

No. SC84342

IN THE MISSOURI SUPREME COURT

**STATE OF MISSOURI ex rel. MISSOURI DIVISION OF MOTOR
CARRIER AND RAILROAD SAFETY,**

Relator,

v.

THE HONORABLE DAVID W. RUSSELL, CIRCUIT JUDGE

Respondent.

**Original Proceeding in Prohibition Against the Circuit Court of Clay
County, Missouri, the Honorable David W. Russell, Circuit Judge**

BRIEF OF RELATOR DIVISION OF RAILROAD SAFETY

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JURISDICTIONAL STATEMENT

This is an original proceeding in prohibition under Rule 97 and Rules 84.22 through 84.26, inclusive, to determine whether the Circuit Court of Clay County has subject matter jurisdiction over Elizabeth Roe's and Joe Wyant's Petition for Damages (Wrongful Death) against the Missouri Division of Motor Carrier and Railroad Safety. On June 25, 2002, this Court issued its amended preliminary writ of prohibition. Therefore, this Court has jurisdiction under Article V, § 4, cl.1 of the Missouri Constitution.

STATEMENT OF FACTS

Elizabeth Roe and Joe Wyant filed a Petition for Damages (Wrongful Death) against the City of Excelsior Springs, Missouri, the Union Electric Company, I & M Rail Link, the Missouri Department of Transportation, and the Missouri Division of Motor Carrier and Railroad Safety. (Relator's Ex. B ¶¶ 2–6.)

Roe and Wyant alleged that on September 19, 1998, at the McLeary Road railroad crossing in Clay County, Missouri, their son was electrocuted when the motor vehicle in which he was a passenger traveled over the railroad crossing and the road on either side of it and “encountered” the dangerous condition of the crossing and the road — broken asphalt, potholes, uneven and rough surfaces, loose gravel, broken and loose railroad ties, uneven railroad tracks, and a steep downhill slope. (Relator's Ex. B. ¶ 7.) They alleged that the vehicle went out of control, crossed into and through the opposite lane, struck a guardrail on a bridge, left the road, struck and broke an electric transmission pole, spun around, and came to rest upside down with an electrified transmission line lying across the vehicle. (Relator's Ex. B ¶¶ 7–9.) They alleged that there were insufficient warning signs to notify the public of “these dangerous conditions.” (Relator's Ex. B. ¶ 7.)¹

¹Flashing light signals were ordered to be installed at the McCleary Road

And they alleged that the guardrails on the bridge, the bridge itself, the electric light pole, and the electric transmission lines were unsafe. (Relator’s Ex. B ¶¶ 8, 9.)

Roe and Wyant alleged that the railroad “owns, leases, or otherwise controls” the railroad tracks at McLeary Road. (Relator’s Ex. B ¶ 3.) But they did not allege who owns, leases, or controls McLeary Road. And they did not allege who created the dangerous condition at the McLeary Road crossing. They did allege, however, that every defendant — the city, the electric company, the railroad, the Department of Transportation, and the Division of Railroad Safety — had notice of the dangerous condition of the crossing in sufficient time to correct it before the accident occurred. (Relator’s Ex. B ¶¶ 10, 11, 12, 13, 14.)

crossing in the mid–1980s. (Relator’s Ex. E; Pet. Writ Prohibition ¶ 6; Answer ¶ 6). At that time, the Missouri Highway and Transportation Commission, which administers the Department of Transportation, the city, and the railroad agreed that the city would maintain the road and that the railroad would maintain the crossing. (Relator’s Ex. F; Pet. Writ Prohibition ¶ 7; Answer ¶ 7.) *See* § 226.005, RSMo 2000; *Martin v. Missouri Highway and Transp. Comm’n*, 981 S.W.2d 577, 579 n.1 (Mo. App., W.D. 1998).

Roe and Wyant alleged that Railroad Safety was created to exercise regulatory and supervisory powers, duties, and functions relating to transportation activities, including those of railroad corporations, and has the exclusive power and duty to recommend, regulate, establish, and enforce “minimum standards” for the “construction, maintenance, alteration, and abolition” of railroad crossings.

(Relator’s Ex. B ¶ 5.)

