

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

A. EDWARD SCHWARTZ,

v.

C-2016-2570929

NORFOLK SOUTHERN RAILWAY COMPANY,  
PENNSYLVANIA DEPARTMENT OF  
TRANSPORTATION, LACKAWANNA COUNTY  
and LAPLUME TOWNSHIP

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PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

**APPLICANT'S ANSWER TO MOTION FOR SUMMARY JUDGMENT  
OF PENNSYLVANIA DEPARTMENT OF TRANSPORTATION  
(AND LACKAWANNA COUNTY AND LAPLUME TOWNSHIP)**

A. Edward Schwartz ("Schwartz"), by and through his attorney, Lawrence M. Ludwig, Esquire, respectfully answers the Motion for Summary Judgment of Norfolk Southern Railway Company (and, in turn, the Joinders of Lackawanna County and Laplume Township), as follows:

1. Admitted, with the caveat that, as stated in the introductory sentence thereof, his Application is an application pursuant to 66 Pa.S.C. Section 2704(a) for "compensation for damages which (as) owners of adjacent property... injured (they) sustain(ed) in the abolition of (the) crossing", specifically alleging as the basis therefor 66 Pa.S.C. Section 2704 injury resulting from the Commission's abolition of a railroad crossing
2. Admitted in part; denied in part. Legal conclusions are denied.
3. Admitted.
4. Admitted.
5. Admitted in part; denied in part. It is denied that the pertinent question of law is "whether the PUC has jurisdiction to determine de facto taking matters..."; that begs the

real question in that the critical legal issue is whether the Commission has jurisdiction to make the particular determinations under 66 Pa.C.S. Section 2704(a), which very specifically provides statutory jurisdiction, "due process" procedure and remedy regarding a very peculiar matter, i.e., compensation for injury to adjacent land resulting from the Commission's abolition of a railroad crossing (regardless of whether or not there was any appropriation/condemnation by the Commission). By way of further response, Schwartz hereby incorporates by reference Paragraphs 1 and 8 through 13 hereof as though fully set forth

6. Admitted in part; denied in part. Schwartz admits that the cited case states what it states. The legal conclusions are denied. Schwartz specifically denies that he can not also avoid summary judgment by demonstrating that the moving parties have failed to establish that the Commission lacks jurisdiction to act and make determinations under 66 Pa.S.C. Section 2704.
7. Admitted.
8. Admitted in part; denied in part. Schwartz admits that the cases cited by Norfolk Southern and paragraph 21 of his Application state what they state. It is specifically denied that Schwartz limited his Application to complain about de facto taking or that his Application is a petition for appointment of viewers to adjudicate a de facto taking; rather, it is an application under 66 Pa.S.C. Section 2704, and indeed, as stated in the introductory sentence thereof, his Application is an application pursuant to 66 Pa.S.C. Section 2704(a) for "compensation for damages which (as) owners of adjacent property... injured (they) sustain(ed) in the abolition of (the) crossing", specifically alleging as the basis therefor 66 Pa.S.C. Section 2704 injury resulting from the Commission's abolition of a railroad crossing. Schwartz separately and distinctly alleged in Paragraph 20 of his Application that he is entitled to full compensation as determined

pursuant to 66 Pa.C.S. Section 2704(a). 66 Pa.C.S. Section 2704(a) very specifically provides statutory jurisdiction, procedure and remedy “after due notice and hearing” for the pertinent peculiar occurrence, i.e., the abolition of the railroad crossing. Schwartz denies that his Application constitutes anything other than an application under 66 Pa.S.C. Section 2704. Further, a claim under the only other arguably relevant statute, section 714 of the Eminent domain Code, 26 Pa.C.S. Section 714 (formerly 26 P.S. Section 1-612), has been held to be “distinct and separate from a claim for de facto taking. *Capece v. City of Philadelphia*, 123 Pa Cmwlth 86, 552 A.2d 1147 (1989).” *Colombari v. Port Authority of Allegheny County*, 951 A.2d 409, 413. By way of further response, Schwartz notes that, as set forth in paragraph 22 of his Motion for Summary Judgment, to accommodate, and remove any impediment to, the Commission's exercise of its primary original jurisdiction under 66 Pa.S.C. Section 2704, he has withdrawn without prejudice any claims for de facto taking. By way of further response, Schwartz hereby incorporates by reference Paragraphs 1, and 9 through 13 hereof as though fully set forth

