tr. p. 62.
3. Mr. Royer alleged in his Complaint that “The railroad crossing concrete rail bed at the intersection of Oakland Avenue & Grant Street in Indiana, PA has sunk relative to its concrete aprons at Oakland Ave and its adjacent amiesite at Grant St. The crossing is no longer smooth to vehicular traffic due to the abrupt change in height causing significant impact to tires.” Complaint at Paragraph 3.

4. The crossings are located in Indiana Borough, Indiana County. I&E St. 1, p. 3.
5. The crossings are one long at-grade crossing approximately 137 feet in length. I&E St. 1, p. 3.
6. Grant Street and Oakland Avenue intersect adjacent to where a single track of the Railroad crosses those streets. I&E St. 1, p. 3.
7. The crossings are protected by railroad flashing lights, gates and traffic signal preemption. I&E St. 1, p. 4.
8. The railroad crossing surface is made up of a series of concrete panels anchored into the railroad ties with steel fasteners. I&E St. 1, p. 4.
9. Each concrete panel is approximately nine feet long. I&E St. 1, p. 4. The panels have steel angle iron around the perimeter of each concrete panel. I&E St. 1, p. 4.
10. The center panels between the tracks are approximately four feet wide and the panels outside of the tracks are approximately two feet wide. I&E St. 1, p. 4.
11. The concrete panel surface extends through two concrete sidewalks, one located along Oakland Avenue and one located along Grant Street. I&E St. 1, p. 4.
12. The Grant Street roadway approaches are flexible bituminous pavement up to the concrete panels. I&E St. 1, p. 4.
13. The Oakland Avenue roadway approaches are flexible bituminous pavement over reinforced concrete pavement. I&E St. 1, p. 4.

14. There is a height difference of approximately two inches between the height of the street and the height of the railroad facilities. Complainant's St. 1, Complainant's Exs. 1-23.

15. The condition of the crossing produces a ride that is not smooth. Complainant's Exs. 24-34.

16. The crossing had been previously reconstructed pursuant to Commission order dated June 15, 2004 at A-00117322. DOT St. 1, p. 3-4, DOT Ex. C-1.

17. The June 15, 2004 order directed the reconstruction of the crossing to its current configuration. DOT Ex. C-1. Paragraph 22 of the June 15, 2004 order directed DOT to maintain the highway approaches on Oakland Avenue and the west approach of Grant Street up to the concrete crossing surface. DOT St. 1, p. 4, DOT Ex. C-1.

18. By Secretarial Letter dated July 17, 2007 at A-00117322, the Commission stated that a Commission engineer had inspected the crossing on November 3, 2006 and that the work at the crossing had been completed in accordance with the June 15, 2004 order. DOT Ex. C-2.

19. The July 17, 2007 Secretarial Letter closed the proceeding at A-00117322. DOT Ex. C-2.

20. The average daily traffic (ADT) using the crossing at Oakland Avenue is 8,993 vehicles. DOT St. 1, p. 3, DOT Ex. B.

21. DOT plans to resurface Oakland Avenue in 2019. DOT St. 1, p.4-5.

22. As part of the resurfacing project, DOT will mill the lip at the crossing to reduce the difference in elevation at the crossing surface. DOT St. 1, p.4-5.

23. DOT will also address the elevation differences at the sidewalks on Oakland Avenue and the west approach to Grant Street. DOT St. 1, p. 5.
24. DOT will bear the cost of resurfacing the roadway and sidewalk adjustments. DOT St. 1, p.5.
25. DOT will perform this work between June and August of 2019. DOT St. 1, p. 5.
26. The Borough plans to mill and repave the roadway surface on the east and west side of the Railroad's tracks south of the Oakland Avenue right of way. Borough St. 1, p. 1.
27. The milled area will be repaved to the level of the concrete crossing. Borough St. 1, p. 1.
28. The Borough will also remove or grade the sidewalk to the concrete crossing on each side of the Railroad's tracks on the southernmost portion of the crossing. Borough St. 1, p. 1.
29. The crossing is currently safe for railroad operations. Railroad St. 1, p. 1.
30. The Railroad currently operates two trains per day over the crossing, mostly between 6:00 p.m. and 6:00 a.m. Railroad St. 1, p. 2.
31. The speed limit for trains using the crossing is ten miles per hour. Railroad St. 1, p. 2.
32. The Railroad has maintenance responsibility for the concrete crossing surface as well as its track and other facilities, pursuant to paragraph 19 of the June 15, 2004 Commission order at A-00117322. Railroad St. 1, p. 2.