For their cause of action against Railroad Safety, Roe and Wyant alleged that the Division had a duty to require I & M and the City to “construct and maintain a good and sufficient” crossing at McLeary Road and to warn of any dangerous condition at that crossing. (Relator’s Ex. B ¶5.) They alleged that Railroad Safety negligently failed to require I & M and the City to construct and maintain the railroad crossing and its approaches in a safe condition or a “good and sufficient condition,” to make or enforce “rules and regulations and minimum standards” for the construction and maintenance of the crossing, to “alter or abolish” the crossing to remedy its unsafe condition, and to require I & M and the City to warn of the dangerous condition of the crossing. (Relator’s Ex. B ¶ 13.) Finally, Roe and Wyant alleged that Railroad Safety knew or should have known of the dangerous condition of the McLeary Road crossing in time to remedy it. (Relator’s Ex. B. ¶ 13.)

In response, Railroad Safety moved to dismiss the petition. (Relator's Ex. C.) For dismissal, the Division argued that the petition is barred by sovereign immunity. (Relator's Ex. C at 2–4.) The circuit court denied the motion. (Relator's Ex. H., Docket Entry 11/28/01.)²

Railroad Safety filed a petition for writ of prohibition in the court of appeals, which denied the petition. (Relator's Ex. A.) Asserting that it has sovereign immunity from liability and suit, Railroad Safety filed a petition for writ of prohibition in this Court, which entered its amended preliminary order on June 25, 2002. (Pet. Writ Prohibition ¶ 12.) The circuit judge answered and denied that Railroad Safety has sovereign immunity. (Answer ¶ 12.)

²The circuit court sustained the Department of Transportation's motion to dismiss based on sovereign immunity and dismissed the Department from the case. (Relator's Exs. G & H, Docket Entry 11/28/01.)

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Introduction

Elizabeth Roe and Joe Wyant brought a wrongful death action against the City of Excelsior Springs, Missouri, the Union Electric Company, I & M Rail Link, the Missouri Department of Transportation, and the Missouri Division of Motor Carrier and Railroad Safety for the death of their son at the McLeary Road railroad crossing in Clay County, Missouri. Roe and Wyant alleged that their son was electrocuted when the motor vehicle in which he was a passenger traveled over the railroad crossing and “encountered” the dangerous condition of the crossing’s surface, ties and tracks, and slope. They alleged that Railroad Safety was negligent in not requiring I & M and the City to construct and maintain the crossing in a safe condition, to alter or abolish the crossing, or to warn of its dangerous condition. And they alleged that Railroad Safety had notice of the dangerous condition in sufficient time to correct it before the accident occurred.

After the circuit court overruled Railroad Safety’s motion to dismiss because of sovereign immunity, Railroad Safety sought a writ of prohibition. The circuit court denied that Railroad Safety has sovereign immunity because of the “ultimate facts” that Roe and Wyant had alleged. The Western District of the Court of

Appeals denied Railroad Safety's petition for writ of prohibition. This court issued a preliminary writ.

Summary of the Argument

The Division of Railroad Safety has sovereign immunity from liability and suit for a dangerous condition of property. The ultimate facts alleged in the petition are nothing more than Railroad Safety has rule making and quasi-judicial power over railroad crossings in Missouri and was negligent in not exercising that power over the McLeary Road crossing. Railroad Safety does have investigative, rule making, quasi-judicial, and enforcement power over railroad crossings in Missouri. But any failure adequately to regulate another's property cannot create a dangerous condition of property, even if that property were to be deemed the state's property. Intangible acts concerning property, such as a failure to supervise or monitor it or to warn of its dangerous condition, do not create a dangerous condition.

The allegation that Railroad Safety had notice of the dangerous crossing in sufficient time to take corrective action also is nothing more than an allegation of a failure to do an intangible act, to regulate — to issue an order for I & M and the City to correct the condition of the McLeary Road crossing. And enforcement of such a corrective order, if necessary, would be unusually difficult.

For Railroad Safety to take effective corrective action over the McLeary Road crossing, it would have to prosecute, prevail in, and conduct two quasi-judicial proceedings and to prosecute and prevail in a third, judicial proceeding. Not until then would any Railroad Safety order have coercive effect. This Court should not hold Railroad Safety liable in tort for failing to conduct its investigative, quasi-judicial, and enforcement functions so as to prevent an accident before it occurs when enforcement of its orders is so difficult.

