

BEFORE THE OFFICE OF THE COMMISSIONER OF RAILROADS

STATE OF WISCONSIN

Complaint of the City of West Allis for the Repair of the Public Crossings of the Union Pacific Railroad Co. Tracks with S. 60th Street, S. 80th Street, and S. 82nd Street and for the Removal of the Abandoned Spur Track Crossing with W. Electric Avenue in the City of West Allis, Milwaukee County

9040-RX-1256

FINAL DECISION

By letter dated January 21, 2008, the City of West Allis filed a complaint with the Office of the Commissioner of Railroads (OCR) under §86.12, Stats., that the Union Pacific Railroad Co. (UP) has failed to maintain in good condition for public travel the public crossings of its tracks with S. 60th Street (crossing no. 177 236H), S. 80th Street (crossing no. 177 247V), and S. 82nd Street (crossing no. 177 248C) in the City of West Allis, Milwaukee County.

The resolution requiring the repair of S. 60th Street and S. 82nd Street crossings was adopted on September 4, 2007 and sent to the railroad by certified mail on September 10, 2007. The resolution requiring the repair of 80th Street crossing was adopted on February 6, 2007 and sent to the railroad by certified mail on February 12, 2007.

The City also seeks the removal of the abandoned spur track crossing with W. Electric Avenue (crossing no. 177 231Y). The City cited s. 86.12 Stats. The OCR takes jurisdiction over the removal of this spur track pursuant to s. 190.16 (5) Stats. The resolution requiring the removal of the W. Electric Avenue crossing was adopted on November 6, 2007 and sent to the railroad by certified mail on November 12, 2007.

(5) REMOVAL, WHEN. When a spur track has been abandoned, as defined in s. 85.09, the office, after hearing held upon notice to all parties interested and for good cause shown may order the removal of the track except that, if no objection has been filed with the office within 20 days from the original notice, the office may without hearing authorize the removal of the track.

The W. Electric Avenue complaint concerns the disconnected spur track that still runs across the street. The remainder of the spur track has been removed. This spur track was formerly operated by the Union Pacific Railroad Co. or its predecessors. The City entered into a contract with the UP in 1998 for the removal of that track.

Pursuant to due notice, public hearing was held in this matter on March 27, 2008 in West Allis, Wisconsin with hearing examiner Douglas S. Wood presiding.

This **final decision relates only to the 80th and 82nd Street and the Electric Avenue crossings** and is issued without an intervening proposed decision. A proposed decision regarding the remaining matters in this docket and in 9040-RX-1240 (55th and 57th Street) will be issued separately.

Appearances:

Parties

City of West Allis, Complainant
by
Jeffrey J. Warchol
Assistant City Attorney
7525 W. Greenfield Avenue
West Allis, WI 53214

No Appearance by Union Pacific Railroad Co. The UP submitted a letter at the time of the hearing.

Findings of Fact

THE COMMISSIONER FINDS:

80th Street and 82nd Street crossings

The Union Pacific Railroad Co. agrees that it has failed to maintain the 80th and 82nd Street crossings as required by s. 86.12 Stats. The railroad also stated that it plans to rebuild those crossings by the end of June 2008.

Under §86.12 Wis. Stats., the railroad bears an obligation to keep all highway/rail crossings in good and safe condition for public travel. The railroad has failed to do so at this crossing. The OCR finds that the railroad has failed to maintain the crossings. The crossings are in deplorable condition with large gaps and uneven surfaces. The crossings are beyond the end of their useful life and require complete renewal.

The City requested that the OCR order the UP to install the concrete-paneled crossings. **The Commissioner agrees and orders the UP to install concrete-paneled crossings.** The OCR typically follows the Wisconsin Department of Transportation Facilities Development Manual (FDM) guidelines when determining appropriate crossing surface.

The FDM states that, "In urban areas, the concrete-panel crossing is the standard crossing surface when the design traffic volume exceeds 7,000 vehicles per day or the exposure factor exceeds 20,000." (FDM, 17-60-30). The "exposure factor" equals the product of the number of trains per day and the number of highway vehicles per day. 80th Street and 82nd Street each carry at least 750 vehicles per day and the railroad operates 34 train movements per day according to the Federal Railroad Administration (FRA) database. Thus, the exposure factor at each crossing exceeds the FDM standard for a concrete-paneled surface.

