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

ISSUED: MAY 15, 1997

IN REPLY PLEASE
REFER TO OUR FILE
C-00913419

REPRESENTATIVE DANIEL L ANDERSON
4767 ROUTE 8
ALLISON PARK PA 15101

ERM

REPRESENTATIVE DANIEL L. ANDERSON v. BESSEMER & LAKE ERIE RAILROAD COMPANY

TO WHOM IT MAY CONCERN:

Enclosed is a copy of the Recommended Decision of Administrative Law Judge John H. Corbett, Jr.. This decision is being issued and mailed to all parties on the above specified date.

If you do not agree with any part of this decision, you may send written comments (called Exceptions) to the Commission. Specifically, an original and nine (9) copies of your signed exceptions MUST BE FILED WITH THE SECRETARY OF THE COMMISSION IN ROOM B-20, NORTH OFFICE BUILDING, NORTH STREET AND COMMONWEALTH AVENUE, HARRISBURG, PA OR MAILED TO P.O. BOX 3265, HARRISBURG, PA 17105-3265, within twenty (20) days of the issuance date of this letter. The signed exceptions will be deemed filed on the date actually received by the Secretary of the Commission or on the date deposited in the mail as shown on U.S. Postal Service Form 3817 certificate of mailing attached to the cover of the original document (52 Pa. Code §1.11(a)) or on the date deposited with an overnight express package delivery service (52 Pa. Code 1.11(a)(2), (b)). If your exceptions are sent by mail, please use the address shown at the top of this letter. A copy of your exceptions must also be served on each party of record. 52 Pa Code §1.56(b) cannot be used to extend the prescribed period for the filing of exceptions/reply exceptions. A certificate of service shall be attached to the filed exceptions.

Replies to exceptions, if any, must be served on the Secretary of the Commission, in the manner described above, within ten (10) days of the date that the exceptions are due.

Exceptions and reply exceptions shall obey 52 Pa. Code 5.533 and 5.535 particularly the 40-page limit for exceptions and the 25-page limit for replies to exceptions. Exceptions should clearly be labeled as "EXCEPTIONS OF (name of party) - (protestant, complainant, staff, etc.)". Any reference to specific sections of the Administrative Law Judge's Recommended Decision shall include the page number(s) of the cited section of the decision. All timely filed exceptions and replies thereto will be attached to the decision for consideration at Public Meeting. Late filed exceptions and/or late filed replies might not be considered by the Commission. cc:ALJ CORBETT/OFFICE OF ALJ/TRANS & SAFETY-LEGAL/TRANS & SAFETY-RAIL/LAW/PIO/OSA/CHAIRMAN/COMMISSIONERS/NEW FILING/OUR FILE/

Very truly yours,

smk
Encls.
Certified Mail
Receipt Requested
SIMILAR LETTER LIST ATTACHED:

John G. Alford
Secretary

DOCUMENT
FOLDER

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Representative Daniel L. Anderson	:	
	:	
v.	:	Docket No. C-00913419
	:	
Bessemer & Lake Erie Railroad Company	:	

SECOND RECOMMENDED DECISION

Before
John H. Corbett, Jr.
Administrative Law Judge

History of the Proceeding

This proceeding commenced on June 11, 1991, when Representative Daniel L. Anderson filed a complaint with the Pennsylvania Public Utility Commission ("Commission") against Bessemer & Lake Erie Railroad Company ("B&LE"). The complaint alleged the Rural Ridge Tunnel ("Tunnel") on Russelton Road in Indiana Township, Allegheny County was deteriorating and in need of repair. The subject structure provides a passageway for highway traffic on Russelton Road to pass beneath the tracks of the B&LE. The complaint requested a Commission Order directing repairs be made to the structure.

B&LE filed an answer, together with an amended answer, alleging it conducts annual inspections of the Tunnel, which confirm its structural soundness. B&LE performs scaling to remove loose concrete inside the structure. B&LE contended the Tunnel is in satisfactory condition and no repairs are necessary.

