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April 20, 2022

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
400 North Street
Harrisburg, PA 17120

Re: Knox Township v. Buffalo & Pittsburgh Railroad, Inc., et al.
Docket No.: C-2019-3009358
Our File No.: 0057694.0368163

Dear Secretary Chiavetta:

Enclosed for electronic filing is Buffalo & Pittsburgh Railroad Inc.'s Reply Brief. Copies have been served on the parties of record in accordance with the Certificate of Service.

Should you have any questions, please do not hesitate to contact me.

Very Truly Yours,

Aaron M. Ponzio

Aaron M. Ponzio

AMP/eie

Attachment

cc (via email w/ attachment): Hon. Mary D. Long
Per Certificate of Service

14308531.1

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Knox Township,

Complainant,

vs.

Docket No. C-2019-3009358

Buffalo & Pittsburgh Railroad Inc.,
Pennsylvania Department of
Transportation, Jefferson County &
Brookville Borough,

Respondents.

REPLY BRIEF OF BUFFALO & PITTSBURGH RAILROAD, INC.

AND NOW, comes Respondent, Buffalo & Pittsburgh Railroad Company (“BPRR”), by its attorneys, Dickie, McCamey & Chilcote, P.C., J. Lawson Johnston, Esquire, Scott D. Clements, Esquire, and Aaron M. Ponzio, Esquire, and files its Reply Brief, arguing as follows:

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I. INTRODUCTION

Pursuant to the Briefing Order entered on March 2, 2022, BPRR submits this Reply Brief to respond to the arguments in the Main Briefs filed by Knox Township and the Bureau of Investigation and Enforcement (“BIE”). As demonstrated below, the Complainant has failed to carry its burden of proof and the evidence weighs against removing the bridge structures at the public crossings where Ramsaytown Road, Harriger Hollow Road, and East Bellport Road cross BPRR’s right of way.

II. DISCUSSION

A. Knox Township has failed to carry its burden of proof.

Knox Township bears the burden of proof in this proceeding. 66 Pa. C.S.A. §332(a); Tr., at 36:11-14. “[T]he term ‘burden of proof’ means a duty to establish a fact by a preponderance of the evidence.” *Patterson v. The Bell Telephone Co. of Pa.*, 1990 Pa. PUC LEXIS 19, *7, (citing *Se-Ling Hosiery v. Marqilies*, 364 Pa. 45, 70 A.2d 858 (1950)). In this case, Knox Township is required to present evidence which is more convincing than evidence presented by the other parties. *Energy Conservation Council of Pa. v. PUC*, 995 A.2d 465, 478 (Pa. Commw. 2010). Knox Township has failed to do so.

Only one witness testified on behalf of Knox Township, Jim Berry, a Township Supervisor. No other members of the community appeared to testify live, and no written testimony was presented on behalf of any members of the community. Not only did the Township fail to present any witnesses other than Mr. Berry, it did not even present any affidavits, written statements, or records such as meeting minutes to support its allegations. Indeed, the Township essentially rested on the allegations of its Complaint, and only presented Mr. Berry’s testimony, which was revealed to be lacking in substance.

His claim that the Ramsaytown Road bridge is difficult to traverse, and his concerns about icicles and falling concrete, are contradicted by his own testimony. He stated that he has driven his school bus under the Ramsaytown Road bridge every day, four times per day, for two years. Tr., 149:20-23 Assuming Mr. Berry drove each of the 180 days school is in session, this would mean that he has driven his school bus through the Ramsaytown Road bridge approximately 1,440 times without incident. He did not provide any testimony that he has ever been involved in an accident or even a near miss, or that his bus has been struck by a piece of concrete, an icicle, or any other type of debris.

His claim that sight distance is worse for him when driving a school bus because he sits higher up than in a typical vehicle was presented without any evidence such as measurements, calculations, or visual aids to demonstrate how sight distance varies based on a driver's change in elevation. This claim also defies common sense and experience that sight distance improves at higher elevation. Further, Mr. Berry never once stated that he was involved in any accidents or near misses due to a lack of sight distance at Ramsaytown Road or any of the other bridges.

Finally, Mr. Berry claims to have seen concrete fall from the bridges, but he only testified to one instance which involved the Ramsaytown Road Bridge. This related to the claim that a Township worker picked up a piece of concrete from Ramsaytown Road and placed it on the side of the road. No testimony from this alleged worker was presented. In fact, this individual was not even identified. Accordingly, there is no first-hand witness account to support this claim, and no other testimony or evidence was provided to substantiate Mr. Berry's claims.

The sum of the evidence submitted by Knox Township fails to demonstrate that the bridges pose a risk to public safety. No evidence was presented by the Township that there have been any accidents at the crossings, or that vehicles have been struck by falling concrete. No evidence was presented that emergency responders have been unable to drive through the crossings. At most, Mr. Berry was able to demonstrate some minor personal inconvenience regarding his farm equipment, due to the fact that his farm is located on Harriger Hollow Road. This does not amount to a public safety hazard.

