



ORIGINAL

March 18, 1988

Jerry Rich, Secretary
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17120

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MAR 21 1988

Re: Borough of Ridley Park v. SEPTA, et al.
Docket No. C-850414

SECRETARY'S OFFICE
Public Utility Commission

Dear Secretary Rich:

Enclosed for filing with the Commission are the original and nine copies of the signed exceptions of the National Railroad Passenger Corporation ("Amtrak"), a respondent in this proceeding.

Sincerely yours,

A handwritten signature in cursive script that reads "Peter S. Craig".

Peter S. Craig
Associate General Counsel

cc: Hon. Martin R. Fountain, Administrative Law Judge
all counsel of record

FOLDER

ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Borough of Ridley Park

v.

SEPTA, et al.

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C-850414

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MAR 21 1988

SECRETARY'S OFFICE
Public Utility Commission

EXCEPTIONS OF NATIONAL RAILROAD PASSENGER CORPORATION

The National Railroad Passenger Corporation ("Amtrak") respectfully excepts to ordering paragraph numbered 6 of the Recommended Decision of Administrative Law Judge Martin R. Fountain, dated February 24, 1988, and served March 8, 1988, reading as follows:

6. That National Railroad Passenger Corporation, at its sole cost and expense, upon completion of the improvement ordered herein, [shall] furnish all material and do all work necessary thereafter to maintain its [sic] facilities, including the substructure and superstructure of the bridge carrying Sellers Avenue over and above the tracks of the railroad Corporation, including bituminous roadway paving, if any, and curbs and sidewalks located on the superstructure. (Rec. Dec., 10-11)

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In support of this exception, Amtrak respectfully shows as follows:

1. As the record shows, the Sellers Avenue bridge is a state highway. (N. T. 26; Rec. Dec. 4, finding 12) As such, it is the property of the Commonwealth of Pennsylvania, not Amtrak, and falls within the jurisdiction of the PennDOT to maintain in good repair.

2. Citing this Commission's order dated May 16, 1949 in Docket C-13677, the ALJ at pages 8 and 9 of his Recommended Decision states:

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The Sellers Avenue Bridge was reconstructed in 1951 pursuant to Commission Order at Docket C-13677. Pennsylvania Railroad Company performed the work of reconstructing the new bridge and was assigned 40% of the cost. Pennsylvania Railroad Company was also assigned, at its sole cost and expense, the responsibility to maintain the bridge substructure and superstructure, including the roadway paving, curbs and sidewalk located on the superstructure. There is no reason to change the maintenance responsibility for the bridge from that which was assigned in the prior Commission order at Docket C-13677, i.e., prior railroad to current railroad, Amtrak. (emphasis added)

3. Amtrak was not a party to Docket C-13677 in 1949 or 1951. Indeed, Amtrak was not created until 1971. Assuming that Judge Fountain correctly characterized the Commission's order in that case and the responsibilities there imposed on the former Pennsylvania Railroad Company, there are ample reasons to "change the maintenance responsibility" imposed in that case, not the least of which is Congressional legislation prohibiting the discriminatory taxation of railroads that once characterized this Commission's decisions.

4. If history has relevance to this case, the ALJ should also have found that due in large part to the financial burdens imposed by Commission orders taxing the Pennsylvania Railroad for highway improvements, that railroad was forced to merge with the New York Central Railroad and then, as Penn Central Transportation Company, went into bankruptcy.

5. By the Regional Rail Reorganization Act of 1973 ("3-R Act"), a federal statute that takes precedence over any state or common law principles to the contrary, Congress

directed that various properties of the bankrupt Penn Central, including the track beneath the Sellers Avenue bridge, be transferred to Amtrak "free and clear of any liens or encumbrances". 45 U.S.C. § 743(b)(2). Thus, contrary to the ALJ's apparent assumption, Amtrak did not "inherit" the encumbrances previously imposed upon the Pennsylvania Railroad. See, Stratford Land & Improvement Co. v. Blanchette, 448 F. Supp. 279, 285 (Sp. Ct. R.R.R.A. 1978), General Motors Corp. v. Blanchette, 470 F. Supp. 866 (Sp. Ct. R.R.R.A. 1979).

