

**LAWRENCE M. LUDWIG, ESQUIRE**  
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April 4, 2017

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

In Re: Schwartz v. Norfolk Southern Railway Company, PennDOT et al  
PUC Docket No.: C-2016-2570929

Dear Secretary Chiavetta:

Please find enclosed for filing in the above-referenced matter:

- (1) Applicant's Answer to Motion for Summary Judgment of Norfolk southern Railway Company; and
- (2) Applicant's Answer to Motion for Summary Judgment of Pennsylvania Department of Transportation (and Lackawanna County and LaPlume Township).

I hereby certify that copies of these pleadings have been sent to all parties of record as indicated on the Certificate of Service attached thereto. I will also Fax a copy directly to Administrative Law Judge David A. Salapa.

Should you have any questions or wish to discuss anything regarding this matter, please contact me at your convenience. Thank you.

**RECEIVED**

APR 05 2017

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

Very truly yours,



Lawrence M. Ludwig

cc: Gina M D'Alfonso, Senior Counsel  
Benjamin C. Dunlap, Jr., Esq.  
Donald J. Frederickson, Jr., Esquire  
David J. Gromelski, Esquire

**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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APR 05 2017

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

**APPLICANT'S ANSWER TO MOTION FOR SUMMARY JUDGMENT  
OF NORFOLK SOUTHERN RAILWAY COMPANY**

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, as follows:

1. Admitted in part; denied in part. It is denied that the Order stated that the issue is "whether the Commission has jurisdiction over matters involving alleged de facto takings of property not directly appropriated or condemned by the Commission". Rather, the Order stated that the issue is "whether the... Commission has jurisdiction over the issues raised in the complaint of A. Edward Schwartz", after repeatedly discussing in the paragraphs prior thereto the perceived need to "address whether (the Commission) had jurisdiction over the issues raised in Schwartz's complaint". Thus, the real legal issue is whether the Commission has jurisdiction over Schwartz's Application under 66 Pa.C.S. Section 2704, 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 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 2 through 5, 10, and 33 through 43 and 46 through 48 hereof as though fully set forth.

2. Admitted in part; denied in part. It is admitted that the cited statutes state what they state. Any implication that the Commission does not have jurisdiction over Schwartz's Application is denied. By way of further response, Schwartz hereby incorporates by reference Paragraphs 1, 3 through 5, 10, and 33 through 43 hereof as though fully set forth.
3. Admitted in part; denied in part. Schwartz denies any implication that the Commission's power to determine appropriate compensation for damages under 66 Pa.S.C. Section 2704(a) is limited to instances where the Commission appropriated/condemned property for railroad crossings; to the contrary, 66 Pa.C.S. Section 2704(a) clearly states the "GENERAL RULE" as follows:

"The compensation for damages which the owners of adjacent property taken, *injured or* destroyed may sustain in the... abolition of any crossing under the provisions of this part, shall, after due notice and hearing, be ascertained and determined by the commission. Such compensation... shall be borne and paid... in such proper proportions as the commission may, after due notice and hearing, determine..."

(emphasis added)

Thus, the Commission has primary original jurisdiction over the instant Section 2704 Application. Any implication that, because the Commission "closed the (railroad) crossing in the interest of public safety", the owner of adjacent land injured by abolition of the

railroad crossing such as Schwartz cannot file for determinations by the Commission pursuant to 66 Pa.S.C. Section 2704(a), is specifically denied; to the contrary, neither the Eminent Domain Code nor the Public Utility Code nor the cited German case nor any holding by a Pennsylvania appellate Court precludes Schwartz from doing so. By way of further response, Schwartz hereby incorporates herein by reference the averments of Paragraph 1, 2, 4, 5, 10, and 33 through 43 hereof as though fully set forth.

4. Admitted in part; denied in part. It is specifically denied that Schwartz so limited his Application 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, as stated in the introductory sentence thereof, he filed his 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” and alleges 66 Pa.S.C. Section 2704 injury resulting from the Commission's abolition of a railroad crossing, and 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). It is denied that his Application constitutes anything other than an application under 66 Pa.S.C. Section 2704. It is also denied that Section 2704 provides no procedure regarding the matter; to the contrary, it sets forth “due notice and hearing” 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 the Commission 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. Furthermore, 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. 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, is not apposite let alone dispositive and does not 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. By way of further response, Schwartz hereby incorporates herein by reference the averments of Paragraphs 1 through 3, 5, 10, 38 and 39 hereof as though fully set forth.

