

**BEFORE THE PENNSYLVANIA
PUBLIC UTILITY COMMISSION**

READING BLUE MOUNTAIN	:	
AND NORTHERN RAILROAD	:	Complaint Docket
COMPANY	:	No: C-2014-2426416
	:	
Complainant	:	
	:	
v.	:	
	:	
COMMONWEALTH OF	:	
PENNSYLVANIA, DEPARTMENT OF	:	
TRANSPORTATION	:	
	:	
Respondent	:	

**READING BLUE MOUNTAIN AND NORTHERN RAILROAD COMPANY'S
BRIEF IN OPPOSITION TO THE PRELIMINARY OBJECTIONS OF THE
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION**

I. Statement of the Case:

In April 2013, Reading Blue Mountain & Northern Railroad Company (“RBM&N”) filed suit against the Commonwealth of Pennsylvania, Department of Transportation (“PennDOT”) with respect to the railroad crossing subject to this suit. The April 2013 suit was docketed to C-2013-2357454 and was substantially similar to the above-captioned matter. After RBM&N chose to voluntarily abandon the April 2013 suit to try and amicably remedy the issues complained of, the Pennsylvania Public Utility Commission (“the Commission”) authored a June 24, 2013 opinion that allowed RBM&N to withdraw its April 2013 Complaint. 2013 WL 3355964 (Pa.P.U.C. 2013). Before allowing RBM&N to withdraw its April 2013 Complaint, the Commission found that “the Commission has jurisdiction over the subject matter and the parties to this proceeding.” *Id* at *4. As PennDOT points out in its own brief, the Commission has issued four prior orders with respect to maintenance and repair of the crossing subject to this dispute. See PennDOT’s Brief at page 2.

Since RBM&N was unsuccessful in amicably resolving the situation with PennDOT as complained of in April 2013, RBM&N filed suit against PennDOT on June 13, 2014. The crux of RBM&N's Complaint is that the crossing subject to this dispute was repaired by RBM&N in 2009 to industry standards at the direction of the Commission. Specifically, RBM&N repaired/installed the crossing at issue in compliance with the HS20-44 load requirements, which suited the crossing to regularly withstand 80,000 pound vehicle crossings. Not only is this the standard found in the American Association of State Highways and Transportation Officials, but it is also the same standard used by PennDOT for its highways and bridges. RBM&N spent \$105,000.00 for these 2009 repairs to comply with the Commission's Order.

After RBM&N's completion of the repairs at the subject crossing, PennDOT proceeded to issue permits for 95,000 pound trucks to regularly travel over the subject crossing. At no time while RBM&N repaired the subject crossing was RBM&N made aware that vehicles in excess of 80,000 pounds would be permitted to travel over this rail crossing. PennDOT's permitting practices have led to rapid deterioration of RBM&N's crossing subject to this dispute.

RBM&N has requested two specific remedies given PennDOT's actions and one general remedy. The three specific remedies are (1) ordering PennDOT to discontinue permitting overweight vehicles to cross over any RBM&N crossing, and (2) ordering PennDOT to require a Bond in favor of PennDOT and RBM&N to assure payment for the costs to repair and/or replace the subject crossing, estimated at \$100,000.00. In its final, catchall request for relief, RBM&N points out that without an order from the Commission, PennDOT will not reimburse RBM&N for the 2009 repairs or for any future, anticipated maintenance and will simply continue its permitting practices. PennDOT's permitting practices with respect to the subject crossing unfairly place the financial burden on RBM&N to repair and/or replace a crossing to a standard

higher than HS20-44 requirements. As this is a PennDOT generated problem, PennDOT should bear the financial burden of its decisions.

Given that the Commission “is vested with the authority to determine who shall bear the costs associated with the repair or maintenance of a railroad crossing,” RBM&N has filed a Complaint against PennDOT that began these proceedings. See e.g. City of Philadelphia v. Pennsylvania Public Utility Com’n, 676 A.2d 1298, 1301 (Pa. Cmwlth. 1996) citing 66 Pa.C.S.A. § 2702, 2704. PennDOT has responded by filing Preliminary Objections asking for dismissal of RBM&N’s Complaint on various grounds. For the reasons provided below, it is respectfully requested that the Commission OVERRULE PennDOT’s objections in their entirety.

