



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

IN REPLY PLEASE
REFER TO OUR FILE

November 7, 2001

ORIGINAL

Mr. James J. McNulty, Secretary
Pa. Public Utility Commission
2nd Floor, 400 North Street
P.O. Box 3265
Harrisburg, PA 17105-3265

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01 NOV - 7 AM 10: 01
PA.U.C.
SECRETARY'S BUREAU

RE: Docket No. C-00992585

DOCUMENT
FOLDER

Dear Secretary McNulty:

Enclosed for filing with the Commission are the original and nine copies of the Bureau of Transportation and Safety's Exceptions in 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

Enclosures

KJR

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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P.A.U.C.
SECRETARY'S BUREAU

Duryea Borough

v.

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

Docket No. C-00992585

EXCEPTIONS OF THE
BUREAU OF TRANSPORTATION AND SAFETY
TO THE RECOMMENDED DECISION

DOCKETED
NOV 08 2001

The Bureau of Transportation and Safety takes Exception to the Recommended Decision of the Administrative Law Judge in the above referenced matter as follows:

1. The Bureau of Transportation and Safety Excepts to Ordering paragraph No. 8 because Ordering paragraph No. 8 fails to set forth a specific time deadline within which the Reading, Blue Mountain and Northern Railroad Company is to replace the timber flange ways and ties at the Foote Avenue crossing. The Commission cannot enforce the order since the Reading, Blue Mountain and Northern Railroad Company is not obligated to complete the work by a specific date. The Commission should modify Ordering paragraph No. 8 to direct the Reading, Blue Mountain and Northern to complete the work at the Foote Avenue crossing within 90 days of the order entry date.

2. The Bureau of Transportation and Safety Excepts to Ordering paragraph No. 10 because Ordering paragraph No. 10 fails to set forth a timeframe within which the

Reading, Blue Mountain and Northern Railroad Company must replace the timber flange ways and ties at the Phoenix Street crossing. The Commission cannot enforce the order since the Reading, Blue Mountain and Northern Railroad Company is not obligated to complete the work by a specific date. The Commission should modify Ordering paragraph No. 10 to direct the Reading Blue Mountain and Northern Railroad Company to complete the work at the Phoenix Street crossing within 90 days of the order entry date.

3. The Bureau of Transportation and Safety Excepts to Ordering paragraph No. 12 because Ordering paragraph No. 12 fails to set forth a time deadline within which the Reading, Blue Mountain and Northern Railroad Company must replace the timber flange ways and ties at the Stevenson Street crossing. The Commission cannot enforce the order since the Reading Blue Mountain and Northern Railroad Company is not obligated to complete the work by a specific date. The Commission should modify Ordering paragraph No. 12 to direct the Reading Blue Mountain and Northern Railroad Company to complete the work at the Stevenson Street crossing within 90 days of the order entry date.

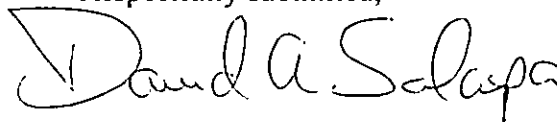
4. The Bureau of Transportation and Safety Excepts to Ordering paragraph No. 20 of the Recommended Decision because Ordering paragraph No. 20 does not provide a deadline within which the Reading, Blue Mountain and Northern Railroad Company must replace the timber flange ways and ties at the Marcy Street crossing. The Commission cannot enforce the order since the Reading Blue Mountain and Northern Railroad Company is not obligated to complete the work by a specific date. The Commission should modify Ordering paragraph No. 20 to direct the Reading Blue

Mountain and Northern Railroad Company complete the work at the Marcy Street crossing within 90 days of the order entry date.

5. The Bureau of Transportation and Safety Excepts to Ordering paragraph No. 23 of the Recommended Decision because Ordering paragraph No. 23 does not provide a deadline within which the Reading, Blue Mountain and Northern Railroad Company must tighten the west rail and repair or replace the roadway paving adjacent to the rails and guard timbers at the Hill Street crossing. The Commission cannot enforce the order since the Reading Blue Mountain and Northern Railroad Company is not obligated to complete the work by a specific date. The Commission should modify Ordering paragraph No. 23 in order to direct the Reading Blue Mountain and Northern Railroad Company to complete work at the Hill Street crossing within 90 days of the order entry date.

WHEREFORE, The Bureau of Transportation and Safety requests that the Commission modify Ordering paragraphs Nos. 8, 10, 12, 20 and 23 as set forth above.

