



VILLAGE OF FOX POINT

MILWAUKEE COUNTY
WISCONSIN

December 30, 1986

VILLAGE HALL
7200 N. SANTA MONICA BLVD.
FOX POINT 53217
414-351-8900

Mr. George Gaspar
7626 N. Links Way
Fox Point, Wisconsin 53217

Dear Mr. Gaspar:

I'm enclosing a copy of the notice of hearing to be held concerning the railroad crossings. Please feel free to attend if you are free.

Thank you for your interest and help with the red tape involved in the project.

Sincerely,

Noreen R. Cook
Village Manager

NRC/jm

CUB

BEFORE THE OFFICE OF THE COMMISSIONER OF TRANSPORTATION

STATE OF WISCONSIN

Complaint of the Village of Fox Point that the)
 Railroad Failed to Repair the Public Crossings of)
 the Chicago and North Western Transportation) 9040-RX-814
 Company tracks with North Bell Road, East Calumet)
 Road, East Bradley Road, and East Dean Road in the)
 Village of Fox Point, Milwaukee County)

NOTICE OF INVESTIGATION AND HEARING
 AND ASSESSMENT OF COSTS

On December 19, 1986, the Village of Fox Point filed a complaint with the Office of the Commissioner of Transportation under section 86.12, Wis. Stats., that the railroad failed to repair the public crossings of the Chicago and North Western Transportation Company tracks with North Bell Road, East Calumet Road, East Bradley Road, and East Dean Road in the Village of Fox Point, Milwaukee County.

If the proceeding described herein is contested, it is deemed to be a Class I proceeding as defined in section 227.01, Wis. Stats.

NOTICE IS HEREBY GIVEN that the Office will investigate said petition and hold public hearing thereon at the Village Hall, 7200 North Santa Monica Boulevard, Fox Point, Wisconsin, on January 14, 1987, at 10:30 A.M.

NOTICE IS FURTHER GIVEN that the Office deems it necessary in order to carry out its duties herein to investigate the books, accounts, practices, and activities of the Chicago and North Western Transportation Company and that the expenses incurred or to be incurred by the Office which are reasonably attributable to such investigation will be assessed against and collected from the Chicago and North Western Transportation Company in accordance with the provisions of section 195.60, Wis. Stats., and the Wisconsin Administrative Code.

If there are any questions regarding this matter, please contact Rex A. Montgomery, Director of Railroad Bureau, at Area Code 608, 266-0276.

Dated at Madison, Wisconsin, _____ December 23, 1986.

By the Office of the Commissioner of Transportation.

 Rex A. Montgomery
 Rex A. Montgomery
 Director of Railroad Bureau

RECEIVED DEC 26 1986



State of Wisconsin \ OFFICE OF THE COMMISSIONER OF TRANSPORTATION

December 23, 1986

JOSEPH SWEDA
Commissioner of Transportation

MARY ANN GERRARD
Deputy Commissioner

4802 Sheboygan Avenue
P. O. Box 7957
Madison, WI 53707-7957

Telephone: (608) 266-2321

To The Person Addressed

9040-RX-814

In the Matter of:

Complaint of the Village of Fox Point that the Railroad Failed to Repair the Public Crossings of the Chicago and North Western Transportation Company tracks with North Bell Road, East Calumet Road, East Bradley Road, and East Dean Road in the Village of Fox Point, Milwaukee County

We enclose copy of Notice of Investigation and Hearing and Assessment of Costs issued in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Joseph Sweda".

Joseph Sweda
Commissioner of Transportation

JS:gnc
Enc.

C.V.B.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY
OFFICE OF ADM - ENGINEERING
LAKE SHORE DIVISION

Escanaba, Mi. 49829
P.O. Box 395
Nov. 24, 1986
File: Fox Point 273 .