Finally, Railroad Safety has exercised its rule making power over railroad crossings and railroad tracks in Missouri.

POINT RELIED ON

The circuit court erred when it denied the Division of Railroad Safety's motion to dismiss because Railroad Safety has sovereign immunity from liability and suit in that any Railroad Safety failure adequately to regulate another's property, such as the McLeary Road railroad crossing, cannot create a dangerous condition of property.

Alexander v. State, 756 S.W.2d 539 (Mo. banc 1988)

State ex rel. Missouri Div. Transp. v. Sure-Way Transp., Inc.,

884 S.W.2d 349 (Mo.App., W.D. 1994)

Tillison v. Boyer, 939 S.W.2d 471 (Mo.App., E.D. 1996)

Tyler v. Housing Auth. of Kansas City, 781 S.W.2d 110

(Mo.App., W.D. 1989)

§ 389.610, RSMo 2000

ARGUMENT

The circuit court erred when it denied the Division of Railroad Safety's motion to dismiss because Railroad Safety has sovereign immunity from liability and suit in that any Railroad Safety failure adequately to regulate another's property, such as the McLeary Road railroad crossing, cannot create a dangerous condition of property.

The circuit judge in his answer to the petition for writ of prohibition denies that Railroad Safety has sovereign immunity because of "the ultimate facts" alleged in the petition. (Answer ¶ 12.) Those ultimate facts are nothing more than Railroad Safety has rule making and quasi-judicial power over railroad crossings in Missouri and was negligent in not exercising that power over the McLeary Road crossing. If Railroad Safety were negligent in exercising its regulatory power, and even if the McLeary Road crossing were the state's property, Railroad Safety still would have sovereign immunity.

A. Railroad Safety has only regulatory power and jurisdiction over railroad crossings and tracks

In July of 2002, all the powers, duties, and functions of the Division of Motor Carrier and Railroad Safety as they relate to rail transportation activities were

transferred to the Department of Transportation. *See* S.B. 1202, 91st Gen. Assembly, 2nd Reg. Sess. (enacted 2002). In July of 1997, Railroad Safety was originally established as part of the Department of Economic Development. *See* §§ 622.010, 622.015, RSMo 2000. Before then, Railroad Safety was known as the Transportation Division, which in 1986 assumed all the powers, duties, and functions performed by the Public Service Commission relating to transportation activities. *See* § 622.010, § 622.015, RSMo 1986 (repealed). Railroad Safety’s administrative law judges have assumed all the duties performed by the Commissioners of the Public Service Commission in their quasi-judicial capacity relating to transportation activities. *See* § 622.030.1, RSMo 2000. S.B.1202 transfers Railroad Safety’s administrative law judges to the Administrative Hearing Commission.

Railroad Safety has rule making power. Railroad Safety “shall make and enforce reasonable rules and regulations pertaining to the construction and maintenance of all public grade crossings.” § 389.610.3, RSMo 2000; A1. Railroad Safety did this in its Grade Crossing Construction and Maintenance regulations. *See* 4 CSR 265–8.130. And Railroad Safety “shall make and enforce reasonable rules and regulations establishing minimum standards of track, bridge

and roadway inspection.” § 389.992, RSMo 2000. Railroad Safety did this in its Track and Railroad Workplace Safety Standards. *See* 4 CSR 265–8.100.

Railroad Safety has “exclusive” quasi-judicial power to make orders over the installation, operation, maintenance, apportionment of expense, and use of warning devices of railroad crossings, over the alteration and abolition of railroad crossings, and over how the expense of constructing, installing, altering, abolishing, or maintaining railroad crossings shall be apportioned between railroads and the public entity in interest. *See* § 389.610.4–.6, RSMo 2000; S.B. 1202; A2–A3. This power is “exclusive” in the sense that Railroad Safety’s authority to regulate grade crossings excludes whatever authority other public entities may have. In other words, there is “a single regulatory source for construction and allocation of costs,” a single “regulatory mechanism for ordering the upgrading of crossings.” *Alcorn v. Union Pacific R.R. Co.*, 50 S.W.3d 226, 235 (Mo. banc 2001).

