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JAMES R. BOWE
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PLEASE REPLY TO: TAMAQUA OFFICE

PLEASE NOTE:

Our New Area Code is "570".

September 1, 1999

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Administrative Law Judge Herbert S. Cohen
Commonwealth of Pennsylvania
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

SEP 02 1999

HARRISBURG
PUBLIC UTILITY COMMISSION

Re: Borough of Tamaqua vs. Reading, Blue
Mountain & Northern Railroad Company
Complaint Docket No. C-00992533

Dear Judge Cohen:

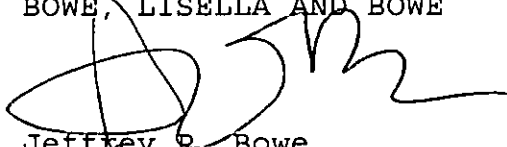
Enclosed please find the written testimony of the Borough of Tamaqua to be filed relative to the above matter. Please return the copy after it has been time-stamped in the enclosed, self-addressed, stamped envelope.

Thank you for your anticipated cooperation.

**DOCUMENT
FOLDER**

Very truly yours,

BOWE, LISELLA AND BOWE



Jeffrey P. Bowe

SEP 02 1999
HARRISBURG
PUBLIC UTILITY COMMISSION

JPB/lls

Enclosures

- cc Gregory F. Lapore, Esquire
- Andrew Gordon, Esquire
- Gina D. Alfonso, Esquire
- Joseph Jones, Jr., Esquire
- William Pickering, PE Chief
- Kenneth McClain
- Jean Heffner, Chief Clerk
- David A. Salapa, Esquire
- Honorable David G. Argall
- Wandaleen Poynter-Cole, Esquire
- Randal S. Noe, Esquire

COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA PUBLIC UTILITY COMMISSION

BOROUGH OF TAMAQUA : DOCKET NO. C-00992533
:
vs. :
:
READING, BLUE MOUNTAIN & :
NORTHERN RAILROAD COMPANY :

WRITTEN TESTIMONY OF THE BOROUGH OF TAMAQUA

The Borough of Tamaqua intends to call two witnesses, Allen Breiner, Code Enforcement Officer of the Borough of Tamaqua, and Kevin A. Steigerwalt, the Borough Secretary.

1. Allen Breiner will testify as to the location of the railroad crossing situate on East Broad Street, Tamaqua, Schuylkill County, Pennsylvania. Through the use of photographs, Mr. Breiner will describe in detail the deteriorating condition of the rubber parko surface of the crossing installed in approximately 1980 as a result of a Public Utility Commission Order. Mr. Breiner's testimony and the photographs which he will authenticcate will document the deteriorating condition of the crossing and the significant depressions which cause westbound traffic on Broad Street to veer to the right to avoid the significant depression in the crossing situate in the westbound lane. This movement by westbound traffic endangers pedestrians walking along the north side of the crossing. Furthermore, if the westbound traffic veers to the left, eastbound traffic on Broad Street is also endangered. Lastly, westbound traffic often stops

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to avoid damage to their vehicles which could result in a rear-end collision caused by westbound traffic following a stopped vehicle.

2. Allen Breiner will further testify that absent significant repairs to alleviate the depressions and otherwise deteriorating condition of the crossing, the crossing should be replaced.

3. Kevin A. Steigerwalt, Secretary of the Borough of Tamaqua, will testify that he has custody of all ordinances duly passed by the Borough of Tamaqua and that the Borough of Tamaqua has not ordained that portion of Broad Street which contains the railroad crossing as a Borough street.

4. Allen Breiner will testify that the Borough does not do any maintenance to the railroad crossing on West Broad Street nor to the approach to the crossing on either side.

Respectfully submitted,



Jeffrey P. Bowe, Esquire
Supreme Court I.D. No. 23188
Bowe, Lisella and Bowe
109 West Broad Street
P.O. Box 290
Tamaqua, PA 18252-0290
Attorney for Borough of Tamaqua

ALJ APPEARANCE SHEET

Hearing Report

Docket No.	C-00992532	Check Those Blocks Which Apply:				
		Prehearing Held	<input type="checkbox"/>	YES	<input type="checkbox"/>	NO
Case Name	Borough of Tamaqua v. Reading, Blue Mountain & Northern Railroad Company	Hearing Held	<input checked="" type="checkbox"/>	YES	<input type="checkbox"/>	NO
		Testimony Taken	<input checked="" type="checkbox"/>	YES	<input type="checkbox"/>	NO
		Transcript Due	<input checked="" type="checkbox"/>	YES	<input type="checkbox"/>	NO
		Hearing Concluded	<input checked="" type="checkbox"/>	YES	<input type="checkbox"/>	NO
Location	Harrisburg	Further Hearing Needed	<input type="checkbox"/>	YES	<input checked="" type="checkbox"/>	NO
Date	September 21, 1999	Estimated Add'l Days	<input type="checkbox"/>	70	<input type="checkbox"/>	YES
ALJ	Herbert S. Cohen	RECORD CLOSED	<input type="checkbox"/>	YES	<input type="checkbox"/>	NO
Reporting Firm	Sargent's	DATE	<input type="checkbox"/>		<input type="checkbox"/>	
		Briefs to be Filed	<input checked="" type="checkbox"/>	YES	<input type="checkbox"/>	NO
		DATE	<input type="checkbox"/>		<input type="checkbox"/>	
		Bench Decision	<input type="checkbox"/>	YES	<input checked="" type="checkbox"/>	NO
		REMARKS:	Briefs due 9/23/99			

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Names, Addresses and Telephone Numbers of Parties or Counsel of Record
PLEASE PRINT CLEARLY

Incomplete Information may Result in Delay of Processing

Name and Telephone Number	Address	Appearing for
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Jason D. Sharp Office of Chief Counsel Telephone No. 717 787 3128	555 Walnut St 9th Floor City HEB State Pa Zip 17101-1901	Pa DOT
Gregory Lepore Telephone No. 215-362-1015	900 S. Broad St P.O. Box 207 City Lansdale State Pa Zip 19446	Reading Blue Mountain & Northern RR.