On January 30, 1992, a hearing was held in the Pittsburgh offices of the Commission. After the parties filed briefs, the record closed on April 14, 1992. Thereafter,

I filed a decision on July 1, 1992, wherein I recommended that B&LE be directed, inter alia, to prepare and submit an in-depth inspection report of the structure. That report was to include a structural analysis, a recommendation for any work necessary to the structure and estimates of costs to perform any recommended work. In an Order entered September 4, 1992, the Commission adopted this Recommended Decision and directed, inter alia, that another hearing be held upon completion of the in-depth inspection report with recommendations to resolve the remaining issues involved in this proceeding.

This matter was reassigned to the Office Administrative Law Judge on November 14, 1996. A further hearing was held in Pittsburgh on January 29, 1997. Attending the hearing were representatives of B&LE, the Commission's Bureau of Transportation and Safety ("BTS") and the Pennsylvania Department of Transportation ("PennDOT"). The hearing generated another 48 pages of notes of testimony. B&LE sponsored two additional exhibits, which were admitted into the record. B&LE, the BTS and PennDOT filed main briefs, while B&LE filed a reply brief also. The record closed on April 16, 1997.

Findings of Fact

61. B&LE performs annual inspections upon the subject Rural Ridge Tunnel on Russelton Road in Indiana Township, Allegheny County (N.T. 101-102).[1]

62. B&LE performed the last inspection in June 1996 (N.T. 106).

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[1] Findings of Fact Nos. 1-60 are set forth in the previous Recommended Decision dated July 1, 1992 in this case and are incorporated herein by reference thereto.

63. B&LE claims the physical condition of the substructure and superstructure of the Rural Ridge Tunnel is good and has not changed since the Commission issued its Order on September 4, 1992. There are spalls on the southwest face of the arch, the southwest end of the barrel and 10' in from the southeast end of the barrel. Additionally, some spalling exists at construction joints 20' and 30' in from the west end. The west spandrel wall is cracked on the south end (N.T. 103, 111-112; B&LE Exh. 7).

64. B&LE contends all of these conditions existed in 1992 (N.T. 103; B&LE Exh. 7).

65. B&LE submitted its most recent bridge inspection report for the subject structure dated June 24, 1996 (N.T. 103; B&LE Exh. 7).

66. To maintain a safe crossing at this location, this inspection report recommended clearing brush from the wingwalls and top of the arch, because it was hanging over the road (N.T. 104; B&LE Exh. 7).

67. B&LE agrees to perform this work (N.T. 104; B&LE Exh. 7).

68. B&LE has no record of spending any significant time maintaining or repairing the subject structure since the Commission's Order issued September 4, 1992 (N.T. 104; B&LE Exh. 7).

69. B&LE's Claims Department records reveal it received no complaints, concerns or claims of any nature regarding this structure since the Commission's Order of September 4, 1992 (N.T. 104-105; B&LE Exh. 7).

70. B&LE's engineer visually inspected the structure a few days before the most recent hearing and found it to be in the same condition as when the inspection report was prepared (N.T. 105).

71. B&LE's engineer found no evidence that large chunks of concrete had fallen from inside the arch; he noticed only small pieces less than three-quarters of an inch in diameter had fallen (N.T. 114).

72. B&LE's engineer opines the Rural Ridge Tunnel is structurally sound (N.T. 105).

73. B&LE will perform some light scaling on the structure this spring (N.T. 105).

74. This light scaling work will entail hammering away loose concrete found in the spalling areas in the arch and removing the concrete (N.T. 109).

75. Since the scaling work will be done in the arch over the roadway, B&LE will coordinate this work with PennDOT (N.T. 110).

76. When this scaling work was performed in the past, B&LE closed one lane of the roadway at a time so work could proceed (N.T. 110).

77. B&LE's engineer claims the scaling work is for cosmetic purposes only (N.T. 106).

78. B&LE's engineer opines the structure is adequate for the safety and convenience of the traveling public, as well as the railroad (N.T. 106).

79. In its 1992 report to the Commission, B&LE stated it could cosmetically repair the headwall of the Tunnel (N.T. 107; B&LE Exh. 8).