9. Admitted in part; denied in part. Schwartz admits that his Application's paragraph 21 is accurately quoted and that the crossing was demolished per PUC Order and and that he makes no claim that a formal declaration of taking had been filed. It is specifically denied that Schwartz limited or focused his Application to complain about any de facto taking; indeed, his Application is an application pursuant to inter alia 66 Pa.S.C. Section 2704(a) for “compensation for damages which (as) owners of adjacent property... injured (they) sustain(ed) in the abolition of (the) crossing”, specifically alleging as the basis therefor 66 Pa.S.C. Section 2704 injury resulting from the Commission's abolition of a railroad crossing. By way of further response, Schwartz hereby incorporates herein by reference the averments of Paragraphs 1, 8, and 10 through 13 hereof as though fully

set forth.

10. Admitted in part; denied in part. Schwartz admits that there was no declaration of taking. The legal conclusions are denied. Schwartz denies any implication that the Commission's jurisdiction over his Application under 66 Pa.S.C. Section 2704 is in any way dependent upon there having been a declaration of taking; rather, jurisdiction stems from the abolition of the railroad crossing and, in turn, 66 Pa.S.C. Section 2704. By way of further response, Schwartz hereby incorporates herein by reference the averments of Paragraph 1, 8, 9, and 11 through 13 hereof as though fully set forth.
11. Admitted in part; denied in part. It is admitted that Cramer states what it states, with the caveat that the 2006 Cramer decision is an unreported, non-precedential decision without published opinion (that, I believe, is subject to 210 Pa. Code Section 67.55, Pa. Rules of Court, I.O.P. Chapter 4, Section 414 and non-binding), which stems from procedurally convoluted litigation, and is not apposite let alone dispositive. The legal conclusions are denied. It is specifically denied that Cramer bars the Commission's exercise of its primary original jurisdiction over a Section 2704 application regarding injury sustained by owners of adjacent property in the abolition of a railroad crossing. It is admitted that no particular procedures are set forth in detail, but it is denied that Section 2704 provides no procedure regarding the matter; to the contrary, 66 Pa.C.S. Section 2704(a) provides statutory jurisdiction, procedure and remedy "after due notice and hearing" for the pertinent peculiar occurrence, i.e., the abolition of the railroad crossing, and thus generally sets forth the procedure for the Commission's determining and paying such compensation, as well as for the Commission's determining what entities will bear and pay appropriate "proper proportions" of not only such "compensation" but also the "cost of... abolition of such crossing" which it certainly has jurisdiction to do itself. Moreover, given the text of Section 2704(a) regarding "due

notice and hearing”, the Commission has authority to establish more detailed internal operating procedures for making its determinations under Section 2704(a) regarding railroad crossings. By way of further response, Schwartz hereby incorporates by reference Paragraphs 1, 10, 12 and 13 hereof as though fully set forth.

12. Admitted in part; denied in part. It is admitted that the cited statute and cases state what they state. The legal conclusions are denied. It is specifically denied that Schwartz has an adequate remedy under the Eminent Domain Code in that it does not, unlike 66 Pa.S.C. Section 2704, provide specific statutory remedy without the prerequisites, conditions and limitations of the Eminent Domain Code. Schwartz denies any implication that the Eminent Domain Code or the cited cases bar the Commission's exercise of its primary original jurisdiction over a Section 2704 application regarding “injury” sustained by owners of adjacent property in the abolition of a railroad crossing. Sienkiewicz v. Dept. of Transportation, 584 Pa. 270 (2005) is clearly distinguishable in that the landowner therein never filed anything with the Commission let alone a Section 2704 Application; rather, as the Pennsylvania Supreme Court recited:

