





February 8, 2002

C-00004204

ROBERT J POWELL SOLICITOR  
WHITE HAVEN BOROUGH  
123 WARREN STREET  
WEST HAZLETON PA 18201

White Haven Borough  
v.  
Reading, Blue Mountain and Northern Railroad Company

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To Whom It May Concern:

This is to advise you that the Commission in Public Meeting on February 7, 2002 has adopted an Opinion and Order in the above-entitled proceeding.

An Opinion and Order has been enclosed for your records.

Very truly yours,

James J. McNulty  
Secretary

Enclosure  
Certified Mail  
LJM

See attached list for  
additional parties of record

DOCUMENT  
FOLDER

**DOCKETED**  
FEB 25 2002

PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17105-3265

Public Meeting held February 7, 2002

Commissioners Present:

Glen R. Thomas, Chairman  
Robert K. Bloom, Vice Chairman  
Kim Pizzingrilli, Abstaining  
Aaron Wilson, Jr.  
Terrance J. Fitzpatrick

White Haven Borough

C-00004204

v.

Reading, Blue Mountain and  
Northern Railroad Company

OPINION AND ORDER

**DOCKETED**  
FEB 25 2002

**BY THE COMMISSION:**

Before the Commission for consideration and disposition are the Exceptions<sup>1</sup> filed by Reading, Blue Mountain and Northern Railroad Company (Railroad), on November 1, 2001, relative to the Recommended Decision (R.D.) issued herein on October 10, 2001, by Administrative Law Judge (ALJ) Richard M. Lovenwirth.

Also before the Commission is a Petition for Leave to File Exceptions *Nunc Pro Tunc* (Petition) filed by the Railroad on December 10, 2001.

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<sup>1</sup> The Railroad filed one Exception to the Recommended Decision herein. However, we will refer to that document as "Exceptions."

DOCUMENT  
FOLDED

## History of Proceeding

This proceeding commenced when the Borough of White Haven (Borough) filed the Complaint at Docket Number C-00004204, on September 18, 2000. The Borough complained about two specific areas along the tracks of the Railroad in the Borough. The first area involved a collapsed retaining wall near the Berwick Street at-grade crossing. The second area involved the railroad trestle (bridge) over Susquehanna Street and the associated stone wing walls and retaining walls.

Answers to the Complaint were filed by the Railroad on October 2, 2000, Luzerne County (County) and Pennsylvania Department of Transportation (PennDOT) on October 10, 2000.

By Hearing Notice of January 16, 2001, this proceeding was scheduled for a hearing on March 8, 2001 before the ALJ Lovenwirth in the Scranton State Office Building. The following Parties were represented at the hearing: the Borough, the Railroad, PennDOT, the Commission's Bureau of Transportation and Safety (BTS), the County and Dennison Township (Township). The hearing produced one hundred and forty-eight pages of transcript from four witnesses, and seven exhibits from four different Parties.

The Recommended Decision of ALJ Lovenwirth was issued on October 10, 2001. The Railroad's Exceptions and its Petition were filed as above noted.

## Discussion

In his Recommended Decision, ALJ Lovenwirth made twenty-six Findings of Fact (R.D., pp. 2-8) and drew seven Conclusions of Law (R.D., pp. 20-21). We shall

adopt and incorporate herein by reference the ALJ's Findings of Fact and Conclusions of Law to the extent that they are not expressly or by necessary implication overruled or modified by this Opinion and Order.

### **Railroad's Petition to File Exceptions *Nunc Pro Tunc***

Before we proceed to a consideration of the Exceptions filed herein, there is an outstanding procedural matter to be resolved. The Railroad filed, on December 10, 2001, a Petition for Leave to File Exceptions *Nunc Pro Tunc* (Petition). The Railroad had filed untimely Exceptions on November 1, 2001.<sup>2</sup> Per Secretarial Letter dated November 5, 2001, the Railroad was informed that, since its Exceptions were not timely filed, they would not be considered.

In its Petition, the Railroad averred that, due to an ongoing labor dispute, the Railroad's counsel was unable to communicate with the Railroad regarding the Recommended Decision until November 1, 2001. (Petition, ¶¶2, 4, 5). Counsel thereupon drafted and filed, *via* Federal Express, the pertinent Exception on that same date. (Petition, ¶6). Counsel argues that the delay of two days (the Exception otherwise being due on October 30, 2001) was not prejudicial to any Party. (Petition, ¶7). Accordingly, counsel requests that its Exceptions be considered *Nunc Pro Tunc*.

