

BEFORE THE OFFICE OF THE COMMISSIONER OF RAILROADS

STATE OF WISCONSIN

In the Matter of the:

Petition of the Village of Mt. Pleasant for the Establishment of a Public Crossing of the Tracks Operated by the Union Pacific Railroad Co. and Owned by the Village of Mt. Pleasant with the Pike River Pathway in the Village of Mt. Pleasant, Racine County

9040-RX-1260

FINAL DECISION

By letter dated June 27, 2008, the Village of Mt. Pleasant petitioned the Office of the Commissioner of Railroads (OCR) for the establishment of a public crossing of the tracks operated by the Union Pacific Railroad Co. (UP) and owned by the Village of Mt. Pleasant with the Pike River Pathway in the Village of Mt. Pleasant, Racine County. The Village proposes to construct a multi-use pathway along the Pike River north of STH 11. The path would cross a spur track a short distance east of Willow Road.

Jurisdiction: Secs. 195.28 and 195.29, Stats.

Pursuant to due notice, public hearing was held in this matter on August 15, 2008 in Mt. Pleasant, Wisconsin with hearing examiner Douglas S. Wood presiding.

On September 18, 2008, the hearing examiner issued a proposed decision recommending the approval of the proposed crossing. By letter dated October 2, 2008, the UP filed comments objecting to the proposed decision. More specifically, the UP argues that the OCR lacks jurisdiction over this matter because, it asserts, a public pathway for non-motorized uses is not a highway. The UP correctly states that the OCR's jurisdiction in matters related to rail-highway crossing is limited to public highways, but incorrectly concludes that a public pathway cannot be a highway. The OCR has addressed this issue in some detail in the past and long ago concluded that the OCR's jurisdiction does extend to public trail crossings. The issue is discussed fully below.

**Jurisdiction**

The UP objects to the OCR's assertion of jurisdiction in this matter. The UP holds the view that the OCR lacks any statutory authority over crossings of railroad tracks with public paths carrying non-motorized users. The OCR concludes that it does have jurisdiction. The OCR has previously and extensively addressed the question of its jurisdiction. See, 9164-RX-228, Green Circle Trail, Stevens Point; 9068-RX-6, Riverfront Parkway, West Bend; and 9005-RX-72, Rock Creek Bikeway, Janesville. The Riverfront Parkway decision was appealed to circuit court, which upheld the OCR's assertion of jurisdiction.

The OCR has jurisdiction over all crossings of railroad tracks with public highways. The central factor is not the mode of transportation used on the particular corridor, but whether the corridor is in fact public, i.e. whether the public can use the trail as matter of right, subject to reasonable rules and regulations. The crucial questions are whether a public authority controls the roadway, whether it grants the public a general right of use, and whether the transportation corridor has been established as highway.

As noted in the proposed decision, the Pike River Pathway will be located on publicly-owned and publicly-controlled property and will be open to the public as a matter of right, subject to reasonable regulations. The trail will be open year-round.

By statutory definition, a "highway" is a "public way" under §990.01(12) Stats., which states that the term "highway" includes "all public ways and thoroughfares" and all bridges on them.

The Wisconsin Supreme Court has adopted a broad reading of "highway". State ex rel. Happel v. Schmidt, 252 Wis. 82 (1947). The Court stated, "A highway is a way open to the public at large, for travel or transportation, without distinction, discrimination, or restriction, except such as is incident to regulations calculated to secure to the general public the largest practical benefit therefrom and enjoyment thereof." (quoting from 25 Am.Jur., Highways, p.339, sec.2.) Id at 86. The public possesses "a common and fundamental right" to use highways, "subject to reasonable limitations and regulations." 39 Am.Jur.2d, pp. 570-571, sec. 192.

The Wisconsin Supreme Court has recognized the need for an expansive view of the word 'highway':

"[T]he term 'highway' may be used in a broader sense. The conception of highways is changing and it is now felt that highways established for the general benefit must admit new methods of use whenever it is found that the general benefit requires it. For the courts to limit the use of highways without considering new methods and usage would defeat, to some extent at least, the purpose for which highways are established." Walker v. Green Lake County, 269 Wis. 103, 112 (1955).

Thus, the mode of travel does not determine whether a "way" is a public way and thus a highway. In Milwaukee v. Milwaukee E.R. & L. Co., 173 Wis. 400 (1921), the Court declared,

"The purpose of dedicating streets and highways for public use is to permit travel thereover. The means by which travel is effected is secondary, the purpose is primary. LaCrosse R. Co. v. Higbee, 107 Wis. 389, 83 N.W. 701. The means may change from time to time, dependent upon man's inventive genius.....Since the primary use of streets is travel - the transportation of persons and goods thereover, - any method of accomplishing that purpose in a reasonably safe, convenient, practical, and effective way constitutes a legitimate

street use.

"... We thus see that man's necessities and his ability to meet those necessities have materially changed street travel as to method though the street purpose remains the same." 173 Wis. at 407-408.

