



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

IN REPLY PLEASE  
REFER TO OUR FILE

August 11, 2000

SECRETARY'S BUREAU  
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James J. McNulty, Secretary  
Pa. Public Utility Commission  
Room G-05, North Office Building  
P.O. Box 3265  
Harrisburg, PA 17105-3265

RE: Duryea Borough v. Reading, Blue  
Mountain and Northern Railroad Company  
Docket No. C-00992585

Dear Secretary McNulty:

Enclosed for filing with the Commission are the original and nine copies of the Bureau of Transportation and Safety's Brief on the above referenced matter. With a copy of this letter, I am sending copies of the enclosed to those persons listed on the Certificate of Service.

Very truly yours,

David A. Salapa  
Assistant Counsel

Enclosure

DOCUMENT  
FOLDER

ORIGINAL

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

DURYEA BOROUGH  
v.  
READING BLUE MOUNTAIN AND  
NORTHERN RAILROAD COMPANY,  
PENNSYLVANIA DEPARTMENT OF  
TRANSPORTATION AND LUZERNE  
COUNTY

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: Docket No. C-00992585  
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SECRETARY'S BUREAU

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BRIEF OF THE BUREAU OF TRANSPORTATION AND SAFETY OF THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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David A. Salapa  
Assistant Counsel

DOCKETED  
AUG 11 2000

DOCUMENT  
FOLDER

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Dated: August 11, 2000

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## PROCEDURAL HISTORY

This matter began when the Borough of Duryea filed a complaint against the Reading, Blue Mountain and Northern Railroad Company on June 28, 1999, with the Pennsylvania Public Utility Commission (Commission). The complaint alleges that the Duryea Borough Council received numerous complaints regarding the condition of several at-grade rail crossings in the Borough. In particular, the complaint alleges that the crossings are in a deteriorated condition, are uneven and have loose rails and potholes. The complaint alleges that the crossing sites include crossings at Coxton Road, Foote Avenue, Phoenix Street, Marcy Street and York Avenue. The Borough of Duryea requested that the Commission order the Reading, Blue Mountain and Northern Railroad Company to repair the crossings. The Commission served copies of the Borough of Duryea's complaint on the Reading, Blue Mountain and Northern Railroad Company, the Pennsylvania Department of Transportation and Luzerne County. All three of these entities filed answers to the complaint denying any responsibility to repair the crossings.

A Bureau of Transportation and Safety (Bureau) staff engineer conducted a field meeting at the site of the crossings on August 17, 1999. The parties were unable to reach an agreement regarding the repair of the crossings subsequent to the field meeting. By notice dated March 28, 2000 the Commission scheduled this matter for hearing on May 18, 2000. The

Commission's notice assigned the matter to Administrative Law Judge (ALJ) Richard M. Lovenworth. The Commission subsequently reassigned the case to ALJ, George M. Kashi who conducted the hearing on this matter on May 18, 2000. By letter dated June 5<sup>th</sup>, 2000, ALJ Kashi directed that briefs be filed by July 20<sup>th</sup>, 2000. This is the Bureau of Transportation and Safety's Main Brief.

## SUMMARY OF ARGUMENT

The Commission should direct the Reading, Blue Mountain and Northern Railroad Company to perform any repairs or reconstruction to any of the crossings where the crossing surface is deteriorated between the rails or in an area two feet outside of the rails. The Commission should direct either the Department of Transportation or the Borough of Duryea to perform any repairs or reconstruction to any of the crossings where the deterioration has occurred in an area more than two feet from the outside of the rails.

## ARGUMENT

### I. THE PENNSYLVANIA PUBLIC UTILITY COMMISSION SHOULD ORDER THE PARTIES TO MAKE REPAIRS TO THE CROSSINGS IN ORDER TO PROMOTE SAFETY, PREVENT ACCIDENTS AND PROVIDE AND PROVIDE A SMOOTH CROSSING SURFACE.

The Commission has exclusive authority, pursuant to 66 Pa. C.S. §2702, to order the construction, reconstruction, alteration, repair, protection, suspension or abolition of rail-highway crossings, as well as the 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, to prevent accidents and promote the safety of the public. SEPTA v. Pa. P.U.C., 140 Pa. Commw. Ct. 270, 592 A.2d 797 (1991) alloc. denied 611 A.2d 714 (1992).

The Commission is empowered, pursuant to 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. Commw. Ct. 1994), alloc. denied 544 Pa. 649, 664 A.2d 977 (1995).

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 to this proceeding in such proportions as the Commission may determine. The Commission also determines what parties are concerned within the meaning of 66 Pa. C.S. §2704(a) and §2702(c). County of Chester v. Pa. P.U.C., 47 Pa. Commw. Ct. 366, 408 A.2d 552 (1979). 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 Township v. Pa. P.U.C., 116 Pa. Commw. Ct. 228, 540 A.2d 600 (1988); Greene Twp. v. Pa. P.U.C., 668 A.2d 615 (Pa. Commw. Ct. 1995); AT&T v. Pa. P.U.C., 737 A.2d 201 (Pa. 1999).

Among the factors which the Commonwealth Court noted in the Greene Township case as relevant 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. While the Commission has considered these factors to be relevant in the past, this in no way limits the

factors that the Commission can consider. Bell Atlantic-Pa, Inc. v. Pa. P.U.C., 672 A.2d 352 (Pa. Commw. Ct. 1996), AT&T v. Pa. P.U.C., 737 A.2d 201 (Pa. 1999).

As the complainant in this case, the Borough of Duryea has the burden to establish its case before the Commission. The burden of proof that the Borough of Duryea must meet is preponderance of the evidence. Samuel J. Lansberry, Inc. v. Pa. P.U.C. 134 Pa. Commw. Ct. 218, 578 A.2d 600 (1990). The evidence that the Borough of Duryea presents must be substantial and legally credible. The Borough of Duryea must establish by preponderance of the evidence that the rail-highway crossings are unsafe. The Borough of Duryea has met its burden of proof.

In this case, none of the parties appear to disagree that the crossings are in a state of disrepair and require some work. The parties do disagree over who should do the work and who should pay for the work.

With regard to Coxtton Street, the Borough of Duryea presented testimony that the crossing area has numerous potholes and ruts as well as deteriorated crossing timbers. (N.T. 22-26, Borough Exhibits 1A-1D) Mr. Hull, the Bureau's Transportation and Safety's witness, observed that the approach roadways are rutted and potholed. He also testified that there was a cracked rail at the crossing. Mr. Hull was particularly concerned that the potholes and ruts at the crossing could cause vehicle operators to lose control of their vehicles or could damage

vehicles. (N.T. 113) The Borough of Duryea's and Mr. Hull's testimony is supported by the testimony of the Department of Transportation's witness, Mr. Strok and the Exhibits he sponsored. (Department Exhibits D1-4) Mr. Hull attributed the condition of the crossing to the failure of the crossing's subgrade. (N.T. 110)

Mr. Hull also stated that the Commission had previously issued an order regarding this crossing. The prior order directed that the Pennsylvania Department of Highways and the Erie Lackawanna Railway Company share maintenance responsibility for the crossing. (N.T. 111-112, Staff Exhibits 1 and 2) Paragraph number 23 of the May 4, 1970 order at Application Docket No. 95397 directs Erie Lackawanna Railway Company to maintain the crossing pavement between the rails and for a distance of at least two feet beyond each outside rail. Ordering paragraph number 22 of that same order directs the Department of Highways to maintain the approaches to the crossing up to a point two feet beyond the outside of each rail. (Staff Exhibit #1)

Given the condition of the Coxton Street crossing, Mr. Hull stated that the entire crossing should be rebuilt. Mr. Hull stated that the problem with the subgrade could only be corrected by completely rebuilding the crossing. (N.T. 114) The Bureau of Transportation and Safety believes that the cost of rebuilding the crossing should be allocated as provided for in the Commission's May 4<sup>th</sup>, 1970 order. The cost of rebuilding the

crossing and paving the area two feet outside of rail should be born by the Reading, Blue Mountain and Northern Railroad Company. The cost for repaving the approach roadways up to within two feet of the outside rails should be born by the Pennsylvania Department of Transportation.

With regard to Foote Avenue, the Borough of Duryea presented evidence that the paving and the crossing timbers were deteriorated. (N.T. 27-30, Borough Exhibits 2A-2G) Mr. Hull testified on behalf of the Bureau of Transportation and Safety that some of the timber flange ways are failing or deteriorated. These deteriorated timber flange ways create an uneven roadway surface. In addition, Mr. Hull stated that the roadway surface between the tracks is uneven with potholes and deterioration. (N.T. 120) The evidence presented by the Pennsylvania Department of Transportation supports Mr. Hull's assessment of the Foote Avenue crossing. (Department statement #1, pgs. 2-3, Department Exhibits A1-A3)

Mr. Hull also noted that the Foote Avenue crossing was the subject of a Commission order dated March 2, 1994 at Complaint Docket 902790. (Staff Exhibit #3) Paragraph 3 of the order assigned Consolidated Railroad Corporation responsibility for maintaining the crossing area between the rails and two feet beyond each rail. Paragraph 4 of the same order directed the Pennsylvania Department of Transportation to maintain the

approach roadways to within two feet of the rails. (Staff Exhibit #3)

Mr. Hull expressed concern that a vehicle operator could lose control if they hit the uneven crossing surface at a high rate of speed. (N.T. 122) Mr. Hull stated that some of the timber flange ways at the Foote Avenue crossing should be replaced and the asphalt between the rails be redone to provide a smooth surface. (N.T. 122) The Bureau of Transportation and Safety contends that since the work Mr. Hull outlined is all between the rails or within two feet of the rails, that responsibility should be assigned to the Reading, Blue Mountain and Northern Railroad Company, consistent with the prior Commission Order at Docket No. C-00902790.

With regard to the Phoenix Street crossing, the Borough of Duryea presented evidence that the crossing area was deteriorated. In particular, the guard timbers were loose and deteriorating. (N.T. 32, Borough Exhibits 3A-3D) The Borough stated that the guard timbers had recently been replaced but they were now loose and needed to be repaired. (N.T. 33)

Mr. Hull stated that the timber flange ways were loose and had deteriorated on the west approach. He also stated that the asphalt paving on the west approach was high and that it created an uneven humped surface. (N.T. 123) Mr. Hull's testimony is supported by the evidence presented by the Pennsylvania

Department of Transportation. (Department Statement #1 pg. 4, lines 26-30, Department Exhibits B1-B4)

Mr. Hull also testified that the Phoenix Street crossing was the subject of a prior Commission order dated December 13, 1994 at Docket Number A-00111309. (N.T. 123-124, Staff Exhibit #4) Paragraph 15 of the order directs that Consolidated Railroad Corporation maintain its facilities at the crossing. Paragraph 13 of the order directs the Department of Transportation to maintain the roadway at the site of the altered crossing. (Staff Exhibit #4)

Mr. Hull testified that in order to provide a smooth crossing surface, the approach roadway at the Phoenix Street crossing should be milled down or ground down in order to match the elevation of the timber flange ways. (N.T. 124) Mr. Hull stated that this would provide a smooth transition onto the timber flange ways. Currently, the roadway is an inch or two higher than the timber flange ways, creating a bump. (N.T. 124) The Commission should order the parties to repair this crossing consistent with the prior Commission order dated December 13, 1994 at Docket Number A-00111309.

With regard to Marcy Street, the Borough of Duryea presented testimony that the guard timbers at the crossing were deteriorated. In addition, the Borough provided evidence that the asphalt paving on the approaches to the crossing had potholes

and was breaking up and otherwise deteriorating. (N.T. 33-35, Borough Exhibits 4A-4D)

Mr. Hull testified that the crossing at Marcy Street had some deterioration of the asphalt paving on the approaches. There are ruts and potholes on both approaches to the crossing. However, Mr. Hull observed that the timber flange ways appeared to be satisfactory at this location. (N.T. 116) Mr. Hull expressed concern that the ruts and potholes at the Marcy Street crossing could cause vehicle operators to loose control of the vehicle if the operator hit one of these potholes or ruts. (N.T. 117)

Mr. Hull testified that the crossing at Marcy Street was the subject of a Commission Order dated May 4, 1970 at Application Docket No. 95397. Paragraph twenty-three of the order directed the Erie Lackawanna Railway Company to maintain the crossing area between the rails and for two feet outside of each rail. Paragraph fourteen of the order directed the Borough of Duryea to maintain the roadway approaches to the crossing to a point two feet outside of the remaining rails. (Staff Exhibit #1)

Mr. Hull stated that the roadway approaches needed to be repaired by filling in the potholes and rutted areas. He testified that most of this work is beyond the area two feet outside of the rails. He asserted that the paving between the rails was satisfactory. The Bureau of Transportation & Safety contends that the Commission should order the parties to repair

the crossing at Marcy Street consistent with the prior Commission Order. The Borough of Duryea should be directed to repave the approach roadways at the crossing to within two feet of the outside of rail.

With regard to York Avenue, the Borough of Duryea presented evidence that the crossing is very deteriorated. The macadam paving in the crossing area is breaking up. (N.T. 37, Borough Exhibits 5A-5D) The Borough has also received numerous complaints on the condition of this crossing. (N.T. 37)

Mr. Hull stated that the crossing at York Avenue appeared to be inactive and had been paved over in the past. (N.T. 119) He testified that the crossing surface itself was very uneven.

Mr. Hull also testified that the Commission had issued an Order regarding the York Avenue crossing at Application Docket No. A-00109312. However, that Order did not assign maintenance responsibility for the crossing area. (N.T. 119, Staff Exhibit #5)

Mr. Hull stated that since the crossing was currently not being used by any railroad, the rails, ties, and other track materials should be removed and the highway restored. In addition, any advance warning signs at the crossing should be removed. (N.T. 119-120)

While there is no outstanding Commission Order that assigns maintenance responsibility for this crossing, the Bureau of Transportation and Safety believes that it would be consistent

with the other orders on the crossings in this proceeding to direct Reading, Blue Mountain and Northern Railroad Company to be responsible for removing the rails, ties and other material from the roadway and repaving that area where the facilities have been removed. The Commission should order the Department of Transportation to repave any of the area outside the area two feet from the rails.

With regard to Stevenson Street, the Borough of Duryea produced evidence that the crossing at Stevenson Street was very deteriorated. The roadway paving between the rails and adjacent to the outside of the rails was rutted and rough. (N.T. 39-40, Borough Exhibits 4A-4D)

Mr. Hull testified that the flange way timbers were deteriorated in certain areas. These deteriorated timbers created an uneven surface. Mr. Hull also stated that the east side of the approach roadway had potholes and rutting. (N.T. 125) In addition, the flashing light signal was thirty feet from the centerline of the tracks. Mr. Hull observed that the Manual on Uniform Traffic Control Devices recommended that the flashing light signals be no closer than twelve feet. (N.T. 125-126)

Mr. Hull expressed concern that the uneven surface could create a hazard to the public. In addition, he stated that the location of the flashing light signal on the east side could be dangerous to vehicle users as well. (N.T. 126) Mr. Hull's testimony is supported by the evidence provided by the

Pennsylvania Department of Transportation. (Department Statement #1, pg. 5 lines 34-41, Department Exhibit C1-C5)

Mr. Hull also testified that the Stevenson Street crossing was the subject of a prior Commission Order dated May 4, 1970 at application docket number 95397. Paragraph twenty-three of the order directs the Erie Lackawanna Railway Company to maintain the crossing surface between the rails and up to two feet outside the rails. Paragraph twenty-two of the order directs the Pennsylvania Department of Highways to maintain the roadway approaches to two feet outside of the rails. (N.T. 126, Staff Exhibit #1)

Mr. Hull stated that the east side of the crossing should be resurfaced. In addition, he stated that some of the timber flange ways should be replaced and the flashing light signal on the east side should be relocated. (N.T. 126-127) The Bureau of Transportation and Safety believes that this work should be assigned and the costs allocated consistent with the Commission Order dated May 4, 1970 at application docket number 95397. The Commission should direct the Reading, Blue Mountain and Northern Railroad Company to replace the timber flange ways, move the flashing light signal on the east side of the crossing and resurface the east side of the crossing area two feet outside the rails. The Department of Transportation should resurface the east side of the crossing up to two feet outside the rails.

With regard to Hill Street, the Borough of Duryea presented evidence that the crossing was deteriorated. The Borough presented testimony that the roadway paving adjacent to the rails and the guard timbers was severely deteriorated with potholes and ruts. (N.T. 41, Borough Exhibits 7A-7E) The Borough testified that it had filled potholes on the railway crossing several times at a cost of approximately three to four hundred dollars. (N.T. 41-42)

Mr. Hull testified that the crossing at Hill Street was deteriorated as well. He indicated that the west rail was loose and needed to be tightened. (N.T. 127) In addition, he stated that the timber flange ways were satisfactory but that the east approach had potholes and needed to be resurfaced. (N.T. 128)

Mr. Hull testified that the Hill Street crossing was the subject of a previous Commission Order dated May 4, 1970 at Application Docket No. 95397. Paragraph twenty-three of the order directed that the Erie Lackawanna Railway Company maintain the crossing area between the rails and up to two feet outside the rails. Paragraph fourteen of the order directed that the Borough of Duryea maintain the approach roadways on the crossing.

Mr. Hull stated that the potholes on the approaches should be filled in and smoothed over in order to provide a smooth crossing surface. (N.T. 128) The work at this crossing should be allocated consistent with the prior Commission Order dated May 4, 1970 at application docket number 95397. The potholes two feet

outside or closer to the rails should be repaired by the Reading, Blue Mountain and Northern Railroad Company. Potholes more than two feet outside the rails should be repaired by the Borough of Duryea.

While the Bureau of Transportation and Safety's position is that the work at these crossings should be allocated consistent with prior Commission Orders, the Commission is free to consider other factors as well. The Commission may consider the factors set forth in the Greene Township decision as relevant.

In addition, the Commission may consider the volume of rail and highway traffic that uses the various crossings. Reading, Blue Mountain and Northern Railroad Company testified that it operates over the Lehigh Mainline six days per week. The trains operate over this line at ten miles an hour and handle approximately six thousand to seven thousand carloads of general merchandise per year. Reading, Blue Mountain and Northern also testified that it operates over the Taylor secondary approximately three times a week. These trains have three to five cars or as many as twenty cars depending on business.

(Reading, Blue Mountain and Northern Statement #1 pgs. 2-3)

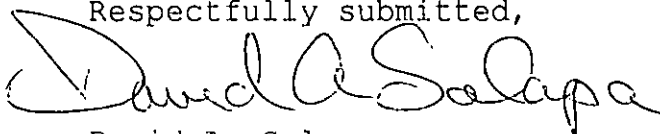
On the crossings involving state highways, the Department of Transportation provided information on the vehicle traffic volume. The traffic volume at the state highway crossings varied from one thousand to seven thousand vehicles per day. In short, the crossings are used frequently by both railroad and vehicles.

The Commission may consider the Commission's previous orders; the factors set forth in the Greene Township decision, the rail and vehicle traffic volume or any other factors it deems relevant in allocating the costs of repairing the crossings which are the subject of the proceeding.

## CONCLUSION

There is ample evidence to support the Commission directing repairs of the at-grade crossings in the Borough of Duryea that are the subject of this complaint proceeding. The crossings all have various deficiencies that create a rough riding surface and potential hazard to vehicle operators. Mr. Hull of the Bureau of Transportation and Safety has recommended various remedial measures to be taken at each of the crossings. The Bureau asks that the Commission adopt those recommendations and direct that the parties perform the necessary repairs consistent prior with Commission Orders governing the maintenance of those crossings.