80. B&LE monitors the headwall of the Tunnel annually for movement and B&LE has not noticed any movement, since it began monitoring it in 1991 (N.T. 107, 114).

81. B&LE will continue to monitor the headwall of the Tunnel annually for movement, but B&LE recommends the headwall remain unchanged for now (N.T. 107).

82. B&LE admits there are no guarantees that the headwall will not move in the future (N.T. 108).

83. B&LE admits a severe freeze-thaw cycle may cause the headwall to move (N.T. 108).

84. B&LE does not feel it is necessary to monitor the headwall of the Tunnel more frequently (N.T. 107-108).

85. An attachment to the 1992 in-depth inspection report on this structure submitted to the Commission recommended installing French drains over the west span wall (N.T. 110; B&LE Exh. 8).

86. The French drain would channel water away from the wall, thus alleviating any movement of the wall and any concerns about future movement (N.T. 111).

87. The same 1992 report recommended scaling and sealing of construction joints located 20' from the west end and 30' in from the west end on the south side of the barrel (N.T. 111; B&LE Exh. 8).

88. B&LE will scale that area, but does not believe it is necessary to seal the construction joints at this time (N.T. 111).

89. Sealing the construction joints will prevent any salt or water intrusion (N.T. 111).

90. The 1992 report also recommended forming and placing concrete in the spalled areas (N.T. 112).

91. B&LE does not believe this latter work is necessary, because it is merely a cosmetic repair and it was included in the report only as a possible repair cost (N.T. 112, 115-116).

92. B&LE's engineer opines this latter work would add nothing structurally to the arch (N.T. 112).

93. B&LE's engineer believes the same result can be achieved by removing the concrete as it loosens on a yearly basis or as often as is necessary (N.T. 112).

94. The only moisture inside the arch, which B&LE's engineer noticed, came from two weep holes. However, he noticed no evidence of ice, icicles or water coming through the arch (N.T. 112).

95. B&LE's engineer admitted the spalling occurring in the arch could be the result of water infiltration, causing the concrete to crack during freeze-thaw cycles (N.T. 112-113).

96. B&LE is willing to maintain the structure at its initial cost and expense, but reserves the right to petition the Commission for allocation of costs in the future (N.T. 108, 118-119).

97. B&LE is not willing to make cosmetic repairs to the structure, because of its limited financial resources (N.T. 116).

98. B&LE is unaware of any Commission Order assigning responsibility for the maintenance of this structure, but does recognize the Commission's September 4, 1992 Order entered in this case (N.T. 117-118).

99. B&LE has inspected and maintained this structure since it was constructed in the early 1900's and is willing to continue to do so, provided that it can reserve the right to petition the Commission in the future for allocation of costs if it chooses to do so (N.T. 117).

100. PennDOT's engineer visited the site of the structure in December 1996 and noticed spalling of the joints in the walls of the interior of the structure. He also noticed the headwall at the west side of the structure appears to be detached and sitting slightly over the edge of the barrel (N.T. 121).

101. PennDOT's engineer agrees these are the same conditions referred to by B&LE's engineer (N.T. 122).

102. PennDOT's engineer believes the spalling is a nuisance, since the small falling stones can cause claims for property damage for broken windshields, etc. (N.T. 122).

103. PennDOT's engineer agrees regular inspections and maintenance to remove the spalls should be adequate (N.T. 122).

104. At a minimum, PennDOT's engineer asserts annual inspections for spalling should be undertaken with immediate removal of any loose concrete; if every inspection shows loose concrete, then PennDOT's engineer opines more frequent inspections should occur, perhaps every six months (N.T. 122-123).

105. If B&LE will assume liability for the property damage claims for falling stones, as well as assume liability for any vehicular accidents caused by larger chunks of

concrete falling upon the roadway, PennDOT will accept B&LE performing inspection and scaling work in lieu of undertaking more major repairs (N.T. 123).

106. PennDOT performs inventory inspections of bridges such as the Tunnel every two years. During an inventory inspection, PennDOT looks for anything that can be loose or falling or defective that may affect the motoring public's safety and notifies the owner to correct the problem (N.T. 123, 128-129).