II. QUESTIONS PRESENTED:

- A. WHETHER THE COMMISSION HAS JURISDICTION OVER THE CURRENT DISPUTE REQUIRING THE COMMISSION TO DENY PENNDOT’S PRELIMINARY OBJECTIONS IN THEIR ENTIRETY?**

Suggested Answer: Yes.

- B. WHETHER RBM&N’S COMPLAINT IS LEGALLY SUFFICIENT REQUIRING THE COMMISSION TO DENY PENNDOT’S PRELIMINARY OBJECTIONS IN THEIR ENTIRETY?**

Suggested Answer: Yes.

- C. WHETHER RBM&N’S COMPLAINT IS RIPE FOR DISPUTE?**

Suggested Answer: Yes.

III. ARGUMENT:

The Commission’s practice in regards to preliminary objections is similar to that of Pennsylvania civil practice. Equitable Small Transp. V. Equitable Gas Co., 1994 Pa. PUC LEXIS 69 (Commission Opinion and Order, July 18, 1994). When the objecting party seeks dismissal of a case by means of the preliminary objections the court should only grant the

preliminary objections “where the dismissal is clearly warranted and free from doubt.” Interstate Traveller Servs., Inc. v. Pennsylvania, 406 A.2d 1020, 1022 (Pa. 1979). The standard stated by the Supreme Court of Pennsylvania in Interstate is applicable in Commission proceedings. Montague v. Phila. Elec. Co., 1988 Pa. PUC LEXIS 299 (Initial Decision, January 6, 1988).

A. THE COMMISSION HAS JURISDICTION OVER THE CURRENT DISPUTE REQUIRING THE COMMISSION TO DENY PENNDOT’S PRELIMINARY OBJECTIONS IN THEIR ENTIRETY.

PennDOT first argues that the Commission does not have subject matter jurisdiction over this proceeding. In asserting its position, PennDOT offers three arguments: (1) that the Commission does not have jurisdiction since the subject crossing allegedly does not need to be constructed, relocated, altered, protected or abolished; (2) that the Commission does not have jurisdiction over PennDOT’s overweight truck permitting practices; and (3) that the Commission does not have jurisdiction over PennDOT because PennDOT is not a “public utility” under the Pennsylvania Code. These three arguments lack merit and require PennDOT’s preliminary objections asserting lack of jurisdiction to be overruled.

i. Construction, Relocation, Alteration, Protection or Abolition.

Addressing the first argument, PennDOT admits that the Commission has jurisdiction to decide these disputes pursuant to 66 Pa.C.S.A. § 2702 and 2704. The relevant statutory language reads as follows:

The commission is hereby vested with exclusive power to appropriate property for any such crossing ... and to determine and prescribe, by regulation or order ... the manner and conditions in or under which such crossing shall be maintained, operated and protected to effectuate the prevention of accidents and the promotion of the safety of the public.”

66 Pa.C.S.A. § 2702(b). Section 2704 reads in relevant part that “the compensation for damages which the owners of adjacent property taken, injured, or destroyed may sustain in the

construction, relocation, alteration, protection, or abolition of any crossing ... shall, after due notice and hearing, be ascertained and determined by the commission.” 66 Pa.C.S.A. § 2704(a). Given the clear statutory language of Sections 2702 and 2704, Pennsylvania courts routinely hold that the Commission “is vested with the authority to determine who shall bear the costs associated with the repair or maintenance of a railroad crossing....” See e.g. City of Philadelphia v. Pennsylvania Public Utility Com’n, 676 A.2d 1298, 1301 (Pa. Cmwlth. 1996) citing 66 Pa.C.S.A. § 2702, 2704.

The essence of RBM&N’s Complaint is that RBM&N followed a 2009 order of the Commission to repair the subject crossing. RBM&N repaired the subject crossing pursuant to industry standards that are implemented by PennDOT in its own construction requirements. Then, PennDOT, without any regard to the newly repaired crossing subject to this dispute, caused 95,000 pound truck traffic to be diverted across RBM&N’s subject crossing. PennDOT’s actions have led to rapid deterioration of RBM&N’s crossing. Given the language of 66 Pa.C.S.A. § 2702 and the holding in City of Philadelphia giving the Commission jurisdiction to allocate repair and maintenance crossing costs, it is absurd to argue that the Commission does not have jurisdiction over this railroad crossing dispute.