Fox Point Village Board
7200 N. Santa Monica Blvd.
Fox Point, Wis. 53217

REFERENCE: Your resolution 86-2109 of 11-11-86

Gentlemen:


I am writing to assure you that the Chicago & North Western Transportation Company will make any repairs to the subject crossings our inspections deem necessary to the extent possible at this late November date. However, I can not help but feel that we are being somewhat penalized for our earlier offer of a joint effort in the complete rehabilitation of crossings within your village.

As you are aware, we operate through-out the State of Wisconsin and have routinely worked with communities on a shared cost basis to rehabilitate railroad crossings. Most communities recognize that the deterioration of a crossing is the result, not only train traffic use but also from highway vehicles.

Our normal agreement has the C&NW, at its costs, completely removing the old track structure, replacing it with new ties, ballast, geotextile fabric, continuous welded rail thru the crossing and installing stand-up flange rail. The City would provide the traffic detours and the asphalt material, generally with the City and the railroad jointly providing the labor to install the asphalt.

We remain open to a rehabilitation program similar to that described above and would be happy to work with your Engineering Dept. to schedule these repairs during the 1987 construction season.

Very Truly Yours;



G.G. Larson
ADM-Engineering

GGL/hfr
Cy: J.R. Panning
A.G. Sebastiani
R.S. Bessey

RECEIVED DEC 26 1986



State of Wisconsin \ OFFICE OF THE COMMISSIONER OF TRANSPORTATION

December 23, 1986

Ms. Noreen R. Cook
Village Manager
Village of Fox Point
Village Hall
7200 N. Santa Monica Blvd.
Fox Point, WI 53217

JOSEPH SWEDA
Commissioner of Transportation

MARY ANN GERRARD
Deputy Commissioner

4802 Sheboygan Avenue
P. O. Box 7957
Madison, WI 53707-7957

Telephone: (608) 266-2321

9040-RX-814

Dear Ms. Cook:

Your December 18, 1986, request included the resolution for repair of the four grade crossings. This will be set for hearing under Sec. 85.12, Wis. Stats.

Your request mentioned repair of a bridge but did not include any other information. Any formal action by our agency on a bridge would be under a different statute.

Sincerely,

A handwritten signature in cursive script that reads "Rex A. Montgomery".

Rex A. Montgomery
Director of Railroad Bureau

RAM:gnc

RECEIVED NOV 18 1987



State of Wisconsin \ OFFICE OF THE COMMISSIONER OF TRANSPORTATION

JOSEPH SWEDA
Commissioner of Transportation

MARY ANN GERRARD
Deputy Commissioner

212 East Washington Avenue, Suite 403
P. O. Box 8968
Madison, WI 53708-8968

Telephone: (608) 266-2321

November 17, 1987

9040-RX-814

Chicago and North Western Transportation Company
N. A. Louris, Assistant Division Manager - Engineering
325 Spencer Street
West Chicago, IL 60185

Re: Complaint of the Village of Fox Point that the Railroad Failed to Repair the Public Crossings of the Chicago and North Western Transportation Company Tracks with North Bell Road, East Calumet Road, East Bradley Road, and East Dean Road in the Village of Fox Point, Milwaukee County

Dear Mr. Louris:

Please refer to our Order dated April 29, 1987 which requires, among other things, that your railroad rehabilitate certain crossings and repair certain crossings with tracks of your railroad in the Village of Fox Point, Milwaukee County.

Please inform this office of the date that the required reconstruction and repair to the crossings was completed.

Sincerely,

Charles A. Campbell

Charles A. Campbell, Director
Railroad Bureau

DRF:cjl

cc: Ms. Noreen Cook
Village Manager & Clerk Treasurer
Village of Fox Point
Village Hall
7200 N. Santa Monica Boulevard
Fox Point, WI 53217

RECEIVED APR 30 1987



State of Wisconsin \ OFFICE OF THE COMMISSIONER OF TRANSPORTATION

FOR YOUR INFORMATION

April 29, 1987

JOSEPH SWEDA
Commissioner of Transportation

MARY ANN GERRARD
Deputy Commissioner

4802 Sheboygan Avenue
P. O. Box 7957
Madison, WI 53707-7957

Telephone: (608) 266-2321

To The Person Addressed

9040-RX-814

In the Matter of:

Complaint of the Village of Fox Point that the Railroad Failed to Repair the Public Crossings of the Chicago and North Western Transportation Company Tracks with North Bell Road, East Calumet Road, East Bradley Road, and East Dean Road in the Village of Fox Point, Milwaukee County

We enclose certified copy of Findings of Fact and Order issued in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Joseph Sweda".