Respectfully submitted,



David A. Salapa
Assistant Counsel
Bureau of Transportation & Safety

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

Dated: November 7, 2001

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SECRETARY'S BUREAU

CERTIFICATE OF SERVICE

I hereby certify that I am this date serving the foregoing document upon the persons and in the manner indicated below, pursuant to 52 Pa. Code §1.54.

SERVICE BY FIRST CLASS MAIL ADDRESSES AS FOLLOWS:

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

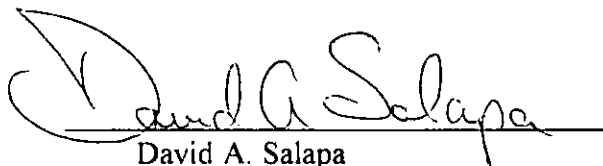
Barry Chromey, Esquire
126 South Main Street
Suite 201
Pittston, PA 18640

Eric M. Hocky, Esquire
Gollatz, Griffin, Ewing, P.C.
213 West Miner Street
P.O. Box 796
West Chester, PA 19381-0796

Jason D. Sharp, Esquire
Pennsylvania Department of Transportation
400 North Street, 9th Floor
P.O. Box 8212
Harrisburg, PA 17105-8212

Charles McCormick, Esquire
PNC Bank Building
76 Public Square
Wilkes-Barre, PA 18701

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SECRETARY'S BUREAU



David A. Salapa
Assistant Counsel
Bureau of Transportation & Safety

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

Dated: November 7, 2001

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION
www.dot.state.pa.us



Office of Chief Counsel
P.O. Box 8212
Harrisburg, PA 17105-8212

Tel: 717-787-3128
Fax: 717-772-2741
jdsharp@dot.state.pa.us

Tuesday, November 13, 2001

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

ORIGINAL

SECRETARY'S BUREAU

01 NOV 13 PM 1:15

RECEIVED

RE: Docket No. C-00992585

Dear Secretary McNulty:

Enclosed for filing, please find the original and nine (9) copies of the **EXCEPTIONS TO THE RECOMMENDED DECISION**, in the above-captioned matter.

I hereby certify that a copy of the Department's **EXCEPTIONS** has been sent to all parties of record as indicated on the **CERTIFICATE OF SERVICE**.

Very truly yours,

DOCUMENT
FOLDER

Jason D. Sharp
Assistant Counsel

220/JDS:scr
Enclosures

cc: Parties of Record
Gary C. Fawver, P.E., Chief, Right-of-Way and Utilities Division, CKB 7th Fl.
Joseph Strok, Grade Crossing Administrator, District 4-0

5

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

DURYLEA BOROUGH

Docket No. C-00992585

v.

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

DOCKETED

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SECRETARY'S BUREAU

EXCEPTIONS TO THE RECOMMENDED DECISION

AND NOW, comes the Commonwealth of Pennsylvania, Department of Transportation (Department), by and through its counsel, Jason D. Sharp, Assistant Counsel, and submits the following Exceptions to the Recommended Decision authored by Administrative Law Judge George M. Kashic, issued by the Pennsylvania Public Utility Commission (Commission) on October 24, 2001, pursuant to 52 Pa. Code Chapters 5.533 and 5.535:

**DOCUMENT
FOLDER**

EXCEPTION NO. 1

The Department excepts to proposed ordering Paragraph 4, which reads:

The Department of Transportation, at its initial cost and expense shall, at York Avenue, within 90 days of service of the Commission's order, furnish all material and do all work necessary to alter the railroad highway crossing, by removing the rails, ties and any advance warning signals, if any, and any other appurtenances or other track facilities from the areas of the crossing, and restore the area of the highway disturbed by the track removal with bituminous concrete or other suitable material.

The Department excepts to proposed ordering in Paragraph 4 due to the timing issues involved. The Department agrees with the Administrative Law Judge (ALJ) that the York Avenue crossing should be suspended by removal of the existing crossing and be replaced with an appropriate asphalt or concrete replacement surface. The proposed ordering paragraph requires that the Department complete such work within ninety (90) days of service of the Commission's order.

To the extent that the Commission's final order would be issued at a time when the ninety (90) day time frame would fall within the winter months, the Department would be unable to procure the necessary paving materials to complete the work. The Department will not be able to complete the job in a satisfactory manner during winter months. As there is no current time frame as to when the Commission's final order will issue in this proceeding, it is respectfully suggested that a caveat be inserted into the proposed ordering paragraph to note that the removal and replacement of the subject crossing should only take place when the appropriate asphalt or concrete replacement paving can be obtained and properly installed in the former crossing area.

Therefore, the Department respectfully requests that the proposed ordering paragraph 4 be modified to state that¹:

The Department of Transportation, at its initial cost and expense, shall at York Avenue, within ninety (90) days of service of the Commission's order, furnish all material and do all work necessary to alter the railroad highway crossing, by removing the rails, ties and advance warning signals, if any, and any other appurtenances or other track facilities from the areas of the crossing, and restore the area of the highway disturbed by the track removal with *bituminous asphalt paving, concrete paving material, or other suitable material, to the extent that such material is available and obtainable by the Department during the normal construction and paving season.*

¹ To the extent that the Commission rejects Department Exception No. 4, *infra*, the Department respectfully requests that the Commission modify proposed ordering Paragraph 16 in the same manner, and for the same reasons, as set forth in this exception.

EXCEPTION No. 2

The Department excepts to proposed ordering paragraph 5 which reads:

The Department of Transportation at its sole cost and expense shall bear 65% of the York Avenue project cost it incurred in accordance with this order. Reading Blue Mountain and Northern Railroad, at its sole cost and expense, shall pay the sum or sums of money to the Department of Transportation equal to 30% of the cost the Department of Transportation incurred in accordance with this order. The Borough of Duryea at its sole cost and expense, shall pay sum or sums of money to the Department of Transportation equal to 5% of the cost the Department of Transportation incurred in accordance with this order (i.e., The cost of the removal of ties and rails, together with all rail facilities, signals, any crossbucks, advance warning signs, and all pavement markings and the pavement replacement at York Avenue.

The Department respectfully suggests that the allocation of costs to remove this crossing is not just and reasonable under the facts. Specifically, the Department testified that it was willing to participate in a crossing removal project for the York Avenue ("Topps") crossing. (R.D. 36; N.T. 67) However, the Department noted that it was willing to participate in the removal project based upon a specific program that provides for the removal of crossing hazards.

Mr. Joseph Strok testified that the Department would participate in a crossing removal program, whereby the Department will fund 50% of the removal of a crossing. The Department proffering half of the costs to remove the crossing helps eliminate unnecessary at-grade crossings, and provides for the convenience and safety of the traveling public. Removal of the crossing is also a benefit to the railroad, as the railroad will not have to maintain an inactive crossing that provided it with no current traffic or revenue. Additionally, the Department could also use federal funding for the crossing removal as outlined in 23 U.S.C. § 130 (i). Under this section, federal money is available to defray the cost of crossing eliminations. There is a corresponding defraying of costs by the Railroad that is necessary.²

² 23 U.S.C. Sec. 130 (i) states:

Clearly, the Department made an equitable and just offer to help defray the costs for removal of the crossing, which is not the Department's responsibility. To saddle the Department with additional costs in this circumstance is unjust and unreasonable.

Wherefore, the Department respectfully requests that Ordering paragraph 5, be modified as follows:

The Department of Transportation at its sole cost and expense, shall *bear 50%* of the York Avenue project cost it incurred in accordance with this order. Reading Blue Mountain and Northern Railroad, at its sole cost and expense, shall pay the sum or sums of money to the Department of Transportation *equal to 50%* of the cost The Department of Transportation incurred in accordance with this order. (i.e., The cost for the removal of ties rails, together with all rail facilities, signals, and crossbucks, advance warning signs, and all pavement markings and the pavement replacement at York Avenue.

EXCEPTION NO. 3.

The Department excepts to proposed ordering paragraphs 8, 10, and 12, to the extent that each ordering paragraph would require Reading, Blue Mountain and Northern Railroad Company to make repairs to the Foote Avenue (S.R. 2032), Phoenix Street (S.R. 2027), and Stevenson Street (S.R. 2031) crossings.

(i) Incentive payments for at-grade crossing closures.

(1) In general. Notwithstanding any other provision of this section and subject to paragraphs (2) and (3), a State may, from sums available to the State under this section, make incentive payments to local governments in the State upon the permanent closure by such governments of public at-grade railway-highway crossings under the jurisdiction of such governments.

(2) Incentive payments by railroads. A State may not make an incentive payment under paragraph (1) to a local government with respect to the closure of a crossing unless the railroad owning the tracks on which the crossing is located makes an incentive payment to the government with respect to the closure.

(3) Amount of State payment. The amount of the incentive payment payable to a local government by a State under paragraph (1) with respect to a crossing may not exceed the lesser of--

(A) the amount of the incentive payment paid to the government with respect to the crossing by the railroad concerned under paragraph (2); or

(B) \$ 7,500.

