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CHERRY HILL, NJ

January 3, 2022

CLEVELAND, OH

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
400 North Street, 2nd Fl.
Harrisburg, PA 17105-3265

Re: Investigation upon the Commission’s motion into matters pertaining to the Proper safety of the traveling public and disposition of the crossing where State Route SR0268, crosses over a railroad tunnel formally used by Bessemer And Lake Erie Railroad in Fairview Township, Butler County and where State Route SR0268 formerly crossed, below grade, the track of Bessemer and Lake Erie Railroad in Bradys Bend Township, Armstrong County, Docket No. I-2019-3012769

PHILADELPHIA, PA

Dear Secretary Chiavetta:

PITTSBURGH, PA

On behalf of the Bessemer & Lake Erie Railroad Company in the above referenced matter, enclosed please find for electronic filing with the Commission, the B&LE’s Motion for Summary Judgment and Brief in Support. Copies of the Motion and Brief are being served in accordance with the attached certificate of service.

Thank you for your assistance and attention to this matter. If you have any questions or concerns regarding the enclosed, please do not hesitate to contact me.

WHEELING, WV

Very truly yours,

John M. Steidle

WILKES-BARRE, PA

JMS/dre

Enclosures

cc: All Interested Parties of Record (per attached service list)
Administrative Law Judge Mary D. Long

WILMINGTON, DE

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation upon the Commission’s motion :
into matters pertaining to the Proper safety of :
the traveling public and disposition of the :
crossing where State Route SR0268, crosses :
over a railroad tunnel formally used by :
Bessemer and Lake Erie Railroad in : Docket No. I-2019-3012769
Fairview Township, Butler County and :
where State Route SR0268 formerly crossed, :
below grade, the track of Bessemer and Lake :
Erie Railroad in Bradys Bend Township, :
Armstrong County :

NOTICE TO PLEAD

To: All Parties

YOU ARE HEREBY NOTIFIED, pursuant to 52 Pa. Code § 5.102(a)-(b), that Bessemer and Lake Erie Railroad Company has filed the within Motion for Summary Judgment (“Motion”) to which you may answer within twenty (20) days. Your failure to answer the Motion within twenty (20) days of service may cause the facts set forth therein to be deemed admitted and will allow the presiding officer to rule on the Motion without a response from you – thereby requiring no other proof, and judgment may be entered against you. All pleadings such as an Answer or Reply to this Motion must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served on the undersigned counsel for Bessemer and Lake Erie Railroad Company and, where applicable, the Administrative Law Judge presiding over the matter.

Dated: January 3, 2022

Respectfully submitted,
BURNS WHITE LLC



By: _____

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Railroad Company

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation upon the Commission’s motion :
into matters pertaining to the proper safety of :
the traveling public and disposition of the :
crossing where State Route SR0268, crosses :
over a railroad tunnel formally used by : Docket No.: I-2019-3012769
Bessemer and Lake Erie Railroad in Fairview :
Township, Butler County and where State :
Route SR0068 formally crosses, below :
grade, the track of Bessemer and Lake Erie :
Railroad in Bradys Bend Township, :
Armstrong County :

AND NOW, here comes BESSEMER AND LAKE ERIE RAILROAD COMPANY (“B&LE”), by and through its counsel, BURNS WHITE LLC and files the within Motion for Summary Judgment pursuant to 52 Pa. Code § 5.102.

I. CONCISE STATEMENT OF THE CASE

1. The instant matter arises out of B&LE’s attempt to abandon, discontinue and abolish a certain railroad crossing located in Fairview Township, Butler County, Pennsylvania.
2. The Pennsylvania Public Utility Commission (the “Commission” or “PUC”) seeks to regulate the disposition of this crossing in addition to potentially allocating the costs of, *inter alia*, abolition, repair and/or future maintenance of the same to B&LE.
3. As will be demonstrated *infra*, no such costs may be allocated to B&LE, because B&LE is not a “concerned party” under state law.
4. In the alternative, the Commission’s attempt to regulate the crossing at issue is preempted by federal law, which provides exclusive jurisdiction to the Surface Transportation Board (“STB”) to decide such matters.

5. B&LE ceased operations on the former Western Allegheny Branch Line (hereinafter “Western Allegheny Branch”) located in Fairview Township, Butler County Pennsylvania on or about 1998. *See* Affidavit of Michael Barron ¶7, appended hereto.

6. In January 2001, B&LE received approval from the STB to abandon and discontinue service on a portion of its Western Allegheny Branch spanning approximately 20.1 miles in Butler County and Armstrong County, Pennsylvania. *Id.* ¶8.

7. On May 31, 2001, B&LE requested Commission approval to abolish 29 at grade and separated crossings that were located on the previously abandoned service line. *Id.* ¶9.

8. Pursuant to the Secretarial letter dated April 30, 2002, Docket No. A-00117858, the Commission abolished 27 of the 29 requested crossings. *Id.* ¶10.

9. The remaining two crossings – where Pennsylvania State Route 268 (“SR0268”) crosses over a railroad tunnel formally used by the B&LE in Fairview Township, Butler County and where Pennsylvania State Route 68 (“SR0068”) formally crosses, below grade, the B&LE track in Bradys Bend Township, Armstrong County – were not abolished at that time. These two crossings are the subject of the instant Investigation. *Id.* ¶¶11-12.

10. By Order dated October 3, 2019, the Commission instituted the Investigation for the purpose of determining all matters relating to the abolition and safety of the two crossings. More specifically, to determine the future disposition of these crossings, what work shall be performed, and the allocation of cost of any work performed. *Id.* ¶13.

11. By way of a Joint Stipulation submitted to the Commission on or about November 12, 2021, all issues related to the Bradys Bend crossing at SR0068 were amicably resolved by the parties. Accordingly, only the SR0268 crossing remains at issue. *Id.* ¶14.

12. On October 24, 2002, B&LE sold a tract of land (consisting of approximately 394 acres) situated in Clay, Fairview and Concord Townships in Butler County and Bradys Bend Township in Armstrong County to the Western Allegheny Landowners Association (“WALA”) via quit claim deed. *Id.* ¶15.¹

13. Crossing SR0268 is situated in the 394 acre parcel of land that was sold.

14. Since the time of this sale, B&LE has owned no property at the SR0268 crossing. *Id.* ¶16.

15. Additionally, as noted above, B&LE has not operated any facility at this crossing since 1999, nor does B&LE enjoy any easement rights in the same. *Id.* ¶17.

16. As a result of the foregoing, the following facts are undisputed:

- B&LE does not own any facilities at the SR0268 crossing;
- B&LE has not had any ownership interest in any facilities at the SR0268 crossing since October 24, 2002;
- B&LE does not have an easement-based right of way at the SR0268 crossing;
- B&LE does not conduct any regular operations at the SR0268 crossing;
- B&LE has not conducted any regular operations at the SR0268 crossing since 1999.

Id. ¶18.

17. As B&LE has no possessory or other property interest in the subject crossing and no longer conducts any rail transportation operations through the subject crossing, B&LE is not a concerned party to this proceeding.

¹Upon information and belief, WALA subsequently subdivided the 394-acre parcel and over time, sold the subdivided parcels to a number of individuals including William G. and Kay D. Barnhart (22.84 acres), Dean M. and Patricia A. Tascarella (4.23 Acres), Thomas H. and Anna Marie Sherwin (4.47 acres) and Ronald E and Madeline E. Stitt (2.48 acres).

18. Accordingly, B&LE has filed the instant motion requesting that it be dismissed as a party from this Investigation and that a judgment be entered in its favor finding that no costs related to the SR0268 crossing be assessed to B&LE.

II. ARGUMENT

A. Standard for Entering Summary Judgment

19. Pursuant to 52 Pa. Code § 5.102(a), “a party may move for . . . summary judgment.”

20. The “presiding officer will grant or deny . . . a motion for summary judgment, as appropriate.” *Id.* at § 5.102(d)(1).

21. “The judgment sought will be rendered if the applicable pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law.” *Id.*

22. The Commonwealth Court has held that the standard for granting summary judgment in a proceeding before the PUC is the same as in court proceedings:

The PUC interprets Section 5.102(c) (motions for summary judgment) of its regulations in conformity with Rule 1035.1 of the Pennsylvania Rules of Civil Procedure. . . . The PUC must view the record in the light most favorable to the non-moving party, giving that party the benefit of reasonable inferences. All doubts as to existence of a genuine issue of material fact must be resolved against the moving party. However, to preclude summary judgment, the non-moving party must establish that a genuine issue of material fact exists.

United Transp. Union v. Pennsylvania Pub. Util. Comm'n, 68 A.3d 1026, 1033 (Pa. Commw. Ct. 2013) (internal quotations and citations omitted).

B. B&LE is not a concerned party liable for any costs related to the repair, removal, reconstruction or

maintenance of the tunnel located at the SR0268 grade crossing.

23. Under Pennsylvania law, the Commission has the authority “after due notice and hearing” to determine the “compensation for damages” related to the “abolition of any crossing”.

See 66 Pa.C.S. § 2704(a).

24. Furthermore:

Such compensation, as well as the cost of construction, relocation, alteration, protection, or abolition of such crossing, and of facilities at or adjacent to such crossing which are *used* in any kind of public utility service, shall be borne and paid . . . by the public utilities, municipal corporations, municipal authority or nonprofit organization . . . *concerned*, or by the Commonwealth, in such proper proportions as the commission may . . . determine

Id. (emphasis added).

25. Historically, the longstanding rule in Pennsylvania was that a railroad must own property or facilities at a crossing in order to be considered a “concerned party” to whom the Commission has authority to allocate any costs associated with the crossing. *See City of Chester v. Pennsylvania Public Utility Comm’n*, 798 A.2d 288, 294 (Pa. Commw. 2002) (*citing Consolidated Rail Corp. v. Pennsylvania Public Utility Comm’n*, 55 Pa.Cmwlth. 576, 423 A.2d 1108 (1980); *Pennsylvania Public Utility Comm’n v. Southeastern Pa. Transp. Auth.*, 21 Pa.Cmwlth. 106, 343 A.2d 371 (1975); and *Lehigh Valley R.R. v. Pennsylvania Public Utility Comm’n*, 161 A. 422 (Pa. Super. Ct. 1932)).

26. In *City of Chester*, the Commonwealth Court held that, “*it is the ownership interest at the crossing*, not mere usage that gives the Commission the authority to allocate costs” associated with a crossing, including repairs, removal, reconstruction or maintenance, to a railroad.

Id. (emphasis added).

27. In fact, the Pennsylvania courts have uniformly held since 1932 that “it is the *presence and ownership* of the track involved . . . which places the liability on the railroad. *Id.* at 292, n.6 (quoting *Lehigh Valley*, 161 A. at 424)(emphasis added).