Further, PennDOT points out that RBM&N filed a similar suit in April 2013 and that RBM&N withdrew this suit when prior counsel stated that PennDOT’s prior preliminary objections “may have merit.” The statement of RBM&N’s prior counsel is irrelevant. RBM&N’s April 2013 Complaint was withdrawn without prejudice to explore alternate resolutions for the necessary maintenance and repairs for the subject crossing. As part of this withdrawal without prejudice, the Commission authored a June 24, 2013 opinion and order, finding that “the Commission has jurisdiction over the subject matter and the parties to this proceeding.” Reading,

Blue Mountain and Northern Railroad Company v. Commonwealth of Pennsylvania, Dept. of Trans., et. al., 2013 WL 3355964 (Pa.P.U.C. 2013) at *4. The Commission found that it had subject matter jurisdiction in 2013. Any argument that the Commission now lacks jurisdiction is meritless.

ii. Jurisdiction over Special Hauling Permits

PennDOT's next subject matter jurisdiction argument is that the Commission does not have authority to rule upon PennDOT's permitting process. PennDOT points out that under 75 Pa.C.S.A. § 4961, PennDOT has statutory authority to issue overweight permits. Just as PennDOT has authority to issue overweight permits, the Commission has the authority to assess damages for injury to rail crossings and to allocate future repair and maintenance responsibility pursuant to 66 Pa.C.S.A. § 2702, 2704. RBM&N does not challenge PennDOT's permitting authority. RBM&N challenges PennDOT's refusal to accept the consequences of PennDOT's permitting practices. If PennDOT wishes to continue this practice pursuant to 75 Pa.C.S.A. § 4961, PennDOT can take responsibility for future maintenance and repairs of the subject crossing pursuant to 66 Pa.C.S.A. § 2702, 2704. PennDOT would have the Commission believe that 75 Pa.C.S.A. § 4961 somehow strips the Commission of its jurisdiction. These statutes co-exist. PennDOT can issue overweight permits while the Commission can determine who pays the bill to repair and maintain railroad crossings. RBM&N's Complaint requests the Commission to rule on the allocation of railroad crossing maintenance and repair, making any reference to 75 Pa.C.S.A. § 4961 irrelevant to this proceeding.

iii. PennDOT is not a "public utility"

PennDOT's final subject matter jurisdiction argument is that PennDOT is not a "public utility" as defined by 66 Pa.C.S.A. § 102 and therefore the Commission does not have subject

matter jurisdiction. Like PennDOT's permitting argument, PennDOT again tries to strip the Commission's clear power to decide this dispute pursuant to 66 Pa.C.S.A. § 2702 and 2704 by pointing to an irrelevant issue unrelated to the current rail crossing maintenance/repair dispute. PennDOT's cited case, Commonwealth v. Merritt Chapman & Scott Corp., 248 A.2d 194 (Pa. 1968), involves a taxpayer dispute. Regardless of whether the Turnpike Commission was labeled a "public utility" in Merritt Chapman, the Commission "is vested with the authority to determine who shall bear the costs associated with the repair or maintenance of a railroad crossing..." City of Philadelphia, 676 A.2d at 1301 citing 66 Pa.C.S.A. § 2702, 2704. The Commission had subject matter jurisdiction in 2013, and it has subject matter jurisdiction now in 2014. Reading, Blue Mountain and Northern Railroad Company v. Commonwealth of Pennsylvania, Dept. of Trans., et. al., 2013 WL 3355964 (Pa.P.U.C. 2013) at *4.

Given the arguments above, it could not be clearer that the Commission has subject matter jurisdiction over this dispute pursuant to 66 Pa.C.S.A. § 2702 and 2704. Accordingly, PennDOT's preliminary objections arguing lack of subject matter jurisdiction must be overruled in their entirety.

B. RBM&N'S COMPLAINT IS LEGALLY SUFFICIENT REQUIRING THE COMMISSION TO DENY PENNDOT'S PRELIMINARY OBJECTIONS IN THEIR ENTIRETY.

PennDOT's next argument requesting dismissal of RBM&N's Complaint is that RBM&N's Complaint does not comply with 66 Pa.C.S.A. § 701. This statute reads as follows:

The commission, or any person, corporation, or municipal corporation having an interest in the subject matter, or any public utility concerned, may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission. Any public utility, or other person, or corporation likewise may complain of any regulation or order of the

commission, which the complainant is or has been required by the commission to observe or carry into effect. The Commonwealth through the Attorney General may be a complainant before the commission in any matter solely as an advocate for the Commonwealth as a consumer of public utility services. The commission may prescribe the form of complaints filed under this section.

