

BEFORE THE OFFICE OF THE COMMISSIONER OF RAILROADS

STATE OF WISCONSIN

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In the Matter of the:

Petition of the Wisconsin Central Ltd. for the Closure of the Public Crossings of Its Tracks with Old Highway 18 and Smokey Road in the Town of Stockton, Portage County

9164-RX-682

FINAL DECISION

This matter was originally scheduled for a hearing on the petition of the Wisconsin Central Ltd. (WCL) for the closure of the public crossings of its tracks with Old Highway 18 (crossing no. 692 529E) and Smokey Road (crossing no. 692 521A) in the Town of Stockton, Portage County.

By letter dated April 9, 2009, the WCL moved to withdraw its petition for the closure of these two crossings. The OCR granted the motion to withdraw on April 16, 2009.

By letter dated April 10, 2009, the Town of Stockton requested that the OCR proceed with a hearing to consider the alteration of the Old Highway 18 crossing. The Heartland Bike & Nordic Ski Club (Heartland) supported the Town's petition. The OCR takes jurisdiction under ss. 86.13, 195.28, and 195.29 Stats.

Pursuant to due notice, public hearing was held in this matter on May 13, 2009 in the Town of Stockton, Wisconsin with hearing examiner Douglas S. Wood presiding.

Discussion of Comments on the Proposed Decision

On June 11, 2009, the hearing examiner issued a proposed decision. By email dated June 18, 2009, the Wisconsin Department of Transportation (DOT) filed comments supporting the proposed decision. By letter dated July 2, 2009, the Town of Stockton filed comments supporting the proposed decision. By letter dated July 2, 2009, the WCL filed comments stating qualified objections to the proposed decision.

The railroad questions whether the proposed decision exceeded the statutory authority of the OCR when it ordered the improvement to the approach grades and apportioned the costs of that improvement. The OCR is an administrative agency. "An administrative agency has only those powers expressly conferred or necessarily implied from the statutory provisions under which it operates. *Wisconsin Citizens Concerned for Cranes & Doves v. DNR*, 2004 WI 40, ¶ 14, 270 Wis.2d 318, 677 N.W.2d 612. To determine whether a rule exceeds an agency's statutory authority, we examine the enabling statute to ascertain whether the statute grants express or implied authorization for the rule. *Id.*" *Wisconsin Builders Ass'n v. Wisconsin Department of Transportation*, 2005 WI App 160, ¶ 9, 285 Wis.2d 472, 702 N.W.2d 433.

The OCR's jurisdiction to order the improvement of the roadway approaches to the crossing rests firmly in the express language of s. 195.29. That provision grants the OCR jurisdiction to "determine what, if anything, shall be done to promote the public safety and the means by which it shall be accomplished, whether by the relocation of the highway, the alteration in such crossing, approaches, mode of crossing, location of highway crossing, closing of highway crossing, with or without the substitution of another therefor, the construction of a public highway bridge, the removal of obstructions to sight at crossing, or by the use of other reasonable methods, and by whom the same shall be made..." See sec. 195.29 (1).

The statute specifically empowers the OCR to order changes to the roadway approaches to the crossing and necessarily implies that this power extends beyond the limits of the railroad right-of-way. Moreover, changes in the approach grades to a crossing are rather minor in the context of a statute that also empowers the OCR to order that an existing roadway be entirely closed at the crossing or relocated to cross the tracks at a different location, or even that a bridge be constructed to replace an existing at-grade crossing. Except in very unusual circumstances, a roadway bridge cannot be constructed totally within railroad right-of-way, yet the statute authorizes OCR to order the construction of bridges. The statute also authorizes the OCR to order the removal of sight obstructions within the necessary corner sight triangles, much of which is generally located off of the railroad right-of-way. Finally, any reasonable doubt whether the breadth of the OCR's discretionary authority includes changes to the roadway approach grades is resolved by the legislative grant of authority to order the "use of other reasonable methods" to promote public safety.