28. The Pennsylvania Public Utility Commission has likewise consistently followed this rule in numerous proceedings. *See, e.g., Re Pennsylvania Department of Transportation*, 76 Pa.PUC 155 (1992); *Re City of Philadelphia*, 75 Pa.PUC 73 (1991); *Re Consolidated Rail Corporation*, 70 Pa.PUC 321 (1989); *see also National Railroad Passenger Corp. v. Pa. Public Utility Comm'n*, 665 F.Supp. 402, 404 (E.D. Pa. 1987), *aff'd*, 848 F.2d 436 (3d. Cir. 1988), *cert. denied*, 488 U.S. 893; and *City of Philadelphia v. Pa. Public Utility Commission*, 676 A.2d 1298, 1300 n. 1 (Pa. Cmwlth. 1996).

29. More recently, in *Norfolk Southern Railway Company v. Public Utility Commission*, the Supreme Court of Pennsylvania expanded the definition of a concerned party for purposes of the Commission’s cost-allocation jurisdiction and authority:

We hold that a transportation utility need not own facilities at a rail-highway crossing to be a *concerned party* for purposes of the PUC’s cost-allocation jurisdiction and authority, *at least where the utility conducts regular operations at the crossing and may enforce an easement-based right of way.*

See 77 A.3d 619, 633 (Pa. 2013) (emphasis added).

30. Although the *Norfolk Southern* court expanded the class of entities (*i.e.*, beyond owners of rail-highway crossing facilities) that can be considered “concerned parties”; it remains the case that there must be *at least* (*i.e.*, in the absence of any ownership) a substantial, ongoing use of the crossing by the railroad in order for it to be a “concerned party”.

31. Stated differently – a railroad must still be an owner of the relevant facilities at issue to be a “concerned party” where no regular operations are conducted and where the railroad no longer enjoys an easement-based right of way.

32. The *Norfolk Southern* court’s holding is consistent with Section 2704(a) of the Public Utility Code, which expressly limits any cost allocation relative to the abolition of a crossing to only those facilities “*used* in any kind of public utility service.” (emphasis added).

33. In so holding, the *Norfolk Southern* court considered the prior decisions of the Supreme and Superior Courts in *Pittsburgh Railways v. Pennsylvania Pub. Util. Comm'n* and *Lehigh Valley R. Co. v. Pub. Serv. Comm'n of Pa.* See 77 A.3d at 630 (citing *Pittsburgh Railways Co. v. Pennsylvania Pub. Util. Comm'n*, 237 A.2d 602, 606 (Pa. 1967) and *Lehigh Valley R. Co. v. Pub. Serv. Comm'n of Pa.*, 161 A. 422, 424 (Pa. Super. Ct. 1932)).

34. The *Norfolk Southern* court observed that the *Pittsburgh Railways* and *Lehigh Valley* holdings “lend substantial support to Norfolk’s position” that it is not a concerned party who can be allocated costs where Norfolk did not own any real property or facilities at the crossing site. *Id.*

35. However, the *Norfolk Southern* court did not stop its analysis there.

36. *Norfolk Southern* went on to distinguish the holdings of the *Pittsburgh Railways* court and the *Lehigh Valley* court stating, “neither of those cases involved a nonowner transportation utility possessing a right of way through a deteriorated rail-highway crossing and regularly conducting operations there.” *Id.*

37. Accordingly, the *Norfolk Southern* court considered the facts before it as presenting “an issue of first impression”. *Id.*

38. It logically follows then that *Norfolk Southern's* holding that “a transportation utility need not own facilities at a rail-highway crossing to be a concerned party for purposes of the PUC’s cost-allocation jurisdiction and authority, at least where the utility conducts regular operations at the crossing and may enforce an easement-based right of way” does not abrogate the prior holdings of *Pittsburgh Railways* or *Lehigh Valley*. See, e.g., *Six L's Packing Co. v. W.C.A.B. (Williamson)*, 44 A.3d 1148, 1157-58 (Pa. 2012) (explaining that the holding of a judicial decision is to be “read against the facts” presented to the reviewing court when evaluating the precedential effect of the same) (citing *Oliver v. City of Pittsburgh*, 11 A.3d 960, 966 (Pa. 2011)).

39. Therefore, the holdings of *Pittsburgh Railways* and *Lehigh Valley* are still binding upon the Commission to the extent the facts in those cases mirror the facts presented here.

40. Indeed, the facts in *Pittsburgh Railways* are highly analogous to (if not on all fours with) the facts presented here.²

41. In *Pittsburgh Railways*, the Commission attempted to allocate the costs of replacing and maintaining a rail-highway crossing known as “Black’s Bridge” to the Port Authority of Allegheny County. See 237 A.2d at 604.

42. However, the evidence was clear that the Port Authority enjoyed no ownership interest and/or right of way interest in either the crossing or its related facilities, nor was the Port Authority operating any transportation utility services over the relevant railroad line, which had been previously abandoned by a railroad company. *Id.* at 605.

²By way of contrast, the facts in *Lehigh Valley* were different in two critical respects. The railroad company in *Lehigh Valley*: (1) still owned the relevant facilities at the subject crossings (*i.e.*, one being abolished and a new crossing being constructed to build a bridge over the existing tracks of the railroad company), and (2) operated public utility services over the crossing to be abolished. See 161 A. 422, 424 (holding that, “It is the presence and ownership of the track involved, not any benefit conferred, which places liability on the railroad”). Here, B&LE has no such ownership interest or right of way interest and does not operate any public utility service on the SR0268 crossing.

43. *Pittsburgh Railways* stated that Section 2704 of the Public Utility Code (formerly known as “Section 411”) “empowering the Commission to allocate costs in a highway-rail crossing situation, must be read in connection with Section [2702]” (i.e., formerly known as Section 409). *See* 237 A.2d at 606.

44. “Section [2702](a) defines the crossings with respect to which the Commission can assess certain costs under Section [2704]. Such crossings are those which involve the facilities of ‘a public utility engaged in the transportation of passengers or property’”. *Id.* (emphasis added); *see also* 66 Pa.C.S. § 2702(a).

45. Therefore, “[t]he transportation utilities [c]oncerned for purposes of assessment under Section [2704] are those whose facilities are constructed or located at such crossing.” *See* 237 A.2d at 606.

46. *Pittsburgh Railways* ultimately held that, “the law has been firmly established in this Commonwealth that a transportation utility has no concern with any crossing for purposes of assessment . . . where it does not have a rail facility situated at such crossing”. *Id.*

47. Applying this rule to the facts before it, the *Pittsburgh Railways* court determined that the Port Authority was not a concerned party and, therefore, the Commission lacked the statutory authority to assess costs to the Port Authority for the replacement and maintenance of the Black’s Bridge crossing – *i.e.*, a railway facility that the Port Authority: (1) did not own, (2) did not have a right of way interest in, and (3) over which the Port Authority did not operate any transportation utility services. *Id.* at 608.

48. Here, there is no factual dispute that the real property, rail line and any rail facilities at the SR0268 grade crossing were conveyed to WALA on October 24, 2002.

49. It is likewise undisputed that B&LE has no ownership interest in real property or track, signal, communication or other railroad facilities whatsoever at the former crossing.

50. Indeed, B&LE has had no ownership interest in any facilities of the SR0268 crossing since October 24, 2002; has not conducted any operations at the SR0268 crossing since 1999; and has no easement-based right of way to the SR0268 crossing.

51. In light of these undisputed facts, the holdings in *Norfolk Southern* and *Pittsburgh Railways* collectively control the cost allocation calculus of the instant Investigation relative to B&LE.

52. These cases collectively require a finding that B&LE is not a “concerned party” as the term is defined under the Public Utility Code, because B&LE: (1) has no ownership interest in the SR0268 crossing, (2) has no right of way interest in the SR0268 crossing, and (3) does not conduct transportation utility operations at the SR0268 crossing.

53. Accordingly, the Commission has no statutory authority to allocate any costs for the repair, removal, reconstruction or maintenance of the tunnel located at the SR0268 grade crossing.

54. A ruling to the contrary would not only be in opposition to the precedential authority of the *Norfolk Southern* Court and the *Pittsburgh Railways* court, but it would also eviscerate the plain language meaning of Section 2704(a) of the Public Utility Code. *See* 66 Pa.C.S. § 2704(a) (expressly limiting the Commission’s cost allocation authority to only those facilities “*used* in any kind of public utility service”) (emphasis added).

55. Section 2704(a) reflects the common-sense judgment of the General Assembly that an entity that abandoned all ownership and usage rights of a rail crossing should not be charged with responsibility for repairs to the crossing.

56. Therefore, B&LE respectfully requests that summary judgment be entered in its favor as a matter of law.

C. Alternatively, this proceeding is preempted by Federal Law such that the Commission has no jurisdiction and/or authority to assess any liability against B&LE for the costs related to the repair, removal, reconstruction or maintenance of the tunnel located at the SR0268 grade crossing

57. The Interstate Commerce Commission Termination Act (“ICCTA”) preempts Pennsylvania law relative to the “abandonment, or discontinuance of . . . [railroad] facilities”, because ICCTA provides “exclusive” jurisdiction to the Surface Transportation Board (“STB”) to decide such issues. *See* 49 U.S.C. § 10501(b).

58. Indeed, the “remedies” provided for under ICCTA with respect to “regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” *Id.*

59. The term “transportation” includes “a . . . property, facility, instrumentality, or *equipment of any kind related to the movement of passengers or property*, or both by rail, *regardless of ownership* or an agreement concerning use” *Id.* at § 10102(9)(A) (emphasis added).

60. Federal courts have held that, “Under the ICCTA, the STB has exclusive jurisdiction over ‘transportation by rail carrier’ and its regulation of rail carriers preempts state regulation with respect to rail transportation.” *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 305 (3d Cir. 2004) (*citing* 49 U.S.C. § 10501(b)).

61. Here, the relevant issue relates to BL&E’s abandonment, discontinuance and attempted abolishment of a railroad crossing involving an underground tunnel, which travels beneath State Route 268.

62. Without question, the tunnel underneath SR0268 constitutes property related to the movement of passengers or property by rail and, therefore, is within ICCTA's definition of "rail transportation".

63. Furthermore, ICCTA expressly preempts any state law, which would attempt to regulate the abandonment and/or discontinuance of railroad facilities.

64. Accordingly, the Commission's attempt to regulate the disposition of SR0268 and allocation of repair/maintenance costs for SR0268 against B&LE is improper, because the Commission lacks jurisdiction to do so as Pennsylvania's Public Utility Code (i.e., 66 Pa.C.S. §§ 101 *et seq.*) is expressly preempted by federal law.

III. CONCLUSION

65. For the foregoing reasons, BESSEMER AND LAKE ERIE RAILROAD COMPANY ("B&LE") respectfully requests that summary judgment be entered in its favor with respect to the Commission's relevant Investigation and that no costs relative to the SR0268 crossing be assessed against B&LE.

Respectfully submitted,
BURNS WHITE LLC



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Attorneys for The Bessemer & Lake Erie
Railroad Company

**BEFORE THE
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Route SR0068 formally crosses, below :
grade, the track of Bessemer and Lake Erie :
Railroad in Bradys Bend Township, :
Armstrong County :

AFFIDAVIT OF MICHAEL JAMES BARRON, JR.

