



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

January 12, 2023

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street 2nd FL
Harrisburg, PA 17120

Re: Complaint filed by Reading Blue Mountain & Northern Railroad Company involving the deteriorated condition of the railroad crossing surface and roadway approaches at the public crossing (DOT 361 425 J) where SR 2019 (Oak Street) crosses, at grade, the tracks of Reading Blue Mountain & Northern Railroad Company, located in the Pittston Township, Luzerne County.
C-2020-3016906

Dear Secretary Chiavetta:

Enclosed for filing please find the ***Reply Exceptions of the Commonwealth of Pennsylvania, Department of Transportation***, in the above-captioned matter.

Copies of this correspondence have been served on the parties of record in accordance with the Certificate of Service. If you have any questions, please contact the undersigned.

Very truly yours,

A handwritten signature in cursive script that reads "Jillian G. Fellows".

Jillian G. Fellows
Assistant Counsel

cc: Sarah J. Fenton, District Grade Crossing Administrator, District 4-0
Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Complaint filed by Reading Blue Mountain & Northern Railroad Company involving the deteriorated condition of the railroad crossing surface and roadway approaches at the public crossing (DOT 361 425 J) where SR 2019 (Oak Street) crosses, at grade, the tracks of Reading Blue Mountain & Northern Railroad Company, located in the Pittston Township, Luzerne County.	:	
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**REPLY EXCEPTIONS OF THE COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION**

And now, comes the Commonwealth of Pennsylvania, Department of Transportation (“PennDOT”), by and through its counsel, Jillian G. Fellows, Assistant Counsel, offering the following Reply Exceptions to the Exceptions of Reading Blue Mountain and Northern Railroad (“RBMN”) to the Recommended Decision of Administrative Law Judge Emily I. DeVoe (“ALJ”) dated December 14, 2022.

1. In response to **RBMN Exceptions 1 and 2**, Section 2702 of the Public Utility Code vests the Commission with exclusive jurisdiction to determine the manner in which a rail-highway crossing is to be constructed, relocated, altered, protected, suspended or abolished, as well as the manner and conditions under which a rail-highway crossing will be maintained, operated and protected to prevent accidents and promote public safety.¹ Pursuant to 66 Pa.C.S. § 2702(a), no rail-highway crossing shall be altered, relocated, suspended, or abolished without approval of the Commission. If there is a change in superelevation of rail tracks greater than 1.5” and such change affects the approach roadway coming into that particular crossing, the

¹ 66 Pa.C.S. §§ 2702 and 2704.

Commission considers that an alteration and an application must be filed.² This is so because the highway entity, in this case PennDOT, would have to make an adjustment to their roadway transition, possibly adjust their posted speed limit, and it also affects drainage.³

Here, the record is clear, and RBMN does not dispute, that 1) RBMN raised the superelevation from two and a half inches to over five inches and 2) such alteration greatly affects the highway approaches and public safety.⁴ Thus, RBMN's raising of the tracks is an alteration and therefore, 66 Pa. Code § 2702(a) requires RBMN file an application and obtain approval from the Commission for the increase in track elevation. Contrary to RBMN's assertions, ALJ DeVoe very clearly laid out and cited the Commission's authority on pages 13-15 of the Recommended Decision.

Pursuant to the above, PennDOT respectfully requests this Commission reject RBMN's Exceptions 1 and 2.

2. In response to **RBMN Exception 3**, PennDOT agrees that Ms. Fenton's testimony was stricken from Page 8, Line 18 to Page 9, Line 10. However, the paragraph on page 30 of the Recommended Decision that RBMNB is excepting to references Ms. Fenton's testimony on Page 9, lines 11-18. This testimony was neither objected to by RBMN nor agreed to be stricken from the record by PennDOT. Therefore, the ALJ did not error in making findings on Page 30 of the Recommended Decision regarding the testimony of Ms. Fenton.

In regard to Mr. Sinick's testimony beginning on Page 3, Line 13 through Page 4, Line 6, the Judge did not error in allowing this testimony. As the Senior Civil Engineer Manager in the Rail Safety Section of the Public Utility Commission, Mr. Sinick is in the best position to

² N.T. 103-05

³ N.T. pg. 104.

⁴ N.T. pgs. 105, 107; I&E Statement No. 1, pgs. 5-6; PennDOT Statement No. 1, pgs. 12-13; PennDOT Exhibits 6-9.

summarize PennDOT and RBMN's responsibilities pursuant to the April 30, 2021, and June 28, 2021, Secretarial Letters. Further, as the core issue in this matter is whether RBMN followed the Secretarial Letters, Mr. Sinick's understanding, interpretation, and review of the Secretarial Letters is essential to this proceeding and it's important to have I&E's position in the record. Lastly, ALJ DeVoe specifically accepted Mr. Sinick's testimony with the caveat that it is Mr. Sinick's understanding of the parties in the secretarial letters and that the ALJ is not bound by that interpretation and is not going to find it any more or less plausible.⁵

Pursuant to the above, PennDOT respectfully requests this Commission reject RBMN's Exception 3 and find the ALJ properly permitted Ms. Fenton's and Mr. Sinick's testimony.