Check this box if additional parties or counsel of record appear on back of form.

John M. ...
Reporter

Name, Title and Telephone Number	Address			Appearing for
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Telephone No. 717 783-2848	City HARRISBURG	State PA	Zip 17105-3265	
Jeffrey P. Bawe, Esq	109 West Broad Street P.O. Box 290			Borough of Tamaqua
Telephone No. 570-668-1241	City TAMAQUA	State PA	Zip 18252	
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Telephone No.	City	State	Zip	
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BOARD OF COMMISSIONERS

FORREST L. SHADLE, Chairman of the Board
JERRY KNOWLES, Vice Chairman of the Board
EDWARD D. BARKET, Commissioner



JOSEPH H. JONES, JR., Solicitor
FRANK ROBERT CORI, Assistant Solicitor
MARY KAY BERNOSKY, Assistant Solicitor

Office of the Solicitor
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401 North Second Street
Pottsville, PA 17901-2528

Telephone: (570) 628-1129
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November 4, 1999

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

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STATE OF PENNSYLVANIA
99 NOV -5 AM 8:49
SRE

In Re: Borough of Tamaqua vs. Reading, Blue Mountain & Northern
Railroad - Docket No. C-00992533

Dear Mr. McNulty:

Please find enclosed the County of Schuylkill's Proposed Findings of Fact and
Conclusions of Law for filing with your office. By copy of this letter, all parties
indicated on the attached Mailing List are also provided with a copy of same.

Very truly yours,

Mary Kay Bernosky
MARY KAY BERNOSKY

MKB:cah

Enclosure

cc: All Parties Indicated on Attached List (w/encl.)

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SRE

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION

BOROUGH OF TAMAQUA

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DOCKET NO. C-00992533

99 NOV -5 AM 8:49

vs.

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READING, BLUE MOUNTAIN &
NORTHERN RAILROAD COMPANY

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

AND NOW, the County of Schuylkill, by and through its solicitor, Mary Kay Bernosky, Esquire, files the within Proposed Findings of Fact and Conclusions of Law and sets forth the following:

1. The subject of this hearing is a railroad crossing located in the Borough of Tamaqua, County of Schuylkill.

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2. The crossing is owned by Reading, Blue Mountain & Northern Railroad Company and it crosses State Highway Route 209.

3. Vehicular and pedestrian traffic utilize the crossing, which traffic consists of residents of the County of Schuylkill as well as adjoining counties and all citizens of the Commonwealth of Pennsylvania. (N.T. at p. 65.)

4. A prior hearing was held regarding this crossing and several others on April 11, 1980 and a final decision and Order was filed on May 3, 1980, wherein, the Railroad (in that case the Consolidated Rail Corporation) and the Commonwealth of Pennsylvania Department of Transportation (PennDOT) were ordered to make the needed repairs to the crossing.

5. All parties agree that the crossing is in need of replacement at this time. (N.T. at pp. 13, 34 and 47.)

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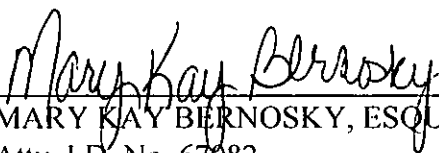
CONCLUSIONS OF LAW:

6. The County of Schuylkill believes that because this crossing is owned by the Railroad and connects a state highway, it is the responsibility of either the Railroad or PennDOT to make all necessary repairs or replacements in order to make the crossing safe for vehicular and pedestrian traffic. This Commission's prior Order acknowledges that it is PennDOT and the Railroad which are responsible for the condition of this crossing. Although Counsel for the Commission had pointed out that County residents traverse this crossing, it is just as likely that non-County residents traverse this crossing.

7. The County is responsible for 66 bridges located in the County and cannot be responsible for all railroad crossings which traverse state highways within its borders.

8. There is no precedent wherein a county has been held responsible for a railroad crossing such as is found in this case. Therefore, the County respectfully submits that the responsible parties in this matter are the Commonwealth of Pennsylvania Department of Transportation and/or the Reading, Blue Mountain & Northern Railroad Company.