B. The evidence weighs against removal of the crossings.

BPRR is the only party to this proceeding that presented evidence and testimony regarding the conditions of the bridges that were based on actual bridge inspections. Knox Township does not attempt to rebut the findings of these inspections. BIE's witness, Mr. Sinick, repeatedly stated that he does not conduct bridge inspections and did not do so in this case. Tr., at 191:15-17; 197:23-198:4, 203:2-5, 207:5-6. PennDOT, Brookville Borough, and Jefferson County did not take a position or submit evidence.

Despite not having performed any inspections, Mr. Sinick claims to have observed conditions he would rate as a category "zero". Tr., at 188:6-9. This is simply not supported by the visual evidence or any inspection report of record. It is also contradicted by the fact that Mr. Sinick took no action whatsoever after purportedly making these observations. If public safety was paramount as BIE consistently claims, the parties would have been notified about these conditions before Mr. Sinick testified on January 25, 2022.

The conditions revealed by the inspections conducted by BPRR and Mr. Duffett consisted of spalling and cracking in specified areas of the structures, most of which was minor, and all of which was rated as low to moderate in terms of their repair priority. See

BPRR Exhibits 4-7, 9-12; Tr., at 52:5-53:6, 78:7-11, 79:2-14; BPRR Statement No. 3, at 3:4-6, 4:6-11; 5:8-10. Importantly, as it relates to the Ramsaytown Road bridge, Mr. Duffett explained that pieces of concrete that may fall from the wing walls and side walls because of exposure to salt and spray do not pose a hazard to motor vehicles. Tr., at 94:11-19. He stated, “We’re looking at the condition of the potential for something to land on a vehicle, which the only way that can happen is if it falls off the arch.” *Id.*, at 95:2-5. He acknowledged that there was spalling on the sides of the arch but stated that the arch itself is in “quite good condition.” *Id.*, at 95:7-9. He therefore concluded that there is “no potential for a piece of concrete of any size to fall off the arch.” Tr., at 95:9-11.

Contrary to BIE’s arguments, the conditions of spalling and cracking do not exist on all parts of the structures and they do not display heavy deterioration. Also contrary to BIE’s arguments, the conditions existing at these bridges can be addressed through routine maintenance and are not grounds for removal of the bridges. *See* BPRR Exhibit 12, at 2. BIE portrays these structures as crumbling and in a state of decay. However, these arguments are inconsistent with the inspection reports and photographs submitted as evidence and made part of the record in this proceeding, and are not supported by the evidence.¹

BIE’s argument that the inspections conducted by BPRR and Mr. Duffett were not completed by National Bridge Inspection Standards (NBIS) is misplaced. NBIS apply to highway bridges located on public roads. 23 CFR §650.303. The bridges at issue in this case are not highway bridges, they are railroad bridges. The Federal Highway Administration (“FHWA”) addressed this issue when it revised its regulations on the NBIS. In response to a

¹ BIE ignores that BPRR had work performed to address the immediate concerns raised during the initial field conference, which included loose concrete, and that no further work was ordered after Mr. Sinick observed the conditions at an interim field conference on February 21, 2020. Tr., at 54:13-55:1; 220:19-23, 221:7-11.

specific comment raising the concern of the inspection of pedestrian and railroad bridges and the potential threat to travelers on public highways, the FHWA stated, “The NBIS does not apply to tunnels, bridges that carry only pedestrians, railroad tracks, pipelines, or other types of non-highway passageways.” National Bridge Inspection Standards, 69 Fed. Reg. 74419, 74420 (Dec. 14, 2004). BIE and Mr. Sinick are attempting to hold BPRR to requirements and standards that simply do not apply to these bridges.

In addition to advocating for inapplicable standards, BIE attacks Mr. Duffett’s credibility and qualifications without any basis. For instance, BIE cites Mr. Duffett’s statement that concrete gains strength over time and suggests that this demonstrates his opinions are not reliable or dependable. BIE Brief, at 19 n.92. However, BIE fails to submit a contrary opinion from a similarly qualified expert, fails to provide any evidence whatsoever that contradicts Mr. Duffett’s statement, and simply claims he is incorrect. BIE goes on to question Mr. Duffett’s qualifications because he is not a certified NBIS bridge inspector. This is misleading and disingenuous. Again, the NBIS do not apply to these bridges as discussed above. Further, Mr. Sinick acknowledged that Mr. Duffett is qualified to inspect railroad bridges. Tr. 216:1-3.

BPRR is also the only party that submitted a report and expert testimony from a traffic safety engineer, Charles Wooster. Mr. Wooster conducted a thorough investigation which included personally observing each structure and roadway, taking sight distance measurements, and analyzing accident data. He concluded, based on his investigation, that the roadways can accommodate their anticipated traffic volume, that no changes to the structures need to be implemented, and that there are no roadway design standards that

require removal of the structures. BPRR Statement No. 5, at 2:8-21. There is no expert in traffic safety engineering who has offered a contradictory opinion.

