

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Andrew Broden	:	
	:	
v.	:	
	:	C-2018-3002326
CSX Transportation Inc.;	:	
City of Philadelphia;	:	
Pennsylvania Department of Transportation	:	

**INITIAL DECISION**

Before  
Eranda Vero  
Administrative Law Judge

**INTRODUCTION**

This Initial Decision approves the Joint Petition for Settlement in the matter of Andrew Broden v. CSX Transportation, Inc., City of Philadelphia, Pennsylvania Department of Transportation, Docket No. C-2018-3002326, in its entirety and without modification upon concluding that it is fair, reasonable, and in the public interest.

**HISTORY OF THE PROCEEDING**

On May 30, 2018, Andrew Broden filed a formal Complaint with the Pennsylvania Public Utility Commission (Commission) alleging that there is a damaged guide rail under a CSX Transportation Inc. (CSX) railroad bridge. The subject public grade-separated crossing (DOT #593 023 T) is located where State Route 1011 (Grant Avenue) crosses below grade, the single track of CSX in the City of Philadelphia, Philadelphia County (Crossing). CSX and the City of Philadelphia (City) are disputing over which party is responsible to repair the guide rail. The Pennsylvania Department of Transportation (PennDOT) was made a party to the proceeding.

A field investigation and conference were held at the site of the crossing on August 3, 2018. Although the parties believed there was an existing agreement defining the maintenance responsibilities to address the matter, the parties could not reach an agreement concerning the resolution of the Complaint. As a result, the Commission referred the proceeding to the Commission's Office of Administrative Law Judge (OALJ) for the scheduling of an evidentiary hearing. I was assigned to serve as the Presiding Officer in this proceeding.

On November 20, 2018, Bradley R. Gorter, Esq., filed a notice of Appearance on behalf of the Commission's Bureau of Investigation and Enforcement (I&E).

A Prehearing Conference was held on January 30, 2019 and a litigation schedule was established. At the request of PennDOT, the litigation schedule was amended, and the hearing was rescheduled for July 29, 2019.

On June 26, 2019, the parties informed me that they had reached an agreement in principle settling all the issues in this proceeding. By Order dated July 22, 2019, I suspended the litigation schedule.

On August 1, 2019, the parties filed a Joint Petition for Settlement ("Joint Petition") signed by Mr. Broden, CSX, the City, PennDOT, and I&E ("Settling Parties"), along with Statements in Support of the Settlement. The City filed its Statement in Support of the Settlement on August 8, 2019.

On September 5, 2019, the Settling Parties filed an Errata to the Joint Petition for Settlement.

The record closed on September 5, 2019.

## STIPULATED FACTS

The Settling Parties stipulated to the following facts contained in Paragraphs 6-27, Section II of the Joint Petition<sup>1</sup>:

6. The Crossing is a grade separated crossing where Grant Avenue, State Route 1011 crosses under a bridge carrying CSX in the City known as DOT 593 023 T. This Crossing is near the intersection of Grant Avenue and Welsh Avenue in the Northeast section of the City. Grant Avenue is an east/west arterial roadway.

7. The average daily traffic is 12,319 with 2% truck traffic.

8. Grant Avenue has 2 travel lanes in each direction. The roadway width varies from 23 feet to 24 feet based upon the pavement markings. The pavement markings also create a median barrier that is approximately 2-foot 6-inch median. The travel ways are curbed with no shoulders. The pavement is aged but is in acceptable condition with limited patching. The pavement markings are adequate to convey travel way usage. The speed limit is posted at 30 miles per hour.

9. The sidewalks are sound with good surface conditions. The widths are adequate at approximately 5 feet and greater. They do not present any issues to pedestrians.

10. In the last five years there have not been any accidents involving trains and motor vehicles; there were 10 reportable accidents involving motor vehicles. None involved guiderail.

11. PennDOT was assigned maintenance responsibility for the guiderail in the order of the Public Utility Commission order docketed at A-94401 dated February 10, 1969.

