

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

Davis-Moore Industrial Park,)	FORMAL COMPLAINT NO. FC-1133
)	
Complainant,)	
)	
vs.)	COMPLAINT SUSTAINED
)	
Missouri Pacific Railroad Company,)	
)	
Defendant.)	ENTERED: April 23, 1980

APPEARANCES:

Victor J. Lich, Jr., Esq.,
10730 Pacific, Suite 238,
Omaha, Nebraska,

and

Gerald Herold, Esq.,
10730 Pacific, Suite 238,
Omaha, Nebraska, both appearing
for Complainant;

Robert J. Hamer, Esq.,
1819 Farnam Street,
Omaha, Nebraska,
Appearing for Complainant-Intervenor
City of Omaha;

Robert Skochdopole, Esq.,
Suite 1900, One First National Center,
Omaha, Nebraska,

and

Robert Craig, Esq.,
Suite 1900, One First National Center,
Omaha, Nebraska, both appearing for
Defendant.

BY THE COMMISSION:

By complaint filed February 24, 1980, Davis-Moore Industrial Park, seeks to compel the Defendant, Missouri Pacific Railroad, to construct and maintain a temporary and permanent grade-crossing for a frontage road located immediately southeast of the intersection of 67th Street and "L" Street in Omaha, Nebraska. By intervention, the City of Omaha, also became a party complainant.

On February 29, 1980, the Secretary of the Commission sent a notice of public hearing to all parties of record. Hearing was held before Commissioner James F. Munnelly, presiding, and Commissioner Duane Gay, in the Board of Equalization Room at the Douglas County Civic Center, 18th & Farnam, Omaha, Nebraska, on March 19, 1980.

F I N D I N G S

At the hearing the following facts were established:

1. Davis-Moore Industrial Park is the owner and developer of a duly platted sub-division known as Davis-Moore Industrial Park. The Complainant owns a parcel of land immediately adjacent to the Missouri Pacific right-of-way just south of the intersection at 72nd and "L" Streets, Omaha, Nebraska.

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

FORMAL COMPLAINT NO. FC-1133

Page Two

2. The Missouri Pacific Railroad Company, hereinafter referred to as Defendant, is a common carrier who owns a railroad line which crosses "L" Street and certain "L" Street frontage roads at the intersection of 67th Street and "L" Street, Omaha, Nebraska.
3. The frontage road south of the intersection at 67th Street and "L" Street was paved up to the west side of the railroad in 1964 or 1965, and at the same time a generally triangular piece of paving was also placed east of the tracks to support a crossing for easterly expansion on the frontage road. It is this crossing which is subject to this proceeding. This crossing lies within the city limits of Omaha, Nebraska.
4. The Defendant railroad entered into a written agreement with the State of Nebraska, Department of Roads, dated August 21, 1962, which provided that the railroad would install the subject crossing at the expense of the State. The evidence indicated that the crossing was installed and that the railroad was paid the sum of \$1,358.45 for the installation.
5. The frontage road west of the crossing has been used by the public since 1964 or 1965, however, the frontage road east of the crossing was not paved until the Complainant recently developed its property east of the Defendant's right-of-way.
6. Mr. James Anthony, an employee for the Defendant, testified that the railroad removed the crossing during track repair sometime during 1970 and 1972 and that it had not been replaced because the railroad considered it to be an inactive crossing. There is no evidence that the railroad received permission to remove the crossing from the State of Nebraska or the City of Omaha.
7. During October or November, 1979, the frontage road was extended from the crossing to the east approximately 350 feet. This extension of frontage road will serve the Davis-Moore Industrial Park and the businesses to be located therein. This extension of frontage road was constructed by the Complainant, according to plans, which had the approval of the State Department of Roads and the City of Omaha.
8. The extension of the frontage road was constructed on the existing right-of-way of "L" Street except for a small additional dedication of land which was made to accommodate the curve just east of the railroad right-of-way. The Defendant contends that the crossing and part of the frontage road are south of the dedicated right-of-way of "L" Street but there does not appear to be conclusive evidence as to the boundary lines where the railroad right-of-way and "L" Street merge.
9. The only present paved access to the Industrial Park is via the easterly extension of the frontage road, but it cannot be used because of the lack of either a temporary or permanent vehicle crossing. The present official position of the City of Omaha, although it was stipulated not binding on the City Council, is that no other temporary or permanent access will be permitted to the frontage road from "L" Street. The frontage road will eventually be extended further to the east where another access to "L" Street will be permitted, but this portion may not be completed for some months.
10. Reagan Buick is the first business scheduled to open for business in the Complainant's industrial park and it was scheduled to commence business on March 31, 1980. Reagan Buick has invested approximately \$1,700,000 in its new place of business and the cost of delaying its opening because of lack of access over the railroad right-of-way will be approximately \$3,000 per day.