BIE's argument that the bridge abutments create a safety hazard because they are "ridged fixed objects" obstructing the clear zone, is not credible.² First, when asked if all bridges with abutments such as the ones at issue here should be removed, Mr. Sinick responded that they did not, if they served some public interest. Tr., at 229:6-9. This directly contradicts the claim that the bridges should be removed because they present a hazard to public safety. Indeed, it would appear that Mr. Sinick would not be advocating for removal of the bridges if they still carried rail traffic. Second, as stated by Mr. Wooster, the clear zone concept in PennDOT's Highway Design Manual does not apply in the manner that BIE and Mr. Sinick advocate. BPRR Statement No. 6, at 1:17-28. BIE attempts to evade this conclusion by arguing that this proceeding is essentially a roadway project, but this is simply a disingenuous attempt to rescue this failed theory. Even if this argument were accepted, Mr. Wooster further explained even when a roadway project is undertaken, the Highway Design Manual would still not require removal of the structures. Tr., at 129:1-130:2.

BIE attempts to diminish the fact that there is no site specific crash pattern based on the accident data submitted by Mr. Wooster by arguing that this data is inconclusive. BIE Brief at 16-17. However, BIE cannot overcome the fact that the only accident data comes from Mr. Wooster's report, and it reflects a total of only two accidents involving these crossings over a ten year time frame, both of which were the fault of the drivers involved.

² As Mr. Duffett pointed out, the wingwalls of the Ramsaytown Road and East Bellport Road structures make an angle with the roadway and do not present a perpendicular obstruction. BPRR Statement No. 3, at 3:12-13, 4:17-18.

BPRR Exhibit 14, at 4-5.³ BIE submitted no data, no reports, no statements, or any other information supporting the claim that non-reportable accidents have occurred. Instead, it relies on one photograph from Mr. Sinick which he claims to indicate “vehicle impact scarring” on the south abutment of the Harriger Hollow Road bridge, and his claim that it is statistically more probable that non-reportable accidents have occurred. See I&E Exhibit C picture 15; BIE Brief, at 17. However, there is no evidence that the marks in Mr. Sinick’s photograph were actually caused by a vehicle strike. Tellingly, none of his photographs of the Ramsaytown Road or East Bellport Road bridges depict alleged “vehicle impact scarring” nor are they labeled as such. Additionally, BIE failed to provide any empirical data, any formula Mr. Sinick used, or any methodology employed to arrive at his statistical conclusion. These assertions are mere speculation, and should not be considered.

Finally, BIE dismisses the notion that rail traffic could return to this line. BIE Brief, at 15-16. However, as explained by Chad Boutet, Director of Engineering Grants for Genesee & Wyoming’s northern region, it is possible for rail traffic to return due to the long term fashion in which railroads operate and changing market conditions. Tr., at 66:17-24. He has been involved in two other instances in which service was returned to rail lines that had been out of service for 15 and 30 years, respectively. Tr., at 66:19-22. Thus, it cannot be assumed that service will never resume as BIE argues.

The evidence of record clearly weighs in favor of BPRR and against removal of the bridges located at these crossings. BPRR has submitted persuasive and credible documentary evidence and witness testimony to establish that the bridges do not present a

³ The Commission has previously found that three accidents in a five year time frame at one crossing did not establish a safety concern. *N. Lebanon Twp. v. PUC*, 962 A.2d 1237, 1245 (Pa. Commw. 2008).

public safety concern. An Order directing complete removal of all three structures based on this record would not be just and reasonable. *N. Lebanon Twp.*, 962 A.2d at 1247.

C. BPRR should not bear the entire cost if the Commission orders removal of any of the structures.

BPRR's Main Brief discussed the relevant factors to be considered in allocating costs. However, there are two critical issues raised by the assertions Knox Township and BIE make with regard to the benefits realized by BPRR that require a response.

First, Knox Township and BIE claim that BPRR "originally built the crossings". Knox Twp. Brief at 5; BIE Brief at 24. This is incorrect and is contradicted by the plans which indicate that the bridges were constructed by the Pittsburg and Shawmut Railroad. BPRR Exhibits 1-3. Accordingly, this factor should not be weighed against BPRR.

Second, Knox Township and BIE each argue that BPRR derived benefits from these structures related to rail traffic that operated over this line. Knox Twp. Brief, at 5; BIE Brief, at 14. However, there is no evidence in the record that BPRR ever operated trains over this line. No testimony was given or elicited on that point. Therefore, it cannot be concluded that BPRR realized the benefit of using the bridges from the time they were constructed until the time the railroad line was abandoned. The record does not support this conclusion.

Thus, for these reasons and for those stated in BPRR's Main Brief, if the Commission still sees fit to order removal of any of the structures, it should not order BPRR to bear the entire cost of the work to remove them when considering all of the relevant factors.

III. CONCLUSION

The Commission should dismiss the Complaint of Knox Township because the Complainant has not carried its burden of proof. The weight of the evidence shows that the continued existence of the railroad bridge structures does not present a hazard to public

safety. Accordingly, the record does not support an order directing the removal or alteration of the crossings pursuant to 66 Pa. C.S.A. §2702. Rather, the crossings should be allowed to remain in place, with BPRR to be responsible for inspecting and maintaining them.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Aaron M. Ponzo, Esquire, hereby certify that true and correct copies of the foregoing have been served this 20th day of April 2022 upon the parties listed below in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party):

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