

**BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

A. Edward Schwartz,  
Complainant,

Docket Nos. P-2011-2241780  
C-2011-2237486

v.

**OMNIBUS MOTION TO STRIKE**

Delaware & Hudson Railway Company, Inc.,  
d/b/a Canadian Pacific, and

Pennsylvania Department of Transportation,

Respondents.

Delaware & Hudson Railway Company, Inc., d/b/a Canadian Pacific (“D&H”), by and through its attorneys, hereby moves to strike portions of the pre-filed testimony submitted by Complainant A. Edward Schwartz (“Complainant”) and Respondent Pennsylvania Department of Transportation (“PennDOT”).

**Complainant’s testimony and exhibits**

1. D&H moves to strike Complainant’s Exhibits 7, 8, 8A, 9 and 10. Exhibit 7, the unfiled Court of Common Pleas Complaint and its included exhibits, should be struck on the grounds that it is wholly without relevance to this proceeding. Similarly, Exhibits 8, 8A, 9 and 10, which purport to provide support for Complainant’s claims in his legal action, are not relevant to a determination of the issues that are the subject of this proceeding. Complainant’s private interest in enforcing any claimed rights under the conveyance of real property by his predecessor-in-interest to D&H is wholly outside the purview of this proceeding, which is to determine the *public’s* interest in the maintenance and future disposition of the subject bridge that carries a public highway over the railroad’s tracks. Whether Complainant may or may not

have an enforceable right of action under certain nineteenth century Acts of the Pennsylvania legislature with respect to the 1917 deed will not aid the Commission in reaching a determination regarding the issues before it. Because Complainant's attempt to inject his private legal claims into this proceeding unnecessarily confuses the issues and complicates the Commission's task, Exhibits 7 through 10 should be struck accordingly.

2. D&H moves to strike the following portions of the pre-filed direct testimony of A. Edward Schwartz: Lines 29; the phrase "structurally-significant" in Lines 31 and 32; Lines 35-36; 39-42; 50-51; the last phrase of the sentence on line 52 and concluding on line 53; Lines 66-68; 80-82; 87-98; 100-106; 109-115; 119-128; 131-145; 148-152; and 161-168. The witness's testimony in lines 6-11 do not qualify him as an expert on technical or engineering matters. Consequently, the proffered opinion testimony in Lines 29; the phrase "structurally-significant" in Lines 31 and 32; 35-36; 39-42; 50-51; the last phrase of the sentence on line 52 and concluding on line 53; Lines 87-98; 100-106; 109-112; 119-128; and 148-152 should be struck on the grounds that the witness is not competent to offer an opinion on engineering or technical matters concerning the condition of the bridge. Lines 66-68 should be struck on the grounds that the testimony is merely conjecture and lacks necessary foundation to the extent it is offered as opinion. Lines 80-82 should be struck on the grounds that the testimony misstates the content of the referenced exhibit (PennDOT Exhibit 3). Lines 113-115 should be struck on the grounds that the testimony purports to summarize content of a report that is not admitted into evidence. (This same testimony and Complainant's Exhibit 4 was not admitted on hearsay grounds at the March 22, 2012 hearing.) Similarly, Lines 131-145 should be struck on the grounds that the testimony is hearsay. Finally, Lines 161-168 should be struck on the grounds of relevance and, to the extent that the testimony offers an opinion regarding the legal effect of

certain Pennsylvania statutes and law on Complainant's claim for relief, the testimony is improper argument.

3. D&H moves to strike the following portions of the pre-filed direct testimony of Lawrence M. Ludwig: Lines 15-21, 22-38; 43-56; 63-66; 71-85; 90-128; 128-135; 138-151; 154-158; and 162-163. Lines 15-21 should be struck on the ground of relevance, as the witness's alleged prior litigation against D&H's corporate parent has no bearing on the issues before the Commission. Lines 22-38 concern Complainant's Exhibit 6 and should be struck on the grounds of relevance. Moreover, Lines 33-38 offer a legal opinion as to Complainant's entitlement to relief and should be struck on the grounds that the testimony constitutes improper argument. Lines 43-56, which merely restate the contents of Complainant's Exhibit 8, should be struck on the grounds of relevance and, in the event that Exhibit 8 is admitted into evidence, should be struck on the grounds that the document itself is best evidence and the testimony is therefore needlessly cumulative. Lines 63-66, 71-85, and 90-128, which claim to describe the content of Complainant's Exhibits 8A, 9 and 10 respectively, should be struck on the grounds of relevance and, in the event that the exhibits are admitted into evidence, on the grounds that the documents themselves are best evidence and the testimony is therefore needlessly cumulative. Further, Lines 63-66 offer a legal opinion in the guise of summarizing the exhibit and should be struck on the additional ground that the testimony is improper argument. Lines 128-135, 138-151, and 154-158 offer various legal opinions as to Complainant's entitlement to relief and should be struck on the grounds that the testimony constitutes improper argument. Finally, Lines 162-163 should be struck on the grounds that the testimony refers to documents not admitted into evidence and the witness has not established personal knowledge of facts to support his testimony.

4. D&H moves to strike Line 13 of the pre-filed rebuttal testimony of Lawrence M. Ludwig on the grounds that the witness has not established personal knowledge of facts to support his testimony and the testimony is therefore merely the naked assertion of a legal conclusion.

**PennDOT's testimony and exhibits**

5. D&H moves to strike PennDOT Exhibits 10 and 11 on the grounds of relevance. Neither the June 11, 1951 Order nor the April 22, 1987 Order of the Public Utilities Commission have any bearing on the Commission's determination in this case. Neither of the orders purport to have general application to every bridge carrying road traffic over D&H's railroad line in Pennsylvania and both orders predate the November 2, 1999 Cooperation Agreement by several years. D&H maintains (with PennDOT's apparent concurrence through its submission of Debbie A. Noone's testimony) that the Cooperation Agreement controls the allocation of maintenance responsibilities for the subject bridge vis-à-vis D&H and PennDOT. Accordingly, both exhibits should be struck as neither exhibit is relevant or helpful to the Commission's task in this matter.

6. D&H moves to strike Page 7, Lines 17 and 19 of the pre-filed direct testimony of Gerard Babinski on the grounds that the witness has provided no foundation for the legal opinion offered regarding ownership of the subject bridge.

7. D&H moves to strike portions of the pre-filed direct testimony of Debbie A. Noone. Page 4, Line 14 and Page 7, Lines 18 and 20 should be struck on the grounds that the witness has provided no foundation for the legal opinion regarding ownership of the subject bridge. Page 4, Lines 20-22 and Page 5, Lines 3-5 describe PennDOT Exhibits 10 and 11 respectively and should be struck on the grounds of relevance. Page 5, Lines 7-9 should be struck on the grounds that the witness lacks qualification either for the legal opinion regarding

ownership of the bridge or for the legal effect of the two unrelated PUC rulings with respect to the bridge that is the subject of this proceeding. The phrase “acknowledging maintenance responsibility” on Page 5, Line 16 should be struck on the grounds that the testimony mischaracterizes the content of PennDOT Exhibit 13 and on the grounds that the document itself is the best evidence. Page 6, Lines 1-2 should be struck on the grounds that the testimony mischaracterizes the content of PennDOT Exhibit 12 and on the grounds that the document itself is the best evidence.

WHEREFORE, for the foregoing reasons D&H respectfully requests that the Public Utilities Commission strike the aforementioned testimony and exhibits.

Respectfully submitted,

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Dated: May 21, 2013

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 relating to service by a party.

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Dated this 21 day of May, 2013.

/s/ Joseph A. O'Brien  
(Signature)