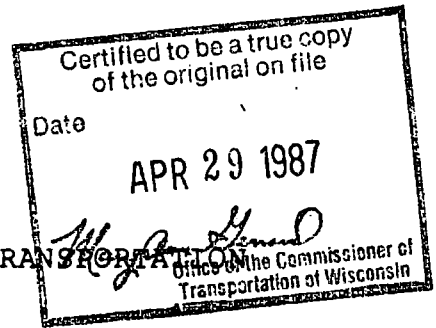
Joseph Sweda
Commissioner of Transportation

JS:gnc

Enc.

NOTICE TO THE PARTIES

Any party aggrieved by this order may petition for rehearing within 20 days after service of this order. In the alternative, a party may petition for judicial review within 30 days after the service of this order or an order following rehearing. The Office of the Commissioner of Transportation shall be named as respondent.



BEFORE THE OFFICE OF THE COMMISSIONER OF TRANSPORTATION
STATE OF WISCONSIN

Complaint of the Village of Fox Point that the)
Railroad Failed to Repair the Public Crossings of)
the Chicago and North Western Transportation)
Company Tracks with North Bell Road, East Calumet) 9040-RX-814
Road, East Bradley Road, and East Dean Road in the)
Village of Fox Point, Milwaukee County)

FINDINGS OF FACT AND ORDER

On December 19, 1986, the Village of Fox Point filed a complaint with the Office of the Commissioner of Transportation under section 86.12, Wis. Stats., that the railroad failed to repair the public crossings of the Chicago and North Western Transportation Company tracks with North Bell Road, East Calumet Road, East Bradley Road, and East Dean Road in the village of Fox Point, Milwaukee County.

Pursuant to due notice, hearing was held at the village of Fox Point on January 14, 1987 before examiner Donald R. Foellmi.

Appearances:

Village of Fox Point, Complainant
by
Carl W. Backus, Village Attorney
Suite 206, 5900 North Port Washington Road
Milwaukee, WI 53217

In Opposition:

Chicago and North Western Transportation Company
by
Roger S. Bessey, Attorney
735 North Water Street
Milwaukee, WI 53202

At the outset of the hearing in this matter, the examiner set forth the issues being: whether the village has passed a resolution ordering the repairs and whether or not a copy of the resolution was served upon the railroad and whether the railroad failed within 30 days to comply with the resolution. The examiner should have increased the scope of the issues. They are hereby

expanded to include: whether the railroad company owning or operating tracks crossing streets at grade in the village of Fox Point is keeping the surface of the crossings between the tracks and rails and extending 4 feet on either side of the outside rails in good condition for highway travel.

At the hearing the examiner incorrectly advised the parties that objections can be filed within 15 days following receipt of the transcript (page 3 of transcript). The procedure was properly stated near the end of the hearing when the examiner correctly advised the parties that upon issuance of the proposed order, they have fifteen days to file objections or comments.

On February 1, 1987, the railroad filed objections to the examiner's ruling on the issues and on March 4, 1987, the village filed a reply to objection. On March 10, 1987, the examiner, by letter, informed the parties of the above and advised the parties that the examiner would accept the railroad's objections and the village reply as briefs to the examiner in the matter. The railroad was permitted and did file a rebuttal brief on March 16, 1987.

Both parties were advised by the examiner that they may file comments and/or objections to the proposed decision with the Commissioner for his consideration.

On April 9, 1987, the examiner issued a proposed decision. No comments or objections were received.

