

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF TRANSPORTATION

In the Matter of the Petition of
Chicago and Northwestern Transportation
Company Requesting the Commissioner of
CERTIFICATION
Transportation to Issue an Order Compelling
Removal of Obstructions and Trackage
Allegedly Created by Whoope, Inc. and
Whebbe's in St. Paul, Minnesota.

ORDER OF

By Order dated October 18, 1983, the Hearing Examiner denied the Motion of Respondents for Summary Disposition or, in the alternative, for Dismissal which asserted a lack of jurisdiction in the Commissioner with respect to standing water on railroad trackage as a result of a private crossing. Upon notice to all parties herein, the Hearing Examiner concludes that the order denying the Motion of Respondents should be certified to the Commissioner of Transportation pursuant to 9 MCAR 2.217 F.1. and 2., in that a final determination by the Commissioner of the Motion would materially advance the ultimate termination of the hearing and the Motion involves controlling questions of law as to which there are substantial grounds for a difference of opinion.

Based on the foregoing and all of the records and files herein, the Hearing Examiner makes the following:

ORDER

the Order of the Hearing Examiner, dated October 18, 1983, denying the Motion of the Respondents for Summary Disposition or, in the alternative, for Dismissal on the ground of a lack of subject matter jurisdiction in the Commissioner of Transportation, is certified to the Commissioner pursuant to 9 MCAR 2.217 F.1. and 2.

The presentation of written material or oral argument to the Commissioner of Transportation, which respect to his consideration of the Order certified, shall be as directed by the Commissioner.

this 18th day of October, 1983.

BRUCE D. CAMPBELL Hearing Examiner

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In the Matter of the Petition of
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DISPOSITION
removal of Costructions in Trackage
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ORDER DENYING MOTION
FOR SUMMARY

the above-entitled matter came on for hearing before Bruce D. Campbell, Bearing Examiner from the Minnesota Office of Administrative Hearings, on August EL 1983 in Minneapolis, Minnesota. During the course of the hearing, an oral Motion for summary Disposition or, in One alternative, for Dismissal was made by counsel for Whoope's, Inc. and Eric J. Mattson. The hearing on One merits was continued pending a decision on the Motion.

The appearances at the hearing were as follows: Jeffrey R. Schmidt, Lindquist and Vennum, Attorneys at law, 4200 IDS Center, Minneapolis, Minnesota 55402, appeared on behalf of the Chicago and Northwestern Trans- portation Company (hereinafter Railroad or Petitioner); Peter H. Grills, O'Neill, Burke and ()'Neill, Ltd., Attorneys at Law, 800 Northwest Center, 55 East Fifth Street, St. Paul, Minnesota 55101, appeared on behalf of Respondent Eric J. Mattson - Mickeys, Inc.; thomas J. Stearns, Attorney it law, 814 Manondrm Avenue, St. Paul, Minnesota 55107, appeared on behalf of Intervenor Whoope, Inc.; and Ronald F. Mattson, 419 Transportation Building, St. Paul, Minnesota 55155, appeared on behalf of One Minnesota Department of trans-- portation.

The record on the Motion closed October 12, 1983, the date of receipt by the Rearing Examiner of the final brief of counsel.

Based upon the averments of the Motion, the oral argument and all of the

files and records herein, the Bearing Examiner makes the following:

FINDINGS OF FACT

1. Petitioner Chicago and North Western Transportation Company operates an industrial spur track which parallels South Robert Street in the City of St. Paul, Minnesota. The spur track runs in part behind commercial establishments owned and operated by Whoope, Inc. and Whebbe's, Inc.. Eric J. Mattson, Julia M. Mattson and Mickey's, Inc, also have an interest in the commercial establishments. The principal use of the spur track is to service Hilex company with chemicals and other caustic materials.

2. By Orders of the Public Service Commission, dated March 25 and December 16, 1968, a public grade crossing, located at the point where the above-referenced industrial spur track crosses Chicago Avenue, now vacated, as ordered abandoned. Petitioner complied with the Orders of the Public Service Commission and closed the public crossing.