Respectfully submitted,


MARY KAY BERNOSKY, ESQUIRE
Atty. I.D. No. 67082
Schuylkill County Courthouse
Office of the Solicitor
401 North Second Street
Pottsville, PA 17901
Tel. (717) 628-1129



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

IN REPLY PLEASE
REFER TO OUR FILE

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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: Borough of Tamaqua v. Reading, Blue
Mountain & Northern Railroad Company
Docket No. C-00992533

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

20

SRB

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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Borough of Tamaqua v. :
Reading, Blue Mountain and : Docket No. C-00992533
Northern Railroad Company :

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

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David A. Salapa
Assistant Counsel

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

Dated: November 9, 1999

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PROCEDURAL HISTORY

This matter began when the Borough of Tamaqua filed a complaint against the Reading, Blue Mountain and Northern Railroad Company on May 24, 1999, with the Pennsylvania Public Utility Commission (Commission). The complaint alleges that the at-grade crossing where West Broad Street crosses the facilities of the Reading, Blue Mountain and Northern Railroad Company is a danger to the public because motorists using the westbound lanes of West Broad Street must swerve to avoid depressions in the crossing. The Borough of Tamaqua requested that the Commission order the Reading, Blue Mountain and Northern Railroad Company to repair the crossing. The Commission served copies of the Borough of Tamaqua's complaint on the Reading, Blue Mountain and Northern Railroad Company, the Pennsylvania Department of Transportation, and Schuylkill County. All three of these entities filed answers to the complaint denying any responsibility to repair the crossing.

By notice dated July 29, 1999, the Commission scheduled this matter for hearing on September 21, 1999. The Commission's notice assigned the matter to Administrative Law Judge (ALJ) Herbert S. Cohen. On September 21, 1999, ALJ Cohen conducted a hearing on this matter. During the hearing, the parties stipulated as to the condition of the crossing (N.T. 18). At the crossing area in the westbound lanes of West Broad Street, the rubber crossing surface between the rails is depressed three or

four inches below the rail head. (N.T. 10, Complainant's Exhibits 1-5). In addition, the Reading, Blue Mountain and Northern Railroad Company agreed to perform the work necessary to reconstruct the crossing. (N.T. 48-49) The only issue which the parties could not resolve was who would pay for rebuilding the crossing. At the close of the hearing, ALJ Cohen ordered briefs filed on or before November 10, 1999. 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 replace the rubber crossing surface currently existing at this crossing with a concrete crossing surface. The existing crossing has outlived its useful life and is beyond repair. The Commission should direct that the Reading, Blue Mountain and Northern Railroad Company use a concrete crossing surface since it is more durable and not require as frequent a replacement as either a rubber crossing or a timber and asphalt crossing.

ARGUMENT

- I. THE PENNSYLVANIA PUBLIC UTILITY COMMISSION SHOULD ORDER THE READING, BLUE MOUNTAIN AND NORTHERN RAILROAD COMPANY TO REPLACE THE EXISTING CROSSING WITH A CONCRETE PANEL CROSSING.

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., 115 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., 1999 LEXIS 2517 (Pa. August 24, 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., 1999 Pa. LEXIS 2517 (Pa. August 24, 1999).

As complainant in this case, the Borough of Tamaqua has the burden to establish it's case before the Commission. The burden of proof which the Borough of Tamaqua 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 must be substantial and legally credible. The Borough of Tamaqua must establish by preponderance of the evidence that the rail-highway crossing where West Broad Street crosses the facilities of the Reading, Blue Mountain and Northern Railroad Company is unsafe. The Borough of Tamaqua has met its burden of proof.

In this case, the parties have all stipulated as to the condition of the crossing. (N.T. 18) The crossing area in the westbound lanes of West Broad Street between the rails is depressed three to four inches below the rail head or top of rail. (N.T. 10) Mr. Knerr, the Bureau of Transportation and Safety's witness, observed that cars traveling in the westbound lane were swerving to avoid this depression between the rails. (N.T. 11) Those vehicles swerving to the right either drove near or onto the sidewalk area since in that portion of Broad Street the sidewalk is not differentiated from the roadway surface by any elevation change. (N.T. 11) The Bureau is concerned that vehicles swerving out of their lanes to avoid this depressed area

will either move into the path of other vehicles or drive into the path of pedestrians. (N.T. 13)

This situation creates an unsafe condition for both vehicle users and pedestrians using the crossing. The number of vehicles and pedestrians using this crossing is substantial. The Department of Transportation presented testimony that in a 12-hour period, 3,817 vehicles used the westbound lanes of West Broad Street and 2,943 vehicles used the eastbound lanes. In addition, in a 12-hour period, 317 pedestrians used the north sidewalk and 467 pedestrians used the south sidewalk. Therefore, the risk of either pedestrians or vehicle users being injured due to the swerving vehicles is substantial.

Mr. Knerr stated that the rubber crossing surface has outlived its usefulness and is worn out. (N.T. 10) The Commission ordered this rubber crossing installed by order entered May 2, 1980 at Docket No. C-79020749. (N.T. 11-12, Staff Exhibit No. 1). Mr. Knerr also noted that in addition to the age of the crossing, the volume of traffic had contributed to the condition of the rubber crossing surface. (N.T. 10) The Bureau of Transportation and Safety has no information that the Commission has issued any subsequent orders that address the construction, reconstruction or maintenance of this crossing. (N.T. 12)

Given the condition of the crossing, it should be replaced with a concrete crossing surface. (N.T. 13)

Replacement of the current crossing with the concrete crossing surface would require rebuilding the crossing from the sub-base up. (N.T. 13-14) The old crossing surface, rails, ties and other track material should be removed and replaced. (N.T. 14) The Bureau advocates a concrete crossing surface because it is a more rigid material and should handle heavy truckloads better than a rubber crossing. (N.T. 14) In addition, the concrete crossing would last longer than a rubber crossing. (N.T. 14) Since the concrete crossing would last longer, it would need to be replaced less frequently and require less maintenance. (N.T. 14)

Since the parties have stipulated to the condition of the crossing, the only issues remaining are what type of crossing surface should be installed at this location and who should pay for the installation. As to what type of crossing surface the Commission should order installed, the Bureau of Transportation and Safety's position and reasoning are set forth above. The Bureau has no position on what party or parties should pay for the new crossings, but there are several relevant factors that the Commission should review in reaching this determination.