Railroad Safety assumes “jurisdiction” over a railroad crossing only when it has issued a “particular order” with respect to that crossing, for example, that warning devices be installed, and when those devices are “actually installed.” *Alcorn*, 50 S.W.3d at 237. A diagnostic inspection, preliminary determination that warning devices may be appropriate, or even authorization of preliminary engineering work to produce an installation plan and cost estimate is not enough for

Railroad Safety to assume jurisdiction. *See id.* Once Railroad Safety assumes jurisdiction over a particular crossing, the warning devices installed are presumed to be adequate, but the railroad’s duty to exercise reasonable care over the crossing “continues” into the future. § 389.614, RSMo 2000; *see id.* at 235, 237.

To obtain an order from Railroad Safety for warning devices or other safeguards at a railroad crossing, any person or Railroad Safety itself may file an application setting forth the required information. *See* § 622.240, RSMo 2000; 4 CSR 265–2.320.³ A hearing may not be necessary, but if one is held, it has the attributes of a contested case, including examination and cross examination of witnesses, a record, and judicial review. *See* § 622.035, §§ 622.350–622.450, RSMo 2000; 4 CSR 265–2.080–2.150. The same procedure is used for railroad safety matters that do not involve crossings. *See* § 622.240; 4 CSR 265–2.300.

To carry out its rule making and quasi-judicial powers, Railroad Safety has general supervisory power over railroads and may inspect their “property, equipment, tracks and facilities” for “safety, adequacy, and security” and for

³Railroad Safety issued an order in the mid-1980s that flashing light signals be installed at the McLeary Road crossing. (Relator’s Ex. E; Pet. Writ Prohibition ¶ 6; Answer ¶ 6.)

“compliance with all provisions of law, orders and decisions of the division.”

§ 622.250, RSMo 2000; *see also* § 622.260, RSMo 2000. If necessary, Railroad Safety’s rules and quasi-judicial decisions may be enforced through filing a complaint, by any person or by Railroad Safety itself, setting forth any act or failure to act claimed to be in violation of “any provision of law, or of any rule or order or decision of the division.” § 622.320, RSMo 2000; 4 CSR 265–2.070. The proceedings on such a complaint is also a contested case. *See* § 622.035, §§ 622.330–622.450, RSMo 2000; 4 CSR 265–2.080–2.150. Such a complaint and the proceedings on it is the necessary prerequisite to seeking a circuit court injunction to comply with, or a penalty for failure to comply with, a Railroad Safety rule, order, or decision. *See* § 389.998, § 622.290, RSMo 2000; *State v. Carroll*, 620 S.W.2d 22, 23 (Mo.App., S.D. 1981) (enforcing the parallel penalty provision for motor carriers), relying on *State ex rel. Cirese v. Ridge*, 345 Mo. 1096, 138 S.W.2d 1012, 1015–16 (banc 1940).

B. Railroad Safety cannot, through its regulatory power, create a dangerous condition of property that would fall within the state’s waiver of sovereign immunity

The state has waived its sovereign immunity only as to dangerous conditions of property. And inadequate state regulation of another’s property — the only role Railroad Safety has with respect to the McLeary Road crossing — cannot create a dangerous condition.

This Court described two early sovereign immunity decisions as follows:

“Plaintiffs in both cases essentially contended that inadequate supervision by the state created a dangerous condition.” *Alexander v. State*, 756 S.W.2d 539, 542 (Mo. banc 1988). Both cases involved allegations of inadequate supervision of state property — allegations that were insufficient to overcome sovereign immunity.

Kanagawa v. State, 685 S.W.2d 831, 833 (Mo. banc 1985); *Twente v. Ellis*

Fischel State Cancer Hosp., 665 S.W.2d 2, 4–5 (Mo.App., W.D. 1983).

Relying on those two cases, the Western District of the Court of Appeals has held that a public entity is immune from its failure to adequately exercise regulatory authority over another’s property. *See Tyler v. Housing Auth. of Kansas City*, 781 S.W.2d 110, 113 (Mo.App., W.D. 1989). In *Tyler*, federal regulations, handbooks, and inspection manuals and a municipal ordinance required

low-income rental housing that receives rental assistance from the federal government to contain safe heating units, and the agency administering the federal funds to inspect and maintain safe heating units. *Id.* at 111–12. The court held that the cause of action against the public entity “for failure to supervise, control and inspect is barred by governmental immunity.” *Id.* at 113.

