

Nauman Smith

Attorneys At Law

Please Reply to:
P. O. Box 840
Harrisburg, PA 17108-0840

Benjamin C. Dunlap, Jr.
E-mail: bdunlapjr@nssh.com
Telephone Extension: 21

April 7, 2017

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17105-3265

RE: A. Edward Schwartz v. Norfolk Southern Railway Company, Lackawanna County, LaPlume Township, and Commonwealth of Pennsylvania, Department of Transportation. Docket No. C-2016-2570929

Dear Secretary Chiavetta:

I am enclosing Norfolk Southern Railway Company's Answer to Edward Schwartz's Motion for Summary Judgment. In accordance with the accompanying Certificate of Service, we are providing a copy of this document to all interested parties. If you have any questions, please advise.

Sincerely yours,



Benjamin C. Dunlap, Jr., Esquire

Enclosure

cc: All Interested Parties (via email w/enc.)
The Honorable David A. Salapa (via email w/enc.)

Superior analysis. Effective solutions. Since 1871.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

A. EDWARD SCHWARTZ	:	
Complainant	:	
	:	Docket No. C-2016-2570929
v.	:	
	:	
NORFOLK SOUTHERN RAILWAY COMPANY,	:	Filed Electronically
LACKAWANNA COUNTY, LAPLUME	:	
TOWNSHIP, AND COMMONWEALTH OF	:	
PENNSYLVANIA, DEPARTMENT OF	:	
TRANSPORTATION,	:	
Respondents	:	

**NORFOLK SOUTHERN RAILWAY COMPANY’S ANSWER TO
A. EDWARD SCHWARTZ’S MOTION FOR SUMMARY JUDGMENT**

Norfolk Southern Railway Company (“Norfolk Southern”), by and through its counsel Nauman, Smith, Shissler & Hall, LLP, hereby files this Answer to A. Edward Schwartz (“Applicant”)’s Motion for Summary Judgment pursuant to 52 Pa. Code. §5.102(b) as follows:

I. INTRODUCTION

1. Petitioner, Norfolk Southern, files this Answer to Applicant’s Motion for Summary Judgment As To PUC Jurisdiction Over Application For Determinations As to Compensation For Damages Sustained Due to Abolition of Railroad Crossing (“Motion”). As demonstrated below, Applicant’s Motion is without merit and should be denied.

2. The Motion fails to identify any statute, regulation, or court decision conferring jurisdiction upon the Commission to determine whether a de facto taking has occurred in the course of a rail crossing project, and, if so, the appropriate measure of damages that must be awarded to the property owner subject to the taking. Contrary to Applicant’s assertions, the sections of the Public Utility Code, Eminent Domain Code, and Pennsylvania appellate court

decisions cited in the Motion affirm that the Commission does **not** have jurisdiction over de facto taking matters; instead, the Commission's jurisdiction is limited to matters where property is expressly condemned pursuant to the Public Utility Code. Here, no party has asserted that any portion of Applicant's property on either side of the rail line was expressly condemned by the Commission.

3. While Norfolk Southern disputes several material facts related to the extent to which Applicant has been impacted by the demolition of the rail crossing, these facts have no bearing on the issue before the Commission on this Motion because Applicant has not asserted that the Commission expressly condemned Applicant's property pursuant to the Code. The Motion fails to identify any basis for a finding that Applicant is entitled to summary judgment as a matter of law or to refute Norfolk Southern's position that the Commission lacks jurisdiction; therefore, Norfolk Southern's Motion for Summary Judgment must be granted.

II. RESPONSES TO FACTUAL ASSERTIONS & PROCEDURAL HISTORY

A. Initial Factual Assertions

4. In paragraphs 1-3 of the Motion, Applicant restates several facts regarding the former rail crossing, the Property and the improvements located upon it, and the basis for the initial Application. Norfolk Southern addressed these facts in both its Answer to the Application as well as its Motion for Summary Judgment and no further response is necessary.