107. PennDOT would like to receive the annual inspection reports prepared by B&LE (N.T. 124).

108. If PennDOT owned the structure, it would replace the headwall, because of its uncertain future. PennDOT is uncertain what freeze-thaw cycle conditions might occur, which will cause the headwall to move another two inches causing it to collapse. This uncertainty concerns PennDOT's engineer (N.T. 124).

109. PennDOT's engineer believes no rebar holds the headwall in place. With no guarantee that it will not move, PennDOT's engineer believes the headwall is a potential hazard (N.T. 124-125).

110. If PennDOT owned the structure, it would have replaced the headwall by now (N.T. 125).

111. If it repaired the headwall with its own forces, PennDOT estimates the cost would be roughly anywhere from $5,000-$10,000 (N.T. 125, 130-131).

112. PennDOT's engineer opines the roadway would only have to be closed intermittently while the headwall was being reconstructed (N.T. 131-132).

113. PennDOT is not volunteering to perform this work (N.T. 125).

114. Until it is replaced, PennDOT recommends frequent monitoring to detect any further movement of the headwall, especially during the winter (N.T. 125-126).

115. PennDOT's engineer describes the portion of the headwall that has moved as being approximately 10 feet long with a triangular base of perhaps three or four feet on the side and rising over the arch about two feet (N.T. 126).

116. PennDOT has not measured the amount of movement of the headwall, but estimates it has possibly moved approximately an inch and a half to two inches. It also appears dislodged. One part of the headwall seems to have moved more on one side than the other (N.T. 127).

117. According to its records, PennDOT first noticed the condition of the headwall in 1990 (N.T. 127).

118. While it is possible the headwall moved in 1990 and hasn't moved since, PennDOT has no way of determining whether movement has occurred, because it does not monitor movement of the headwall (N.T. 127, 129).

119. PennDOT's engineer suggested replacing the headwall, instead of undertaking the expense of constructing a French drain, which may be inadequate to relieve the problem (N.T. 128).

120. BTS's engineer visited the crossing site on December 4, 1996 (N.T. 133-134).

121. BTS's engineer agrees the subject structure is basically sound (N.T. 134).

122. To BTS's engineer, it appeared someone had scaled loose concrete from inside the arch (N.T. 135).

123. BTS's engineer found no major sections of loose concrete inside the arch (N.T. 135).

124. BTS's engineer agrees with B&LE that scaling the loose concrete should suffice to solve the spalling problem inside the arch (N.T. 135).

125. BTS's engineer recommends monitoring the headwall every six months to check for movement (N.T. 136).

126. If further movement is detected, BTS's engineer recommends either replacing the headwall or installing a French drain to divert runoff water away from the headwall as two options to solve the movement problem (N.T. 136).

127. BTS's engineer recommends that the parties be directed at their sole cost to maintain the structure and the highway approaches thereto, as well as perform regular inspections upon the structure every six months with particular attention paid to the movement of the headwall (N.T. 136-137).

128. If regular inspections were performed every six months and no movement of the headwall was detected, BTS's engineer opines the headwall would not have to be replaced or a French drain installed (N.T. 137-138).

129. If further movement is detected, BTS's engineer believes the best option is to replace the headwall, because further monitoring for movement of the headwall will still be necessary after a French drain is installed (N.T. 138).

130. In the opinion of the BTS's engineer, additional factors to consider in choosing which option to pursue include whether there is movement of the headwall, how far it moves and how fast (N.T. 139-140).

131. The BTS's engineer agrees some movement of the headwall must be detected before determining what option should be chosen to correct the problem (N.T. 140).

132. As directed in Paragraph Four of the Commission's Order entered in this case on September 4, 1992, PennDOT will, at its sole cost and expense, maintain the existing public highway, shoulders, guide rails and drainage structures within the legal right-of-way at the subject crossing and will not oppose a Commission Order directing it to perform this work (N.T. 140).

133. Allegheny County notified the presiding Administrative Law Judge ("ALJ") that it had no material interest in the proceeding and did not intend to participate in the hearing held on January 29, 1997 (N.T. 141).