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<sup>1</sup> The original numbering of Section II of the Joint Petition was maintained for ease of reference.

12. The current condition of the guiderail is unacceptable for a number of reasons. The end treatments for the existing guiderail are no longer considered crash-worthy. The end treatments no longer provide adequate deflection for the guiderail to operate properly. They do not meet current standards.

13. The guiderail height is insufficient. The guiderail height ranges from 23.5 inches to 25.5 inches; the current design height for guiderail is 31 inches.

14. The guiderail is missing posts resulting in too much space between the posts for the guiderail to operate properly allowing for a larger deflection and potential connection with the concrete collars.

15. There is insufficient clearance (less than 18 inches) between the concrete collars around the metal piers for the railroad bridge and the guiderail. The unobstructed distance from the back of the guiderail system to the face of the concrete collars is insufficient and does not achieve the appropriate deflection.

16. The combination of the inadequate height, non-uniform post spacing and the insufficient unobstructed distance from the guiderail to the face of the concrete collar, would likely prevent the guiderail system from achieving the smooth deflected shape that is essential for controlled redirection of an impacting vehicle.

17. The guiderail needs to be removed and replaced with a single face concrete barrier in front of the concrete collars and steel beams. The installation of this barrier will require removal of approximately 6 inches of existing bituminous pavement. Appropriate end treatments must be installed at all four corners of the structure. Two locations will require crash cushions at the approach ends. The crash cushions will be Test Level 2, self-restoring, minimal maintenance units.

18. PennDOT will remove the existing guiderail system and engineer and install the concrete barrier estimated at \$104,225 with the costs capped at \$105,000. PennDOT will use 100% state funds to complete the work.

19. Upon completion of the project PennDOT will invoice CSX for one third of the costs not to exceed \$35,000.00.
20. Upon completion of the project PennDOT will invoice the City \$15,000.00.
21. The City will maintain the barriers and end treatments.
22. PennDOT will maintain the roadway between the barriers and the approaches thereto.
23. CSX is a Virginia corporation authorized to transact freight railroad business in the Commonwealth of Pennsylvania with a business address of 4 Neshaminy Interplex, Suite 205, Trevose, PA 19053.
24. CSX is not aware of any conditions existing along its line that will impact its operations or adjacent property.
25. The railroad facilities of CSX cross above Grant Avenue on a three-span through plate girder bridge constructed in 1904 by the Reading Railroad. The structure is approximately 91 feet long and designed to carry two tracks. Current timetable speed is 50 miles per hour.
26. CSX will maintain its railroad facilities.
27. The safety improvements agreed to above, when completed, will increase safety through the crossing.

## SETTLEMENT TERMS

The principal terms and conditions of the proposed settlement, contained in Paragraphs 7-17, Section IV of the Joint Petition, are as follows:<sup>2</sup>

7. The parties agree to perform the responsibilities as specified herein to increase safety and reduce future incidents at the Crossing.
  
8. PennDOT shall:
  - a) Remove the guiderail and replace it with a single face concrete barrier in front of the concrete collars and steel beams and install appropriate end treatments.
  - b) Perform the work detailed above at its initial cost and expense using state funds.
  - c) Invoice the City \$15,000.00 and CSX one-third of the final costs not to exceed \$35,000.00.
  - d) Maintain the roadway between the barriers.
  
9. The City shall:
  - a) Reimburse PennDOT upon receipt of invoice for its share of the barrier work, \$15,000.00;
  - b) Maintain the single face concrete barrier and end treatments at its sole cost and expense.
  
10. CSX shall:
  - a) Reimburse PennDOT upon receipt of invoice for its one-third share of the barrier work, not to exceed \$35,000.00.
  - b) Maintain its railroad facilities at its sole cost.

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<sup>2</sup> The original numbering of Section IV of the Joint Petition was maintained for ease of reference.