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

FORMAL COMPLAINT NO. FC-1133

Page Three

11. The combined cost of temporary and permanent crossings would vary because of the cost of materials but would be approximately \$5,000. The cost of automatic signalization would be approximately \$27,000.
12. The railroad has refused to install a crossing unless the Complainant industrial park would pay all costs of construction of the crossing and the automatic signalization.

O P I N I O N

The Complainant and the Intervenor, City of Omaha, contend that the railroad has a statutory and contractual duty to construct and maintain a vehicle crossing at the subject crossing and that it should be required to replace the crossing which it constructed and later removed without permission of the City of Omaha or the State of Nebraska, Department of Roads. The Defendant contends that the original Complainant does not have a standing to maintain this proceeding and that this Commission lacks jurisdiction over crossings within the corporate limits of the City of Omaha. Section 75-131, R.R.S., 1943, as amended, provides as follows:

"Any person, firm, corporation, association, society or body politic, or municipal organization, complaining of anything done or omitted to be done by any common carrier, may apply to the commission by petition briefly stating the facts constituting the complaint. A copy of the complaint shall be served upon the common carrier, which shall be required to answer or satisfy the same within a reasonable time fixed by the commission...."

The Defendant has admitted it is a common carrier and the Complainant, which is a partnership, certainly qualifies as a "firm or association".

The Commission has jurisdiction of the parties, the subject matter of the proceedings, and the railroad grade-crossing which is the subject of this proceeding. Defendant argues that Section 75-410, R.R.S. 1943 (Reissue 1976) limits the jurisdiction of the Commission to crossings outside of incorporated cities and that the Commission, therefore, has no jurisdiction of this crossing which lies within the corporate limits of the City of Omaha. The basic powers of the Commission arise, however, from the Nebraska constitution, Article IV, Section 20 (as amended 1972) and we do not read Section 75-410 as a limitation on the Commission's powers. Section 75-410 by its own language specifically provides that it "should not be construed as a limitation of the powers of the commission which have been heretofore granted, but as supplemental and additional thereto." The commission's jurisdiction is further supported by sections 75-401 and 75-414, R.R.S. 1943 (Reissue 1976). Section 75-401 provides that: "The commission shall have and exercise jurisdiction over the service, facilities, and equipment of all railroad carriers in this state." Section 75-414 specifically provides that authorized officers of incorporated cities and villages may complain to the commission for the relief of matters relating to "any crossing or crossings within such city or village..." We find that the jurisdiction and powers of this commission extend to the crossing, notwithstanding the fact that it is located within an incorporated city.

There does not appear to be any case law holding that the Commission does not have jurisdiction over matters pertaining to crossings within the city limits of an incorporated city. The Chicago R.I.&P. Ry. Co. vs. The Nebraska State Railway Commission, 88 Neb. 239, 129 N.W. 439 (1911); rehearing denied 89 Neb. 853, 132 N.W. 409 (1911) might at first glance appear to be contrary; but a careful reading of that case evidences that it is limited only to the authority of the Commission to determine whether public roads should be open. There is no doubt that the Commission does not have authority to open and/or vacate streets within city limits. That power rests with the city under our state statutes. That case involved a crossing

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

FORMAL COMPLAINT NO. FC-1133

Page Four

within a city limits and the Court specifically stated: "We do not question the Commission's authority to inspect railroad crossings and to compel a railway company to construct them..." In the matter now before the Commission, there is no issue over the opening of a public road. The public frontage road has been opened since approximately 1962 and the only question presented to the Commission is whether the Defendant has a duty to install and maintain a crossing.

In addition to the foregoing argument, it is also clear that the City of Omaha has standing to maintain this proceeding and so the Commission's jurisdiction of the matter would not be lost even if the complainant was dismissed as not being a proper party. See Section 75-414, R.R.S. 1943 (Reissue 1976) which provides:

"Whenever complaint is filed in writing with the Commission by the duly authorized officers of any incorporated village or city, relative to any crossing or crossings within such village or city, praying for relief from the matters complained of, the commission shall hold a hearing in the manner provided by section 75-132 and shall make such order as the facts warrant. The findings of the commission, subject to the right of appeal, shall be binding on the parties to the suit."

It is the Commission's opinion that the City of Omaha, having intervened as a party complainant, satisfy the requirements of section 75-401.

Both the original Complainant and the City of Omaha have standing to maintain this proceeding, and in addition the Commission can maintain the proceeding upon its own motion pursuant to section 75-133.