(4) Use of State payments. A local government receiving an incentive payment from a State under paragraph (1) shall use the amount of the incentive payment for transportation safety improvements.

In regard to the three referenced State highways, the Recommended Decision, and ordering paragraphs 8, 10, and 12, requires that Reading make various repairs to these crossings and restore the area of the highway disturbed "in compliance with local municipality criteria or the criteria of the Department of Transportation." The Department agrees that the restoration of any highway area disturbed by Reading in the modification and alteration of the crossings should be done pursuant to applicable codes, regulations, and construction criteria. However, as the three referenced crossings in proposed ordering paragraphs 8, 10, and 12 are State highways, it is respectfully submitted that the appropriate criteria to follow would be that of the Department of Transportation.

Therefore, the Department respectfully requests that the reference in proposed ordering in paragraphs 8, 10, and 12, which states, "and restore the area of the highway disturbed by the repairs with bituminous concrete or other suitable material, in the crossing area between the rails and for two feet outside of each rail, in compliance with local municipal criteria or the criteria of the Department of Transportation," be modified to delete "*in compliance with local municipality criteria or.*"

EXCEPTION NO. 4.

The Department excepts to ordering Paragraph 16, which requires, *inter alia*, that the Department of Transportation, at its initial cost and expense, reconstruct the Coxton Road Crossing. While the Department is certainly ready, willing, and able to complete all necessary highway repairs in conjunction with the crossing, it is respectfully submitted that the Department is without the knowledge, experience, or expertise with which to undertake and accomplish a

major crossing reconstruction project. Particularly in this case, it is not just the reconstruction of the crossing, but the complete removal of the crossing and reconstruction down to the subgrade level for the purpose of eliminating water ponding at the subject crossing. (R.D. 33; N.T. 110). The Department employs no crews or maintenance personnel who are skilled or versed in the construction of crossings, nor does any testimony reveal the Department's desire or ability to complete any of the actual crossing reconstruction work as ordered.

In contrast, Reading is clearly in the best position to complete the recommended work. A railroad is required to maintain its facilities, is involved in the railroad industry, and is presumed to have the knowledge and expertise by which to maintain and upgrade crossings. It is presumed that Reading would require inspectors to be on-site to review any Department work being completed at the project. In addition to inspectors, flaggers would also be required by Reading. Having these personnel at the crossing would simply add to the overall project costs. Moreover, the Department wishes to avoid any involvement of third-parties on behalf of the Department, as would be necessary for the Department to complete the work. Because of the Department's lack of skill and knowledge, an outside contractor would be required to complete the work.

Therefore, for all the above-cited reasons, it would be just and reasonable for the Commission to order Reading, Blue Mountain and Northern Railroad Company to complete the repairs at the Coxtan Road Crossing. As the Department is without the knowledge, experience, or expertise with which to complete these repairs, the convenience and safety of the public will be best served by requiring that Reading complete this railroad-oriented work.

EXCEPTION NO. 5

The Department excepts to the cost allocation for the repairs necessary at the Coxtan Road Crossing, as stated in proposed ordering Paragraph 17:

The Commission had previously issued an order regarding this crossing (order of May 4, 1970 at Application Docket No. 95397). In keeping with the prior order which directed that the Pennsylvania Department of Highways and the Erie and Lackawanna Railway Company share maintenance responsibility for the crossing and considering the current status as presented in the testimonies, the Department of Transportation at its sole cost and expense shall bear (65% of the Coxtan Road Crossing project cost it incurred in accordance with this order. Reading, Blue Mountain and Northern Railroad, at its sole cost and expense, shall pay sum or sums of money to the Department of Transportation equal to 30% of the cost the Department of Transportation incurred in accordance with this order. The Borough of Duryea at its sole cost and expense, shall pay sum or sums of money to the Department of Transportation equal to 5% of the cost the Department of Transportation incurred in accordance with this order (i.e., rebuilding the entire Coxtan Road Crossing).

In the Recommended Decision, the ALJ correctly noted that the Coxtan Road Crossing needs to be completely rebuilt (R.D. 32). Particularly important was that Reading had been aware of the problems at the crossing and had simply not chosen to make any repairs, citing financial concerns (R.D. 33). However, there is no reference in the record that the deterioration at the crossing was caused by, or allowed to happen by, the Department. While the Department takes responsibility for the approaches of the crossing, the Department can in no way be held responsible for the problems that have occurred within two feet of either rail at this crossing, the location that the railroad was to maintain.