Respectfully submitted,

A handwritten signature in cursive script that reads "David A. Salapa". The signature is written in dark ink and is positioned above the typed name and title.

David A. Salapa  
Assistant Counsel

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### PROPOSED FINDINGS OF FACT

- (1) The Foote Avenue crossing is a state highway crossing. (Department Statement #1, pg. 2 line 34-35)
- (2) The current speed limit on Foote Avenue is thirty-five miles an hour. (Department Statement #1, pg. 2 line 35)
- (3) The roadway width of Foote Avenue is approximately twenty-five feet. (Department Statement #1, pg. 2 line 39-40)
- (4) The Foote Avenue crossing consists of two tracks. (Department Statement #1, pg. 2 line 40)
- (5) The average daily vehicle traffic volume at Foote Avenue is seven thousand, three hundred and six with two hundred and twenty trucks. (Department Statement #1, pg. 3 line 6-7)
- (6) The Department of Transportation has no record of any accident at the Foote Avenue crossing within the last five years. (Department Statement #1, pg. 3 line 14)
- (7) The Reading, Blue Mountain and Northern Railroad operates over the Lehigh Mainline at Foote Avenue. (Reading, Blue Mountain and Northern Statement #1, pg. 2)
- (8) The Reading, Blue Mountain and Northern Railroad Company operates six trains per week at the Foote Avenue crossing. (Reading, Blue Mountain and Northern Statement #1, pg. 2)
- (9) The Reading, Blue Mountain and Northern Railroad Company operates trains at ten miles an hour at the Foote Avenue crossing. (Reading, Blue Mountain and Northern Statement #1, pg. 2)
- (10) The Reading, Blue Mountain and Northern Railroad Company handles approximately six thousand to seven thousand carloads of merchandise per year over the Lehigh Mainline. (Reading, Blue Mountain and Northern Statement #1, pg. 2)
- (11) Flashing lights and gates protect the Foote Avenue crossing. (N.T. 120, Borough Exhibit 2D, Department Exhibits A1-A3)
- (12) The Commission issued an order at Docket No. C-00902790 that authorized the modification of the Foote Avenue crossing and assigned maintenance responsibility for the crossing. (N.T. 120-121, Staff Exhibit 3)

- (13) The crossing at Foote Avenue is deteriorated due to failing or deteriorated timber flange ways and potholes. (N.T. 120, N.T. 27-30, Borough Exhibits 2A-2G, Department Exhibits A2-A3)
- (14) A vehicle operator could lose control when using the Foote Avenue crossing due its uneven surface. (N.T. 122)
- (15) The timber flange ways at the Foote Avenue crossing should be replaced and the asphalt between the tracks should be redone in order to provide a smooth Crossing surface. (N.T. 122)
- (16) Phoenix Street is a state highway route. (Department Statement #1, pg. 4, line 1)
- (17) The Phoenix Street crossing consists of a single track. (Department Statement #1, pg. 4, line 2)
- (18) The Phoenix Street crossing is protected with flashing light warning signals. (Department Statement #1, pg. 4, line 3)
- (19) The speed limit on Phoenix Street in the vicinity of the crossing is thirty-five miles per hour. (Department Statement #1, pg. 4, line 3)
- (20) Phoenix Street in the vicinity of the crossing is twenty-four feet wide. (Department Statement #1, pg. 4, line 6)
- (21) The average daily traffic volume is three thousand sixteen vehicles per day with one hundred and fifty-one trucks. (Department Statement #1, pg. 4, lines 13-14)
- (22) The Department of Transportation has no record of any accidents at the Phoenix Street crossing within the last five years. (Department Statement #1, pg. 4, line 21)
- (23) The Reading, Blue Mountain and Northern operates over the Lehigh Mainline at Phoenix Street six days per week. (Reading, Blue Mountain and Northern Statement #1, pg. 2)
- (24) The Reading, Blue Mountain and Northern operates trains at ten miles per hour at the Phoenix Street crossing. (Reading, Blue Mountain and Northern Statement #1, pg. 2)
- (25) The Reading, Blue Mountain and Northern Railroad handles approximately six to seven thousand of carloads of merchandise on the Lehigh Mainline at the Phoenix Street crossing. (Reading, Blue Mountain and Northern Statement #1, pg. 2)

- (26) The crossing at Phoenix Street is deteriorated with loose flange ways on the West approach. (N.T. 123)
- (27) The asphalt approach roadway on the west side of the crossing is higher than the flange ways created a humped, uneven surface. (N.T. 123)
- (28) The Commission issued an Order regarding the Phoenix Street crossing at Docket No. A-00111309. (N.T. 123, Staff Exhibit 4)
- (29) The uneven crossing surface could cause a vehicle operator to lose control of the vehicle when passing over the crossing area. (N.T. 124)
- (30) The deteriorated timber flange way at the Phoenix Street crossing should be replaced. (N.T. 124)
- (31) The asphalt on the west approach of the Phoenix Street crossing should be milled down so that it is level with the timber flange ways. (N.T. 124)
- (32) Stevenson Street is a state highway. (Department Statement #1, pg. 5, line 8)
- (33) The speed limit at the Stevenson Street crossing is twenty-five miles per hour. (Department Statement #1, pg. 5, line 9)
- (34) The roadway at the Stevenson Street crossing is twenty-four feet wide. (Department Statement #1, pg. 5, line 11)
- (35) The Stevenson Street crossing is protected with flashing lights and gates. (Department Statement #1, pg. 5, lines 12-13)
- (36) The average daily traffic volume at the Stevenson Street crossing is three thousand seven hundred and eighty-four vehicles with one hundred and eighty-eight trucks. (Department Statement #1, pg. 5, line 21)
- (37) The Department of Transportation has no record of any accidents at the Stevenson Street crossing within the last five years. (Department Statement #1, pg. 5, line 29)
- (38) The Stevenson Street crossing consists of a single track. (N.T. 125)
- (39) The timber flange ways in the Stevenson Street crossing area are deteriorated and split, creating an uneven surface. (N.T. 125)

- (40) The east side of the Stevenson Street crossing approach has some potholes and rutting. (N.T. 125, Department Exhibits C1-C5, Borough Exhibits 6A-6D)
- (41) The flashing light signal at the Stevenson Street crossing is thirty feet from the centerline of tracks. (N.T. 125)
- (42) The Manual on Uniform Traffic Control Devices provides that a flashing light signal should be no closer than twelve feet to the centerline of tracks. (N.T. 125)
- (43) The Stevenson Street crossing was the subject of a prior Commission Order Docket No. A-95397. (N.T. 26, Staff Exhibits #1,2)
- (44) The uneven crossing surface at the Stevenson Street crossing creates a hazard for vehicle users. (N.T. 126)
- (45) The flashing light signal on the east side of the Stevenson Street crossing should be relocated to twelve feet from the centerline of tracks. (N.T. 126)
- (46) The deteriorated timber flange and the approach roadways should be repaired at the Stevenson Street crossing. (N.T. 127)
- (47) Coxtan Road is a state highway. (Department Statement #1, pg. 6, lines 19-20)
- (48) Coxtan Road is approximately twenty feet wide at the crossing. (Department Statement #1, pg. 6, line 20)
- (49) The Coxtan Road crossing is protected with flashing lights and gates. (Department Statement #1, pg. 6, line 23)
- (50) The average daily traffic volume on the Coxtan Road crossing is one thousand three hundred and ninety-nine with thirty-nine trucks. (Department Statement #1, pg. 6, line 29)

- (51) The Department of Transportation has no record of any accidents at the Coxton Street crossing within the past five years. (Department Statement #1, pg. 6, line 37)
- (52) The Coxton Road crossing has numerous ruts and potholes. (N.T. 110, Department Exhibits D1-D4, Borough Exhibits 1A-1D)
- (53) The west rail at the Coxton Road crossing is cracked. (N.T. 110, Department Exhibits D3-D4, Borough Exhibits 1C-1D)
- (54) The sub-grade at the Coxton Road crossing has failed. (N.T. 114)
- (55) The Commission issued an Order at Application Docket No. 95397 assigning maintenance responsibilities for the Coxton Road crossing. (N.T. 111-113, Staff Exhibits 1&2)
- (56) York Avenue is a state highway. (N.T. 66-67)
- (57) The crossing at York Avenue has not been used since the Topps' facility moved out. (N.T. 78)
- (58) The York Avenue crossing has some asphalt placed over the rails. (N.T. 119, Borough Exhibits 5A-5D)
- (59) Marcy Street is a Borough of Duryea street. (N.T.)
- (60) The Marcy Street crossing has one railroad track. (N.T., Borough Exhibits 4A-4D)
- (61) Flashing light signals protects the Marcy Street crossing. (Borough Exhibits 4A-4B)
- (62) The Marcy Street crossing has ruts and potholes in the roadway area. (N.T. 116, 34-35, Borough Exhibits 4A-4D)
- (63) The Commission issued an Order at Application Docket No. 95397, which assigned maintenance responsibility for the Marcy Street crossing. (N.T. 117, Staff Exhibits 1&2)

- (64) Hill Street is a Borough of Duryea street. (N.T. 41)
- (65) The Hill Street crossing consists of a single track. (N.T. 41, Borough Exhibits 7A-7E)
- (66) The Borough of Duryea expended approximately three hundred to four hundred dollars filling potholes at the Hill Street crossing. (N.T. 41-42)
- (67) Cross-buck warning signs protect the crossing at Hill Street. (N.T. 127, Borough Exhibits 7A-7E)
- (68) The east approach at the Hill Street crossing has ruts and potholes. (N.T. 128)
- (69) The west rail at the Hill Street crossing is loose. (N.T. 127)
- (70) The Commission issued an Order at Application Docket No. 95397 that assigned maintenance responsibility for the Hill Street crossing. (N.T. 128, Staff Exhibits 1&2)

CERTIFICATE OF SERVICE

I hereby certify that I am this date serving the foregoing document upon the persons and in the manner indicated below:

Service By First Class Mail Addressed As Follows:

George M. Kashi  
Administrative Law Judge  
PA Public Utility Commission  
PO Box 3265  
Harrisburg, PA 17105-3265

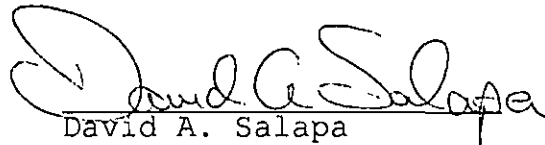
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Dated: August 11, 2000

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**ORIGINAL**

August 11, 2000

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Secretary of the Commission  
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Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, Pa. 17105-3265

AUG 14 2000

PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

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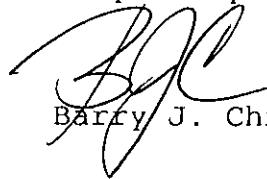
Re: Duryea Borough vs. Reading Blue Mountain and Northern  
Railroad, Delaware and Hudson Railway Company, PENNDOT  
and Luzerne County  
Docket No. C-00992585

Dear Sir/Madam:

Enclosed please find the original Main Brief, filed on behalf of  
Duryea Borough with nine (9) copies. A copy has been forwarded to  
the Honorable George M. Kashi, the presiding Administrative Law  
Judge.

Three (3) copies have been sent to counsel of record for each  
party.

Very truly yours,



Barry J. Chromey, Esq.

BJC/bc

cc: Hon. George M. Kashi, Adm. Law Judge  
Eric M. Hocky, Esq. (RBM&NRR Co.)  
Jason D. Sharp, Esq. (PENNDOT)  
David A. Salopa, Esq. (PUC-T&S BUREAU)  
Charles McCormick, Esq. (Luz. Co.)

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COMMONWEALTH OF PENNSYLVANIA  
PUBLIC UTILITY COMMISSION

ORIGINAL

DURYEA BOROUGH

DOCKET # C-00992585

VS.

READING BLUE MOUNTAIN  
AND NORTHERN RAILROAD  
COMPANY, PENNSYLVANIA  
DEPARTMENT OF  
TRANSPORTATION AND  
LUZERNE COUNTY

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AUG 14 2000

PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

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BRIEF OF PLAINTIFF, DURYEA BOROUGH WITH PROPOSED FINDINGS OF  
FACT AND CONCLUSIONS OF LAW

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DOCUMENT  
FOLDER

Barry J. Chromey, Esquire  
Solicitor, Duryea Borough

126 S. Main Street, Suite 201  
Pittston, PA 18640

Dated: August 14, 2000

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## **PROCEDURAL HISTORY**

This matter arose when the Complainant, Duryea Borough filed a Complaint with the Public Utility Commission on June 28, 1999 wherein it was alleged that a number of gate crossings were in deteriorated condition and in need of repair. Specifically, Foote Avenue, SR 2032; New Street, Phoenix Street, SR 2027; Coxton Road, SR 2033; Stevenson Street, Sr 2031; Marcy Street, Hill Street, York Avenue, SR 2029 and a second York Avenue crossing. The Complaint alleged that the Borough received numerous complaints regarding the condition of these sites. A field investigation was conducted and a conference was held at the site of the crossings. The parties are disputing who is responsible to fund the repairs at the crossings. The matter was then transferred to the Office of Administrative Law Judge for Hearing. A hearing was held before Administrative Law Judge George M. Kashi on May 18, 2000.

## SUMMARY OF ARGUMENT

In accordance with the evidence of record, the administrative law judge for the Commission should direct the Reading Blue Mountain Railroad Company to perform repairs or reconstruction of the crossings at issue where the crossing surface is deteriorated between the rails or in the area two feet outside of the rails. The Commission should direct the department of Transportation and any and all other responsible parties to perform any repairs or reconstruction to any of the crossings where the deterioration has occurred in an area more than two feet from the outside of the rails in a proportionate, reasonable share.

## ARGUMENT

### **I. THE PENNSYLVANIA PUBLIC UTILITY COMMISSION SHOULD ORDER THE PARTIES TO MAKE REPAIRS TO THE SEVEN CROSSINGS AT ISSUE IN PROPORTIONAL SHARE AND IN ACCORDANCE WITH THEIR APPROPRIATE RESPONSIBILITIES TO REPAIR THE RAILS, AND AREAS IN AND AROUND AND APPROACHING THE RAILS WITH THE COST TO BE BORNE IN REASONABLE AMOUNTS AMONG THE PARTIES.**

Pursuant to 66 Pa. C.S. Section 2702, the Commission has the exclusive authority to order the construction, reconstruction alteration, repair, protection, suspension or abolition of rail-highway crossings, as well as the 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, to prevent accidents and promote the safety of the public. SEPTA v. Pa. P.U.C., 140 Pa. Cmwlth. Ct. 270, 592 A. 2d. 797 (1991) alloc. denied 611 A. 2d 714 (1992).

Additionally, 66 Pa. C.S. Section 2704(a) grants the Commission the exclusive authority to assess the costs of any work it orders upon the concerned parties to this proceeding in such proportions as the Commission may determine. The Commission also determines the what parties are concerned within the meaning of 66 Pa. C.S. Section 2702(c). County of Chester v. Pa. P.U.C., 47 Pa. Commwlth. Ct. 366, 408 A.2d 552 (1979). 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 Township v. Pa. P.U.C., 116 Cmwlth. Ct. 228, 540 A.2d 600 (1988); Greene Township v. Pa. P.U.C., 668 A.2d 615 (Pa. Cmwlth. Ct. 1995); AT&T v. Pa. P.U.C., 737 A.2d 201 (Pa. 1999). 737 A.2d 201 (Pa. 1999).

*The relevant factors for consideration as set forth in Greene Township, are as follows:*

(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 led to the need for the repair, replacement or removal; and (5) the relative benefit that each party will receive from the repair, replacement or removal of the crossing. While the Commission has considered these factors to be relevant in the past, this in no way limits the factors that the Commission can consider. Bell Atlantic-PA, Inc. v. Pa. P.U.C., 672 A.2d 352 (Pa Cmwlth. 1996); AT &T v. Pa. P.U.C., 737 A.2d 201(Pa. 1999).

In the present case, the Plaintiff, borough of Duryea has the burden of proof in establishing its case before the Commission. Notably, the burden of proof is by a preponderance of the evidence. Samuel Lansberry, inc. V. Pa. P.U.C., 134 Cmwlth. Ct. 218, 578 A.2d 600 (1990).

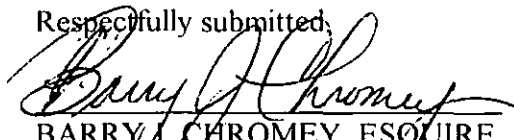
In the present case, the Plaintiff, Duryea borough has met its burden of proof in this case.

Notably, the parties are in agreement that the crossings are in a state of disrepair and deterioration and require repair and replacement. The parties disagree as to who is particularly responsible for the repair work but agree that they will perform in accordance with a proportionate reasonable share of the work and cost of same.

## CONCLUSION

In the present case, the evidence of record establishes that the Plaintiff, Duryea borough has met its burden of proof in establishing by a preponderance of the evidence the deteriorated and dilapidated condition of the seven crossings at issue, namely Foote Avenue, SR 2032; New Street, Phoenix Street, SR 2027; Coxton Road, SR 2033; Stevenson Street, Sr 2031; Marcy Street, Hill Street, York Avenue, SR 2029 and a second York Avenue crossing. The testimony at the hearing of May 18, 2000 by Councilman Keith Moss, Duryea Borough and Mr. Hull of the Bureau of Transportation and Safety adequately establishes the condition of the crossing and the remedial measures necessary to restore each of the crossing to acceptable safety standards. The borough of Duryea respectfully requests that the Commission order the parties to perform the necessary repairs as established by the testimony evidence of record and the applicable Pennsylvania statutes and case law governing the within matter.

Respectfully submitted,

  
BARRY J. CHROMEY, ESQUIRE  
Attorney for Duryea Borough

### **PROPOSED FINDINGS OF FACT**

1. This matter arose when the Complainant, Duryea Borough filed a Complaint with the Public Utility Commission on June 28, 1999 wherein it was alleged that a number of gate crossings were in deteriorated condition and in need of repair. Specifically, Foote Avenue, SR 2032; New Street, Phoenix Street, SR 2027; Coxtton Road, SR 2033; Stevenson Street, Sr 2031; Marcy Street, Hill Street, York Avenue, SR 2029 and a second York Avenue crossing.
2. A field investigation was conducted and a conference was held at the site of the crossings. The parties are disputing who is responsible to fund the repairs at the crossings.
3. The matter was then transferred to the Office of Administrative Law Judge for Hearing.
4. A hearing was held before Administrative Law Judge George M. Kashi on May 18, 2000.
5. On Behalf of Duryea Borough, the testimony of Councilman Keith Moss was presented to testify on the conditions of the seven crossings at issue; five involving state roads and two involving local roads.
6. Defendant, The Pennsylvania Department of Transportation, presented testimony regarding the condition of the five state highways named in the Complaint and presented testimony regarding the second York Avenue crossing. The Department agreed to do any of the paving work on the approaches to the state highway crossings necessary and recommended by the Bureau of Transportation and Safety. Other than that, the Department would not agree to do any of the work inside the rails.

7. The Bureau of Transportation and Safety presented the testimony of a Mr. Hall regarding the condition of the various crossings as well as prior Commission orders that have dealt with either reconstruction or maintenance of these crossings.