The statute also expressly grants the OCR authority to "...fix the proportion of the cost and expense of alterations, removals and new crossings, or any other work ordered..." including costs incurred "by reason of a change in the grade of such street or highway...to be paid or borne by the railroad companies and the municipalities in interest." See Section 195.29 (2). This authority to apportion costs must be exercised reasonably, but the OCR's discretion is not limited to a benefits received standard. In addition to the benefits received, the OCR may also consider "public safety, prior dealings, and the extent of the burden." *Chicago & N. W. Ry. v. Public Service Comm.*, 43 Wis.2d 570, 581, 169 N.W.2d 65 (1969).

Thus, the statute gives the OCR jurisdiction over changes in the approaches, empowers the OCR to order such changes, and requires the OCR to apportion the costs for those changes.

The railroad also objected, with some merit, that the proposed decision did not adequately explain why the railroad should be apportioned 5% of the project costs. First, it is important to note that this roadway project is a spot improvement of the rail-highway crossing vicinity and not a larger roadway project. The Commissioner finds that the project will improve public safety at the crossing in part by improving the approaches to the crossing. The existing approaches are very steep. Furthermore, drivers traveling on Old Highway 18 essentially execute an S-curve as they traverse the crossing. The steep inclines and the S-curve each distract a driver from the dangers of trains at the crossing and obstruct the driver's view of trains. The roadway project will improve (reduce) the approach grades. The project will eliminate the S-curve. The project will move the Burbank Road intersection a short distance to the south so that it is not nearly adjacent to the crossing.

The project will also more clearly define that intersection. All of these elements of the project will improve public safety at the crossing. The railroad will benefit by a reduction in the likelihood of train-vehicle accidents.

The Commissioner and DOT have agreed to use federal safety funds to pay for 90% of the roadway project [but not Highway Safety Improvement Program (HSIP) funds]. The Town estimated the roadway project cost at \$213,500. That estimate may be low because it assumed the Town would perform the work with its own force, but the project will have to be bid. The Town will pay 5% of the roadway costs. Thus, public funds will be used to fund an estimated \$421,925 and the railroad would fund an estimated \$10,675. As stated in the proposed decision, the OCR had previously decided to use state and federal funds to pay for 100% of the cost for the cost of materials and installation of the new automatic flashing lights with gates (currently programmed by DOT at \$202,000) and that project is in the OCR's 2011 signal program. The Commissioner concludes that it is reasonable to apportion 5% of the roadway project cost to the railroad because the railroad will benefit from a reduction in train-vehicle crashes, the railroad will benefit from reduced liability exposure through the expenditure of federal funds on both the warning devices and the roadway, public safety will benefit from both reduced train-vehicle crashes and run-off-the-road crashes, and the burden on the railroad is very small.

In its comments, the railroad conditionally agreed to contribute the 5% share provided that the payment is not due until the roadway project is completed and open to the public and that the contribution is limited to \$10,675 (5% of the estimated cost). The Commissioner agrees that the railroad should only pay after the work is completed. The Commissioner does not agree to limit the railroad's contribution to a specific dollar amount, but if the amount exceeds \$10,675, the railroad may request that the Commissioner determine whether the amount is reasonable.

The railroad also asked that its limited agreement to the cost apportionment in this case not be used against it in future cases before the OCR. The Commissioner understands the conditional nature of the railroad's concurrence.

With these clarifications, the Commissioner adopts the proposed decision as final.

Appearances:

Parties

Town of Stockton, Petitioner
by
David Ray, Town Attorney
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In Support:

Heartland Bike & Nordic Ski Club
by
Brian Formella, Attorney
Anderson, O'Brien, Bertz, Skrenes & Golla
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Stevens Point, WI 54481-0228

As Interest May Appear:

Wisconsin Central Ltd.
by
Thomas J. Healey
Counsel Regulatory
17641 S. Ashland Ave
Homewood, IL 60430

Wisconsin Department of Transportation
by
Mark Morrison, PE
Grade Crossing Safety Engineer
PO Box 7914
Madison, WI 53707-7914

Findings of Fact

THE COMMISSIONER FINDS:

The Town proposes to improve the roadway approaches to the at-grade crossing of Old Highway 18 with the Wisconsin Central Ltd. tracks.

