

**COMMOWEALTH OF PENNSYLVANIA
PUBLIC UTILITY COMMISSION**

BLACKWOOD, INC.	:	
	:	
v.	:	Docket Nos.
	:	C-20078010 and A-20082016324
READING, BLUE MOUNTAIN AND NORTHERN RAILROAD COMPANY	:	
	:	
	:	Judge F. Joseph Brady

**READING, BLUE MOUNTAIN AND NORTHERN
RAILROAD COMPANY’S REPLY TO THE
EXCEPTIONS TO THE RECOMMENDED
DECISION FILED BY BLACKWOOD, INC.**

Petitioner-Respondent, Reading, Blue Mountain and Northern Railroad Company (the “Railroad” or “RBMN”), by and through its undersigned counsel, hereby submits its Reply to the Exceptions to the recommended decision of Administrative Law Judge F. Joseph Brady (the “ALJ”) filed by Complainant-Respondent Blackwood, Inc. (“Blackwood”).

I. The Commission Should Deny Blackwood’s Exceptions And Adopt The Recommendations Of The ALJ.

A. Legal Standards.

As the party seeking affirmative relief from the Commission, the complainant in a formal complaint proceeding has the burden of proof. 66 Pa. C.S. § 332(a). The evidence necessary to meet that burden must be substantial. 2 Pa. C.S. § 704.

“Substantial evidence” is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. Consolidated Edison Company of New York v. National Labor Relations Board, 305 U.S. 197, 229, 59 S. Ct. 206, 217 (1938). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk & Western Ry. Co. v. Pa. PUC, 489 Pa. 109, 413 A.2d 1037 (1980).

To establish a sufficient case and satisfy the burden of proof, the Complainant must show that the respondent utility is responsible or accountable for the problem described in the Complaint. Patterson v. The Bell Telephone Company of Pennsylvania, 72 Pa. P.U.C. 196 (1990). The offense must be a violation of the Public Utility Code (Code), a Commission Regulation or Order or a violation of a Commission-approved tariff. 66 Pa. C.S. § 701. Such a showing must be by a “preponderance of the evidence.” Samuel J. Lansberry, Inc. v. Pa. PUC, 578 A.2d 600 (Pa. Cmwlth. 1990), alloc. denied, 529 Pa. 654, 602 A.2d 863 (1992). That is, the Complainant’s evidence must be more convincing, by even the smallest amount, than that presented by the respondent. Se-Ling Hosiery, Inc. v. Margulies, 364 Pa. 45, 70 A.2d 854 (1950).

The burden of proof is comprised of two distinct burdens: (1) the burden of production; and (2) the burden of persuasion. Hurley v. Hurley, 2000 Pa. Super. 178, 754 A.2d 1283 (2000). The burden of production, also called the burden of going

forward with the evidence, determines which party must come forward with evidence to support a particular claim or defense. Scott and Linda Moore v. National Fuel Gas Distribution, Docket No. C-2014-2458555 (Initial Decision issued May 11, 2015) (Moore). The burden of production goes to the legal sufficiency of a party's claim or affirmative defense. See Id. It may shift between the parties during a hearing. A complainant may establish a prima facie case with circumstantial evidence. See Milkie v. Pa. PUC, 768 A.2d 1217, 1220 (Pa. Cmwlth. 2001) (Milkie). If a complainant introduces sufficient evidence to establish legal sufficiency of the claim, also called a prima facie case, the burden of production shifts to the utility to rebut the complainant's evidence. See Moore.

If the utility introduces evidence sufficient to balance the evidence introduced by the complainant, that is, evidence of co-equal value or weight, the complainant's burden of proof has not been satisfied and the burden of going forward with the evidence shifts back to the complainant, who must provide some additional evidence favorable to the complainant's claim. See Milkie, 768 A.2d at 1220; see also, Burleson v. Pa. PUC, 443 A.2d 1373 (Pa. Cmwlth. 1982), aff'd, 501 Pa. 433, 461 A.2d 1234 (1983).

Having produced sufficient evidence to establish legal sufficiency of a claim, the party with the burden of proof must also carry the burden of persuasion to be entitled to a favorable ruling. See Moore. While the burden of production may shift

back and forth during a proceeding, the burden of persuasion never shifts; it always remains on a complainant as the party seeking affirmative relief from the Commission. See Milkie, 768 A.2d at 1220; see also Riedel v. County of Allegheny, 633 A.2d 1325, 1328, n. 11 (Pa. Cmwlth. 1993); see also Burleson, 443 A.2d at 1375. It is entirely possible for a party to carry the burden of production but not be entitled to a favorable ruling because the party did not carry the burden of persuasion. See Moore. In determining whether a complainant has met the burden of persuasion, the fact-finder may engage in determinations of credibility, may accept or reject testimony of any witness in whole or in part, and may accept or reject inferences from the evidence. See Moore, citing Suber v. Pa. Comm'n on Crime and Delinquency, 885 A.2d 678 (Pa. Cmwlth. 2005), appeal denied, 586 Pa. 776, 895 A.2d 1264 (2006).

A. Reply to Exception No. 1: The ALJ correctly found that the physical infrastructure of the Crossing was removed by an unknown actor prior to RBMN's purchase of the railroad tracks in 1990. (Recommended Decision, p. 9, Finding of Fact No. 11.

Blackwood argues that “[t]here was no evidence or even a mere accusation made by RBMN to suggest an unknown actor removed any part of the Crossing prior to 1990. See Exceptions at p. 2.

