

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

A. Edward Schwartz	:	
	:	
v.	:	C-2016-2570929
	:	
Norfolk Southern Railway Company,	:	
Pennsylvania Department of Transportation,	:	
Lackawanna County and LaPlume	:	
Township	:	

**ORDER DIRECTING FILING OF MOTIONS
FOR SUMMARY JUDGMENT**

On September 21, 2016, A. Edward Schwartz (Schwartz) filed a pleading titled “application for determination as to compensation for damages sustained due to abolition of railroad crossing”, pursuant to 66 Pa.C.S. § 2704(a), with the Pennsylvania Public Utility Commission (Commission). The application states that the Commission issued an order on December 5, 2013 at C-2011-2237486 directing that the Delaware and Hudson Railway Company d/b/a/ Canadian Pacific Railroad (D&H) remove a highway bridge carrying S.R. 4009 over its facilities located in LaPlume Township, Lackawanna County. According to the application, the Commission’s March 17, 2016 order at C-2011-2237486 indicated that Norfolk Southern Railway Company (NS) had acquired the D&H rail line and assumed D&H’s responsibility for removing the S.R. 4009 bridge.

The application asserts that the S.R. 4009 bridge was demolished on or about May 9, 2016. The application references a Commission Secretarial Letter dated July 20, 2016 indicating that a Commission engineer conducted a final inspection on July 14, 2016 and that the removal work had been satisfactorily completed.

The application alleges that prior to the removal of the S.R. 4009 bridge, Schwartz used the S.R. 4009 bridge to travel between the two portions of his property which were bisected by the rail line. The application alleges that the Schwartz has been injured and sustained damages by the removal of the S.R. 4009 bridge. The application alleges that Schwartz is entitled to

compensation for the damages he has suffered due to the de facto taking of his property. The application requests that the Commission determine compensation for his damages, pursuant to 66 Pa.C.S. § 2704(a).

The Commission treated Schwartz's pleading as a complaint and docketed it at C-2016-2570929. Pursuant to 52 Pa.Code § 3.361(a) the Commission made the Pennsylvania Department of Transportation (DOT), LaPlume Township (Township), Lackawanna County (County) and D&H parties respondent and served copies of the complaint on those entities on October 12, 2016.

By Secretarial Letter dated October 31, 2016, the Commission informed the parties that it had mistakenly failed to serve Schwartz's complaint on NS. The Secretarial Letter indicated that the Commission would re-serve the complaint on the parties, including NS. The Secretarial Letter also stated that the Commission was removing D&H as a party respondent.

On November 15, 2016, DOT filed an answer with new matter. The answer admitted that Schwartz had filed the complaint docketed at C-2011-2237486. The answer admits that the Commission directed that the S.R. 4009 bridge be removed and that the bridge had been removed.

The new matter asserts that Schwartz's complaint is seeking damages from the Commission. The new matter argues that DOT has been improperly joined as a party since the complaint is actually an application for damages.

The new matter points out that the Commission did not appropriate any property in the proceeding docketed at C-2011-2237486. In addition, no court of competent jurisdiction has determined that there has been a taking of Schwartz's property. The new matter contends that neither the Commission's order directing removal of the S.R. 4009 bridge nor its actual removal constitute a de facto appropriation of Schwartz's property. DOT asserts that if a court of competent jurisdiction determines that there has been a de facto taking of Schwartz's property, the Court of Common Pleas determines damages. DOT's answer with new matter requests that the Commission dismiss Schwartz's complaint.

On November 21, 2016, NS filed an answer with new matter. The answer admits that Schwartz had filed the complaint docketed at C-2011-2237486. The answer admits that the Commission directed that the S.R. 4009 bridge be removed and that the bridge had been removed.

The answer asserts that, by order dated December 17, 2015, the Court of Common Pleas of Lackawanna County determined that Schwartz had no legal right to a private crossing. A copy of the December 17, 2015 order is attached to the answer with new matter and marked as Exhibit A.

The new matter contends that Schwartz's current complaint alleges a de facto condemnation. The new matter argues that actions to protect the public safety do not constitute a de facto condemnation. The new matter states that the Commission did not appropriate any of Schwartz's property. The answer with new matter requests that the Commission deny Schwartz's complaint.

On November 30, 2016, the County filed an answer with new matter. The answer admits that Schwartz had filed the complaint docketed at C-2011-2237486. The answer admits that the Commission directed that the S.R. 4009 bridge be removed and that the bridge had been removed. The answer asserts that the County did not own or maintain the S.R. 4009 bridge.

