

COMMONWEALTH OF PENNSYLVANIA  
PUBLIC UTILITY COMMISSION

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CITY OF PHILADELPHIA :  
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Approval of (1) the construction, :  
alteration or reconstruction of the :  
crossings of Penn Central Transportation :  
Company, debtor, Reading Company, :  
debtor, The Baltimore and Ohio Railroad :  
Company and SEPTA involved in the con- :  
struction of a high-speed passenger line :  
from Suburban Station to the Philadel- :  
phia International Airport, in the City :  
of Philadelphia, (2) the allocation of :  
the costs and expenses incident thereto :  
and (3) exemption from the minimum over- :  
head and side clearance requirements of :  
Part III of the Commission's Railroad :  
Regulations. :  
:

DOCKET NUMBER:  
A-00098061

Further Hearing :  
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DOCUMENT  
FOLDER

Hearing Room No. 1  
State Office Building  
Broad & Spring Garden Sts.  
Philadelphia, Pennsylvania

Wednesday, October 8, 1980

The above-entitled matter met, pursuant to notice,  
at 12:15 p.m.

BEFORE: THE HONORABLE RUDOLPH S. PALLASTRONE  
Administrative Law Judge

APPEARANCES:

HERBERT SMOLEN, ESQ.  
Deputy City Solicitor  
1580 Municipal Services Building  
Philadelphia, Pennsylvania  
(For City of Philadelphia)

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APPEARANCES CONTINUED:

HERBERT G. ZAHN, ESQ.  
Assistant Attorney General  
522 Transportation & Safety Building  
Harrisburg, Pennsylvania 17120  
(For PennDOT)

JOEL E. MAZOR, ESQ.  
1138 Six Penn Center Plaza  
Philadelphia, Pennsylvania 19104  
(For Conrail)

EDWARD H. HUSS, ESQ.  
Ninth and Sansom Streets, Room 500  
Philadelphia, Pennsylvania 19007  
(For Septa)

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1 JUDGE PALLASTRONE: We will open the hearing  
2 on A-0098061.

3 Mr. Smolen, do you have an opening statement  
4 on that matter?

5 MR. SMOLEN: If Your Honor please, this  
6 hearing is as a result of the Public Utility  
7 Commission grant of a City petition for modifica-  
8 tion, rescission and rehearing of the Commission  
9 Order adopted May 29, 1980 and entered June 19,  
10 1980 in Docket 98061. The City requested further  
11 hearing and modification and rescission of so much  
12 of the Order of May 29th, entered June 19th, so  
13 much of that Order which designates Elmwood Avenue  
14 and the bridge as being a City street.

15 In our petition for modification which the  
16 Commission granted, we point out that Elmwood  
17 Avenue and the bridge is on the State Highway System  
18 under Act 615. And I have --

19 JUDGE PALLASTRONE: Being designated --

20 MR. SMOLEN: Under various sections of the  
21 Act 36, Purdon's 1758 et seq. -- and there are a  
22 number of sections there -- all this is spelled  
23 out in my petition for modification. So we ask  
24 the Commission to give us further hearings on that  
25 question.

1                   And on the issue, since it is on the State  
2 Highway System, who should bear the responsibility  
3 for maintenance of the substructure, superstruc-  
4 ture and approaches of the bridge, the Commission  
5 having been under the misapprehension at that time  
6 that it was a City street, that is the purpose for  
7 this hearing.

8                   Our position, that is the position of the City,  
9 is that Elmwood Avenue and the bridge is a State  
10 Highway and that under the provision of the Act,  
11 that the Pennsylvania Department of Transportation  
12 and/or the Commonwealth of Pennsylvania has the  
13 duty to maintain the bridge and the approaches and  
14 that the City should have no responsibility with  
15 respect thereto. That is the position of the  
16 City which was set forth in the petition for  
17 modification and for rehearing and that is why we  
18 are having this hearing.

