

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

|   |   |                |
|---|---|----------------|
| Blackwood, Inc.   | : |                |
|   | : |                |
| v.  | : | C-20078010     |
|   | : |                |
| Reading, Blue Mountain and Northern<br>Railroad Company   | : |                |
|   | : |                |
| Application of Reading Blue Mountain and<br>Northern Railroad Company for Approval of the<br>Abolition of the Crossing (AAR 592 007 F)<br>Where Township Route T-567 Crosses at Grade<br>The Tracks of Reading Blue Mountain and<br>Northern Railroad Company, located in<br>Reilly Township, Schuylkill County | : | A-2008-2016324 |
|   | : |                |

**INITIAL DECISION**

Before  
Joel H. Cheskis  
Deputy Chief Administrative Law Judge

**INTRODUCTION**

This decision grants the department of transportation's motion to be dismissed because this joint proceeding does not involve a rail or highway cross on a state-designated highway and the motion is unopposed. Thus, the motion to dismiss will be granted and the department will be removed as a party in the above-captioned cases.

**HISTORY OF THE PROCEEDING**

On July 18, 2007, Blackwood, Inc. (Blackwood) filed a formal complaint with the Pennsylvania Public Utility Commission (Commission) against Reading Blue Mountain &

Northern Railroad Company (Reading). Blackwood owns a tract of land in Reilly Township, Schuylkill County, Pennsylvania consisting of approximately 2,200 acres which is traversed and separated by Reading's railroad track facilities and Township Road T-567. Blackwood averred that Reading has denied Blackwood with access to its property and requested that the Commission order Reading to permit Blackwood access to its property.

Subsequently, a long history of activities related to the complaint occurred, including the joinder of the application filed at A-2008-2016324. None of the activities that occurred, however, disposed of the underlying complaint. In particular, on October 27, 2016, then presiding officer Administrative Law Judge (ALJ) David A. Salapa entered an order that extended a stay of the proceedings that had originally been entered on June 12, 2008. The order dated October 27, 2016 stayed the proceeding until 35 days after the Schuylkill County Court of Common Pleas issued a final order in a related matter.

On September 17, 2020, a Judge Change Notice/Further Prehearing Conference Notice was issued in the above-captioned cases setting a further prehearing conference for November 12, 2020 at 10:00 a.m. and assigning me as the presiding officer. The further prehearing conference was held as scheduled. Lawrence J. Moran, Jr., Esquire, appeared on behalf of Reading; Kayla Rost, Esquire, appeared on behalf of the Commission's Bureau of Investigation and Enforcement (I&E); Gina D'Alfonso, Esquire, appeared on behalf of the Pennsylvania Department of Transportation (PennDOT); Benjamin C. Dunlap, Jr., Esquire, appeared on behalf of Reilly Township; and Glenn T. Roth, Esquire, appeared on behalf of Schuylkill County.

During the further prehearing conference, I noted that this case has not had any action in several years and a discussion was held regarding any efforts that could be made at this juncture to move this case forward. In particular, it was unclear whether the complainant, Blackwood, was still represented by counsel and whether the civil litigation in the Schuylkill County Court of Common Pleas impacted the Commission proceeding. All parties were given an opportunity to discuss the current state of this proceeding as well as what steps could be taken to move this case forward.

As a result, counsel for Reading endeavored to determine if new counsel had entered an appearance on behalf of Blackwood and the status of the civil litigation in Schuylkill County. Counsel further committed to file within 30 days either a motion to dismiss the complaint or a status report regarding his efforts to move this case forward. On December 11, 2020, counsel for Reading submitted a status report indicating the various attempts made to reach counsel for Blackwood and requesting an additional two weeks to file a motion to dismiss the complaint.

On December 24, 2020, Martin J. Cerullo, Esquire, entered his appearance on behalf of Blackwood.

On January 15, 2021, counsel for Reading indicated that she spoke with counsel for Blackwood about settling both the Schuylkill County proceeding and the complaint pending before the Commission. Counsel requested additional time to explore a global resolution of these matters. No party opposed the requested additional time. The request for additional time was granted via order dated January 22, 2021 which also memorialized a directive to provide a status report within 90 days.