5. Admitted in part; denied in part. It is admitted that, except as authorized by 66 Pa.S.C. 2702 or 66 Pa.S.C. Section 2704 or as may be appropriately ancillary thereto, the Public Utility Code does not provide authority for the Commission to solely address a de facto taking and damages therefor where no abolition of a railroad crossing occurred. Thus, the real legal issue is whether the Commission has jurisdiction over Schwartz’s claim under 66 Pa.C.S. Section 2704(a), which very specifically provides statutory jurisdiction, “due process” procedure and remedy regarding a very particular subject, i.e., the abolition of a railroad crossing. Any implication that, because there was no appropriation/condemnation in conjunction therewith, the owner of adjacent land injured by abolition of a railroad crossing such as Schwartz cannot file for determinations by the Commission pursuant to 66 Pa.S.C.. Section 2704(a), is denied; to the contrary, neither the Eminent Domain Code nor the Public Utility Code nor any holding by a Pennsylvania appellate Court preclude Schwartz from doing so. Furthermore, 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.Cmwlth. 386, 390, 512 A.2d 1356, 1358 (Pa.Cmwlth. 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.”] Thus, the Commission has primary original jurisdiction over the instant Section 2704 Application. By way of further response, Schwartz hereby incorporates by reference Paragraphs 1 through 4, and 33 through 43 and 46 through 48 hereof as though fully set forth.

6. Admitted in part; denied in part as stated. On September 21, Schwartz filed his “Application for Determinations as to Compensation for Damages Sustained due to Abolition of Railroad Crossing” pursuant to inter alia 66 Pa.C.S. Section 2704(a) for “compensation for damages which (as) owners of adjacent property... injured (they) sustain(ed) in the... abolition of (the) crossing” “carrying S.R. 4009 over the facilities of the Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railroad located in LaPlume Township, Lackawanna County”, per P.U.C. Order. That Application speaks for itself and Norfolk Southern's mis-

characterization thereof is denied. By way of further response, Schwartz hereby incorporates by reference Paragraphs 1 through 5, 24, 33 through 43, and 46 through 48 hereof as though fully set forth.

7. Admitted in part; denied in part. It is admitted that the Secretarial Letter dated October 31, 2016 states what it states. The legal conclusions are denied. Any implication that the Commission does not have jurisdiction over Schwartz's 2704 Application is denied. By way of further response, Schwartz hereby incorporates by reference Paragraphs 1 through 6, and 33 through 43 and 46 through 48 hereof as though fully set forth.
8. Admitted that Norfolk Southern's Answer With New Matter states what it states. The legal conclusions are denied. By way of further response, Schwartz hereby incorporates his Reply thereto as though fully set forth.
9. Admitted.
10. Admitted in part; denied in part. It is admitted that the Order, which speaks for itself, was issued. It is denied that the Order stated that the issue is "whether the Commission has jurisdiction over the de facto taking issues raised in Mr. Schwartz's Application". Rather, the Order stated that the issue is "whether the... Commission has jurisdiction over the issues raised in the complaint of A. Edward Schwartz", after repeatedly discussing in the paragraphs prior thereto the perceived need to "address whether (the Commission) had jurisdiction over the issues raised in Schwartz's complaint". Thus, the real legal issue is whether the Commission has jurisdiction over Schwartz's Application 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, 3, 5, and 33

through 43 and 46 through 48 hereof as though fully set forth.

