



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

May 28, 2013

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

RE: *Pittston Township v. RBMN Co.*
C-2011-2274074

Dear Secretary Chiavetta:

Enclosed for filing please find *Reply Exceptions of the Commonwealth of Pennsylvania, Department of Transportation*, in the above-captioned matter

I hereby certify that a copy has been sent to all parties of record as indicated on the Certificate of Service.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Nicholas D. Mertens".

Nicholas D. Mertens
Assistant Counsel

Enclosures

220/NDM/aca

cc: Ember S. Jandebaur, Administrative Law Judge
Parties of Record
Mark Chappell, P.E., Chief, Utilities and Right-of-Way Division, 7th Floor
Joseph Strok, Grade Crossing Engineer, District 4-0

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PITTSTON TOWNSHIP	:	Docket Number
	:	
v.	:	C-2011-2274074
	:	
READING BLUE MOUNTAIN AND NORTHERN RAILROAD	:	Filed Electronically
	:	

**REPLY EXCEPTIONS OF THE COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION**

AND NOW, comes the Commonwealth of Pennsylvania, Department of Transportation (“Department”), by and through its counsel, Jason D. Sharp, and offers the following Reply to the Exceptions filed by the Reading Blue Mountain and Northern Railroad (“Reading”), to the Recommended Decision issued by the Administrative Law Judge Ember S. Jandebaur on April 24, 2013:

I. BACKGROUND

On or about November 10, 2011, Pittston Township, Luzerne County, filed a Formal Complaint against Reading alleging that an at-grade crossing, owned and operated by Reading, “has fallen into a state of disrepair and needs to be rebuilt” (Complaint ¶ 3). On March 2, 2012, the Commission sent notice to the parties of record, including Reading, scheduling an initial hearing for May 1, 2012 (Hearing Notice, March 2, 2012). The date of the initial hearing was subsequently changed to June 20 and 21, 2012 (Hearing Cancellation/Reschedule Notice, April 6, 2012). On June 20, 2012, the initial hearing was conducted; however, counsel for Reading failed to appear (Recommended Decision {R.D.}, pg. 3) (Hearing Transcript, pg. 5, lns. 1-5, June 20, 2012). Judge Jandebaur contacted Reading’s counsel, Paul S. Ober, during the hearing. Mr. Ober informed the Judge that Reading did not plan to appear and that he was directed not to defend the matter at the hearing (Hearing Transcript, pg. 5, lns. 2-5, June 20, 2012). Reading’s failure to appear caused the Judge to find a lack of a complete record, and a further hearing was scheduled for January 8, 2013 (Hearing Notice, Dec. 11, 2012).

On or about January 7, 2013, counsel for the Complainant, Pittston Township, requested an Order continuing the hearing for thirty (30) days to allow the parties to formalize a stipulation of settlement resolving the present matter. Judge Jandebaur granted the motion and rescheduled the January 8, 2013 hearing to February 4, 2013 (Hearing Cancellation/Reschedule Notice, Jan. 8, 2013). Unfortunately, settlement discussions broke down and a further hearing was necessary. At the February 4, 2013 hearing, counsel for Reading failed to appear (R.D., pg. 3). Judge Jandebaur noted that the Commission did not receive a returned copy of the notice and therefore presumed that Reading received proper notice (R.D., pg. 3). All other parties of record received the notice and appeared at the hearing (Hearing Transcript, pg. 7, lns. 8-21, pg. 9, lns. 8-13, Feb. 4, 2013). In fact, undersigned counsel noted that Reading was advised of the upcoming hearing during the parties' settlement discussion, and as of at least Saturday, February 2, 2013, Wayne Michel, president of Reading, was aware of the matter (Hearing Transcript, pg. 10, lns. 6-25, pg. 11, lns. 1-3, Feb. 4, 2013). Additionally, Judge Jandebaur took notice that both Wayne Michel, president of Reading, and Reading's counsel had been on notice of the February 4, 2013 hearing (Hearing Transcript, pg. 13, lns. 5-10, Feb. 4, 2013).

Judge Jandebaur issued her Recommended Decision on April 24, 2013 (R.D., pg. 14), finding, *inter alia*, that Reading has failed to maintain its facilities in smooth and satisfactory condition pursuant to a prior Commission order (R.D., pg. 12) and allocated the cost of a replacement crossing to Reading (R.D., pg. 13). The Department filed its Exceptions to the Recommended Decision on May 13, 2013. Reading filed its Exceptions on May 14, 2013. Pursuant to 52 Pa. Code § 5.535, the Department is filing its Reply Exceptions.

II. READING RECEIVED SUFFICIENT NOTICE OF THE HEARING AND RECEIVED DUE PROCESS.

Reading alleges that it failed to receive proper notice of the February 4, 2013, rescheduled hearing in the present matter (Reading's Exceptions, ¶ 9). It is further alleged that, due to the lack of notice, the issuance of the Recommended Decision "constitutes a denial of RBMNJ's (sic) due process rights on the part of RBMN to be heard and articulate its position under both the United States and Pennsylvania Constitution" (Reading's Exceptions, ¶ 13). Reading requests that a new hearing be scheduled allowing them to participate.