The Wisconsin Supreme Court and the Court of Appeals have reaffirmed the validity of these conclusions on numerous occasions, including as recently as 1994. See, Chicago & M.E.R. Co. v. Public Service Commission, 254 Wis. 551, 558 (1948); Poff v. Lockhart, 21 Wis.2d 575, 124 N.W.2d 636, 639 (1963) (a street "generally means a public way used for purposes of travel") and In re Application of K.G.R. Partnership, 187 Wis.2d 375, 382-383 (Court of Appeals, 1994).

The Commissioner finds that the Pike River Pathway will be a public way and will qualify as a highway under this statutory definition and that the OCR has jurisdiction over this crossing.

The Commissioner adopts the proposed decision as final.

Appearances:

**Parties**

Village of Mt. Pleasant, Petitioner  
by  
Tony Beyer, Water Systems Engineer  
6126 Durand Avenue  
Racine, Wisconsin 53406

In Opposition:

Union Pacific Railroad Co.  
by  
Patrick McNally, Attorney  
Borgelt, Powell, Peterson & Frauen S.C.  
735 N. Water Street, Suite 1500  
Milwaukee, WI 53202-4188

## Findings of Fact

### THE COMMISSIONER FINDS:

The Village of Mt. Pleasant proposes to construct a pathway for bicycles, pedestrians and other non-motorized uses along the Pike River corridor. The pathway, called the Pike River Pathway for purposes of this order, would cross the track operated by the Union Pacific Railroad Co. and owned by the Village of Mt. Pleasant. The project is planned for construction in 2010.

The Pike River Pathway is part of a larger project to rehabilitate a 5.2 mile environmental corridor including stormwater and erosion controls, habitat improvements, and aesthetic improvements. The trail would utilize the environmental corridor for an off-road transportation corridor.

The trail will be located on publicly owned and controlled property and will be open to the public as a matter of right, subject to reasonable regulations. The trail will be open year-round, although it will not be snow-plowed.

Pike River Pathway will be a 10'-wide asphalt pathway and would intersect the tracks at an angle of about 88°. The pathway approaches to the crossing will ascend at 0.83%. The crossing consists of one industrial spur track. There is an existing gravel private driveway crossing at the site. The pathway crossing will be located 4' east of that private crossing.

The Village estimates the Pike River Pathway will carry 100 to 500 users per day. The Village projects the Pike River Pathway will carry 750 users per day as more connections are made with other trails. A future trail extension would lead directly to Racine Case High School.

The sight distance for a trail user approaching the crossing is unobstructed in all quadrants for a sufficient distance to provide adequate approach, corner, and clearing sight distances.

The Village did consider alternates that would not cross the spur track. The primary alternate would follow Oakes Road, which would create a long indirect, on-road route with numerous conflict points. Most people would not use such a route and those who did would be subjected to more unsafe conditions than would be caused by crossing this spur track. The alternate route would frustrate the goals of the Village's long-term bicycle and pedestrian plan.

The UP currently operates 2 train movements per day on 3 days/week at a speed of 10 mph. The track is a short industrial spur track constructed as part of TEA grant (Transportation Economic Assistance) from the Wisconsin Department of Transportation (DOT) in 1998. The spur track is 2250' long. A second spur track off the main spur track is 722' long. The railroad typically delivers 5 to 10 covered hopper cars on each trip. These hopper cars are typically about 65' long. The installation of the crossing should not interfere with use of the track.

The UP operates on the track, but does not own the track. By consequence of its operation on the track, the UP is a 'railroad' at this location under s. 195.02 (1), which states in pertinent part:

In this chapter, unless a different meaning is manifest: "Railroad" means and embraces all corporations...that...operate any railroad...as a common carrier in this state, or cars, or other equipment used thereon, or bridges, terminals or sidetracks, used in connection therewith, whether owned by such railroad or otherwise.

According to the facility use agreement (FUA) (Delayed Exhibit 8) entered into on November 10, 1998 as part of the TEA grant, the track is owned by the Village of Mt. Pleasant (as successor to the Town of Mt. Pleasant), the land is owned as tenants in common by JDI Racine Limited Partnership and Shoemaker Properties L.L.C. (JDI/Shoemaker), and Liquid Containers, L.P. leases the land for its plant from JDI/Shoemaker. The track, or 'project facility', runs partly on land owned by JDI/Shoemaker and partly on land owned by A.W. Oakes & Son, Inc. The Village has an easement from the land owners for the track.

A review of the various agreements and easements (including the FUA, an April 15, 1998 easement, a September 29, 1998 easement, a September 30 assignment of easement, and two September 23, 1998 industry track agreements) yields some confusion as to which party bears responsibility for maintenance of the track. The FUA imposes track maintenance responsibility on JDI/Shoemaker. The "Applicant Agreement for Industry Track" assigns track maintenance to Liquid Container (in contradiction of the explicit assurances set forth in the Oakes easement of April 15, 1998).<sup>1</sup>

The statutes save the OCR from the task of determining who bears the track maintenance duties under the easements and agreements. The UP operates on the track in question and that fact is enough to give the OCR jurisdiction over the UP as the railroad for purposes of s. 195.29. That jurisdiction grants the OCR the authority to order the UP to construct the crossing. For future reference, section 86.12 provides that the operating railroad shall also maintain at-grade crossings on which it operates. It is worth noting that this crossing is likely to last many years before needing significant maintenance given the amount of train operations and the low impact of trail users.