On April 27, 2021, Mr. Cerullo indicated via email that the proceeding in Schuylkill County was still open and that a resolution of that case was still an appropriate predicate to any further action by the Commission. As a result, Mr. Cerullo stated that the parties were requesting that the Commission's stay of this proceeding remain in effect and that an additional status conference 90 days out will give the parties time to address any further negotiations or determine what can be done about the proceeding in Schuylkill County. In response, an order dated April 29, 2021, directed that this matter remains stayed and that a status report should be filed every 90 days.

On May 3, 2021, PennDOT filed the instant motion to dismiss requesting that it be dismissed from these cases. In its motion, PennDOT stated that it has been a party to these proceedings since its inception because PennDOT is added as a party to every rail complaint and application pursuant to Commission regulations. PennDOT added that these matters have lingered for years and it is apparent from the face of these matters that PennDOT is not involved

in either case because the matters involve a rail/highway crossing on a non-state route. PennDOT added that resolution of these matters will not involve PennDOT. PennDOT noted that Blackwood and Reading have suggested in the April 27, 2021 status report that PennDOT be dismissed from these proceedings. PennDOT concluded that its dismissal from these matters will be of no consequence to the active litigants or the outcome of the cases, nor will it impact PennDOT, and that no party has objected to the motion.

PennDOT's motion to dismiss is ready for disposition. For the reasons discussed below, PennDOT's motion will be granted and PennDOT will be dismissed from this matter. The remaining parties are expected to file a further status report regarding this matter no later than July 29, 2021 as previously directed.

#### FINDINGS OF FACT

1. The Complainant in this case is Blackwood, Inc.
2. On July 18, 2007, Blackwood filed a complaint against Reading Blue Mountain & Northern Railroad.
3. The Respondents in this case are Reading Blue Mountain & Northern Railroad Company, the Public Utility Commission's Bureau of Investigation and Enforcement, the Pennsylvania Department of Transportation, Reilly Township and Schuylkill County.
4. The Applicant in this case is Reading Blue Mountain & Northern Railroad Company.
5. The Application was filed on December 31, 2007.
6. On May 3, 2021, PennDOT filed a motion to dismiss seeking to remove itself from this joint proceeding.
7. The complaint and application involve a rail/highway crossing on a non-state route.

8. No party objected to PennDOT's motion.

### DISCUSSION

Although captioned as a motion to dismiss, PennDOT's motion is, in effect, a preliminary objection. Section 5.101 of the Commission's Rules of Administrative Practice and Procedure provides for the filing of preliminary objections. 52 Pa.Code § 5.101. Commission preliminary objection practice is comparable to Pennsylvania civil practice respecting the filing of preliminary objections. Equitable Small Transp. Intervenors v. Equitable Gas Co., 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994) (Equitable). Section 5.101(a) provides:

- (a) *Grounds.* Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be limited to the following:
  - (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
  - (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
  - (3) Insufficient specificity of a pleading.
  - (4) Legal insufficiency of a pleading.
  - (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
  - (6) Pendency of a prior proceeding or agreement for alternative dispute resolution.
  - (7) Standing of a party to participate in a proceeding.

52 Pa.Code § 5.101(a)(1)-(7).

For purposes of disposing of preliminary objections, the Commission must accept as true all well pleaded, material facts of the nonmoving party, as well as every reasonable

inference from those facts. Cnty. of Allegheny v. Commonwealth of Pa., 490 A.2d 402 (Pa. 1985); Commonwealth v. Bell Tel. Co. of Pa., 551 A.2d 602 (Pa. Cmwlth. 1988). The Commission must view the complaint in this case in the light most favorable to Blackwood and should dismiss the complaint only if it appears that Blackwood would not be entitled to relief under any circumstances as a matter of law. Equitable, supra; *see also*, Interstate Traveler Servs., Inc. v. Pa. Dep't of Env't Res. 406 A.2d 1020 (Pa. 1979).