11. All work will be completed by December 31, 2019 unless another date is agreed to by the parties.

12. This Joint Petition for Settlement is contingent upon its approval pursuant to Sections 507 and 2702 of the Code and the issuance of a Commission Secretarial Letter or Order accepting and approving the same without modification.

13. The parties agree that any party may petition the Commission for rehearing if the Commission Secretarial Letter or Order substantively modifies the terms of this Joint Petition for Settlement. In that event, any party may give notice to the other parties that it is withdrawing from this Joint Petition for Settlement. Such notice must be in writing and must be given within twenty (20) business days of the issuance of any Initial or Recommended Decision or any Commission Order or Secretarial Letter which adopts this Joint Petition for Settlement with substantive modifications of its terms. The consequence of any party withdrawing from this Joint Petition for Settlement as set forth above is that all issues associated with the requested relief presented in the proceeding will be fully litigated unless otherwise stipulated between the parties and all obligations of the parties as set forth above to each other are terminated and of no force and effect.

14. The parties executing this Joint Petition for Settlement agree that its purpose is to act as a General Release, except as specifically noted within, and is to settle, compromise and release all claims, actions, suits and rights whatsoever existing between and on behalf of those respective parties as set forth above, their successors and assigns, including all such claims, actions, suits and rights whatsoever; whether known or unknown to those parties, except to enforce the terms of this Joint Petition for Settlement.

15. The benefits and obligations of this Joint Petition for Settlement shall be binding upon the successors and assigns of the parties to this Stipulation.

16. This Stipulation may be signed in counterparts and all signatures attached hereto will be considered as originals.

17. In order to effectuate the parties' Joint Petition for Settlement, the undersigned parties request that the Commission issue a Secretarial Letter or Order approving the Petition without modification.

### DISCUSSION

The Commission has exclusive jurisdiction over public rail-highway crossings in the Commonwealth. 66 Pa. C.S. § 2702. The Commission also 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. § 2702; *SEPTA v. Pa. PUC.*, 592 A.2d 797 (Pa. Cmwlth. 1991).

Additionally, the Commission encourages parties in contested on-the-record proceedings to settle cases. See, 52 Pa.Code § 5.231(a). Settlements eliminate or significantly reduce the time, effort, and expense of litigating a proceeding to its final conclusion, which might include review of the Commission's decision by the Pennsylvania appellate courts. Such savings directly benefit the individual parties to a proceeding; however, these savings also benefit the Commission and all ratepayers of the utility, who otherwise may have to bear the financial burden such litigation necessarily entails.

The Commission's policy to encourage settlements mirrors the Pennsylvania courts' policy.

Not only does the settlement spare the parties the expense and risks of continuing litigation, it accords with the strong judicial policy in Pennsylvania favoring voluntary settlements. See e.g., *Muhammad v. Strassburger*, 526 Pa. 541, 548, 587 A.2d 1346, 1349 (1991), *cert. denied*, 502 U.S. 867 (1991) ("A long-standing principle of our courts has been to encourage settlements. "). But *cf. McMahon v. Shea*, 547 Pa. 124, 688 A.2d 1179 (1997) (limiting *Muhammad* to its facts). See also, *Rothman v. Fillett*, 503 Pa. 259, 266, 469 A.2d 543, 546 (1983) ("There is a strong judicial policy in favor of parties voluntarily settling lawsuits.").

In addition, settlements help reduce over-crowded courts, thereby shortening a litigant's wait for a trial date. They also reduce the burdens and expenses in maintaining court systems.

*Muhammad, supra*, 526 Pa. at 548-49, 587 A.2d at 1350. See also, *Rothman v. Fillett*, *supra*, 503 Pa. at 267, 469 A.2d at 546.

Once the settling parties have submitted their joint settlement petition for approval, the principal issue for Commission consideration is whether the agreement serves the public interest. *Pa. Pub. Util. Comm'n v. Philadelphia Electric Company*, 60 Pa. PUC 1, 21 (1985); *Pa. Pub. Util. Comm'n v. C S Water and Sewer Associates*, 74 Pa. PUC 767, 771 (1991).