On review of this Petition, we find it to be meritorious. The Railroad has explained to our satisfaction the reason for its delay in the filing of its Exceptions. Additionally, based on our review of the record before us, we are persuaded that a grant of the instant Petition would not be prejudicial to any Party. Therefore, the Railroad's Petition is granted and its Exceptions will be considered *Nunc Pro Tunc*.

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<sup>2</sup> The deadline for the filing of Exceptions herein was October 30, 2001. The Railroad's Exceptions were filed on November 1, 2001.

## Railroad's Exceptions

Initially, we are reminded that we are not required to consider expressly or at great length each and every contention raised by a party to our proceedings.

*(University of Pennsylvania, et al. v. Pennsylvania Public Utility Commission, 485 A.2d 1217, 1222 (Pa. Cmwlth. 1984) (University of Pennsylvania v. Pa. PUC).* Any exception or argument that is not specifically addressed herein shall be deemed to have been duly considered and denied without further discussion.

The Railroad files an Exception to Ordering Paragraph No. 5 of the Recommended Decision, which is as follows:

5. That Reading, Blue Mountain and Northern Railroad Company, at its sole cost and expense, within nine (9) months of service of the Commission Order, furnish all material and do all work necessary to demolish and remove that portion of the superstructure of the Susquehanna Street Bridge which carried the inactive track of the railroad. Said work to include, but not be limited to, removing the timber ties, plank walkway and hand railing, and the steel beams. Also, to install concrete barriers, as it agreed to do so, at each abutment to effectively close off the area where the inactive track superstructure was removed. Also, as a safety measure, to construct a hand railing along the West side of the remaining bridge structure.

(R.D., p. 22).

The Railroad asserts that it excepts to the proposed Ordering Paragraph because it requires the Railroad to remove the unused portion of a steel superstructure of a bridge that formerly carried two tracks and now carries one. The Railroad contends that there was no testimony whatsoever presented at the hearing that the steel superstructure

was unsafe or unstable. Furthermore, the Railroad contends that the vertical clearance of the unused portion of the structure does not present a problem due to a steep grade beyond the crossing which limits the use of large trucks in the area. (Tr., p. 87). (Exc., ¶1).

The Railroad points out that the sole testimony presented concerning the removal of the superstructure was that of the Commission staff engineer who stated that “some consideration” should be given to removing it, due to a concern about possible trespassers. (Tr., p. 87). The Railroad maintains that it agreed, at the hearing, to install barriers at either end of the unused superstructure. (Tr., p. 96). Accordingly, argues the Railroad, this should be sufficient to address any trespassing concerns at a reasonable cost. (Exc., ¶1).

It is well settled that in rail-highway crossing cases, the guiding principle for Commission action is the public interest, *i.e.*, to ensure and promote the protection, safety, convenience and welfare of the travelling public. Accordingly, the Commission has exclusive authority, under 66 Pa. C.S. §2702, to order the construction, reconstruction, alteration, repair, protection, suspension or abolition of rail-highway crossings. The Commission also has exclusive authority to determine and order which parties shall perform such work at the crossings and which parties shall maintain the crossings in the future. (*SEPTA v. Pa. P.U.C.*, 592 A.2d 797 (Pa. Cmwlth. 1991).

Furthermore, the Commission is empowered, under 66 Pa. C.S. §2702(b), to determine and prescribe the manner in which such crossings may be constructed, reconstructed, altered, repaired, protected, suspended or abolished. The Commission is also empowered, pursuant to 66 Pa. C.S. §2702(c), to order the work performed upon such reasonable terms and conditions as it prescribes. (*Pennsylvania Game Commission v. Pa. P.U.C.*, 651 A.2d 596 (Pa. Cmwlth. 1994). Additionally, the Commission, pursuant to

66 Pa. C.S. §2704(a), has the exclusive authority to assess the costs of any work it orders upon the concerned parties in the proceeding in such proportions as the Commission may deem appropriate.

It is also within the purview of the Commission to determine which parties are concerned within the meaning of 66 Pa. C.S. §§2704(a) and 2702(c). (*County of Chester v. Pa. P.U.C.*, 408 A.2d 552 (Pa. Cmwlth. 1979)). Moreover, the Commission's jurisdiction also extends to the approaches to rail-highway crossings. (*Department of Transportation v. Pa. P.U.C.*, 440 A.2d 657 (Pa. Cmwlth. 1982); *Springgettsbury v. Pa. P.U.C.*, 289 A.2d 762 (Pa. Cmwlth. 1972)).