The prior order of the Commission at Docket No. C-79020749 entered May 2, 1980, directed that Consolidated Rail Corporation, then the rail operator at this location, install the rubber crossing surface which now exists. In particular, paragraphs three and five of the order directed Consolidated Rail Corporation to prepare plans for installation of a rubber

crossing surface and then to install it. Paragraph 18 of that same order directed the Department of Transportation to reimburse Consolidated Rail Corporation 100 percent of the costs incurred in installing the rubber crossing surface. Finally, paragraph 25 of that same order directed Consolidated Rail Corporation, at its sole cost and expense, to maintain the crossing area to a distance of two feet beyond the outermost tracks. (Staff Exhibit No. 1, N.T. 12)

None of the parties to this proceeding has performed any maintenance work to the area between the tracks. Since North Broad Street is a state highway, the Borough of Tamaqua and Schuylkill County have performed no maintenance to the crossing. (N.T. 22, 64) The Department of Transportation has maintained the roadway surface of West Broad Street to within two feet of the outermost rails at the crossing. (N.T. 32) The Reading, Blue Mountain and Northern Railroad Company has not performed any maintenance to the crossing area other than for some drainage work in 1993 or 1994. (N.T. 43-45)

The volume of train traffic, vehicular traffic and pedestrian are relevant factors as well. The Reading, Blue Mountain and Northern Railroad Company operates four to six trains per day through the crossing area at a speed of approximately 28 miles per hour. (N.T. 45) The vehicular traffic in a twelve hour study consisted of 3,817 vehicles traveling westbound and 3,943 vehicles traveling eastbound. West Broad

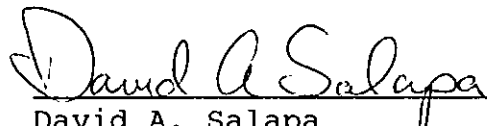
Street has a twenty-five mile per hour speed limit. (N.T. 26)
There were 317 pedestrians utilizing the north sidewalk and 467
pedestrians utilizing the south sidewalk. (N.T. 28) The
crossing is used frequently by the railroad, vehicles and
pedestrians.

The Commission should consider these factors in
determining which party or parties should contribute to the cost
of replacing the crossing surface.

CONCLUSION

There is ample evidence to support the Commission directing replacement of the rubber crossing surface at West Broad Street with a concrete crossing surface. The existing crossing has outlived its useful life and its condition is causing vehicles to engage in maneuvers which may result in injury or death. Since the Reading, Blue Mountain and Northern Railroad Company has agreed to install whatever crossing surface the Commission orders, the Commission should direct it to install the concrete crossing surface. The Commission should allocate the costs of installing the concrete crossing surface among the concerned parties, taking into account all relevant factors.

Respectfully submitted,


David A. Salapa
Assistant Counsel

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

Dated: November 9, 1999

PROPOSED CONCLUSIONS OF LAW

- (1) The Commission has jurisdiction over the subject matter and parties pursuant to 66 Pa. C.S. §2702 and §2704.
- (2) The Pennsylvania Department of Transportation, Reading, Blue Mountain and Northern Railroad Company, Schuylkill County and Borough of Tamaqua are all concerned parties within the meaning of 66 Pa. C.S. §2702 and §2704.
- (3) The Commission can best promote safety and prevent accidents at the West Broad Street Crossing by directing the Reading, Blue Mountain and Northern Railroad Company to install a concrete crossing surface.
- (4) The Borough of Tamaqua has established by a preponderance of evidence that the condition of the existing West Broad Street crossing constitutes a hazard to vehicles users and pedestrians who use the crossing.

PROPOSED FINDINGS OF FACT

- (1) The crossing where West Broad Street crosses the facilities of Reading Blue Mountain and Northern Railroad Company consists of a single track protected by flashing lights. (N.T. 9)
- (2) The crossing surface consists of a full depth rubber crossing that is four lanes wide. (N.T. 9-10)
- (3) West Broad Street at the crossing consists of four lanes each approximately 12 feet wide with 12 foot wide sidewalks on both sides. (N.T. 10)
- (4) In the westbound lane of the crossing, there is a depression between the rails that is four inches below the height of the rail head. (N.T. 10)
- (5) Due to the depression in the westbound lanes between the rails of the crossing, cars swerve to avoid going through the depression and drive up onto the sidewalk area. (N.T. 11)
- (6) By order entered May 2, 1980, at Docket No. C-79020749, the Commission directed the existing rubber crossing be installed at this location. (N.T. 12)
- (7) There are no subsequent Commission orders to the 1980 order which addressed the construction, reconstruction or maintenance of this crossing. (N.T. 12-13)
- (8) The Commission order entered May 2, 1980, at Docket No. C-79020749, directed Consolidated Rail Corporation to maintain the crossing area between the rails. (Staff Exhibit No. 1)
- (9) The current condition of the crossing is due to its age, traffic volume and possibly poor drainage. (N.T. 10-11, 17)
- (10) The crossing needs to be completely reconstructed at this time. (N.T. 13)
- (11) The Commission order entered May 2, 1980, directed the Pennsylvania Department of Transportation to reimburse Consolidated Rail Corporation 100 percent of its costs incurred in installing the rubber crossing at West Broad Street. (N.T. 15, Staff Exhibit No. 1)
- (12) There are no records of any accidents at this crossing in the last five years. (N.T. 21, 30)

