

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement	:	
	:	
v.	:	C-2024-3050823
	:	
Buffalo & Pittsburgh Railroad, Inc.	:	

ORDER
DENYING PRELIMINARY OBJECTIONS

On August 21, 2024, the Pennsylvania Public Utility Commission’s (Commission) Bureau of Investigation and Enforcement (I&E) filed a Formal Complaint against Buffalo & Pittsburgh Railroad, Inc. (BPRR) at Docket No. C-2024-3050823. In its Formal Complaint, I&E avers that BPRR did not notify or receive approval from the Commission for the closure of a public railroad crossing at Etna Street in Bulter, Pennsylvania. I&E alleges that BPRR, by altering the public railroad crossing by removing the wooden timbers, removing asphalt and placing concrete barriers obstructing passage without Commission approval, violated 66 Pa.C.S. § 2702(a). I&E further avers that the closure of the Etna Street crossing creates unsafe conditions. I&E proposes BPRR be assessed a civil penalty of \$21,700, comprising a continuous daily civil penalty of \$100 from the date of BPRR’s notice of I&E’s investigation of the unlawful alteration to the date of the filing of I&E’s Formal Complaint. I&E also seeks completion of the remediation of the tracks at the Etna Street crossing at BPRR’s sole cost and expense so that the Etna Street crossing may be re-opened within six months of the Commission’s order or Secretarial Letter concluding this matter.

On September 10, 2024, BPRR filed an answer and new matter to I&E’s Formal Complaint. BPRR states that it was engaged in a project to rehabilitate the railroad tracks and track bed on the railroad line where the Etna Street crossing is located, that the project required the wood timbers to be temporarily removed from the crossing, and that the intent was to replace

the timbers once the rehabilitation work was completed. BPRR denies that the crossing is unsafe. BPRR avers that, upon learning of I&E's investigation, BPRR requested I&E's guidance on the appropriate way to proceed in order to comply with the Public Utility Code, and BPRR refrained from taking any action until receiving guidance, which was never provided. In its new matter, BPRR states that its alleged violation does not qualify as a continuing offense because it did not involve repeated conduct, multiple occurrences, or an ongoing violation of a Commission order or regulation. BPRR also asserts that I&E waited 217 days to file its Complaint, and granting the relief requested by I&E would violate BPRR's constitutional rights.

Also on September 10, 2024, BPRR filed preliminary objections to I&E's Formal Complaint alleging that I&E's Formal Complaint is legally insufficient and should be dismissed. BPRR asserts that I&E's Formal Complaint is devoid of any allegations that BPRR repeatedly altered the Etna Street crossing or that BPRR acted in violation of an existing Commission order. BPRR avers that I&E's attempt to recover a continuous daily penalty of \$100 per day is excessive, illogical, and not contemplated by 66 Pa. C.S. § 3301(b). BPRR also avers that, although the courts have not applied 66 Pa. C.S. § 3301(b) to a case involving the removal of a railroad crossing without an order from the Commission, the cases in which penalties for continuing offenses were imposed illustrate that a one-time alteration of a railroad crossing does not justify such a penalty. Additionally, BPRR avers that I&E was dilatory in its prosecution, thereby artificially and arbitrarily inflating the penalty amount. BPRR concludes by stating that since BPRR's alleged violation does not qualify as a continuing offense, I&E's Formal Complaint must be dismissed.

On September 19, 2024, I&E filed a reply to BPRR's new matter. In its reply, I&E asserted that BPRR's ongoing violation of 66 Pa.C.S. § 2702 is a continuing violation that is subject to the per-day civil penalty set forth in 66 Pa.C.S. § 3301(b). I&E admits that 217 days elapsed from the day BPRR submitted its response to I&E's data request to the day I&E filed the Formal Complaint in this matter but denies that this is grounds to deny I&E's requested relief.

Also on September 19, 2024, I&E filed an answer to BPRR's preliminary objections. I&E denies that its Formal Complaint is legally insufficient. I&E states that the

speed at which I&E investigates and brings enforcement actions against regulated entities is irrelevant to determining whether a violation takes place at a singular instant or whether it is of a continuous nature. I&E avers that prior Commission orders have recognized that altering or abolishing a crossing by closing it to vehicular and pedestrian traffic without Commission authorization is a continuing violation. I&E states that the proposed \$21,700 civil penalty is fair and reasonable where previous similar cases have imposed a civil penalty starting from the day the crossing was altered or abolished by the regulated utility. I&E denies the proposition that only violations of Commission orders may result in the imposition of per-day penalties.

