

BOSTON AND MAINE CORPORATION, DEBTOR
ROBERT W. MESERVE AND BENJAMIN H. LACY, TRUSTEES

J.
Manchester
1/14

CONTRACT BUREAU TRANSMITTAL MEMO

DATE MAY 24 1979

FROM: L. R. Mattice
Director-Contract Bureau

TO: Messrs. S. B. Culliford
P. W. Carr
J. J. Nee
D. J. Hughes

Boston Div. Supt. ~~G. F. Gallagher~~ *E. R. Towle*
~~N. E. Div. Supt. W. V. Furey~~
Agent-*Manchester, N.H.*

Attached for your information is copy of numbered document checked below.

CONTRACT #60263-A

DEED #

CORRESPONDENCE RE CONTRACT #

OPENING NOTICE SENT

CLOSING NOTICE SENT

2014

H-6

CRYSTAL LAUNDRY AND DRY CLEANERS, INC.

Petition for a private grade crossing over the Valley Street track of the Boston and Maine Corporation in the City of Manchester.

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Appearances: for the petitioner, Robert F. McNeil; for the Boston and Maine Corporation, Gary Hicks.

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REPORT ON REHEARING

The Report on the original case and an Order providing for a private crossing was issued August 1, 1978. A motion for rehearing was filed on behalf of the Boston and Maine Corporation on August 18, 1978, and on August 22, 1978, Order No. 13,295 was issued granting the motion for rehearing. Notices were issued on August 24, 1978, providing for rehearing to be held on October 20, 1978, but upon request of counsel for petitioner, it was postponed. Arrangements were set for the rehearing on December 7, 1978, following which it was postponed again on request of counsel for the petitioner. Subsequent to this, a rehearing was held on March 19, 1979, at Concord at the office of the Commission.

The Motion for Rehearing sets forth three grounds as follows:

1. Said Order exceeded the statutory authority granted the Public Utilities Commission under RSA 373:1 in that the railroad is under no duty to construct a private crossing unless the property is divided by or separated from a public highway.
2. Said Order was incomplete in that it failed to assess maintenance responsibility and costs for the crossing and for any necessary signs or signals to Crystal Laundry and Dry Cleaners, Inc. The failure to assess maintenance responsibility and costs of the crossing and any necessary signs or signals to the owner was an abuse of discretion and against the weight of evidence.
3. Said Order was against the weight of the evidence and an abuse of discretion by the Commission in that it was

based on an erroneous finding of suitability for the additional crossing on Valley Street.

In support of the first exception, it is argued that the Commission is without authority to require a private crossing when there is presently access to the property by a public highway, and in this particular instance, it is pointed out that access is readily obtainable from both Union Street on the west and Merrill Street on the south.

RSA 373:1 provides that: "It shall be the duty of every railroad to provide suitable crossings, stations and other facilities for the accommodation of the public, and suitable gates, crossings, cattle passes and other facilities for the accommodation of persons whose lands are divided or are separated from a highway by a railroad." The railroad corporation takes the position that, since the track parallels only the northerly border of the property, it is not reasonable to require access to a third side of the lot. In support of its position, photographs were introduced to indicate that there is no impediment to provide such access as may be necessary from both sides of the property bordering Union and Merrill Streets.

Exception No. 2 indicates that the original order failed to assess responsibility for the costs of maintenance of the crossing and for any necessary signs or signals. It is claimed that this is abuse of discretion and is against the weight of the evidence. In arguing this exception, counsel for the railroad also includes failure to require liability insurance on the part of the property owner.

Exception is also taken to language contained in the original report which states: "Without such a facility, (crossing) it will be impossible to develop this lot for the purpose intended." It is correctly pointed out by counsel for petitioner that this language was used in summing up the position of the petitioner and was not included as a conclusion of the Commission. It is agreed that a better choice of language might have been the use of the word "impractical" instead of "impossible."