8. Defendant, Luzerne County indicated that it owned no property nor any of the roads in question and intended to present no testimony of the issues of the crossings.

9. The court clarified that the hearing testimony would cover Coxtton Road, Foote Avenue, Phoenix Street, Marcy Street and York Avenue.

10. A Stipulation was entered on the record by the Solicitor for Luzerne County, Charles McCormick, Esquire regarding the County's lack of ownership of the property involved in any of the complained upon crossings and further, that there are no public right-of-ways .

11. Duryea Borough presented the testimony of Councilman Keith Moss on its own behalf.

12. Councilman Moss testified that he has held the position of Councilman in Duryea borough for seven years and is familiar with the crossings at issue. (Transcript at p. 21 lns. 10-20).

13. Mr. Moss indicated that his testimony at the hearing is with the authorization of the Duryea Borough. (N.T. p. 22 lns. 2-10).

14. Mr. Moss testified first with regards to the Coxtton Road crossing and explained that this crossing as depicted in Exhibit 1-A through 1-D showed the deplorable condition of the crossing, specifically, the deterioration of the blacktop and wooden ties at the crossing. (N.T. p. 23 lns. 2-12).

15. Councilman Moss testified that he has driven over the Coxtton Road Crossing and that

the crossing is extremely deteriorated due to heavy traffic, in particular heavy tractor-trailer traffic from Pulp and Talbert and Airport Sand and Gravel. (N.T. pp. 23-26).

16. Councilman Moss next testified with regard to the Foote Avenue Crossing and identified the photographs and testified concerning the deterioration of the wood, macadam and tracks at the crossing. He further explained the heavy traffic in this area consisting of emergency vehicles from Germania and Excelsior fire companies and heavy tractor-trailer traffic. (N.T. p. 27 at Ins. 2-25, pp. 26-30).

17. Councilman Moss next testified to the Phoenix Street Crossing which was repaired sometime in 1999, with the railroad ties being replaced. Mr. Moss indicated that the railroad ties are loose and falling apart in this location which has heavy traffic from the shopping center and is a PennDot road. ( N.T. p. 31 Ins. 5-16 pp. 32-33 Ins. 1-20).

18. Councilman Moss next testified with regard to the Marcy Street crossing and stated that this crossing is a Borough-owned road with deteriorating railroad ties and macadam with heavy pedestrian traffic . (N.T. pp.34, 35 and p. 36 Ins. 1-10).

19. Mr. Moss next testified with regard to The Reading Blue Mountain Northern crossing on York Avenue in Duryea and stated that this is a very busy roadway/business area which is a State road accommodating traffic to Shot Optical. Additionally, this crossing has heavy pedestrian traffic. (N.T. p. 36, 37 ).

20. Councilman Moss testified with regard to Stevenson Street and Hill Street and indicated that the Stevenson Street crossing with deteriorating railroad ties and macadam that has very heavy pedestrian traffic. (N.T. p. 39-41 ).

21. Next, Keith Moss testified with regard to the Hill Street crossing and stated that this

crossing suffers deteriorating macadam and railroad ties. Notably, the Borough has filled in the potholes at this crossing on several occasions. Furthermore, this crossing is very dangerous in that there are no markings at the crossing. (N.T. pp. 42-44).

22. Mr. Moss testified that all of the crossing at issue are owned by the Reading Blue Mountain Railroad. (N.T. p. 44 L.S. 10-14).

23. Mr. Moss indicated that complaints were made with regard to each of the crossing but that the only crossing for which action was Phoenix Street where the Railroad ties were replaced. (N.T. pp. 44-45).

24. In regard to the Coxtton road crossing, Mr. Moss indicated that the Borough had an agreement with Conrail before Reading Blue Mountain Northern that the Borough would replace the blacktop and be reimbursed by the railroad. When reading Blue Mountain took over they refused to reimburse the Borough for the work. (N.T. p. 45 Ins. 9-16).

25. The Borough stated that in its opinion, the crossing should be taken out and redone over with new rails and ties. The Borough's suggestion is for the State road crossings to be replaced with rubber crossings similar to the rubber crossings installed by D And H at MacAlpine Street in Avoca and York Avenue in Duryea. (N.T. p. 46).

26. In regard to the crossings testified to, Mr. moss indicated that although there had been no traffic accidents at the crossings, there were incidents involving tractor trailers having their landing gear torn off, cars having their mufflers and tailpipes torn off. ( N.T. p. 47 Ins.8-23).

27. Mr. Moss verified that the Borough had filled some of the potholes at the crossings and the cost of these repairs was between \$300.00 and \$400.00. ( N.T. p. 48 Ins. 1-6).

28. Mr. Moss testified that although the Borough did not have monies budgeted for the payment of construction costs at the crossings, Duryea Borough would be agreeable to budgeting

money toward a reasonable share of the construction cost to repair the crossings.(N.T. p. 49 lns. 14-25 and p. 50 lns. 1-5).

29. Mr. Moss indicated that the Borough had not made an independent investigation as to what the cost of repairing the crossings would be. (N.T. p. 50 lns. -9).

30. On cross examination, Mr. Moss described the traffic at Coxtan road as constant heavy tractor-trailer traffic because it is the only road that goes into Ransom from Duryea and services Pope and Talbert and a sand and gravel plant, called Airport Sand and gravel and Lower Lackawanna Sewer Authority and a railroad repair company called RMDI. (N.T. p. 51 lns. 1-15).

31. Mr. Moss verified that the majority of these companies are located in Luzerne County with one or two located in Lackawanna County. (N.T. p. 51 lns. 16-19).

32. Mr. Moss indicated that Airport Sand and gravel, Lower Lackawanna Valley Sewer Authority and RMDI are located in the Borough of Duryea. ( N.T. p. 51 lns. 20-25).

33. Mr. Moss explained that the potholes repaired by the Borough at the Coxtan Road crossing were repairs made to the approach to the rails and to the middle of the rails . ( N.T. p. 52 lns. 2-9).

34. Mr. Moss testified that the potholes which were filled at Hill Street were inside the rails. ( N.T. p. 52 lns. 10-13).

35. Mr. Moss testified that there are sidewalks at the Stevenson Street crossing which is also equipped with a senior citizen hand railing. ( N. T. pp. 53-54).

36. Mr. Moss indicated that at the Stevenson Street crossing there is deterioration of the timbers at the crossing. (N.T. p.54 lns. 14-17.)

37. Mr. Moss explained that at the Foote avenue crossing there is tractor trailer traffic from local businesses. 9 N.T. p. 55 lns. 1-70.

38. In regard to the Phoenix Street crossing, Mr. Moss testified that much of the highway traffic is headed to the local shopping center and therefore, this crossing is mostly used by local residents. 9 N.T. p. 55 lns. 8-14).

39. In regard to the York Avenue crossing, Mr. Moss testified that most of the traffic is for Shott Glass Technologies located Duryea borough, Luzerne County. (N.T. p. 55 lns. 18-23).

40. Mr. Moss explained that in regard to the Foote avenue crossing, there is sagging of the rails and ties. ( N.T.p. 56 lns. 5-11).

41. Mr. Moss explained that at the Phoenix Street crossing Reading Blue Mountain Northern had performed tie work that had failed. ( N.T. p. 56 lns. 15-20).

42. Mr. moss testified that in regard to the Coxton road crossing that this crossing is used mostly by businesses located in Duryea Borough with the exception of Plainwell tissue and Keystone Sand and Gravel which is located in Lackawanna County. ( N.T. p. 57 lns. Ransom Township, Lackawanna County. ( N.T. p. 57 lns. 1-6).

43. Mr. Moss testified that the general condition of the state highways approaching the crossings are in halfway decent shape with the Coxton crossing being 'rough,' Foote Avenue "not so bad" and Phoenix Street being 'a little bit wavy,' and Stevenson Street being 'pretty good.'

44. Mr. Moss identified a photograph labeled Exhibit 6-b and testified that this depicted a three to four inch pavement cut to the left of the outermost rail as the place where the second rail used to come through on the Reading Blue Mountain Northern Railroad. (N.T. p. 57 lns. 21-25 and p. 58 lns. 1-6).

45. Mr. Moss explained that this line had been ripped out. ( N.T. p. 58 lns. 13-15).

46. Mr. Moss agreed that if reading blue mountain were to perform routine maintenance to the crossing areas from the rails and the ties and the inner ties to the outer ties and the paving between the rails that this would satisfy ninety (90) percent of the borough's complaints with the other ten (10) percent representing the approaches to the crossings which the borough would be willing to maintain. ( N.T. p. 58 lns. 21-25 and p. 59 lns. 1-8).

47. On cross examination by counsel for the Bureau of transportation and Safety, Councilman Moss agreed that in stating that the ties at various crossings were loose that he was referring to the timbers that run parallel with the rails on both the inside and outside of the rails and not the ties that run across and connect the rails. (N.T. p. 59 lns. 19-25 and p. 60 lns. 1-3).

48. Mr. Moss agreed that the York Avenue crossing once serviced the Topps Chewing gum factory which was sold to Shott Glass Technologies and that to his knowledge there had not been any rail traffic on that line within the last year or two but that there was rail traffic in the past when the Topps plant was operating. ( N.T. p.60 lns. 7-25 and p. 61 lns. 1-5).

49. Joseph Strok next testified on behalf of the office of Chief Counsel Real Property Division. (N.T. p. 63 lns. 5-10).

50. Mr. Strok testified with regard to Department Statement Number One prepared at his direction and control. ( N.T. p. 63 lns. 14-22).

51. Mr. Strok testified that he adopts Department Statement Number One as his testimony in this case. (N.T. p. 64 lns. 3-5).(See Department Statement Number One).

52. In regard to the York Avenue crossing, Mr. Strok described this Delaware and Hudson crossing in Luzerne County, Luzerne/Susquehanna Rail Authority and testified that an application was filed with the Public Utility Commission to install high-type rubber surface crossings; this work having been completed one week before the hearing in this case. (N.T. p. 65

Ins. 2-7).

53. Mr. Strok identified three (3) photographs marked as Department Exhibit F and described these photographs as depicting the newly installed rubber crossings with the two closest tracks being owned by Delaware and Hudson and the farthest track being owned by Luzerne/Susquehanna Railway Company. (N. T. P. 65 Ins. 19-25 and p. 66 ln. 1).

54. Mr. Strok described the other two photographs as depicting the approach looking west of the crossing after the completion of the work where the Department installed new pavement markings at the crossing and depicting the other side of the crossing showing the new pavement markings on that side. (N.T. p. 66 Ins. 2-90).

55. Mr. Strok testified that he was the person who took these photographs and that in his opinion, the three (3) photographs adequately depicted the conditions at the crossings and that the crossing surface is now adequately safe for both vehicular traffic and rail traffic. (N.T. p. 66 Ins. 11-20).

56. Mr. Strok next testified with regard to the York Avenue crossing and opined that the Department would like this crossing suspended and the ties and rail removed. (N.T. p. 66 Ins. 21-25 and p. 67 Ins. 1-4).

57. Mr. Strok stated that the Department would follow its district policy in paying fifty (50) percent of the cost of removal and replacement of the pavement which would come out of the County's general fund with the other fifty (50) percent being the responsibility of the railroad. (N.T. p. 67 Ins. 1-19).

58. Mr. Strok agreed that the Department would be willing to abide by and bear the cost of and do the work that the PUC orders in this case. (N.T. p. 67 Ins. 23-25 and p. 68 ln. 1).

59. In regard to the state highway crossings involved in this matter, Mr. Strok testified

that the department is willing to maintain the roadway approaches up to within two feet of the rail which includes the basic inch and one-half or one inch overlays on the eight to ten year cycle and that the Coxtton road crossing would need a little base course or deeper restoration but that here too, the department would be willing to go within two feet of the head of the rail and do pavement restoration. (N.T. p. 68 lns. 2-130).

60. Mr. Strok stated that based on the testimony of the Borough that they would like to see rubber high-type surfaces at either crossing that these roadways did not warrant a high type surface because they are not on the Section 130 list and have not been requested to be placed on this list by any municipal authority or railroad. Furthermore, he indicated that none of the roads have a significantly high AVT that would warrant a high-type surface of any material. (N.T. p. 68 lns. 14-25).

61. Mr. Strok explained that Section 130 is a federal money program given to the state to install safety devices that can include new rubber surfaces and lights and gates which is limited to rubber or full- depth concrete. (N.T. p. 69 lns. 21-25 and p. 70 lns. 1-2).

62. Mr. Strok explained the Department parameters for installing high rubberized crossings as consisting of consideration of the approach grades of the roadways, both entering and leaving the crossings and that this was one of the reasons for the work at the York Avenue crossing where the Department raised one set of tracks over seven inches because of the severe grades of the approaches. (N.T. p. 70 lns. 3-22).

63. Mr. Strok further testified that the department looks at existing conditions that they know is bad and continues to be bad, the number of vehicles, the number of trains, grade problems, the proximity to intersections, safety factors and a list for the probability of accidents at the crossing. (N.T. p. 70 lns.23-25 and p. 71 lns. 1-19).

64. On cross examination by counsel for the Borough of Duryea, Mr. Strok admitted that the conditions at the York Avenue crossing specifically, the elevation of the Two D and H tracks and the third, Luzerne/Susquehanna track and the approach of the roadway grades and the fact that the crossing was on the safety list for four years and the increase I rail traffic on the D and H line warranted the installation of the high-type rubberized surface. (N.T. p. 73 Ins. 2-10 and Ins. 22-25 and p. 74 Ins. 1-3).

65. Mr. Strok admitted that this is the same line that crosses Foote Avenue and that the Department would like to improve the Foote Avenue crossing but that there is no big difference in the elevation at this crossing that would be helped by a high-type surface and there is no other safety benefit. (N.T. p. 74 Ins. 4-16).

66. Notably, Mr. Strok acknowledged that he was present for the testimony of Keith Moss, Duryea Borough Councilman, and that he did not disagree with any of the testimony of Mr. Moss. (N.T. p. 74 Ins. 17-24).

67. On cross examination by counsel for Reading Blue Mountain and Northern Railroad, Mr. Strok admitted that the Foote Avenue crossing had Section 130 funds available but that no Section 130 monies are available at this time for the other crossings at issue. (N.T. p. 75 Ins. 21-25 and p. 76 ln. 1).

68. Mr. Strok explained that the railroad's share of the cost when Section 130 monies are available is zero if its on a state-owned roadway but if it's on a locally owned roadway there is a \$5,000.00 cost for engineering that has to be borne by the local municipality or the railroad with the actual cost of construction of the crossing being at no expense to the railroad. ( N.T. p. 76 Ins. 2-11).

69. Mr. Strok testified that he is unable to render an opinion as to the current safety of the

crossings for railroad operations since his opinions are focused on a vehicular, public operational standpoint. ( N.T. p. 76 Ins. 12-19).

70. Mr. Strok testified that it is his understanding that to his knowledge the York Avenue crossing is owned by Shott Optical and not an industrial authority. ( N.T. p. 77 Ins. 1-9).

71. Mr. Strok testified with regard to the York avenue crossing that he did not recall a train at that location since the Topps plant moved out six or seven years earlier. (N.T. p. 78 Ins. 6-17).

72. Mr. Strok testified that the Department is interested in removing the crossing at the York Avenue location if it appears that the crossing is not being used, is a nuisance to the motoring public and the maintenance of the roadway. In this case the cross warnings and signs would be removed by the Department. ( N.T. p. 78 Ins. 18-25 and p. 79 Ins. 1-6).

73. On cross examination by counsel for the office of Chief Counsel, Mr. Strok admitted that the York Avenue line is not the same line running through Foote Avenue and that the only two railroads operating on the on the York Avenue line are D and H and Norfolk Southern. (N.T. p. 79 Ins. 14-24 and p. 80 Ins. 1-4).

74. Reading Blue Mountain and Northern Railroad presented the testimony of Andrew Muller, president of the railroad regarding the seven crossings at issue. (N.T. p. 80 Ins. 13).

75. A copy of the prepared testimony of Mr. Muller was offered into the record on behalf of the railroad. ( N.T. p. 80 Ins. 2-6) .

76. Mr. Muller testified that is it was determined that the Reading Blue Mountain crossings needed to be replaced that the cost of replacement be allocated in a fair and reasonable manner. He further indicated that the railroad would tear down the crossing, tear up the roadway, rebuild the whole crossing , including the flangeways but would need someone to pay for the

detour and the State, county or local municipality would have to come in and pave the new roadway. (N. T. P. 84 lns. 2-13).

77. Despite his testimony that all of the crossings at issue in this case are safe for rail operation, Mr. Muller admitted on cross examination by counsel for the Borough that he does not have personal knowledge of the complaints regarding the crossings at issue. 9 N.T. p. 84 lns. 22-25 and p. 85 lns. 1-8).

78. Mr. Muller acknowledged that he had seen the Coxtan crossing and that to the best of his recollection some small repairs were done at this crossing since it was purchased in 1996. ( N.T. p. 85 lns. 14-25).

79. In regard to the Foote Avenue crossing, Mr. Muller stated that no monies were expended by the railroad at this crossing. ( N.T. p. 86 lns. 9-13).

80. Mr. Muller did not know of any monies spent by the railroad at the Phoenix Street crossing, or Marcy Street crossing. (N.T. p. 86 lns. 20-25 and p. 87 lns. 1-4).

81. Mr. Muller testified that at the time of the hearing he had not been to the York Avenue crossing for over three years, was uncertain as to the ownership of that rail line but admitted that while Topps was there in 1997 that his railroad served the plant. (N.T. p. 87 lns. 5-12 and p. 88 lns. 1-14).

82. In regard to the Stevenson Street crossing, Mr. Muller had no knowledge at all of this crossing and had no knowledge of any monies spent for repairs at this crossing. (N.T. p. 88 lns. 15-22).

83. Mr. Muller admitted to having no knowledge whatsoever regarding the Hill Street crossing. ( N.T. p. 88 lns. 23-25 and p. 89 lns. 17-23).

84. Mr. Muller testified that in regard to the Hill street crossing that both Reading Blue

Mountain and Delaware and Hudson have operating rights on that line. ( N.T. p. 90 Ins. 9-20).

85. Mr. Muller further testified that Luzerne and Schuylkill have operating rights at Foote Avenue. ( N.T. p. 90 Ins. 22-25).

86. In regard to these other railroads, Mr. Muller testified that none of them pay monies to use these lines and they are essentially free to them. (N.T. p. 91 Ins. 6-13).

87. Mr. Muller agreed that there is a split rail at the Coxtan Road crossing and admitted that it is possible for a train to derail on the northeast corridor and further admitted that the whole branch line going through Coxtan is in terrible condition. (N.T. p. 92 Ins. 7-25).

88. With regard to the condition of the rails at Coxtan road crossing, Mr. Muller speculated that a tractor-trailer low-boy hit the rails at this crossing and that's what caused the damage; he admitted to having no personal knowledge if this being the actual cause of the damage. (N.T. p. 94 Ins. 3-9).

89. Mr. Muller was shown a photograph of a panel in place at the Coxtan road crossing and admitted to having no knowledge of a panel placed at the Coxtan road crossing by his maintenance-of-way people. ( N.T. p. 94 Ins. 20-25 and p. 95 Ins. 1-14).