The Defendant has a duty to construct and maintain the subject crossing. The Defendant, pursuant to its written agreement with the State of Nebraska, Department of Roads, dated August 31, 1962, constructed the crossing and was paid by the State of Nebraska for that construction. The Defendant's removal of the crossing in 1970 or 1971 was without consent of the State of Nebraska, Department of Roads, and was in violation of the 1962 agreement. The decision of the Commission on this issue does nothing more than require the Defendant to do what it has previously agreed to do. However, this decision is not based solely upon the 1962 agreement. In addition to the contractual duty of the Defendant, we find that the Defendant has a statutory duty to construct and maintain the subject crossing pursuant to Section 75-411, R.R.S. 1943 (Reissue 1976):

"It is hereby made the duty of every person or corporation, owning or operating any railroad crossed by a public road, to make, and keep in good repair, good and sufficient crossings for such road over its tracks,...that may be necessary within their right-of-way...The commission is hereby authorized, upon proper investigation and hearing, to amend these requirements in particular instances, or to impose additional requirements, as the circumstances may warrant."

The public frontage road has crossed the Defendant's tracks since its construction in the year 1964 or 1965. Although only paved approximately 20 feet east of the tracks, paving east of the tracks was obviously intended to facilitate eventual construction of the extension of the frontage road to the east. The Defendant has made an issue of the fact that a small portion of the frontage road as now constructed south of the "L" Street dedicated right-of-way on the Defendant's right-of-way without its permission or consent. There is no conclusive evidence of this fact, but even if it were true, it would be irrelevant to the issues of this proceeding. Such a claimed trespass is not within the jurisdiction of this Commission to resolve. The plain facts are that the Defendant in 1962 agreed to a crossing at that location. It knew that the crossing for an extension of the frontage road over its tracks, and it knew, or should have known, that the extension of the frontage road to the east of the tracks would

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

FORMAL COMPLAINT NO. FC-1133

Page Five

have to connect up with the crossing which it now claims is located on its right-of-way to the south of the "L" Street dedicated right-of-way. We believe the Defendant would be estopped from raising such a defense even if it were relevant to the issues of this proceeding. Further, it is important to note the careful reading of Section 75-411 requires railroads to "make and keep in good repair, good and sufficient crossings for such roads over its tracks...that may be necessary within their right-of-way." The evidence shows that it was necessary to have a crossing located at its present location which was agreed to by the Defendant in 1962, in order to provide an adequate turn-out from "L" Street. We reject the Defendant's position that it can agree to a crossing at a specific location and then later object to its construction because of the location of the contemplated road that will connect with the crossing.

The Commission should not refuse to order construction of railroad crossings within its jurisdiction solely on the basis that it does not have jurisdiction over the installation of automatic grade-crossing protection devices. The Defendant has argued that it should not be required to construct and maintain the subject crossing because the crossing should have automatic grade crossing devices. Section 75-410, R.R.S. 1943 (Reissue 1976) denies the Commission jurisdiction to order installation of automatic grade-crossing protection. Because of a lack of jurisdiction, the Commission makes no finding as to any advisability or necessity of automatic grade-crossing protection devices at the subject crossing. It should be remembered, however, that the Department of Roads must have contemplated grade-crossing protection devices for this crossing back in 1962 or 1963 when the crossing was constructed. This Commission, therefore, strongly recommends to the Defendant and to the Department of Roads that they determine such need and take appropriate measures for the protection of the public. The Commission will provide grade-crossing protection which is consistent with the jurisdiction granted to the Commission, such as cross-bucks and stop signs.

O R D E R

IT IS, THEREFORE, ORDERED by the Nebraska Public Service Commission that Formal Complaint No. FC-1133, Davis-Moore Industrial Park, Complainant, vs. Missouri Pacific Railroad Company, Defendant, be, and it is hereby, sustained.

IT IS FURTHER ORDERED that the Defendant, Missouri Pacific Railroad Company, shall as soon as possible, considering the availability of materials, construct a temporary vehicular crossing or a permanent vehicular crossing.

IT IS FURTHER ORDERED that Defendant, Missouri Pacific Railroad Company, shall furnish and install the following grade-crossing protection:

1. Commission approved cross-buck railroad signs on both sides of the frontage road and protecting the crossing from east and west.
2. The Nebraska Department of Roads approved highway stop signs on both sides of the road and protecting the crossing from east and west.

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

FORMAL COMPLAINT NO. FC-1133

Page Six

MADE AND ENTERED at Lincoln, Nebraska, this 23rd day of April, 1980.

NEBRASKA PUBLIC SERVICE COMMISSION

Harold D. Simpson
Chairman

ATTEST:

Terence L. Kubicsek
Acting Executive Secretary

COMMISSIONERS CONCURRING:

COMMISSIONERS DISSENTING: