

August 24, 1983

C-80041953

Steven B. Garfunkel, Esquire
Rachael E. Geiersbach, Esquire
The Baltimore & Ohio Railroad Company
Terminal Tower
P. O. Box 6419
Cleveland, OH 44101

Ralph D. Pratt, State Representative

v.

The Baltimore and Ohio Railroad Company, Pennsylvania
Department of Transportation, Borough of Ellwood City,
Lawrence County, Pennsylvania Power Company, Western
Pennsylvania Water Company, Columbia Gas of Pennsyl-
vania, Inc., The Bell Telephone Company of Pennsylva-
nia and The Pittsburgh and Lake Erie Railroad Company

To Whom It May Concern:

This is to advise you that an Opinion and Order has been adopted by the Commission in Public Meeting on August 18, 1983, in the above entitled proceeding.

A copy of this Opinion and Order has been enclosed for your records.

Very truly yours,

Jerry Rich, Secretary

jr
Encls.
Cert. Mail
Bureau of Rail Trans.
Law Bureau
Office of Special Assistants

DOCKETED

AUG 26 1983

DOCUMENT
FOLDER

Similar letters to: see list with letter dated August 9, 1983.

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120

Public Meeting held August 18, 1983

Commissioners Present:

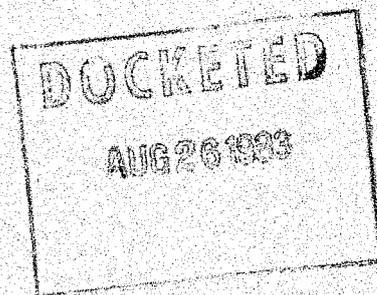
Linda C. Taliaferro, Chairman
Michael Johnson
James H. Cawley

Ralph D. Pratt, State Representative

C-80041953

v.

The Baltimore and Ohio Railroad Company,
Pennsylvania Department of Transportation,
Borough of Ellwood City, Lawrence County,
Pennsylvania Power Company, Western
Pennsylvania Water Company, Columbia Gas
of Pennsylvania, Inc., The Bell Telephone
Company of Pennsylvania and The Pittsburgh
and Lake Erie Railroad Company



OPINION AND ORDER

BY THE COMMISSION:

Before us for consideration is the Application of The Baltimore and Ohio Railroad Company for Rehearing filed May 26, 1983.^{1/} We shall deny the request for rehearing of our Order entered May 11, 1983.

On April 1, 1980, the Honorable Ralph D. Pratt filed a formal complaint (complaint) regarding the safety and adequacy of three rail/highway crossings within the Borough of Ellwood City. The rail/highway crossings are: the Second Street overpass; the Fifth Street underpass; and, the Sixth Street crossing at grade.

A hearing was held on August 14, 1980; Administrative Law Judge Clements presided because Administrative Law Judge Michael A. Nemeč's prior scheduling precluded his attendance. On February 13, 1981, Administrative Law Judge (ALJ) Michael A. Nemeč's Initial Decision, dated January 22, 1981, was issued for exceptions. The Initial Decision directed that various improvements be made at the crossings and assigned cost responsibility to the parties. Exceptions to the Initial Decision were filed by the Commission's Trial Staff, The Baltimore and Ohio Railroad Company, The Pittsburgh and Lake Erie Railroad Company and Complainant, State Representative Ralph D. Pratt.

Subsequent to review of the Initial Decision and the exceptions filed thereto, we entered an Opinion and Order on May 14, 1981, wherein we reversed the ALJ's ordering paragraph 10, which dismissed the complaint

^{1/} We shall refer to the Application as a Petition.

at the Sixth Street at grade crossing. We ordered improvement work at the Sixth Street crossing by The Baltimore and Ohio Railroad Company and The Pittsburgh and Lake Erie Railroad Company. In all other respects, we concluded that the ALJ's opinion and discussion correctly resolved the matters in dispute.

On September 17, 1981, the Borough of Ellwood City (Borough) filed a Petition for Clarification of Opinion and Order. In its petition the Borough argued that our Opinion and Order, entered May 14, 1981, improperly placed responsibility on it for the curbs, sidewalks, and railings on the Second Street overpass and its approaches. The Borough contended that its responsibility should be limited to the approaches only.

By Opinion and Order adopted November 6, 1981, and entered November 23, 1981, we modified our Opinion and Order entered May 14, 1981, and assigned responsibility for curbs, sidewalks, and sidewalk railings on the Second Street overpass to The Baltimore and Ohio Railroad Company. Also, we limited the Borough's responsibility for the curbs, sidewalks, and sidewalk railings to the approaches to the Second Street overpass only. Our reasoning in support of the modification of our Opinion and Order, entered May 14, 1981, is set forth in our Opinion and Order entered November 23, 1981.

On January 19, 1982, we entered an Opinion and Order addressing a Petition of The Baltimore and Ohio Railroad Company for Modification of Order or, in the Alternative, for Rehearing, which was filed June 1, 1981. After finding that our decision requiring The Baltimore and Ohio Railroad Company and The Pittsburgh and Lake Erie Railroad Company to paint the Fifth Street underpass was appropriate, we denied the above-mentioned petition in its entirety.