“Landowner filed a petition for appointment of a board of viewers pursuant to Section 502(e) of the Eminent Domain Code, 26 P.S. Section 1-502(e), which provides for the appointment of a board of viewers where a petitioner has suffered a compensable injury at the instance of an entity clothed with the power of eminent domain, but no declaration of taking has been filed... In an amended petition, Landowner invoked Section 612 of the Eminent Domain Code, 26 P.S. Section 1-612, authorizing an award of consequential damages relative to, inter alia, permanent interference with access...”

By way of further response, Schwartz hereby incorporates by reference Paragraphs 1, 4, 8 through 11, and 13 hereof as though fully set forth.

13. Admitted in part; denied in part. It is admitted that the cited cases state what they state.

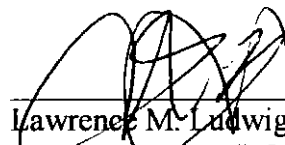
The legal conclusions are denied. Further, any implication that the Lackawanna County Court of Common Pleas has “exclusive” or even concurrent jurisdiction over Schwartz's application under 66 Pa.C.S. Section 2704 is denied. Indeed, the jurisdiction of a Court of Common Pleas over a claim under 66 Pa.C.S. Section 2704 has been held to be only derivative or secondary, as follows:

“It is apparent that Section 2704(a) contemplates an application first be made to the Commission for a determination of the amount of compensation for damages... An application must instead be filed with the Commission, which has the authority to determine the amount in question or to refer it to a court of common pleas for the appointment of a Board of View. The jurisdiction of a common pleas court to appoint a Board of View to determine damages in these matters is, therefore, derivative, being dependent solely upon the Commission's action.”

Huss v. Department of Transportation, 99 Pa.Cmwth. 386, 390, 512 A.2d 1356, 1358 (Pa.Cmwth. 1986) appeal dismissed 544 A.2d 446 (Pa. 1988) which was cited by Pennsylvania Supreme Court as the authority for per curiam reversal of the Commonwealth Court in Barron v. Department of Transportation, 526 Pa. 539, 587 A.2d 727 (1991). See also CSX, supra at 708 [“Thus, the trial court, under section 2704(b), has no jurisdiction to appoint a board of view without the commission relinquishing its jurisdiction to the trial court to do so.”]. Schwartz denies any implication that the cited cases cited by PennDOT bar the Commission's exercise of its primary original jurisdiction over his 66 Pa.S.C. Section 2704 application regarding injury sustained by owners of adjacent property in the abolition of a railroad crossing. By way of further response, Schwartz hereby incorporates by reference Paragraphs 1, 4, and 8 through 12 hereof as though fully set forth

WHEREFORE, Schwartz respectfully moves this Honorable Commission to deny Department's Motion for Summary Judgment (and, in turn, the Joinders filed by Lackawanna County and LaPlume Township), ruling that, pursuant to 66 Pa.S.C. Section 2704, it has primary original jurisdiction over his Application, and to exercise that jurisdiction to "determine" under Section 2704(a) compensation for damages which as owner of the injured adjacent Premises were sustained in the Commission's above-described abolition of the railroad crossing.

Respectfully submitted,



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ATTORNEY FOR APPLICANT

Dated: April 5, 2017

**PENNSYLVANIA  
PUBLIC UTILITY COMMISSION**

A. EDWARD SCHWARTZ,

v.

C-2016-2570929

NORFOLK SOUTHERN RAILWAY COMPANY,  
COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF TRANSPORTATION ET AL

**CERTIFICATE OF SERVICE**


I, Lawrence M. Ludwig, Esquire, attorney for Complainant, hereby certify that on April 5, 2017, I serve foregoing **ANSWER TO SUMMARY JUDGMENT MOTION** by depositing true and correct copies thereof in the U.S. Mail, first-class postage prepaid, addressed to counsel of record, as follows:

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