19                   Mr. Zahn in his answer or his reply to the  
20 petition in Paragraph 6 admits that Elmwood Avenue  
21 is a State Highway, but takes the further position  
22 that the Commonwealth has no responsibility to  
23 maintain the structure except the base or  
24 surface courses. Now, again --

25                   MR. ZAHN: And the approaches.

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MR. SMOLEN: And the approaches.

JUDGE PALLASTRONE: Well, your answer is in the record and it speaks for itself, Mr. Zahn.

MR. ZAHN: And I will stipulate for this record that this Elmwood Avenue is a State Highway and that the Department has the responsibility for the approaches to the bridge.

We take the position that we have no responsibility for the maintenance because of the fact that the City has acquired the line beneath the bridge and that is within the PUC's jurisdiction to determine maintenance.

We further ask that until the issue is decided at Application 00102085, if Federal funding is or is not available, that until that time, the City continue to have the responsibility to maintain the substructure and superstructure of the bridge and that we defer the permanent allocation of maintenance until we know what the situation is at the other docket.

MR. SMOLEN: If Your Honor please, I want to go back just to backstep for a moment. In the Commonwealth's answer to my petition, it says, although Elmwood Avenue is a State Highway, the Commonwealth has no responsibility to maintain the

1 structure except the base or surface courses and  
2 Mr. Zahn has added, now, the approaches.

3 MR. ZAHN: Yes.

4 MR. SMOLEN: So that it would appear that at  
5 the minimum at this point, PennDOT has stated or  
6 admitted that they have responsibility for the  
7 base or surface course and the approaches.

8 MR. ZAHN: I will agree to that.

9 MR. SMOLEN: He stated that in their answer  
10 and today.

11 Now, that is okay as far as it goes. But  
12 my position is the one step farther to say that  
13 whatever balance of maintenance responsibility there  
14 may be with respect to the Elmwood Avenue Bridge  
15 also should be upon the State in addition to  
16 these things which they have now admitted, namely  
17 a base surface and the approaches. And we want to  
18 have a determination of that not being delayed or  
19 deferred because if there is -- again, in the  
20 other proceeding -- no Federal funding available,  
21 this is an important matter as to who maintains  
22 it now for this period of time until it is  
23 determined whether Federal funding would be  
24 available.

25 One other point before I forget. Mr. Zahn

1 raised a question as to the City having acquired  
2 the title to the line below the bridge. We are  
3 not talking about the bridge, itself. We are  
4 talking about the right-of-way below the bridge,  
5 having acquired the title to that.

6 I want to state of record that the City did  
7 acquire title to that by way of a Quick Claim Deed  
8 from the previous owner and I would like to have  
9 the right to submit that deed if I deem it  
10 desirable --

11 MR. ZAHN: I think it is.

12 MR. SMOLEN: -- in the case, to show that by  
13 Quick Claim, if I want to put that in.

14 MR. ZAHN: I do not know that that deed shows  
15 that by the transfer of the line of railroad that  
16 all the appurtenances and other facilities owned  
17 by Conrail were also transferred, which is a big  
18 problem in other cases.

19 We claim that bridges over the railroad built  
20 by the railroad were owned by the railroad and  
21 Conrail acquired it from the prior railroad and  
22 they had the responsibility.

23 JUDGE PALLASTRONE: I know what your position  
24 is, Mr. Zahn.

25 MR. SMOLEN: I have to interrupt, again. It

1 is by way of argument just so that the position is  
2 clear. And I stated it --

3 JUDGE PALLASTRONE: That is his position, Mr.  
4 Smolen.

5 MR. SMOLEN: I mean, about the point that  
6 there's a legislative enactment placing it on the  
7 State Highway and placing maintenance responsibility  
8 on the PennDOT. And if, in fact, the railroad  
9 predecessor or the Conrail or its predecessor  
10 did maintain it after it became a State Highway,  
11 that may very well have been. They may very well  
12 have been volunteered.

13 MR. MAZOR: I assure you the railroad never  
14 volunteered to do anything.

15 MR. SMOLEN: That is argument, I know.

16 JUDGE PALLASTRONE: The reason why this case  
17 came back to me or came back to anyone is because  
18 of the petition filed.