11. Admitted, with the caveat that the Bridge was built prior to 1915.
12. Admitted.
13. Admitted.
14. Admitted, with the caveat that Raintree Farm is not just a farm, but several businesses.
15. Admitted.
16. Admitted. Further, the Commission's said Order and other Orders docketed to C-2011-2237486 and P-2011-2241780 resulting in the abolition of the subject railroad crossing injured Complainant's adjacent (and bisected) property within the meaning of 66 Pa.C.S. Section 2704 and applicable law
17. Admitted with the caveat that said restrictions were put into effect after April 15, 2011.
18. Admitted.
19. Admitted.
20. Admitted, with the caveat that some portion of the Premises might be located in North Abington Township.
21. Admitted in part; denied in part. It is admitted that no portion of Schwartz-owned Premises was condemned; however, The Delaware, Lackawanna and Western Railroad Company had condemned part of Emma Slayton's farm in 1912 or so.
22. Admitted, with the caveat that, as further addressed in Schwartz's Motion for Summary Judgment and his Affidavit in support thereof, that access is via the circuitous "Detour" of eight (8) miles delineated by PennDOT in the proceedings docketed to C-2011-2237486 and P-2011-2241780, which is dangerous and impassable at times.
23. Admitted, with the caveat that, as further addressed in Schwartz's Motion for Summary Judgment and his Affidavit in support thereof, the alternate route available to Schwartz is that circuitous "Detour" of eight (8) miles delineated by PennDOT in the proceedings

docketed to C-2011-2237486 and P-2011-2241780, which is dangerous and impassable at times.

24. Admitted in part; denied in part. The legal conclusions are denied. By way of further response, Schwartz hereby incorporates by reference Paragraphs 1, 3, 5, 10, and 33 through 43 and 46 through 48 hereof as though fully set forth.
25. Admitted.
26. Admitted, with the caveat that the postulated question as to “whether the Commission has jurisdiction to determine if a de facto taking occurred” 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.
27. Admitted, with the observation that such provision on its face applies to “condemnations” and with the caveat that 26 Pa.S.C. Section 102(b)(1) sets forth exceptions. See, Paragraphs 2, 30 and 31 of Norfolk Southern's Motion for Summary Judgment for pertinent examples.
28. Admitted in part; denied in part. It is denied that the Eminent Domain Code or its procedure precludes owners such as Schwartz from pursuit of determinations by the Commission pursuant to 66 Pa.S.C. Section 2704. Schwartz denies 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. By way of further response, Schwartz hereby incorporates by reference Paragraphs 1, 3, 5, 10, 24, and 33 through 43 and 46 through 48 hereof as though fully set forth
29. Admitted in part; denied in part. Schwartz denies 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. By way of further response, Schwartz hereby incorporates by reference Paragraphs 1, 3, 5, 10, 24, and 33 through 43 and 46 through 48 hereof as though fully set forth.

30. Admitted.

31. Admitted, with the caveat that all of the cited powers conferred upon the Commission are “exclusive”.

32. Admitted.

33. Admitted in part; denied in part. It is denied that the “aggrieved party” need be a party whose property was formally appropriated. Further, any implication that the Commission's original jurisdiction under 66 Pa.S.C. Section 2704 only arises in instances where there has occurred a formal appropriation of property under Section 2702(b) is denied. To the contrary, as in the instant case, the Commission's primary original jurisdiction under 66 Pa.S.C. Section 2704 arises as a result of the occurrence of one of the few events specified in Section 2704(a), e.g., the abolition of a railroad crossing. Cf. CSX Transportation, Inc. v. Department of Transportation of Commonwealth of Pennsylvania, 163 Pa.Cmwlth 620, 626, 641 A.2d 705, 708 (1994) wherein the Court held: “Thus, the Code does not affect the jurisdiction of the commission under section 2702 and 2704 of the Public Utility Code”.

34. Admitted in part; denied in part. It is admitted that the cited cases state what they state. It is denied that either is apposite let alone dispositive. To the contrary, both Smoluk and Kemp involved matters where PennDOT had appropriated frontage and offered “just compensation” (of \$6,000 and \$10,400, respectively) and the owners filed petitions for appointment of viewers with the Delaware County Court of Common Pleas; in neither case had the owner even mentioned, let alone applied for determinations under, 66 Pa.C.S. Section 2704. Further, any implication that the Commission's primary original jurisdiction

under 66 Pa.S.C. Section 2704 only arises in instances where there has occurred a formal appropriation of property under Section 2702(b) is denied. To the contrary, as in the instant case, the Commission's primary original jurisdiction under 66 Pa.S.C. Section 2704 arises as a result of the occurrence of one of the few events specified in Section 2704(a), e.g., the abolition of a railroad crossing. The legal conclusions are denied. By way of further response, Schwartz hereby incorporates by reference Paragraphs 1 and 35 hereof as though fully set forth.