Findings of Fact and Order

THE COMMISSIONER FINDS:

The village of Fox Point is located north of the city of Milwaukee, Milwaukee County, on the west shore of Lake Michigan. The single main line track of the Chicago and North Western Transportation Company extends through the village in a generally north-south direction. The track intersects five east-west village streets at grade. From south to North they are East Green Tree Road, East Bell Road, East Calumet Road, East Bradley Road and East Dean Road.

The crossings of East Bell Road, East Calumet Road, East Bradley Road and East Dean Road are the subject of this proceeding. The four crossings intersect the tracks at about right angles. The roadway approaches to the tracks at the crossings are generally slightly ascending from either direction.

The village of Fox Point is dissatisfied with the condition of the crossings. In accordance with the provisions of chapter 86.12 of the statutes, the village by letter dated November 11, 1986 sent a certified copy of a village resolution requesting the railroad to repair the subject crossings. On November 24, 1986 the

railroad by letter advised the village that the railroad would provide repairs and offered to completely rehabilitate the crossings if the village would agree to participate in the crossing repairs by providing the blacktop surfacing material and share in the installation costs. The village declined the railroad's offer. The railroad patched voids and holes in the crossing with a cold mix or cold pack type material. It is not known when such work was started, but railroad field forces reported the work to their offices as complete on December 16, 1986.

The crossing of East Bradley Road is constructed of double (inside and outside) flangeway guard rails and blacktop. The flange rails consist of a length of scrap rail which extends the full width of the crossing. They are laid on their side with the head or ball of the rail fitted into the web of the running rail. The base of the flange rail and the web between head and base creates a channel for the wheel flanges on railroad rolling stock. The outside flange rails prevent the adjacent surfacing material from coming into direct contact with the running rails. This aids in diverting surface drainage from the crossing.

The crossing of East Dean Road is constructed similarly to East Bradley Road except that it is constructed with only the inside flange rail.

The crossings of East Bell Road and East Calumet Road are constructed of blacktop material inside and outside of the main line track. There is no flangeway guard material in either crossing.

The four streets are constructed of blacktop about 24 feet wide with narrow grassy shoulders. They intersect the tracks at about right angles. There are no sidewalks. The street surfaces at the approaches to the crossing outside of the crossing area are in good condition without voids or potholes. The speed limit on the streets is 25 m.p.h.

East Bell Road

The crossing of East Bell Road is constructed without flangeway material. There is blacktop between the tracks and at the outside of each rail. It is not known when the crossing was last constructed. The blacktop pavement inside and outside of the rails has fractured and some pavement is missing. There are gaps adjacent to the rails which are 6 inches wide and 5 inches deep. There are ripples or wavelike forms in the pavement just outside of the rails which appear to conform with the ties below the pavement. There is mud around the crossing apparently caused by pumping (up and down movement of the track) rails. Rail deflection of 1½ inches has been observed at the crossing. In portions of the crossing, the rail is

above the pavement and at other locations the rail is below the pavement. There is scattered cold patch material around the ends of the crossing. There is evidence of some recent blacktop patching near the rails. The village indicated that the crossing rides rough. The railroad indicated no problem with respect to the rideability of the crossing. There are scrape marks in the pavement which extend parallel to the railroad tracks.

East Calumet Road

This crossing is similar to East Bell Road in that it is constructed without flangeway material. The pavement outside of the rails and in the track zone has fractured. There are flangeway or gaps $4\frac{1}{2}$ inches wide and 4 inches deep. The ripple effect exists just outside of the rails above the tie ends. There is evidence of recent patching with blacktop material in the track zone. The tracks have settled through the entire crossing. There is a variation of $1\frac{1}{2}$ inches plus between the top of rail and the adjacent pavement. The crossing rides rough according to the village. The railroad indicated no problem with respect to its rideability. This crossing shows evidence of the longitudinal markings which parallel the tracks.