33. In the summer of 2015, the Railroad replaced some of the concrete panels at the crossing. Railroad St. 1, p. 3.

34. In July 2018, the Railroad applied cold patch to areas in several of the concrete panels at the crossing and removed a broken piece of metal framing on one panel. Railroad St. 1, p. 3.

35. As part of its ongoing maintenance of the concrete crossing surface, the Railroad plans to remove and replace two of the concrete panels at the crossing. Railroad St. 1, p. 6.

36. The Railroad estimates that to fully reconstruct and rebuild the crossing with all new panels to raise the crossing surface would cost approximately \$400,000. Railroad St. 1, p. 6.

DISCUSSION

Before addressing the merits of the case, we will first provide a brief discussion of the Commission's jurisdiction over rail highway crossings. The Commission has the authority, pursuant to 66 Pa.C.S. § 2702, to order the construction, reconstruction, alteration, repair, protection, suspension or abolition of a rail highway crossing, as well as the authority to determine and order which parties shall perform such work at the crossing and which parties shall maintain the crossing in the future to prevent accidents and promote the safety of the public. Southeastern Pennsylvania Trans. Auth. v. Pa. Pub. Util. Comm'n, 592 A.2d 797 (Pa.Cmwlth. 1991), alloc. denied, 611 A.2d 714 (Pa. 1992). The Commission is empowered, pursuant to 66 Pa.C.S. § 2702(b), to determine and prescribe the manner in which such a crossing may be constructed, altered, relocated, suspended, abolished, maintained, operated or protected.

The Commission is also empowered, pursuant to 66 Pa.C.S. § 2702(c), to order the relocation, alteration, suspension or abolition of a crossing upon such reasonable terms and conditions as the Commission prescribes. Pa. Game Comm'n v. Pa. Pub. Util. Comm'n, 651 A.2d 596 (Pa.Cmwlth. 1994), alloc. denied, 664 A.2d 977 (Pa. 1995). The Commission's

jurisdiction over a rail-highway crossing includes the highway approaches to the crossing. Dept. of Trans. v. Pa. Pub. Util. Comm'n, 440 A.2d 657 (Pa.Cmwlth. 1982); Springettsbury Twp. v. Pa. Pub. Util. Comm'n, 289 A.2d 762 (Pa.Cmwlth. 1972); Pittsburgh and L.E.R. Co. v. Pa. Pub. Util. Comm'n, 445 A.2d 851 (Pa.Cmwlth. 1982); Pittsburgh and Shawmut R. Co v. Pa. Pub. Util. Comm'n, 14 A.2d 903 (Pa.Super. 1940).

In a rail-highway crossing proceeding, the Commission determines what parties are concerned within the meaning of 66 Pa.C.S. § 2704(a) and § 2702(c). County of Chester v. Pa. Pub. Util. Comm'n, 408 A.2d 552 (Pa.Cmwlth. 1979); Consolidated Rail Corp. v. Pa. Pub. Util. Comm'n, 671 A.2d 24 (Pa.Cmwlth. 1995). The Commission has the authority to assess the costs of any work it orders performed upon the concerned public utilities, municipal corporations, or the Commonwealth, in such proper proportions as it may determine. 66 Pa.C.S. § 2704(a). 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. Wheeling and L. E. Rwy. Co. v. Pa. Pub. Util. Comm'n, 778 A.2d 785 (Pa.Cmwlth. 2001), alloc. denied, 790 A.2d 1021 (Pa. 2001); AT&T v. Pa. Pub. Util. Comm'n, 737 A.2d 201 (Pa. 1999); East Rockhill Twp. v. Pa. Pub. Util. Comm'n, 540 A.2d 600 (Pa.Cmwlth. 1988); Municipality of Monroeville v. Pa. Pub. Util. Comm'n, 600 A.2d 655 (Pa.Cmwlth., 1991); Greene Twp. Bd. Of Supervisors v. Pa. Pub. Util. Comm'n, 668 A.2d 615 (Pa.Cmwlth. 1995); Dept. of Trans. v. Pa. Pub. Util. Comm'n, 464 A.2d 645 (Pa.Cmwlth. 1983). See also, Consolidated Rail Corp. v. Pa. Pub. Util. Comm'n, 423 A.2d 1108 (Pa.Cmwlth. 1980); D & H Corp. v. Pa. Pub. Util. Comm'n, 613 A.2d 622 (Pa.Cmwlth., 1992), alloc. denied, 626 A.2d 1160 (Pa. 1993).