90. Mr. Muller admitted to having visited the Foote, Phoenix and Stevenson crossings in March and further admitted and specifically indicated that he would not dispute that the timbers are loose at the flangeways at the Foote Avenue crossing. (N.T. p. 96 Ins. Lns. 1-5 and Ins. 15-19).

91. Mr. Muller acknowledged that there is a way for the railroad to tighten the loose timber flangeways or replace them to get them in a more solid condition . (N.T. p. 96 Ins. 20-25).

92. Mr. Muller indicated that reading would be willing to do paving and timber tightening or replacement work at the seven crossings if that were to create a smoother, safer crossing. (

N.T. p. 97 Ins. 7-11).

93. Mr. Muller agreed that the railroad would be willing to accomplish an adequate crossing area by maintenance with asphalt and timber and would be willing to do the whole crossing if the cost could be shared fairly. (N.T. p. 97 Ins. 12-23).

94. Mr. Mueller acknowledged that the timbers at the Stevenson Street crossing are loose and admitted that these crossings haven't been repaired for a period of time. (N.T. p. 97 Ins. 24-25 and p. 98 Ins. 1-100).

95. Mr. Mueller testified with regard to photograph exhibit department 3-B depicting Phoenix Street crossing and admitted that the rail is shown an inch to an inch and one half to two inches below the top of the wooden timber and indicated that this was the result of deterioration of the timbers. (N.T. p. 98 Ins. 22-25 and p. 99 Ins. 1-70).

96. Mr. Muller stated that if the PUC orders it, that the railroad is willing to accept the routine maintenance crossing areas within the traditional area within two feet of the rail from the head out. (N.T.p. 99 Ins. 18-24).

97. Mr. Muller acknowledged that is not personally aware that the Stevenson Street crossing signal is located thirty feet from the edge of the rail but admitted that he was not surprised that this is the case at this crossing but stated that the railroad is not able to relocate the signal without orders of the PUC or federal government. (N.T. p. 100 Ins. 19-24 and p. 101 Ins. 1-40).

98. Mr. Mueller testified that the railroad would be willing to relocate the signal at the crossing if it is the legal, right thing to do. (N.T. p. 102 Ins. 3-17).

99. Mr. Muller explained that he would like to see the crossings at issue redone and some resolution to the issues with these crossings by doing some patching at the crossings and then over the next two to three years rebuilding all of the crossings if the cost could be allocated fairly.

(N.T. p. 102 lns. 24-25 and p. 103 lns. 11-16).

100. Mr. Muller agreed that if there was a way to take some of the monies being received by the railroad and with the cooperation of PennDot and/or the federal government, either contribute or work with some way to a long term solution of implementing high-rubber at these crossings . (N.T. p. 104 lns. 1-7).

101. Mr. Muller stated that the railroad has received monies in the past for projects from Penn DOT and that in this case it may be possible to have PennDOT allocate funds for the crossings at issue. (N.T. p. 105 lns. 20-25 and p. 106 lns. 1-6).

102. Mr. Muller testified that to his knowledge the railroad is not responsible for the costs like detours or paving the approaches. (N.T. p. 106 lns. 20-24).

103. Mr. Muller testified with regard to Staff exhibit One, an application to alter numerous crossings on the Taylor secondary line specifically, Hill Road, Marcy Street to remove one of two tracks on the line by Commission order dated may 4, 1970. (N.T. p. 11 lns. 12-22).

104. Mr. Hull indicated that with regard to Staff exhibit one, that the Commission order assigned maintenance responsibilities to Erie Lackawanna Railway Company for the area inclusive of the tracks, in between the tracks and two foot out side the rails with the approach roadway being assigned to the Department of Transportation.. (N.T. p. 112 lns. 6-18).

105. Mr. Hull stated that the current condition of the crossing raises concerns regarding the safety of the crossing and its use by vehicular traffic and pedestrians because it is a very uneven ride and extremely rutted and could cause someone to lose control at the crossing if the hit an uneven surface. (N.T. p. 113 lns. 7-15).

106. Mr. Hull opined with regard to the Coxtton road crossing that in order to provide a smooth crossing surface the entire crossing would have to be rebuilt from the ties up and that the

approaches would have to be reconstructed. (N.T. p. 114 lns. 3-10).

107. With regard to the Marcy street crossing Mr. Hull stated that the timber flangeways were satisfactory but the approach work was rutted and potholed and would need rehab work. (N.T. p. 116 lns. 18-24).

108. With regard to the York Avenue crossing, Mr. Hull indicated that the crossing in uneven and since it appears that has been abandoned that the rails should be removed. (N.T. p. 119 lns. 18-250).

109. With regard to the Foote Avenue crossing, Mr. Hull testified that this consists of two tracks, one main and one siding and that the timbers flangeways at this crossing are deteriorating and failing at this crossing. Additionally, there is an uneven surface between the tracks and potholes and deterioration at the approach. (N.T. p. 120 lns. 13-19).

110. In regard to Foote Avenue, reference was made to Staff exhibit three, a Commission order entered March 2, 1994 in which the railroad was directed to rehabilitate the crossing and Conrail was assigned the maintenance at this crossing with PennDOT being assigned the approach roadway maintenance, later Conrail filed an application to alter several crossings including the Foote Avenue crossing which was granted and directed maintenance responsibilities to Conrail. (N.T. p. 120 lns. 20-25 and p. 121 lns. 1-18).

111. With regard to the Foote Avenue crossing it was stated that the conditions at the crossing could cause a vehicle traveling at a high rate of speed to lose control if they hit an uneven surface and would require the timber flangeways to be replaced and the asphalt between the two sets of tracks to be redone to a smooth condition. (N.T. p. 122 lns. 5-20).

112. The Phoenix Street crossing was described as a single track protected by existing signals with no gates at the crossing with the surface consisting of timber flangeways. The

testimony indicated that some of the flangeways are loose and deteriorated specifically at the west approach and an uneven surface exists at the west approach where the asphalt transitions into the flangeways. (N.T. p. 123 lns. 1-19).

113. The prior Commission Orders pertaining to the Phoenix street crossing consisted of Exhibit 4, application No. 109312 of Conrail for alteration of the crossing consisting of the removal of the two tracks. (N.T. p. 123 lns. 21-25 and p. 124 ln. 1).

114. The testimony indicated that the uneven condition of the Phoenix Street crossing is a concern with regard to the vehicles that use the crossing, specifically that vehicles traveling at a high rate of speed could lose control at the crossing because of the uneven surface. (N.T. p. 124 lns. 2-7).

115. It would be necessary to replace the timber flangeways with steel replacements being acceptable and the asphalt needs to be milled down which would mean removing the asphalt so that there would be a smooth transition into the timber flangeways so that when a vehicle comes off the approach it will be a smoother transition by grinding down the asphalt. (N. T. P. 124 lns. P. 11-25 and p. 125 lns. 1-3).

116. In regard to the Stevenson Street crossing, a single track crossing with timber flanges, the flanges are deteriorated and the cart pathway, the inside with the four sections of timber inside are splitting and deteriorated and would have to be replaced because they created an uneven surface. Also, the east approach shows potholes and rutting with a signal base 30 feet from the center line of the track with the manual on uniform control traffic devices suggesting that the be no closer than 12 feet from the center but as close as possible to the rails. (N.T. p. 125 lns. 4-25).

117. The testimony reflected that at the time that no application to remove the second

track at the Stevenson Street crossing was received by the Commission and this could explain why the signal was never moved since when an application is filed an order is usually issued to relocate the signal. (N.T. p. 126 lns. 1-10).

118. In regard to prior Commission orders to the Stevenson Street crossing , there was one where the Erie Lackawanna was directed to remove a track and later this order was modified. *The current conditions of the crossing raises concern because of the uneven surface which could create a hazard to the public specifically since the signals are too far apart in the east approach and should be relocated.* (N.T. p. 126 lns. 11-25).

119. The recommendation for Stevenson Street would be to resurface the crossing for a smoother surface especially the east approach needs resurfacing and the failed timber flanges need to be replaced. (N.T. p. 127 lns. 4-15).

120. In regard to Hill road crossing consists of a single rail showing that the west rail was loose and needs to be tightened with the east approach being potholed and rutted and needs to be resurfaced. (N.T. p. 127 lns. 22-25 and p. 128 lns. 1-3).

121. The prior orders of the Commission regarding Hill Road consisted of two applications of the Erie Lackawanna Railway Company . (N.T. p. 128 lns. 4-7).

122. Mr. Hull testified that the current condition of the Hill Road crossing requires reconstruction and filling in potholes in order to make the crossing satisfactory and does not require repaving or work between the rails. ( N.T. p. 128 lns. 8-17).

### **CONCLUSIONS OF LAW**

1. The parties are bound by the Public Utility Commission regulations, as amended.
2. The Public Utility Commission administrative Law Judge is convinced that the seven crossings at issue are of a deteriorated condition which require repair of the timber flanges,

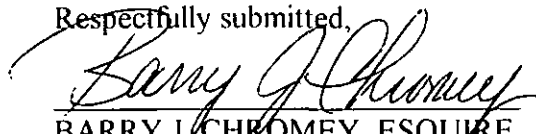
replacement of flanges, and replacement of asphalt at or between the rails and replacement of asphalt at the approaches to the crossings.

3. Based upon the evidence of record, the administrative law judge is convinced that the cost associated with the repairs necessary to the seven crossings at issue are to be borne by each of the parties contributing a reasonable share of the cost.

4. The Commission should direct the Reading Blue Mountain and Northern Railroad to perform any repairs or reconstruction to any of the crossings where the crossing surface is deteriorated between the rails or in an area two feet outside of the rails.

5. The Commission should direct the Department of Transportation, the Department of Transportation and Safety and Duryea Borough to contribute a proportional share of the reconstruction and repairs of the crossings where the deterioration has occurred in an area more than two feet from the outside of the rails.

Respectfully submitted,

  
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Monday, August 14, 2000

James J. McNulty, Secretary  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

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Docket # C-00992585

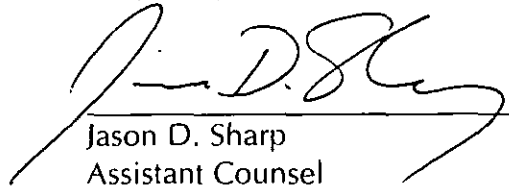
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Dear Secretary McNulty:

Enclosed for filing is an original and nine (9) copies of the Department of Transportation's Main Brief in the above captioned matter.

The parties have been served with two (2) copies of the Brief in the manner indicated on the attached certificate of service.

Very Truly Yours,

  
Jason D. Sharp  
Assistant Counsel

220/JDS:jds

cc: All parties of record  
Gary Fawver, P.E., Chief, Right-of-Way and Utilities Division)  
Joe Strok, Grade Crossing, District 4-0

4

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

ORIGINAL

DURYEA BOROUGH

V.

READING BLUE MOUNTAIN AND  
NORTHERN RAILROAD COMPANY,  
PENNSYLVANIA DEPARTMENT OF  
TRANSPORTATION AND  
LUZERNE COUNTY

Docket Number

C-00992585

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MAIN BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF TRANSPORTATION

DOCUMENT  
FOLDER

DOCKETED  
AUG 15 2000

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STATEMENT OF THE ISSUES INVOLVED

- I. IT IS JUST AND REASONABLE FOR THE PENNSYLVANIA PUBLIC UTILITY COMMISSION TO ENTER AN ORDER REQUIRING REPAIRS TO THE CROSSINGS AT FOOTE AVENUE (S.R. 2032), PHOENIX STREET (S.R. 2027), AND STEVENSON STREET (S.R. 2031).
- II. IT IS JUST AND REASONALBE FOR THE PENNSYLVANIA PUBLIC UTILITY COMMISSION TO ENTER AN ORDER SUSPENDING THE YORK AVENUE ("TOPPS") CROSSING.
- III. IT IS JUST AND REASONABLE FOR THE PENNSYLVANIA PUBLIC UTILITY COMMISSION TO ENTER AN ORDER REQUIRING THE COMPLETE RECONSTRUCTION OF THE COXTON STREET CROSSING (S.R. 2033).

## STATEMENT OF THE CASE

This case involves numerous crossings, in the Borough of Duryea ("Borough"), Luzerne County ("County"), intersecting with the tracks of the Reading Blue Mountain and Northern Railroad Company ("Reading"). One particular set of crossing involves the tracks of the Delaware and Hudson Railway Company ("D&H") and the Luzerne County Rail Authority ("LCRA").<sup>1</sup>

The Public Utility Commission ("Commission") held a field conference on August 17, 2000, which was attended by representatives from the Commonwealth of Pennsylvania, Department of Transportation ("Department"), the Commission's Bureau of Transportation and Safety ("BTS"), Reading and the Borough. Subsequent to the field conference, the Commission scheduled a Hearing for Thursday, May 18, 2000. At that hearing, the testimony was presented by the Department, the Borough, Reading and BTS. The County participated in the initial stages of the hearing but did not present a witness.

By letter dated June 5, 2000, ALJ George M. Kashi (ALJ) directed the parties to file Main Briefs by July 20, 2000. By Order dated July 17, 2000, the ALJ, granted a request for extension of time for the filing of the briefs. This is the Department's Main Brief.

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<sup>1</sup> These crossings, which consist of two D&H tracks and one LCRA track are referred to as the "York Avenue" crossing in Mr. Joseph Strok's testimony, at pages seven to eight. This crossing differs from the York Avenue crossing that services the former Topps, Inc., bubble gum / trading cars factory. As the work at the D&H crossing has been completed under a separate docket, the Department is not addressing the crossing in this brief.

## SUMMARY OF ARGUMENT

The Commission is vested with the exclusive authority to allocate costs and maintenance responsibilities relating to highway / rail crossings. The Commission takes all relevant factors into consideration. The Commission is not limited to any fixed rule, other than its allocation of costs and responsibilities must be just and reasonable.

The Foote Avenue, Phoenix Street and Stevenson Street crossings are in need of some repairs. However, these crossings do not require a complete replacement at the present time. A just and reasonable solution would be to require that maintenance work be completed at this time, with crossing replacement occurring when necessary in the future.

The crossing located on York Avenue that services the former "Topps" plant should be suspended. Suspension would allow for a smooth roadway / crossing transition and safety would be improved. Second, Reading could reestablish service at the crossing in case a new tenant of the "Topps" plant wishes to be a shipper on the line in the future.

The Coxtton Road crossing should be replaced. The crossing is in poor condition and any repair work will be temporary at best. Reading should be ordered to replace the crossing at its sole cost and expense.

## ARGUMENT

The Commission is vested with the exclusive authority to allocate costs and maintenance responsibilities relating to highway / rail crossings. 66 Pa. C.S. §§ 2702 (b), 2704 (a); City of Philadelphia v. Pa. Public Utility Com'n, 676 A.2d 1298 (Pa. Cmwlth.), alloc dn 546 Pa. 657, 684 A.2d 558 (1996), cert. denied 117 S. Ct. 1384, 137 L. Ed. 2d 494 (1997). The Commission takes all relevant factors into consideration.

Commonwealth, Department of Transportation v. Pa. Public Utility Com'n, 469 A.2d 1149 (1983). The Commission is not limited to any fixed rule, other than its allocation of costs and responsibilities must be just and reasonable. AT&T v. Pa. Public Utility Commission, 737 A.2d 201 (Pa. 1999).

**I. IT IS JUST AND REASONABLE FOR THE PENNSYLVANIA PUBLIC UTILITY COMMISSION TO ENTER AN ORDER REQUIRING REPAIRS TO THE CROSSINGS AT FOOTE AVENUE (S.R. 2032), PHOENIX STREET (S.R. 2027), AND STEVENSON STREET (S.R. 2031).**

The Foote Avenue, Phoenix Street and Stevenson Street crossings require repairs. Generally, tightening or replacement of ties and patch paving between the rails of these crossings would alleviate the uneven crossing surfaces. Additionally, approach paving work is appropriate in some cases.

**a. Foot Avenue (S.R. 2032).**

The Foote Avenue crossing is located at State Route 2032, Segment 30, Offset 1215 (AAR # 631 435 P). (Department Statement at 2) (D.S. 2). The speed limit at the crossing is thirty-five (35) miles per hour. The crossing itself sits on a flat spot. However, there is an approach grade heading into the crossing from north to south. Vehicles travel over the flat

railroad crossing and proceed upgrade after exiting the crossing area. There are no real "sidewalks" at the crossings, however the shoulder area is partially paved and covered with dirt and gravel on both sides of the crossing. The width of the roadway surface area at this crossing is approximately twenty five (25) feet. The crossing consists of two (2) tracks. (D.S. 2).

The problems with the Foote Avenue crossings are poor paving between the rails and deteriorated tie conditions. Several of the timber flangeways are failing or deteriorated. (N.T. 120). Some of the existing ties are split, which creates an uneven surface. (N.T. 120). The ties should be replaced or tightened and paving work should be completed between the rails. (D.S. 3).

The Department would be willing to complete and maintain any approach paving work that would be necessary, to a distance extending from twenty-four inches outside of each rail and beyond. However, it does not appear from the record that any approach work needs to be completed at this crossing. In fact, the Department completed approach work at these crossings within the last two to three years. (D.S. 2). Therefore, no approach work is necessary.

Reading, as it agreed to do at the hearing, should be directed to complete the suggested repairs to this crossing. (N.T. 97). The Department agrees to future maintenance of the approach roadways, the advance warning signs and the pavement markings. Reading should be responsible for maintenance of the entire crossing surface, to a distance extending twenty-four inches outward from each rail, which it agreed to do. (N.T. 107). Reading should also maintain the flashing warning signals and gates.

**b. Phoenix Street (S.R. 2027).**

The Phoenix Street crossing is located at State Route 2027, Segment 40, Offset 1628 (AAR # 361 437 P). The crossing consists of a single track. There are no gates, but the crossing is protected with cross bucks, warning lights and bells. The speed limit is thirty-five (35) miles per hour. (D.S. 4).

The approaches are generally in smooth condition. The crossing is tangential in the middle of a grade. The width of the subject roadway is approximately twenty four (24) feet. There are no sidewalks at the subject crossing. (D.S. 4).

The Phoenix Street crossing suffers from shifting ties and an uneven crossing surface. The western flangeways are loose and have deteriorated. The ties are not level with the rails. (D.S. 4). The west approach has a high transition into the flangeways, creating an uneven surface. (D.S. 4, N.T. 124).

The Department recommends that new bituminous material be placed in the crossing between the rails. (D.S. 3). Moreover, the timber flangeways should be repaired or replaced to aid in creating a smooth transition between the crossing and the roadway. (D.S. 3, N.T. 122). Also, the ties should be set even with the new timber or steel flangeways to help provide a smooth transition. (D.S. 4).

The Department would be willing to complete and maintain any approach paving work that would be necessary, to a distance extending from twenty-four inches outside of each rail and beyond. Specifically, BTS recommended that a portion of the asphalt approach be milled down to provide a smooth transition with the timber flangeways. If

the milling work is beyond twenty-four inches from the rails, the Department would complete it. If the milling work is within twenty-four inches from the rail, that should be the responsibility of Reading.

Reading, as it agreed to do at the hearing, should be directed to complete the suggested repairs to this crossing. (N.T. 99). The Department will complete any paving or milling work ordered by the Commission within the area defined above. The Department also agrees to future maintenance of the approach roadways, the advance warning signs and the pavement markings. Reading should be responsible for maintenance of the entire crossing surface, to a distance extending twenty-four inches outward from each rail, which it agreed to do. (N.T. 99, 107). Reading should also maintain the flashing warning signals and gates.