B. The Schwartz Affidavit

5. Paragraph 2 of the Motion references a document attached to the Motion termed the Schwartz Affidavit. Paragraphs 1-6 of this Affidavit largely repeat the assertions in the Motion and in the initial Application; however, several portions of these paragraphs feature new

or expanded allegations to which further response is necessary. Paragraph 3 of the Schwartz Affidavit repeats that the former crossing was the “only direct means of ingress and egress” between the Property and the town of LaPlume, and the only “fit means of access” to the Property. Norfolk Southern denies both assertions. Additionally, neither of these asserted facts, which may be more accurately characterized as opinions, have any bearing on the issue of whether the Commission has jurisdiction over this matter.

6. Paragraph 4 of the Schwartz Affidavit references the 1917 Deed which Norfolk Southern has addressed in prior filings with the Commission, but to the extent that Applicant is citing the Deed in this paragraph for the notion that the Deed entitles Applicant to a private crossing over the rail line, paragraph 4 is denied. See Exhibit “A” to Norfolk Southern’s Answer to Complaint with New Matter for Memorandum and Order of Judge Robert A. Mazzoni of the Lackawanna County Court of Common Pleas granting summary judgment to Norfolk Southern on Applicant’s Complaint alleging the right to a private crossing under the 1917 Deed.

7. Paragraphs 7-15 of the Schwartz Affidavit discuss the procedural history for the earlier proceedings before the Commission following Applicant’s filing of a Complaint with the Commission on April 15, 2011. No further response by Norfolk Southern to the procedural history of the prior proceedings before the Commission is necessary as the procedural history was addressed in Norfolk Southern’s Motion for Summary Judgment and the dates and contents of the filings referenced in these paragraphs, as well as the Commission’s rulings, are already a matter of public record.

8. In its Answer, Norfolk Southern has already addressed the assertions in paragraph 16 of the Schwartz Affidavit regarding the current existence of a crossing within Applicant’s property and no further response to that issue is necessary. Norfolk Southern denies

that the only means of access to the Property requires an eight-mile detour; further, a review of the record from the earlier proceedings before the Commission failed to identify any document confirming that a detour of eight miles specifically was established by PennDOT during the period that the crossing was closed prior to its demolition.

9. Paragraphs 17-20 of the Schwartz Affidavit restate the alleged harms suffered by Applicant that Norfolk Southern denied in its Answer and no further response is necessary; additionally, these assertions have no bearing on the issue before the Commission on whether it has jurisdiction to determine if a de facto taking occurred.

10. Norfolk Southern agrees with paragraph 21 of the Schwartz Affidavit to the extent that it states that Section 2704(a) of the Public Utility Code provides a mechanism to address damages of property taken in the abolition of a railroad crossing. Contrary to paragraph 21, Norfolk Southern denies that this Section applies to Applicant because Applicant's property was not taken by the Commission pursuant to Section 2702(b) of the Public Utility Code in its abolition of the crossing or by Norfolk Southern when it carried out the demolition of the bridge structure.

C. Procedural History

11. Paragraphs 6-9 of the Motion repeat the procedural history for the earlier proceedings before the Commission related to the crossing that are discussed in paragraphs 7-15 of the Schwartz Affidavit. Norfolk Southern previously addressed this procedural history in its Motion for Summary Judgment and no further response is required. As stated in paragraph 7 of this Answer, the dates and contents of the filings referenced by Applicant, as well as the Commission's rulings, are already a matter of public record.

D. Asserted Harms

12. While the Commission directed the parties to this matter to file motions for summary judgment on the issue of whether the Commission has jurisdiction to determine if a de facto taking occurred, paragraphs 4, 10, and 11 of the Motion restate allegations from the initial Application and the Schwartz Affidavit regarding the alleged harm suffered by Applicant. Norfolk Southern admits that the demolition of the bridge structure eliminated the crossing between both portions of Applicant's property, but Norfolk Southern denies the alleged harms stated in these paragraphs.

13. Further, even if Applicant could demonstrate that he sustained each of the harms and injuries alleged in paragraphs 4, 10, and 11 of the Motion, this fact would not aid in resolving the legal question before the Commission – whether the Commission has jurisdiction to hear matters relating to de facto takings and determine if a de facto taking occurred.