The undersigned, Michael James Barron, Jr., swears and affirms to the following:

1. I, Michael James Barron, Jr., am an attorney admitted to the practice of law in the state of Illinois and the state of Wisconsin.
2. I am a partner in the law firm of Fletcher & Sippel located at 29 N. Wacker, Suite 800, Chicago, Illinois 60606.
3. Consistent with my obligations as a lawyer, I provide legal advice to BESSEMER AND LAKE ERIE RAILROAD COMPANY (“B&LE”) concerning real estate matters and state and federal regulatory matters.
4. I am familiar with the factual history of the State Route 268 crossing (“SR0268 crossing”) at issue in this Investigation from my institutional knowledge of B&LE and my review of historical records, business records and legal documents.
5. The SR0268 crossing is a former railroad tunnel that passes under Pennsylvania State Route 268.

6. The tunnel is located on the former Western Allegheny Branch Line of B&LE in Fairview Township, Butler County, where the railroad tracks were previously laid through a tunnel that runs beneath Pennsylvania State Route 268.

7. B&LE ceased all operations over the Western Allegheny Branch Line around 1998, has not restarted operations on the Western Allegheny Branch Line since, and currently does not operate over the Western Allegheny Branch Line.

8. In January 2001, B&LE received approval from the Surface Transportation Board (“STB”) to abandon and discontinue service on a portion of its Western Allegheny Branch Line spanning approximately 20.1 miles in Butler County and Armstrong County, Pennsylvania. *See* October 10, 2000 STB Order, appended hereto as Exhibit “1”, and January 17, 2001 STB Order, appended hereto as Exhibit “2”.

9. On May 31, 2001, B&LE requested Commission approval to abolish 29 at grade and separated crossings that were located on the previously abandoned service line. *See* May 31, 2001 Application to Abolish, appended hereto as Exhibit “4”.

10. Pursuant to the Secretarial letter dated April 30, 2002, Docket No. A-00117858, the Commission abolished 27 of the 29 requested crossings. *See* April 30, 2002 Secretarial Letter, appended hereto as Exhibit “3”.

11. The remaining two crossings – where Pennsylvania State Route 268 (“SR0268”) crosses over a railroad tunnel formally used by the B&LE in Fairview Township, Butler County and where Pennsylvania State Route 68 (“SR0068”) formally crosses, below grade, the B&LE track in Bradys Bend Township, Armstrong County – were not abolished at that time. *Id.*

12. These two crossings are the subject of the instant Investigation.

13. By Order dated October 3, 2019, the Commission instituted the Investigation for the purpose of determining all matters relating to the abolition and safety of the crossings. More specifically, to determine the future disposition of these crossings, what work shall be performed, and the allocation of cost of any work performed.

14. By way of a Joint Stipulation submitted to the Commission on or about November 12, 2021, all issues related to the Bradys Bend crossing at SR0068 were amicably resolved by the parties. Accordingly, only the SR0268 crossing remains at issue.

15. On October 24, 2002, B&LE sold a tract of land (consisting of approximately 394 acres) situated in Clay, Fairview and Concord Townships in Butler County and Bradys Bend Township in Armstrong County to the Western Allegheny Landowners Association (“WALA”) via quit claim deed. *See* Oct. 24, 2002 Quit Claim Deed appended hereto as Exhibit “5”.¹

16. Crossing SR0268 is situated in the 394 acre parcel of land that was sold. Since the time of this sale, B&LE has owned no property at the SR0268 crossing.

17. Additionally, as noted above, B&LE has not operated any facility at this crossing since 1999, nor does B&LE enjoy any easement rights in the same.

18. As a result of the foregoing:

- B&LE does not own any facilities at the SR0268 crossing;
- B&LE has not had any ownership interest in any facilities at the SR0268 crossing since October 24, 2002;
- B&LE does not have an easement-based right of way at the SR0268 crossing;
- B&LE does not conduct any regular operations at the SR0268 crossing;

1 Upon information and belief, WALA subsequently subdivided the 394-acre parcel and over time, sold the subdivided parcels to a number of individuals including William G. and Kay D. Barnhart (22.84 acres), Dean M. and Patricia A. Tascarella (4.23 Acres), Thomas H. and Anna Marie Sherwin (4.47 acres) and Ronald E and Madeline E. Stitt (2.48 acres).

- B&LE has not conducted any regular operations at the SR0268 crossing since 1999.

19. As B&LE has no possessory or other property interest in the subject crossing and no longer conducts any rail transportation operations through the subject crossing, B&LE is not a concerned party to this proceeding and, therefore, the Commission has no statutory authority to assess costs related to repair, maintenance and/or abolition of the SR0268 crossing to B&LE.

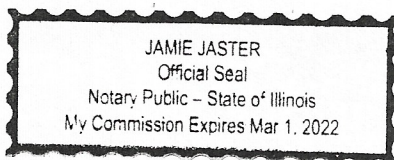
Michael James Barron, Jr.
Michael James Barron, Jr., Esquire
IL I.D. No. 6228809
WI I.D. No. 1038112

SWORN to and subscribed before me
this 3rd day of January, 2022.

[Signature]

Notary Public

My commission expires:



31344

SERVICE DATE - OCTOBER 10, 2000

DO

FR-4915-00-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB-88 (Sub-No. 10X)]

Bessemer and Lake Erie Railroad Company—Abandonment Exemption—in Armstrong and Butler Counties, PA

Bessemer and Lake Erie Railroad Company (B&LE) has filed a verified notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments and Discontinuances to abandon and discontinue service over its line of railroad known as the Western Allegheny Branch, extending from Station 1400+80 East to End of Track, at Station 2460+98, in Armstrong and Butler Counties, PA, a distance of 20.1 miles (line). The line traverses United States Postal Service Zip Codes 16025, 16028, 16041, and 16061.

B&LE has certified that: (1) no local traffic has been handled over the line for at least 2 years; (2) no overhead traffic has been handled over the line for at least 2 years; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government agency acting on behalf of such user) regarding cessation of service over the line is either pending with the Surface Transportation Board (Board) or any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental reports), 49 CFR 1105.8 (historic reports), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.



As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed. Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on November 9, 2000, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,¹ formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),² and trail use/rail banking requests under 49 CFR 1152.29 must be filed by October 20, 2000. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by October 30, 2000, with the Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, N.W., Washington, DC 20423-0001.

A copy of any petition filed with the Board should be sent to applicant's representative: Thomas R. Ogoreuc, Esq., Bessemer and Lake Erie Railroad Company, 135 Jamison Lane, Monroeville, PA 15146. If the verified notice contains false or misleading information, the exemption is void ab initio.

¹ The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis in its independent investigation) cannot be made before the exemption's effective date. See Exemption of Out-of-Service Rail Lines, 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

² Each offer of financial assistance must be accompanied by the filing fee, which currently is set at \$1000. See 49 CFR 1002.2(f)(25).

B&LE has filed an environmental report which addresses the abandonment's effects, if any, on the environment and historic resources. The Section of Environmental Analysis (SEA) will issue an environmental assessment (EA) by October 16, 2000. Interested persons may obtain a copy of the EA by writing to SEA (Room 500, Surface Transportation Board, Washington, DC 20423-0001) or by calling SEA, at (202) 565-1545. Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), B&LE shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by B&LE's filing of a notice of consummation by October 10, 2001, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our website at

“WWW.STB.DOT.GOV.”

Decided: September 28, 2000.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams

Secretary

31593
DO

SERVICE DATE - JANUARY 17, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-88 (Sub-No. 10X)

BESSEMER AND LAKE ERIE RAILROAD COMPANY—ABANDONMENT
EXEMPTION—IN ARMSTRONG AND BUTLER COUNTIES, PA

Decided: January 12, 2001

Bessemer and Lake Erie Railroad Company (B&LE) filed a verified notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments and Discontinuances for B&LE to abandon and discontinue service over its line of railroad known as the Western Allegheny Branch, extending from Station 1400+80 East to End of Track, at Station 2460+98, in Armstrong and Butler Counties, PA, a distance of 20.1 miles (line). Notice of the exemption was served and published in the Federal Register on October 10, 2000 (65 FR 60246).

By decision served November 8, 2000, the Board imposed three environmental conditions on the abandonment exemption, held in abeyance the request from the Pennsylvania Department of Conservation and Natural Resources (DCNR) for issuance of a notice of interim trail use under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act) and for issuance of a public use condition, pending completion of the offer of financial assistance (OFA) process,¹ extended the time for the filing of an OFA until January 8, 2001, and postponed the effective date of the exemption until January 18, 2001.

On November 14, 2000, the National Geodetic Survey (NGS) late-filed comments with the Board's Section of Environmental Analysis (SEA) identifying 3 geodetic station markers that may be affected by the proposed abandonment. NGS requests that it be notified 90 days in advance of any activities that would disturb or destroy these markers to plan for their relocation. Therefore, SEA recommends that, in addition to the conditions imposed in the Board's November 8 decision, a further condition be imposed requiring B&LE to consult with the NGS and provide NGS with 90 days' notice prior to disturbing or destroying any geodetic markers. The new environmental condition will be imposed.

On January 8, 2001, Bradys Bend submitted a letter stating that it had decided not to go forward with the filing of an OFA. This terminates the OFA process and it is now appropriate to

¹ A formal expression of intent to file an OFA was timely filed by Bradys Bend Corporation (Bradys Bend) to purchase a portion of the line.



address the DCNR's request for issuance of a notice of interim trail use and for issuance of a public use condition.

By letter submitted by facsimile on January 11, 2001, B&LE states that it is not willing to negotiate with the DCNR for interim trail use, but that it does not oppose imposition of a public use condition. Because the Trails Act permits only voluntary interim trail use, the Board cannot issue a NITU in this proceeding. See Rail Abandonment—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591 (1986) (Trails).

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. 10905. See Trails, 2 I.C.C.2d at 609. To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. See 49 CFR 1152.28(a)(2). DCNR has met these requirements. A 180-day public use condition will therefore be imposed. B&LE may remove the tracks, ties, and signal equipment on the right-of-way, but is required to leave bridges, culverts, and tunnels intact during that period. A public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide an opportunity for an interested person to acquire the right-of-way that has been found appropriate for public purposes.²

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. The request for issuance of a notice of interim trail use is denied.
3. The request for a public use condition is granted. The abandonment of the line described above is subject to the further environmental condition that B&LE consult with the NGS and provide NGS with 90 days' notice prior to disturbing or destroying any geodetic markers.³ Also, B&LE shall leave intact all of the right-of-way underlying the tracks, including

² Under 49 U.S.C. 10905, the Board may prohibit the disposal of rail properties that are proposed to be abandoned and are suitable for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

³ The exemption continues to be subject to the three environmental conditions imposed in the Board's November 8 decision. Those conditions are that B&LE: (1) consult with the U.S.
(continued...)

bridges, trestles, culverts and tunnels (but not tracks, ties and signal equipment), for a period of 180 days from the effective date of the exemption (i.e., until July 17, 2001), to enable any State or local government agency, or other interested person to negotiate the acquisition of the line for public use.

4. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary

³(...continued)

Department of Agriculture, Natural Resources Conservation Service, and contact Dave Rupert, District Manager, Armstrong County Conservation District, Armsdale Administrative Building, RR#8, Box 294, Kittanning, PA 16201 [(724) 854-3425] prior to salvage operations, (2) consult with the U. S. Environmental Protection Agency-Region III prior to salvage operations, and (3) retain its interest in and take no steps to alter the historic integrity of the line in its entirety until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f.



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

IN REPLY PLEASE
 REFER TO OUR FILE

APRIL 30, 2002

A-00117858
 (corrected)

TO ALL PARTIES

DOCKETED
 MAY 01 2002

Application of Bessemer and Lake Erie Railroad Company for approval of the abolition of twenty-eight crossings where applicant's former Hilliard's Branch and Western Allegheny Branch are intersected by public highways and streets in the Township of Marion, Clay, Concord and Fairview in Butler County and in the Township of Brady's Bend in Armstrong County and application for the abolition of one Tunnel located in the Township of Fairview in Butler County.

DOCUMENT
 FOLDER

To Whom It May Concern:

This matter is before us upon application, filed May 31, 2001, by Bessemer and Lake Erie Railroad Company (B&LE) requesting Commission approval to abolish 29 at grade and separated grade crossings at various locations in Armstrong and Butler Counties.

A field conference, arranged by a Commission staff engineer and held at the site of the crossings was attended by representatives of B&LE, PennDOT, Concord Township, Fairview Township and Brady's Bend Township.

B & LE avers that it no longer needs a portion of its Hilliard's Branch and Western Allegheny Branch. The railroad states that at Docket No. Ab-88 (Sub No. 10X) the Surface Transportation Board granted approval to abandon and discontinue service on the subject rail line.

A list of the crossings to be abolished and their locations is as follows:

<u>No.</u>	<u>Location</u>	<u>Street</u>	<u>Type</u>	<u>DOT No.</u>
1	Marion Twp. Butler Co.	S. R. 4012	at grade	051 760 F
2	Marion Twp. Butler Co.	S. R. 0308	at grade	051 754 L



3	Marion Twp. Butler Co.	T-541	at grade	051 756 R
4.	Marion Twp. Butler Co.	T-560	at grade	051 755 J
5	Clay Twp. Butler Co.	T-458	at grade	051 698 X
6	Clay Twp. Butler Co.	S. R. 0308	at grade	051 699 E
7	Clay Twp. Butler Co.	T-515	at grade	051 702 K
8	Concord Twp. Butler Co.	T-504	at grade	051 708 B
9.	Concord Twp. Butler Co.	T-608	at grade	051 712 R
10	Concord Twp. Butler Co.	T-621	at grade	051 716 T
11.	Concord Twp. Butler Co.	S. R. 1017	at grade	051 718 G
12.	Fairview Twp. Butler Co.	S. R. 1013	at grade	051 721 P
13.	Fairview Twp. Butler Co.	S. R. 1013	at grade	051 722 W
14.	Fairview Twp. Butler Co.	T-674	at grade	051 723 D
15	Fairview Twp. Butler Co.	T-621	at grade	051 724 K
16	Fairview Twp. Butler Co.	T-676	at grade	051 726 Y
17	Fairview Twp. Butler Co.	T-621	at grade	051 727 F

18	Brady's Bend Twp. Armstrong Co.	SR0068	at grade	051 731 V
19	Brandy's Bend Twp. Armstrong Co.	SR4007	at grade	051 733 J
20	Brady's Bend Twp. Armstrong Co.	SR0068	at grade	051 734 R
21	Concord Twp. Butler Co.	T-502	highway below grade	051 706 M
22	Concord Twp. Butler Co.	SR0038	highway below grade	051 710 C
23	Concord Twp. Butler Co.	T-606	highway below grade	051 711 J
24	Concord Twp. Butler Co.	T-623	highway below	051 715 J
25	Concord Twp. Butler Co.	SR1013	highway above grade	051 720 H
26	Fairview Twp. Butler Co.	B & P Railroad	railroad below grade	
27	Fairview Twp. Butler Co.	SR1023	highway below grade	051 728 M
27a)	Fairview Twp. Butler Co.	SR0268	highway above grade (tunnel)	
28	Brady's Bend Twp. Armstrong Co.	SR0068	highway below grade	051 730 N

B&LE and Concord Township have reached an agreement concerning the disposition of the crossings involving Concord Township roads. The township, at the at grade crossings of T-504, T-608 and T-621, will remove the rails and ties at each crossing. The Township will repave the crossing areas to conform with the approach roadways. B&LE agrees to remove the separated grade crossings at T-623, T-502 and T-606. At each of these crossings, B&LE will remove the superstructure, abutments and backwalls of the bridges. At T-606 and T-623 the remaining fill will be graded to a 2:1 slope. At T-502, the north-side fill will be graded to a 2:1 slope with the south-side full grading will be extended to provide better sight distance.

At crossing Nos. 2 and 18, the rails and ties have been removed and crossing area repaved. At crossing Nos. 1, 3-7, 11-17, 19 and 20, B&LE will remove the rails and ties from the highway right-of-way and restore the disturbed highway area with suitable material conforming with local and/or PennDOT specifications. B&LE agrees to remove any crossbuck warning signs and any warning devices and their foundation to one foot below ground level at the crossings.

At crossing Nos 22 and 27, B&LE agrees at its sole cost to remove the substructure and superstructure of the bridge and grade the remaining fill to a 2:1 slope. PennDOT agrees, at its sole cost, to provide maintenance of traffic for the two bridge removals.

At crossing No 25, B&LE will remove the rails and ties from under the bridge and the bridge remain in place. At crossing No. 26, B&LE agrees to remove the superstructure of the bridge and the westerly abutment.

At crossing No. 28, PennDOT is in the process of designing a highway realignment along with the bridge removal. Once the design is complete, PennDOT will submit the plans to the parties. At crossing No. 27(a), B&LE and PennDOT presently are negotiating the disposition of the tunnel. These two crossings will be the subject of future Secretarial letters or formal hearing.

B&LE avers that work on the crossing abolitions may not start until 2003. The railroad proposes to install "TRACKS OUT OF SERVICE" signs at the at grade crossings, so that until the crossings are abolished, in accordance with the Motor Vehicle Code [75§3342(c)(4)] certain vehicles [75§3342(b)] will not be required to stop at the crossings.

The applicant has certified that a copy of the application has been served on each party in interest. Upon full consideration of the matters involved, we find that a hearing is not necessary at this time and that a Secretarial letter may be issued approving the application.

The Commission issues this Secretarial letter in accordance with Section 2702 of the Public Utility code and finds that the abolition of the crossings is necessary and proper for the service, accommodation, convenience or safety of the public.

The application of Bessemer & Lake Erie Railroad Company is approve as herein directed:

1. The crossings listed in this application, except for Crossing Nos. 27(a) and 28, at various locations in Armstrong and Butler Counties, be and are hereby abolished.

2. The Bessemer & Lake Erie Railroad Company, at its sole cost and expense, furnish all material and do all work necessary to abolish crossing Nos. 1, 3-7, 11-17, 19 and 20 by removing rails and ties within the limits of the highways; restore the disturbed area with suitable material conforming on all respects with the abutting highway paving; and removing any warning devices at the crossings and their foundations to at least one foot below ground.

3. The Bessemer & Lake Erie Railroad Company, at its sole cost and expense, furnish all material and do all work necessary to abolish crossing Nos. 21-24, and 27 by removing the substructure and superstructure of the bridges and grading the remaining fill to a 2:1 slope; crossing No. 25 by removing the rails, ties and any other railroad facilities at the crossing; and crossing No. 26 by removing the superstructure and westerly abutment of the bridge.

4. Concord Township, at its sole cost and expense, furnish all material and do all work necessary to abolish crossing Nos. 8, 9 and 10 by removing the rails and ties within the limits of the highways; restore the disturbed area with suitable material conforming in all respects with the abutting highway paving; and removing the crossbuck warning signs and posts at each crossing.

5. Any relocation of, changes in or removal of any adjacent structures, equipment or other facilities of any public utility, other than Bessemer and Lake Erie Railroad Company, which may be required as incidental to the abolition of the crossings, be made by said utility at the sole cost and expense of Bessemer and Lake Erie Railroad Company, and in such a manner as will not interfere with the abolition of the crossings; and such relocated or changed facilities thereafter to be maintained by said utility, at its sole cost and expense.

6. Bessemer and Lake Erie Railroad Company, at its sole cost and expense, furnish all material and do all work necessary to establish and maintain any detours or traffic control devices that may be required to properly accommodate traffic during the time crossing Nos. 1, 3-7, 11-17, 19-21, 23, and 24 are being abolished.

7. Concord Township, at its sole cost and expense, furnish all material and do all work necessary to establish and maintain any detours or traffic control devices that may be required to properly accommodate traffic during the time crossing Nos. 8, 9, and 10 are being abolished.

8. Pennsylvania Department of Transportation, at its sole cost and expense, furnish all material and do all work necessary to establish and maintain any detours or traffic control devices that may be required to properly accommodate traffic during the time crossing Nos. 22 and 27.

9. Bessemer & Lake Erie Railroad Company, at its sole cost and expense, furnish all material and perform all work necessary to install "TRACKS OUT OF SERVICE" signs (R8-9) at the at grade crossings, in accordance with Part 8 of the Manual on Uniform Traffic Control Devices, until such time as the rails and ties are removed from the crossing areas.

10. The rail-highway crossing abolitions be completed in a manner satisfactory to this Commission on or before December 31, 2004 and that on or before said date, Bessemer and Lake Erie Railroad Company report the actual completion of the work.

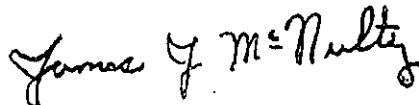
11. Upon completion of the abolition of the at-grade crossings, Pennsylvania Department of Transportation, Marion Township, Clay Township, Concord Township, and Fairview Township each, at its sole cost and expense, furnish all material and do all work necessary thereafter to maintain its respective roadways in the areas formerly occupied by the at-grade crossings.

12. Upon completion of the abolition of crossing No. 25, Pennsylvania Department of Transportation, at its sole cost and expense, furnish all material and do all work necessary thereafter to maintain the substructure and superstructure of the bridge carrying SR1013 over the former railroad right-of-way.

13. This Secretarial letter insofar as it imposes costs upon any party, is without prejudice to the right of that party to recover part or all of said costs in accordance with any lawful agreement between it and any of the other parties hereto.

If you are dissatisfied with the resolution of this matter, you may, as set forth in 52 Pa. Code §5.44, file a petition with the Commission within ten (10) days of the date of this letter.

