

BEFORE THE
ILLINOIS COMMERCE COMMISSION
SPECIAL OPEN MEETING
(TRANSPORTATION)
Thursday, January 8th, 2020
Chicago, Illinois

Met, pursuant to notice, at 10:30 A.M., at
160 North LaSalle Street, Chicago, Illinois.

PRESENT:

CARRIE ZALEWSKI, Chairman

BRIEN J. SHEAHAN, Commissioner

D. ETHAN KIMBREL, Commissioner

SADZI M. OLIVA, Commissioner

MARIA S. BOCANEGRA, Commissioner

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3 CHAIRMAN ZALEWSKI: Good morning. Happy New Year. Are
4 we ready to proceed in Springfield?

5 THE CLERK: Yes, we're ready.

6 CHAIRMAN ZALEWSKI: Under the Open Meetings Act, I call
7 the January 8th, 2020 Regular Opening Meeting to order.
8 Commissioners Oliva, Kimbrel, Bocanegra, and Sheahan are with
9 me in Chicago. We have a quorum.

10 We have no requests to speak. We will move on
11 to our Transportation Agenda.

12 There are no Transportation Minutes to
13 approve. There are no Railroad items.

14 Under our Motor Carrier items, Items MC-1 and
15 MC-2 concern renewals of Commercial Relocation Towing Licenses.
16 The Orders grant the license renewals, finding that the
17 applicants meet the requirements.

18 Are there any objections to considering these
19 items together and approving the Orders?

20 (No response.)

21 CHAIRMAN ZALEWSKI: Hearing none, the Orders are
22 approved.

1 Item MC-3 concerns a stipulated settlement
2 agreement concerning alleged violations of the Illinois
3 Commercial Transportation Law. The Order accepts a stipulated
4 agreement.

5 Are there any objections to approving the
6 Order?

7 (No response.)

8 CHAIRMAN ZALEWSKI: Hearing none, the Order is approved.

9 Under are Administrative matters, AM-1
10 concerns Docket T17-0033, which is the Illinois Department of
11 Transportation, or IDOT's, petition for approval of a permanent
12 easement at property jointly owned by BNSF and the Union
13 Pacific Railroad. IDOT has moved to correct a drafting error
14 in its petition for a rehearing. The motion will delete a
15 citation in the petition.

16 Are there any objections to granting the
17 motion to correct a drafting error?

18 (No response.)

19 CHAIRMAN ZALEWSKI: Hearing none, the motion's granted.

20 Item AM-2 also concerns Docket T17-0033, which
21 is IDOT's petition for a rehearing. IDOT seeks a rehearing to
22 allow the Department to submit evidence refuting the claim of

1 unreasonable interference with Railroad operations.

2 On January 7th, 2020, the Commission Staff
3 filed a Staff position asking the Commission to reopen the
4 hearing to allow for evidence related to Docket T17-0038. ALJ
5 Duggan is available to answer any questions concerning the
6 case.

7 Do any Commissioners have any questions for
8 Judge Duggan?

9 COMMISSIONER KIMBREL: Yeah, Judge Duggan, I have a few
10 questions for you, sir.

11 JUDGE DUGGAN: Okay. So do you want to ask your
12 questions, or do you want me to just...?

13 COMMISSIONER KIMBREL: Yeah, Judge, I'd just like for
14 you -- you know, we're obviously faced with a petition for
15 rehearing filed by IDOT, so I'd like to know what your
16 recommendation is on that petition. But, first, I'd like for
17 you to run through your decision, the issues you may or may not
18 have with the Commission's decision, and then give us your
19 recommendation.

20 JUDGE DUGGAN: All right. Well, everybody knows the
21 background. We don't have to discuss that, I guess. IDOT --
22 I'm sorry?

1 COMMISSIONER KIMBREL: I was just going to say, Judge,
2 just take your time. The background may actually be necessary.

3 JUDGE DUGGAN: Okay. I'll go ahead, and then you can
4 tell me when it's too much.

5 Basically, we have -- IDOT has a bridge over
6 I-80 -- excuse me -- carrying I-80 over UP and BNSF tracks.
7 It's been there for 50 years (inaudible).

8 COMMISSIONER KIMBREL: I'm sorry, Judge. We're having
9 some technical difficulties. We can't hear you very well.

10 JUDGE DUGGAN: Should I move further away or closer?

11 CHAIRMAN ZALEWSKI: Is there a second microphone on down
12 there? It seems like there's an echo.

13 THE CLERK: No, there no other microphones on.

14 JUDGE DUGGAN: Let me just try this: I'll move further
15 away and closer and see which one's the one.

16 (Whereupon, a discussion was had off
17 the record.)

