

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Authorization of)
Wheeling and Lake Erie Railway and Norfolk)
and Southern Railway to Construct Active) Case No. 08-574-RR-FED
Grade Crossing Warning Devices in)
Crawford, Preble, and Montgomery Counties.)

ENTRY ON REHEARING

The Commission finds:

- (1) By entry of May 28, 2008, the Commission, in part, ordered Norfolk Southern Railway (NS) to install active grade crossing warning devices at the Kimberly Road grade crossing (524-642M), located in the city of West Carrollton, Montgomery County. The Commission directed that the construction of active warning devices at the grade crossing be completed by May 28, 2009. The actual completion of the crossing project occurred on June 1, 2009.
- (2) On May 28, 2009, NS filed a request for a 14-day extension of time in which to complete the project.
- (3) On May 27, 2009, staff filed a memo recommending against granting the extension of time.
- (4) By entry of June 3, 2009, the Commission denied NS's request for an extension of time. In its June 3, 2009 entry, the Commission stated that:

NS is hereby put on notice that, in the future, all grade crossing improvement projects are to be completed, absent extraordinary circumstances, in the time set forth by the Commission. In the event NS fails to timely complete a grade crossing project in the future as ordered by the Commission, the Commission will consider imposing a civil forfeiture pursuant to Section 4905.47, Revised Code.

- (5) Section 4903.10, Revised Code, indicates that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined by filing

an application within 30 days after the entry of the order upon the journal of the Commission.

- (6) On July 6, 2009, NS filed an application for rehearing of the Commission's June 3, 2009 entry. In its application for rehearing, NS notes that it does not and cannot contest the factual findings set forth in the Commission's June 3, 2009 entry; however, it applies for rehearing as to whether the issuance of the notice of potential future fines was reasonable and appropriate in the instant circumstances. NS maintains that it performed the requisite engineering, submitted the related plans and cost estimates for approval, and undertook the necessary steps toward proceeding with construction. NS also claims that, as of May 2009, construction was substantially completed and it understood that the construction was on target to be completed within the original deadline of May 28, 2009. According to NS, on May 26 or 27, 2009, it became aware that there had been a communication breakdown within two departments of NS and that it did not have on hand certain special-order insulated joints, the installation of which would have been the final necessary piece of the construction project. NS notes that it immediately contacted staff and filed a request for a 14-day extension of time so as to alert the Commission of the issue. Although NS requested a 14-day extension, NS notes that it did everything in its power to expedite the completion of the project, ultimately completing it just 4 days beyond the original construction deadline.

In addition, NS submits that, in the instant circumstances, the inclusion of the notice language was unreasonable and unnecessary. First, NS assures the Commission that it is taking appropriate action internally, toward ensuring its involved departments are cognizant of construction deadlines. Second, NS states that its failure to comply with the original construction deadline was inadvertent and not willful. Third, NS contends that once it became aware of the problem, it took appropriate action in conferring with Commission staff, filing a request for an extension, and involving all departments to complete the construction project as expeditiously as possible. Indeed, NS believes it handled this situation in a manner the Commission should encourage. Lastly, NS states that it remains concerned that the standard one-year construction deadline is somewhat ambitious and quite taxing. NS notes that while it has participated in approximately 378 projects throughout Ohio

during the past ten years, it certainly welcomes and appreciates the Commission's ongoing cooperation and assistance in resolving not only the instant concern, but any future concerns regarding rail-related construction projects including assigned deadlines and would welcome an informal conference with the Ohio Rail Development Commission, Ohio Department of Transportation, and the Commission toward resolving these concerns.

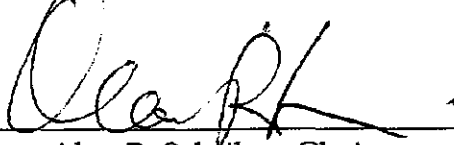
- (7) The Commission recognizes that at times and for various reasons, a need for an extension of time for the completion of a grade crossing project may arise. The Commission's policy with respect to extensions of time in grade crossing project cases requires that any railroad requesting up to a 30-day extension of time to complete a railroad crossing improvement project, must file its request in Docketing at least five working days in advance of the scheduled deadline. Further, any request must include a statement setting forth the reasons prompting the request, the time within which the project will be completed, and include the reasons why the request could not have been filed earlier. We acknowledge that, in this case, NS did not become aware of the need for an extension of time until after the deadline for a timely request had passed. We also acknowledge that, once NS learned of the problem, it appraised staff and worked to complete the project as close to the original deadline as possible. The notice set forth in finding 8 of the June 3, 2009 entry was merely to serve as a reminder that grade crossing improvement projects are to be completed, absent extraordinary circumstances, in the time set forth by the Commission and that any railroad failing to comply with a Commission order is subject to a civil forfeiture. NS's application for rehearing is denied.

It is, therefore,

ORDERED, That NS's application for rehearing be denied. It is, further,

ORDERED, That copies of this entry on rehearing be served upon parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

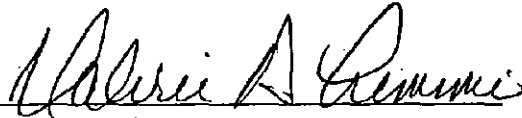


Alan R. Schriber, Chairman



Paul A. Centolella

Ronda Hartman Fergus



Valerie A. Lemmie



Cheryl L. Roberto

SEF:ct

Entered in the Journal

JUL 23 2009



Renee J. Jenkins
Secretary