It is well established that the Pennsylvania Public Utility Commission (“Commission”) is “required to provide due process to the parties appearing before them.” *Schneider v. Pa. Pub. Util. Comm.*, 479 A.2d 10, 15 (Pa. Cmwlth. 1984). However, due process is sufficient “when the parties are afforded notice and the opportunity to appear and be heard.” *Id.* In the present context, “once timely notice of a hearing and the opportunity to be heard [has] been provided, it is the responsibility of the parties to be present and participate in the hearing.” *Mumma v. PPL Electric Utils Corp.*, Docket No. C-00014869 (Commission Opinion and Order, Jan. 24, 2002). The Public Utility Code and the Commission’s regulations provide that a party who fails to appear and defend, at a conference or hearing, is “deemed to have waived the opportunity to participate in such conference or hearing.” 66 Pa. C.S. § 332(f); 52 Pa. Code § 5.245.

Reading argues that proceeding with the further hearing on February 4, 2013, constituted a violation of its due process rights under both the federal and state Constitutions (Reading’s Exceptions ¶ 13). However, the argument is mislaid; Reading can only claim a lack of due process if it did not receive notice and an opportunity to be heard on the issue in the case. Here, Judge Jandebour determined that Reading received notice of the hearing and thus its opportunity to proceed was preserved. This determination was neither unreasonable nor an abuse of discretion, and her decision should be adopted by the Commission.

Commission practice clearly demonstrates that the Commonwealth’s long standing law, known as the “mailbox rule,” applies to Commission proceedings. See *Laughner v. Duquesne Light Co.*, 2013 Pa. PUC LEXIS 82 (Initial Decision, March 14, 2013); *Dennis v. Columbia Gas of Pa., Inc.*, 2013 Pa. PUC LEXIS 71 (Initial Decision, March 12, 2013) (affirmed by Commission on April 30, 2014, PUC Docket No. F-2012-2335983). “One can assume that notices sent in the ordinary course of business are received by the addressee.” *App. of Empire Ambulance, Inc.*, 2012 Pa. PUC LEXIS 1593, *7 n.2 (Commission Opinion and Order, Sept. 26, 2012). Precedent clearly establishes that “proof of mailing raises a rebuttable presumption that the mailed item was received and it is well-established that the presumption under the mailbox rule is not nullified solely by testimony denying receipt of the item mailed.” *Pa. Dep’t of Transp. v. Grasse*, 606 A.2d 544, 545 (Pa. Cmwlth. 1991). See *Berkowitz v. Mayflower Sec., Inc.*, 317 A.2d 584, 585 (Pa. 1974) (a rebuttable presumption of receipt is proper upon evidence that letter was mailed); *Meierdierck v. Miller*, 147 A.2d 406, 408 (Pa. 1959) (“depositing a properly addressed prepaid letter in the post office raises the presumption that it reaches the

destination by due course of the mail, and mailing a letter in such a way is prima facie evidence that it was received by the persons to whom it was addressed”). While this presumption is not absolute, a mere denial of receipt is insufficient to defeat the presumption. *Id.*

In the present matter, the scheduling staff received no return mail for the Office of Administrative Law Judge (R.D., footnote 1). Additionally, it was reasonable for Judge Jandebour to presume that Reading received notice, as the record reflects that Reading has received prior notices at this same address. Just as in the present matter, in both *Laughner* and *Dennis*, proper notice was sent to all of the parties of record via first-class mail pursuant to the Commission’s Rules and Regulations. Additionally, the Office of Administrative Law Judge never received a copy of the notice as returned mail by the United States Postal Service in either case. In addition, all of the other parties in the matter received the notice, further bolstering the conclusion that notice was properly sent (Hearing Transcript, pg. 7, lns. 8-21, pg. 9, lns. 8-13, Feb. 4, 2013).

Reading’s own negligence, in failing to appear before the Commission, does not constitute a violation of due process. *See Eat’N Park Hospitality Grp., Inc. v. Unemployment Comp. Bd. of Review*, 970 A.2d 492, 494 (Pa. Cmwlth. 2008) (“a party’s own negligence is not sufficient good cause as a matter of law for failing to appear at a . . . hearing”). Beyond the mailbox rule, Reading had actual notice of the hearing by at least February 1st or 2nd. Reading acknowledges that it was aware of the further hearing, as evidenced by a Letter sent to Judge Jandebour and the parties of the record on February 1, 2013 (Letter from Mr. Ober, Feb. 1, 2013). *See* Department “Exhibit A” attached hereto. In the letter, counsel for Reading acknowledges the upcoming hearing, but claims that neither he nor his client had notice of the rescheduled hearing. Moreover the president of Reading had knowledge of the hearing by, at the latest, Saturday February 2, 2013 (Hearing Transcript, pg. 10, lns. 6-25, pg. 11, lns. 1-3, Feb. 4, 2013). It strains credibility to believe that after over a year of litigation, prior hearings, and protracted settlement negotiations that neither the railroad nor its attorney knew of the pending hearing in the matter.