Moreover, the ALJ consistently cited to the May 4, 1970 Order as an appropriate guideline as to an allocation of duties and apportionment of project costs. However, the ALJ deviates significantly from the previous order by requiring the Department to bear 65% of the costs to replace this crossing.

The May 1970 Order required the railroad to rehabilitate its remaining crossing and bear the future maintenance of these crossings (PUC Staff Exhibit #1, May 1970 Order, ¶¶ 5, 23).

The Department was ordered to maintain the approaches to the involved State routes, including Coxton Road (identified in the order as Everhart's Road) (PUC 1, ¶ 22). In fact, even though the Department was ordered to maintain detours for the crossing work performed on State highways, the Commission required the railroad to reimburse the Department for such work (PUC 1, ¶¶ 8, 14).

Under both the facts of this case, and the prior Commission order, there is no basis to allocate all, or even a majority, of the crossing reconstruction costs to the Department. There is no evidence of fault or responsibility for the crossing deterioration that can be leveled at the Department. In contrast, Reading has clearly understood that there is a problem with the crossing, as evidenced by the fact that they have had a replacement crossing panel sitting nearby, ready for installation (R.D. 33). Indeed, the ALJ stated that: "What is relevant, material, controlling and determinative is that the crossings are in a state of disrepair due to lack of adequate maintenance by the railroad and its predecessors (R.D. 25)."

Reading was hesitant to make the repairs due to a lack of money, and specifically, because Reading did not want to bear the costs of any necessary detours (R.D. 25). However, the ALJ rejected this contention, stating that it would be "unfair and inequitable for the Department to absorb the Railroad's detour costs (R.D. 25)." The ALJ's logic in this regard is perplexing, as he noted that the Department should not pay for a detour, nor is the Department at fault for the crossing problems, but then decides that the Department should bear the majority of the costs to rehabilitate the crossing. In actuality, the ALJ's discussion of the condition of the Coxton Road Crossing, its history and the railroad's lack of maintenance support a finding that

Reading should be responsible for the crossing reconstruction costs. To the extent that the ALJ's discussion and opinion are well founded, proposed ordering Paragraph 17 must be reformed to meet the logic and spirit of the rest of his opinion.

Therefore, proposed ordering Paragraph 17 should be modified to read:

The Commission had previously issued an order regarding this crossing (May 4, 1970 Order at Application Docket No. 95397). In keeping with the prior order which directed that the Pennsylvania Department of Highways and the Erie and Lackawanna Railway Company share maintenance responsibility for the crossing and considering the current status as presented in the testimonies, Reading, Blue Mountain and Northern Railroad, at its sole cost and expense, shall bear 100% of its costs incurred in accordance with rebuilding the entire Coxtan Road Crossing, including the cost of any necessary traffic control or detours.

EXCEPTION NO. 6:

The Department excepts to ordering Paragraphs 16, 17, 18, and 19. Notwithstanding other exceptions to the allocation of reconstruction work and the associated costs posited by the Department herein, the Department respectfully suggests that the Commission clarify the scope of work to be performed during the crossing reconstruction.

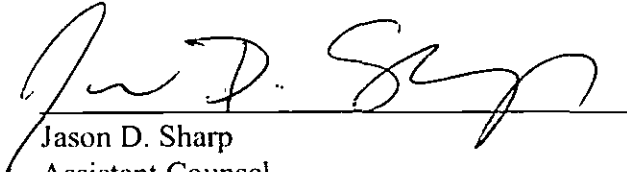
It is presumed from a review of the transcript and the cited ordering paragraphs that the existing railroad warning lights, gates, and bell will be retained as part of the reconstruction project on Coxtan Road (Proposed Ordering ¶ 18). However, proposed ordering Paragraph 16 required the Department to remove all "advance signals." It is respectfully submitted that the reference in ordering Paragraph 16 was not meant to consider the removal of the lights, gates, and bells, but rather warning signs or markings that might need to be removed to facilitate the removal and installation of the crossing components.

Therefore, the reference to "advance signals" in ordering Paragraph 16 should be modified to read "any and all signs or pavement markings."

WHEREFORE, the Commonwealth of Pennsylvania, Department of Transportation, respectfully requests that this Honorable Commission grant the aforesaid Exceptions and issue an order consistent therewith.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



Jason D. Sharp
Assistant Counsel
Office of Chief Counsel
Keystone Building - 9th Floor
P.O. Box 8212
Harrisburg, PA 17105-8212

DATED: November 13, 2001

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

DURYEA BOROUGH

Docket No. C-00992585

v.