In this case, Blackwood averred in its complaint that it owns a tract of land in Reilly Township, Schuylkill County consisting of approximately 2,200 acres which is traversed and separated by Reading's railroad track facilities and Township Road T-567. Blackwood further averred that Reading has denied Blackwood access its property and requested that the Commission order Reading to permit Blackwood access to its property. In its motion, PennDOT argued that the matters involve a rail/highway crossing on a non-state route and that "the resolution of these matters will not involve PennDOT." PennDOT added that "the dismissal of PennDOT in these matters will be of no consequence to the active litigants or the outcome of the case nor will it impact PennDOT."

PennDOT's motion will be granted. When accepting as true all well-pleaded materials facts in Blackwood's complaint, as well as every reasonable inference from those facts, and viewing the complaint in the light most favorable to Blackwood, it is clear that PennDOT can be dismissed from this proceeding. Blackwood would not be entitled to relief under any circumstances as a matter of law with regard to PennDOT.

The Commission's regulations provide that when a complaint alleges that a crossing is dangerous or inadequate and requires reconstruction, relocation, alteration or abolition, public utilities and municipal corporations concerned and, if applicable, PennDOT, will be made parties to the proceeding. 52 Pa.Code § 3.361(a). Yet, in this case, when accepting as true all well pleaded averments in the complaint, PennDOT is correct that the complaint filed by Blackwood involves a rail/highway crossing on a non-state route, not a state-designated highway. Therefore, even when viewing as true all well-pleaded allegations in Blackwood's complaint, as well as every reasonable inference from those facts, and viewing the complaint in the light most favorable to Blackwood, it is clear that Blackwood would not be entitled to relief

under any circumstances as a matter of law with regard to PennDOT. PennDOT's motion to dismiss itself as a party to this proceeding will be granted.

The remaining parties are expected to provide a further status report on this matter no later than July 29, 2021. In the interim, the parties are encouraged to pursue settlement discussions. Commission policy promotes settlements. 52 Pa. Code § 5.231(a). Even if the parties are unable to settle this case, they may still resolve some of the questions or issues during their discussions. If the parties reach an agreement on all issues, a formal hearing will not be necessary.

### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the parties to this proceeding. 66 Pa.C.S. § 701.

2. Commission preliminary objection practice is comparable to Pennsylvania civil practice respecting the filing of preliminary objections. Equitable Small Transp. Intervenor v. Equitable Gas Co., 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

3. Preliminary objections are available to parties and may be filed in response to a pleading when there is improper service of a pleading initiating the proceeding. 52 Pa.Code § 5.101(a)(1).

4. For purposes of disposing of preliminary objections, the Commission must accept as true all well pleaded, material facts of the nonmoving party, as well as every reasonable inference from those facts. Cnty. of Allegheny v. Commonwealth of Pa., 490 A.2d 402 (Pa. 1985); Commonwealth v. Bell Tel. Co. of Pa., 551 A.2d 602 (Pa. Cmwlt. 1988).

5. The Commission must view the complaint in this case in the light most favorable to Blackwood and should dismiss the complaint only if it appears that Blackwood would not be entitled to relief under any circumstances as a matter of law. Equitable, *supra*; *see also*, Interstate Traveler Servs., Inc. v. Pa. Dep't of Env't Res., 406 A.2d 1020 (Pa. 1979).

6. When a complaint is made that a crossing is dangerous or inadequate and requires reconstruction, relocation, alteration or abolition, public utilities and municipal corporations concerned and, if applicable, PennDOT, will be made parties to the proceeding. 52 Pa.Code § 3.361(a).

7. PennDOT's motion to dismiss itself from this proceeding should be granted.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the motion to dismiss filed by the Pennsylvania Department of Transportation on May 3, 2021 at docket numbers C-20078010 and A-2008-2016324 is granted.

2. That the Pennsylvania Department of Transportation is dismissed from this proceeding.

3. That the remaining parties are expected to file a further status report regarding these matters no later than July 29, 2021.

4. That parties are encouraged to pursue settlement discussions.

Date: May 20, 2021

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/s/  
Joel H. Cheskis  
Deputy Chief Administrative Law Judge