III. RESPONSE TO LEGAL ARGUMENT

A. Applicant has no vested right to a private crossing.

14. Preliminarily, Applicant cites Green v. Baltimore & Ohio R. Co., 91 A. 248 (Pa. 1914) in Paragraph 5 of the Motion for the concept that the former bridge crossing over the rail line was a “vested right.” In Green, the removal of the private crossing was not lawful; the railroad demolished the crossing “without a semblance of right, but in open disregard of the statutory duty imposed on it to provide and maintain the means of its enjoyment.” Green, 91 A. at 249. This fact distinguishes Green from cases where a crossing is condemned pursuant to a law authorizing a railroad to demolish a crossing. See Williams v. Delaware, L. & W. R. Co., 99 A. 477 (Pa. 1916). See also Exhibit “A” to Norfolk Southern's Answer to Complaint with New

Matter for Memorandum and Order of Judge Robert A. Mazzone of the Lackawanna County Court of Common Pleas granting summary judgment to Norfolk Southern on Applicant's Complaint alleging the right to a private crossing.

15. Unlike in Green, the crossing at issue in this matter was a public crossing carrying a state route over Norfolk Southern's rail lines. This matter is also distinguishable from Green in that the demolition of the crossing was not the result of unilateral action by Norfolk Southern but instead was the accomplished pursuant to Commission's Order requiring demolition of the bridge structure. Therefore, given the significant factual differences between this matter and Green, the Green opinion is not controlling or even instructive in the instant matter.

B. The Commission lacks jurisdiction under the Public Utility Code.

16. In paragraphs 13-14 of the Motion, Applicant argues that he is entitled to compensation "as determined pursuant to 66 Pa. C.S. Section 2704(a)," and that Section 2704(a) provides jurisdiction "for the pertinent peculiar occurrence, i.e., the abolition of the railroad crossing."

17. Applicant correctly cites Section 2704(a) as providing jurisdiction for the Commission to ascertain and determine damages for property taken, injured, or destroyed in the abolition of a crossing. However, Applicant ignores a key provision of Section 2704(a): that the Commission has such jurisdiction when the damages arise from property taken due to the "construction, relocation, alteration, protection, or abolition of any crossing *under the provisions of this part.*" 66 Pa. C.S. §2704(a) (emphasis added).

18. Section 2702(d) provides the exclusive procedure for the Commission to appropriate property for the construction, alteration, or demolition of railroad crossings; namely, the Commission must issue an order of appropriation and file a copy of the order with the

recorder of deeds for the county where the property is located. This procedure was never followed by the Commission in this case, and no portion of Applicant's property was condemned by the Commission pursuant to this Section.

19. Where property is appropriated by the Commission pursuant to Section 2702(d), the Commission has original jurisdiction to determine the measure of damages to be awarded to the aggrieved party. See CSX Transp. Inc. v. Dept. of Transp. of Com. of Pa., 641 A.2d 705, 707-708 (Pa. Cmwlth. 1994). Nowhere in the Motion is Section 2702(d) mentioned, nor is the Section cited as a basis for any de facto condemnation of Applicant's property that allegedly occurred.

20. Huss v. Dept. of Transp., 512 A.2d 1356 (Pa. Cmwlth. 1986), cited in paragraph 16 of the Motion, confirms that Section 2702 of the Public Utility Code vests the Commission with the "exclusive power to appropriate property" for rail crossing projects. Huss, 512 A.2d at 1358 (emphasis in original). When property is condemned pursuant to Section 2702, Section 2704 provides for the determination of the amount of compensation to be paid. Id. The Common Pleas Court's jurisdiction to determine damages only arises when a party seeks review of the Commission's determination of damages or where the Commission, on its own motion, submits the matter to the court of common pleas. However, given that no portion of the Property was condemned pursuant to Section 2702, Section 2704 and the cited language from Huss do not apply to this matter.¹

21. Commonwealth Court opinions following Huss specifically distinguish the procedure identified in Huss from the procedure that must be followed in cases involving de

¹ Relatedly, the two-sentence per curiam order in Barron v. Dept. of Transp., 587 A.2d 727 (1991), citing Huss, referenced in paragraph 16 of the Motion is of no relevance to the instant matter as it does not discuss the Commission's jurisdiction over de facto taking matters.

facto takings. See Norfolk Southern's Motion for Summary Judgment, ¶34 (citing Com., Dept. of Transp. v. Smoluk, 514 A.2d 1000, 1001, n.2 (Pa. Cmwlth. 1986) and Com., Dept. of Transp. v. Kemp, 515 A.2d 68, 70, n. 2 (Pa. Cmwlth. 1986)). In de facto taking cases, where the Commission does not appropriate property under Section 2702(b) of the Public Utility code, the provisions of Section 2704(a) do not apply to confer jurisdiction upon the Commission to award damages. See id.