3. Some time after the closing of the public crossing, the Respondents,

pursuant to Minn Stat" 219.46, subd. (1982), constructed and maintained four private grade crossings over the industrial spur track at the specific locations shown on Petitioner's exhibit 1. The private crossings are used by the patrons of Respondents to reach parking facilities located across the industrial spur track on land owned or leased by Respondents.

4. In its Petition dated April 13, 1981, the Railroad alleged violations of ?Ann. Stat. 219.50, 219.51, and 219.46, subd. 1 (1982), in the establishment of the private crossings as a result of blacktop and dirt fill obstructions, the construction of a wood walkway, stairway and hand railing, and the installation of concrete steps. Such asserted statutory violations have been abated by, Respondents and are not now a basis for the Commissioner assuming jurisdiction in the above-captioned cause.

5. The Railroad 'has asserted that the establishment of the private cross-ings and their maintenance results in standing water partially obstructing the industrial spur track and, under certain climatic conditions, ice causing a hazard to railroad operations thereon and to Railroad employees acting in the course of their employment.

6. As a consequence of Minn Stat. 219.50, 219.51 (1982), the Com-missioner of Transportation has jurisdiction to order a railroad, corporation or other person to abate the obstruction of railroad trackage by a foreign obstacle.

7. Standing water on railroad trackage may, under appropriate cir-cumstances and proof, constitute the construction of a railroad track lay a. foreign obstacle or render the trackage unduly hazardous to railroad employees in -tie conduct of their employment.

8. As a consequence of Findings 1-7, supra, the Commissioner of Trans- portation 'has subject tter jurisdiction to order Respondents to abate an object struction to the aforesaid industrial spur track in the form of standing water resulting from the creation and maintenance of private railroad cross-ings. Minn. Stat. 219.45, 219.50, and 219.51 (1982).

Having considered the averments of the Motion, all of the arguments and

comments by the participants in -Ova oral argument on tie Motion, the
written
submissions of counsel, and, in reliance an the Facts heretofore found,
the
Hearing Examiner makes the following:

ORDER

The oral Motion of Respondents for Summary 'Disposition or, in the
alter-
native, for Dismissal on the ground of lack of subject matter
jurisdiction in
the Commissioner of Transportation is DENIED.

this 18th day of October, 1983.

BRUCE D. CAMPBELL
Hearing Examiner

At the hearing on the above-captioned matter, Respondents moved for Summary Disposition or, in the alternative, for Dismissal. The basis for the motion was that the commissioner of Transportation lacks jurisdiction over drainage problems created by private railroad crossings.

In considering a Motion for Summary Disposition or Dismissal, the Examiner must accept the truth of all well-pleaded facts and must afford the non-moving party the benefit of all inferences from the evidence adduced up to the time of the bringing of the Motion. *Grondahl v. Bulluck*, 318 N.W.2d 240 (Minn. 1982); *Nord v. Herreid*, 305 N.W.2d, 337 (Minn 1981); *Delgado v. Lohmar*, 289 N.W.2d 479 (Minn. 1979).

Viewed in the light most favorable to the Railroad, the evidence adduced at the hearing prior to the Motion demonstrates that Respondents, pursuant to Minn. Stat. 219.35 (1982), have established four private crossings over an industrial spur track operated by the Railroad and that the construction and maintenance of such private railroad crossings result in standing water on the trackage which, under winter weather conditions, creates a hazard to Railroad traffic and Railroad employees.

The Respondents argue that the Commissioner of Transportation, as a consequence of the limitations on the authority of the commissioner under Minn. Stat. C 219 (1982) has no jurisdiction with respect to drainage difficulties resulting from a private crossings Minn. Stat. 219.35 (1982). Petitioner, on the contrary, argues that sufficient jurisdiction over the subject matter of the above-captioned cause is conferred on the commissioner of Transportation by Minn Stat: 219.45, 219.50, and 219.52 (1982), and sections giving the commissioner of Transportation authority to order the abatement of an obstruction to railroad trackage which results in a hazard to railroad employees.