**c. Stevenson Street (S.R. 2031).**

The Stevenson Street crossing is located at SR 2031, Segment 10, Offset 435 (AAR # 266 109 C). The speed limit at the crossing is twenty-five (25) miles per hour. The crossing is tangential. The northbound approach has an eight percent (8%) grade, while the southbound approach is relatively flat. (D.S. 5).

The roadway is approximately twenty-four (24) feet in width. There are sidewalks on both sides of each approach roadway. There are lights, gates and bells present at the crossing on both approaches. Additionally, there is a pedestrian gate on the southeast approach. (D.S. 5).

There are a number of problems at Stevenson Street. The timber sections inside the rails are deteriorated and split, creating an uneven surface. (D.S. 5, N.T. 125). The northeastern approach has some potholes and rutting. (D.S. 5, N.T. 125). However, one of the causes of the substandard condition of the northeastern approach is a poorly patched trench. (D.S. 5)

Additionally, there is a signal placement problem at this crossing. The eastern signal base is located thirty feet from the centerline of tracks. (N.T. 125). While the signals should be no closer than twelve (12) feet, they should be as close to the crossing as possible. (N.T. 125-126). In fact, the BTS recommended that Reading should relocate the signal. (N.T. 126).

The Department agrees with BTS that northeastern approach work should be completed. (D.S. 5, N.T. 127). Additionally, the failed timber flangeways, located in the interior of the crossing, should be replaced or tightened. (D.S.5, N.T. 127).

Reading should be directed to complete the suggested repairs to this crossing. The Department will complete the paving work ordered by the Commission. The Department also agrees to future maintenance of the approach roadways, the advance warning signs and the pavement markings. Reading should be responsible for maintenance of the entire crossing surface, to a distance extending twenty-four inches outward from each rail, which it agreed to do. (N.T. 107). Reading should also maintain the flashing warning signals and gates.

II. IT IS JUST AND REASONABLE FOR THE PENNSYLVANIA PUBLIC UTILITY COMMISSION TO ENTER AN ORDER SUSPENDING THE YORK AVENUE ("TOPPS") CROSSING.

Both the Department and BTS recommend that the York Avenue crossing, serving the former Topps, Inc. facility, should be suspended. (N.T. 66-67, 119-120). The crossing has been inactive for at least two years. (N.T. 87). In fact, the crossing has been paved over. (N.T. 119).

This crossing should be suspended, with removal of all rail facilities, signals, any crossbucks, advance warning signs, and all pavement markings. Although Reading would like to keep the crossing in place, there is no service to the current tenant. Reading has not served the location since Topps was located there. (N.T. 87). Moreover, suspension would not bar Reading from seeking to reestablish the crossing in the event a new shipper occupies the Topps plant.

Additionally, funding is available for the removal of this crossing. (N.T. 67). If general maintenance funds are used, the Department will reimburse a railroad for fifty percent of crossing closing or suspension costs. (N.T. 67). However, the railroad must supply the remaining fifty percent (50%). This funding is only available if the crossing is removed, not simply paved over. (N.T. 67).

Because the crossing is not currently in use, it is in the interest of public safety to order suspension. Reading should be ordered to remove all rails ties and other material from the crossing and to replace the vacated section with bituminous paving material. Additionally, the Department agrees to remove any and all pavement markings and advance warning signs currently at the site.

**III. IT IS JUST AND REASONABLE FOR THE PENNSYLVANIA PUBLIC UTILITY COMMISSION TO ENTER AN ORDER REQUIRING THE COMPLETE RECONSTRUCTION OF THE COXTON ROAD CROSSING (S.R. 2033).**

The Coxtton Road crossing is located at SR 2033, Segment 10, Offset 197 (AAR # 266 107 N). The roadway width is approximately twenty (20) feet. The alignment is tangent into a curve that intersects with Main Avenue (SR 2006). There is an approach grade of about eight to ten percent (8% - 10%) on the east end. There is a relatively flat approach on the west end. There are no sidewalks at the subject crossing. There are lights, gates and bells present at the crossing. (D.S. 6).

Coxtton Road suffers mainly from an inadequate subgrade. (N.T. 110). The roadway and the track are located in a low area where water ponds at the crossing and the surrounding areas. (N.T. 110). The BTS recommended that the whole crossing be rebuilt from the ties up. Additionally, the approaches need to be reconstructed. The witness for BTS opined that "if you don't correct the subgrade, no matter what you build on top of it, you're going to have problems in the future." (N.T. 114).

In the case of Coxtton Road, simple maintenance is not enough. As the BTS stated, the subgrade is the root problem with this crossing. Simple paving and patching will be cosmetic at best and will not address the ultimate problem.<sup>2</sup> The entire crossing needs to be replaced.

---

<sup>2</sup> It has come to the attention of the Department that a number of events have taken place in regard to the Coxtton Road crossing. To the Department's knowledge, Reading has replaced the broken rail in the crossing as a result of a Federal Railroad Administration citation. Additionally, the Department has been informed that a outside paving contractor completed significant approach work at this crossing. However, as of the writing of the Department's Main Brief, I was unable to obtain and attach the appropriate witness statements

Reading has been aware of the need for a replacement at this crossing site for some time. In fact, Reading admitted that the only reason it has not replaced the crossing was due to a lack of money. (N.T. 95). However, Reading has a brand new crossing panel located on site to be placed at the Coxtan Road crossing. It is respectfully submitted that the time to do that work is now.

A prior Commission order assigned crossing maintenance responsibility for the crossing to the rail carrier. (N.T. 111-112; BTS Staff Exhibit # 1 and 2).<sup>3</sup> As such, it is the Department's opinion that Reading should be responsible for replacing the crossing, and maintaining the new crossing in the future.

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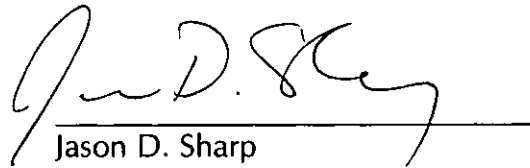
with verification of these facts, but I will endeavor to do so in conjunction with the filing of the Department's Reply Brief in this matter.

<sup>3</sup> Although the Orders in question deal with an "Everhart Road," the Commission's witness stated that the Legislative Route Numbers identifying this crossing matches the Legislative Route Number for Coxtan Road. Therefore, it is a reasonable assumption that the Coxtan Road crossing was the subject crossing under the prior order. (N.T. 111).

CONCLUSION

For all of the above cited reasons, the Department respectfully requests that the Commission order appropriate repairs to the subject crossings, consistent with the allocation of responsibility as set for the herein.

Respectfully Submitted,



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Assistant Counsel  
PA Atty. Id # 80488

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P.O. Box 8212  
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Dated: Monday, August 14, 2000

## PROPOSED FINDINGS OF FACT

1. Reading Blue Mountain and Northern Railroad owns the rail lines involved in this matter. (N.T. 82).
2. None of the subject crossings are listed on the Department of Transportation's (Department) Section 130 program. (N.T. 68).
3. No municipality or railroad has requested placement of any of these crossings on the Section 130 program. (N.T. 68).

### ***Foote Avenue***

4. Foote Avenue, located in the borough of Duryea, is also known as State Route 2032, Segment 30, Offset 1215 and is AAR # 631 435 P. (Department Statement (D.S.) 2).
5. The speed limit at the crossing is thirty-five (35) miles per hour. (D.S. 2).
6. The alignment of the crossing is tangent. (D.S. 2).
7. The crossing itself sits on a flat spot. (D.S. 2).
8. There is an approach grade and then the railroad crossing flattens out. As one goes through the crossing going south, there is another up hill grade. (D.S. 2).
9. There are no real sidewalks at the crossings, however the shoulder area is partially paved and is covered with dirt and gravel on both sides of the crossing. (D.S. 2).
10. The width of the roadway surface area at this crossing is approximately twenty-five (25) feet. (D.S. 2).
11. The crossing consists of two (2) tracks. (D.S. 2).

12. The approaches to both the main line and siding tracks on the roadway side seem to be in very good condition, the paving having been completed within the last two (2) or three (3) years. (D.S. 2).
13. Some of the timbers on the crossing have lost their cross section. (D.S. 2).
14. There has been minor patching and there was visible movement of ties under the weight of the vehicles going over the crossing. (D.S. 2).
15. The general condition is fair, but the timber in the crossing could use some repairs. (D.S. 2).
16. The average daily traffic volume at this crossing is 7,306 vehicles, with 220 total trucks. No pedestrian information is available. (D.S. 3).
17. The Department has no record of any accidents at this crossing in the last five years. (D.S. 3).
18. The Germania and Excelsior Hose Companies are volunteer fire companies located near the crossing. (N.T. 27).
19. The Borough has received several complaints from the Germania Hose Company and Excelsior Hose Company regarding the crossing. (N.T. 27).
20. Neither federal nor state funds would be available to improve this area of the rail line. (D.S. 3).

**Phoenix Street**

21. Phoenix Street is located in the borough of Duryea, and is also known as S.R. 2027, Segment 40, Offset 1628, AAR # 361 437 P. (D.S. 4).

22. The Phoenix Street crossing consists of a single track without gates, but the crossing is protected with cross bucks, warning lights and bells. (D.S. 4).
23. The speed limit is thirty-five (35) miles per hour. (D.S. 4).
24. The approaches are generally in smooth condition. (D.S. 4).
25. The crossing is tangential in the middle of a grade. (D.S. 4).
26. The width of the roadway is approximately 24 feet and there are no sidewalks at the crossing. (D.S. 4).
27. The average daily traffic volume at this crossing is 3,016 vehicles, with 151 total trucks. No pedestrian information is available. (D.S. 4).
28. The Department has no record of any accidents at this crossing in the last five years. (D.S. 4).
29. There are many loose timbers in this crossing and the Department is unsure of any repair it could make to the approaches, within two feet of the rail, to make this ride any smoother. (D.S. 4).
30. Neither federal nor state funds would be available for any improvements to this particular crossing. (D.S. 4).

***Stevenson Street***

31. The Stevenson Street crossing is S.R. 2031, Segment 10, Offset 435, AAR # 266 109 C. (D.S. 5).
32. The speed limit at the crossing is twenty-five (25) miles per hour. (D.S. 5).
33. The crossing is tangential; the northbound approach is an eight percent (8%) grade, while the southbound approach is relatively flat. (D.S. 5).

34. The roadway is approximately twenty-four (24) feet wide with sidewalks on both sides of each approach. (D.S. 5).
35. There are lights, gates and bells present at the crossing on both approaches and there is a pedestrian gate on the southeast approach. The foundation for the light standard on the southeast approach is in the roadway. (D.S. 5).
36. The average daily traffic volume at this crossing is 3,784 vehicles, with 188 total trucks. No pedestrian information is available. (D.S. 5).
37. The Department has no record of any accidents at this crossing in the last five years. (D.S. 5).
38. The rough ride experienced by motorists is not necessarily related to the approach, but rather the deteriorated timbers in the crossing. (D.S. 5).
39. The north side approach would be in completely adequate condition except for what appears to be a poorly patched trench. (D.S. 5).
40. Neither federal nor state funds would be available for any improvements to this particular crossing. (D.S. 5).

***Coxton Road***

41. Coxton Road, also known as S.R. 2033, Segment 10, Offset 197, is crossing AAR # 266 107 N. (D.S. 6).
42. The roadway is approximately twenty (20) feet wide and the alignment is tangent into a curve that goes up and meets Main Avenue (S.R. 2006). (D.S. 6).
43. There is an approach grade of about eight to ten percent (8% - 10%) on the east end; the approach on the west end is relatively flat. (D.S. 6).

44. There are no sidewalks, but there are lights, gates and bells present at the crossing. (D.S. 6).
45. The average daily traffic volume at this crossing is 1,399 vehicles, with 39 total trucks. No pedestrian information is available. (D.S. 6).
46. The Department has no record of any accidents at this crossing in the last five years. (D.S. 6).
47. The approaches are in fair condition, but they are in need of repair. (D.S. 6).
48. One of the major problems with this entire section is the heavy number of trucks from a quarry that this road services. (D.S. 6).
49. Most of the deterioration is within the timber asphalt crossing area. (D.S. 6).
50. Neither federal nor state funds would be available for any improvements to this particular crossing. (D.S. 7).

***York Avenue***

51. Department District policy dictates that the Department will pay for fifty percent (50%) of the cost associated with removal of a crossing and replacement of the pavement. (N.T. 67).
52. There is no cap on the fifty percent (50%) participation. (N.T. 67)
53. The funding would be state, and not federal funding. (N.T. 67).
54. The affected railroad would be responsible for the other fifty percent (50%).

### PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of this proceeding and the parties hereto. 66 Pa. C.S. §§ 2702, 2704.
2. The Commission is vested with the exclusive power to allocate costs and assign maintenance responsibilities involving rail-highway crossings. 66 Pa. C.S. §§ 2702 (a), 2704 (b).
3. The Commission determines who are concerned parties to a proceeding. 66 Pa. C.S. § 2704 (a).
4. 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. Greene Twp. v. Public Utility Com'n, 668 A.2d 615 (Pa. Cmwlth. 1995); Bell Atlantic-PA, Inc. v. PA. P.U.C., 672 A.2d 352 (Pa. Cmwlth. 1996).

### PROPOSED ORDERING PARAGRAPHS

1. That the Reading Blue Mountain and Northern Railroad Company, at its sole cost and expense, replace or repair all deteriorated railroad ties and timber flangeways on the Foote Avenue, Stevenson Street and Phoenix Street crossings.
2. That the Reading Blue Mountain and Northern Railroad Company, at its sole cost and expense, place appropriate bituminous paving material between the rails of the Foote Avenue, Stevenson Street and Phoenix Street crossings so as to provide a smooth crossing surface.
3. That the Reading Blue Mountain and Northern Railroad Company, at its sole cost and expense, remove the rails, ties and any other railroad facilities from the York Avenue (Topps) crossing so as to effectuate suspension of that crossing.
4. That the Reading Blue Mountain and Northern Railroad Company, at its sole cost and expense, upon completion of the York Avenue (Topps) crossing removal, pave the area formerly occupied by the York Avenue (Topps) crossing.
5. That the Reading Blue Mountain and Northern Railroad Company, at its sole cost and expense, erect appropriate barriers on each end of the severed rail line created by the removal of the York Avenue (Topps) crossing.
6. That the Reading Blue Mountain and Northern Railroad Company, at its sole costs and expense, within six (6) months of the date of entry of this order, submit detailed construction plans for the removal and replacement of the Coxtton Road crossing.
7. That the Reading Blue Mountain and Northern Railroad Company, at its sole cost and expense, within six (6) months of the approval of the detailed construction

- plans, remove and replace the Coxton Road crossing with a new timber and asphalt crossing, including proper drainage facilities to prevent water damage to the crossing subbase.
8. That the Reading Blue Mountain and Northern Railroad Company, at its sole cost and expense, provide appropriate traffic detours, railroad and highway flagmen and notice to the public in conjunction with the replacement of the Coxton Road crossing.
  9. That the Department of Transportation, at its sole cost and expense, complete paving work at the Phoenix Street and Stevenson Street crossings so as to provide a smooth transition with the rail/highway crossing.
  10. The Department of Transportation, at its sole cost and expense, maintain the approach roadways, pavement markings and advance warning signs on the Foote Avenue, Phoenix Street, Stevenson Street and Coxton Road crossings.
  11. That upon completion of the suspension of the York Avenue (Topps) crossing, the Department of Transportation, at its sole cost and expense maintain York Avenue, including the area formerly occupied by the subject crossing.
  12. That the Reading Blue Mountain and Northern Railroad Company, its successors or assigns, maintain the York Avenue, Coxton Road, Stevenson Street and Phoenix Street crossings, including all facilities within twenty-four inches (24") from the outermost point of each rail.
  13. That the Reading Blue Mountain and Northern Railroad Company, its successors or assigns, maintain the all crossing signals, including any and all flashing lights, gates

and bells at the York Avenue, Coxton Road, Stevenson Street and Phoenix Street crossings.

14. That Reading Blue Mountain and Northern Railroad Company, at its sole cost and expense, maintain all of its facilities at the crossing.
15. That any affected non-carrier public utilities, at their sole cost and expense, maintain their own facilities at the crossing.
16. That the parties to this proceeding cooperate with each other so that maintenance and repair work, either routine or as ordered by the Commission, can be accomplished in a timely and safe manner.
17. That this Order is binding upon all the parties, their successors and assigns.
18. That this Order, insofar as it places costs and maintenance responsibility on any parties, is without prejudice to their respective rights to recover any and all costs from others in accordance with any lawful agreement.

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

DURYEA BOROUGH	:	
	:	
V.	:	Docket Number
	:	
READING BLUE MOUNTAIN AND	:	
NORTHERN RAILROAD COMPANY,	:	
PENNSYLVANIA DEPARTMENT OF	:	C-00992585
TRANSPORTATION AND	:	
LUZERNE COUNTY	:	

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CERTIFICATE OF SERVICE

I, Jason D. Sharp, hereby certify that two (2) true and correct copies of the Department of Transportation's Main Brief, was served upon the parties listed below by first class mail, postage prepaid, this 14<sup>th</sup> day of August, 2000:

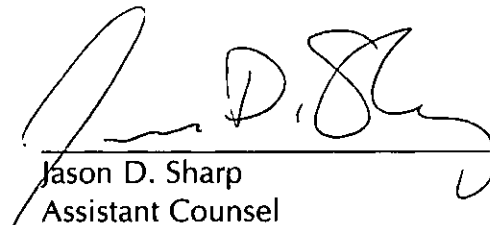
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August 14 2000

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AUG 14 2000

PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

Re: Duryea Borough v. Reading, Blue Mountain  
and Northern Railroad Company, Pennsylvania  
Department of Transportation and Luzerne County  
Docket No. C-00992585  
Main Brief

Dear Sir or Madam:

Enclosed for filing in the above captioned proceeding are an original and nine (9) copies of the Main Brief of Reading Blue Mountain & Northern Railroad Company in the above-referenced proceeding. Attached to this letter is the FedEx receipt.

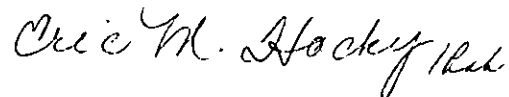
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151

Prothonotary  
August 14, 2000  
Page 2

stamped, self-addressed envelope provided for your convenience.

Respectfully,



Eric M. Hocky

Enclosures

cc: Administrative Law Judge George Kashi (w/encl. and disk)  
All Persons Shown on the Service List (w/encl.)

Before the

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

\_\_\_\_\_  
Duryea Borough )

v. )

Reading, Blue Mountain and Northern Railroad )  
Company, Pennsylvania Department of )  
Transportation and Luzerne County )

**ORIGINAL**

Docket No. C-00992585

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AUG 14 2000

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PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

**MAIN BRIEF OF**

**READING BLUE MOUNTAIN & NORTHERN RAILROAD COMPANY**

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Dated: August 14, 2000

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APPENDIX A – PROPOSED FINDINGS OF FACT

**MAIN BRIEF OF**  
**READING BLUE MOUNTAIN & NORTHERN RAILROAD COMPANY**

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This Main Brief is filed by Reading Blue Mountain & Northern Railroad Company ("RBMN") to address the issues raised in the Complaint and at the hearing in this matter held May 18, 2000.<sup>1</sup>

**STATEMENT OF THE CASE**

On June 28, 1999, Duryea Borough (the "Borough") filed a formal complaint with the Commission seeking to have the Commission inspect and order the repair of the at-grade crossings where RBMN's tracks crossed Coxtan Road, Foote Avenue, Phoenix Street, Marcy Street and York Avenue. Of these crossings, one is a Borough road (Marcy Street), and the others are state highways. All of the crossings are located in the Borough which in turn is located in Luzerne County. PennDOT, Luzerne County and Delaware and Hudson Railway ("D&H") were named by the Commission as additional respondents.