East Bradley Road

This crossing is constructed of double tipped flange rail with blacktop. The blacktop between the rails is fractured. The crossing has been patched by the placement of blacktop at the edge of the base of the flange rails. The cross section indicates that the running rails are above and below the permanent surface at various locations. The same applies to the edge of the flange material. The rideability of the crossing has been described by the village as being not as bad as Bell and Calumet Roads. The condition of the crossing is acceptable to the railroad. There are marks on the pavement which parallel the tracks.

East Dean Road

This crossing is constructed with inside flange rail and blacktop. The pavement between the rails is fractured. There is evidence of some blacktop patching around the rails. The ripple effect outside of the rails is very evident. There are gaps inside of the rails $6\frac{1}{2}$ inches wide and 7 inches deep. The edge of the flange rail projects at least $\frac{1}{2}$ inch above the pavement in some locations. There is mud around the ties just outside of the crossing. The crossing has been described as being not as bad as the Bell Road and Calumet Road crossings.

The crossings show evidence of being patched in the area of the track. This patch work was reported to have been completed in mid-December 1986. Some of this material no longer remains intact. Cold mix blacktop material which is only available during the winter

months is not as effective as hot mix material which is available during the construction season.

It is generally agreed by the village and the railroad that of the four crossings being considered herein, East Bell Road and East Calumet Road are in the worst condition. Their condition is probably related to the type of crossing construction, that is without the benefit of flangeway material. The blacktop adjacent to both sides of the running rails has broken away causing voids in the crossing surface.

The main track crossings of East Bell Road and East Calumet Road have settled below the surface of the pavement. The vertical movement of the rails through the crossing, the mud around the area, the ripple effect just outside of the rails are an indication of an unstable substructure. Repair of the crossings with patch material has not been an effective or suitable remedy to correct the conditions at the crossings.

In at least three of the crossings, the pavement in the track zone is crowned. The markings on the pavement are an indication that dragging rolling stock equipment may be striking the pavement. A crossing in such condition is hazardous to operations. A derailment can be caused by such conditions.

There are voids in the pavement at the outside running rails through the crossing of Dean Road and where there are no flange rails. There is no indication that these voids were repaired with blacktop material. At the crossing of Bradley Road which is constructed with inside and outside flange rails, there are no large voids and the blacktop patching materials appears to be holding in place.

The Chicago and North Western Transportation Company has not kept the surface of the crossings at grade of East Bell Road, East Calumet Road, East Bradley Road and East Dean Road, between the tracks and rails and extending four feet on either side of the outside rails in good condition and repair for highway travel.

The village of Fox Point did by resolution require the railroad to repair the crossings. The railroad did make repairs to the crossings but such repairs have not been effective or satisfactory so as to provide crossings in good condition for highway travel.

The conditions of the crossings of East Bell Road and East Calumet Road are such that they can not be adequately repaired with blacktop patching material to restore the surfaces to a good condition for highway travel. The same does not necessarily follow with respect to the crossings of East Bradley Road and East Dean Road, which crossings can be repaired with hotmix blacktop material to provide crossings in good condition.

It is reasonable that the crossings of East Bell Road and East Calumet Road with tracks of the Chicago and North Western Transportation Company be rehabilitated in an appropriate manner by the railroad and that the crossings of East Bradley Road and East Dean Road be repaired with hot mix blacktop by the railroad as hereinafter ordered to provide crossings in good condition for highway travel, said crossings located in the village of Fox Point, Milwaukee County.

Conclusions of Law

THE COMMISSIONER CONCLUDES:

That the Commissioner has authority under sec. 86.12, Wis. Stats., to enter an Order consistent with the foregoing Findings of Fact; and that such an order should be entered.

Order

THE COMMISSIONER THEREFORE ORDERS:

1. That the Chicago and North Western Transportation Company shall change or otherwise improve as the needs require by rehabilitation or restoration of the crossings of East Bell Road and East Calumet Road at grade with tracks of the railroad in the village of Fox Point, Milwaukee County (180 104B/82.9 NWE and 180 105H/8.53 NWE).
2. That the Chicago and North Western Transportation Company shall change or otherwise improve as the needs require by repairing the voids in the pavement in and outside of the track zone with hot mix blacktop at the crossings at grade of East Bradley Road and East Dean Road with tracks of the railroad in the village of Fox Point, Milwaukee County (180 106P/903 NWE and 108 107W/9.54 NWE).
3. That the work ordered in paragraph No. 1 shall be completed not later than 6 months from the date of this order and the work ordered in paragraph No. 2 shall be completed not later than 30 days from the date of this order.
4. That jurisdiction is retained.