The Public Utility Code and the Commission’s regulations clearly establish that a party’s failure to attend, when sufficiently notified, constitute a waiver of any opportunity to participate in the hearing. 66 Pa. C.S. § 332(f); 52 Pa. Code § 5.245(a). Reading has failed to allege that its failure to attend either hearing was unavoidable; Reading clearly had received some notice prior to both

hearings as evidenced by the record (Letter from Mr. Ober, Feb. 1, 2013). *See* Department “Exhibit A” attached hereto; (Hearing Transcript, pg. 10, lns. 6-25, pg. 11, lns. 1-3, Feb. 4, 2013). The Department properly raised its objection to any further participation by Reading prior to the February 4, 2013 hearing (Department’s Motion to Preclude Testimony of Reading Blue Mountain and Northern, Jan. 2, 2013). The Department renewed its objection during the February 4, 2013 hearing, in which Judge Jandebaur granted the motion to preclude Reading’s written testimony (Hearing Transcript, pg. 12, lns. 13-25, pg. 13, lns. 1-11, Feb. 4, 2013).

Reading has been provided with notice and many opportunities to participate in the hearing in this matter. The fact that Reading chose, not once but twice, not to appear and defend in the present matter was a decision it made on its own accord and the record reflects the fact the its failure to appear at both hearings was not unavoidable but in fact intentional and deliberate (Hearing Transcript, pg. 5, lns. 1-5, June 20, 2012) (Letter from Mr. Ober, Feb. 1, 2013). *See* Department “Exhibit A” attached hereto. If the Commission sees it fit to grant a *third* evidentiary hearing in the present matter, it will be essentially granting an impermissible third opportunity to present evidence as to the conditions of the subject at-grade crossing. “A party seeking to ensure that truth favoring his position comes out in a hearing bears a responsibility to complete a record at the time of a hearing.” *City of Wilkes-Barre v. Wilkes-Barre Fire Fighters Ass’n*, 992 A.2d 246, 255 (Pa. Cmwlth. 2010). Reading has been presented with two opportunities to present its case before the Commission, it failed to attend either of the prior hearings without any sufficient justification. The Commission cannot permit Reading to continue to cavalierly flaunt the rules and procedures, inconvenience the ALJ, and waste the parties’ time. The Commission cannot allow Reading to have what amounts to an impermissible third bite at the apple in this case.

III. CONCLUSION


It is well-established precedent in this Commonwealth, that a letter is presumed to have been received upon evidence that same was properly addressed and deposited with the post office. Reading has failed to allege or otherwise present evidence rebutting the presumption made by Judge Jandebaur. Reading received both proper notice and opportunity to be heard; as such, Reading received due process afforded by the United States and Pennsylvania Constitutions. Additionally,

granting a new hearing will provide Reading with a *third* opportunity to present evidence. Reading's dilatory tactics should not be permitted to allow it a third bite of the "evidentiary apple."

WHEREFORE, the Department of Transportation, based upon the foregoing, respectfully requests that the Pennsylvania Public Utility Commission deny the Exceptions of the Reading Blue Mountain and Northern Railroad Company to the Recommended Decision issued on April 24, 2013.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



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DATED: May 28, 2013

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IN PENNSYLVANIA, FLORIDA & NEW YORK

February 1, 2013
URGENT

The Honorable Ember Jandebaur
Room 317, Scranton State Office Building
100 Lackawanna Avenue
Scranton, PA 18503

Via Fax: 570-963-3310

**RE: Pittston Township v. Reading Blue Mountain & Northern Railroad Crossing
Docket No. C-2011-2274074**

Dear Judge Jandebaur:

I today, February 1, 2013, received a copy of a letter dated February 1, 2013 from Jason Sharpe, Esquire addressed to Wayne Michel, President of the Reading Blue Mountain & Northern Railroad (the "Railroad"). The letter mentioned a hearing scheduled for Monday, February 4, 2013.

I then had the docket pulled and learned, for the first time, that there is, indeed, a hearing scheduled for Monday, February 4, 2013.

I consulted with the Railroad and confirmed that neither they nor I received notice of the hearing notice and were unaware of its being scheduled for February 4, 2013 until receiving the letter from Attorney Sharpe.

I am presently out of the area, scheduled to return Tuesday morning, February 5, 2013. I don't know that I will be able to make the hearing and respectfully request that it be rescheduled.

I can be reached at: 570-769-7609 or by e-mail at paul@oberandassociates.com.

Very Truly Yours,
PAUL R. OBER & ASSOCIATES

/s/ Paul

Paul R. Ober, Esquire
**Dictated, but not read.*

PRO/kns

Cc: John P. Finnerty, Esquire (via e-mail)
Gina D'Alfonso, Esquire (via e-mail)
Adam D. Young, Esquire (via e-mail)
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BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

PITTSTON TOWNSHIP	:	Complaint Docket
	:	
v.	:	C-2011-2274074
	:	
READING BLUE MOUNTAIN AND NORTHERN RAILROAD	:	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the *Reply Exceptions of the Commonwealth of Pennsylvania, Department of Transportation*, was served upon the parties below by first-class mail, postage prepaid this 28th day of May, 2013:

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DATED: May 28, 2013