Discussion

A. The Legal Standard

Section 2702 of the Public Utility Code (the "Code"), 66 Pa. C.S. §2702, invests the Commission with exclusive authority in the Commonwealth to order the construction, reconstruction, alteration, repair, protection or abolition of a rail-highway crossing, as well as the exclusive authority to determine and order which parties should perform such work at the crossing and which parties shall maintain the crossing in the future, all to effectuate the prevention of accidents and promote the public safety. SEPTA v. Pa. P.U.C., 592 A.2d 797 (Pa. Commonwealth Ct. 1991). This jurisdiction extends to the approaches of a crossing. Department of Transportation v. Pa. P.U.C., 440 A.2d 657 (Pa. Commonwealth Ct. 1982); Springettsbury v. Pa. P.U.C., 289 A.2d 762 (Pa. Commonwealth Ct. 1972).

The Commission is empowered to determine and prescribe the manner in which a crossing may be reconstructed. 66 Pa. C.S. §2702(b). The Commission also is empowered, pursuant to 66 Pa. C.S. §2702(c), to order the reconstruction of a crossing upon such reasonable terms and conditions as it shall prescribe. Pennsylvania Game Commission v. Pa. P.U.C., 651 A.2d 596 (Pa. Commonwealth Ct. 1994). Additionally, the Commission possesses the exclusive authority to assess the costs of any ordered performance upon the concerned parties to this proceeding in such proper proportions as it may determine. 66 Pa. C.S. §2704(a). The Commission determines which parties are "concerned" within the meaning of 66 Pa. C.S. §§2704(a) & 2702(c). County of Chester v. Pa. P.U.C., 408 A.2d 552 (Pa. Commonwealth Ct. 1979). In apportioning costs, the Commission is not limited to any fixed rule, but takes all relevant factors into consideration; the only requirement is that its order must be just and reasonable. East Rockhill Township v. Pa. P.U.C., 540 A.2d 600 (Pa. Commonwealth Ct. 1988). The assignment of future maintenance of any portion of a crossing remaining in place is logically within the parameters of "reasonable terms and conditions."

The structural integrity of the subject Tunnel is not at issue. The 1992 in-depth inspection report prepared for B&LE declares the structure to be in good condition (N.T. 110; B&LE Exh. 8). Apparently, little has changed since that 1992 report. B&LE's engineer opines the arch is structurally sound (N.T. 105). Neither the BTS's nor PennDOT's engineers, both of whom visually inspected the structure, refuted either the 1992 in-depth inspection report or the testimony of B&LE's engineer concerning the basic soundness of this structure. However, two problems remain for consideration in this proceeding: i.e., spalling inside the arch over the roadway, as well as cracking and movement of the headwall or the spandrel wall.

B. Spalling Inside the Arch

B&LE performs annual inspections upon the subject structure (N.T. 101-102). It performed the last inspection in June 1996 (N.T. 106). That inspection disclosed spalls on the southwest face of the arch, the southwest end of the barrel and 10' in from the southeast end of the barrel. Additionally, some spalling exists at construction joints 20' and 30' in from the west end (N.T. 103, 111-112; B&LE Exh. 7). No evidence suggests that large chunks of concrete have fallen from the arch; only small pieces less than three-quarters of an inch in diameter have fallen onto the roadway (N.T. 114). Visual inspections by engineers for PennDOT and the BTS confirm these findings (N.T. 121, 135).

B&LE agrees to maintain the structure by performing light scaling to remove loose concrete from inside the barrel of the arch (N.T. 108-109). This light scaling will entail hammering away loose concrete found in the spalling areas in the arch and removing the concrete (N.T. 109). Since the scaling work will be done in the arch over the roadway, B&LE will coordinate this work with PennDOT. When it performed this work in the past, B&LE closed one lane of the roadway at a time so work could proceed (N.T. 110). The light scaling will satisfy the concerns of the BTS and PennDOT regarding loose concrete falling upon vehicles passing through the arch (N.T. 122-123, 135). PennDOT agrees to maintain the roadway passing under the arch (N.T. 140).