19 I think that what you should have done and  
20 what, I think, you still can do -- this is a  
21 matter of legal interpretation, whether, in fact,  
22 you are responsible or PennDOT is responsible.  
23 I think what you should do, you should have  
24 addressed this petition to the Commission. And in  
25 the body of your petition, you should have

1 requested oral argument. Because this is not a  
2 factual determination where I have to gather facts.  
3 This is a legal determination as to whether, in  
4 fact, you are responsible or PennDOT is responsible.

5 Now, the way the Commission should have  
6 resolved that and the way you should have asked  
7 them to resolve that is to file your petition and  
8 request that briefs be submitted and have oral  
9 argument the way it used to be under the old  
10 Examiner's system.

11 And I suggest to you now, that rather than we  
12 have this record, I think what you should do is  
13 resubmit to the Commission, based on what we have  
14 in the record here, an application for oral argu-  
15 ment and file a brief.

16 MR. ZAHN: Your Honor, I do not think oral  
17 argument is necessary if we file briefs.

18 MR. SMOLEN: I was going to say that the issue  
19 of maintenance never really came up, the issue of  
20 maintenance of the bridge never came up at the  
21 hearing -- at the underlying hearing in this  
22 matter. The underlying hearing merely involved  
23 putting up protective barriers and some work  
24 underneath.

25 MR. MAZOR: The Order of the Commission was

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gratuitous in that respect.

JUDGE PALLASTRONE: I think what you should have done in this petition that you addressed for rescission or modification of the Commission's Order of May 29, 1980 is request that you be permitted to file briefs and/or oral argument concerning that issue which was not covered, because there really is no testimony here.

MR. SMOLEN: But there was no testimony in the underlying case as to whether it was a State Highway or a City street. There was no such testimony.

The record was reopened to allow that to come in. We have now put that in by my stipulation.

I had a problem on possibly having to file an appeal if they did not grant. So that is why I had to file this petition for a rehearing.

JUDGE PALLASTRONE: Mr. Smolen, I think that you could have accomplished that by merely addressing that petition to the Commission and asking that that issue be decided based on some oral argument or a brief.

MR. SMOLEN: I am willing to submit a brief now. But I think the record was not complete in that it did not appear of record that it was a

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State Highway.

JUDGE PALLASTRONE: The record is complete now. You have stated your position. The answer of PennDOT indicates that it is a State Highway, except that even though it is a State Highway, by their legal interpretations, they have no responsibility other than that which is contained in their answer. Your position is different.

MR. ZAHN: I would like the record to indicate that it is PennDOT's position that this petition should be disallowed because all of these facts could have been produced at the original hearing. They are not producing any new facts at the present hearing and, therefore, the old Order should stand.

JUDGE PALLASTRONE: You are making a motion to dismiss this petition?

MR. ZAHN: Yes.

JUDGE PALLASTRONE: I deny it.

Now, I am going to also mark down the briefs that you are going to be filing.

MR. SMOLEN: And this Quick Claim Deed.

JUDGE PALLASTRONE: You can submit that as an exhibit in your brief.

MR. SMOLEN: As an attachment to the deed, an

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exhibit to the brief.

JUDGE PALLASTRONE: The brief.

MR. SMOLEN: All right. I just do not want an argument raised that it is not a matter of record.

MR. ZAHN: Off the record.

(Discussion held off the record.)

JUDGE PALLASTRONE: I will place on the record that briefs are to be submitted within 60 days of receipt of the notes of testimony.

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(Thereupon, at 12:30 p.m., the hearing in the above-entitled matter was closed.)

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C E R T I F I C A T I O N

I HEREBY CERTIFY that the proceedings  
and evidence are contained fully and accurately in  
the stenographic notes taken by me upon the foregoing  
matter on Wednesday, October 8, 1980, and that  
this is a correct transcript of same.

Cheryl Benoff

Registered Professional Reporter  
and Notary Public

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CHERYL BENOFF, Notary Public  
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My Commission Expires Oct. 24, 1983