- (13) West Broad Street in the vicinity of the crossing has a posted speed limit of 25 miles per hour. (N.T. 26)
- (14) For a twelve hour period, the number of vehicles using the crossing of 3,817 vehicles traveling westbound and 4,943 vehicles traveling northbound. (N.T. 28)
- (15) For a twelve hour period, the number of pedestrians using the crossing consisted of 317 using the north sidewalk and 467 pedestrians using the south sidewalk. (N.T. 28)
- (16) The existing crossing should be replaced with a concrete crossing. (N.T. 13, 30)
- (17) The Pennsylvania Department of Transportation has maintained the roadway approaches to the Broad Street crossing. (N.T. 32)
- (18) The expected useful life of a Parco rubber crossing is approximately fifteen to twenty years. (N.T. 36)
- (19) The Broad Street crossing is within 200 feet of the intersection with State Route 309. (N.T. 39)
- (20) The traffic light at the intersection of Routes 309 and Broad Street is interconnected with the railroad flashing lights at the West Broad Street Crossing. (N.T. 39)
- (21) The Reading, Blue Mountain and Northern Railroad Company performed some work at the crossing to improve drainage. (N.T. 44-45)
- (22) The Reading, Blue Mountain and Northern Railroad Company operates four to six trains a day at a speed of about 28 miles per hour through the Broad Street crossing. (N.T. 45)
- (23) The Reading, Blue Mountain and Northern Railroad Company sees no increase in the amount of train traffic in the near future. (N.T. 46)
- (24) The Reading, Blue Mountain and Northern Railroad Company is willing to perform work at the Broad Street crossing. (N.T. 48)
- (25) The Reading, Blue Mountain and Northern Railroad Company does not wish to assume the financial burden of reconstructing the crossing at Broad Street. (N.T. 49)
- (26) No other rail carrier operates on this line other than Reading, Blue Mountain and Northern Railroad Company. (N.T. 50)

- (27) The Reading, Blue Mountain and Northern Railroad Company purchased this line from Consolidated Rail Corporation in December, 1990. (N.T. 50)
- (28) The cost to install a concrete crossing at this location is approximately \$125,000 to \$150,000. (N.T. 55)
- (29) The cost to install a timber and asphalt crossing at this location is approximately \$50,000 to \$60,000. (N.T. 56)
- (30) The life expectancy of a timber and asphalt crossing is approximately five to seven years. (N.T. 56)
- (31) The expected useful life of a concrete crossing is approximately 15 years. (N.T. 57)

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:

Herbert S. Cohen
Administrative Law Judge
PA Public Utility Commission
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Dated: November 9, 1999

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DEPARTMENT OF TRANSPORTATION

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ORIGINAL

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James McNulty, Secretary
Pennsylvania Public Utility Commission
Harrisburg, PA 17108

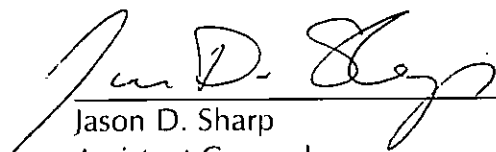
IN RE: Borough of Tamaqua v. Reading, Blue Mountain and Northern
Railroad Company, et al.
Docket # - C-00992533

Dear Secretary McNulty:

Enclosed for filing are an original and nine (9) copies of the Department's
Memorandum of Law in the above captioned matter.

The parties have been served with two (2) copies of the Memorandum 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
Harvey I. Cassell, , P.E., AC Right-of-Way and Utilities
Ken McClain, Grade Crossing, District 5-0

34

SRB

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

ORIGINAL

BOROUGH OF TAMAQUA,
Schuylkill County,

Petitioner

v.

**READING, BLUE MOUNTAIN AND
NORTHERN RAILROAD COMPANY, ET AL.**

Respondents

Docket Number

C-00992533

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**MEMORANDUM OF LAW OF THE COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION**

**DOCUMENT
FOLDER**

Jason D. Sharp
Assistant Counsel

Gina M. D'Alfonso
Assistant Counsel in Charge

DOCKETED
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Commonwealth of Pennsylvania
Department of Transportation
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ISSUES PRESENTED

I. IS IT JUST AND REASONABLE FOR THE PUBLIC UTILITY COMMISSION TO ORDER RECONSTRUCTION OF THE SUBJECT CROSSING?

Suggested Answer: Yes.

II. IS IT JUST AND REASONABLE FOR THE PUBLIC UTILITY COMMISSION TO ALLOCATE THE COST OF RECONSTRUCTION AND FUTURE MAINTAINANCE RESPONSIBILITY FOR THE CROSSING TO READING, BLUE MOUNTIAN AND NORHERN RAILROAD COMPANY?

Suggested Answer: Yes.

HISTORY OF THE CASE

The Borough of Tamaqua (Borough) filed a Complaint regarding the deteriorating condition of the West broad Street Crossing (SR 0209) on May 24, 1999. The Public Utility Commission (Commission), by notice dated July 29, 1999, ordered that a hearing be held to determine the condition of and future maintenance responsibility for the crossing. (N.T. 5). Pursuant to this notice, Administrative Law Judge Herbert S. Cohen (ALJ) held a hearing on Tuesday, September 21, 1999. Present at the hearing were representatives from the Borough, the County of Schuylkill (County), the Reading, Blue Mountain and Northern Railroad Company (RBMN), the Pennsylvania Department of Transportation (Department) and the Commission's Bureau of Transportation and Safety (BTS). The parties stipulated to the condition of the crossing by agreeing to adopt the testimony of the witness from the BTS. (N.T. 7, 18). Additional testimony was taken regarding the type of replacement crossing needed, the approximate costs of such work and which parties should bear the cost of reconstruction and future maintenance responsibility. The relevant facts adduced are summarized in the Department's Proposed Findings of Fact, p. a-f, *infra*. ALJ Cohen ordered that the parties file brief Memorandum of Law in support of their respective positions by November 10, 1999, along with proposed Findings of Fact and Conclusions of Law. (N.T. 66). This is the Department of Transportation's Memorandum of Law.