Among the factors that the Commonwealth Court noted in Greene Twp. v. Pa. Pub. Util. Comm'n, 668 A.2d 615 (Pa.Cmwlth. 1995) as relevant are the following: (1) which party built the crossing; Pa. Dept. of Trans. v. Pa. Pub. Util. Comm'n, 464 A.2d 645 (Pa.Cmwlth. 1983); (2) whether the roadway existed before or after the construction of the crossing; Pa. Dept. of Trans. v. Pa. Pub. Util. Comm'n, 464 A.2d 645 (Pa.Cmwlth. 1983); (3) relative benefit conferred on each party with the construction of the crossing; Pennsylvania Dept. of Trans. v. Pa. Pub. Util. Comm'n, 346 A. 2d 371 (Pa.Cmwlth. 1975); (4) whether a party is responsible for the

deterioration of the crossing which has led to the need for its repair, replacement or removal; Pa. Dept. of Trans. v. Pa. Pub. Util. Comm'n, 469 A.2d 1149 (Pa.Cmwlth. 1983); and (5) the relative benefit that each party will receive from the repair, replacement or removal of the crossing; Pittsburgh and L. E. R. Co. v. Pa. Pub. Util. Comm'n, 556 A.2d 944 (Pa.Cmwlth. 1989). 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. Pub. Util. Comm'n, 672 A.2d 352 (Pa.Cmwlth. 1996); AT&T v. Pa. Pub. Util. Comm'n, 737 A.2d 201 (Pa. 1999); PECO Energy Co. v. Pa. Pub. Util. Comm'n, 791 A.2d 1155 (Pa. 2002); Norfolk Southern Rwy Co. v. Pa. Pub. Util. Comm'n, 971 A.2d 545 (Pa.Cmwlth. 2009).

Having provided a brief discussion of the Commission's jurisdiction over rail highway crossings, we will now address the merits of the Complainant's complaint. Before addressing the allegations in the Complainant's complaint, we will first provide a brief description of the crossings.

The crossings are located in Indiana Borough, Indiana County. I&E St. 1, p. 3. The crossings are one long at-grade crossing approximately 137 feet in length. I&E St. 1, p. 3. Grant Street and Oakland Avenue intersect adjacent to where a single track of the Railroad crosses those streets. I&E St. 1, p. 3. The crossings are protected by railroad flashing lights, gates and traffic signal preemption. I&E St. 1, p. 4.

The railroad crossing surface is made up of a series of concrete panels anchored into the railroad ties with steel fasteners. I&E St. 1, p. 4. Each concrete panel is approximately nine feet long. I&E St. 1, p. 4. The panels have steel angle iron around the perimeter of each concrete panel. I&E St. 1, p. 4. The center panels between the tracks are approximately four feet wide and the panels outside of the tracks are approximately two feet wide. I&E St. 1, p. 4. The concrete panel surface extends through two concrete sidewalks, one located along Oakland Avenue and one located along Grant Street. I&E St. 1, p. 4.

The Grant Street roadway approaches are flexible bituminous pavement up to the concrete panels. I&E St. 1, p. 4. The Oakland Avenue roadway approaches are flexible bituminous pavement over reinforced concrete pavement. I&E St. 1, p. 4.