Since all of the concerned parties agree B&LE's suggestion for resolution of this problem is appropriate, I recommend that the Commission enter an Order directing B&LE to continue to maintain the structure, as it has done since the early 1900's, by performing light scaling to remove loose concrete as needed at its sole cost and expense.

C. The Headwall or Spandrel Wall

The remaining problem at this crossing concerns what work, if any, needs to be performed upon the west headwall or spandrel wall of the structure. A portion of the headwall on the west side of the structure has cracked and moved and now sits over the edge of the barrel on the arch (N.T. 111-112, 121; B&LE Exh. 7). The size of this piece of headwall is significant. PennDOT's engineer describes this piece as being approximately 10 feet long with a triangular base of perhaps three or four feet on the side and rising over the arch about two feet (N.T. 126). He estimates the headwall has moved approximately an inch and a half to two inches. One side of the headwall appears to have moved more than the other (N.T. 127). No one knows when this segment cracked and moved, but PennDOT first noticed this condition in 1990 (N.T. 127). Since B&LE began annually monitoring the headwall for movement in 1991, it has detected no further movement (N.T. 107, 114).

For the first time in this proceeding, B&LE argues in its brief that the spandrel wall is not an integral part of this structure (B&LE M.B. 6-7). It notes no one disputes the purpose of the spandrel wall is merely to "... keep the dirt from falling down on the road" (N.T. 68). B&LE claims the spandrel wall is not a "... load bearing portion of the structure" (N.T. 68). It also notes any drainage from the spandrel wall does not affect the arch (N.T. 68). Accordingly, B&LE contends any repairs to the spandrel wall would be merely cosmetic in nature and unnecessary to ensure the structural integrity of the arch.

This contention is ludicrous. Simply because the spandrel wall does not support a "load bearing portion of the structure" does not mean it is not an integral part of the structure. Whatever its engineering function relative to the structure itself, the spandrel wall, at the very

least, "keeps the dirt from falling upon the roadway." By assuring clear passage, it performs an important safety function for members of the public traversing the subject crossing upon this roadway. If this 10 feet long segment falls upon the highway, its impact upon the health and safety of the traveling public could be immediate and perhaps fatal. Therefore, B&LE's cavalier characterization of the legitimate health and safety concerns of other parties in this proceeding as being "fixated" upon movement of the spandrel wall is both inappropriate and misguided.

Having established that movement of this segment of the headwall raises legitimate safety concerns, we turn now to the question of what, if anything, should be done to correct the problem. B&LE posits it will continue to monitor the headwall of the structure annually for movement, but recommends no repairs be undertaken now (N.T. 107). It admits no guarantees exist that the headwall will not move in the future (N.T. 108). It even concedes a severe freeze-thaw cycle may cause the headwall to move further (N.T. 108). However, B&LE sees no need to monitor the headwall more frequently as the other parties suggest (N.T. 107-108).

PennDOT does not dispute B&LE's assertion that the headwall has not moved since 1991 (N.T. 129). Its concern is that the headwall is not attached to the structure by means of any support, such as rebar (N.T. 124-125, 127). It opines further shifting of the headwall could interfere with the safe movement of vehicular traffic (PennDOT M.B. 2). If PennDOT owned the structure, it would replace the headwall, because it is uncertain what freeze-thaw cycle conditions may occur which will cause the headwall to move another two inches causing it to collapse. This uncertainty concerns PennDOT (N.T. 124). To eliminate the possibility of collapse, PennDOT recommends replacing the headwall (N.T. 123-126).

BTS strikes a middle ground. It agrees with B&LE that no repairs need be undertaken at present. However, the BTS posits the headwall should be monitored for movement every six months, instead of annually as B&LE suggests (N.T. 136). If further movement of the headwall occurs, additional action may then be taken depending upon the nature and extent of the movement (N.T. 137-138; BTS M.B. 8). This solution makes the most sense under the circumstances and it is the one the Commission should adopt.

