

# Nauman Smith

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April 9, 2020

**VIA ELECTRONIC FILING**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
PO Box 3265  
Harrisburg, PA 17105-3265

**In Re:        A. Edward Schwartz v. Canadian Pacific Railroad, Commonwealth of  
                 Pennsylvania Department of Transportation, Et Al  
                 Docket No. P-2011-2241780 and C-2011-2237486**

Dear Secretary Chiavetta:

Attached please find the Answer to the Petition and Certificate of Service, evidencing service of the same, in the above-referenced matter.

Please contact me if you have any questions.

Sincerely yours,



Benjamin C. Dunlap, Jr.

BCDjr/io  
attachment  
cc w/ attachment: all parties of record

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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

A. EDWARD SCHWARTZ,	:	
Complainant	:	
	:	Docket No. C-2011-2237486
v.	:	
	:	and
CANADIAN PACIFIC RAILROAD,	:	
COMMONWEALTH OF PENNSYLVANIA,	:	Docket No. P-2011-2241780
DEPARTMENT OF TRANSPORTATION,	:	
ET AL,	:	
Respondents	:	

**NORFOLK SOUTHERN RAILWAY COMPANY'S  
ANSWER TO THE PETITION OF A. EDWARD SCHWARTZ  
FOR RECONSIDERATION FROM STAFF ACTION**

Norfolk Southern Railway Company (“Norfolk Southern”), by and through its counsel Nauman, Smith, Shissler & Hall, LLP, hereby files this Answer with New Matter to the Petition of A. Edward Schwartz for Reconsideration from Staff Action (“Petition for Reconsideration”), pursuant to 52 Pa. Code §§ 5.44, 1.31 and 1.56(b) as follows:

1. Admitted upon information and belief.
2. Denied as stated. It is admitted that Petitioner filed the above-captioned matters seeking to have the subject rail-highway crossing adjacent to his property repaired. It is further admitted that the Commission, following hearings and briefing, ordered the bridge to be removed and the crossing abolished, due to the condition of the bridge and insufficient public need for the crossing, by its Order entered December 5, 2013 in the proceeding docketed to C-2011-2237486. It is additionally admitted that the bridge was removed pursuant to such Order in 2016.
3. Admitted in part and denied in part. It is admitted that Petitioner filed an “Application for Determination as to Compensation for Damages Sustained Due to Abolition of

Railroad Crossing” with the Commission concerning the abolition of the subject crossing, which was docketed to C-2016-2570929. It is denied that Petitioner’s Application had any merit.

4. Admitted in regard to ordering paragraph 5 of the Opinion and Order entered April 23, 2018, in the proceeding docketed to C-2016-2570929 (“Opinion and Order”), which is incorporated herein by reference.

5. Denied. It is denied that the Commission’s Opinion and Order did not “specifically address the transfer of jurisdiction to the Court of Common Pleas.” To the contrary, the Opinion and Order specifically held that the Commission’s sole authority over property damage claims is when property is appropriated pursuant to 66 Pa.C.S. § 2702(b). As it was admitted no appropriation of property was exercised against Mr. Schwartz, the Commission lacked jurisdiction to determine his property devaluation claims or refer such claims to a court of common pleas. See Opinion and Order at 21-23, 29.

6. Admitted.

7. Denied. It is denied that it would be appropriate for the Commission to “submit[] the case to the Lackawanna County Court of Common Pleas for determination of matters within their jurisdiction.” To the contrary, Mr. Schwartz’s claim for the deprivation of his property would constitute a *de facto* taking. The Commission held it has no jurisdiction to determine whether a *de facto* taking occurred, which must be adjudicated under the provisions of the Eminent Domain Code. See Opinion and Order at 23-24, 30. As the Commission has no jurisdiction over such claim or related claims, there is nothing for it to transfer. Instead, the proper procedure is for Mr. Schwartz to file for the appointment of viewers in the Lackawanna County Court of Common Pleas, which indeed he already did in an eminent


domain/condemnation action filed at 5712-CV-2019 on September 26, 2019. See Exhibit "A" attached hereto.

8. Denied. As the Commission has already determined that there is no claim within its jurisdiction to transfer to the court of common pleas, any such transfer as requested by Mr. Schwartz would not only be inappropriate, but a legal nullity. Furthermore, Mr. Schwartz failed to appeal this legal determination made by the Commission in its Opinion and Order, which is therefore *res judicata* and cannot be relitigated here. *City of McKeesport v. Pa. Public Utility Comm'n*, 65 Pa. Cmwlth. 179, 182, 442 A.2d 30, 31 (1982).

WHEREFORE, Norfolk Southern Railway Company respectfully requests that the Petition for Reconsideration from Staff Action filed by A. Edward Schwartz be denied.