35. Admitted in part; denied in part. It is admitted that no appropriation or condemnation of Schwartz's property pursuant to the dictates of Section 2702(d) occurred. It is denied that no appropriation or condemnation occurred in the cited cases; to the contrary, therein PennDOT exercised its power of eminent domain and took frontage from each of the owners. Further, any implication that the Commission's primary original jurisdiction under 66 Pa.S.C. Section 2704 only arises in instances where there has occurred a formal appropriation or condemnation of property under Section 2702(b) is denied. To the contrary, as in the instant case, the Commission's original jurisdiction under 66 Pa.S.C. Section 2704 arises as a result of the occurrence of one of the few events specified in Section 2704(a), e.g., the abolition of a railroad crossing. The legal conclusions are denied. By way of further response, Schwartz hereby incorporates by reference Paragraphs 1 and 34 hereof as though fully set forth.
36. Admitted in part; denied in part. It is admitted that no particular detailed procedures are provided in the Public Utility Code. It is denied that Section 2704 provides no procedure regarding the matter; to the contrary, 66 Pa.C.S. Section 2704(a) very specifically provides statutory jurisdiction, "due process" procedure and remedy for the pertinent peculiar occurrence, i.e., the abolition of the railroad crossing, and thus sets forth generally 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 the Commission certainly has jurisdiction to do itsself. 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. The legal conclusions are denied. By way of further response, Schwartz hereby incorporates by reference Paragraphs 1, 3, 5, 10 and \_\_\_ hereof as though fully set forth.

37. Admitted in part; denied in part. It is admitted that the cited 2002 P.U.C. Slip Opinion states what it states. It is denied that it is apposite let alone dispositive. To the contrary, as discussed at pages 5 and 6 of the 2006 Cramer decision cited by Norfolk Southern in paragraphs 38, 39, 42 and 47 of its Motion for Summary Judgment, the cited 2002 P.U.C. Slip Opinion was reversed by the Commonwealth Court in 2003. By way of further response, Schwartz hereby incorporates by reference Paragraphs 38 and 39 hereof as though fully set forth

38. 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, is not apposite let alone dispositive and does not 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. After the aforesaid 2006 Cramer decision, the Legislature re-established the Commission's jurisdiction in matters such as this by stating in pertinent part in the new Eminent Domain Code at 26 Pa.C.S. Section 203(b) that: “This chapter does not affect... (t)he jurisdiction or power of the Pennsylvania Public Utility Commission.” By way of further response, Schwartz hereby incorporates by reference

Paragraphs 1, 3, 5, 10, 37 and 39 hereof as though fully set for

39. 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 nonbinding), which stems from procedurally convoluted litigation, is not apposite let alone dispositive and does not 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. The legal conclusions are denied. It is specifically denied that Cramer bars the Commission's exercise of its primary jurisdiction over a 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, 3, 5, 10, 37 and 38 hereof as though fully set forth.
40. Admitted in part; denied in part. The legal conclusions are denied. By way of further response, Schwartz hereby incorporates by reference Paragraphs 1, 3, 5, 10 and 27 through 39 hereof as though fully set forth.
41. Admitted in part; denied in part as stated. Section 2704(b) states what it states and Norfolk Southern's mis-characterization thereof is denied. It is specifically denied that Section 2704 or any part thereof is limited in application to "condemnation" and denied that the Commission's power to determine appropriate compensation for damages under 66 Pa.S.C. Section 2704(a) is limited to instances where the Commission appropriated/condemned property for railroad crossings; to the contrary, 66 Pa.C.S. Section 2704(a) clearly states the "GENERAL RULE" as follows:

"The compensation for damages which the owners of adjacent property taken, *injured or* destroyed may sustain in the... abolition of any crossing under the

provisions of this part, shall, after due notice and hearing, be ascertained and determined by the commission. Such compensation... shall be borne and paid... in such proper proportions as the commission may, after due notice and hearing, determine...” (emphasis added)

Thus, the Commission has primary original jurisdiction over the instant Section 2704 Application. By way of further response, Schwartz hereby incorporates by reference Paragraphs 1 through 5, 10 and 27 through 40 hereof as though fully set forth.