Very truly yours,

A handwritten signature in cursive script that reads "James J. McNulty".

James J. McNulty
Secretary

CAPTION SHEET

CASE MANAGEMENT SYSTEM

1. REPORT DATE: 00/00/00 :
 2. BUREAU: TSR :
 3. SECTION(S): : 4. PUBLIC MEETING DATE:
 5. APPROVED BY: : 00/00/00
 DIRECTOR: :
 SUPERVISOR: :
 6. PERSON IN CHARGE: : 7. DATE FILED: 05/31/01
 8. DOCKET NO: A-00117858 : 9. EFFECTIVE DATE: 00/00/00

PARTY/COMPLAINANT: TOWNSHIP OF FAIRVIEW BUTLER COUNTY

RESPONDENT/APPLICANT: BESSEMER & LAKE ERIE RAILROAD COMPANY

COMP/APP COUNTY: BUTLER

UTILITY CODE: 950000

ALLEGATION OR SUBJECT

APPLICATION OF BESSEMER AND LAKE ERIE RAILROAD COMPANY FOR APPROVAL OF THE ABOLITION OF TWENTY-EIGHT CROSSINGS WHERE APPLICANT'S FORMER HILLIARD'S BRANCH AND WESTERN ALLEGHENY BRANCH ARE INTERSECTED BY PUBLIC HIGHWAYS AND STREETS IN THE TOWNSHIPS OF MARION, CLAY, CONCORD AND FAIRVIEW IN BUTLER COUNTY AND IN THE TOWNSHIP OF BRADY'S BEND IN ARMSTRONG COUNTY AND APPLICATION FOR THE ABOLITION OF ONE TUNNEL LOCATED IN THE TOWNSHIP OF FAIRVIEW IN BUTLER COUNTY.

DOCUMENT
FOLDER

DOCKETED
JUN 01 2001

EXHIBIT
B&LE 4

ORIGINAL

THOMAS R OGOREUC
Attorney at Law

135 Jamison Lane
P.O. Box 68
Monroeville, PA 15146

Tel: 412-829-6893
Fax: 412-829-6607
E-Mail: trogoreuc@hotmail.com

May 29, 2001

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
2nd Floor, 7 North
Harrisburg, PA 17120

A-00117858

Re: Application of the Bessemer and Lake Erie Railroad Company for the
Abolishment of twenty-eight grade crossings and one tunnel located in Armstrong
and Butler Counties, Pennsylvania

Dear Secretary McNulty:

Enclosed for filing on behalf of the Bessemer and Lake Erie Railroad Company, please
find the original and three copies of the above-referenced Application for the abolishment of
twenty-eight grade crossings and one tunnel.

Please acknowledge receipt by date stamping the enclosed copy of this letter and
returning it to me in the enclosed self-addressed, stamped envelope.

If you have any questions, please feel free to call me at the above number.

Very truly yours,



Thomas R. Ogoreuc

*Counsel for
Bessemer and Lake Erie Railroad Company*

DOCUMENT
FOLDER

Enclosure

cc: J. E. Streett
H. K. Callen

014395

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SECRETARY'S ROOM
MAY 31 AM 11:20

22

BEFORE
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

ORIGINAL

IN RE: Application of Bessemer and Lake Erie Railroad Company for approval of the abolition of twenty-eight crossings where applicant's former Hilliard's Branch and Western Allegheny Branch are intersected by public highways and streets in the townships of Marion, Clay, Concord and Fairview in Butler County and in the township of Brady's Bend in Armstrong County and application for the abolition of one tunnel located in the township of Fairview in Butler County.

Application
Docket No. A-00117858

DOCKETED
JUN 01 2001

014398

To Pennsylvania Public Utility Commission:

1. The name and address of applicant are:

Bessemer and Lake Erie Railroad Company (B&LE)
135 Jamison Lane
Monroeville, PA 15146

2. The name and address of applicant's attorney are:

Thomas R. Ogoreuc, Esq.
135 Jamison Lane
Monroeville, PA 15146

3. The applicant, which is classified by the Surface Transportation Board (STB) as a Class II common carrier by rail, is a line haul railroad operating approximately 220 miles of road extending south from Conneaut, Ohio and Erie, Pennsylvania to North Bessemer, Pennsylvania.

4. By way of this application, applicant seeks the approval and ratification of the Pennsylvania Public Utility Commission for removal of all rails, ties and crossing surface and restoration of the twenty-eight crossings listed in detail in Exhibit A.

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5. By way of this application, applicant seeks the approval and ratification of the Pennsylvania Public Utility Commission for the abolition of the tunnel located on the B&LE's Western Allegheny Branch at MP WA 42.09 and which is located under SR 0268 in Fairview Township, Butler County.

6. Applicant seeks abolishment of the above road crossings and tunnel as it has received STB approval to discontinue and abandon service over its Hilliard's and Western Allegheny Branches by Order dated January 9, 2001 and January 12, 2001, respectively, and no longer requires access through the subject crossings and tunnel. Attached as Exhibit B is a map indicating the exact location of each crossing and tunnel for which applicant is seeking abolishment.

7. No service to any customer will be affected by this proposed crossing and tunnel abolishment as the associated track has already been approved for abandonment by the STB.

WHEREFORE, applicant prays your Honorable Commission to approve the application.

Respectfully submitted,


Thomas R. Ogoreuc, Esq.
135 Jamison Lane
Monroeville, PA 15146

Tel: (412) 829-6893
Fax: (412) 829-6607

*Counsel for
Bessemer and Lake Erie Railroad Company*

VERIFICATION

I, James E. Streett, hereby state that the facts set forth above are true and correct to the best of my knowledge, information and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

Date: 5/29/2001

James E Streett
James E. Streett, General Superintendent
Bessemer and Lake Erie Railroad Company

Subscribed and sworn to before me
this ____ day of May, 2001.

Notary Public

EXHIBIT A

**Hilliard's Branch
At Grade Crossings**

1. AAR#51-760F, SR 4012, Magerk Road, Marion Twp., Butler County.
2. AAR#51-759L, SR 308, Town of Boyers, Marion Twp., Butler County.
3. AAR#51-756R, Township Road 541, Marion Twp., Butler County.
4. AAR#51-755J, Township Road 560, Marion Twp., Butler County.

014399

**Western Allegheny Branch
At Grade Crossings**

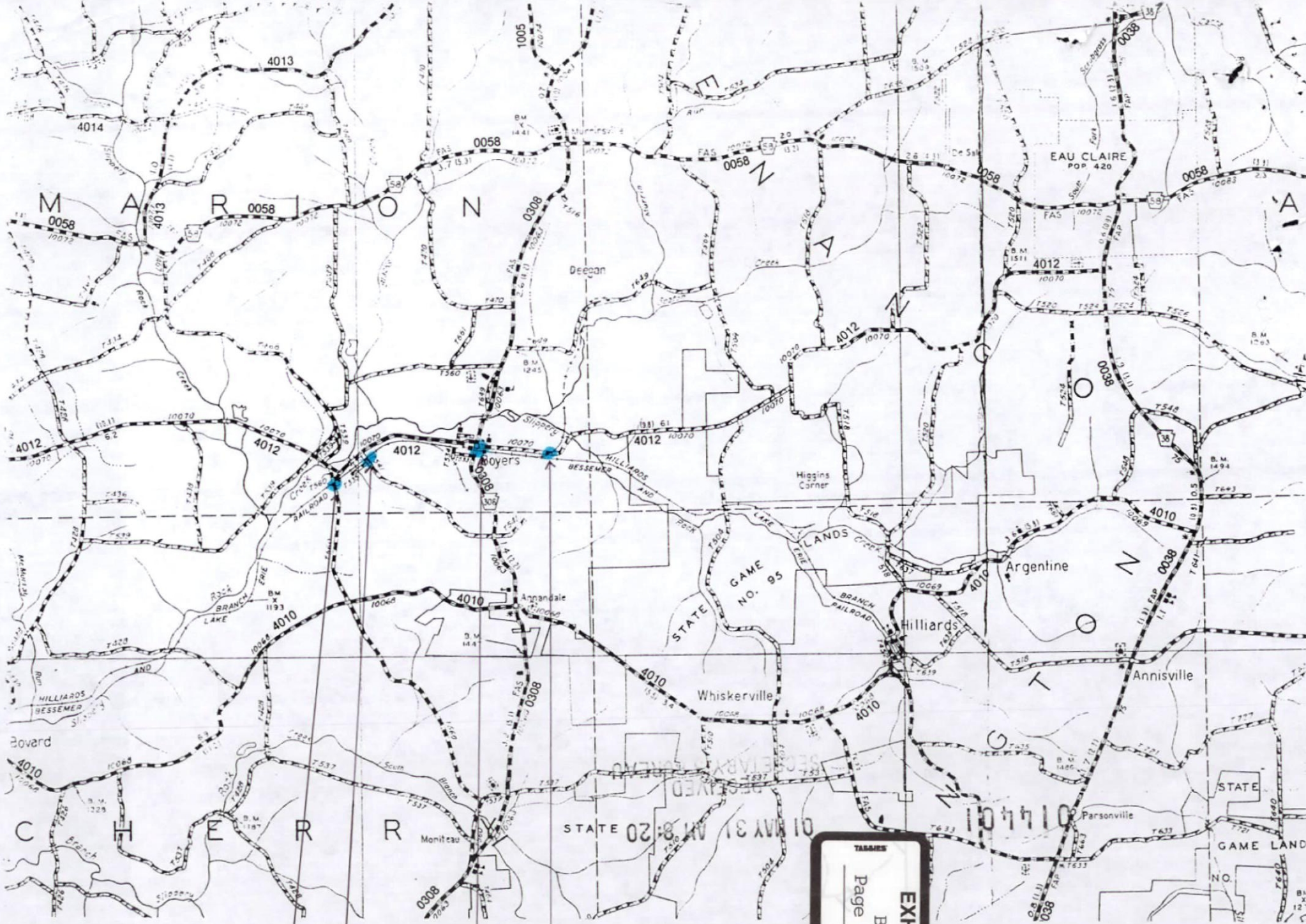
5. AAR#51-698X, Township Road 458, Clay Twp., Butler County.
6. AAR#51-699E, SR 0308, Clay Twp., Butler County.
7. AAR#51-702K, Township Road 515, Clay Twp., Butler County.
8. AAR#51-708B, Township Road 504, Hooker Road, Concord Twp., Butler County.
9. AAR#51-712R, Township Road 608, Troutman Road, Concord Twp., Butler County.
10. AAR#51-716T, Township Road 621, Zion Road, Concord Twp., Butler County.
11. AAR#51-718G, SR 1017, Utley Road, Concord Twp., Butler County.
12. AAR#51-721P, SR 1013, Fairview Twp., Butler County.
13. AAR#51-722W, SR 1013, Fairview Twp., Butler County.
14. AAR#51-723D, Township Road 674, Fairview Twp., Butler County.
15. AAR#51-724K, Township Road 621, Fairview Twp., Butler County.
16. AAR#51-726Y, Township Road 676, Karn's City Road, Fairview Twp., Butler County.
17. AAR#51-727F, Township Road 621, Fairview Twp., Butler County.