Old Highway 18 is 20-22' wide with no shoulders and intersects the track at an angle of 55°-60° (left-hand forward). The roadway approaches to the crossing ascend at a grade of about 6%. The crossing consists of one mainline track. West of the crossing, Old Highway 18 runs parallel to the tracks at a distance of about 50' north of the tracks until the roadway curves sharply to the south to cross the tracks and then curves sharply to the east and runs parallel to the track about 50' south of the tracks. In addition, Burbank Road, a north-south road, T-intersects with Old Highway 18 less than 50' south of the tracks. Burbank Road currently physically ends at that point, but there are tentative plans to extend it farther north at an unspecified future date.

Old Highway 18 carries about 300 ADT (average daily traffic). Old Highway 18 also carries a significant number of bicycle users. The speed limit is 45 mph for eastbound and northbound

traffic and 35 mph on westbound Old Highway 18. Highway vehicle speed is much lower than the posted speed limit due to the sharp curves and steep approach and descent at the crossing.

The railroad currently operates about 25 through train movements per day over the crossing at a timetable speed of 60 mph. A siding begins about 200' west of the crossing and train speed is limited to 35 mph at that location.

The proposed improvements would slightly widen the roadway at the crossing to 24' and would add 3'-wide gravel shoulders on all three approaches. The roadway would be raised on the approaches, which would reduce the approach grades to 3%. The angle of the crossing intersection with Old Highway 18 would be improved to 90°. The Burbank Road intersection would be moved about 50' to the south.

A driver traveling at 45 mph needs a distance of 394' to stop safely. The crossing warning devices are visible from more than 394' in each direction. The approach sight distance is adequate.

Assuming a train speed of 60 mph, a driver traveling at 45 mph needs to see a train when it is 625' from the crossing from a point 394' down the highway. The sight distance available in each quadrant from the safe stopping distance is inadequate.

At all crossings, except those with gates, a driver stopped 15' short of the near rail must be able to see far enough down the track, in both directions, to determine if sufficient time exists for moving their vehicle safely across the tracks to a point 15' past the far rail, prior to the arrival of a train. Required clearing sight distance along both directions of the track, from the stopped position of the vehicle, is dependent upon the maximum train speed and the acceleration characteristics of the "design" vehicle. The necessary clearing sight distance at the Old Highway 18 crossing is 1345'. The available clearing sight distance is less than 1345' in all quadrants. The clearing sight distance is inadequate.

The proposed improvements will improve the corner sight distances, but not enough to be considered adequate. The proposed improvements will improve the clearing sight distances enough to exceed the 1345' minimum.

The exposure factor at this crossing is 7500. The exposure factor equals the product of the number of trains per day and the number of highway vehicles per day, which yields a numerical value for the potential conflicts each day at the crossing.

Three train-vehicle collisions have occurred at this crossing since 1973. The crashes occurred in 1978, 1998, and 2001. The 1998 crash occurred when a vehicle was intentionally abandoned on the tracks.

Accidents that do occur here will likely be quite serious if a through train is involved due to their 35 mph to 60 mph speed. Train speed is strongly correlated with fatalities in train/vehicle accidents. More specifically, crossings with train speeds of 40 mph and over have a disproportionate number of fatalities.

The Wisconsin Department of Transportation has produced a benefit-cost analysis for all at-grade crossings in the state. Installing new automatic flashing lights with gates and constant warning time circuitry at the Old Highway 18 crossing has a net benefit of about \$2,386,000. The benefit-cost ratio is about 12.39 meaning that the public will receive \$12.39 in safety benefits for each dollar expended. The projected value is somewhat overstated because it is based in part on the 1998 intentional crash. Even without that crash the crossing would have a large positive projected net benefit.

