



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

November 7, 1997

IN REPLY PLEASE
REFER TO OUR FILE

A-001-11016
C-00913256

SCOTT T WYLAND ESQUIRE
SUSAN J SMITH ESQUIRE
MALATESTA HAWKE & MCKEON
P O BOX 1778
HARRISBURG PA 17105

Application of Consolidated Rail Corporation

Board of Supervisors of Bart Township

v.

Consolidated Rail Corporation, Pennsylvania Department of Transportation, Lancaster
County, et al.

To Whom It May Concern:

This is to advise you that an Opinion and Order has been adopted by the
Commission in Public Meeting on November 6, 1997 in the above entitled proceeding.

An Opinion and Order has been enclosed for your records.

Very truly yours,

James J. McNulty
Acting Secretary

DOCKETED

NOV 26 1997

Enclosure
Certified Mail
JEP

DOCUMENT
FOLDER

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held November 6, 1997

Commissioners Present:

John M. Quain, Chairman
Robert K. Bloom, Vice Chairman
John Hanger
David W. Rolka
Nora Mead Brownell

Application of Consolidated Rail
Corporation for the abolition of
31 crossings of the Enola Branch,
LC: 201323, MP 3.5 to MP 27.0, Sub
No. 1095X, Harrisburg Division, Lancaster
County

A-00111016

Board of Supervisors of Bart Township

C-00913256

v.

Consolidated Rail Corporation, Pennsylvania
Department of Transportation, and
Lancaster County, et al.

DOCKETED

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OPINION AND ORDER

BY THE COMMISSION:

Before the Commission for consideration and disposition is the Petition for Supplementation of the Record and Reconsideration (Petition) filed by Friends of the Atglen-Susquehanna Trail, Inc. (FAST) on October 23, 1997. Specifically, FAST seeks the reopening of the record of the instant proceeding and the vacating of our October 9, 1997 Opinion and Order.

History of the Proceeding

This Opinion and Order concerns two consolidated proceedings at Docket Nos. C-00913256 and A-00111016. The Complaint Docket at No. C-00913256 was initiated on February 25, 1991, at which time the Commission received the Complaint of the Board of Supervisors of Bart Townships against Consolidated Rail Corporation (Conrail), Pennsylvania Department of Transportation (PennDOT) and Lancaster County (County).

The proceeding at Docket No. A-00111016 was initiated when Conrail filed an Application with the Commission on September 29, 1993, for the approval of the abolition of 31 rail-highway Crossings along its Enola Branch located in Lancaster County.

After consolidation of the proceedings and after negotiations, Conrail reached a Settlement with PennDOT involving State highways, and Conrail also reached an Agreement with the various relevant municipalities regarding the

disposition of structures and the rail line. FAST objected to the Settlements and hearings were held by the Administrative Law Judge (ALJ) Louis J. Cocheres

On September 17, 1997, the ALJ's Recommended Decision was issued, recommending the approval of the Settlements. Exceptions to the Recommended Decision were filed by FAST, Conrail, Quarryville Borough, Historic Preservation Trust of Lancaster County. By Opinion and Order entered on October 9, 1997 (Order), the Commission granted the Exceptions in part, modifying the Recommended Decision.

On October 23, 1997, FAST filed the instant Petition for Supplementation of the Record and Reconsideration. Answers to the Petition were filed by the Commission's Bureau of Transportation and Safety (BTS) and Conrail, respectively. On October 31, 1997, FAST filed a Petition for Review with the Commonwealth Court. FAST also filed an Application for Supersedeas.

Discussion

The standards for granting a Petition for Reconsideration were set forth in Duick v. Pennsylvania Gas and Water Company, 56 Pa. P.U.C. 553 (1985). In Duick, we said that:

A Petition for Reconsideration, under the provisions of 66 Pa. C.S. §703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part.

In this regard we agree with the court in the Pennsylvania Railroad Company case, wherein it was stated that:

Parties... cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically decided against them... what we expect to see raised in petitions for reconsideration are new and novel arguments, not previously heard or considered which appear to have been overlooked by the Commission.