3. In response to **RBMN Exception 4**, PennDOT incorporates its argument on pages 14-15 of its Main Brief.

Specifically, the record is clear that PennDOT was not aware that a safety hazard existed until the project was completed and the roadway was re-opened to the traveling public.⁶ It wasn't until shortly after the road was re-opened that PennDOT started receiving complaints and learned that there was an elevation change.⁷ Obviously PennDOT could have no way of knowing that vehicles were bouncing dangerously and erratically and scraping on the ground until the construction was completed and the road was re-opened to vehicular traffic again. PennDOT could not raise an objection to the manner in which the work was being performed until it was made aware there was a problem.⁸

⁵ N.T. 95.

⁶ N.T. pgs. 84, 90.

⁷ N.T. pgs. 84, 90; PennDOT Statement No. 1, pg. 11.

Even if PennDOT was aware of the safety hazard prior to completing its portion of construction, there was nothing PennDOT could do to fix the problem at that time.⁹ This is so because the base course, which was prepped and completed by RBMN, sets the elevation of the crossing and roadway approaches.¹⁰ Once the elevation was set by the base course, there's nothing that PennDOT could do to fix the problem.¹¹ As ordered by the Secretarial Letters, PennDOT placed the two inches of wearing course over the base course so that it would be at grade with the tracks.¹² In order to maintain a smooth and safe transition throughout the crossing and ensure that the rail was protected from traffic impact, the wearing course needed to be placed at the proper grade with the rail.¹³ Increasing the depth of the wearing course would cause the tracks to be covered with the wearing course and placing less than two inches of wearing course would leave the tracks exposed.¹⁴

Pursuant to the above, PennDOT respectfully requests this Commission reject RBMN's Exception 4 and find the ALJ properly concluded RBMN is the sole party responsible for the current unsafe condition of the Oak Street crossing.

4. In response to **RBMN Exception 5**, PennDOT incorporates its argument on pages 12-14 in its Main Brief.

Specifically, it is proper to place the sole responsibility for the costs of the reconstruction of the Oak Street crossing on RBMN. Numerous factors are relevant for determining the allocation of costs between a railroad and PennDOT. *Greene Township v. Pa. Pub. Util. Comm'n*, 668 A.2d 615 (Pa. Cmwlth. 1995). RBMN should be solely responsible for all costs of

⁹ PennDOT Statement No. 1, pg. 13.

¹⁰ PennDOT Statement No. 1, pg. 13.

¹¹ PennDOT Statement No. 1, pg. 13; N.T. 84.

¹² PennDOT Statement No. 1, pg. 13.

¹³ PennDOT Statement No. 1, pg. 13.

¹⁴ PennDOT Statement Np. 1, pg. 14.

reconstruction because (1) the raising of the tracks solely benefits RBMN and has a negative impact on PennDOT and the travelling public; (2) RBMN is responsible for the safety hazard that currently exists at the crossing; and (3) the safety hazard RBMN created could have been completely avoided had RBMN disclosed to PennDOT or the Commission of its intention to raise the tracks prior to the replacement project.

RBMN took it upon themselves to unilaterally decided to raise the elevation of the grade through the crossing, resulting in the safety issue that exists today.¹⁵ Whether an application to alter the crossing was filed or not, had RBMN identified the need to raise the tracks prior to the replacement in 2021, the issues could have been addressed during the replacement project, thus eliminating additional redundant work and expenses.¹⁶ RBMN asserts that “[p]lacing sole responsibility on RBMN for reconstructing the Oak Street crossing ignores all of the relevant factors which should be considered in allocating the costs of reconstruction.” However, RBMN fails to identify any factors that were ignored.

Lastly, RBMN’s assertion that “the record unequivocally establishes that RBMN had to increase the elevation in curves of track one and two according to Federal Railroad Administration requirements” is erroneous at best. Chris Goetz, Vice President Maintenance of Way for RBMN, testified that the traveling speed and the degree of the curve are used to determine the necessary curve elevation.¹⁷ However, the record is abundantly clear that neither Mr. Goetz nor Mr. Johnson knew the speed the trains are currently traveling at through the crossing or the degree of curvature at the crossing.¹⁸ RBMN failed to present any testimony or

¹⁵ PennDOT Statement No. 1, pg. 18.

¹⁶ PennDOT Statement No. 1, pg. 18.

¹⁷ RBMN Direct Testimony, pg. 7.

¹⁸ N.T. pgs. 51, 53-54.

evidence as to the existing speed and existing degree of curvature of the tracks to support its contention that raising the elevation was necessary.

Pursuant to the above, PennDOT respectfully requests this Commission reject RBMN's Exception 5 and find the ALJ properly concluded RBMN should bear the sole cost of reconstructing the Oak Street crossing.

WHEREFORE, the Department of Transportation respectfully requests that the Public Utility Commission dismiss Reading Blue Mountain Northern Railroad's Exceptions from the Recommended Decision of Administrative Law Judge Emily DeVoe dated December 14, 2022, in their entirety and enter an Order accordingly.

Respectfully Submitted,



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Dated: January 12, 2023

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Respectfully Submitted,

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



Jillian G. Fellows
Assistant Counsel

Dated: January 12, 2023