The most significant circumstance militating in favor of the BTS's proposal is the fact that the subject headwall has not moved since 1991. No one knows when the headwall originally cracked and moved nor the cause for this event. During the more than 80 years of its life, one would reasonably expect this structure has experienced a variety of stresses. Yet, PennDOT speculates repeated freeze-thaw cycles may have caused the movement. Specifically, its engineer testified (N.T. 124):

> Q. Moving on to the head wall, does the Department have an opinion as to what may need to be done at the head wall?
>
> A. If that was a state structure, if we owned that, we would direct that it be replaced because of its unknown future. We don't know -- we assume a freeze-thaw cycle that it moves approximately two inches, two and a half, two inches. We don't know under what conditions that might occur again, whether or not another two-inch movement would cause it to collapse. It's the unknown involvement that bothers me. (Emphasis added).

Assumptions and speculation do not supply the requisite proof. The witness fails to explain the basis for his opinion. Without an adequate foundation for his opinion, no evidence exists in this record to support the witness' conclusion that the headwall requires replacement.

To reiterate, B&LE has detected no movement of the headwall since it began annual inspections in 1991 even though the structure has presumably experienced a variety of

weather conditions since then. Uncertain of what conditions could cause the headwall to move, PennDOT nevertheless recommends its immediate replacement. While extreme caution should always be exercised in matters of public safety, some evidence must demonstrate a dangerous condition exists before requiring corrective action. Such evidence is lacking in this case. Engineers for both B&LE and the BTS apparently agree the condition of the headwall has not yet approached the threshold of collapse. PennDOT's engineer did not unequivocally state the headwall is in danger of immediate collapse or is in any manner threatening to do so. He was merely concerned with what "might happen" two to five years from now (N.T. 125-126).

As the party seeking an Order from the Commission directing an entity to undertake affirmative action, PennDOT bears the burden of proving by a preponderance of the evidence that replacement of the headwall is a reasonable solution. 66 Pa. C.S. §332(a). With no evidence appearing anywhere in this record to support the opinion of its engineer that the headwall needs immediate replacement and the countervailing testimony of two other engineers that close monitoring for movement of the headwall will suffice for the present, PennDOT has failed to meet this burden of proof. For this reason, the Commission should reject the recommendation of PennDOT.

All of this discussion does not mean that maintaining the status quo is a reasonable option. On the contrary, PennDOT's concern of further movement is a legitimate one. Apparently sharing this concern, the BTS recommends more frequent monitoring of the headwall for movement. It proposes that B&LE monitor the headwall every six months, instead of the current annual inspections. Concern for the safety of the public traveling through this crossing,

together with the advanced age of the structure itself, lead me to conclude BTS's proposal for more diligent surveillance is a common sense interim solution to the problem.

For this reason, I recommend that the Commission direct B&LE, at its sole cost and expense, to begin monitoring the subject headwall for movement every six months, beginning 30 days after entry of the Commission's Order in this case, and report the results in writing to the Commission, as well as to PennDOT and the BTS, within 30 days of completion of the inspection. Close monitoring of the headwall should alleviate concerns of further movement threatening public safety. If further movement occurs, a decision can then be made whether to replace the headwall, install a French drain or undertake some other alternative measure.

In addition, B&LE should inspect the arch for spalling concrete during these six-month inspections. Inspecting the arch for spalling will add very little, if any, cost to the monitoring process. If B&LE finds any loose concrete, it must remove it at its sole cost and expense. This process will protect the public from falling concrete for very little additional expense.

Since the foregoing recommendation is only an interim solution, I recommend that the Commission undertake no further action at this time to fix responsibility for any future maintenance and repair of the subject structure beyond the limits already discussed in this decision or any prior Commission Order. However, a further hearing may be held, if any of the concerned parties to this proceeding request it or circumstances warrant it.

Conclusions of Law

1. The Commission has jurisdiction over the subject matter and the parties to this proceeding.

2. The Commission has exclusive jurisdiction over all rail-highway crossings in the Commonwealth and the approaches thereto.