Having provided a brief description of the crossings, we will now address the allegations in the Complainant's complaint. The Complainant filed the complaint in this proceeding requesting the Commission direct the Railroad to repair the crossings so that they are restored to a smooth and satisfactory condition.

As the participant seeking an order of the Commission, the Complainant bears the burden of proof, pursuant to the provisions of 66 Pa. C.S. §332(a). The Complainant must establish his case by a preponderance of the evidence. Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n, 578 A.2d 600 (Pa. Cmwlth. 1990), alloc. den., 602 A.2d 863 (Pa. 1992). To meet his burden of proof, the Complainant must present evidence more convincing, by even the smallest amount, than that presented by the Railroad, DOT, the County or the Borough. Se-Ling Hosiery v. Margulies, 70 A.2d 854 (Pa. 1950).

In support of his complaint, the Complainant presented evidence that the crossings are not smooth due to the difference in height where Grant Street and Oakland Avenue intersect the Railroad's facilities. Complainant's St. 1. The Complainant's testimony and exhibits show that there is a height difference of approximately two inches between the height of the street and the height of the railroad facilities. Complainant's St. 1, Complainant's Exs. 1-23. The videos provided by the Complainant show that the condition of the crossing produces a ride that is not smooth. Complainant's Exs. 24-34.

None of the parties dispute the fact that there is a difference in height between the height of the street and the height of the railroad facilities. Similarly, none of the parties disagree with the Complainant that the condition of the crossing produces a ride that is not smooth.

The Complainant requests that the Commission order that the crossing be replaced. Complainant's St. 1. The Complainant contends that the crossing needs a better foundation and a surface that is more durable than the concrete panels. Complainant's St. 1.

We will sustain the complaint, since the Complainant established his case by a preponderance of the evidence. The Complainant presented credible testimony and exhibits to support his assertions that there is a height difference of approximately two inches between the height of the street and the height of the railroad facilities and that the condition of the crossing produces a ride that is not smooth.

However, we cannot give any weight to the Complainant's testimony concerning the safety of the crossing, the cause of the conditions at the crossing or the work that needs to be performed to correct the condition. The Complainant did not present any evidence that he has any experience designing or constructing rail highway crossings. There is no evidence that the Complainant is an engineer with education or training in designing or constructing rail highway crossings.

Since the Complainant is not qualified as an expert in designing or constructing rail highway crossings by either experience or education, his opinion testimony has little value as to the safety of the crossing, the cause of the conditions at the crossing or the work that needs to be performed to correct the condition. Delaware and Hudson Railroad Corporation v. Pa. Pub. Util. Comm'n, 182 A.2d 254 (Pa. Super. 1962). The Complainant's evidence concerning the cause of the conditions at the crossing and the work that needs to be performed to correct the condition consisted mostly of unsupported assertions. Assertions, no matter how honest or strong, cannot form the basis of a finding in the Complainant's favor. Assertions, personal opinions or perceptions do not constitute evidence. Pa. Bureau of Corrections v. City of Pittsburgh, 532 A.2d 12 (Pa. 1987).

Having sustained the complaint as to the condition of the crossing, we will now address what work needs to be performed in order to correct that condition. DOT presented evidence that the crossing had been previously reconstructed pursuant to Commission order dated

June 15, 2004 at A-00117322. DOT St. 1, p. 3-4, DOT Ex. C-1. The June 15, 2004 order directed the reconstruction of the crossing to its current configuration. DOT Ex. C-1. Paragraph 22 of the June 15, 2004 order directed DOT to maintain the highway approaches on Oakland Avenue and the west approach of Grant Street up to the concrete crossing surface. DOT St. 1, p. 4, DOT Ex. C-1.

By Secretarial Letter dated July 17, 2007 at A-00117322, the Commission stated that a Commission engineer had inspected the crossing on November 3, 2006 and that the work at the crossing had been completed in accordance with the June 15, 2004 order. DOT Ex. C-2. The July 17, 2007 Secretarial Letter closed the proceeding at A-00117322. DOT Ex. C-2.

DOT provided information on the traffic using the crossing. The average daily traffic (ADT) using the crossing at Oakland Avenue is 8,993 vehicles. DOT St. 1, p. 3, DOT Ex. B.