Pursuant to the terms of the Settlement, PennDOT agrees to: 1) remove the guiderail and replace it with a single face concrete barrier in front of the concrete collars and steel beams and install appropriate end treatments; 2) perform the work detailed above at its initial cost and expense using state funds; 3) invoice the City \$15,000.00 and CSX one-third of the final costs not to exceed \$35,000.00; and 4) maintain the roadway between the barriers. Settlement, ¶ 8. In turn, the City agrees to: 1) reimburse PennDOT upon receipt of an invoice for its share of the barrier work, \$15,000.00; and 2) maintain the single face concrete barrier and end treatments at its sole cost and expense. Settlement, ¶ 9. Additionally, CSX agrees to: 1) reimburse PennDOT upon receipt of an invoice for its one-third share of the barrier work, an amount not to exceed \$35,000.00; and 2) maintain its railroad facilities at its sole cost. Settlement, ¶ 10. The Settling Parties agree that all work will be completed by December 31, 2019, unless another date is agreed to by the parties. Settlement, ¶ 11.

A settlement eliminates an uncertain outcome for both parties in the event of fully litigating this case to conclusion. After a thorough review of the terms of the Settlement, I approve the Settlement as just and reasonable. The present Settlement is the result of successful negotiations among the parties and resolves all the outstanding issues in this proceeding. It addresses all public safety concerns and cost issues. Specifically, the Settlement addresses the replacement of the guiderail with a concrete barrier along the highway at the crossing and the assignment of future maintenance responsibilities and costs. In addition, the Settlement will save the parties the time and expenses that would be incurred in further litigation before the

Commission and avoid the possibility of appeals from the Commission's order. Therefore, approval of the Settlement is in the public interest.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter of this proceeding. 66 Pa. C.S. §§ 701, 2702.
2. The Commission encourages parties in contested on-the-record proceedings to settle cases. 52 Pa. Code § 5.231.
3. The Settlement executed by the Settling Parties is just, reasonable and in the public interest.

#### ORDER

THEREFORE,

IT IS ORDERED:

1. That the Joint Petition for Settlement in the matter of Andrew Broden v. CSX Transportation, Inc., City of Philadelphia, Pennsylvania Department of Transportation, at Docket No. C-2018-3002326, is approved in its entirety without modification.
2. That Pennsylvania Department of Transportation shall:
  - i. Remove the guiderail and replace it with a single face concrete barrier in front of the concrete collars and steel beams and install appropriate end treatments.
  - ii. Perform the work detailed above at its initial cost and expense using state funds.

- iii. Invoice the City of Philadelphia \$15,000.00 and CSX Transportation Inc. one-third of the final costs not to exceed \$35,000.00.
    - iv. Maintain the roadway between the barriers.
3. That the City of Philadelphia shall:
  - i. Reimburse Pennsylvania Department of Transportation upon receipt of an invoice for its share of the barrier work, \$15,000.00
  - ii. Maintain the single face concrete barrier and end treatments at its sole cost and expense.
4. That CSX Transportation Inc. shall:
  - i. Reimburse PennDOT upon receipt of an invoice for its one-third share of the barrier work, an amount not to exceed \$35,000.00.
  - ii. Maintain its railroad facilities at its sole cost.
5. That all work be completed by December 31, 2019, unless another date is agreed to by the parties.
6. That all costs which are to be reimbursed by PennDOT shall be reimbursed pursuant to the provisions of 23 CFR Parts 140 and 646. The aforesaid federal reimbursement shall not supersede, delay or, in any manner, postpone the effect of any paragraph contained in this or any related Secretarial Letter or Order.
7. That, pursuant to 52 Pa.Code § 5.591, Notice of Compliance shall be filed by all parties upon completion of the work designated in this Order.
8. That the Secretary mark this docket closed.

Date: September 5, 2019

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Eranda Vero  
Administrative Law Judge