W. Electric Avenue

Crossing no. 177 231Y

In 1998, the City and the UP entered into an agreement for the removal of the spur tracks through W. Electric Avenue by the UP as part of a larger project. The entire project included the removal of the four existing at-grade crossings and the reinstallation of the two mainline track crossings for a total cost of \$189,808. The City agreed to pay and did pay \$38,011 to the UP in 1999. The UP removed and reinstalled the two existing mainline track crossings, but did not remove the two spur tracks through the roadway.

As has been noted above, the railroad has a duty to maintain at-grade crossings. Thus, the railroad was required to maintain the mainline track crossings at its own cost. The removal of the spur tracks from the roadway was the only consideration benefiting the City in the 1998 contract. The City paid the UP, but the work was never performed.

The remnants of these two spur tracks remain in the W. Electric Avenue and are in extremely poor condition.

The City of West Allis petitioned the Office under §190.16 (5). As amended by Wisconsin Act 179, that statute grants the Office authority over the removal of any abandoned spur track.

Section 190.16 Industrial spur tracks. (5) REMOVAL, WHEN. When a spur track has been abandoned, as defined in s. 85.09, the office, after hearing held upon notice to all parties interested and for good cause shown may order the removal of the track except that, if no objection has been filed with the office within 20 days from the original notice, the office may without hearing authorize the removal of the track.

Under § 85.09, abandonment includes the "use of rail property for railroad or railway purposes has been discontinued with the intent not to resume. Intent not to resume may be inferred from circumstances including, but not limited to, the following: 1. If the rail property is not used for railroad purposes for 2 consecutive years. 2. If the facilities on the rail property are removed or rendered unfit for service. 3. If the rail property is used for other than railroad purposes."

In this case, the track remnants in the roadway are the only part of the spur tracks remaining. The rest of the spur tracks were removed years ago, probably as part of the work done under the 1998 agreement. No person or entity has objected to the removal of the tracks. Given the removal of the rest of the tracks, the OCR finds that the use of the tracks for railway purposes has been discontinued with no intent to resume such use. The OCR concludes that the spur tracks have been previously abandoned.

The railroad did not file an objection to the removal of the tracks.

The remnant spur track crossings provide a rough ride for users of the roadway. Good cause exists for the removal of the remnants by the UP. In addition, the UP previously contracted with the City for the removal of these remnants and paid for the removal. The order requires the UP to remove the remnants from the roadway.

The UP has informally requested that the City provide the asphalt paving and traffic control when the tracks are removed. This request is consistent with the 1998 agreement.

Ultimate Conclusions on the Issues

THE COMMISSIONER CONCLUDES:

- 1 That the Union Pacific Railroad Co. has failed to maintain the crossings at-grade of 80th Street and 82nd Street with its tracks in good condition and repair for public travel in the City of West Allis, Milwaukee County.
- 2 That the spur tracks at W. Electric Avenue have been abandoned and good cause exists for their removal.

Conclusion of Law

THE COMMISSIONER CONCLUDES:

That the jurisdiction of the Office of the Commissioner of Railroads under §86.12 and 190.16 (5), Wis. Stats., extends to this matter. Accordingly, the Office enters an order consistent with the findings of fact.

Order

THE COMMISSIONER ORDERS:

1. That the **Union Pacific Railroad Co.** shall repair the crossing at-grade of **S. 80th Street** with its tracks by fully renewing the crossing **with a concrete-paneled surface** in the City of West Allis, Milwaukee County by **July 31, 2008** (crossing no. 177 247V).
2. That the **Union Pacific Railroad Co.** shall repair the crossing at-grade of **S. 82nd Street** with its tracks by fully renewing the crossing **with a concrete-paneled surface** in the City of West Allis, Milwaukee County by **July 31, 2008** (crossing no. 177 248C).
3. That the **Union Pacific Railroad Co.** shall remove the spur track from the **W. Electric Avenue** roadway in the City of West Allis, Milwaukee County by **October 1, 2008** (crossing no. 177 231Y). That the **City of West Allis** shall provide asphalt paving and traffic control.
4. That jurisdiction is retained.

Dated at Madison, Wisconsin, (June 16, 2008).

By the Office of the Commissioner of Railroads.

Roger Breske
Commissioner of Railroads