On August 16, 1982, State Representative Ralph D. Pratt filed a formal complaint (complaint) against The Baltimore and Ohio Railroad Company seeking Commission enforcement of Ordering Paragraphs 6(a) and 9 of our Opinion and Order, entered May 14, 1981. Specifically, State Representative Ralph D. Pratt requests that The Baltimore and Ohio Railroad Company be ordered to clean and paint the entire substructure and superstructure of the Fifth Street underpass. The Baltimore and Ohio Railroad Company filed an Answer on September 7, 1982 alleging compliance in that removal of old paint, repainting of the structural steel and resealing of the longitudinal deck joint had all been completed. Further, it pointed out correctly that Ordering Paragraphs 6(a) and 9 also included The Pittsburgh and Lake Erie Railroad Company.

By letter dated September 29, 1982, the Commission informed Representative Pratt that his complaint was being considered as a Petition for Enforcement of the Commission's Opinion and Order, entered May 14, 1981, at C-80041953. On October 8, 1982, Commission Trial Staff filed a Reply to Petition for Enforcement requesting that the Petition for Enforcement be denied. It was Commission Trial Staff's position that the standard practice involving Commission orders concerning the cleaning and painting of a structure has been for the work to be limited to exposed structural steel and not concrete surfaces. A hearing on the matter was held in Ellwood City on December 15, 1982.

By Further Initial Decision dated February 15, 1982, ALJ Nemeč modified Ordering Paragraph 6(a) of our May 14, 1981 Opinion and Order by including "the painting, as needed of the concrete surfaces of the sidewalks, wingwalls and abutments that face the public thoroughfare," as a maintenance responsibility at the Fifth Street crossing. On May 11, 1983, we adopted as our action the Further Initial Decision of ALJ Nemeč, dated February 15, 1983, and denied the exceptions filed thereto. On May 26, 1983, the Application of The Baltimore and Ohio Railroad Company for Rehearing was filed (hereinafter "Petition").

In support of its Petition, The Baltimore and Ohio Railroad Company (Petitioner) argues that the evidence produced by the parties at the original complaint hearing (August 14, 1980) addressed only the issue of the structural integrity of the structure at the Fifth Street underpass. Further, Petitioner maintains that none of the evidence concerned motorist visibility or safety hazards posed by lack of paint on the concrete surfaces.

At the hearing for enforcement, Petitioner contends that the only evidence proffered was four photographic exhibits taken during daylight hours which show the underpass in its painted condition. Petitioner argues that no evidence exists which indicates how painting would make the underpass safer for the motoring public. In other words, the Petitioner maintains that no evidence of a hazardous condition exists which would warrant remedial measures. Petitioner requests that our May 11, 1983 Opinion and Order be vacated and Petitioner be granted a rehearing for the purpose of presenting new and additional evidence.

In Re Barbe Construction Co. v. Pennsylvania Public Utility Commission, 50 Pa. P.U.C. 192 (1976), we stated the standard for granting a petition for rehearing:

In seeking a further hearing, a petitioner must be able to aver and show that the evidence proffered is such as could not with reasonable diligence have been discovered and produced at the earlier hearing; that such evidence is not merely cumulative; and that it is such as to render a different result probable on rehearing of the case.

We are of the opinion, and so find, that the Petition has failed to satisfy this standard.

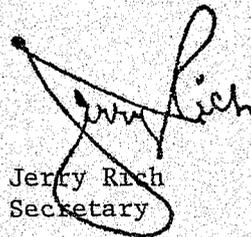
Although the Petitioner has requested that it be permitted to present new and additional evidence, Petitioner has failed to reveal the nature or substance of the new evidence. We assume that the Petitioner would proffer evidence which would attempt to prove that the painting of the concrete surfaces would not make the underpass safer for the motoring public. However, the ALJ found, and we agreed, that "[t]he dingy condition of the walls and ceiling of the Fifth Street underpass adversely

affect the safety and convenience of the traveling public."^{1/} Further, the ALJ was persuaded by Petitioner's photographic exhibits that the painted condition^{2/} of the underpass improved the visibility of the traveling public.^{2/}

In view of our adoption, for the most part, of the ALJ's Initial Decision, dated January 22, 1981, and our adoption of the ALJ's Further Initial Decision, dated February 15, 1983, we were of the opinion that motorist visibility was improved by painting the concrete surfaces of the Fifth Street underpass. Therefore, it appears that the Petitioner is also, in effect, seeking reconsideration of our Opinion and Order, entered May 11, 1983.^{3/} We consider our Opinion and Order to be supported by the evidence and further conclude that the presentation of evidence which attempts to prove that the painting of the concrete surfaces is unwarranted would not "render a different result probable on rehearing of the case"; THEREFORE,

IT IS ORDERED: That the Application of The Baltimore and Ohio Railroad Company for Rehearing is hereby denied.

BY THE COMMISSION,



Jerry Rich
Secretary

(SEAL)

ORDER ADOPTED: August 18, 1983

ORDER ENTERED: AUG 24 1983

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- ^{1/} This is Finding of Fact No. 12 of his Initial Decision, dated January 22, 1981, which was referred to in his Further Initial Decision, dated February 15, 1983, which we adopted.
- ^{2/} Further Initial Decision, dated February 15, 1983, at page 6.
- ^{3/} In paragraph 3 of its Petition, Petitioner contends that our May 11, 1983 Opinion and Order is not supported by the evidence.