DOT stated that as part of its maintenance schedule, Oakland Avenue will be resurfaced in 2019. As part of this project, DOT will mill the lip at the crossing to reduce the difference in elevation at the crossing surface. DOT St. 1, p.4-5. DOT will also address the elevation differences at the sidewalks on Oakland Avenue and the west approach to Grant Street. DOT St. 1, p. 5. DOT will bear the cost of resurfacing the roadway and sidewalk adjustments. DOT St. 1, p.5. DOT will perform this work between June and August of 2019. DOT St. 1, p. 5.

The Borough stated that it would mill and repave the roadway surface on the east and west side of the Railroad's tracks south of the Oakland Avenue right of way. Borough St. 1, p. 1. The milled area will be repaved to the level of the concrete crossing. Borough St. 1, p. 1. The Borough will also remove or grade the sidewalk to the concrete crossing on each side of the Railroad's tracks on the southernmost portion of the crossing. Borough St. 1, p. 1.

The Railroad provided information on rail traffic at the crossing. The Railroad stated that the crossing is currently safe for railroad operations. Railroad St. 1, p. 1. The Railroad currently operates two trains per day over the crossing, mostly between 6:00 p.m. and 6:00 a.m. Railroad St. 1, p. 2. The speed limit for trains using the crossing is ten miles per hour. Railroad St. 1, p. 2.

The Railroad has maintenance responsibility for the concrete crossing surface as well as its track and other facilities, pursuant to paragraph 19 of the June 15, 2004 Commission order at A-00117322. Railroad St. 1, p. 2. The Railroad testified that in the summer of 2015 it replaced some of the concrete panels at the crossing. Railroad St. 1, p. 3. In July 2018, the Railroad applied cold patch to areas in several of the concrete panels at the crossing and removed a broken piece of metal framing on one panel. Railroad St. 1, p. 3. As part of its ongoing maintenance of the concrete crossing surface, the Railroad will remove and replace two of the concrete panels at the crossing. Railroad St. 1, p. 3.

The Railroad contends that the work planned by DOT and the Borough will provide a smooth transition between the Oakland Avenue and Grant Street approaches and the railroad crossing surface. Railroad St. 1, p. 5. Therefore, there is no need to reconstruct and raise the railroad crossing surface. Railroad St. 1, p. 5. The Railroad estimates that to fully reconstruct and rebuild the crossing with all new panels to raise the crossing surface would cost approximately \$400,000. Railroad St. 1, p. 6.

I&E expressed concern that milling the roadway at the crossing is complicated by the fact that there is reinforcing steel in the concrete. I&E St. 1, p. 7. If the concrete portion of the roadway is milled too deeply, the reinforcing steel would be exposed. I&E St. 1, p. 7. Exposing the reinforcing steel would cause safety problems at the crossing. I&E St. 1, p. 7.

I&E states that as an alternative to milling the roadway, the Railroad could raise the crossing surface to the height of the roadway. I&E St. 1, p. 8. I&E indicated that at least two concrete panels needed to be replaced due to deterioration. I&E St. 1, p. 10. I&E also noted that the Commission order in the proceeding at A-00117322 did not assign maintenance responsibility for the sidewalks at the crossing. I&E St. 1, p. 9.

From this evidence, it is clear that the crossing is uneven and needs work to be performed in order to make the crossing smooth. Since DOT already has work scheduled in 2019 at the crossing that it contends will address the problem, we will order it and the Borough to mill the roadway surface at the crossing. DOT and the Borough will bear the costs of this work as they have

agreed. The Railroad will provide personnel to protect its operations at its sole cost and expense during the DOT and Borough repairs. The Railroad will remove and replace the two deteriorated concrete panels at the crossing.

CONCLUSIONS OF LAW

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

2. The Commission has the authority to order the construction, reconstruction, alteration, relocation, repair, maintenance, protection, suspension or abolition of railroad crossings, as well as the authority to determine and order which concerned parties should perform such work, in order to prevent accidents and promote the safety of the public. 66 Pa.C.S. §§ 2702, 2704.