18 COMMISSIONER SHEAHAN: Further away.

19 COMMISSIONER KIMBREL: Yeah, further away.

20 JUDGE DUGGAN: All right. You'll just have to tell me
21 again.

22 I-80 has been in this location for over 50

1 years. And during this period of time, there's a part of it
2 that goes over tracks that are owned by UP and BNSF. And UP
3 and BNSF own the property underneath there, so they've operated
4 this way for 50 years.

5 And so IDOT wants to rebuild the structure,
6 which is, essentially, a bridge. It's not over water. It's
7 over tracks. The bridge, of course, has to be supported by
8 piers on the ground. And so IDOT's rebuild would be to --
9 they've presented a plan. They've, obviously, discussed it
10 with the railroads. Then they came to the Commission and got
11 approval to do this rebuild; and included in this was the
12 design plans.

13 And these design plans will move the
14 supporting piers further away from the existing tracks than
15 they are. Right now they're about 9 feet apart. They're going
16 to move them to 125 feet apart. The clearance on both sides of
17 the UP tracks and the BNSF tracks will be greater than
18 presently exist.

19 So this Order that's approved by the
20 Commission was T17-38 (sic), so it's a separate docket. But
21 that docket reviewed these particular design plans and approved
22 them without objection by BNSF or UP. And UP is not objecting

1 to this thing at all. They do own the property, but they're
2 just -- you know, they have no concerns here.

3 So BNSF is the one that I'm focused on,
4 obviously; and BNSF's tracks are on the west side. And the
5 pier on the west is also going to be moved, so BNSF will now
6 have more clearance than its ever had in 50 years to run its
7 operations on this track. Even the vertical clearance is going
8 to be increased by 3 inches, I think.

9 And then BNSF, in fact -- a little more
10 background. BNSF in fact signed a contract -- what we call a
11 Construction and Maintenance Agreement -- with IDOT, approving
12 this very same structure after the Commission approval and
13 having certain provisions included in that contractual
14 agreement. One of the things that the contract agrees to is --
15 it says that BNSF will in fact grant IDOT the easements
16 necessary to build this construction.

17 Now, of course, the key word is "necessary"
18 there. I'm still coming back to that. But the bottom line is
19 BNSF is committed to this project. BNSF has not objected. It
20 has twice agreed by not objecting in the order and then writing
21 in this contract the design of where these piers will be
22 located. And so -- and it's reasonable to grant easements; so,

1 in some respects, there's no doubt that this project is going
2 to happen and that this pier is going to be placed where they
3 say within total agreement of BNSF.

4 There's a couple of other provisions that
5 would be relevant to this within the BNSF contract. One that
6 we actually use is Section 20 -- Section 13 allows IDOT access,
7 at all times, for inspection and maintenance, which is, of
8 course, huge. Whether you have an easement of any type, IDOT
9 is going to get in there and inspect the structures. They're
10 going to inspect the piers on the ground, and they have to
11 inspect the bridge over east.

12 Now, the contract says that IDOT may have this
13 inspection at any time or at all times. It requires notice to
14 BNSF only if IDOT believes -- or excuse me -- only if IDOT
15 determines that it, quote "may", unquote, interfere with BNSF
16 operations.

17 The third thing that's pretty relevant here,
18 this contract prevents any changes to design without agreement.
19 All right? Now, with that in mind, you still can't -- you
20 can't build the structure without an easement, either the one
21 that BNSF offers or the one that IDOT seeks. So even though
22 this project is agreed, everyone wants to do it, and BNSF said,

1 "We'll give you easements", we're now in a separate proceeding
2 because IDOT wants a little bit more expansive easement than
3 BNSF, presumably, will offer.

4 BNSF says -- in here it said this -- let me
5 back up once again. BNSF objects to IDOT's easement on two
6 grounds. Number one, it's overly broad in the area sought;
7 and, number two, that it will cause unreasonable interference
8 with the operations of the railroad. The concept that BNSF's
9 area is larger than BNSF believes is necessary because IDOT
10 seeks the entire area under the structure.

11 BNSF says all you need is the exact dimensions
12 of all three structures: the piers, the footings, what supports
13 the structure from the ground. So BNSF says, "We will give you
14 that area right around that structure. We will give you that
15 easement. So you don't need an easement to stretch this out
16 beyond that area".

17 And another aspect of that easement is that,
18 whereas IDOT's easement would give it the air rights up to the
19 structure itself, BNSF wants to grant -- BNSF said, "We're
20 going to offer you this. We're going to offer you the air
21 easement that go around the stretch of the structure, put
22 buckets hanging over the bridge structure, and then you can

1 check that, as opposed to putting a man lift down on the ground
2 and inspecting from above". BNSF says, "You don't need that
3 easement. You don't need all of this land".

