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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

FedEx

Prothonotary
Pennsylvania Public Utility Commission
North Office Building
Commonwealth Avenue & North
P.O. Box 3265
Harrisburg, PA 17105-3265

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

Rebuttal

Dear Sir or Madam:

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

Kindly time stamp the extra copy of this document also enclosed to indicate receipt and return it to me in the

Prothonotary
October 16, 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.)

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Before the

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

PENNSYLVANIA PUBLIC UTILITY COMMISSION

_____)
 Duryea Borough)
)
 v.)
)
 Reading, Blue Mountain and Northern Railroad)
 Company, Pennsylvania Department of)
 Transportation and Luzerne County)
 _____)

Docket No. C-00992585

REBUTTAL OF

READING BLUE MOUNTAIN & NORTHERN RAILROAD COMPANY

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DOCKETED
OCT 18 2000

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Attorneys for Reading Blue Mountain
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Dated: October 16, 2000

REBUTTAL OF
READING BLUE MOUNTAIN & NORTHERN RAILROAD COMPANY

This Rebuttal is filed by Reading Blue Mountain & Northern Railroad Company ("RBMN") to address certain issues raised in the Reply Briefs filed by the Bureau of Transportation and Safety (the "Bureau") and by PennDOT.¹ This Rebuttal does not address all the issues raised by the Reply Briefs as RBMN believes certain issues were adequately addressed in RBMN's Main Brief.

A. The Commission does not have the power to suspend a rail line that has not been abandoned.

In its Main Brief, RBMN contended that because under federal law, the Surface Transportation Board ("STB") has exclusive jurisdiction over rail carriers and their facilities and that the Commission's suspension power with respect to such facilities is pre-empted. RBMN Main Brief at 4-5. While claiming that RBMN has misstated the law, the Bureau acknowledges that under the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), the STB was clearly given exclusive authority to control the construction, acquisition, operation, abandonment or discontinuance of spur, industrial, team switching or side tracks. Bureau Reply Brief at 9. The Bureau further acknowledges that this is a change from prior law. *Id.* However,

¹ Because of some confusion about the briefing schedule, RBMN was given the right to file this Rebuttal by the Order dated September 27, 2000 of the Administrative Law Judge George M. Kashi.

the Bureau somehow believes that this exclusive jurisdiction is not affected by a suspension order which would cause the removal of tracks at a crossing. This is not the case.

It has been held that actions that would interfere with or affect railroad facilities would violate the STB's exclusive jurisdiction. *See Wisconsin Central, Ltd. v. City of Marshfield*, 2000 US Dist. Lexis 10570 (D. Ct. Wisc. 2000) (finding ICCTA's preemption is broad and clear; rejecting contention that ICCTA only preempts economic regulation of railroads). Clearly, ordering the removal of tracks (whether under a suspension order or otherwise) affects facilities of the railroad, and the railroad's ability to provide services in the future. RBMN testified that, although the tracks are not currently in active use, it did not want to have them removed, because once removed it is difficult to ever attract traffic again. Transcript at 87.²

The main decision relied upon by the Bureau, *CSX Transportation, Inc. v. PUC*, 558 A.2d 902 (Pa. Cmwlth. 1989), *alloc. denied*, 567 A.2d 654 (Pa. 1989), is not applicable. Beside being decided prior to the passage of ICCTA, the decision merely holds that the Commission continues to have authority over safety issues at crossings even *after* they have been abandoned pursuant to federal law. RBMN is not in this proceeding challenging the jurisdiction of the Commission to order repairs to maintain the safety of highway crossings, but is challenging the jurisdiction of the Commission to order railroad facilities removed in instances where the facilities have not been abandoned under federal law.³

² References to "Transcript" are to the transcript of the hearing held on May 18, 2000.

³ Because this proceeding does not involve any abandoned crossings, RBMN does not need to address whether *CSX Transportation* has continued vitality despite the changes in the law enacted by ICCTA.

The Bureau also criticizes RBMN for not presenting testimony that the branch line is usable without substantial repairs or rehabilitation. However, this crossing was not in the original set of crossings that were to be the subject of this proceeding, nor was suspension of the crossing a part of the relief requested by the complaining party, Duryea Borough. Accordingly, there was no need to present such testimony. Further, RBMN would point out that there is also no testimony that the crossing needs to be fully removed and replaced in order to reactivate rail service over the line. The Bureau merely testified that the crossing was "uneven." Transcript at 118-119. No substantial amount of work seems necessary to make this crossing safe even if the tracks were left in place.

B. The cost of detouring should be allocated among the parties based on the benefit received.

As noted by PennDOT, RBMN has suggested that a fair allocation of the costs associated with the crossing repairs should be allocated based on the benefit received by the various parties. RBMN Main Brief 6-9, 12. Because the crossings at issue in this case are currently safe for railroad operations, any repairs at or to the crossing generally are for the benefit of the traveling public. As such, it is not unfair for costs, including detour costs, to be allocated to the owner of the associated highway, and where different, to the Borough and the County whose citizens and businesses benefit from the proposed improvements.

PennDOT claims (without any supporting citation) that the crossings would not be in the same condition today if RBMN had done routine maintenance in the past. However, it is important to note that RBMN has only owned these lines since August, 1996, and that, with the exception of the crossing at Coxton Road (which has since been temporarily repaired), there is no

testimony that any of the crossings need to be replaced; only minor patching and paving is required. As noted by RBMN in its Main Brief, no justification has been given for application of the "historical rule" that would assign to a railroad all costs associated with repairs to the crossing between the tracks and for two feet on the outside of each. Main Brief at 11. Accordingly, RBMN has proposed general rules that it believes reflect a fair allocation of costs based on the relative benefits to be enjoyed from any ordered repairs.

CONCLUSION

For the reasons set forth above, and in RBMN's Main Brief, RBMN requests that the Commission allocate costs and maintenance responsibilities as set forth by RBMN in its Main Brief.

Respectfully submitted,



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Dated: October 16, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have this day served one true copy of the foregoing document by U.S. first class mail upon the participants, in accordance with the requirements of §1.54 (relating to service by a participant):

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Dated this 16th day of October, 2000.



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