A field investigation and conference conducted by the Bureau of Transportation and Safety (the "Bureau") was held on August 17, 1999. The crossings named in the Complaint

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<sup>1</sup> By letter dated June 5, 2000, Main briefs were scheduled to be filed by July 20, 2000. In an order dated July 17, 2000, the due date was extended until August 14, 2000.

were all viewed,<sup>2</sup> as were additional crossings at two Borough roads (Hill Street and New Street), and one state highway (Stevenson Street).

Subsequently, an initial hearing was ordered and was held on May 18, 2000, before Administrative Law Judge George M. Kashi. The notice of hearing mentioned only the crossings named in the original complaint.<sup>3</sup>

### **STATEMENT OF ISSUES PRESENTED**

At issue is whether and to what extent the various crossings involved in this proceeding need repair or replacement. To the extent repair or replacement is required, it must be determined which parties will bear the expense of such repair and replacement.

### **PROPOSED FINDINGS OF FACT**

Based upon the testimony presented, RBMN proposes the findings of fact set forth in Appendix A hereto. RBMN is presenting proposed findings of fact on each of the crossings addressed at the hearing. However, as noted in the jurisdictional argument below, RBMN believes that any order should address only the crossings identified in the Complaint and in the notice of hearing.

---

<sup>2</sup> There is some confusion with respect to the crossing at York Avenue as both RBMN and D&H have rail lines that cross York Avenue. At the field conference, the parties viewed the D&H crossing.

<sup>3</sup> The accompanying Questions and Procedure indicated that the D&H York Avenue crossing was being considered.

## **ARGUMENT**

### **A. Summary of Argument**

There was no substantial dispute about the condition of the various crossings, with most needing minor patching and surfacing, and some timber work. The parties generally agree that the Coxton Road crossing should be replaced. The only real dispute is about how the costs should be allocated. Since the crossings are currently safe for RBMN's operations but not for the traveling public, the Commission should find that the benefits of the repairs and replacement will be enjoyed by the traveling public (including residents of, and businesses in, the Borough and County) , and accordingly the costs should be substantially allocated to the Borough and County, and in the case of state highways to parties other than the RBMN. RBMN should be responsible only for maintaining its property (the tracks and timbers) within the crossings, and such other costs as it has voluntarily offered to bear.

### **B. Jurisdiction of Commission**

#### **1. Lack of jurisdiction over additional crossings**

This proceeding was commenced by a formal complaint filed with the Commission in accordance with the provisions of 52 Pa. Code §5.21 and §5.22. The Complaint gave notice that the conditions of five at-grade crossings were going to be examined. The notice of hearing issued by the Commission gave notice that the same five crossings were at issue, and further gave notice that of the five, four were crossings with RBMN and one was with D&H. Although testimony was received at the hearing on three additional crossings (Hill Street,

Stevenson Street and the RBMN crossing with York Avenue)<sup>4</sup>, RBMN did not have adequate notice that they would be the subject of the hearing. In *Pocono Water Co. v. PUC*, 630, A.2d 971, 973 (Pa. Cmwlth. 1993), the Commonwealth Court held:

Due process in matters before the Commission requires that a party be afforded reasonable notice of the nature of the allegations against it so that the party can prepare a suitable defense.

Although RBMN was given an opportunity to participate in the hearing on the additional crossings, it did not have adequate notice that such crossings would be the subject of the hearing, and therefore, for the Commission to issue an order with respect to any of these additional crossings would be a violation of RBMN's due process rights.<sup>5</sup> RBMN's presentation in this Brief with respect to these additional crossings is presented so that the Commission can have a complete record of the testimony presented at the hearing, but should not be construed as a waiver of RBMN's claim that the additional crossings may not be the subject of an order in this proceeding.

## **2. Lack of jurisdiction to order suspension**

RBMN, as a carrier of interstate commerce, is subject to the jurisdiction of the Surface Transportation Board ("STB") under Title 49, Subchapter IV of the U.S. Code. Under federal law, the STB is given exclusive jurisdiction over rail carriers and their facilities.

Specifically, federal law provides:

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<sup>4</sup> The Borough withdrew its reference to a fourth additional crossing at New Street. Tr. 12.

<sup>5</sup> This is especially true with respect to the RBMN York Avenue crossing. At the hearing for the first time, it was recommended by the Bureau that the crossing be suspended and removed. Tr. 119. The Complaint did not ask for that type of relief with respect to any of the crossings.

The jurisdiction of the [STB] over—

\* \* \*

(2) the construction, acquisition, operation, *abandonment, or discontinuance* of spur, industrial, team switching, or side tracks, or facilities, even if the tracks are located, or intended to be located entirely in one State,

is *exclusive*. Except as otherwise provided in this part, the remedies provided under this part with respect to the regulation of rail transportation are exclusive and preempt the remedies provided under Federal and State law.

49 U.S.C. §10501(b). Section 10501(b) clearly preempts any use of the Commission's suspension power with respect to a crossing where the railroad has not abandoned its service rights. To allow otherwise would have the effect of causing the railroad to discontinue or abandon its ability to provide rail service in violation of the STB's exclusive jurisdiction over such decisions. *See Wisconsin Central Ltd. v. City of Marshfield*, 2000 U.S. Dist. LEXIS 10570 (D.Ct. Wisc. 2000) (holding that attempted condemnation or relocation of passing siding was preempted). Since RBMN has not abandoned its rights to the line at the York Avenue crossing,<sup>6</sup> the Commission may not order the crossing suspended.

### **3. Jurisdiction in this proceeding**

Except as set forth above, the Commission has jurisdiction in this proceeding over the crossings identified in the Complaint and notice to determine how crossings will be constructed, altered and maintained "to effectuate the prevention of accidents and the promotion

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<sup>6</sup> RBMN testified that it desired to retain the line for possible future service. Tr. at 87.

of the safety of the public." 66 Pa.C.S.A. §2702(b). It also has the authority to assess the costs of any work performed on concerned municipal corporations (such as the Borough and County), the Commonwealth (PennDOT), as well as carriers at the crossing. 66 Pa.C.S.A. §2704(a). *See also D&H Corporation v. PUC*, 613 A.2d 622, 623 (Pa. Cmwlth. 1992).<sup>7</sup> There is no fixed formula for the allocation of costs. Instead,

In apportioning costs in highway-rail crossing cases, the PUC is not limited to any fixed rate but takes all relevant factors into consideration with the fundamental requirement being that its order be just and reasonable.

*D&H*, 613 A.2d at 625 (citing *Dept. of Transportation v. PUC*, 464 A.2d 645 (Pa. Cmwlth. 1983)).

### **C. Benefits of repair or replacement**

The major factor to be considered by the Commission in allocating costs are the benefits received by the parties. *Pittsburgh and Lake Erie Railroad Company v. PUC* ("PLE"), 556 A.2d 944, 946 (Pa. Cmwlth. 1989); *D&H*, 613 A.2d at 625. Here, all the testimony points to the fact that the crossings are safe for railroad operations. Additionally, there are no known railroad or vehicle accidents at the crossings. The Bureau's major concern seemed to be problems that drivers might have if they were traveling at an excessive rate of speed. To the extent paving or replacement is determined to be necessary, it is only to improve the roadway for the traveling public, including the providers of municipal (including emergency) services to community. The repairs would be of no benefit to RBMN since it can currently operate safely at each of the

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<sup>7</sup> The Commission's powers to allocate maintenance costs are limited to preventing accidents and promoting public safety pursuant to 66 Pa.C.S.A. §2702(b). *Commonwealth, Department of Transportation v. PUC*, 408 A.2d 1149, 1152 n.7 (Pa. Cmwlth. 1983).

crossings. The specific beneficiaries of any crossing improvements is discussed more fully in Section E below.

The traveling public in this case is primarily made up of residents of the Borough, heavy trucks serving local businesses, and emergency vehicles serving the area. It is clear the residents of the Borough would get the most benefits from any improvements.

With respect to the crossings with state highways, PennDOT has substantial involvement. This involvement and the resulting responsibility has been recognized:

DOT has a continuing responsibility for the safe passageway of the traveling public over the Commonwealth highways arising from its administrative and advisory functions . . .

*Dept. of Transportation*, 469 A.2d at 1153 (citation and footnotes omitted). There is no prohibition to placing on PennDOT a share of the reconstruction costs. *Id.*

With respect to Borough owned roads, similar justification applies for allocating costs to the Borough. In determining whether a municipality should be assessed with the costs of rehabilitation and maintenance, the Commission looks to whether the improvement will "result in substantial local improvement or a distinct local benefit for the residents of the municipality. Because the local governments will derive future benefits from the reconstruction, assessments for reconstruction and future maintenance are just and reasonable." *Dept. of Transportation*, 469 A.2d at 1154 (local benefit from reduction of traffic congestion, more efficient and safe fire, police and ambulance service); *County of Chester v. PUC*, 408 A.2d 552, 554 (Pa. Cmwlth. 1979) (local improvements included safer route for school children, better traffic control and better and safer fire and ambulance service). Allocation of costs to a locality is not unjust and unreasonable since, as governing bodies, they have sufficient revenue-raising

ability to offset any deficit created. *East Rockhill Township v. PUC*, 540 A.2d 600, 603 (Pa. Cmwlth. 1988). In this case because the residents and local businesses will benefit from the improvements to the crossing and its reopening, the Borough should be assessed with all, or the major portion, of the rehabilitation and maintenance costs.<sup>8</sup>

Of course, any benefit from highway improvements that benefit the Borough and its residents and businesses, is, by definition, also a benefit to the County and its residents and businesses. *See County of Chester*, 408 A.2d at 554.<sup>9</sup>

On the other hand there is no evidence that RBMN needs the repair or replacement of any of the crossings or that it will get more than a marginal benefit from any such improvements.<sup>10</sup> In fact, the United States Department of Transportation in reviewing the various types of projects involved in the elimination of hazards at railway-highway crossings has determined:

Projects for grade crossing improvements are deemed to be of no ascertainable net benefit to the railroad ...

---

<sup>8</sup> In *Dept. of Transportation*, 469 A.2d 645, all future maintenance costs were allocated to the towns on either side of the highway viaduct and to the County where it was located.

<sup>9</sup> The County stipulated that the crossings were all located in the the County, but otherwise by agreement of the parties did not participate in the hearing. Tr. at 15. However, it was agreed that no party waived any claim that the County was responsible for a portion of any costs. *Id.*

<sup>10</sup> The only benefit alleged at the hearing was the supposed benefit RBMN would get from the elimination of the split rail in the Coxtton Road crossing. Although RBMN disputed any benefit since it continued to operate safely over the crossing, this is no longer an issue because RBMN has replaced the split rail.

23 CFR §646.210(b)(1).<sup>11</sup>

Additionally, RBMN operates only a single line through each of these crossings, and handles a minimal amount of traffic over them. Because of the general conditions of the lines, RBMN only operates at 10 mph. RBMN is of course much smaller than the railroads previously operating this line of railroad, and is less able to bear the costs of repair, replacement or maintenance. Additionally, the transportation market has become more competitive, RBMN's rates are no longer regulated and it does not have the same ability to recover costs imposed on it through rate increases railroads previously did. Thus, there is no justification for assessing further costs to the RBMN. This is especially highlighted when the relative usages of the crossings by the RBMN and the traveling public are compared.

**D. Specific benefits of suspension**

As discussed above, RBMN believes that the Commission does not have jurisdiction to order the suspension of the RBMN York Avenue crossing because of the STB's exclusive jurisdiction, and because RBMN did not receive adequate notice that such relief would be sought in this proceeding. Without waiving such claims, it is clear that the suspension of the crossing would be of no benefit to RBMN. RBMN would of course lose the possibility of generating any additional traffic from the industrial park served by the line. Accordingly, RBMN should not be assessed any costs if the crossing were suspended.<sup>12</sup>

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<sup>11</sup> It is clear that if there federal funding were used that the RBMN could not be assessed with any of the costs. *Conrail v. PUC*, 557 A.2d 832 (Pa. Cmwlth. 1989). PennDOT indicated that no federal monies are available for any the crossings in this proceeding. Tr. at 68.

<sup>12</sup> The United States Department of Transportation has similarly found that railroads should not bear any costs on projects for the elimination of existing grade crossings where active warning device are not in place (York Avenue is protected only by crossbucks). 23 C.F.R. §646.210(4).

**E. Specific benefits at crossing**

In addition to the general discussion of benefits above, the testimony presented indicated that there were specific benefits that the traveling public would receive at particular crossings as follows:

*Marcy Street.* Fixing the crossing will be beneficial to the Borough residents that use the nearby convenience store.

*Coxton Road.* The roadway is used by a great deal of heavy truck traffic, mostly from Borough businesses including a quarry and the sewer authority. The heavy truck traffic has contributed to the deterioration of the roadway and crossing.

*Foote Avenue.* Improvements at this crossing will benefit the truck traffic from a local business, and two volunteer fire companies that use the crossing.

*Phoenix Street.* This crossing is heavily used by local residents and the traveling public using a nearby Borough shopping center.

*York Avenue.* Crossing repairs would be beneficial to the truck traffic serving the industrial park in the Borough that includes Shot Glass Technologies.

*Stevenson Street.* This crossing is used by Borough residents to access the nearby post office, pharmacy and churches. In addition, it is subject to heavy pedestrian traffic because of a nearby senior citizen high-rise.

**F. Effect of past orders**

While historical orders assigning costs to the parties (and to railroads previously operating at a crossing) may be considered (*D&H*, 613 A.2d at 625), they are not binding, and

the. Commission should focus on the changes in circumstances here from those that may have justified prior allocations.

The Bureau presented prior Commission orders which related to the Hill, Marcy, Stevenson and Everhart<sup>13</sup> crossings (PUC Staff Exhibits 1 and 2), and to the Foote Crossing (PUC Staff Exhibits 3 and 4). In each, the respective railroads (Erie Lackawanna Railway ("EL") and Consolidated Rail Corporation ("Conrail")) were ordered to maintain the reconstructed crossings within the Commission's historical rule of between the rails and for two feet outside. The orders also make it clear that the owners of the highway become responsible for the portion of the highway where tracks have been removed.

However, in both cases the railroads were getting benefits because they were being permitted to remove tracks at the crossings.<sup>14</sup> Further, Conrail had caused the damage at the Foote crossing by a derailment.

Neither of the carriers covered by the orders are around today. EL went bankrupt; Conrail has now been acquired by CSX and Norfolk Southern.

No testimony was presented to justify the use of the historical rule here. RBMN is a much smaller entity than either EL or Conrail. And, "historically" there was substantially more rail traffic on the lines which provided substantially more benefit to the owners. It is also clear from the record that the need for reconstruction at this time is not attributed to the operations of RBMN. Thus, because of the changes in circumstances, the Commission should

---

<sup>13</sup> The Bureau believes that "Everhart" is the same as "Coxton" although neither PennDOT nor the Bureau had ever heard of Coxton referred to as Everhart.

<sup>14</sup> Although EL later asked not to remove the tracks, at this time they have been removed by a party other than RBMN.

allocate costs based on the relative benefits that would currently accrue to the parties from any ordered repairs or replacement, and should adjust the allocations set forth in prior orders to eliminate or reduce the share allocable to RBMN.

### **PROPOSED REPAIRS AND ALLOCATION**

In reviewing benefits and allocating related benefits, RBMN believes generally that a fair allocation would be that the railroad at an at-grade crossing be required to maintain the tracks and flanges (timbers in this case) that affect the safety and utility of the crossing for train operations, and that other concerned parties, primarily the owner of the roadway, maintain the roadway surfaces, including the approaches and those portions up to and between the rails. When replacement of an at-grade crossing is necessary, RBMN believes generally that a fair allocation would be that the railroad remove the existing crossing panel, and install the new panel, and that the other concerned parties, primarily the owner of the roadway, be responsible for the approaches and the paving within the crossing. In all cases, the railroad should provide supervision and flagging when paving is done at and within the crossing. Parties other than the railroad should pay for the costs of detouring the traveling public.

Based on the foregoing, with respect to the crossings over which RBMN acknowledges the Commission has jurisdiction in this proceeding, RBMN proposes the following proposed repairs and allocation of costs based on the relative benefits to be received by the parties from the work to be done:

*Marcy Street.* Borough shall at its cost and expense repair and resurface the approaches, and bear the costs of any detours. A portion determined by the Commission shall be paid by the County.

*Coxton Street.* RBMN shall at its cost and expense remove the existing crossing panel, and install a new panel with timber or steel flanges.

PennDOT shall at its cost and expense rebuild the approaches and pave with asphalt the approaches up to the flanges and within the crossing.

PennDOT shall provide for the detour at its initial cost and expense, and shall be reimbursed by the Borough (50%) and County (50%).

*Foote Avenue.* RBMN shall at its cost and expense repair and replace the timbers.

PennDOT shall at its cost and expense repair and resurface the approaches and within the crossing, and bear the costs of any detours.

*Phoenix Street.* RBMN shall at its cost and expense repair and replace the timbers.

PennDOT shall at its cost and expense repair and resurface the approaches, including “milling,” and within the crossing, and bear the costs of any detours.

Subject to RBMN’s objections to jurisdiction, with respect to the other crossings addressed at the hearing, RBMN proposes the following proposed repairs and allocation of costs based on the relative benefits to be received by the parties from the work to be done:

*Hill Street.* Borough shall at its cost and expense repair and resurface the approaches, and bear the costs of any detours. A portion determined by the Commission shall be paid by the County.

*York Avenue.* RBMN shall at its cost and expense repair and replace the timbers.

PennDOT shall at its cost and expense repair and resurface the approaches and within the crossing, and bear the costs of any detours.

PennDOT shall at its expense replace the missing crossbuck.

*Stevenson Street.* RBMN shall at its cost and expense repair and replace the timbers.

RBMN shall at its cost and expense relocate the signal to an appropriate distance outside the track.

PennDOT shall at its cost and expense repair and resurface the approaches and within the crossing, and bear the costs of any detours.

Because none of the crossings seem to be immediately dangerous, the Commission should give the parties sufficient time to do any repairs that are necessary. Scheduling of any crossing replacement will also need to allow sufficient time for any detours to be arranged. With respect to any work to be performed by other parties at or near the crossings, RBMN requests that it be given 14 days notice to arrange for any necessary flagmen or supervision.

**CONCLUSION**

For all of the foregoing reasons, RBMN requests that the Commission enter an order in accordance with the proposed repairs and allocation of expenses set forth above.