6. By the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), 49 U.S.C. § 11503(b), Congress expressly prohibited any State from imposing any "tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the [Interstate Commerce] Commission." Cases construing this provision have held that it "is indeed intended as a catchall provision to prevent discriminatory taxation of a railroad carrier by any means," Alabama Great Southern R.R. v. Eagerton, 663 F.2d 1036, 1040 (11th Cir. 1981), that "its purpose was to prevent tax discrimination against railroads in any form whatsoever," Ogilvie v. State Board of Equalization, 657 F.2d 204, 210 (8th Cir.), cert. denied, 454 U.S. 1086 (1981), and "on its face, [it] clearly and unambiguously prohibits all forms of discriminatory taxation of railroads." Richmond, F. & P. R.R. v. Department of Taxation, 762 F.2d 375, 379 (4th Cir. 1985). See also, Burlington

Northern R.R. v. Oklahoma Tax Commission, 107 S.Ct. 1855 (1987) (49 U.S.C. § 11503(b) prohibition not limited to taxes that intentionally discriminate against railroads); Atchison, T. & S.F. Ry. v. Bair, 535 F.Supp. 68 (S.D.Iowa 1982), 338 N.W. 2d 338 (Iowa 1983), cert. denied, 465 U.S. 1071 (1984) (invalidating Iowa tax on railroads levied for the state's purchase and upgrading of railroad facilities).

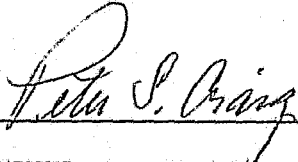
7. Thereafter, in an effort to minimize the federal subsidies required for Amtrak's operations, Congress in 1981 enacted 45 U.S.C. § 546b, expressly immunizing Amtrak from "any taxes or other fees imposed by any State, political subdivision of a State, or a local taxing authority."

8. Paragraph 6 of the proposed order is a tax against Amtrak and, moreover, a tax that discriminates against Amtrak, a rail carrier subject to the jurisdiction of the Interstate Commerce Commission. National Railroad Passenger Corp. v. Commonwealth of Pennsylvania Public Utility Commission, 665 F. Supp. 402 (1987). Therefore, it is prohibited by the clear and express language of both 49 U.S.C. § 11503(b) and 45 U.S.C. § 546b.

WHEREFORE, Amtrak respectfully prays that paragraph 6 be deleted from the Commission's final order in this proceeding and that the Commission refrain from making any

other involuntary exactions upon Amtrak relating to this public improvement.

Respectfully submitted,



PETER S. CRAIG
Associate General Counsel
National Railroad
Passenger Corporation
400 North Capitol St., N.W.
Washington, D.C. 20001

Attorney for Respondent
National Railroad
Passenger Corporation

March 18, 1988

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Exceptions of the National Railroad Passenger Corporation were served on this date, by first class mail, postage prepaid, upon:

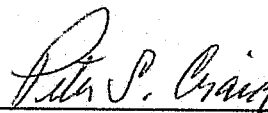
Ronald Klimas, Esq.
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Consolidated Rail Corporation
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Pennsylvania Department of Transportation
Transportation & Safety Building
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Harrisburg, PA 17120

James DelBello, Esq.
Assistant Solicitor, County of Delaware
210 West Front Street
Media, PA 19063



Peter S. Craig

Dated: March 18, 1988

**Eckell
Sparks
Levy
Auerbach
Monte
Moses**

ATTORNEYS AT LAW
215-565-3700

March 28, 1988

#596-81

Jerry Rich, Secretary
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17120

Re: Borough of Ridley Park v. SEPTA, et al.
Docket No. C-850414

Dear Secretary Rich:

Enclosed for filing with the Commission are the original and nine copies of the Borough of Ridley Park's signed Reply to the Exceptions of the National Railroad Passenger Corporation ("Amtrak"). Borough of Ridley Park is the complaining party in this matter.

Very truly yours,

ECKELL, SPARKS, LEVY, AUERBACH, MONTE & MOSES

By: Stephen J. Polaha
STEPHEN J. POLAHA

SJP:re

enclosure

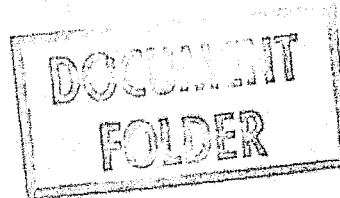
cc: Honorable Martin R. Fountain, Administrative Law Judge
All Counsel of Record

MURRAY S. ECKELL
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ARTHUR LEVY
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NICHOLAS D. VADINO, JR.
(1961-1977)