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18. AAR#51-731V, SR 0068, Route 68, Brady's Bend Twp., Armstrong County.
19. AAR#51-733J, SR 4007, Brady's Bend Twp., Armstrong County.
20. AAR#51-734R, SR 0068, Route 68, Brady's Bend Twp., Armstrong County.

**Western Allegheny Branch
Below Grade Crossings**

21. MP WA 30.83, Township Road 502, Concord Twp., Butler County.
22. MP WA 32.93, SR 0038, Concord Twp., Butler County.
23. MP WA 33.69, Township Road 606, Concord Twp., Butler County.
24. MP WA 35.51, Township Road 623, Concord Twp., Butler County.
25. MP WA 37.35, SR 1013, Concord Twp., Butler County.
26. MP WA 40.71, B&P Railroad, Fairview Twp., Butler County.
27. MP WA 40.98, SR 1023, Fairview Twp., Butler County.
28. MP WA 43.72, SR 0068, Brady's Bend Twp., Armstrong County.



AT Grade
Crossings

4 3 2 1

TABES
B
EXHIBIT
Page 1 of 2

Hilliard's Branch



At Grade
Cross. ngs

Below grade
cross. ngs

EXHIBIT
B
Page 2 of 2

Tunnel
W.A. Branch

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

IN REPLY PLEASE
REFER TO OUR FILE
A-00117858

JUNE 1, 2001

DOCUMENT
FOLDER

THOMAS R. OGOREUC, ESQUIRE
135 JAMISON LANE
MONROEVILLE PA 15146

Application of Bessemer and Lake Erie Railroad Company for approval of the abolition of twenty-eight crossings where applicant's former Hilliard's Branch and Western Allegheny Branch are intersected by public highways and streets in the townships of Marion, Clay, Concord and Fairview in Butler County and in the township of Brady's Bend in Armstrong County and application for the abolition of one tunnel located in the township of Fairview in Butler County.

Dear Sir/Madam:

Receipt is acknowledged of the application of BESSEMER & LAKE ERIE RAILROAD COMPANY (B&LE) which has been captioned and docketed to the above number.

It will be necessary for you to serve a copy of the application upon the parties involved and file proof of such service with the Commission.

The matter will receive the Commission's attention, and you will be advised of any further procedure.

Very truly yours,

James J. McNulty

James J. McNulty
Secretary

DOCKETED
JUN 01 2001

jih

COMMONWEALTH OF PENNSYLVANIA

DATE: JUNE 1, 2001

SUBJECT: A-00117858

TO: Bureau of Transportation & Safety - Rail

FROM:  James J. McNulty, Secretary

DOCUMENT
FOLDER

DOCKETED
JUN 01 2001

Application of BESSEMER & LAKE ERIE RAILROAD COMPANY (B&LE)

We attach hereto copy of the application of BESSEMER & LAKE ERIE RAILROAD COMPANY (B&LE) which has been captioned and docketed to the above number.

Applicant has been instructed to serve copies of the application upon the parties involved and to file proof of service with the Commission.

This matter is assigned to your Bureau for appropriate action.

Attachment

cc: TSL - w/ copy of application

JIH

Instr: 200211080037746 11/08/2002
Pages: 5 F: \$40.50 2:30PM
Michele Mustello T20020037129
Butler County Recorder MLWESTERN

MONITEAU SCHOOL DIST \$226.28
CLAY TWP \$226.28
KARNS CITY AREA SCHO \$571.50
FAIRVIEW TWP \$571.49
TOTAL TAX \$5584.43

THIS QUIT CLAIM DEED

MADE THE 24th of October in the year of our Lord two thousand and two (2002)

200211080037746
11/08/2002 2:30:40PM T20020037129
PA TRF TAX \$2901.00
MONITEAU SCHOOL DIST \$543.94
CONCORD TWP \$543.94

BETWEEN

BESSEMER AND LAKE ERIE RAILROAD COMPANY, whose address is 135 Jamison Lane, P. O. Box 68, Monroeville, PA 15146, a corporation organized and existing under the laws of the state of Delaware, (hereinafter called "Grantor"),

AND **AFFIDAVIT FILED**

WESTERN ALLEGHENY LANDOWNERS ASSOCIATION, whose address is 121 Maier Lane, West Sunbury, PA 16061, (hereinafter called "Grantee");

WITNESSETH, that the Grantor, for and in consideration of the sum of Two Hundred Ninety Thousand and One Hundred Dollars and zero cents (\$290,100.00), lawful money of the United States of America, unto it well and truly paid by the Grantee, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has remised, released and quit claimed, and by these presents does remise, release and forever quit claim unto the Grantee, itself, its heirs and assigns,

ALL THAT CERTAIN tract of land situate in Clay, Fairview and Concord Townships, Butler County, and Brady's Bend Township, Armstrong County, Commonwealth of Pennsylvania, consisting of approximately three hundred ninety-four (394) acres, more or less, and a six hundred foot (600') viaduct, together with all rights, privileges and easements appurtenant thereto (collectively the "Premises"). Being the property conveyed to Grantor herein by virtue of Butler County Deed Book Volume 885, page 1062 and Armstrong County Deed Book Volume 510, page 27.

This transfer is subject to all legal highways and to all prior conveyances of coal and mining rights, oil and gas leases, rights of way and easements affecting the herein described tracts of land in instruments of record.

TO HAVE AND TO HOLD the said premises with all and singular the appurtenances, unto the said Grantee, its heirs and assigns, to and for the only proper use and behoove of the said Grantee, its heirs and assigns forever.



IN WITNESS WHEREOF, the Grantor has hereunto set its hand and seal the day and year first above written.

ATTEST:

BESSEMER AND LAKE ERIE
RAILROAD COMPANY

A. Bradley Cramer
Assistant Secretary

By: *J. E. Giles*
J. E. Giles
President and Chief Executive
Officer

NOTICE THE UNDERSIGNED, AS EVIDENCED BY THE SIGNATURE(S) TO THIS NOTICE AND THE ACCEPTANCE AND RECORDING OF THIS DEED, (IS, ARE) FULLY COGNIZANT OF THE FACT THAT THE UNDERSIGNED MAY NOT BE OBTAINING THE RIGHT OF PROTECTION AGAINST SUBSIDENCE, AS TO THE PROPERTY HEREIN CONVEYED, RESULTING FROM COAL MINING OPERATIONS AND THAT THE PURCHASED PROPERTY, HEREIN CONVEYED, MAY BE PROTECTED FROM DAMAGE DUE TO MINE SUBSIDENCE BY A PRIVATE CONTRACT WITH THE OWNERS OF THE ECONOMIC INTEREST IN THE COAL. THIS NOTICE IS INSERTED HEREIN TO COMPLY WITH THE BITUMINOUS MINE SUBSIDENCE AND LAND CONSERVATION ACT OF 1966.

WITNESS OR ATTEST:

Andrea C. Parents

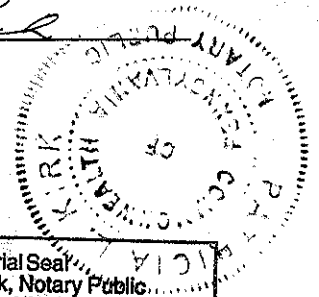
William G. Bamhart

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF ALLEGHENY)

On this, the 24th day of October, 2002, before me the undersigned officer, personally appeared J. E. Giles, who acknowledged himself to be the President and Chief Executive Officer of Bessemer and Lake Erie Railroad Company, a corporation, and that he as such President and Chief Executive Officer, being authorized to do so, executed the foregoing instrument for the purposes therein contained by signing the name of the corporation by himself as President and Chief Executive Officer.

In witness whereof, I hereunto set my hand and official seal.

Patricia L. Kirk
Notary Public



Notarial Seal
Patricia L. Kirk, Notary Public
Monroeville Boro, Allegheny County
My Commission Expires July 13, 2004

CERTIFICATE OF RESIDENCE

I, Andrea C. Parenti, do hereby certify that the precise residence and complete post office address of the within named Grantee is 121 Maier Lane, West Sunbury, PA 16061.

This 24 day of October, 2002

Andrea C. Parenti
Agent for Grantee



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF REVENUE
BUREAU OF INDIVIDUAL TAXES
DEPT. 280603
HARRISBURG, PA 17128-0603

**REALTY TRANSFER TAX
STATEMENT OF VALUE**

See Reverse for Instructions

RECORDER'S USE ONLY	
State Tax Paid	2901.00
Book Number	Inst#
Page Number	200211080037746
Date Recorded	11-8-02

Complete each section and file in duplicate with Recorder of Deeds when (1) the full value/consideration is not set forth in the deed, (2) when the deed is without consideration, or by gift, or (3) a tax exemption is claimed. A Statement of Value is not required if the transfer is wholly exempt from tax based on: (1) family relationship or (2) public utility easement. If more space is needed, attach additional sheet(s).

A CORRESPONDENT - All inquiries may be directed to the following person:

Name: Dillon McCandless King Coulter + Graham Telephone Number: Area Code (724) 283-2200
Street Address: 128 W. Cunningham St City: Butler State: PA Zip Code: 16001

B TRANSFER DATA

Grantor(s)/Lessor(s)			Grantee(s)/Lessee(s)		
Bessemer and Lake Erie Railroad Company			Western Allegheny Landowners Association		
Street Address 135 Jamison Lane, P.O. Box 68			Street Address 121 Maier Lane		
City Monroeville	State PA	Zip Code 15146	City West Sunbury	State PA	Zip Code 16061

C PROPERTY LOCATION

Street Address: _____ City, Township, Borough: Clay, Fairview and Concord Twps. in Butler Co.; Brady's Bend Twp in Armstrong Co.
County: Butler and Armstrong School District: Moniteau and Karns City Tax Parcel Number: _____

D VALUATION DATA

1. Actual Cash Consideration <u>290,100.00</u>	2. Other Consideration <u>+ 0.00</u>	3. Total Consideration <u>= 290,100.00</u>
4. County Assessed Value	5. Common Level Ratio Factor <u>X</u>	6. Fair Market Value <u>=</u>

E EXEMPTION DATA

1a. Amount of Exemption Claimed: _____ 1b. Percentage of Interest Conveyed: _____

2. Check Appropriate Box Below for Exemption Claimed

- Will or intestate succession _____ (Name of Decedent) _____ (Estate File Number)
- Transfer to Industrial Development Agency.
- Transfer to a trust. (Attach complete copy of trust agreement identifying all beneficiaries.)
- Transfer between principal and agent. (Attach complete copy of agency/straw party agreement.)
- Transfers to the Commonwealth, the United States and Instrumentalities by gift, dedication, condemnation or in lieu of condemnation. (If condemnation or in lieu of condemnation, attach copy of resolution.)
- Transfer from mortgagor to a holder of a mortgage in default. Mortgage Book Number _____, Page Number _____.
- Corrective or confirmatory deed. (Attach complete copy of the prior deed being corrected or confirmed.)
- Statutory corporate consolidation, merger or division. (Attach copy of articles.)
- Other (Please explain exemption claimed, if other than listed above.) Property is located almost entirely in Butler County in the municipalities of Clay, Fairview, and Concord Townships. The \$2,901.00 local transfer tax amount should be distributed as follows: \$1,087.88 to Concord Township; \$452.56 to Clay Township and \$1,142.99 to Fairview Township. The remaining \$217.57 is payable to Brady's Bend Township, Armstrong County.