3. The Commission has the exclusive authority in the Commonwealth to order the construction, reconstruction, alteration, repair, protection or abolition of a rail-highway crossing, as well as the exclusive authority to determine and order which parties should perform such work at the crossing and which parties shall maintain the crossing in the future, all to effectuate the prevention of accidents and promote the public safety.

4. The record in this case supports a determination that Bessemer and Lake Erie Railroad Company should, at its sole cost and expense, continue to perform light scaling to remove any spalling concrete found on the subject structure.

5. The record in this case supports a determination that Bessemer and Lake Erie Railroad Company should, at its sole cost and expense, monitor the subject west headwall of this structure for movement every six months, beginning 30 days after entry of the Commission's Order in this case, and report the results in writing to the Commission, as well as to the Pennsylvania Department of Transportation and the Commission's Bureau of Transportation and Safety within 30 days of completion of the inspection.

6. The record in this case supports a determination that Bessemer and Lake Erie Railroad Company should, at its sole cost and expense, inspect the arch for spalling

concrete during these six-month inspections. If it finds any loose concrete, Bessemer and Lake Erie Railroad Company should remove it at its sole cost and expense.

7. The record fails to support any determination that the west headwall of the subject structure should be altered, reconstructed or replaced at this time.

RECOMMENDED ORDER

THEREFORE,

IT IS RECOMMENDED:

1. That Bessemer and Lake Erie Railroad Company is hereby directed, at its sole cost and expense, to monitor the subject west headwall of this structure for movement every six months, beginning 30 days after entry of the Commission's Order in this case, and report the results in writing to the Commission, as well as to the Pennsylvania Department of Transportation and the Commission's Bureau of Transportation and Safety, within 30 days of completion of the inspection.

2. That Bessemer and Lake Erie Railroad Company is hereby directed, at its sole cost and expense, to inspect the subject structure for spalling concrete every six months, beginning 30 days after entry of the Commission's Order in this case, and report the results in writing to the Commission, as well as to the Pennsylvania Department of Transportation and the Commission's Bureau of Transportation and Safety, within 30 days of completion of the inspection; further, if it finds any loose concrete, Bessemer and Lake Erie Railroad Company is hereby directed to remove it at its sole cost and expense.

3. That Bessemer and Lake Erie Railroad Company, at its initial cost and expense, is hereby directed to furnish all materials and do all work necessary to maintain the structure and its facilities at the subject crossing in a safe and satisfactory manner, until further Order of the Commission.

4. That Bessemer and Lake Erie Railroad Company and the Pennsylvania Department of Transportation are hereby directed to cooperate with one another and coordinate their efforts during any period when inspections or work are performed at the subject crossing.

5. That, pursuant to its agreement to do so, the Pennsylvania Department of Transportation is hereby directed, at its sole cost and expense, to maintain the existing public highway, shoulders, guide rails and drainage structures within the legal right-of-way at the subject crossing.

6. That any non-carrier utilities involved in the subject crossing, at their sole cost and expense, furnish all material and do all work necessary to maintain their respective facilities in the vicinity of this crossing.

7. That this Order, insofar as it assigns costs to the parties involved in this project, is without prejudice to their right(s) to recover the costs from others in accordance with any lawful agreement.

8. That a further hearing may be held, if any of the concerned parties to this proceeding request it or circumstances warrant it.

Dated: April 30, 1997

JOHN H. CORBETT, JR.
Administrative Law Judge

DOCUMENT FOLDER

DATE: June 17, 1997

SUBJECT: C-00913419

DOCKETED JUN 18 1997

TO: Office of Administrative Law Judge
Annette Shelley

FROM: Joyce G. McGrady, Supervisor
New Filing Section

REPRESENTATIVE DANIEL L. ANDERSON
VS
BESSEMER & LAKE ERIE RAILROAD COMPANY

The Initial Decision has been served upon all parties of interest.

Neither exceptions nor requests for review from the Commissioners have been received by the Commission. This matter is referred to your office for whatever action you deem necessary.

cc: Office of Special Assistants

P.S. Please note that exceptions or reply exceptions may come in timely with certificates of mailings. A second memo will not be released for these exceptions.