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MAR 30 1988
SECRETARY'S OFFICE
Public Utility Commission



FAX # 215-565-1596

LEGAL ARTS BUILDING
344 W. FRONT STREET
P.O. BOX 319
MEDIA, PENNSYLVANIA 19063
DELAWARE COUNTY

BEFORE THE PENNSYLVANIA
PUBLIC UTILITY COMMISSION

C-850414

BOROUGH OF RIDLEY PARK

vs.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,
PENNSYLVANIA DEPARTMENT OF
TRANSPORTATION, CONSOLIDATED
RAIL CORPORATION, NATIONAL
RAILROAD PASSENGER CORPORATION
and DELAWARE COUNTY

BOROUGH OF RIDLEY PARK'S REPLY
TO EXCEPTIONS OF
NATIONAL RAILROAD PASSENGER
CORPORATION

STEPHEN J. POLAHA, ESQUIRE


**Eckell
Sparks
Levy
Auerbach
Monte
Moses**

ATTORNEYS AT LAW
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LEGAL ARTS BUILDING
344 W. FRONT STREET
P.O. BOX 319
MEDIA, PENNSYLVANIA 19063
DELAWARE COUNTY

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Borough of Ridley Park :

vs. :

Southeastern Pennsylvania : C-850414
Transportation Authority, :
Pennsylvania Department of :
Transportation, Consolidated Rail :
Corporation, National Railroad :
Passenger Corporation, and :
Delaware County :

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**SECRETARY'S OFFICE
Public Utility Commission**

BOROUGH OF RIDLEY PARK'S REPLY
TO EXCEPTIONS OF
NATIONAL RAILROAD PASSENGER CORPORATION

1. The National Railroad Passenger Corporation ("Amtrak") has filed an Exception to paragraph 6 of the Recommended Decision of the Administrative Law Judge Martin R. Fountain, dated February 24, 1988, and served March 8, 1988, which provides as follows:

6. That National Railroad Passenger Corporation, at its sole cost and expense, upon completion of the improvement ordered herein, [shall] furnish all material and do all work necessary thereafter to maintain its [sic] facilities, including the substructure and superstructure of the bridge carrying Sellers Avenue over and above the tracks of the railroad Corporation, including bituminous roadway paving, if any, and curbs and sidewalks located on the superstructure. (Rec. Dec., 10-11)

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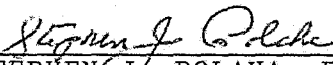
**DOCUMENT
FOLDER**

2. Amtrak essentially contends in its Exceptions that the Sellers Avenue bridge was transferred from the bankrupt Penn Central to Amtrak free and clear of any liens or encumbrances and that the Administrative Law Judge's Recommended Decision imposes a tax upon Amtrak which is contrary to the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11503(b), and the Regional Rail Reorganization Act of 1973, 49 U.S.C. § 546(b).

3. Amtrak's obligation to maintain the Sellers Avenue bridge is not a tax, the imposition of which is prohibited by the Railroad Revitalization and Regulatory Reform Act of 1976 or the Regional Rail Reorganization Act of 1973. 49 U.S.C. §11503(b) and 45 U.S.C. §546(b). Further, the assignment of future maintenance to Amtrak, which is a continuance of the maintenance responsibility of the Pennsylvania Railroad Company, is not a lien or encumbrance which Amtrak took free and clear of by virtue of the provisions contained in 45 U.S.C. § 743(b)(2). Even if Amtrak is not subject to the maintenance responsibilities for the Sellers Avenue bridge as a successor to the Pennsylvania Railroad Company, there is nothing to preclude the Administrative Law Judge from now assigning that maintenance responsibility to Amtrak which the Administrative Law Judge has properly done in his Recommended Decision.

WHEREFORE, the Borough of Ridley Park respectfully
prays that Amtrak's Exceptions be denied.

Respectfully submitted,


STEPHEN J. POLAHA, ESQUIRE
Solicitor for Borough of Ridley Park
344 West Front Street
Media, PA 19063

March 28, 1988

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply of the Borough of Ridley Park to the Exceptions of the National Railroad Passenger Corporation were served on this date, by first class mail, postage prepaid, upon:

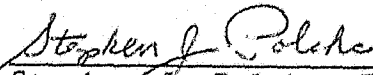
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Stephen J. Polaha, Esquire

Dated: March 28, 1988