The third exception is a claim that the original order was against the weight of the evidence and an abuse of discretion by the Commission in that it was based on an erroneous finding of suitability for the additional crossing on Valley Street.

There were eight photographs submitted at the rehearing taken from various positions near the intersection of the highways bordering the lot which is proposed to be developed. All of these photographs, taken a few days before the rehearing, reveal an undeveloped lot on which there are presently no buildings, although some advertising signs appear to be located thereon or immediately adjacent thereto.

Information was presented concerning the condition of the side track which was not entered at the original hearing. The track parallels Valley Street on a twenty-foot right-of-way just south thereof. This track leads from the Manchester-Portsmouth Branch near its intersection with Valley Street and continues in a generally westerly direction to a point some 300 feet west of Union Street. It crosses Wilson, Lincoln, Maple, Beech, Union and Pine Streets. The record is silent concerning any positive use of the track west of the Agway property which is just east of the land of the petitioner, even though the railroad witness present offered no information as to the frequency of use, or the location of users or any freight service on this track, west of the Agway property. A witness for the petitioner indicates that an examination of the tracks reveals that the tops of the rails are well rusted, that there is a growth of grass and weeds with no indication of any crushed material on or about the track. Near the end of this spur is an advertising sign mounted on two pipes and stretched across the track at a point approximately 300 feet west of Union Street.

This witness also testified that he has not seen any evidence of use nor any freight cars spotted on any portion of the track west of the Agway property. It is generally conceded, however, that this is an industrial area and is a likely location for future business that might wish to use rail facilities.

As outlined in the original report, the proposed development has been placed before the Manchester Planning Board and has been approved by that Board. There is no evidence that the development of the property will result in any use of railroad freight service.

The original report contained the following language: "The record is silent as to the number of train movements made on this spur, but it is reasonable to assume that it is available for use whenever the demand exists for the service. The fact that the number of train movements has not been submitted may be due to very infrequent use in which case it would seem unfair to deprive the improvement of land usage simply because a spur track exists adjacent to the property. Under the circumstances, however, it does not appear within reason to require the railroad to provide such a crossing at its own expense."

Accordingly, with this decision, the Boston and Maine Corporation was required to construct a private crossing for the benefit of the petitioner, but the cost of the construction, together with its approaches, would be borne by the petitioner.

The physical characteristics of the track are such that a descending grade of 2½% exists east of Beech Street, which is about 491 feet east of the petitioner's property. A runaway car on this section of the line might well continue into this area. If such should happen, it could develop very serious consequences. However, this would not constitute any greater hazard to a private crossing than to that which now exists with respect to Beech, Union, and Pine Street crossings.

The question of protecting the crossing and the cost of the same is raised as not having been dealt with in the original report. This is a spur track and carries nothing but switching movements with respect to railroad service. Since it is customary to protect all train movements by a member of the crew, any such crossing authorized should be protected in this manner. The cost

of the same would be very difficult to determine especially when there is no evidence presented of any train movements over the area where this crossing is petitioned to be located.

The railroad's attorney suggests in argument that the Commission should require petitioner to provide liability insurance if a private crossing is to be required. While we are concerned with safety at all private and public crossings, there is no statutory authority to require liability insurance; thus this problem is one which must be a concern of the petitioner and the railroad corporation.

No conditions were imposed in the original order relative to maintaining the crossing because of the language in RSA 373:1 which sets forth that it is the duty of the railroad. Based upon all of the facts presented at the rehearing, it would appear that the original order should be affirmed. However, the legal interpretation of the statute must be considered in the light of the argument raised at the rehearing. If the interpretation of this statute must be in its narrowest form, that it is the duty of the railroad corporation to provide a suitable crossing for persons whose land is separated from a highway by a railroad only when there is no other access to the land, than the petitioner is not legally entitled to a crossing because there is access to the property from both Union and Merrill Streets.