Under penalties of law, I declare that I have examined this Statement, including accompanying information, and to the best of my knowledge and belief, it is true, correct and complete.

Signature of Correspondent or Responsible Party: [Signature] Date: 11-8-02

FAILURE TO COMPLETE THIS FORM PROPERLY OR ATTACH APPLICABLE DOCUMENTATION MAY RESULT IN THE RECORDER'S REFUSAL TO RECORD THE DEED.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation upon the Commission’s motion :
into matters pertaining to the proper safety of :
the traveling public and disposition of the :
crossing where State Route SR0268, crosses :
over a railroad tunnel formally used by : Docket No.: I-2019-3012769
Bessemer and Lake Erie Railroad in Fairview :
Township, Butler County and where State :
Route SR0068 formally crosses, below :
grade, the track of Bessemer and Lake Erie :
Railroad in Bradys Bend Township, :
Armstrong County :

AND NOW, here comes BESSEMER AND LAKE ERIE RAILROAD COMPANY (“B&LE”), by and through its counsel, BURNS WHITE LLC and files the within Memorandum of Law in Support of Bessemer and Lake Erie Railroad’s Motion for Summary Judgment pursuant to 52 Pa. Code § 5.102.

I. CONCISE STATEMENT OF THE CASE

The instant matter arises out of B&LE’s attempt to abandon, discontinue and abolish a certain railroad crossing located in Fairview Township, Butler County, Pennsylvania. The Pennsylvania Public Utility Commission (the “Commission” or “PUC”) seeks to regulate the disposition of this crossing in addition to potentially allocating the costs of, *inter alia*, abolition, repair and/or future maintenance of the same to B&LE. As will be demonstrated *infra*, no such costs may be allocated to B&LE, because B&LE is not a “concerned party” under state law. In the alternative, the Commission’s attempt to regulate the crossing at issue is preempted by federal law, which provides exclusive jurisdiction to the Surface Transportation Board (“STB”) to decide such matters.

B&LE ceased operations on the former Western Allegheny Branch Line (hereinafter “Western Allegheny Branch”) located in Fairview Township, Butler County Pennsylvania on or about 1998. *See* Affidavit of Michael Barron ¶7, appended hereto. In January 2001, B&LE received approval from the STB to abandon and discontinue service on a portion of its Western Allegheny Branch spanning approximately 20.1 miles in Butler County and Armstrong County, Pennsylvania. *Id.* ¶8.

On May 31, 2001, B&LE requested Commission approval to abolish 29 at grade and separated crossings that were located on the previously abandoned service line. *Id.* ¶9. Pursuant to the Secretarial letter dated April 30, 2002, Docket No. A-00117858, the Commission abolished 27 of the 29 requested crossings. *Id.* ¶10. The remaining two crossings – where Pennsylvania State Route 268 (“SR0268”) crosses over a railroad tunnel formally used by the B&LE in Fairview Township, Butler County and where Pennsylvania State Route 68 (“SR0068”) formally crosses, below grade, the B&LE track in Bradys Bend Township, Armstrong County – were not abolished at that time. These two crossings are the subject of the instant Investigation. *Id.* ¶¶11-12.

By Order dated October 3, 2019, the Commission instituted the Investigation for the purpose of determining all matters relating to the abolition and safety of the two crossings. More specifically, to determine the future disposition of these crossings, what work shall be performed, and the allocation of cost of any work performed. *Id.* ¶13.

By way of a Joint Stipulation submitted to the Commission on or about November 12, 2021, all issues related to the Bradys Bend crossing at SR0068 were amicably resolved by the parties. Accordingly, only the SR0268 crossing remains at issue. *Id.* ¶14.

On October 24, 2002, B&LE sold a tract of land (consisting of approximately 394 acres) situated in Clay, Fairview and Concord Townships in Butler County and Bradys Bend Township

in Armstrong County to the Western Allegheny Landowners Association (“WALA”) via quit claim deed. *Id.* ¶15.¹ Crossing SR0268 is situated in the 394 acre parcel of land that was sold. Since the time of this sale, B&LE has owned no property at the SR0268 crossing. *Id.* ¶16. Additionally, as noted above, B&LE has not operated any facility at this crossing since 1999, nor does B&LE enjoy any easement rights in the same. *Id.* ¶17.

As a result of the foregoing, the following facts are undisputed:

- B&LE does not own any facilities at the SR0268 crossing;
- B&LE has not had any ownership interest in any facilities at the SR0268 crossing since October 24, 2002;
- B&LE does not have an easement-based right of way at the SR0268 crossing;
- B&LE does not conduct any regular operations at the SR0268 crossing;
- B&LE has not conducted any regular operations at the SR0268 crossing since 1999.

Id. ¶18.

As B&LE has no possessory or other property interest in the subject crossing and no longer conducts any rail transportation operations through the subject crossing, B&LE is not a concerned party to this proceeding. Accordingly, B&LE has filed the instant motion requesting that it be dismissed as a party from this Investigation and that a judgment be entered in its favor finding that no costs related to the SR0268 crossing be assessed to B&LE.

II. SUMMARY OF ARGUMENT

¹Upon information and belief, WALA subsequently subdivided the 394-acre parcel and over time, sold the subdivided parcels to a number of individuals including William G. and Kay D. Barnhart (22.84 acres), Dean M. and Patricia A. Tascarella (4.23 Acres), Thomas H. and Anna Marie Sherwin (4.47 acres) and Ronald E and Madeline E. Stitt (2.48 acres).

B&LE is not a “concerned party” as the term is defined under the relevant provisions of Pennsylvania’s Public Utility Code where: (1) B&LE has no ownership interest in the SR0268 crossing, (2) B&LE has no right of way interest in the SR0268 crossing, and (3) B&LE has not conducted operations on or over the SR0268 crossing since 1998. Consequently, the Commission has no statutory authority to assess the costs of repair, maintenance, abolishment, etc. of the SR0268 crossing against B&LE. Summary judgment should be entered in B&LE’s favor on this basis alone.

In the alternative, state law is preempted by the federal Interstate Commerce Commission Termination Act (“ICCTA”), which provides exclusive jurisdiction to the Surface Transportation board (“STB”) to regulate “rail transportation”. *See* 49 U.S.C. § 10501(b). The STB’s authority expressly includes the regulation of “abandonment, or discontinuance of . . . [railroad] facilities”. *Id.* Therefore, ICCTA expressly preempts the Commission’s authority under the Pennsylvania Public Utility Code to regulate the abolishment of the SR0268 crossing and any of its facilities (i.e., including the at issue tunnel). Summary judgment should be entered in B&LE’s favor on this alternative basis.

III. ARGUMENT

A. Standard for Entering Summary Judgment

Pursuant to 52 Pa. Code § 5.102(a), “a party may move for . . . summary judgment.” The “presiding officer will grant or deny . . . a motion for summary judgment, as appropriate.” *Id.* at § 5.102(d)(1). “The judgment sought will be rendered if the applicable pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law.” *Id.*

The Commonwealth Court has held that the standard for granting summary judgment in a proceeding before the PUC is the same as in court proceedings:

The PUC interprets Section 5.102(c) (motions for summary judgment) of its regulations in conformity with Rule 1035.1 of the Pennsylvania Rules of Civil Procedure. . . . The PUC must view the record in the light most favorable to the non-moving party, giving that party the benefit of reasonable inferences. All doubts as to existence of a genuine issue of material fact must be resolved against the moving party. However, to preclude summary judgment, the non-moving party must establish that a genuine issue of material fact exists.

United Transp. Union v. Pennsylvania Pub. Util. Comm'n, 68 A.3d 1026, 1033 (Pa. Commw. Ct. 2013) (internal quotations and citations omitted).

B. B&LE is not a concerned party liable for any costs related to the repair, removal, reconstruction or maintenance of the tunnel located at the SR0268 grade crossing.

Under Pennsylvania law, the Commission has the authority “after due notice and hearing” to determine the “compensation for damages” related to the “abolition of any crossing”. *See* 66 Pa.C.S. § 2704(a). Furthermore:

Such compensation, as well as the cost of construction, relocation, alteration, protection, or abolition of such crossing, and of facilities at or adjacent to such crossing which are *used* in any kind of public utility service, shall be borne and paid . . . by the public utilities, municipal corporations, municipal authority or nonprofit organization . . . *concerned*, or by the Commonwealth, in such proper proportions as the commission may . . . determine

Id. (emphasis added).

Historically, the longstanding rule in Pennsylvania was that a railroad must own property or facilities at a crossing in order to be considered a “concerned party” to whom the Commission has authority to allocate any costs associated with the crossing. *See City of Chester v. Pennsylvania Public Utility Comm’n*, 798 A.2d 288, 294 (Pa. Commw. 2002) (*citing Consolidated Rail Corp. v.*

Pennsylvania Public Utility Comm'n, 55 Pa.Cmwlth. 576, 423 A.2d 1108 (1980); *Pennsylvania Public Utility Comm'n v. Southeastern Pa. Transp. Auth.*, 21 Pa.Cmwlth. 106, 343 A.2d 371 (1975); and *Lehigh Valley R.R. v. Pennsylvania Public Utility Comm'n*, 161 A. 422 (Pa. Super. Ct. 1932)).

In *City of Chester*, the Commonwealth Court held that, “*it is the ownership interest at the crossing*, not mere usage that gives the Commission the authority to allocate costs” associated with a crossing, including repairs, removal, reconstruction or maintenance, to a railroad. *Id.* (emphasis added). In fact, the Pennsylvania courts have uniformly held since 1932 that “it is the *presence and ownership* of the track involved . . . which places the liability on the railroad. *Id.* at 292, n.6 (quoting *Lehigh Valley*, 161 A. at 424)(emphasis added). The Pennsylvania Public Utility Commission has likewise consistently followed this rule in numerous proceedings. *See, e.g., Re Pennsylvania Department of Transportation*, 76 Pa.PUC 155 (1992); *Re City of Philadelphia*, 75 Pa.PUC 73 (1991); *Re Consolidated Rail Corporation*, 70 Pa.PUC 321 (1989); *see also National Railroad Passenger Corp. v. Pa. Public Utility Comm'n*, 665 F.Supp. 402, 404 (E.D. Pa. 1987), *aff'd*, 848 F.2d 436 (3d. Cir. 1988), *cert. denied*, 488 U.S. 893; and *City of Philadelphia v. Pa. Public Utility Commission*, 676 A.2d 1298, 1300 n. 1 (Pa. Cmwlth. 1996).