The new matter contends that the County has been improperly joined as a party to this proceeding. The new matter further states that the Commission did not appropriate any of Schwartz's property. In addition, the County has never owned or maintained the crossing abolished by the Commission, was not responsible for its deterioration and did not receive any benefit from its removal. The answer with new matter requests that the Commission dismiss Schwartz's complaint or dismiss the County as a party.

On December 5, 2016, Schwartz filed a reply to DOT's new matter. The reply admits that that Schwartz's complaint is seeking damages from the Commission. The reply denies that DOT has been improperly joined as a party.

The reply admits that the Commission did not appropriate any property in the proceeding docketed at C-2011-2237486. The reply acknowledges that no court of competent jurisdiction has determined that there has been a taking of Schwartz's property. The reply requests that the Commission determine compensation for damages to Schwartz's property.

On December 9, 2016, Schwartz filed a reply to NS' new matter. The reply admits that Schwartz's complaint is seeking damages from the Commission. The reply denies that Schwartz's complaint only alleges a de facto condemnation. The reply admits that the Commission did not appropriate any of Schwartz's property. The reply requests that the Commission determine compensation for damages to Schwartz's property.

On December 16, 2016, Schwartz filed a reply to the County's new matter. The reply admits that the Commission did not appropriate any of Schwartz's property. The reply admits that the County has never owned or maintained the crossing abolished by the Commission. The reply requests that the Commission determine compensation for damages to Schwartz's property.

On December 29, 2016, the Township filed an answer with new matter. The answer admits that Schwartz had filed the complaint docketed at C-2011-2237486. The answer admits that the Commission directed that the S.R. 4009 bridge be removed and that the bridge had been removed. The answer asserts that the Township did not own or ever maintain the S.R. 4009 bridge.

The new matter contends that the Township has been improperly joined as a party to this proceeding. The new matter further states that the Commission did not appropriate any of Schwartz's property. In addition, the Township has never owned or maintained the crossing abolished by the Commission, was not responsible for its deterioration and did not receive any benefit from its removal. The answer with new matter requests that the Commission dismiss Schwartz's complaint or dismiss the Township as a party.

On January 13, 2017, Schwartz filed a reply to the Township's new matter. The reply admits that the Commission did not appropriate any of Schwartz's property. The reply admits that the Township has never owned or maintained the crossing abolished by the Commission. The reply requests that the Commission determine compensation for damages to Schwartz's property.

By notice dated January 4, 2017, the Commission scheduled a telephonic prehearing conference for this matter on February 8, 2017 at 10:00 a.m. I issued a prehearing conference order dated January 18, 2017, setting forth the procedural matters to be addressed at the prehearing conference.

I conducted a telephonic prehearing conference in this case as scheduled on February 8, 2017 at 10:00 a.m. Participating were counsel for Schwartz, NS, the Township and DOT.

At the prehearing conference, several of the parties questioned whether the issues raised in Schwartz's complaint could be adjudicated by the Commission. I concurred with these parties that the Commission should address whether it had jurisdiction over the issues raised in Schwartz's complaint before establishing a litigation schedule and conducting hearings.

I will therefore direct the parties to file motions for summary judgment and answers to those motions pursuant to 52 Pa. Code 5.102, addressing whether the Commission has jurisdiction over the issues raised in Schwartz's complaint. The motions and answers should incorporate legal arguments and references to any documents already filed with the Commission or if not already filed with the Commission, attached to the motion or answer.

ORDER

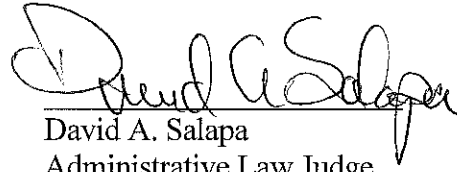
THEREFORE,

IT IS ORDERED:

1. That the parties shall file and serve motions for summary judgment, pursuant to 52 Pa. Code §5.102, addressing whether the Pennsylvania Public Utility Commission has jurisdiction over the issues raised in the complaint of A. Edward Schwartz at C-2016-2570929, on or before March 13, 2017.

2. That the parties shall file and serve answers to the motions for summary judgment, pursuant to 52 Pa. Code §5.102, on or before April 7, 2017.

Date: February 9, 2017


David A. Salapa
Administrative Law Judge

C-2016-2570929 - A EDWARD SCHWARTZ v DELAWARE AND HUDSON RAILWAY
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