That a governmental agency supervising railroad operations has limits on its jurisdiction congruent with its specific statutory grants of authority is well recognized. In *Backus-Brooks Co. v. Northern Pacific Railway, co.*, 21

F.2d 4, 19-20 (8th Cir. 1927), Cert. denied, 275 U.S. 562, 48 S.Ct. 120, 72

L.Ed. 427 (1928), the Court, applying Minnesota law, well stated the applicable rule:

It is well settled that the powers of a State Commission are special and limited, and they can exercise only such authority as is legally conferred by expressed provisions of law, or such as is by fair implication and intendment incident to and included in the authority, expressly conferred for the purpose of carrying out and accomplishing the objects for which the Commission was created, and any reasonable doubt of the existence of any, particular power in the Commission should be resolved against the exercise of such power. (Citations omitted).

see also, Op. Atty. Gen., 365-B-5, April 3, 1950; (Op Atty. Gen., 369-C, April 14, 1930.

lo amply demonstrated by Respondents in their Briefs, the commissioner

acquires no jurisdiction over private railroad crossings as a consequence of

Stat. 219.35 (1982). Moreover, the regulatory authority of the con-

missioner of Transportation with respect to railroad crossings is generally limited to crossings which intersect a public highway. then a private crossing agreement has no impact upon public safety, the cases uniformly hold that the creation, maintenance, and operation of a private railroad crossing is a matter of private concern between the landowner and the railroad affected. Ivor controversies arising as a consequence of the private rights involved in such a crossing must be enforced, if at all, in the courts. See, Weiss v. Chicago North Shore & Milwaukee Railroad, 101 N.W.2d 688, 692 (Wis. 1980); Union Pacific Railway Co. v. Public Utilities Commission, 158 Pac. 863, 864 (Kan. 1916).

When, however, the creation or maintenance of a private crossing impacts on the safety of the public or railroad employees, the courts have determined that the appropriate regulatory authority, as a consequence of its general power to regulate the safety of domestic railroad traffic, has jurisdiction over private crossings. See, City of Bayonne v. Board of Public Utility Commissioners, 105 Atl. 417 (N.J. super. 1954); State v. Mason City & Ft. D.R. Co., 52 N.W. 490 (Iowa 1892); Union Pacific R. Co. v. Court of Industrial Relations, 224 P. 51, 53 (Ka. 1924). But see Weiss v. Chicago North Shore and Milwaukee Railroad, 101 N.W.2d 688, 692 (Wis. 1960).

As a consequence of the regulatory authority given the Commissioner under Minn. Stat. 219.45, 219.50 and 219.51 (1982), the Hearing Examiner need not predicate jurisdiction of the Commissioner on the general grant of regulatory authority over the conduct of railroad operations.

Minn. Stat. 219.45 (1982), applies to railroad trackage obstruction sections, Minn. Stat. 219.50 and 219.51 (1982), to a person or corporation other than the railroad involved if it owns, operates, or maintains "any structure or obstruction adjacent to any railway tracks." If the activities of Respondents amount to an obstruction of the trackage by a foreign obstacle, they would be maintaining an "obstruction adjacent to any railway-tracks" within the meaning of Minn. Stat. 219.45 (1982) As a consequence of Minn.

Stat. 219.45 (1982), the Commissioner has authority to order the abatement of any obstruction of railway trackage which constitutes a violation of Minn.

Stat. 219.50 and 219.51 (1982).

Minn. Stat. 219.50 (1982), provides:

It shall be unlawful for any such common carrier or any person or corporation to which 219.44 to 219.52 apply to allow the space between or beside such of its tracks as are ordinarily used by yardmen and other employees in the discharge of their duties, and within 8 feet 6 inches of the center line of any such track, to become or remain obstructed by any foreign obstacle that will interfere with the work of the employees, or subject the employees to unnecessary hazard. The space between or beside the tracks, as aforesaid, and between the rails of the tracks, must be kept in a condition as to permit the employees to pass over or between the tracks or to use the same night or day and under all weather conditions without unnecessary hazard.