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, 684 A.2d 558 (Pa. 1996), cert. denied 117 S. Ct. 1384, 137 L. Ed. 2d 494 (1997). The Commission takes all relevant factors into consideration. Id. at 1301 (citations omitted). The Commission is not limited to any fixed rule, other than its allocation of costs and responsibilities must be just and reasonable. Borough of South Greensburg v. Pa. Public Utility Com'n, 544 A.2d 82 (Pa. Cmwlth. 1988).

I. IT IS JUST AND REASONABLE FOR THE PUBLIC UTILITY COMMISSION TO ORDER RECONSTRUCTION OF THE SUBJECT CROSSING.

The parties to this case all agree that the crossing is in a deteriorated state and must be replaced. (N.T. 7, 18, 30, 47). However, the Department and BTS agree that the crossing should be replaced with a full depth concrete crossing. (N.T. 13-14, 30). In contrast, RBMN would replace the current crossing with a timber and asphalt surface. (N.T. 47).

It is clear from the testimony that the appropriate crossing surface is a full depth concrete crossing. The area sees a fairly high volume of traffic, with a standard amount of large truck traffic utilizing the crossing. (N.T. 28-29; Department Exhibit # 3). A concrete crossing would provide rigidity and stability for the crossing. (N.T. 14). A concrete crossing would last longer than a rubber or timber and asphalt crossing, and requiring less

maintenance. (N.T. 14, 56-58). All of these facts lend credence to the argument that a full depth concrete crossing is the appropriate crossing for the subject site.

Although RBMN indicated that it would complete crossing repairs if needed, the timber and asphalt crossing would require more maintenance than a concrete crossing. It is respectfully submitted that the less maintenance burden placed on the railroad the better, considering RBMN's reluctance to address crossing repairs until a complaint is filed with the Commission.

II. IT IS JUST AND REASONABLE FOR THE PUBLIC UTILITY COMMISSION TO ALLOCATE THE COST OF RECONSTRUCTION AND FUTURE MAINTAINANCE RESPONSIBILITY FOR THE CROSSING TO READING, BLUE MOUNTIAN AND NORHERN RAILROAD COMPANY.

The parties to the case generally agree that the crossing surface has outlived its useful life and must be replaced. However, lack of maintenance on the part of RBMN is a factor supporting the allocation of crossing replacement cost to the railroad.

Some of the factors consistently viewed as relevant in crossing cases are:

- (a) the party that originally built the crossing;
- (b) the party that owned and maintained the crossing;
- (c) the benefit conferred upon the parties by the crossing;
- (d) what parties, if any, are responsible for the deterioration of the crossing; and,
- (e) the benefit the parties will receive from the repair or removal of a crossing.

Greene Township Bd. of Supervisors v. Pa. Public Util. Com'n, 668 A.2d 615, 619 (Pa. Cmwlth. 1995). While these factors are not exclusive, they represent guidelines often used by the Commission. Bell Atlantic-Pa. v. Pennsylvania Public Utility Commission, 672 A.2d

352, 354 (Pa. Cmwlth. 1995). Indeed, while these factors may be relevant, "the Commission is not limited to any fixed rule but takes all relevant factors into consideration, with the fundamental requirement being that its order be just and reasonable." AT&T v. Pa. Public Utility Commission, 737 A.2d 201, 209 (Pa. 1999), citing Bell-Atlantic-PA, supra.

Evidence adduced at the hearing revealed that Consolidated Rail Corporation (Conrail), RBMN's predecessor in interest, constructed the crossing in 1980 or 1981. (N.T. 10). While no ownership interest was assigned or assumed for the crossing surface, Conrail was ordered to maintain the crossing surface. (N.T. 32, Department Exhibit # 4, p. 14). Additionally, the Department was ordered to maintain the approaches at the crossing. The Department has performed maintenance under the Commission order in the past. Additionally, the Department is willing to complete any necessary repairs as per its duty under the prior order. (N.T. 35, 37-39). In contrast, RBMN has done no work on the crossing surface. (N.T. 52-53).

All the parties benefit from the crossing. Here, the crossing is protected with cantilevered lights and pre-empted signalization. (N.T. 39-40). This protection at the crossing reduces the potential for highway / rail conflicts and enhances overall safety at the crossing. In fact, there have been no accidents, either vehicle-train collisions or vehicle-vehicle collisions, at the subject crossing. (N.T. 29, 30; Department Exhibit # 3).

Finally, deterioration of the crossing is the central issue in this case. The parties agree that the crossing is deteriorated and must be replaced. However, it is not entirely clear from the record that the current condition of the crossing is simply a result of wear

and use over time. Rather, the lack of any program of maintenance by RBMN or its predecessor at the crossing may have led to its deterioration.