Dated at Madison, Wisconsin, April 29, 1987

By the Office of the Commissioner of Transportation.

Joseph Sweda

Joseph Sweda, Commissioner of Transportation



State of Wisconsin \ OFFICE OF THE COMMISSIONER OF TRANSPORTATION

April 9, 1987

JOSEPH SWEDA
Commissioner of Transportation

MARY ANN GERRARD
Deputy Commissioner

4802 Sheboygan Avenue
P. O. Box 7957
Madison, WI 53707-7957

Telephone: (608) 266-2321

Re: Complaint of the Village of Fox Point that the Railroad Failed to Repair the Public Crossings of the Chicago and North Western Transportation Company Tracks with North Bell Road, East Calumet Road, East Bradley Road, and East Dean Road in the Village of Fox Point, Milwaukee County
9040-RX-814

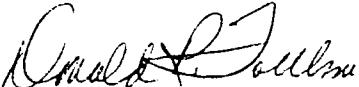
To The Person Addressed:

Pursuant to the procedure described in section 227.09(2) or (4), Wis. Stats., there is enclosed a Proposed Decision of Hearing Examiner in the above-captioned proceeding, including Proposed Findings of Fact, Conclusion of Law and Order.

This is a proposed decision and not the decision of the Office of the Commissioner of Transportation. The Office will not issue its decision until after each party adversely affected by the proposed decision has had an opportunity to file objections and present briefs to the Office. Objections and briefs, if any, must be filed in writing in time to reach the Office not later than 15 days from the date of this letter. Statements or briefs in support of the Proposed Decision may be filed within the same 15 day period of time. Three copies of the objections, statements, and briefs must be filed with the Office and one copy served upon each party of record.

The Proposed Decision does not become effective unless adopted by the Office of the Commissioner of Transportation.

Very truly yours,


Donald R. Foellmi
Hearing Examiner

DRF/lsk

Enc.

BEFORE THE OFFICE OF THE COMMISSIONER OF TRANSPORTATION

STATE OF WISCONSIN

Complaint of the Village of Fox Point that the)
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PROPOSED DECISION

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Suite 206, 5900 North Port Washington Road
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expanded to include: whether the railroad company owning or operating tracks crossing streets at grade in the village of Fox Point are keeping the surface of the crossings between the tracks and rails and extending 4 feet on either side of the outside rails in good condition for highway travel.

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Both parties were advised by the examiner that they may file comments and/or objections to the proposed decision with the Commissioner for his consideration.

Proposed Findings of Fact and Order

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The village of Fox Point is dissatisfied with the condition of the crossings. In accordance with the provisions of chapter 86.12 of the statutes, the village by letter dated November 11, 1986 sent a certified copy of a village resolution requesting the railroad to repair the subject crossings. On November 24, 1986 the

railroad by letter advised the village that the railroad would provide repairs and offered to completely rehabilitate the crossings if the village would agree to participate in the crossing repairs by providing the blacktop surfacing material and share in the installation costs. The village declined the railroad's offer. The railroad patched voids and holes in the crossing with a cold mix or cold pack type material. It is not known when such work was started, but railroad field forces reported the work to their offices as complete on December 16, 1986.

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The crossing of East Dean Road is constructed similarly to East Bradley Road except that it is constructed with only the inside flange rail.

The crossings of East Bell Road and East Calumet Road are constructed of blacktop material inside and outside of the main line track. There is no flangeway guard material in either crossing.