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

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CERTIFICATE OF SERVICE

I, Jason D. Sharp, hereby certify that a true and correct copy of the **EXCEPTIONS TO THE RECOMMENDED DECISION**, was served upon the parties listed below by first-class mail, postage-prepaid this 13th day of November, 2001.

GEORGE M. KASHI
Administrative Law Judge
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

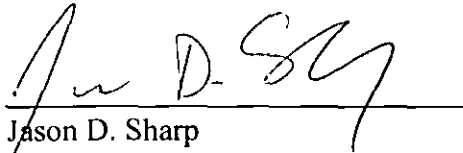
BARRY CHROMEY, Esquire
126 South Main Street – Suite 201
Pittston, PA 18640
Counsel for Duryea Borough

ERIC M. HOCKY, Esquire
GOLLATZ, GRIFFIN, EWING, P.C.
213 West Miner Street
P.O. Box 796
West Chester, PA 19381-0796
Counsel for Reading, Blue Mountain and Northern Railroad Company

DAVID A. SALAPA, Esquire
Pennsylvania Public Utility Commission
Bureau of Transportation & Safety
Keystone Building - 3rd Floor
400 North Street
P.O. Box 3265
Harrisburg, PA 17105-3265
Counsel for Bureau of Transportation and Safety

CHARLES McCORMICK, Esquire
PNC Bank Building
76 Public Square
Wilkes-Barre, PA 18701
Counsel for Luzerne County

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



Jason D. Sharp
Assistant Counsel
Office of Chief Counsel
Keystone Building - 9th Floor
P.O. Box 8212
Harrisburg, PA 17105-8212
Telephone No. (717) 787-3128

DATED: November 13, 2001

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SECRETARY'S BUREAU

DATE: November 29, 2001

SUBJECT: C-00992585

TO: Cheryl W. Davis, Director
Office of Special Assistants

FROM: James J. McNulty
Secretary
nvl

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

Copies of the Initial Decision have been served upon all parties of interest.

Exceptions have been filed by:

TSL
PENNDOT

Reply Exceptions have been received from:

DOCKETED
DEC 04 2001

cc: Susan Hoffner

**DOCUMENT
FOLDER**

Reading, Blue Mountain & Northern Railroad Company

C-00992585

NOTICE OF PETITION by Reading, Blue Mountain & Northern Railroad Company v. Pennsylvania Public Utility Commission. at No. 357 C.D. 2002, in the Commonwealth Court of Pennsylvania from the order of the Commission entered January 11, 2002 in the above-captioned appeal.

B-00023901

Filed: February 5, 2002

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B-023901 DS
C. 02992585

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DOCKETED

Reading Blue Mountain &
Northern Railroad Company,

NOV 14 2002

Petitioner

v.

No. 357 C.D. 2002

Pennsylvania Public
Utility Commission,

Argued: September 11, 2002

Respondent

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PA. JUD. C.
LAW BUREAU

DOCUMENT FOLDER

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE RENÉE L. COHN, Judge
HONORABLE CHARLES P. MIRARCHI, JR., Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN

FILED: November 4, 2002

This is an appeal by Reading Blue Mountain and Northern Railroad Company (Blue Mountain) from an order of the Public Utility Commission (Commission) modifying the recommended decision of an Administrative Law Judge (ALJ) and assessing 100 percent of the cost to rebuild the Coxtan Road railroad crossing to Blue Mountain.

On June 28, 1999 the Borough of Duryea filed a complaint against Blue Mountain with the Commission alleging that unsafe or deteriorating conditions

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existed at numerous crossings that intersected the tracks of Blue Mountain. The Coxton Road site was one of the subjects of the complaint. A traffic and safety engineer conducted a field meeting at the site. The parties, however, could not reach an agreement. Thereafter, the ALJ conducted a hearing. On October 4, 2000 he issued a recommended decision and order indicating that, given the condition of the grade for the Coxton Road crossing, the entire crossing should be completely rebuilt. Based upon his reading of a prior Commission order of May 4, 1970, as modified on September 14, 1970, he concluded that the Department of Transportation (DOT) should bear 65 percent of the cost of replacement, Blue Mountain 30 percent and the Borough 5 percent. Exceptions were filed. The Commission then reviewed the matter and determined that Blue Mountain should be assessed 100 percent of the cost to repair the Coxton Road crossing. Its basis for doing so was the determination made by the ALJ that the crossing was in a state of disrepair due to a lack of adequate maintenance by Blue Mountain and its predecessor, Erie and Lackawanna Railway Company (Erie). Blue Mountain filed a petition for review with this Court.