22. While Cramer v. Pa. Dept. of Transp., 1232 CD 2005 (Opinion and Order filed Feb 28, 2006), is indeed an unreported Commonwealth Court decision, the similarity of the facts and issues in that case to the instant matter, as well as the dearth of available authority discussing the Commission's jurisdiction in de facto taking cases, make this decision highly persuasive.

C. The Eminent Domain Code describes the appropriate procedure for De Facto Takings

23. Applicant, citing CSX Transp. and the Eminent Domain Code itself, notes in paragraphs 15 and 20 of the Motion that the provisions of the Eminent Domain Code do not affect the "jurisdiction or power of the Pennsylvania Public Utility Commission." The Public Utility Code permits the Commission to condemn property for rail crossing projects pursuant to Section 2702(b) and outlines the procedure for such condemnations in Section 2702(d). The Public Utility code does not provide any procedure for assessing whether a de facto taking has occurred, and, if a taking has occurred, what the measure of damages would be. The Commonwealth Court's decision in Huss, as applied in Smoluk and Kemp, demonstrates that de facto takings are treated differently for jurisdictional purposes than express condemnations under Section 2702(b). The same court's decision in Cramer confirms that the Commission does not have jurisdiction over de facto takings.

24. Contrary to the assertions in paragraph 20 of the Motion that, when the Legislature codified Section 203(b) of the Eminent Domain Code, 26 Pa.C.S. § 203(b), the Legislature “re-established” the Commission’s jurisdiction over de facto taking matters, the actual effect of Section 203(b) is to preserve the Commission’s existing jurisdiction and powers. Section 203(b), which became effective on September 1, 2006, followed the Commonwealth Court decisions outlined in the above paragraph distinguishing express condemnations from de facto takings. Rather than expanding the Commission’s jurisdiction to include de facto taking matters, Section 203(b) merely provides that the Eminent Domain Code is not to affect the existing jurisdiction and power of the Commission as it currently existed when the Section was codified. In 2006, like today, the Commission did not have jurisdiction over de facto takings; therefore, the Eminent Domain Code, rather than the Public Utility Code, provides the exclusive remedy for persons claiming that a de facto taking of their property has occurred. See 26 Pa.C.S. §102(a): “This title provides a complete and exclusive procedure and law to govern all condemnations of property for public purposes and the assessment of damages.”

25. Applicant’s reference to Section 714 of the Eminent Domain Code, 26 Pa.C.S. § 714, has no relevance to the matter currently before the Commission; as he notes in paragraph 17, a claim under this Section is distinct from a claim for a de facto taking. See Capece v. City of Philadelphia, 552 A.2d 1147 (Pa. Cmwlth. 1989). At no point in the current proceedings before the Commission has Applicant alleged that he is entitled to damages under Section 714 of the Eminent Domain Code. Therefore, it is unclear why a reference to this Section is included in the Motion.

26. Although the Pennsylvania Supreme Court’s opinion in Sienkiewicz v. Com., Dept. of Transp., 883 A.2d 494 (Pa. 2005), cited in paragraph 18 of the Motion, does not involve

an application for damages before the Commission, that fact supports, rather than detracts, from the opinion's persuasive nature. There, a property owner filed a claim for a de facto taking following the reconfiguration of roadways to the detriment of his business. Sienkiewicz, 883 A.2d at 494. Unlike in this case, the property owner in Sienkiewicz properly brought his claim pursuant to the Eminent Domain Code. Id. at 497. While Sienkiewicz did not involve a rail crossing, the analysis and holding from that case are still relevant given that they discuss a claim for a de facto taking based primarily on the effect of an entity clothed with the power of eminent domain's actions allegedly restricting traffic and access to a business. Because Applicant's claim should have been brought pursuant to the Eminent Domain Code, rather than an application under Section 2704 of the Public Utility Code, the Court's reasoning in Sienkiewicz is applicable to the specific facts at the root of the de facto taking claim in this matter.