Stat. 219.51 (1982), allows the Commissioner to order the abatement of

violators of Minn. Stat. 219.50 (1982), and to institute suit for the

of statutory penalties.

Minn. Stat. 219.50 and 219.51 (1982), are independent grants of statutory authority to the Commissioner which depend on no other grant of authority for their validity. Nothing contained in Minn Stat. 219.50 and 219.51 (1982), either expressly, or, by necessary implication, excludes track-age obstruction resulting from private crossings. Such a conclusion is strengthened by the fact that Minn. Stat. 219.35 (1982), does not affirmatively provide that the Commissioner has no authority with respect to private railroad crossings. That section, when read in conjunction with the statutory provisions regarding his authority over public railroad crossings, merely provides no general regulatory authority over private crossings. when, however, the installation and maintenance of a private crossing impacts public safety, the assertion of regulatory authority over such crossings is appropriate. City of Bayonne v. Board of Public Utility Commissioners 105 Atl. 417 (N.J. Riper. 1954),- Slater v. Mason City of It. D.R. Co., 52 N.W. 490 (Iowa 1892); Union Pacific R. Co. v. Court of Industrial Relations, 224 P. 51, 53 (1924). Minn. Stat. 219.50, 219.51 (1982), provide tie independent grant of statutory authority which justifies such assertion of jurisdiction in the public interest. Backus-Brooks Co. v. Northern Pacific Railway Co., 21 F. 2d 4, 19-20 (8th-h Cir. 1927), cert. denied, 275 U.S. 562, 48 sec.. Ct. 120, 72 L. Ed. 427 (1928); Union Pac. Ry. OD. v. Public Utilities Commission, 158 P. 863, 864 (Ka. 1916).

The sole question of construction with respect to Minn. Stat.. 219.50 (1982), is whether standing water may be considered an obstruction of the railroad track by a foreign obstacle.

In McDermott v. Minneapolis & S Railway Co., 204 Minn. 215, 283 N.W. 116, 118 (1938), the court held that ice and snow piled along the trackage constituted a foreign obstacle that could interfere with the work of railroad employees or subject them to unnecessary hazard.

The Hearing Examiner finds no difference in fact or law between standing water which, under adverse climatic circumstances, could freeze, thereby sub-

jecting railroad employees to a hazard, and piled ice and snow which subjects such employees to the same hazard. Moreover, standing water, even if unfrozen, may pose a significant safety hazard to railroad employees traversing the industrial spur track.

In order to constitute a foreign obstacle, however, the standing water must be the result of an artificial enterprise or activity and be in excess of that normally found at the location. Water resulting from nature and natural forces, not exacerbated by artificial activity, is not a foreign obstacle. See, *Porsmer v. Davis*, 152 Minn. 181, 188 N.W. 279, 281 (1922); *Gibson v. Iowa Century Railway Co*, 115 Minn. 147, 131 N.W. 1057 (1911); *Fay v. Chicago, St. P., M. & O. Ry. Co.*, 72 Minn. 192, 75 N.W. 15 (1898).

As previously discussed, the hearing examiner, for purposes of a motion for summary Disposition or Dismissal, must accept the truth of all well-pleaded facts and afford the nonmoving party the benefit of all favorable inferences to be drawn from the existing record.- There is testimony that the creation and maintenance of the private crossings has resulted in periodic standing water on the industrial spur track which, under adverse climatic conditions poses a threat to the safety of railroad employees. Assuming for

proposes of the Motion the truth of those assertions, the Commissioner of Transportation, as a consequence of Minn. Stat. 219.45, 219.50, and 219.51

(1982), has subject matter jurisdiction in the above-captioned cause.

The Motion of Respondents must be denied and the hearings herein must proceed to determine whether the activities of Respondents do constitute a violation of Minn. Stat. 219.50 and 219.51 (1982).

B.D.C.