All the parties generally agreed that the crossing surface has reached or is near the end of its useful life. It is also clear that RBMN never performed any work on the crossing surface. (N.T. 52, 53). RBMN never inspected the panels, and in fact, never inspected the subsurface of the crossing.

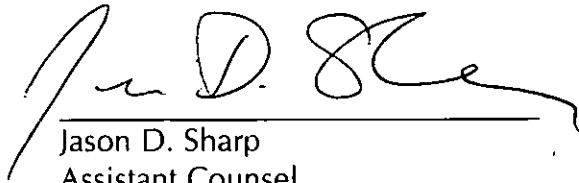
While the witnesses were not sure what type of maintenance could have been performed to prolong the useful life of the crossing, RBMN was aware of the problem at least back to 1995, but did nothing. Had the railroad, under its maintenance duty, addressed the deterioration in its initial stages, the useful life of the crossing may have been extended. Even assuming nothing could be done to the crossing, early detection of the problem by RBMN could have led to programming and replacement of the crossing by now, when all parties agree that the crossing must be replaced.

RBMN simply feels that maintenance of the crossing surface requires them to maintain it for rail use only. (N.T. 49). However, the prior Commission order does not take such a narrow view. Would it be acceptable for the Department to maintain the approaches in such a way that cars and trucks came smashing down on the rails, splintering ties and pounding ballast? Respectfully, the Department thinks not. Therefore, it is only logical that the railroad maintain the crossing for the safe passage of both trains and cars.

CONCLUSION

For all of the above cited reasons, this Honorable Commission should order that the West Broad Street Crossing be replaced with a full depth concrete crossing, at the sole costs and expense of RBMN.

Respectfully Submitted, .



Jason D. Sharp
Assistant Counsel
Pa. Atty. Id. # 80488

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DATED: November 10, 1999

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Memorandum of Law of the Commonwealth of Pennsylvania, Department of Transportation were served this day, November 10, 1999, via First Class Mail, upon the following parties:

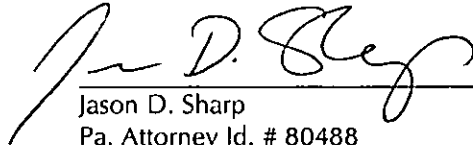
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November 10, 1999

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PROPOSED FINDINGS OF FACT

The Department adopts by reference, as if set forth at length, the Proposed Findings of Fact of the Borough of Tamaqua. Additionally, the Department submits the following proposed findings of fact:

1. State Route 0209 is also known as West Broad Street. (N.T. 26).
2. Eastbound, SR 0209 consists of one twelve-foot left turn lane and one twelve-foot through / right turn lane. (N.T. 26).
3. Westbound SR 0209 consists of one twelve-foot left turn lane and one twelve-foot through lane. (N.T. 26).
4. Both eastbound and westbound SR 0209 consist of a curved section and have a posted speed limit of twenty-five miles per hour. (N.T. 26).
5. The approaches are constructed of bituminous pavement and are presently in good condition. (N.T. 26).
6. Sidewalks are present on both the north and south sides of the SR 0209. (N.T. 26).
7. The approach grades are relatively flat and the railroad crossing traverses the highway at ninety degrees. (N.T. 26).
8. Department Exhibit One consists of two pictures of the rubber high-type crossing surface. (N.T. 27).
9. There are wavy, depressed areas in the rubber panels which result in different elevations between the height of the rail and the panel themselves. (N.T. 27).
10. The highway approaches are in fairly good condition. (N.T. 27).

11. SR 0209 is classified as an urban or other principal arterial. (N.T. 28).
12. Traffic counts were performed for a twelve-hour period from 6:00 a.m. to 12:00 p.m. on August 13th, 1999 and from 12:00 p.m. to 6:00 p.m. on August 12th, 1999. (N.T. 28).
13. The twelve-hour study consisted of 3,817 vehicles travelling westbound, with 241 trucks and 3,943 vehicles travelling northbound, with 199 trucks. (N.T. 28).
14. The total percentage of trucks from both directions is 5.7 percent. (N.T. 28).
15. For the same study period, there were 317 pedestrians utilizing the north sidewalk and 467 pedestrians utilizing the south sidewalk. (N.T. 28).
16. The traffic counts from 6:00 a.m. to 6:00 p.m. include both peak flows of traffic. (N.T. 29).
17. The a.m. peak flow is mostly people who are travelling to and from work. (N.T. 29).
18. The p.m. peak time is when people are travelling home from work. (N.T. 29).
19. Department Exhibit Three is a computer printout of a Department database that lists all of the accidents that would have happened at the subject crossing over the last five years. (N.T. 30).
20. There were no accidents or collisions between trains or vehicles, and also, no accidents at the existing crossing between vehicles and other vehicles. (N.T. 30).
21. A full deck concrete crossing is the preferred way of solving the problem at the crossing. (N.T. 30).

22. The subject crossing is not currently programmed under the federal rail safety program or under any Department programs. (N.T. 30).
23. The Department's current program is full with other candidate projects. (N.T. 31).
24. The next round of projects in the four-year cycle starts in the year 2001. (N.T. 31).
25. There is a possibility that this project could be included in the next program cycle beginning in 2001. (N.T. 31).
26. Department Exhibit Four consists of Commission docket number C-79020749, which is the same exhibit that was introduced as Bureau of Transportation Exhibit Number One. (N.T. 31).
27. The Department has complied with the prior Commission Order regarding this crossing. (N.T. 32).
28. To the best of the Department's knowledge, neither Consolidated Rail Corporation nor RBMN has performed any maintenance at the subject crossing. (N.T. 33).
29. The Department is not willing to assume any of the costs to make any repairs at the crossing. (N.T. 33).
30. In the past, the Department has resurfaced the highway and repainted the highway markings. (N.T. 35).
31. The Department also maintains advance signing. (N.T. 35).
32. The Department would we be willing to agree to continue the same maintenance in the future. (N.T. 35).