27. Under the Eminent Domain Code, and as demonstrated in Sienkiewicz, the Court of Common Pleas has original jurisdiction over matters involving alleged de facto takings. Section 2702 and Section 2704 of the Public Utility Code do not provide for the Commission's jurisdiction over matters involving de facto takings, including de facto takings related to rail crossing projects. Therefore, the Eminent Domain Code provides the exclusive remedy and procedure for Applicant's de facto taking claim. The Lackawanna County Court of Common Pleas, rather than the Commission, has jurisdiction over this claim, contrary to the assertion in paragraph 21 of the Motion. Whether or not Applicant withdraws the de facto taking claim as described in paragraph 22 of the Motion, the Commission is without jurisdiction to determine the alleged damages under this or any other legal basis that Applicant may choose to claim. See Elkin v. Bell Telephone Co. of Pa., 420 A.2d 371, 375-376 (Pa. 1980) (Citing Feingold v. Bell of Pa., 383 A.2d 791 (Pa. 1977)) (Explaining that the courts, rather than the Commission, have

jurisdiction over all actions for damages against public utilities). Indeed, Norfolk Southern asserts that there could be no basis other than a de facto taking for the type of damages that Applicant alleges where no property was condemned by the Commission.


IV. CONCLUSION

28. The Motion fails to identify a basis for the Commission's jurisdiction over matters involving de facto takings and the award of damages for such takings. The Eminent Domain Code, rather than Sections 2702 or 2704 of the Public Utility Code, provides the exclusive remedy and procedure for Applicant for any alleged taking that occurred.

WHEREFORE, Norfolk Southern respectfully requests that Applicant's Motion for Summary Judgment be denied and that Summary Judgment be entered in Norfolk Southern's favor on the basis that the Commission does not have jurisdiction over the alleged de facto taking.

Respectfully submitted,

NAUMAN, SMITH, SHISSLER & HALL, LLP

By: 

Benjamin C. Dunlap, Jr., Esquire
Supreme Court I.D. #66283
200 North Third Street, 18th Floor
P.O. Box 840
Harrisburg, PA 17108-0840
Telephone: (717) 236-3010
Facsimile: (717) 234-1925
Counsel for Norfolk Southern Railway Company

Date: April 7, 2017

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

A. EDWARD SCHWARTZ :
Complainant :
 : Docket No. C-2016-2570929
v. :
 :
NORFOLK SOUTHERN RAILWAY COMPANY, : **Filed Electronically**
LACKAWANNA COUNTY, LAPLUME :
TOWNSHIP, AND COMMONWEALTH OF :
PENNSYLVANIA, DEPARTMENT OF :
TRANSPORTATION, :
Respondents :

CERTIFICATE OF SERVICE

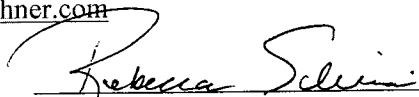
I hereby certify that I served one (1) copy of the Norfolk Southern Railway Company's Answer to Edward Schwartz's Motion for Summary Judgment in the above-referenced matter, this day, via electronic mail, addressed to:

LAWRENCE M LUDWIG ESQUIRE
238 VASSAR AVENUE
CLARKS GREEN PA 18411
lawludwig@epix.net

GINA M D'ALFONSO ESQUIRE
PENNDOT
PO BOX 8212
HARRISBURG PA 17105-8212
GDALFONSO@pa.gov

DONALD J FREDERICKSON JR ESQUIRE
LACKAWANNA COUNTY GENERAL
COUNSEL
200 ADAMS AVENUE 6TH FLOOR
SCRANTON PA 18503
kobalfrederickson@yahoo.com

DAVID J GROMELSKI ESQUIRE
148 ADAMS AVENUE
SCRANTON PA 18503
djgromelski@wrightreihner.com


Rebecca Silvia, Secretary to
Benjamin C. Dunlap, Jr., Esquire

Dated: April 7, 2017