Additionally, a Petition for Reconsideration is properly before the Commission where it pleads newly discovered evidence, alleges errors of law, or a change in circumstances.

In its Petition, FAST requests that the record in these proceedings be reopened to allow the admission of an Order of the Surface Transportation Board (STB) dated September 23, 1997. FAST also argues that the Commission did not have sufficient time to give full consideration to the STB Order as it impacts upon the issue of preemption of the Commission's authority.

We note that the STB Order dated September 23, 1997, was specifically discussed in our October 9, 1997 Order. (See page 32 of the Order, footnote 3). We hasten to add that we took official notice of the Order and its contents in accordance with Section 5.406 of Our Regulations, 52 Pa. Code §5.406. Specifically, Ordering Paragraph No. 161 of our October 9, 1997 Order provides as follows:

That consistent with the Decision issued by the Surface Transportation Board on September 23, 1997, at Docket No. AB-167 (Sub. No. 1095X) Consolidated Rail Corporation is hereby directed, consistent with its willingness and agreement to complete the Section 106 Process, to satisfy and otherwise comply with the requirements of the Surface Transportation Board's Decision.

It is evident from the foregoing Ordering Paragraph that the STB Order was duly considered in our disposition of the issues raised in this proceeding. Accordingly, we will deny FAST's request to reopen the record for the admission of the STB Order.

FAST also urges the Commission to reconsider our Order in light of the STB Order dated September 23, 1997. FAST contends that the Commission's authority is preempted if it conflicts with federal law. FAST takes the position that our Order should be vacated under federal preemption principles.

We note at the outset that FAST fails to offer any authority to support its bald assertions. In our view, the STB Order does not directly affect our authority to adjudicate Conrail's application under Sections 2702 and 2704 of the Public Utility Code, 66 Pa. C.S. §§2702 and 2704. In the absence of compelling arguments, we are not persuaded that our jurisdiction in this matter is preempted by the STB's Order dated September 23, 1997.

FAST also requests that we vacate our Order in view of a Motion adopted by the Commission on October 23, 1997 in the Rails-To-Trails Initiative to Create a Moratorium for the Disposition of Railroad Bridges Suitable of Potential Trail Use, (Moratorium Motion). FAST avers that the instant proceeding should be reconsidered in light of the Commission's recently adopted moratorium policy regarding the removal of rail crossings.

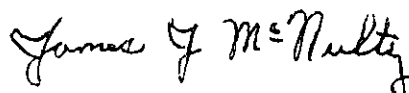
FAST's argument is without merit. The Moratorium Motion was adopted after the closing of the record in this proceeding which included rigorous negotiations, several hearings and the filing of post hearing briefs, culminating in the execution of Settlement Agreements among the majority of the Parties.. To apply the moratorium to a proceeding, such as the instant one, in which a final order has been

entered would, in our view, violate the due process rights of the Parties. Consistent with our Motion as of October 23, 1997, we expressly provided that no a final order will be entered in which a rail trail issue has been identified in the record for a period of eighteen months from the entry date of that Order, except where the Secretary of the Department of Transportation and the Secretary of the Department of Conservation and Natural Resources jointly recommend that an order be issued or unless public safety concerns require otherwise. In this case, a final order had already been entered on October 9, 1997. Accordingly, we will decline to retroactively apply the Motion to the instant proceeding.

As is evident from the criteria enunciated in Duick, supra., the grant of a request to modify or rescind a Commission decision is not bestowed lightly. The proponent of such a request is required to present newly discovered evidence or convince us that we have overlooked an issue or consideration. FAST has not presented any new or novel arguments such as to persuade us to grant its Petition for Reconsideration; **THEREFORE,**

IT IS ORDERED: That the Petition for Supplementation of the Record and for Reconsideration filed by Friends of the Atglen-Susquehanna Trail, Inc. on October 23, 1997, is denied.

BY THE COMMISSION,



James J. McNulty
Acting Secretary

(SEAL)

ORDER ADOPTED: November 6, 1997

ORDER ENTERED: NOV 7 1997