It is well settled that in apportioning costs in rail-highway crossing cases, the Commission is not limited to any fixed rule, but takes all relevant factors into consideration; the only requirement being that its Order is just and reasonable. (*East Rockhill Twp. v. Pa. P.U.C.*, 540 A.2d 600 (Pa. Cmwlth. 1988); *Municipality of Monroeville v. Pa. P.U.C.*, 600 A.2d 655 (Pa. Cmwlth. 1991); *Greene Township v. Pa. P.U.C.*, 668 A.2d 615 (Pa. Cmwlth. 1995) (*Green Township*); *Commonwealth Department of Transportation v. Pa. P.U.C.*, 464 A.2d 645 (Pa. Cmwlth. 1983). *See also, Consolidated Railroad Corp. v. Pa. P.U.C.*, 423 A.2d 1108 (Pa. Cmwlth. 1980).

As aforesaid, the paramount consideration in proceedings of this nature is the promotion and enhancement of the safety of the public and the prevention of accidents. Inherent therein is the necessity to identify the contributing factors to unsafe conditions at rail-highway crossings and approaches thereto. Among the factors which the Commonwealth Court noted as relevant in the *Greene Township* case cited *supra*, are the following: (1) which party built the crossing; (2) whether a roadway existed before or after the construction of the crossing; (3) relative benefit conferred on each party with the construction of the crossing; (4) whether either party is responsible for the deterioration of

the crossing which has lead to the need for its repair, replacement or removal; and (5) the relative benefit that each party will receive from the repair, replacement or removal of the crossing.

Based on our review of the Railroad's Exceptions, we conclude that, given the totality of the facts and circumstances in this proceeding, the Exceptions are meritorious. We note that there was no testimony presented at the hearing to indicate that the steel superstructure at issue, the Susquehanna Street Bridge, was unsafe or unstable. Also, for the reason outlined above, the vertical clearance of the unused portion of the structure does not present a safety issue. As to the concern about possible trespassers, the Railroad's agreement to install barriers at either end of the unused superstructure would, in our view, serve to alleviate this problem. (Tr., p. 96).

Finally, we note that to order the Railroad to remove the steel superstructure, because of speculative concerns about trespassers without any concomitant evidence of other need to remove the superstructure such as a safety concern, would create an unreasonable expense for a short line railroad that is struggling to survive. Accordingly, the Railroad's Exceptions on this issue are granted, and the proposed Ordering Paragraph No. 5 as it appears in the Recommended Decision will be deleted from the instant Opinion and Order.

### Conclusion

We have carefully reviewed the record as developed in this proceeding, including the ALJ's Recommended Decision, as well as the Exceptions filed thereto. Premised upon our review of the record evidence, we conclude that the Railroad's Exceptions are meritorious and they will be granted consistent with this Opinion and

Order. Accordingly, the ALJ's Recommended Decision will be adopted as modified by this Opinion and Order; **THEREFORE,**

**IT IS ORDERED:**

1. That the Petition for Leave to file Exceptions Nunc Pro Tunc filed by Reading, Blue Mountain & Northern Railroad Company herein on December 10, 2001 is hereby granted.

2. That the Exceptions filed by Reading, Blue Mountain & Northern Railroad Company herein on November 1, 2001 to the Recommended Decision of Administrative Law Judge Richard M. Lovenwirth issued on October 10, 2001 are hereby granted.

3. That the Recommended Decision of Administrative Law Judge Richard M. Lovenwirth herein, issued on October 10, 2001, is hereby adopted as modified by this Opinion and Order.

4. That the Complaint of the Borough of White Haven involving the rail-highway crossing at Berwick Street is dismissed for satisfaction of that part of the Complaint; and sustained as it relates to the Susquehanna Street below-grade crossing and associated stone retaining walls.

5. That Reading, Blue Mountain and Northern Railroad Company, having agreed to do so, at its sole cost and expense, within nine (9) months of entry of this Opinion and Order, furnish all material and do all work necessary to cut and remove all trees growing around the Susquehanna Street Bridge and between its tracks and the retaining walls along the track approaching the bridge.