Respectfully Submitted,

**NAUMAN, SMITH, SHISSLER & HALL, LLP**

By: 

**Benjamin C. Dunlap, Jr., Esquire**  
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**Counsel for Norfolk Southern Railway Company**

Date: April 9, 2020

Case No..... 2019-05712 SCHWARTZ (vs) COMM OF PA

Reference No.....  
Case Type..... REAL PROPERTY - EMINEN  
Judgment..... \$.00  
Judge Assigned.....  
Disposed Desc.....  
----- Case Comments -----

Filed..... 9/26/2019  
Time..... 1:21  
Execution Date.. 0/00/0000  
Jury Trial.....  
Disposed Date.. 0/00/0000  
Higher Crt 1...  
Higher Crt 2...

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++ GENERAL INDEX ++

Indexed Party

SCHWARTZ A EDWARD

PLAINTIFF

Attorney Info

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CLARKS SUMMIT, PA 18411

COMMONWEALTH OF PENNSYLVANIA DEFENDANT  
DEPT OF TRANSPORTATION

COMMONWEALTH OF PENNSYLVANIA DEFENDANT

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++ DOCKET ENTRIES ++

Date	Entry Text
9/26/2019	PETITION TO APPOINT VIEWERS FILED W/ CERT OF SER AND COMPLIANCE 40 Image page(s) exists for this entry
10/07/2019	ENTRY OF APPEARANCE OF ROBT. J. KOPACZ, ESQ. FOR DEFT 1 Image page(s) exists for this entry
10/09/2019	ORDER DATED 10-9-19. MUNLEY THOMAS, J. NOTIFIED 10-9-19 ALSO, FILED CERT OF COMPL. & SERVICE 43 Image page(s) exists for this entry
10/25/2019	COMMONWEALTH OF PA AND PA DEPT. OF TRANSPORTATION'S PRELIMINARY OBJ. TO PETITION TO APPOINT VIEWERS 4 Image page(s) exists for this entry
11/19/2019	PRAECIPE FOR ASSIGNMENT FILED. (SENT TO C.A.) W/ CERT OF SER 2 Image page(s) exists for this entry
11/19/2019	PETITIONER'S ANSWER AND NEW MATTER TO COMM OF PA'S AND PA DEPT OF TRANSP'S PREL. OBJ'S TO PETITION TO APPOINT VIEWERS FILED W/ CERT OF SER AND COMPLIANCE 11 Image page(s) exists for this entry
12/23/2019	LETTER FROM COURT ADMINISTRATOR FILED 1 Image page(s) exists for this entry
1/30/2020	ORDER DATED 1-30-20 FILED. MOYLE, J. NOTIFIED 1-31-20 1 Image page(s) exists for this entry
2/10/2020	PETITIONER'S BRIEF IN OPPOSITION TO COMM OF PA'S & PENNSYLVANIA DEPT OF TRANSPORTATION'S PO'S TO PETITION TO APPOINT VIEWERS W/COMPLIANCE & CERT OF SERVICE 11 Image page(s) exists for this entry
	----- LAST ENTRY -----

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++ Escrow Information ++

Cost / Fee	Beg. Balance	Pymts/Adjmts	End. Balance
PETITION WRIT	\$ .50	\$ .50	\$ .00
DISC	\$5.00	\$5.00	\$ .00
PAF	\$5.00	\$5.00	\$ .00
JCS/ATJ	\$40.25	\$40.25	\$ .00
COMPUTER FEE	\$5.00	\$5.00	\$ .00
PETITION MISC	\$114.50	\$114.50	\$ .00
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	\$170.25	\$170.25	\$ .00

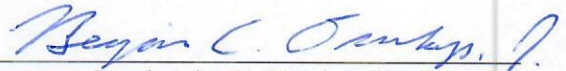
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End of Case Information

Exhibit "A"

**VERIFICATION**

I, Benjamin C. Dunlap, Jr., Esquire, a member of the firm of Nauman, Smith, Shissler & Hall, attorneys for Norfolk Southern Railway Company in the above-captioned proceedings, make this verification on behalf of Norfolk Southern Railway Company, and do state that as an attorney for Norfolk Southern Railway Company, I am authorized to make this Verification on behalf of Norfolk Southern Railway Company, and further state that, based on information provided to me by Norfolk Southern Railway Company, the facts set forth in the foregoing ***ANSWER TO THE PETITION OF A. EDWARD SCHWARTZ FOR RECONSIDERATION FROM STAFF ACTION*** are true and correct to the best of my knowledge, information and belief. I understand that my statements are made subject to 18 Pa. C.S. §4904 providing for criminal penalties for unsworn falsification to authorities.



Benjamin C. Dunlap, Jr., Esquire

Dated: April 9, 2020

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

A. EDWARD SCHWARTZ,	:	
Complainant	:	
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COMMONWEALTH OF PENNSYLVANIA,	:	Docket No. P-2011-2241780
DEPARTMENT OF TRANSPORTATION,	:	
ET AL,	:	
Respondents	:	

**CERTIFICATE OF SERVICE**

I hereby certify that I served one (1) copy of the foregoing *Answer to the Petition* on behalf of Norfolk Southern Railway Company, in the above-referenced matter, this day, via electronic mail as noted below, addressed to:

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Benjamin C. Dunlap, Jr., Esquire

Dated: April 9, 2020