4 So one quickly disposed of issue is this: I
5 believe BNSF is objecting to the easement granted and asked for
6 as too broad and, secondly, unreasonable interference. On the
7 "too broad" issue I discussed it at length in my direct and
8 concluded that you're right. It's more than IDOT needs. But
9 the Supreme Court has said that IDOT has discretion as to what
10 property interests IDOT may seek.

11 So I wrote that, you know -- even though IDOT
12 cases do not involve railroad property, I wrote that because
13 they said it was so -- the Supreme Court's statements of
14 discretion was so strongly worded that I would suggest that, if
15 it did go to the Supreme Court, they would say that that
16 discretion applies even in a railroad case.

17 You could have easily said, "No, we don't
18 think so. We're going to let it go"; but the Commission in the
19 past did not really address that issue. It should only be in
20 passing to see that the Commission has -- IDOT has a lot of
21 discretion. So, presumably, that wasn't an issue significantly
22 or one that you felt was significant to order. In any event,

1 you didn't deal with it; and of course you wouldn't have to
2 deal with it because you decided the easement should be granted
3 on unreasonable interference issues anyway.

4 So that's brings us to the unreasonable
5 interference issues. The unreasonable interference, BNSF will
6 claim that there was unreasonable interfering with -- that the
7 easement causes unreasonable interference; and that will be
8 identified in two questions. Number one, the structures; and
9 then the abstract access rights. All right?

10 Well, the structures have already been agreed
11 to. The plans allowed under this easement will allow the
12 piers to be placed farther away than they've been for 50 years.
13 To me, on the surface, it's unfathomable to me how these piers
14 allowed by this easement could cause unreasonable interference
15 when the tracks that have operated there for 50 years where
16 interference is greater; so I didn't give that that much
17 credibility. It's just irreconcilable with -- there's no way
18 it could interfere. That's all there is to it.

19 So BNSF argues, well, it's going to interfere
20 with a third track. And the fact is of course there's no third
21 track. The fact is there are no present plans to build a third
22 track. BNSF's witness, Calvin Nutt, said, "Well, it's likely",

1 but did not say that it's possible. But there's no present
2 plans; so it's pretty flimsy evidence to sit here and decide,
3 well, we're going to question unreasonable interference of a
4 third track that may or may not ever exist.

5 However, the other thing -- aspect of that, in
6 evaluating unreasonable interference to a third track that
7 doesn't exist, is that third track almost couldn't exist until
8 you redesign, until you put these piers away in the greater
9 distance authorized by the T17-38 and in the contract.

10 So Mr. Nutt said -- he said moving these piers
11 will make it much easier to build this third track. He did
12 not -- actually, what he said is it's much less complicated.
13 So he didn't say that they actually couldn't somehow build a
14 third track; but, clearly, it made it much less complicated.

15 So then BNSF is sitting there arguing, well,
16 this third track is going to interfere -- these piers are going
17 to interfere with this third track because they're close enough
18 because of the curve and this other thing, that we're going to
19 have to have smaller trains.

20 So, in my opinion, this argument about
21 interference with a non-existent third track that you couldn't
22 even build until you moved the piers out, in practicality, was

1 simply not worthy of much consideration or credibility, much
2 less the interference that they referred to. The interference
3 that they referred to said, you know, "We may have to lower the
4 size of our cars and the width of our cars because of this".

5 So, anyway, so that's why I felt that the
6 entire conversation about interference, whether you use this
7 track or the hypothetical third track, was not well-taken in
8 any regard. And, in fact, that is one thing that IDOT pointed
9 out in its motion, I think, that said that IDOT wanted to
10 cross-examine on some of that, and I stopped them because I
11 thought it was so clear as to be just not an issue.

12 So what I have now said in my brief is and in
13 the motion memo is, if the Commission truly believes that this
14 is an issue, that it's unreasonable interference, then IDOT
15 should be allowed to cross-examine on this interference issue,
16 and it should be reopened, because I stopped them.

17 Now, once you get past the existing two tracks
18 and then the third track, then you get into the abstract cries
19 of control and access. And BNSF had two witnesses, Calvin
20 Nutt, which was the project manager at that time, basically, he
21 really didn't testify to any interference other than that
22 about, well, if you have this third track because of the

1 curvature of the tracks in this area, that we would have to
2 have smaller cars than we might otherwise want to have.
3 That's really all Mr. Nutt said about interference at all. And
4 he talked about control and access in general.

5 Now, bear in mind, that even if you -- even if
6 BNSF. BNSF is still contractually bound and has offered to
7 give easements upon which to construct these piers. When you
8 give those piers you're still going to have to give access to
9 inspect. So the question of access -- and, again, going back
10 to the contract, IDOT will have, at all times, access for
11 construction and maintenance. That's what they will grant. So
12 where is the difference? When you have an easement to build a
13 structure for a highway overpass, you have to have access to
14 inspect. So one way or the other you're going to have access,
15 and one way or the other you're going to have complaints of
16 access control because one way or the other IDOT is going to
17 come in there to do this.

18 Now, you can say, well, the question is does
19 IDOT always have to notify them before they come in? In fact,
20 in the contract it says, no, you don't always have to notify
21 them. "Notify us only if it may affect us". The bottom line
22 is, I suppose you can write an easement that says you don't

1 come in to inspect without notifying us each time, but that's
2 the only difference. And, at this point, even if you gave --
3 BNSF offered an easement, they will still have access rights.
4 So for them to argue that some unreasonable access -- I mean,
5 that interference is caused by access granted by the easement
6 sought by IDOT is -- you've got to have access either way.

7 COMMISSIONER KIMBREL: Judge, what was Staff's position
8 in this docket?

9 JUDGE DUGGAN: They had no objection whatsoever.

10 COMMISSIONER KIMBREL: And what is your recommendation
11 regarding IDOT's application for rehearing? How do you think
12 we should handle it.

13 JUDGE DUGGAN: Well, I still stand by my original order
14 with one potential exception that I thought about as I was
15 preparing this. In my first order, in paragraph -- in my draft
16 I state that the easement -- I actually noted this in my memo
17 to you on this rehearing. I stated that the easement, as I had
18 drafted that you passed, was that the easement would be for the
19 permanent easement for construction, maintenance, and repair of
20 an overpass bridge structure in and to the property now sought
21 by the Department. So that's in and to the property now sought
22 by the Department.

1 And when I read it now, I think that's
2 correct. I think that what I had argued in my memo was
3 something to the effect that that meant they were limited to
4 this structure now sought. Now that I'm reading it I don't
5 think it does that; so probably my argument was wrong, stating
6 that this easement would limit it to the structure now sought.

7 So, anyway, no, I think the order as written
8 is still fine, and that's what I would recommend. The only
9 reason I recommended an alternative to reopen is, if the
10 Commission truly believes that there is unreasonable
11 interference and that some of this testimony was
12 uncontroverted -- sometimes, you know, controverted testimony
13 is -- think about it -- you know, cross-examination testimony
14 that didn't do you any harm. If it doesn't make any sense, it
15 doesn't make any sense.

16 So IDOT chose not to elaborate on this because
17 the testimony was submitted by BNSF partially by written
18 testimony. The guy wasn't there. We didn't want to wait 2
19 more days and open it up. And neither of us thought that --
20 obviously, I didn't think that we needed more -- I didn't think
21 it had any basis.

22 So to answer your question, pardon me, is that

1 I think you should re-enter the order that I just presented to
2 you.

3 COMMISSIONER KIMBREL: Okay. Well, thank you very much,
4 Judge, for your very thorough explanation of the case.

5 JUDGE DUGGAN: Okay.

6 CHAIRMAN ZALEWSKI: Do any of the Commissioners have any
7 questions for Judge Duggan?

8 (No response.)

9 CHAIRMAN ZALEWSKI: Thank you, Judge Duggan.

10 JUDGE DUGGAN: Thank you.

11 CHAIRMAN ZALEWSKI: Are there any objections to
12 considering both IDOT's and Staff's request for a rehearing
13 together?

14 (No response.)

15 CHAIRMAN ZALEWSKI: Hearing none --

16 To ensure that we have a record, I'm going to
17 call each Commissioner individually for a vote. Please answer
18 "aye" or "nay" as to whether to grant both requests for a
19 rehearing.

20 Commissioner Kimbrel?

21 COMMISSIONER KIMBREL: Yes, I think we should grant it.

22 CHAIRMAN ZALWESKI: Commissioner Oliva?

1 COMMISSIONER OLIVA: Nay.

2 CHAIRMAN ZALEWSKI: Commissioner Bocanegra?

3 COMMISSIONER BOCANEGRA: Nay.

4 CHAIRMAN ZALEWSKI: Commissioner Sheahan?

5 COMMISSIONER SHEAHAN: Aye.

6 CHAIRMAN ZALEWSKI: I'm an "aye" as well, so the ayes
7 have it, and the requests for rehearing are granted.

8 This completes our Transportation Agenda.

9 (Whereupon, the above entitled matter
10 adjourned.)

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