Respectfully submitted,



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Attorneys for Reading Blue Mountain  
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Dated: August 14, 2000

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served one true copy of the foregoing document by FEDEX upon the participants listed below, in accordance with the requirements of §1.54 (relating to service by a participant):

Jason D. Sharp, Esq.  
Assistant Counsel  
PA Department of Transportation  
Forum Place - 9th Floor  
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Harrisburg, PA 17101-1900

Barry J. Chromey, Solicitor  
126 South Main Street  
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Charles McCormick  
County Solicitor for  
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Suite 808 PNC Bank Building  
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Wilkes-Barre, PA 18701

David Salapa, Esq.  
Pennsylvania Public Utility Commission  
Bureau of Transportation and Safety  
North Office Building  
Commonwealth Avenue and North  
Harrisburg, PA 17105

and a true copy of the foregoing document by U.S. first class mail upon the participants listed below:

Lois Morreale, Secretary  
Borough of Duryea  
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William Pickering, PE Chief  
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Scranton, PA 18501

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Delaware & Hudson Railway Company  
P.O. Box 8002  
200 Clifton Corporate Park  
Clifton Park, NY 12065

and a true copy of the foregoing document by FEDEX upon:

Administrative Law Judge  
George M. Kashi  
Pennsylvania Public Utility Commission  
North Office Building  
Commonwealth Avenue and North  
Harrisburg, PA 17105

Dated this 14<sup>th</sup> day of August, 2000.

*Eric M. Hocky*

---

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## APPENDIX A

### PROPOSED FINDINGS OF FACT

#### General

1. RBMN acquired the rail lines at the crossings in August, 1996. Railroad Statement No. 1 at 4, 6.
2. RBMN operates over the Lehigh Main (including the Foote Ave. and Phoenix St. crossings) six days per week. The trains operate at 10 miles per hour. RBMN handles approximately 6,000 to 7,000 carloads of general merchandise per year over this portion of the Lehigh Main Railroad Statement No. 1 at 2.
3. In 1990, Conrail was operating six to eight trains per day at 25 mph over the Lehigh Main. PUC Staff Exhibit 3.
4. RBMN operates over the Taylor Secondary (including the Marcy St. and Coxtton Rd. crossings) approximately three times a week to serve its customers in the Kaiser Valley. These trains also operate at 10 miles per hour. The trains can have three to five cars to as many as 20 cars due to the seasonality of some of the business. Railroad Statement No. 1 at 3.
5. In 1970, Erie Lackawanna was operating four to six trains daily at speeds of between 10 and 25 mph over the Taylor Secondary. PUC Staff Exhibit 1.
6. The other railroads that use RBMN's line through the crossing do not pay for such use. Tr. 91.
7. No significant changes in operations are contemplated. Railroad Statement No. 1 at 3.
8. All crossings are located in the Borough of Duryea in the county of Luzerne. Tr. 50.
9. There is one track at each of the subject crossings (excluding York Avenue), except for Foote Ave. where there are two tracks. Railroad Statement No. 1 at 2.

10. All of the crossings are constructed of asphalt and timbers. Railroad Statement No. 1 at 4.
11. The use of steel flanges instead of timber is acceptable. Tr. 125.
12. None of the state highway crossings require high rubber type crossing surfaces. Tr. 68, 129.
13. None of the state highway crossings are on the list to receive federal funds for improvements under Section 130. Tr. 68.
14. All of the tracks are safe for current rail operations. Railroad Statement No. 1 at 4, 5.
15. There have been no accidents at any of the crossings since RBMN acquired the rail lines. Railroad Statement No. 1 at 4; Department Statement No. 1; Tr. 47.
16. The only reported damage has been to tractor trailers bottoming out at Coxtan Road. Tr. 47.<sup>15</sup>
17. There are no prior complaints filed with the PUC against RBMN with respect to any of these crossings. Tr. 130.
18. Because of the location of the crossings, detouring costs could be substantial. Railroad Statement No. 1 at 5.
19. Who and when the second track at the crossings were removed is unknown; however, they were not removed by RBMN. Tr. 77, 83, 131.
20. The standard when a track is removed is that the railroad removes and restores the highway and the area formerly occupied by the track becomes the responsibility of the party owning the road.. Tr. 131.

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<sup>15</sup>

“Tr.” refers to the transcript of the hearing held on May 18, 2000.

## **Borough Roads**

### **a. Marcy Street**

1. There used to be two tracks at this crossing, but now there is one. Tr. 34.
2. This crossing is located near a convenience store and is a busy area for pedestrians. Tr. 34.
3. Approximately 25 to 50 people per day and approximately 250 cars per day use the crossing. Tr. 46-47.
4. The Bureau believes the timbers are in acceptable condition while the approaches is rutted and potholed. Tr. 116. *Compare* the Borough description. Tr. 34.
5. High speed could lead to an accident. Tr. 117.
6. Prior PUC orders apply to this crossing. Tr. 117; PUC Staff Exhibits 1 and 2.

### **b. Hill Street (jurisdiction disputed)**

1. There is a single track, although there used to be a second track. Tr. 41.
2. The crossing is located near to Main Street, but is a low area for pedestrians. Tr. 41.
3. The crossing is used by about 10 pedestrians per day and about 75 cars per day. Tr. 47.
4. The Borough has filled in potholes several times. Tr. 42.
5. The west rail is loose and needs to be tightened. Tr. 127.
6. The timbers are in acceptable shape, but the approaches are rutted and need resurfacing. Only minor approach work is needed, and nothing is needed between the rails. Tr. 128. *Compare* the Borough description. Tr. 41.
7. This crossing was covered by prior PUC orders. Tr. 128; PUC Staff Exhibits 1 and 2.

## State Highways

### a. Coxton Road

1. The primary use is heavy truck traffic from various businesses and the sewer authority. *Most of the businesses are located in Luzerne County, many of them in the Borough.* Tr. 23, 50-51, 57, 110; Department Statement No. 1 at 6.
2. There is very little pedestrian traffic at this crossing. Tr. 25.
3. The average daily traffic volume at this crossing is 1,399, with 39 total trucks. Department Statement No. 1, at 6.
4. There have not been any accidents at the crossing, although tractor trailers with dollies have hit the rail. Tr. 25.
5. In the railroad's experience, the "lowboys" have problems because they are too heavy and ride too low. Tr. 93.
6. There is a split rail, but it does not hamper rail traffic because the speed at that location is less than 10 mph. Tr. 92.
7. No work is needed to make the rail operations safe. Railroad Statement No. 1 at 4; Tr. 86.<sup>16</sup>
8. The crossing is not safe for highway uses; the PUC is not an expert on rail and leaves it to the FRA to determine if it is safe for rail operations. Tr. 129-130.
9. According to the Bureau, the surface crossing has failed, the approach roadways are rutted and potholed, and there is a cracked rail at the crossing. Tr. 110.
10. According to the Borough, the crossing is in deplorable condition, with deterioration of the blacktop and timbers. Tr. 22, 23.
11. The approaches are in need of repair. There is also deterioration within the crossing area. Department Statement No. 1, at 6.

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<sup>16</sup>

Since the hearing, RBMN has replaced the split rail at the crossing.

12. Since the subgrade has failed, the whole crossing should be rebuilt, as should be the approaches. Tr. 114.
13. Because of the uneven ride, if exceeding the speed limit, a vehicle could lose control. Tr. 113.
14. The PUC believes that this crossing is the Everhart crossing referred to in prior Commission orders. Tr. 111; PUC Staff Exhibits 1 and 2.
15. Neither PennDOT nor the Borough knows of Coxtan Road ever being known as "Everhart." Tr. 59, 78.

**b. Foote Avenue**

1. There are two tracks located at siding, one main and one siding. Tr. 120.
2. Complaints have been received from the volunteer fire companies that use the crossing. Tr. 27.
3. The crossing is also used by heavy tractor trailer traffic from a local business. Tr. 27, 55.
4. Average daily traffic volume is 7,306, with 220 total trucks. Department Statement No. 1, at 3.
5. Several of the timbers are failing or deteriorated. Tr. 56, 120.
6. The railroad can tighten the timber flangeways if they are loose. Tr. 96.
7. Tightening the flangeways would not improve railroad operations, but might help the highway users. Tr. 97.
8. The surface is uneven with some potholes and deterioration. Tr. 120.
9. According to the Bureau, some of the timber should be replaced and the asphalt between the two sets of tracks should be redone. Tr. 122.
10. PennDOT also believes repairs to the bituminous material between the crossings should be performed. Department Statement No. 1, at 3.
11. Because of the uneven surfaces and sharp grade, vehicles could lose control. Tr. 122.

12. The crossing is covered by prior orders of the Commission. Tr. 120, 121; PUC Staff Exhibits 3 and 4.
13. Under the PUC orders, Conrail was given approval to remove a third track. Tr. 121.

**c. Phoenix Street**

1. There is a single track at this crossing. Tr. 123.
2. This crossing is used by heavy traffic because of a nearby shopping center located in the Borough. Tr. 31, 55.
3. The average daily traffic volume at this crossing is 3,016 with 151 total trucks. Department Statement No. 1, at 4.
4. The Borough believes that the approaches are "wavy." Tr. 57.
5. The asphalt is "humped" resulting in an uneven surface. Tr. 123.
6. The timbers are loose and some are deteriorated. Tr. 31,123.
7. The deteriorated timber should be replaced and the approaches should be milled down so that they are level. Tr. 124.
8. PennDOT believes the rails should be raised and the timbers tightened and stabilized. Department Statement No. 1, at 4.
9. Because the surface is uneven, cars moving at higher speeds could lose control. Tr. 124.
10. This crossing is covered by a prior Commission order. Tr. 123; PUC Staff Exhibit 4.

**d. York Avenue (jurisdiction disputed)**

1. The crossing is located in a heavy business area in the Borough near Shot Glass Technologies. Tr. 36, 55.
2. The rail line serves Shot Glass Technologies which bought out Topps Gum. Tr. 60.
3. The crossing is used by tractor trailers and pedestrians. Tr. 37.

4. According to RBMN the last car handled there was approximately two years ago. Tr. 87. *Compare* Borough (last year or two), Tr. 60; PennDOT (six or seven years), Tr. 78; and Bureau (inactive for at least several months), 118, 120.
5. If the crossing is inactive, then it should be suspended with the rails removed and the highway restored. Tr. 119.
6. RBMN does not want to remove the track from the crossing because, once removed, it is almost impossible to get business. Tr. 87.
7. One of the cross bucks is missing from the crossing. Tr. 119.
8. The D&H crossing of York Avenue is in Avoca. Tr. 12.
9. The D&H crossing of York Avenue was replaced in May, 2000, with the use of Federal funds under Section 130. Tr. 65, 75.
10. The D&H York Avenue crossing was removed and replaced with a completely new rubber crossing, and the entire area was milled and repaved. The project is to be paid for by PennDOT with state or federal funds. Department Statement No. 1, at 8.
11. At the D&H York Crossing, a rubber crossing was installed because the number of tracks (3) and the difference in elevations between the tracks. Tr. 67, 73.
12. Additionally, there has been a significant increase in the number of trains, and in their size and speed at the D&H York Avenue Crossing. Tr. 73.
13. Section 130 funds were available for the D&H/York Crossing, but are not available for any of the others at issues in this proceeding. Tr. 75.
14. When Section 130 funds are used, the railroad is not required to pay anything toward the project. Tr. 76.

**e. Stevenson Street (jurisdiction disputed)**

1. This crossing has a lot of pedestrian use, it is near a senior citizens high-rise, post office and churches. Tr. 39.
2. It is also used by traffic going to and from the pharmacy and churches. Tr. 40.

3. The average daily traffic volume at this crossing is 3,784 with 188 total trucks. Department Statement No. 1, at 5.
4. There used to be two tracks at this crossing. Tr. 39.
5. RBMN did not remove the second track at this crossing. Tr. 101.
6. The deterioration in the highway is outside of the timbers where the second track used to be located. Tr. 54.
7. There is some deteriorated timber that needs to be replaced. Tr. 125.
8. There are potholes and rutting in the approaches. Tr. 125.
9. The signal is located approximately 30 feet from the rail. Tr. 100.
10. The signal should be more like 12 feet away from the rail. Tr. 125.
11. When the tracks were removed, the railroad that removed the track did not relocate the signal. Tr. 126.
12. In the usual case, a PUC order would require a signal to be moved. Tr. 126.
13. The uneven surface is a hazard to the traveling public. Tr. 126.
14. The railroad should be ordered to relocate the signal, and PennDOT should have to resurface the approaches. Failed timbers should be replaced by the railroad. Tr. 127.
15. PennDOT recommends paving on the north side to increase smoothness, repair of the timbers, and removal and replacement of the paving between the rails. Department Statement No. 1, at 5.
16. This crossing is covered by prior Commission orders. Tr. 126; PUC Staff Exhibits 1 and 2.



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

IN REPLY PLEASE  
REFER TO OUR FILE

August 25, 2000

ORIGINAL

James J. McNulty, Secretary  
Pa. Public Utility Commission  
Room G-05, North Office Building  
P.O. Box 3265  
Harrisburg, PA 17105-3265

DOCUMENT  
FOLDER

RE: Duryea Borough v. Reading, Blue  
Mountain and Northern Railroad Company  
Docket No. C-00992585

Dear Secretary McNulty:

Enclosed for filing with the Commission are the original and nine copies of the Bureau of Transportation and Safety's Reply Brief on the above referenced matter. With a copy of this letter, I am sending copies of the enclosed to those persons listed on the Certificate of Service.

Very truly yours,

David A. Salapa  
Assistant Counsel

Enclosure

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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

ORIGINAL

Duryea Borough : Docket No.  
v. : C-00992585  
Reading Blue Mountain and :  
Northern Railroad Company, :  
Pennsylvania Department of :  
Transportation and :  
Luzerne County :

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REPLY BRIEF OF THE BUREAU OF TRANSPORTATION AND SAFETY  
TO THE BRIEF OF THE READING BLUE MOUNTAIN AND NORTHERN RAILROAD  
COMPANY

---

DOCUMENT  
FOLDER

David A. Salapa  
Assistant Counsel

P.O. Box 3265  
Harrisburg, PA 17105-3265  
(717) 783-2840

Dated: August 25, 2000

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### PROCEDURAL HISTORY

The Bureau of Transportation and Safety incorporates the procedural history set forth in its main brief. The Reading Blue Mountain and Northern Railroad Company (Railroad) filed a brief in this matter raising several issues not addressed in the Bureau of Transportation and Safety's main brief. This is the reply to those issues raised by the Railroad.

## ARGUMENT

### I. REPLY TO THE DUE PROCESS ARGUMENT

In its main brief, the Railroad asserts that the Commission has violated its due process rights because it had inadequate notice of the subject matter of the hearing in this proceeding. The Railroad states that the original complaint filed by the Borough of Duryea complains about the condition of five at-grade crossings located within the borough. At the hearing on this matter, the Borough of Duryea included testimony on the condition of three additional crossings located within the borough. The Railroad contends it had no notice prior to the hearing that the Borough of Duryea was going to present testimony on three additional crossings beside those named in the complaint. The Railroad claims that this lack of notice violates its due process rights and the Commission cannot consider the evidence presented on the three additional crossings and issue an order regarding the crossings. The Railroad's argument ignores relevant facts and misstates applicable law.

While it is true that the complaint and the Pennsylvania Bulletin notice of the hearing only listed five crossings as the subject matter of the complaint, the Railroad admitted at the hearing that its' representative did attend a field meeting where other crossings were viewed and discussed.

(N.T. 17). At the hearing, Administrative Law Judge (ALJ) George Kashi offered the Railroad the opportunity to cross examine witnesses with regard to testimony on the three additional crossings at a later date and present testimony on those crossings. ALJ Kashi further stated that the Borough of Duryea could amend its' complaint to conform to the evidence it presented. (N.T. 18).

The Railroad did not request further hearings to cross-examine witnesses or to present additional testimony on the three additional crossings. Rather, the Railroad stated that it would circulate a stipulation as to its testimony on the three crossings not listed in the complaint. (N.T. 134) The Railroad has not circulated a stipulation nor has it requested additional time to complete and circulate the stipulation.

ALJ Kashi gave the Railroad the opportunity to present testimony on the three additional crossings and the Railroad has not availed itself of that opportunity. The Railroad has waived its' right to further hearing on the matter. It can not now argue that it did not receive adequate notice when ALJ Kashi gave it adequate opportunity to address the three additional crossings when it became aware that the Borough of Duryea would present testimony on the crossings.

The Commission's Rules of Practice and Procedure provide that the Borough of Duryea can amend its complaint to conform to the evidence presented at the hearing. 52 Pa.Code

§5.92. The provisions of 52 Pa.Code §5.92 are identical to those found in the general rules of administrative practice and procedure at 1 Pa.Code §35.49. Commonwealth Court has ruled that an agency violated the due process rights of a respondent by allowing the amendment of a pleading to conform the proof under 1 Pa.Code §35.49 before the hearing was concluded, but after all the evidence had been presented. White v. the State Board of Optometry, 682 A.2d 404 (Pa.Comm. Ct. 1996). The Court held that allowing amendment of the pleading at that stage of the proceeding denied the respondent the opportunity, as it related to the new charges, to cross-examine witnesses or to introduce exculpatory evidence. The Court concluded that the agency denied the respondent's due process rights regarding the new charges and remanded the case so that the respondent could present evidence at further hearings on the new charges.

The facts in this proceeding differ from those in the White case. In this case, the Railroad objected to adding additional crossings to the complaint before any witness testified. ALJ Kashi stated that the Borough could amend its complaint to conform to the evidence before any witnesses testified. Under the Commonwealth Court's decision in White, the Commission did not violate the Railroad's due process rights by proceeding in this manner. The Railroad had the opportunity to hear the evidence as it related to the new crossings, to cross-

examine witnesses and to introduce exculpatory evidence on those three crossings.

Furthermore, before any witnesses testified, ALJ Kashi offered the Railroad the opportunity to present evidence and cross-examine witnesses at a subsequent hearing if the Railroad was inadequately prepared to do so at the initial hearing. The Railroad did not accept this offer nor did it file a petition for further hearing after the conclusion of the initial hearing. In fact, at the close of the initial hearing, counsel for the Railroad stated that he would circulate a stipulation as to its' testimony on the three crossings not listed in the complaint in order to avoid further hearings. (N.T. 134-135). The Railroad never circulated any stipulation to the parties.

Since the Railroad did not accept ALJ Kashi's offer to conduct further hearings, did not petition the Commission for further hearings after the close of the initial hearing or circulate a stipulation of facts, the Commission can fairly conclude that the Railroad has waived its' right to a further hearing in this matter. The Commission can consider the evidence on the three crossings not included in the complaint and issue a decision regarding those crossings without violating the Railroad's due process rights.

Even if the Railroad is correct that the proceedings in this case violate its due process rights, the remedy is not, as the Railroad suggests, for the Commission to refuse to issue an

order regarding the three additional crossings. Rather the Commission should be guided by the Commonwealth Court's decision in the White case and schedule the matter for further hearing on the three crossings and allow the Railroad to present evidence and to cross-examine witnesses on the three crossings not included in the original complaint. The Commonwealth Court ruled that the lack of procedural due process in White should be cured by remanding the proceeding to the agency for further hearings. If the Commission concludes that the Railroad is correct in its assertions, the Commission should do likewise.

## II. REPLY TO THE PRE-EMPTION ARGUMENT

The Railroad also asserts in its brief that the Commission is preempted from issuing an order directing removal of the rails, ties and other track materials from the York Street crossing and suspending it. The Railroad states that it has not abandoned service on this branch line and the Commission cannot interfere with the Railroad's ability to provide service on the line. The Railroad argues that the Commission cannot order the suspension of the York Street crossing, because of the preemptive effect of the Interstate Commerce Commission Termination Act.