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<sup>1</sup> A.W. Oakes was not a party to the FUA, but granted an easement to JDI/Shoemaker to construct, use, and maintain a spur track on Oakes property. This easement ("Oakes easement") is dated April 15, 1998 in the preamble.

On September 29, 1998, JDI/Shoemaker granted an easement to the Village of Mt. Pleasant for the construction, use, and maintenance of a spur track on the Oakes property and certain other property owned by JDI/Shoemaker. On September 30, 2008, JDI/Shoemaker assigned the easement granted by Oakes to the Village of Mt. Pleasant. Both the September 29 easement and the September 30 assignment of the Oakes easement incorporated the terms of the FUA.

The UP entered into an "Applicant Agreement for Industry Track" that assigned to Liquid Container certain rights and duties possessed by JDI/Shoemaker under a separate "Industry Track Agreement" with the UP. These rights and duties include the ownership of the track and maintenance responsibility. Both of these industry agreements were entered into on September 23, 1998.

The FUA imposes track maintenance responsibility on JDI/Shoemaker. The "Applicant Agreement for Industry Track" assigns track maintenance to Liquid Container. The Oakes easement, however, explicitly states that the Liquid Container "shall have no liability or obligation with respect to said costs." Oakes easement paragraph 3 at page 2.

Several related points deserve emphasis. First, this order assigns all costs for the new crossing to the Village of Mt. Pleasant in accordance with the OCR's standard practice for new crossings that the petitioning party pays for new crossings. Second, while the order requires the UP to install the crossing, the order also allows the Village of Mt. Pleasant and the UP to agree that the Village's contractor may install the crossing. Third, in the future when the crossing ultimately needs maintenance, while the UP will be responsible for the maintenance under 86.12, it may recover its costs to maintain the crossing if it has an otherwise enforceable agreement that allows it to do so. Fourth, the UP may require the industry to perform track maintenance if it has an otherwise enforceable agreement to do so. If the crossing is not maintained, however, the OCR would enforce the requirements of s. 86.12 against the UP.

Crossbucks and stop signs will adequately protect public safety.

In summary, the establishment of the crossing at-grade of the tracks operated by the Union Pacific Railroad Co. and owned by the Village of Mt. Pleasant with Pike River Pathway will promote public safety and convenience by providing a safe off-road corridor for biking, walking, and other non-motorized transportation and recreation.

**Source of funding:** The Village of Mt. Pleasant will pay all costs for the establishment of the crossing.

#### Ultimate Conclusions on the Issues

THE COMMISSIONER CONCLUDES:

1. That the establishment of the crossing at-grade of Pike River Pathway with the tracks operated by the Union Pacific Railroad Co. and owned by the Village of Mt. Pleasant in accordance with the design plans of the Village of Mt. Pleasant in the Village of Mt. Pleasant, Racine 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 reflective crossbucks and stop signs.
3. That it is reasonable that the Union Pacific Railroad Co. bear no part of the cost for the crossing construction.

#### 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 **Union Pacific Railroad Co.** shall install and maintain a crossing at-grade of Pike River Pathway with the tracks operated by the Union Pacific Railroad Co. and owned by the Village of Mt. Pleasant in accordance with the design plans of the Village of Mt. Pleasant in the Village of Mt. Pleasant, Racine County by **October 31, 2010**. The **Union Pacific Railroad Co.** and the **Village of Mt. Pleasant** may agree to have the Village's contractor construct the crossing.

2. That the **Union Pacific Railroad Co.** shall install and maintain retroreflective yields signs and back-to-back crossbucks on the same posts with 2" wide reflective vertical strips on the front and back of the support posts on each approach to the crossing of the tracks operated by the Union Pacific Railroad Co. and owned by the Village of Mt. Pleasant with Pike River Pathway at-grade in the Village of Mt. Pleasant, Racine County by **October 31, 2010**. The **Union Pacific Railroad Co.** and the **Village of Mt. Pleasant** may agree to have the Village's contractor install the crossbucks.

3. That the **Village of Mt. Pleasant** shall install and maintain stop signs on separate posts on each approach to the crossing of the tracks operated by the Union Pacific Railroad Co. and owned by the Village of Mt. Pleasant with Pike River Pathway at-grade in the Village of Mt. Pleasant, Racine County by **October 31, 2010**.

4. That the **Union Pacific Railroad Co.** shall bear no part of the cost of the crossing construction, 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.

5. That jurisdiction is retained.

Dated at Madison, Wisconsin,(October 9, 2008).

By the Office of the Commissioner of Railroads.

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Roger Breske  
Commissioner of Railroads