If the statute can be interpreted to require a private crossing when access is desired from a public highway from which the land is separated by a railroad, then the Commission does have the authority to require such a crossing, and it is the duty of the railroad corporation to provide it. It is possible, and there have been previous cases before the Commission in which more than one private crossing has been authorized to properly provide the land owner with necessary access. (Plymouth Furniture Company v Boston and Maine Corporation 49 NHPUC 89 and 54 NHPUC 375)

We believe that the broad interpretation of the statute is intended; and, since the property in question is separated from Valley Street by the railroad spur track, if reasonable use of the property requires a crossing, it is necessary that a suitable crossing be provided. The proposal has been placed before the Planning Board of the City of Manchester and has been approved.

The development of the land as intended requires a crossing; and, since there is no evidence that such a crossing will be unsafe or will constitute an undue hazard to either the railroad or the public, the Commission is of the opinion that it should be provided.

Because of the legal interpretations of the statutes involved, a request was submitted to the Office of the Attorney General as to the authority of the Commission as to whether a railroad corporation can be required to provide a private crossing where other access to the property is available without a crossing.

In response to this request, an opinion has been received. It reads in part as follows:

A "'suitable crossing' is one reasonably safe and convenient for the purpose at a location to be determined according to the use made of the land..." Id. "The question of the location... is to be determined by the application of the doctrine of reasonable use. The convenience of all parties is to be considered in determining this question." (Citations omitted) Costello v. Railway, 70 NH 403 (1900). Thus, a railroad has a duty to provide a crossing from a highway to a parcel of land when the crossing is necessary to the use of that parcel by the landowner, and requiring a crossing is reasonable when all of the benefits and burdens upon both the railroad and the landowner are considered.

The fact that a parcel of land is directly accessible from a highway without crossing the railroad, as in this case, is not dispositive of the question, but is merely a factor to be considered in determining necessity and in balancing the respective benefits and burdens. Bolger v. Railroad, 82 NH 372, 379 (1926). In the instant case, Crystal has the burden of proving that access to the subject parcel of land from Valley Street across the railroad, in addition to the existing access to that parcel from Union Street and Merrill Street, is necessary to the reasonable

use of the parcel of land by Crystal, and that, if necessary, the burden upon Boston and Maine in constructing and maintaining that crossing, is outweighed by the benefit conferred upon Crystal.

It should be noted that there is no provision for the apportionment of cost for private crossings. If a crossing is necessary, the landowner has a right to that crossing, and the railroad must provide it at the expense of the railroad.

Upon consideration of all the facts and upon consideration of the opinion of the Attorney General, the Commission is of the opinion that the petitioner is entitled to a crossing as authorized in our original report. However, the original report and order must be amended to conform to the interpretation of the statute to eliminate the provisions which require the petitioner to assume the cost of the crossing. Our order will issue accordingly.

J. Michael Love
Chairman

Francis J. Riordan _____, Commissioner

Malcolm J. Stevenson _____, Commissioner

Concurring:

May 17, 1979

DT 78-28

CRYSTAL LAUNDRY AND DRY CLEANERS, INC.

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S U P P L E M E N T A L O R D E R N O. 13,628

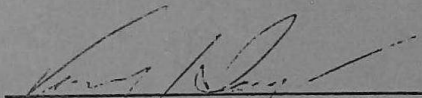
Upon consideration of the foregoing report, which is made a part hereof; it is

ORDERED, that the Boston and Maine Corporation be, and hereby is, directed to construct the private crossing over the Valley Street spur track adjacent to the Crystal Laundry and Dry Cleaners, Inc. in accordance with plans on file with the office of this Commission, marked DT 78-28; and it is

FURTHER ORDERED, that all train movements passing over the crossing authorized above shall be protected by making a full stop and flagged by a member of the crew before passing over the crossing; and it is

FURTHER ORDERED, that Order No. 13,253, dated August 1, 1978, be, and hereby is, revoked.

By order of the Public Utilities Commission of New Hampshire this seventeenth day of May 1979.


Vincent J. Iacopino
Executive Director
and Secretary