The Western District’s decision in *Tyler* is well-reasoned, and this Court should apply that same reasoning here. Though the *Tyler* plaintiff argued that the public entity’s regulatory authority over low-income rental housing gave the entity a property interest in the housing, *see id.* at 112, the court rejected that idea and concluded that the failure to regulate the property of another could not create a dangerous condition. “The property in question in the case at bar was owned by a Mr. and Mrs. White. It was not public property and the only negligence alleged against the housing authority was in its failure to supervise, control and inspect the property.” *Id.* at 113. The court that decided *Tyler* has described it as a “dangerous condition” rather than a “public entity’s property” case.

§ 537.600.1(2), RSMo 2000; *James v. Farrington*, 844 S.W.2d 517, 519 (Mo.App., W.D. 1992).

Relying on *Alexander*, the Eastern District of the Court of Appeals has concluded that a failure to perform “intangible acts” concerning a public entity’s

property, such as a failure to supervise or a failure to warn, does not create a dangerous condition. See *O'Dell v. Missouri Dept. of Corrections*, 21 S.W.3d 54, 58 (Mo.App., E.D. 2000); *Necker v. City of Bridgeton*, 938 S.W.2d 651, 655 (Mo. App., E.D. 1997); *Tillison v. Boyer*, 939 S.W.2d 471, 473 (Mo.App., E.D. 1996). In *O'Dell*, the Department of Corrections' two-year failure to inspect a steam pipe above a visiting room was not sufficient evidence that Corrections created a leak in the pipe, and a water-stained and visibly wet ceiling tile below the pipe was not sufficient evidence that Corrections was on notice of the leaking pipe. See *O'Dell*, 21 S.W.3d 58–59. In *Necker*, a city's failure to supervise and to warn a child at a community center to prevent it falling off a balance beam was not sufficient evidence of a dangerous condition of property. See *Necker*, 938 S.W.2d at 655. And in *Tillison*, an allegation of a failure to warn of a dead tree on a neighbor's property, parts of which had previously fallen onto the defendant's property, did not state a claim for a dangerous condition of property. See *Tillison*, 939 S.W.2d at 472–73. The Eastern District described this Court's decision in *Alexander* as rejecting a claim based on failure to supervise or warn:

The Supreme Court expressly rejected the notion that the failure to perform an intangible act, whether it be a failure to supervise or a failure to warn, could constitute a

dangerous condition of the property for the purpose of
waiving sovereign immunity.

Tillison, 939 S.W.2d at 473. Consequently, even if the McLeary Road crossing were to be deemed the state's property, any Railroad Safety failure to monitor it or warn of its condition cannot create a dangerous condition.

Roe and Wyant's allegations of negligence, which merely track the language of § 389.610, are nothing more than allegations that Railroad Safety failed to perform an intangible act with respect to certain property, that is, it failed to regulate the McLeary Road crossing. They allege that Railroad Safety failed to require I & M and the City to construct and maintain the crossing in a safe condition, to warn of its dangerous condition, or to alter or abolish the crossing. *See* § 389.610.2, .4, .5; A1, A2–A3. And their allegation that Railroad Safety had notice of the dangerous condition of the crossing in sufficient time to take corrective action also is nothing more than an allegation that Railroad Safety failed to regulate. To regulate or to take corrective action, Railroad Safety first would have to take investigative action and then take quasi-judicial action — file an application, hold a hearing, and issue an order. To enforce any order it may issue in the event a party refused to comply, Railroad Safety again would have to take quasi-judicial action — file a complaint, hold a second hearing, and issue a second order — before it

could seek an injunction to enforce its first order through the circuit courts. And in a circuit court, Railroad Safety would have to prove its case a third time. *See State ex rel. Missouri Div. Transp. v. Sure-Way Transp., Inc.*, 884 S.W.2d 349, 353, 353 n.5 (Mo.App., W.D. 1994) (enforcing the parallel penalty provision for motor carriers).

Finally, again tracking the language of the statute, see § 389.610.3 and A1, Roe and Wyant allege that Railroad Safety failed to use its rule making power for construction and maintenance and minimum standards for the McLeary Road crossing. But Railroad Safety has exercised its rule making power with respect to both railroad crossings and railroad tracks and by doing so has taken regulatory action over all crossings and tracks in Missouri, including those at McLeary Road. *See* 4 CSR 265–8.100, 8.130. Administrative rules do not act upon specific crossings or tracks. *See Missouri Nat’l Educ. Ass’n v. Missouri State Bd. of Educ.*, 34 S.W.3d 266, 287 (Mo.App., W.D. 2000); *Missourians for Separation of Church and State v. Robertson*, 592 S.W.2d 825, 841 (Mo.App., W.D. 1979).