42. 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, is not apposite let alone dispositive and does not 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. 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. The legal conclusions are denied. By way of further response, Schwartz hereby incorporates by reference Paragraphs 1, 3, 5, 10, 24, 38 through 41 hereof as though fully set forth.
43. Admitted in part; denied in part. It is admitted that 42 Pa.S.C. Section 5103 states what it states. Schwartz denies that Section 5103 is applicable and denies 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. Furthermore, 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.Cmwlth. 386, 390, 512 A.2d 1356, 1358 (Pa.Cmwlth. 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.”] 2704. By way of further response, Schwartz hereby incorporates by reference Paragraphs 1, 3, 5, 10, 24, 38 through 41 hereof as though fully set forth.

44. Admitted.

45. Admitted in part; denied in part. It is admitted that pursuant to 66 Pa.C.S. Section 2704(b) the commission may transfer Schwartz's application under 66 Pa.C.S. Section 2704. The legal conclusions are denied. By way of further response, Schwartz hereby incorporates by reference Paragraphs 1, 3, 5, 10, 42, 43 and \_\_\_ hereof as though fully set forth.

46. Admitted in part; denied in part. It is specifically denied that Schwartz so limited his Application 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; rather, as stated in the introductory sentence thereof, he filed his 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” and alleges 66 Pa.S.C. Section 2704 injury resulting from the Commission's abolition of a railroad crossing, and 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). It is denied that his Application constitutes anything other than an application under 66 Pa.S.C. Section 2704. It is also denied that 2704 provides no procedure regarding this 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 sets forth the procedure for determining and paying such compensation, as well as the procedure 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 the Commission 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, 3, 5, 10, 24, 36, 38 through 41 hereof as though fully set forth.

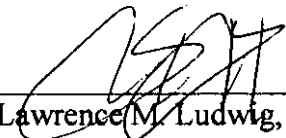
47. Admitted in part; denied in part. It is admitted that 42 Pa.S.C. Section 5103 and Cramer state what they state, and that pursuant to 66 Pa.S.C. Section 2704(b) the Commission may transfer this matter to the Lackawanna County Court of Common Pleas. It is denied that Section 5103 is applicable. Schwartz denies 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. Furthermore, 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. By way of further response, Schwartz hereby incorporates herein

by reference the averments of Paragraphs 1 through 5, 10, 38, 39, 42, 43 and 45 hereof as though fully set forth.

48. Admitted in part; denied in part. It is specifically denied that Schwartz so limited his Application; rather he filed his 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”, and alleges 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 through 5, 10, 38, 39, 46 and 47 hereof as though fully set forth.

WHEREFORE, Schwartz respectfully moves this Honorable Commission to deny Norfolk Southern Company's Motion for Summary Judgment and instead rule that, pursuant to Section 2704, it has primary original jurisdiction over his Application and will 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,

  
\_\_\_\_\_  
Lawrence M. Ludwig, Esquire  
PA Attorney I.D. # 21599  
238 Vassar Avenue  
Clarks Green, PA 18411  
(570) 586-6817  
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**

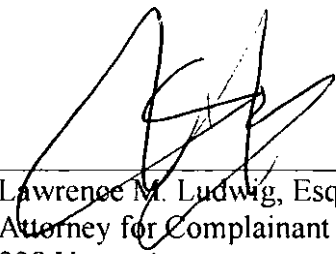
I, Lawrence M. Ludwig, Esquire, attorney for Complainant, hereby certify that on April 5, 2017, I serve foregoing **ANSWER TO SUMMARY JUDGMENT MOTION** by depositing true and correct copies thereof in the U.S. Mail, first-class postage prepaid, addressed to counsel of record, as follows:

Gina M. D'Alfonso, Senior Counsel  
Department of Transportation  
Office of Chief Counsel  
P.O. Box 8212  
Harrisburg, PA 17105-8212

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David J. Gromelski, Esquire  
LaPlume Twp Solicitor  
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148 Adams Avenue  
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Lawrence M. Ludwig, Esquire  
Attorney for Complainant  
238 Vassar Avenue  
Clarks Green, PA 18411  
(570) 586-6817  
PA Attorney I.D. # 21599

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