The Railroad's argument omits certain important facts. Currently, the rails at the crossing are paved over. (Borough

Exhibits 5A-5D). The Railroad currently does not operate over the branch line or crossing and has not operated at the crossing for at least two years. (N.T. 87). There is no testimony by the Railroad that it could operate on the tracks at the crossing in their current condition. There is no testimony by the Railroad that the branch line is even useable without substantial repairs or rehabilitation. The Railroad also omits the fact from its brief that the crossing can be restored if the line is reactivated. (N.T. 120).

The Railroad's arguments also misstate the law. In 1995, Congress passed the Interstate Commerce Commission Termination Act of 1995 modifying the Stagger's Act, abolishing the Interstate Commerce Commission and creating the Surface Transportation Board. The Interstate Commerce Termination Act eliminated the states' authority to regulate intrastate rates and service by repealing the sections of the Stagger's Act that allowed states to apply for federal certification to regulate rates and services. CSX Transportation, Inc. v. Georgia Public Service Commission, 944 F.Supp. 1573(N.D.Ga. 1996)

The Interstate Commerce Commission Termination Act also empowers the Surface Transportation Board to control the construction, acquisition, operation, abandonment or discontinuance of spur, industrial, team, switching or sidetracks. Formerly, 49 U.S.C.§10907 did not give this authority to the Interstate Commerce Commission, but rather the

states. Illinois Commerce Commission v. Interstate Commerce Commission, 879 F.2d 917 (D.C.Cir. 1989) and Consolidated Rail Corporation v. Pa.P.U.C., 565, F.Supp. 153 (Sp.Ct.R.R.R.A. 1983). It is clear that the Commission cannot control the construction, acquisition, operation, abandonment or discontinuance of any rail line, including, spur, industrial, team, switching or sidetracks. However, the suspension of a rail highway crossing does not do this. As noted by the Commonwealth Court in CSX Transportation, Inc. v. Pa.P.U.C., 125 Pa.Comm. Ct. 528, 558 A.2d 902 (1989), alloc. denied, 567 A.2d 654, 523 Pa. 651 (1989), the Interstate Commerce Commission's authority over rail lines involves economic impact while the Pennsylvania Public Utility Commission's highway crossings involve safety. The Surface Transportation Board, as successor to the Interstate Commerce Commission, has no more authority over rail highway crossings than the Interstate Commerce Commission did.

Furthermore, the Commission's action in suspending a crossing does not have the effect of causing the Railroad in this proceeding to discontinue or abandon its service on the rail line. The crossing may be replaced when service on the rail line is restored. Currently, the Railroad provides no service on this line. There is no indication of when, if ever, the Railroad will restore service or what work the Railroad will have to perform to the line in order to return it to service. It is also not clear that the Railroad can use the crossing without removing the

existing rail facilities and replacing them. If the crossing must be removed and replaced to accommodate train traffic, the Commission's order directing removal and suspension only makes this two separate projects rather than one. In either case, the existing crossing must be removed.

The facts in this case are different than those set forth in the case of Wisconsin Central Ltd. v. City of Marshfield, 2000 U.S.Dis. Lexus 10570 (D.Ct.D.C. 2000) cited in the Railroad's main brief. In that case, the City of Marshfield sought to condemn sixty-eight hundred feet of actively used railroad passing track. The court in that proceeding ruled that the City of Marshfield's actions were pre-empted by the Interstate Commerce Commission Termination Act. The court reasoned that condemnation of the active passing track was an exercise of state control over rail transportation prohibited by the Interstate Commerce Termination Act.

Here, the Bureau of Transportation and Safety is asking the Commission to suspend the York Street crossing by removing approximately fifty feet of inactive track in the roadway. Removal of the track from the York Street crossing would not control railroad transportation since there are no trains currently operating on the track. Furthermore, the Railroad does not contemplate operating at this location in the near future so removing the tracks from the York Street crossing does not interfere with future rail transportation. If and when the

Railroad commences operating at this location again, tracks can be installed at the crossing, thus restoring service.

Removing the tracks at the York Street crossing is not an exercise of state control over rail transportation prohibited by the Interstate Commerce Commission Termination Act nor does it have the effect of causing the Railroad to discontinue or abandon service on the line. The case cited by the Railroad is simply inapplicable to this proceeding.

#### CONCLUSION

The issues raised by the Railroad in its main brief are without merit. The Commission proceeding has afforded the Railroad adequate due process. The Commission gave the Railroad the opportunity to present additional testimony on the three crossings at another hearing. The Railroad did not request further hearings.

The Interstate Commerce Commission Termination Act does not pre-empt the Commission from ordering the York Street crossing suspended. A Commission order suspending the crossing would not control railroad transportation nor have the effect of causing the Railroad to abandon or discontinue service over the line.

Respectfully submitted,



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Assistant Counsel  
Bureau of Transportation &  
Safety

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Dated: August 25, 2000

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I hereby certify that I am this date serving the foregoing document upon the persons and in the manner indicated below:

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Tuesday, September 05, 2000

James J. McNulty, Secretary  
Pennsylvania Public Utility Commission  
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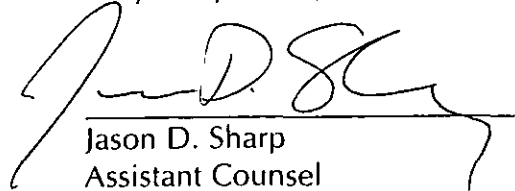
IN RE: Duryea v. Reading Blue Mountain, et al.  
Docket # C-00992585

Dear Secretary McNulty:

Enclosed for filing is an original and nine (9) copies of the Department of Transportation's Reply Brief in the above captioned matter.

The parties have been served with two (2) copies of the Brief in the manner indicated on the attached certificate of service.

Very Truly Yours,

  
Jason D. Sharp  
Assistant Counsel

220/JDS:\_  
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cc: All parties of record  
Gary Fawver, P.E., Chief, Right-of-Way and Utilities Division)  
Joe Strok, Grade Crossing, District 4-0

ORIGINAL

90

**BEFORE THE**  
**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

DURYEA BOROUGH

v.

READING BLUE MOUNTAIN AND  
NORTHERN RAILROAD COMPANY,  
PENNSYLVANIA DEPARTMENT OF  
TRANSPORTATION AND  
LUZERNE COUNTY

Docket Number

C-00992585

**DOCKETED**  
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**REPLY BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA,**  
**DEPARTMENT OF TRANSPORTATION**

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Commonwealth of Pennsylvania  
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## ARGUMENT

The Commonwealth of Pennsylvania, Department of Transportation (Department) incorporates by reference its Main Brief in this matter, as if set forth at length. The Department also incorporates by reference the arguments as set forth by the Bureau of Transportation and Safety in its Reply Brief.

**I. THE DEPARTMENT SHOULD NOT BE RESPONSIBLE FOR COSTS ASSOCIATED WITH ANY WORK PERFORMED BY READING BLUE MOUNTAIN AND NORTHERN RAILROAD COMPANY.**

In its Main Brief, Reading Blue Mountain and Northern Railroad Company (Reading) suggests that the Department or other parties should bear the cost for detours associated with the repair or replacement of the subject crossings. (Reading Main Brief, p.12-14). The Department disagrees. While it is appropriate for the Department to bear any detour costs for work the Department needs to perform on the highway, it would be unfair and inequitable to require the Department to absorb Reading's detour costs.

One of the main reasons the Reading wants to shift the cost of the detours is that they may be expensive. (Reading Main Brief, p. A-2, Proposed Finding of Fact 18). The simple fact that detour costs will be expensive to Reading is not a sufficient reason to allocate those costs to other parties. East Rockhill Twp. v, Pa. P.U.C., 540 A.2d 600, (Pa. Cmwlt. 1988) (ability of a party to pay for ordered repairs is not relevant). What is relevant is that the crossings are in a state of disrepair due to lack of adequate maintenance by Reading and its predecessors.

The Department is willing to bear any costs associated with traffic flagging or detours that may be occasioned by highway approach work that needs to be performed

at the crossings. However, to saddle the Department with detour costs incident to Reading's work between the rails is unfair in light of Reading's lack of maintenance. Had Reading conducted routine maintenance in the past, the crossings may not be in the condition that they are today. The crossings require significant work, in some cases replacement, which will necessitate roadway protection and detours involving complete road closings.

This is not the Department's fault. In fact, the Complainant states that the vast majority of the crossing problems, 90%, lie between the tracks. (N.T. 58-59). It is Reading's responsibility to remediate the problem with the crossings "between the ties." Detour costs associated with this work should likewise be Reading's responsibility.

**II. COXTON ROAD HAS BEEN TEMPORARILY REPAIRED.**

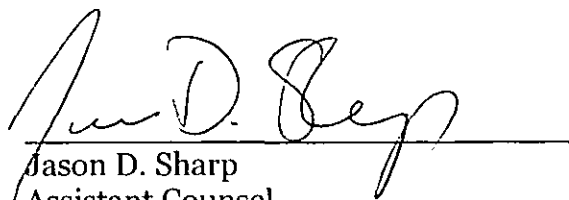
As indicated by both Reading and the Department in their respective Main Briefs, repairs have been made at the Coxtan Road crossing. Reading has replaced the broken rail with a joint rail. The Department has completed approach paving work, including paving to the westerly rail, so as to provide a smooth transition. A party other than the Department completed patching between the rails. These repairs are shown in Attachments A-D.

However, the Department stands by its statement that any repairs here are temporary and that full replacement is ultimately necessary. (Department Main Brief, p. 10-11).

CONCLUSION

For all of the above-cited reasons, the Department respectfully requests that the Commission allocates costs and maintenance responsibilities as set forth by the Department in its Main Brief.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Jason D. Sharp", written over a horizontal line.

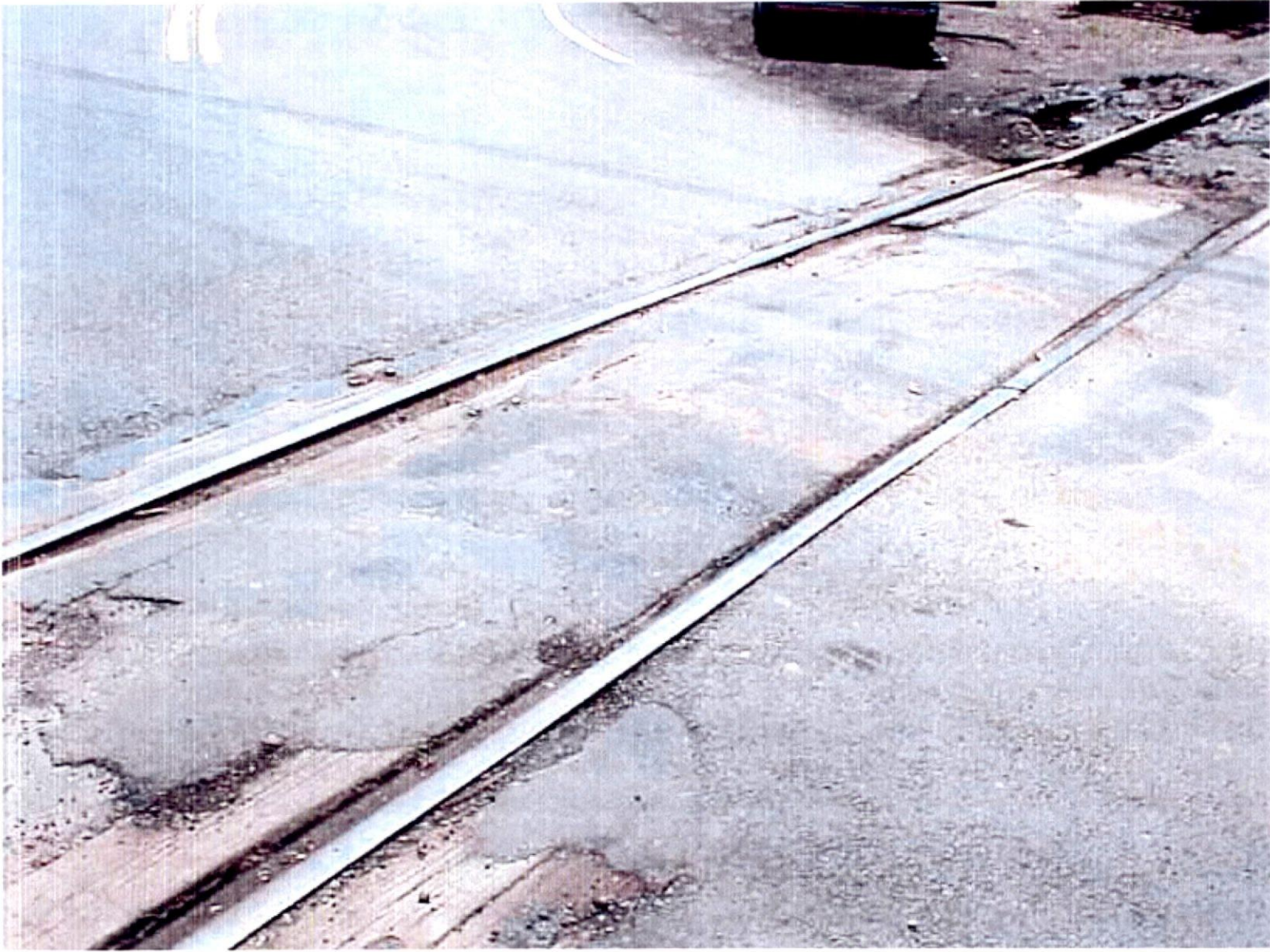
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Dated: Tuesday, September 05, 2000



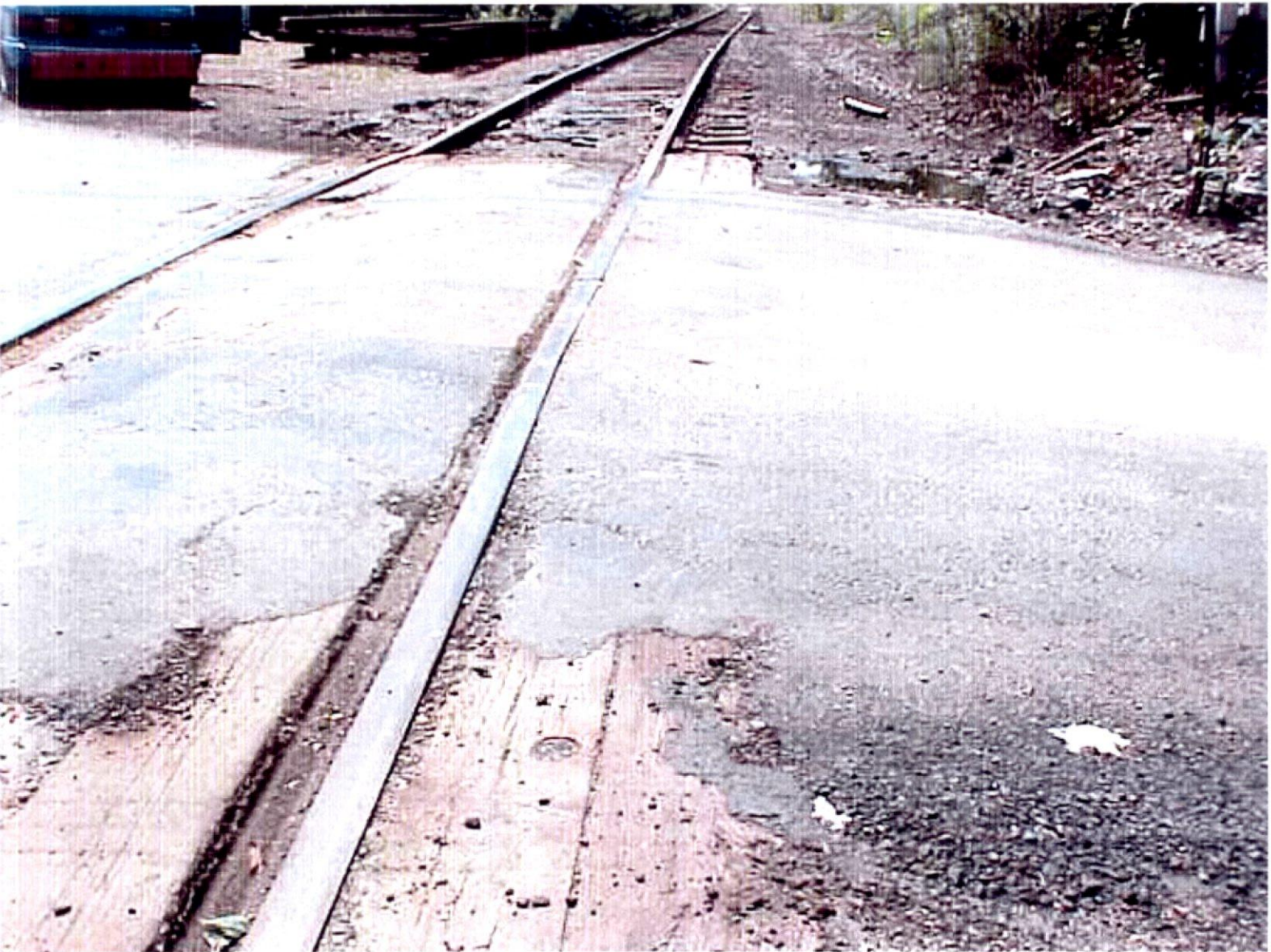
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B



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*D*

**BEFORE THE**  
**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

DURYEA BOROUGH	:	
	:	
V.	:	Docket Number
	:	
READING BLUE MOUNTAIN AND	:	
NORTHERN RAILROAD COMPANY,	:	
PENNSYLVANIA DEPARTMENT OF	:	C-00992585
TRANSPORTATION AND	:	
LUZERNE COUNTY	:	

**CERTIFICATE OF SERVICE**

I, Jason D. Sharp, hereby certify that two (2) true and correct copies of the Department of Transportation's Reply Brief, was served upon the parties listed below by first class mail, postage prepaid, this 5<sup>th</sup> day of September, 2000:

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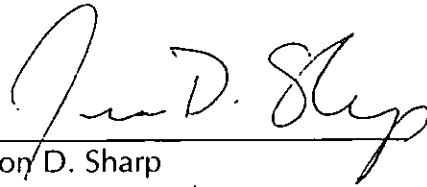
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September 11, 2000

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Re: Duryea Borough v. Reading, Blue Mountain  
and Northern Railroad Company, Pennsylvania  
Department of Transportation and Luzerne County  
Docket No. C-00992585

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SEP 13 2000

Dear Judge Kashi:

At the hearing held on May 18, 2000, your honor indicated that you did were not interested in reply briefs "unless the parties insisted." Tr. at 133. None did at the hearing. The briefing schedule dated June 5, 2000, did not make any mention of reply briefs.

We have now received reply briefs filed by both the Bureau of Transportation and Safety and by PennDOT. We would appreciate a notice as to whether these reply briefs are going to be accepted, and if so, whether all parties are to be given an opportunity to file reply briefs or rebuttal.

Hon. George M. Kashi  
September 11, 2000  
Page 2

Thank you for your consideration of this request.

Respectfully,



Eric M. Hocky  
Attorney for Reading Blue Mountain  
and Northern Railroad Company

cc: Prothonotary, PUC  
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David A. Salapa, Esq.  
Jason D. Sharp, Esq.  
Charles D. McCormick, Esq.