Preliminarily, it should be noted that it is not the actual cost of replacing the crossing that concerns the parties, but rather the fact that, due to the nature of an existing bridge abutment, a detour will need to be constructed because a flagman cannot safely perform a traffic re-routing function. It is the cost of this detour that will be expensive.¹

¹ We note that "the financial ability to pay is not controlling or determinative of the issue of allocation of costs by the Commission." East Rockhill Township v. Pennsylvania Public Utility Commission, 540 A.2d 600, 603 (Pa. Cmwlth. 1988).

In rail highway proceedings, the Commission is not confined to any one formula. It must consider all relevant factors when allocating costs of constructing, removing, or altering rail highway crossings. AT&T v. Pennsylvania Public Utility Commission, 558 Pa. 290, 737 A.2d 201 (1999); accord Department of Transportation v. Pennsylvania Public Utility Commission, 469 A.2d 1149 (Pa. Cmwlth. 1983) (Commission is not limited to any fixed rule, but must only consider relevant factors). Among those factors deemed relevant are the identity of the party that owned and maintained the crossing, the relative benefit initially conferred on each party, who is responsible for the deterioration, and the relative benefit each party will receive from repair or replacement. Greene Township Board of Supervisors v. Pennsylvania Public Utility Commission, 668 A.2d 615 (Pa. Cmwlth. 1995).²

Blue Mountain argues, on appeal here, that the Commission's modification of the recommended decision is unfair, unjust and unreasonable because the undisputed evidence at the hearing demonstrated that the May and September 1970 orders of the Commission required DOT and the railroad to share the cost of maintenance and because the testimony of DOT's and the Borough's own witnesses established that a primary reason for the deterioration of the crossing was the natural geography of the area, coupled with heavy truck traffic utilizing the crossing. While the Commission concedes that utilization of the crossing is a

² On appeal, our scope of review of the Commission order is limited to determining whether constitutional rights have been violated, an error of law has been committed or the Commission's findings are not supported by substantial evidence. Department of Transportation.

relevant factor, it asserts in response that another relevant factor is that, in the past, Blue Mountain's predecessor in interest, Erie, had been responsible for the maintenance of the site in question and, therefore, it is appropriate to assess the replacement cost entirely against Blue Mountain.

We begin by examining the May 4, 1970 order. The basis for that order was a request by Erie to remove one of two sets of tracks. In its order, the Commission directed Erie, at its sole cost and expense, to furnish all material and do all work necessary to remove the rails, ties and other railroad facilities of one main track within the limits of the crossings and to restore the areas disturbed with concrete or other suitable material in conformance with the abutting highway paving. Erie was also directed, at its sole cost, to relocate flashing lights, replace the crossbuck railroad crossing warning signs, and do all work necessary to complete the alteration of the crossings in accordance with approved plans. Its responsibilities **included the alteration or installation of drainage facilities.** The Department of Highways, DOT's predecessor, was directed to furnish and maintain necessary construction inspectors, **establish and maintain any necessary detour for highway traffic, and furnish all materials and do all work necessary to maintain the approaches to the altered crossings to points two feet beyond each outside remaining rail, including any highway drainage facilities installed or altered in accordance with the order.**³

³ As noted earlier, on September 14, 1970, the Commission modified its order in part. For our purposes, the modification stated that Erie was directed, at its sole cost and expense, to furnish all materials and do all work necessary to rehabilitate the remaining track or tracks within the limits of "Everhart's (State Highway Route 35033 Spur)" (now Coxtan Road) and repave the total crossing areas remaining with suitable material. It was these provisions that the ALJ relied

As we previously noted, the Commission, in assessing costs, is not confined to any fixed formula, but it must *consider* all relevant factors. AT&T. In our view, it has failed to do so. It is clear from the 1970 orders that DOT was responsible for the entrance ramps, the area of approach roads two feet from the crossings and beyond, and for providing detours. While the Commission can now act to re-allocate costs for those responsibilities, as we will explain in detail, there is no indication in its adjudication that it considered the relevant factors in doing so.

At the hearing, Andrew Muller, President of Blue Mountain, testified that Blue Mountain would be willing to accept responsibility for routine maintenance at the railroad crossing areas within the "traditional area" of two feet from the rail head out (N.T. 99) but did not believe it was responsible for the approach roads and for detours. (N.T. 106). Additionally, Ronald J. Hull, a civil engineer employed by the Commission in its Bureau of Transportation and Safety, stated that in the 1970 proceedings Erie had been assigned maintenance responsibility for the area inclusive of the tracks, "in between the tracks and two foot [sic] outside of [sic] rail." (N.T. 112). It was also responsible for the areas between the rails. (N.T. 113). This witness further stated, that [t]he approach roadways then would have been assigned to the highway entity," *i.e.*, DOT. (N.T. 112). We note that these statements are consistent with the May 1970 order, as modified.

upon in the case *sub judice* in assessing the cost of repair and replacement partially to DOT, partially to the Borough and partially to Blue Mountain.