The crossing presently has crossbucks and stop signs for warning devices. Conditions warrant upgrading the warning devices at this crossing. The existing warning devices will be adequate until such time as the new warning devices are installed. In order to adequately protect public safety, 12" LED automatic flashing lights with gates and constant warning time circuitry are needed because of poor geometry of the crossing, high net benefit, high number of trains, and relatively high train speeds.

Constant warning time circuitry adjusts for train speed and causes the crossing signals to always operate for the same amount of time before the train reaches the crossing, regardless of train speed. A motion detector simply detects the train operation, but does not adjust for train speed so that the amount of warning time varies based on train speed.

Light emitting diodes (LED) lamps replace incandescent bulbs. LEDs have higher conspicuity, a wider cone of vision, and longer life than incandescent lights. LEDs are especially useful on east-west roadways where the rising and setting sun may make the signals difficult to see.

In-summary, the improvement and alteration of the crossing at-grade of the Wisconsin Central Ltd. tracks with Old Highway 18 will promote public safety and convenience by improving the angle of intersection, by reducing the approach grades, by moving the Burbank Road intersection away from the crossing, by improving the corner and clearing sight distances, and by slightly widening the roadway at the crossing to 24' and adding 3'-wide gravel shoulders on all three approaches.

The project does not include any alteration of the crossing *per se*. The crossing was recently rebuilt (about two years ago) and is in overall good condition except that the running rails are a little too far below the level of the crossing planks. This condition causes a rough ride, especially for bicyclists. The order requires the railroad to perform limited repairs to the crossing surface to reduce the difference in elevation, including the replacement of the crossing planks if necessary, at its own cost in 2009.

Source of funding: As stated in the discussion of comments section, the Commissioner and DOT have agreed to use federal safety funds to pay for 90% of the roadway project. The Town estimated the roadway project cost at \$213,500. That estimate may be low because it assumed the Town would perform the work with its own force, but the project will have to be bid. This order requires that the Town and the railroad split the cost of the local match. See the *Discussion of Comments* section for details.

The signal materials and installation shall be paid from the OCR's state and federal safety funds.

Ultimate Conclusions on the Issues

THE COMMISSIONER CONCLUDES:

1. That the alteration of the crossing at-grade of Old Highway 18 with the Wisconsin Central Ltd. tracks in accordance with the design plans of the Town of Stockton and the Wisconsin Department of Transportation in the Town of Stockton, Portage County will promote public safety and convenience.
2. That in order to adequately protect and promote public safety, it is necessary to install and maintain 12" LED automatic flashing lights with gates.
3. That it is reasonable that the Wisconsin Central Ltd. bear half of the 10% local match for the cost of the roadway improvements.

Conclusion of Law

THE COMMISSIONER CONCLUDES:

That the jurisdiction of the Office of the Commissioner of Railroads under §§195.28 and 195.29, Stats., extends to this matter. Accordingly, the Office enters an order consistent with the findings of fact.

Order

THE COMMISSIONER ORDERS:

1. That the **Wisconsin Central Ltd.** shall perform minor repairs to the crossing surface in order to reduce the difference in elevation between the running rails and the crossing planks at the crossing at-grade of **Old Highway 18** with its tracks in the Town of Stockton, Portage County by **October 1, 2009** (Crossing No. 692 529E).
2. That the **Town of Stockton** shall reconstruct and maintain the roadway approaches to the crossing at-grade of **Old Highway 18** with the Wisconsin Central Ltd. tracks in accordance with the design plans of the Town of Stockton and the Wisconsin Department of Transportation in the Town of Stockton, Portage County by **October 1, 2011** (Crossing No. 692 529E).