6. That Reading, Blue Mountain and Northern Railroad Company, having agreed to do so, at its sole cost and expense, within nine (9) months of entry of this Opinion and Order, furnish all material and do all work necessary to control, support or retain the track ballast from spilling from its intended location. This includes, but is not limited to, areas where existing timber cribbing is supported by live trees or areas where the ballast is supported by the hand railing which is leaning against live trees.

7. That Reading, Blue Mountain and Northern Railroad Company, having agreed to do so, at its sole cost and expense, within nine (9) months of entry of this Opinion and Order, furnish all material and do all work necessary to repair and make safe the hand railing and plank walkway on the East side of the active track; this includes on the bridge and along the track approaches to the bridge.

8. That Reading, Blue Mountain and Northern Railroad Company, at its sole cost and expense, within twelve (12) months from the date of entry of this Opinion and Order: (1) perform an In-Depth Inspection and Load Rating analysis of the railroad bridge over Susquehanna Street in the Borough of White Haven; and (2) prepare and submit to this Commission and each party of record a written report of the In-Depth Inspection and Load Rating Analysis of the structural members with a recommended load carrying capacity of the subject bridge.

9. That Reading, Blue Mountain and Northern Railroad Company, at its sole cost and expense, with services of an outside consultant engineer, within twelve (12) months from service of the instant Opinion and Order: (1) perform an in-depth inspection and evaluation of the stone retaining walls along its tracks leading from the Susquehanna Street railroad bridge; and (2) prepare and submit to this Commission and each party of record a written report of its in-depth inspection and evaluation of the retaining walls including an evaluation of the stability of the stone walls, locations of

failures or potential failures, reasons for failures or bulges in the walls, recommendations for prevention of future problems and recommendations for any necessary repairs including cost estimates for said work.

10. That the Borough of White Haven, Pennsylvania Department of Transportation, County of Luzerne, and the non-carrier utilities involved cooperate with the Reading, Blue Mountain and Northern Railroad Company while it performs the work herein ordered.

11. That Reading, Blue Mountain and Northern Railroad Company, at its sole cost and expense, furnish and maintain flagmen, watchmen and construction inspectors and engineering services, as necessary, while work is being performed above, along and across its tracks in accordance with this Opinion and Order.

12. That the non-carrier utilities involved, if any, each at its initial cost and expense, shall furnish all material and do all work necessary to alter, relocate or protect its facilities as necessary to accommodate construction of the work herein ordered.

13. That Reading, Blue Mountain and Northern Railroad Company, at its sole cost and expense, furnish all material and do all work necessary to establish and maintain traffic controls and/or traffic detours, if required, at the subject crossing to provide a safe condition for pedestrians, vehicular traffic, and construction workers in the crossing area, all in accordance with the Manual of Uniform Traffic Control Devices.

14. That Reading, Blue Mountain and Northern Railroad Company, at its sole cost and expense, furnish all material and do all work necessary to (1) determine the actual vertical clearance at the crossing upon removal of the inactive track superstructure,

and (2) erect and maintain appropriate low clearance signs at the crossing indicating the proper clearance.

15. That upon completion of the removal of the inactive track superstructure, Reading, Blue Mountain and Northern Railroad Company, at its sole cost and expense, furnish all material and do all work necessary to maintain the remaining bridge substructure and superstructure, including any walkways and hand railings associated with the bridge, all in a safe and satisfactory condition.

16. That upon completion of the work herein ordered, Reading, Blue Mountain and Northern Railroad Company, report to this Commission the date of actual completion of the work.

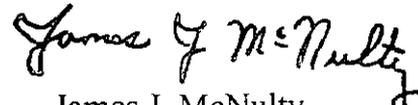
17. That upon completion of the work herein ordered, the Borough of White Haven, at its sole cost and expense, furnish all material and do all work necessary thereafter to maintain Susquehanna Street at the subject crossing.

18. That this Opinion and Order, insofar as it places costs on the various parties, is without prejudice to their rights to recover the said cost from others in accordance with any lawful agreement.

19. That upon the submission of the In-Depth Inspection and Load Rating Analysis Report of the bridge and the In-Depth Inspection and Evaluation Report

of the retaining walls, a further hearing be held to consider the reports and their recommendations and any other issues involved.

**BY THE COMMISSION,**

  
James J. McNulty  
Secretary

(SEAL)

ORDER ADOPTED: February 7, 2002

ORDER ENTERED: **FEB 08 2002**