66 Pa.C.S.A. § 701. PennDOT then, without explanation, concludes that RBM&N “has failed to allege that [PennDOT] has violated any Commission statute, regulation or order.” See PennDOT Brief at page 11.

PennDOT again ignores the clear language of 66 Pa.C.S.A. § 2702 and 2704 and the caselaw clearly holding that the Commission “is vested with the authority to determine who shall bear the costs associated with the repair or maintenance of a railroad crossing....” City of Philadelphia, 676 A.2d at 1301 citing 66 Pa.C.S.A. § 2702, 2704. In 2009, RBM&N complied with an opinion and order of the Commission to repair the crossing subject to this dispute. RBM&N spent \$105,000.00 to complete these repairs. These repairs were completed to industry standards and in strict conformance with the Commission’s 2009 order. The subject crossing was repaired to regularly withstand normal, 80,000 pound vehicle traffic. Now, PennDOT has unilaterally diverted 95,000 pound traffic over the subject crossing, which has deteriorated due to this overweight traffic. PennDOT’s response is that it did not violate “any law” and because of this, the Commission does not have jurisdiction. As argued above, 66 Pa.C.S.A. § 2702 and 2704 unequivocally grant jurisdiction to the Commission to decide this railroad crossing dispute. Therefore, PennDOT’s argument that it allegedly did not violate “any law,” while irrelevant, even ignores the clear language of 66 Pa.C.S.A. § 701 that any corporation “may complain of any regulation or order of the commission, which the complainant is or has been required by the

commission to observe or carry into effect.” 66 Pa.C.S.A. § 701. If anything, 66 Pa.C.S.A. § 701 bolsters the fact that the Commission has jurisdiction over this dispute.

66 Pa.C.S.A. § 701, 2702 and 2704 all show that the Commission has subject matter jurisdiction over this dispute. Pennsylvania courts have consistently reiterated this jurisdictional power. See e.g. City of Philadelphia, 676 A.2d at 1301. Therefore, PennDOT’s preliminary objection arguing legal insufficiency must be overruled in its entirety.

C. RBM&N’S COMPLAINT IS RIPE FOR DISPUTE.


PennDOT’s final argument is that RBM&N’s Complaint is not ripe for dispute. As argued extensively above, this claim is certainly ripe for dispute. Prior repairs were made to the subject crossing by RBM&N in 2009 pursuant to an opinion an order of the Commission. PennDOT proceeded to cause overweight vehicles to travel over the crossing. RBM&N has discovery damage to the subject crossing and discovered that PennDOT has been issuing overweight permits for travel across the subject crossing. RBM&N now seeks an allocation of future repair and maintenance costs under 66 Pa.C.S.A. § 2702 and 2704 since PennDOT is responsible for the damage to the subject crossing. To argue that this dispute is not ripe for adjudication simply makes no sense.

IV. CONCLUSION:

RBM&N has filed a Complaint seeking damages for past repairs to a railroad crossing and seeking allocation of future repairs to a railroad crossing that has been damaged by PennDOT. 66 Pa.C.S.A. § 2702 and 2704 clearly grant the Commission jurisdictional power over this dispute. Pennsylvania courts have consistently cited 66 Pa.C.S.A. § 2702 and 2704 to hold that the Commission “is vested with the authority to determine who shall bear the costs associated with the repair or maintenance of a railroad crossing....” City of Philadelphia, 676

A.2d at 1301 citing 66 Pa.C.S.A. § 2702, 2704. Furthermore, the Commission made a conclusion of law in 2013 that it has jurisdiction over the subject matter of this RBM&N and PennDOT dispute concerning maintenance and repairs to the subject crossing. Reading, Blue Mountain and Northern Railroad Company v. Commonwealth of Pennsylvania, Dept. of Trans., et. al., 2013 WL 3355964 (Pa.P.U.C. 2013) at *4. All this considered, it is respectfully requested that the Commission overrule PennDOT's preliminary objections in their entirety and order that this case proceed under the jurisdiction of the Commission.

Respectfully submitted by:



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