The four streets are constructed of blacktop about 24 feet wide with narrow grassy shoulders. They intersect the tracks at about right angles. There are no sidewalks. The street surfaces at the approaches to the crossing outside of the crossing area are in good condition without voids or potholes. The speed limit on the streets is 25 m.p.h.

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above the pavement and at other locations the rail is below the pavement. There is scattered cold patch material around the ends of the crossing. There is evidence of some recent blacktop patching near the rails. The village indicated that the crossing rides rough. The railroad indicated no problem with respect to the rideability of the crossing. There are scrape marks in the pavement which extend parallel to the railroad tracks.

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In at least three of the crossings, the pavement in the track zone is crowned. The markings on the pavement are an indication that dragging rolling stock equipment may be striking the pavement. A crossing in such condition is hazardous to operations. A derailment can be caused by such conditions.

There are voids in the pavement at the outside running rails through the crossing of Dean Road and where there are no flange rails. There is no indication that these voids were repaired with blacktop material. At the crossing of Bradley Road which is constructed with inside and outside flange rails, there are no large voids and the blacktop patching materials appears to be holding in place.

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The village of Fox Point did by resolution require the railroad to repair the crossings. The railroad did make repairs to the crossings but such repairs have not been effective or satisfactory so as to provide crossings in good condition for highway travel.

The conditions of the crossings of East Bell Road and East Calumet Road are such that they can not be adequately repaired with

blacktop patching material to restore the surfaces to a good condition for highway travel. The same does not necessarily follow with respect to the crossings of East Bradley Road and East Dean Road, which crossings can be repaired with hotmix blacktop material to provide crossings in good condition.

It is reasonable that the crossings of East Bell Road and East Calumet Road with tracks of the Chicago and North Western Transportation Company be rehabilitated in an appropriate manner by the railroad and that the crossings of East Bradley Road and East Dean Road be repaired with hot mix blacktop by the railroad as hereinafter ordered to provide crossings in good condition for highway travel, said crossings located in the village of Fox Point, Milwaukee County.

Proposed Conclusions of Law

That the Commissioner has authority under sec. 86.12, Wis. Stats., to enter an Order consistent with the foregoing Findings of Fact; and that such an order should be entered.

Proposed Order

1. That the Chicago and North Western Transportation Company shall change or otherwise improve as the needs require by rehabilitation or restoration of the crossings of East Bell Road and East Calumet Road at grade with tracks of the railroad in the village of Fox Point, Milwaukee County (180 104B/82.9 NWE and 180 105H/8.53 NWE).

2. That the Chicago and North Western Transportation Company shall change or otherwise improve as the needs require by repairing the voids in the pavement in and outside of the track zone with hot mix blacktop at the crossings at grade of East Bradley Road and East Dean Road with tracks of the railroad in the village of Fox Point, Milwaukee County (180 106P/903 NWE and 108 107W/9.54 NWE).

3. That the work ordered in paragraph No. 1 shall be completed not later than 6 months from the date of this order and the work ordered in paragraph No. 2 shall be completed not later than 30 days from the date of this order.

4. That jurisdiction is retained.

Dated at Madison, Wisconsin, April 9, 1987



Donald R. Foellmi, Hearing Examiner



State of Wisconsin \ OFFICE OF THE COMMISSIONER OF TRANSPORTATION

RECEIVED FEB 24 1987

February 23, 1987

9040-IR-172

JOSEPH SWEDA
Commissioner of Transportation

MARY ANN GERRARD
Deputy Commissioner

4802 Sheboygan Avenue
P. O. Box 7957
Madison, WI 53707-7957

Telephone: (608) 266-2321

Chicago and North Western Transportation Company
Mr. J. R. Panning, Assistant Vice-President & Division Manager
Escanaba, Michigan 49829

Re: Complaint of the Condition of the North Santa Monica
Boulevard Bridge Over Tracks of the Chicago and North
Western Transportation Company in the Village of Fox
Point, Milwaukee County

Dear Mr. Panning:

Please refer to our letter of January 5, 1987 concerning the above-captioned matter. If you have completed your investigation of this matter, please furnish us with such information and your comments.