33. The expected useful life of a Parkco railroad crossing is anywhere from fifteen to twenty years. (N.T. 36).
34. The Department would agree to make sure that the advance pavement markings are installed. (N.T. 38).
35. Stop bars are six-inch wide white strips on pavement where a car should stop at the outside of the collision zone of a train. (N.T. 39).
36. If not present, the Department would be willing to install stop bars. (N.T. 39).
37. This crossing is approximately 200 feet from to an intersection of State Route 0309 and there is a stop light at the intersection of SR 0209 and SR 0309. (N.T. 39).
38. Railroad preemption is present at the intersection. (N.T. 39).
39. Railroad preemption means that both the railroad warning devices and the highway traffic signal are interconnected. (N.T. 39).
40. When there is a train coming to the crossing, preemption gives a green signal that enables the cars to get off the railroad crossing safely before trains enter the crossing. (N.T. 40, 41).
41. It is standard Department practice to put pedestrian push buttons in at signal light intersections. (N.T. 40).
42. The crossing is protected by flashing light signals that are cantilevered over the track and crossing area. (N.T. 9).
43. The current crossing surface is full depth rubber manufactured by Parkco. (N.T. 9).

44. There is currently a depression in the rubber crossing surface approximately three to four inches below the rail head. (N.T. 10).
45. The crossing was installed in either 1980 or 1981. (N.T. 10).
46. Both the Borough and the Commission are concerned about vehicular traffic swerving or leaving the restricted traffic lanes, which would cause problems for other vehicles as well as pedestrians on the adjacent sidewalks. (N.T. 13).
47. The Commission recommends replacement of the existing rubber crossing with a concrete crossing surface. (N.T. 13).
48. A rigid concrete surface handles large truckloads better than rubber because the concrete surface does not give under the weight of the load. (N.T. 14).
49. The Commission is not aware of any maintenance at the crossing by RBMN. (N.T. 16).
50. The crossing surface has been in a deteriorated state for approximately four to five years, dating back to approximately 1994 or 1995 (N.T. 16).
51. Inadequate drainage facilities at the crossing would contribute to the deterioration of the crossing surface. (N.T. 17).
52. The Commission's witness is not sure of what type of maintenance can be performed on the Parkco crossing surface. (N.T. 17).
53. A proper maintenance schedule implemented in 1994 or 1995 could have helped to prolong the life of the crossing. (N.T. 17).
54. RBMN was made aware of the conditions at the crossing as early as April 1995. (N.T. 23).

55. Train traffic at the crossing consists of one track with trains reaching speeds of approximately twenty-eight miles per hour, with four to six train movements per day. (N.T. 45).
56. It is the position of RBMN that it has maintained the crossing in a safe manner for train traffic. (N.T. 49).
57. RBMN is the immediate successor to Consolidated Rail Corporation. (N.T. 50).
58. RBMN is currently the only operator on the subject rail line. (N.T. 50).
59. The subject line may see additional traffic from Canadian Pacific Railroad, either by RBMN accepting shipments from Canadian Pacific, or Canadian Pacific actually running on the line. (N.T. 50).
60. RBMN has never released the tension held panels to remove them. (N.T. 52).
61. RBMN has never looked at the condition of the sub-base of the crossing. (N.T. 52).
62. RBMN is unaware of the condition of the railroad ties underneath the crossing. (N.T. 52).
63. RBMN never replaced any of the rubber panels in the crossing even when the panels began to fail. (N.T. 52).
64. RBMN has never replaced any wooden ties under the crossing. (N.T. 53).
65. RBMN has performed a weekly Federal Railroad Administration inspection, which consists of inspecting the crossing and making sure that it is safe for train service. (N.T. 53).

PROPOSED CONCLUSIONS OF LAW

1. The Public Utility Commission has exclusive jurisdiction over the rail-highway crossings and approaches in this case under 66 Pa. C.S.A. §§ 2702, 2704.
2. The Borough of Tamaqua, the County of Schuylkill, the Department of Transportation and the Reading, Blue Mountain and Northern Railroad Company are all concerned parties subject to the Public Utility Commission's jurisdiction under 66 Pa. C.S.A. §§ 2702, 2704.
3. The Public Utility Commission has the exclusive authority to order the construction, reconstruction, alteration, repair, protection or abolition of rail-highway crossings, as well as the exclusive authority to determine and order which parties should perform such work at the crossings and which parties shall maintain the crossings in the future. 66 Pa. C.S. §§ 2702, 2704.
4. The Public Utility Commission has the exclusive authority to allocate the costs of the work ordered performed upon the parties to this proceeding in such proper proportions as it may determine.
5. In apportioning costs in a rail-highway crossing case, the Public Utility Commission is not limited to any fixed rule but takes into consideration all relevant facts, the only requirement being that its order is just and reasonable.
6. The prevention of accidents and the promotion of safety will be advanced if the subject crossing is replaced with a new full depth concrete crossing surface.

7. It is just and reasonable for the Reading, Blue Mountain and Northern Railroad Company to construct, at its sole cost and expense, a new full depth concrete crossing surface.