More recently, in *Norfolk Southern Railway Company v. Public Utility Commission*, the Supreme Court of Pennsylvania expanded the definition of a concerned party for purposes of the Commission’s cost-allocation jurisdiction and authority:

We hold that a transportation utility need not own facilities at a rail-highway crossing to be a *concerned party* for purposes of the PUC’s cost-allocation jurisdiction and authority, *at least where the utility conducts regular operations at the crossing and may enforce an easement-based right of way.*

See 77 A.3d 619, 633 (Pa. 2013) (emphasis added).

Although the *Norfolk Southern* court expanded the class of entities (*i.e.*, beyond owners of rail-highway crossing facilities) that can be considered “concerned parties”; it remains the case that there must be *at least* (*i.e.*, in the absence of any ownership) a substantial, ongoing use of the crossing by the railroad in order for it to be a “concerned party”. Stated differently – a railroad must still be an owner of the relevant facilities at issue to be a “concerned party” where no regular operations are conducted and where the railroad no longer enjoys an easement-based right of way. The *Norfolk Southern* court’s holding is consistent with Section 2704(a) of the Public Utility Code, which expressly limits any cost allocation relative to the abolition of a crossing to only those facilities “*used* in any kind of public utility service.” (emphasis added).

In so holding, the *Norfolk Southern* court considered the prior decisions of the Supreme and Superior Courts in *Pittsburgh Railways v. Pennsylvania Pub. Util. Comm'n* and *Lehigh Valley R. Co. v. Pub. Serv. Comm'n of Pa.* See 77 A.3d at 630 (citing *Pittsburgh Railways Co. v. Pennsylvania Pub. Util. Comm'n*, 237 A.2d 602, 606 (Pa. 1967) and *Lehigh Valley R. Co. v. Pub. Serv. Comm'n of Pa.*, 161 A. 422, 424 (Pa. Super. Ct. 1932)). The *Norfolk Southern* court observed that the *Pittsburgh Railways* and *Lehigh Valley* holdings “lend substantial support to Norfolk’s position” that it is not a concerned party who can be allocated costs where Norfolk did not own any real property or facilities at the crossing site. *Id.*

However, the *Norfolk Southern* court did not stop its analysis there. *Norfolk Southern* went on to distinguish the holdings of the *Pittsburgh Railways* court and the *Lehigh Valley* court stating, “neither of those cases involved a nonowner transportation utility possessing a right of way through a deteriorated rail-highway crossing and regularly conducting operations there.” *Id.* Accordingly, the *Norfolk Southern* court considered the facts before it as presenting “an issue of first impression”. *Id.*

It logically follows then that *Norfolk Southern's* holding that “a transportation utility need not own facilities at a rail-highway crossing to be a concerned party for purposes of the PUC’s cost-allocation jurisdiction and authority, at least where the utility conducts regular operations at the crossing and may enforce an easement-based right of way” does not abrogate the prior holdings of *Pittsburgh Railways* or *Lehigh Valley*. See, e.g., *Six L's Packing Co. v. W.C.A.B. (Williamson)*, 44 A.3d 1148, 1157-58 (Pa. 2012) (explaining that the holding of a judicial decision is to be “read against the facts” presented to the reviewing court when evaluating the precedential effect of the same) (citing *Oliver v. City of Pittsburgh*, 11 A.3d 960, 966 (Pa. 2011)). Therefore, the holdings of *Pittsburgh Railways* and *Lehigh Valley* are still binding upon the Commission to the extent the facts in those cases mirror the facts presented here.

Indeed, the facts in *Pittsburgh Railways* are highly analogous to (if not on all fours with) the facts presented here.² In *Pittsburgh Railways*, the Commission attempted to allocate the costs of replacing and maintaining a rail-highway crossing known as “Black’s Bridge” to the Port Authority of Allegheny County. See 237 A.2d at 604. However, the evidence was clear that the Port Authority enjoyed no ownership interest and/or right of way interest in either the crossing or its related facilities, nor was the Port Authority operating any transportation utility services over the relevant railroad line, which had been previously abandoned by a railroad company. *Id.* at 605.

Pittsburgh Railways stated that Section 2704 of the Public Utility Code (formerly known as “Section 411”) “empowering the Commission to allocate costs in a highway-rail crossing situation, must be read in connection with Section [2702]” (i.e., formerly known as Section 409).

²By way of contrast, the facts in *Lehigh Valley* were different in two critical respects. The railroad company in *Lehigh Valley*: (1) still owned the relevant facilities at the subject crossings (i.e., one being abolished and a new crossing being constructed to build a bridge over the existing tracks of the railroad company), and (2) operated public utility services over the crossing to be abolished. See 161 A. 422, 424 (holding that, “It is the presence and ownership of the track involved, not any benefit conferred, which places liability on the railroad”). Here, B&LE has no such ownership interest or right of way interest and does not operate any public utility service on the SR0268 crossing.

See 237 A.2d at 606. “Section [2702](a) defines the crossings with respect to which the Commission can assess certain costs under Section [2704]. Such crossings are those which involve the facilities of ‘a public utility *engaged in the transportation of passengers or property*’”. *Id.* (emphasis added); *see also* 66 Pa.C.S. § 2702(a). Therefore, “[t]he transportation utilities [c]oncerned for purposes of assessment under Section [2704] are those whose facilities are constructed or located at such crossing.” *See* 237 A.2d at 606.

Pittsburgh Railways ultimately held that, “the law has been firmly established in this Commonwealth that a transportation utility has no concern with any crossing for purposes of assessment . . . where it does not have a rail facility situated at such crossing”. *Id.* Applying this rule to the facts before it, the *Pittsburgh Railways* court determined that the Port Authority was not a concerned party and, therefore, the Commission lacked the statutory authority to assess costs to the Port Authority for the replacement and maintenance of the Black’s Bridge crossing – *i.e.*, a railway facility that the Port Authority: (1) did not own, (2) did not have a right of way interest in, and (3) over which the Port Authority did not operate any transportation utility services. *Id.* at 608.

Here, there is no factual dispute that the real property, rail line and any rail facilities at the SR0268 grade crossing were conveyed to WALA on October 24, 2002. It is likewise undisputed that B&LE has no ownership interest in real property or track, signal, communication or other railroad facilities whatsoever at the former crossing. Indeed, B&LE has had no ownership interest in any facilities of the SR0268 crossing since October 24, 2002; has not conducted any operations at the SR0268 crossing since 1999; and has no easement-based right of way to the SR0268 crossing.

In light of these undisputed facts, the holdings in *Norfolk Southern* and *Pittsburgh Railways* collectively control the cost allocation calculus of the instant Investigation relative to B&LE. These cases collectively require a finding that B&LE is not a “concerned party” as the term is defined under the Public Utility Code, because B&LE: (1) has no ownership interest in the SR0268 crossing, (2) has no right of way interest in the SR0268 crossing, and (3) does not conduct transportation utility operations at the SR0268 crossing.

Accordingly, the Commission has no statutory authority to allocate any costs for the repair, removal, reconstruction or maintenance of the tunnel located at the SR0268 grade crossing. A ruling to the contrary would not only be in opposition to the precedential authority of the *Norfolk Southern* Court and the *Pittsburgh Railways* court, but it would also eviscerate the plain language meaning of Section 2704(a) of the Public Utility Code. *See* 66 Pa.C.S. § 2704(a) (expressly limiting the Commission’s cost allocation authority to only those facilities “*used* in any kind of public utility service”) (emphasis added).

Section 2704(a) reflects the common-sense judgment of the General Assembly that an entity that abandoned all ownership and usage rights of a rail crossing should not be charged with responsibility for repairs to the crossing. Therefore, B&LE respectfully requests that summary judgment be entered in its favor as a matter of law.

C. Alternatively, this proceeding is preempted by Federal Law such that the Commission has no jurisdiction and/or authority to assess any liability against B&LE for the costs related to the repair, removal, reconstruction or maintenance of the tunnel located at the SR0268 grade crossing

The Interstate Commerce Commission Termination Act (“ICCTA”) preempts Pennsylvania law relative to the “abandonment, or discontinuance of . . . [railroad] facilities”, because ICCTA provides “exclusive” jurisdiction to the Surface Transportation Board (“STB”) to

decide such issues. *See* 49 U.S.C. § 10501(b). Indeed, the “remedies” provided for under ICCTA with respect to “regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” *Id.* The term “transportation” includes “a . . . property, facility, instrumentality, or *equipment of any kind related to the movement of passengers or property*, or both by rail, *regardless of ownership* or an agreement concerning use” *Id.* at § 10102(9)(A) (emphasis added).

Federal courts have held that, “Under the ICCTA, the STB has exclusive jurisdiction over ‘transportation by rail carrier’ and its regulation of rail carriers preempts state regulation with respect to rail transportation.” *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 305 (3d Cir. 2004) (*citing* 49 U.S.C. § 10501(b)).

Here, the relevant issue relates to BL&E’s abandonment, discontinuance and attempted abolishment of a railroad crossing involving an underground tunnel, which travels beneath State Route 268. Without question, the tunnel underneath SR0268 constitutes property related to the movement of passengers or property by rail and, therefore, is within ICCTA’s definition of “rail transportation”. Furthermore, ICCTA expressly preempts any state law, which would attempt to regulate the abandonment and/or discontinuance of railroad facilities. Accordingly, the Commission’s attempt to regulate the disposition of SR0268 and allocation of repair/maintenance costs for SR0268 against B&LE is improper, because the Commission lacks jurisdiction to do so as Pennsylvania’s Public Utility Code (i.e., 66 Pa.C.S. §§ 101 *et seq.*) is expressly preempted by federal law.

IV. CONCLUSION

For the foregoing reasons, BESSEMER AND LAKE ERIE RAILROAD COMPANY (“B&LE”) respectfully requests that summary judgment be entered in its favor with respect to

the Commission's relevant Investigation and that no costs relative to the SR0268 crossing be assessed against B&LE.

Respectfully submitted,

BURNS WHITE LLC



By: _____

John M. Steidle, Esquire
Edwin B. Palmer, Esquire
Burns White Center
48 26th Street
Pittsburgh, PA 15222
(412) 995-3000
jmsteidle@burnswhite.com
ebpalmer@burnswhite.com

Attorneys for The Bessemer & Lake Erie
Railroad Company

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation upon the Commission’s motion :
into matters pertaining to the Proper safety of :
the traveling public and disposition of the :
crossing where State Route SR0268, crosses :
over a railroad tunnel formally used by :
Bessemer and Lake Erie Railroad in : Docket No. I-2019-3012769
Fairview Township, Butler County and :
where State Route SR0268 formerly crossed, :
below grade, the track of Bessemer and Lake :
Erie Railroad in Bradys Bend Township, :
Armstrong County :

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing **Motion for Summary Judgment and Brief in Support** dated January 3, 2022, upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (related to service by a party).

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Respectfully submitted,

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