Blue Mountain asserts that it should not be solely responsible for the replacement of the crossing and attendant detour if the deterioration was not solely caused by its admitted failure to maintain the crossing area. There is evidence that poor drainage due to a subgrade problem caused deterioration.⁴ The ALJ found that the subgrade caused the deterioration at the Coxton Road site and concluded that the entire crossing would need to be rebuilt. (Findings of Fact 9 and 13). He also stated, however, without further explanation, that the state of disrepair was due to the lack of adequate maintenance by the railroad. In allocating costs between DOT and Erie, he relied on the 1970 orders and “the current status as presented in the testimonies.” However, there is no indication in the Commission’s order that *it* took into account the cause of the deterioration when it modified the ALJ’s recommended decision by allocating 100 percent of the costs at issue here to Blue Mountain. The Commission made no relevant findings on this point, but instead merely parroted the ALJ’s statement of “the current status as presented in the testimonies.” (Commission Adjudication at 16). There is no further explanation for varying the cost allocation.

⁴ Mr. Hull stated that the roadway and track are in a low area and there is a lot of water that ponds at the crossing and surrounding area. (N.T. 110). He further opined that the subgrade has failed, the whole crossing needs to be rebuilt, and the approaches are poor due to the subgrade problem and need to be rebuilt. He also stated that if that problem is not corrected, whatever is built on top of it will suffer problems in the future. (N.T. 114).

While we are well aware of the Commission's fact finding power,⁵ its adjudication does not indicate that it exercised that discretion properly. First, the prior history of this crossing did indicate that costs for repairs had been allocated between DOT and Blue Mountain's predecessor and that detour costs were assigned to DOT.⁶ Second, it is clear here that since the railroad bed and the area two feet beyond, as well as the approach roads require rebuilding, *both* DOT's and Blue Mountain's repair/rebuilding activities require the use of a detour. Additionally, as previously noted, it is not clear that the Commission considered whether the deterioration was due to the admitted lack of maintenance or to the subgrade problem, which may well have extended beyond Blue Mountain's area of maintenance responsibility.

Finally, there is evidence in the record that large trucks driving over the Coxton Road rail crossing contributed to the deterioration of the rails, roadbed and approach roads.⁷ The Commission's adjudication is devoid of any reference

⁵ The Commission is the ultimate fact finder and is responsible for weighing evidence and resolving conflicts in the testimony. Department of Transportation.

⁶ DOT's assertions to the contrary in its brief are not borne out by its cited references to the record.

⁷ Keith Moss, a Borough Councilman, stated that heavy tractor trailer traffic is going over the crossing and it is deteriorating. (N.T. 23). Joseph Strok, a district grade crossing engineer with DOT, stated in Department Statement #1 that the average daily traffic volume at Coxton Road is 1,399 with 39 total trucks. (Department Statement #1 at 6). Mr. Muller stated that extra long trucks that sit low and have a lot of extra weight go across the crossing, get hung up and break the rails. (N.T. 93). This witness also stated, "they [the large trucks] are our direct competition. And I have a real problem philosophically subsidizing the trucks...." (N.T. 103).

whatsoever to this evidence and whether it played any part in the deterioration of the crossing area.

For these reasons, we must vacate the order and remand for a new adjudication by the Commission that addresses these points. See Greene Township Board of Supervisors v. Pennsylvania Public Utility Commission, 642 A.2d 541 (Pa. Cmwlth. 1994) (where Commission modified ALJ recommended decision without indicating relevant factors for doing so, Court vacated and remanded for additional findings and discussion).


RENEE L. COHN, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Reading Blue Mountain &
Northern Railroad Company,

Petitioner

v.

Pennsylvania Public
Utility Commission,

Respondent

No. 357 C.D. 2002

PA P.U.C.
LAW BUREAU

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ORDER

NOW, November 4, 2002, the order of the Public Utility Commission in the above-captioned matter is hereby vacated and this case is remanded for a new adjudication consistent with this opinion and based on the presently existing record.

Jurisdiction relinquished.


RENE L. COHN, Judge

Certified from the Record

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and Order Exit