Sincerely,

Rex A. Montgomery DRJ
Rex A. Montgomery, Director
Railroad Bureau

DRF:cjl

cc: Village of Fox Point
Ms. Noreen R. Cook, Village Manager
Village Hall
7200 N. Santa Monica Boulevard
Fox Point, WI 53217

BEFORE THE OFFICE OF THE COMMISSIONER OF TRANSPORTATION

STATE OF WISCONSIN

Complaint of the Village of Fox Point that the)
Railroad Failed to Repair the Public Crossings)
of the Chicago and North Western Transportation) 9040-RX-814
Company Tracks with North Bell Road, East)
Calumet Road, East Bradley Road, and East Dean)
Road in the Village of Fox Point, Milwaukee)
County)

FOR YOUR INFORMATION

REPLY TO OBJECTIONS

TO

EXAMINER'S RULING

Carl W. Backus
Attorney for Complainant
Village of Fox Point

Suite 206
5900 N. Port Washington Road
Milwaukee, WI 53217

Telephone: 414/332-2880

ISSUES

1. The first issue appears to be whether or not Respondent Railroad Company, made such "repairs" within 30 days of receipt of notice so that the Complaint should be dismissed.
2. The next issue seems to be that in the case the first issue is resolved in favor of the Complainant, whether or not the commission may apportion the costs of whatever work is ordered.

ARGUMENT

1. Respondent appears to be arguing that because some cold-pack was dumped on the railroad crossings that repairs have been made within the meaning of Section 86.12 of the Wisconsin Statutes. The Wisconsin Supreme Court in the case of Congress Bar & Restaurant v. Transamerica Insurance Company, 42 Wis. 2nd 56 (1968) use the following definition for "repair":

"Black's Law Dictionary defines 'repair' as follows:

'To mend, remedy, restore, renovate, to restore to a sound or good state after decay, injury, dilapidation, or partial destruction.'"

The question that pervades the entire hearing is whether what the Respondent did was to "mend, remedy, restore, or rejuvenate". Certainly, Complainant is not bound by Respondent Railroad Company's definition that some cold-pack is repair and thereafter be denied relief.

2. Respondent points out that the amended Section 86.12 refers to Chapter 195. The argument is then made that that should include

Section 195.29 wherein an apportionment of costs is permitted.

Section 86.12(2) states as follows: "The office of the Commissioner of Transportation shall investigate and determine the matter in controversy as provided in Chapter 195." The better and more reasonable interpretation is that that refers to Section 195.04 and no other sections. That is a specific section which concerns itself with "investigate and determine".

Section 86.12(2) goes on to state: "An order issued by the office of the Commissioner of Transportation under this subsection has the same effect as an order and a proceeding brought under Chapter 195." The specific statute involving effect is found in 195.06. There is no need to include the entire Chapter 195 to carry out the mandate of section 86.12.

3. There is another distinction which should be considered. That is in Section 86.12 is concerned with repairs. Section 195.29 is concerned with improvements. Black's Law Dictionary defines "improvements" as follows:

"a valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes."

It is clear that improvement is contrasted with repair. It is not one and the same.

4. Respondent cites the response of the Supreme Court case of

Chicago N.W. Ry. v. Public Service Comm. 43 Wis. 2d 570 (1969) as standing authority as to how the OCT is to function and perform under Section 195.29(1)(2). That was a case that arose under Section 84.05 which specifically referred to Section 195.29. That is not our case in this hearing as Complainant brought its action under Section 86.12 which does not specifically refer to Section 195.29.

CONCLUSION

In summary, the Examiner has made the proper decisions in this action and the Respondent's objections should be denied.

Dated at Milwaukee, Wisconsin, this 3rd day of March, 1987.

Respectfully submitted,



Carl W. Backus
Attorney for Complainant,
Village of Fox Point

P.O. ADDRESS:
Suite 206
5900 N. Port Washington Road
Milwaukee, WI 53217
414/332-2880