3. That the **Wisconsin Central Ltd.** shall install and maintain 12" LED automatic flashing lights with gates, constant warning time circuitry, and other appropriate appurtenances in accordance with such plans as are filed with and approved by the Office of the Commissioner of Railroads at the crossing of its tracks with **Old Highway 18** at-grade in the Town of Stockton, Portage County by **October 1, 2011** (Crossing No. 692 529E).

4. That the **Wisconsin Central Ltd.** shall submit to the Office of the Commissioner of Railroads signal and circuit plans with the cost estimate of its proposed installation and upon completion of the signal project, a detailed statement of the actual cost to the Office and to the Wisconsin Department of Transportation.

5. That the signal installation work herein ordered shall not begin until the regional office of the Wisconsin Department of Transportation informs the railroad that they may start such work and such start notice will not be issued until appropriate federal aid or other funding arrangements have been assured. The cost of the new project initiated before the start notice will not be reimbursed with public funds and shall be the responsibility of the railroad.

6. That the Wisconsin Central Ltd. shall notify the Office of the Commissioner of Railroads upon completion of the signal project.

7. That the **Town of Stockton** shall install and maintain advance warning signs (sign W10-1) at a distance from the crossing in accordance with the Manual on Uniform Traffic Control Devices (MUTCD) on the eastbound approach on **Old Highway 18** and the northbound approach on **Burbank Road** by **October 1, 2009**.

8. That the **Town of Stockton** shall install and maintain a "parallel tracks" advance warning sign [Sign W10-2, 3, or 4 in the Manual on Uniform Traffic Control Devices (MUTCD)] on **Old Highway 18** for westbound traffic at a distance in accordance with the Manual on Uniform Traffic Control Devices (MUTCD) from the intersection of Burbank Road by **October 1, 2009**.

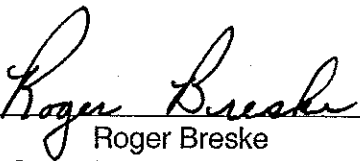
9. That the **Wisconsin Central Ltd.** and the **Town of Stockton** shall each bear half of the 10% local match required by the use of federal funds for the project. The **Wisconsin Central Ltd.** shall pay any cost assessed to the railroad pursuant to §195.60, Stats., for the investigation of this matter by the Office. The railroad shall not pass on those assessment costs either directly or indirectly. The **Wisconsin Central Ltd.** shall pay its share upon billing at the completion of the project.

10. That the **Wisconsin Central Ltd.** and the **Town of Stockton** shall bear no part of the cost of the crossing signal materials or installation, except for any cost assessed to the railroad pursuant to §195.60, Stats., for the investigation of this matter by the Office. The railroad shall not pass on those assessment costs either directly or indirectly.

11. That jurisdiction is retained.

Dated at Madison, Wisconsin, JUL 15 2009.

By the Office of the Commissioner of Railroads.



Roger Breske
Commissioner of Railroads

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NOTICE TO THE PARTIES

Any party adversely affected by this order may petition for rehearing in writing within 20 days after service of this order. The petition for rehearing shall be served upon the Office of the Commissioner of Railroads (OCR) by mail or in person. The petition for rehearing must also be served upon all other parties listed in the "Appearance" section of this order. Filing a petition for rehearing does not automatically stay this order. The process for rehearings is in sec. 227.49 of the statutes.

A party adversely affected by this order may petition for judicial review within 30 days after the service of this order or after the disposition of a request for rehearing. A petition for rehearing is not a prerequisite for filing a petition for judicial review. The Office of the Commissioner of Railroads shall be named as respondent.

The petition for judicial review must be served on the Office of the Commissioner of Railroads either by certified mail or by personal service upon the Commissioner of Railroads. The appeal must also be served upon all other parties listed in the "Appearance" section of this order. The process for court review is in sec. 227.53 of the statutes.

The OCR is located at 610 North Whitney Way, Room 110, Madison, Wisconsin.

The OCR's mailing address is: Office of the Commissioner of Railroads, P.O. Box 7854, Madison, WI 53707-7854.