For these reasons, Railroad Safety has sovereign immunity from liability and suit.

CONCLUSION

For the reasons stated above, this Court should enter a final order in prohibition directing the circuit court to sustain the Division of Motor Carrier and Railroad Safety's motion to dismiss.

Respectfully submitted,

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I hereby certify that this brief contains the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 4030 words and that the diskettes provided this Court and counsel have been scanned for viruses and are virus-free.

Assistant Attorney General

APPENDIX

389.610. Railroad crossings construction and maintenance, division of motor carrier and railroad safety to have exclusive power to regulate and provide standards – apportionment of cost. – 1. No public road, highway or street shall be constructed across the track of any railroad corporation, nor shall the track of any railroad corporation be constructed across a public road, highway or street, nor shall the track of any railroad corporation be constructed across the track of any other railroad or street railroad corporation at grade or shall the track of a street railroad corporation be constructed across the tracks of a railroad corporation at grade, without having first secured the permission of the division of motor carrier and railroad safety, except that this subsection shall not apply to the replacement of lawfully existing tracks. The division shall have the right to refuse its permission or to grant it upon such terms and conditions as it may prescribe.

2. Every railroad corporation shall construct and maintain good and sufficient crossings and crosswalks where its railroad crosses public roads, highways, streets or sidewalks now or hereafter to be opened.

3. The division of motor carrier and railroad safety shall make and enforce reasonable rules and regulations pertaining to the construction and maintenance of all public grade crossings. These rules and regulations shall establish minimum standards for:

- (1) The materials to be used in the crossing surface;
- (2) The length and width of the crossing;
- (3) The approach grades;
- (4) The party or parties responsible for maintenance of the approaches

and the crossing surfaces.

4. The division shall have the exclusive power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, apportionment of expenses, use and warning devices of each crossing of a public road, street or highway by a railroad or street railroad, and of one railroad or street railroad by another railroad or street railroad. In order to facilitate such determinations, the division may adopt pertinent provisions of The Manual on Uniform Traffic Control Devices for Streets and Highways or other national standards.

5. The division shall have the exclusive power to alter or abolish any crossing, at grade or otherwise, of a railroad or street railroad by a public road, highway or street whenever the division finds that public necessity will not be adversely affected and public safety will be promoted by so altering or abolishing such crossing, and to require, where, in its judgment it would be practicable, a

separation of grades at any crossing heretofore or hereafter established, and to prescribe the terms upon which such separation shall be made.

6. The division shall have the exclusive power to prescribe the proportion in which the expense of the construction, installation, alteration or abolition of such crossings, the separation of grades, and the continued maintenance thereof, shall be divided between the railroad, street railroad, and the state, county, municipality or other public authority in interest.

7. Any agreement entered into after October 13, 1963, between a railroad or street railroad and the state, county, municipality or other public authority in interest, as to the apportionment of any cost mentioned in this section shall be final and binding upon the filing with the division of an executed copy of such agreement. If such parties are unable to agree upon the apportionment of the cost, the division shall apportion the cost among the parties according to the benefits accruing to each. In determining such benefits, the division shall consider all relevant factors including volume, speed and type of vehicular traffic, volume, speed and type of train traffic, and advantages to the public and to such railroad or street railroad resulting from the elimination of delays and the reduction of hazard at the crossing.

8. Upon application of any person, firm or corporation, the division shall determine if an existing private crossing has become or a proposed private crossing will become utilized by the public to the extent that it is necessary to protect or promote the public safety. The division shall consider all relevant factors including but not limited to volume, speed, and type of vehicular traffic, and volume, speed, and type of train traffic. If it be determined that it is necessary to protect and promote the public safety, the division shall prescribe the nature and type of crossing protection or warning device for such crossing, the cost of which shall be apportioned by the division among the parties according to the benefits accruing to each. In the event such crossing protection or warning device as prescribed by the division is not installed, maintained or operated, the crossing shall be closed to the public.