3. In apportioning costs in railroad 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 be just and reasonable. Bell Atlantic-Pa, Inc. v. Pa. Pub. Util. Comm'n, 672 A.2d 352 (Pa. Cmwlth. 1996), Greene Twp. Board of Supervisors v. Pa. Pub. Util. Comm'n, 668 A.2d 615 (Pa. Cmwlth. 1995).

4. The Pennsylvania Department of Transportation, Buffalo & Pittsburgh Railroad, Inc., Indiana Borough and Indiana County are all concerned parties within the meaning of 66 Pa.C.S. §§ 2702 and 2704.

5. Pursuant to 66 Pa. C.S. § 332(a), the burden of proof in this proceeding is on the Complainant.

6. The Complainant has met his burden of proving that he is entitled to relief. 66 Pa. C.S. § 332(a).

7. It is just and reasonable for the Buffalo & Pittsburgh Railroad, Inc., Pennsylvania Department of Transportation and Indiana Borough to each bear the costs for the work each is ordered to perform by this order.

8. The Commission can promote safety and prevent accidents by ordering the Buffalo & Pittsburgh Railroad, Inc., Pennsylvania Department of Transportation and Indiana Borough to each perform the work ordered by this order.

ORDER

THEREFORE,

IT IS RECOMMENDED:

1. That the complaint of Joel Royer against the Buffalo & Pittsburgh Railroad, Inc., Pennsylvania Department of Transportation, Indiana Borough and Indiana County at Docket No. C-2016-2580970 is hereby sustained.

2. That the Pennsylvania Department of Transportation, at its sole cost and expense, shall as part of its resurfacing of Oakland Avenue mill the lip at the crossing to reduce the difference in elevation at the crossing surface and shall address the elevation differences at the sidewalks on Oakland Avenue and the west approach to Grant Street.

3. That Indiana Borough shall mill and repave the roadway surface on the east and west side of the Buffalo & Pittsburgh Railroad, Inc.'s tracks south of the Oakland Avenue right of way to the level of the concrete crossing and remove or grade the sidewalk to the concrete crossing on each side of the Buffalo & Pittsburgh Railroad, Inc.'s tracks on the southernmost portion of the crossing.

4. That the Buffalo & Pittsburgh Railroad, Inc., at its sole cost and expense, shall remove and replace two of the concrete panels at the crossing.

5. That the Buffalo & Pittsburgh Railroad, Inc., at its sole cost and expense, shall furnish any watchmen, flagmen, construction inspectors and engineering services as it deems necessary to protect its operations and facilities while the work set forth in ordering paragraphs 2-4 is performed.

6. That the Buffalo & Pittsburgh Railroad, Inc., Pennsylvania Department of Transportation and Indiana Borough cooperate with each other to coordinate the work set forth in ordering paragraphs 2-4 so that the operations or facilities of those parties will not be endangered or impeded.

7. That the Buffalo & Pittsburgh Railroad, Inc., Pennsylvania Department of Transportation and Indiana Borough within one (1) year of the date of this Order, perform the work set forth in ordering paragraphs 2-4.

8. That the Buffalo & Pittsburgh Railroad, Inc., Pennsylvania Department of Transportation and Indiana Borough, at least ten (10) days prior to the start of work, notify each other of the actual date on which the work set forth in ordering paragraphs 2-4 is to be performed.

9. That the Buffalo & Pittsburgh Railroad, Inc., Pennsylvania Department of Transportation and Indiana Borough, report to the Pennsylvania Public Utility Commission the date of actual completion of the work set forth in ordering paragraphs 2-4 at the earliest practicable time subsequent to said date of completion.

10. That the Buffalo & Pittsburgh Railroad, Inc., Pennsylvania Department of Transportation and Indiana Borough continue to maintain the crossing as directed by the Commission order dated June 15, 2004 at A-00117322.

11. That this order, insofar as it imposes any costs on any of the parties, is without prejudice to any party's right to recover all or part of such costs incurred from others in accordance with any lawful agreement.

Date: December 18, 2018

_____/s/
David A. Salapa
Administrative Law Judge

_____/s/
Andrew M. Calvelli
Administrative Law Judge