On October 9, 2024, the Commission issued a motion judge assignment notice, assigning me to this proceeding.

BPRR's preliminary objections are now ready for disposition, and they will be denied as stated below.

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 Transportation Intervenors v. Equitable Gas Company*, 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. Commw. of Pa.*, 490 A.2d 402 (Pa. 1985); *Commw. of Pa. v. Bell Telephone Co. of Pa.*, 551 A.2d 602 (Pa. Cmwlth. 1988). The Commission must view the Formal Complaint in this case in the light most favorable to I&E and should dismiss the Complaint only if it appears that I&E would not be entitled to relief under any circumstances as a matter of law. *Equitable, supra*; *see also, Interstate Traveler Services, Inc. v. Commw., Dept. of Env't Res.*, 406 A.2d 1020 (Pa. 1979).

BPRR's preliminary objections are based on claimed legal insufficiency of the Formal Complaint. Preliminary objections in the form of legal insufficiency, also known as a demurrer, will be sustained only in cases which are free and clear of doubt and where dismissal is clearly warranted by the record. *Cnty. Life Support Sys., Inc. v. Commonwealth*, 689 A.2d 1014 (Pa. Cmwlth. 1997). Any doubt must be resolved in favor of overruling a demurrer. *Id.*; *see also, Hoffman v. Misericordia Hosp. of Phila.*, 267 A.2d 867 (Pa. 1970) ("the question presented by the demurrer is whether on the facts averred, the law states with certainty that no recovery is possible"). To grant BPRR's preliminary objections, I would need to accept that, even if all the facts set forth in the Formal Complaint are true, I&E fails to set forth a claim for which the Commission can grant relief as a matter of law. *Scott v. Metro. Edison Co.*, C-2009-2083345 (Initial Decision issued Mar. 20, 2009).

The Public Utility Code states that a public utility may not alter, relocate, suspend or abolish a crossing without an order from the Commission. 66 Pa.C.S. § 2702(a). A violation

of the Public Utility Code shall result in civil penalties. 66 Pa.C.S. § 3301. I&E's Formal Complaint alleges that BPRR altered the Etna Street crossing without prior Commission approval and proposes a civil penalty. Therefore, under the standards of evaluating preliminary objections, I&E clearly sets forth facts setting forth a claim for which the Commission can grant relief as a matter of law, i.e., if I&E can prove a violation of 66 Pa.C.S. § 2702(a), BPRR shall be subject to civil penalties.

Although not relevant to the standards of evaluating preliminary objections, it is also notable that BPRR's preliminary objections do not argue that it did not alter the Etna Street crossing. Instead, BPRR's preliminary objections argue that the alteration of the Etna Street Crossing is a one-time alteration that does not qualify as a continuing offense. Therefore, BPRR's preliminary objections appear to acknowledge that relief for I&E's claim is possible, although BPRR argues the civil penalty amount proposed by I&E is inappropriate. This order does not make any conclusions regarding what is a possible appropriate civil penalty amount in this proceeding. Instead, this order simply finds that BPRR's preliminary objections should be denied because the allegations set forth in I&E's Formal Complaint are legally sufficient.

In the interim, the parties are reminded that Commission policy promotes settlements. 52 Pa. Code §5.231(a). The parties are encouraged to commence settlement discussions amongst themselves for this proceeding as early as possible. 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. The parties are also reminded that the presiding officer may participate in settlement discussions upon agreement of all parties. 52 Pa.Code § 5.223(c); *see also*, 52 Pa.Code § 5.231(c).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the preliminary objections filed by Buffalo & Pittsburgh Railroad, Inc. at Docket Number C-2024-3050823 on September 10, 2024 are hereby denied;
2. That the Formal Complaint filed by the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement at Docket Number C-2024-3050823 will proceed to a hearing.

Date: November 4, 2024

_____/s/
John M. Coogan
Administrative Law Judge

C-2024-3050823 - BUREAU OF INVESTIGATION AND ENFORCEMENT v. BUFFALO AND PITTSBURGH RAILROAD INC

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