To the contrary, the evidence of record is replete with unrebutted testimony that the subject Crossing was physically non-existent before RBMN purchased this

railroad from Conrail in 1990. RBMN Vice-President of Operations Tyler Glass (“Mr. Glass”) testified that from 1990 (when RBMN purchased the railroad from Conrail) through 1998, he travelled the rail line that passed through the former Blackwood Road section approximately twelve (12) times a year. See 2008 N.T. 402:20-405:15. Beginning in 1990, upon RBMN’s purchase of the subject rail line, Mr. Glass witnessed no indication whatsoever of the presence of a crossing at the area formerly known as Blackwood Road. Id. at 404:3-25. Mr. Glass did not see any crossbucks or any built-up approach to the rail line. Id. Mr. Glass did not see any concrete between the rails, or any blacktop or macadam between the rails. Id. Mr. Glass did not see any flangeways or ties laid perpendicular to the ties to support the rails. Id. Mr. Glass did not see anything that would ease the passage of a vehicle over the rails. Id. Later, in 1991, Mr. Glass observed dirt and mud that had washed down onto the tracks in this area. Id.

Likewise, RBMN Assistant Vice-President in Charge of Field Maintenance Duane Engle (“Mr. Engle”) testified he saw no evidence of any crossing when he conducted an inspection of rail line upon RBMN acquiring the line from Conrail in 1990. See N.T. 2008, 424:14-17.

Robert Butensky, Chairman of the Board of Supervisors of Reilly Township, also testified that he has lived in the Township for seventy-two (72) years and that he his familiar with the area formerly known as Blackwood Road. See 2025 N.T. at

580. Mr. Butensky testified that he recalled the Crossing having “crossbars,” but the last time he saw the crossbars for a Crossing was in approximately 1983. Id.

It is disingenuous to argue that there is “no evidence” that the physical Crossing was removed prior to RBMN’s purchase of the subject rail line in 1990. It is even more disingenuous to further argue that “[t]he evidence substantially demonstrates that RBMN most likely removed the infrastructure [of the Crossing]. See Exceptions at p. 2. Not surprisingly, Blackwood fails to cite any evidence to support this inflammatory allegation. Id.

Further, Blackwood attempts to argue that RBMN knew that the Crossing was being used, that RBMN performed maintenance and construction in the same area where the Crossing once existed, and that RBMN created a berm on each side of the Crossing to prevent crossings. See Exceptions at p. 2. Again, Blackwood ignores the evidence of record. The record is clear that there is no evidence that the public is using the subject Crossing. Mr. Engle testified he observed ATV tracks near the crossing but never saw ATVs or other vehicles cross. See 2008 N.T., 352:5-353:25. Mr. Glass testified that in his [then-]17 years at RBMN, he never observed vehicles cross the track and only observed one (1) ATV cross. Id. at 408:3-18. In its current state, it is effectively impassable by any vehicle without clearcutting trees and removing large rocks. See RBMN Exhibits 8A-8G; 2008 N.T., 68:3-11, 108:15-22.

Moreover, the only work performed by RBMN in the area of the subject crossing was -- from time-to-time -- the removal of erosion (dirt and mud) off the rails of the railroad and create berms to prevent water runoff going into the railroad. Id. at 328:1-25, 329:1-2, 340:10-13. When RBMN purchased the property, there was no evidence the area was being used as railroad crossing. Id. at 337:1-3, 350:4-6, 370:9-25, 371:1-4.

Additionally, Blackwood states if the Crossing was physically removed by an “unknown actor,” then it was “RBMN’s responsibility to either maintain the Crossing or properly abolish the Crossing with PUC approval.” See Exceptions at p. 3. Blackwood fails to cite any legal authority to support such argument. Id. Although RBMN did not remove the physical infrastructure of the Crossing, it also was not at liberty to reconstruct the crossing. Reconstruction of the crossing would have required application and approval by this Commission. See 66 Pa.C.S. § 2702(a), (c).

Further, Blackwood confusingly argues that “RBMN’s actions constitute improper actions and abolishing acts that circumvented PUC authority.” See Exceptions at p. 3. Blackwood, again, fails to describe what actions constitute “improper actions” by RBMN, and Blackwood fails to describe the “abolishing acts” of a Crossing that was physically non-existent prior to the purchase of the subject rail line by RBMN. Id.

Blackwood does not cite to any evidence of record that RBMN engaged in “abolishing acts” of the subject Crossing because it cannot. See Exceptions, generally. No such evidence exists. See record, generally. This is highlighted by the undisputed fact that when Blackwood purchased its property in 1999, the physical infrastructure of Crossing #592007F was already removed by an unknown actor. See 2008 N.T., 42-43 (Blackwood President Nolan Perin (“Mr. Perin”) testifying that before he purchased the property, he could not cross the subject railroad tracks because “there was nothing there[,] and there were no crossing mechanisms, no rubber installations or concrete to drive over, and the railroad ties were nine (9) inches above the ground). T-567, in its entire existence, has never been a paved road, rather “it’s basically dirt” and “dirt north and south” of the purported crossing. See 2008 N.T., 59-60, 65.

In light of the clear and un-rebutted evidence, the ALJ correctly found that the physical infrastructure of the Crossing was removed by an unknown actor prior to RBMN’s purchase of the railroad tracks in 1990, and thus, Blackwood’s Exception No. 1 should be denied.

B. Reply to Exception No. 2: The ALJ correctly found that the portion of T-567/Blackwood Road encompassing the Crossing was vacated on May 7, 1946, pursuant to an Order of the Court of Common Pleas of Schuylkill County. (Recommended Decision, p. 9, Finding of Fact No. 13).

The ALJ correctly found that the portion of T-567/Blackwood Road encompassing the Crossing was vacated on May 7, 1946, pursuant to an Order of the Court of Common Pleas of Schuylkill County. See Recommended Decision at p. 9, Paragraph 13, citing 2025 N.T. 553-556; Township Exs. 2,4.

C. Reply to Exception No. 3: The ALJ correctly found that Reilly Township enacted an ordinance vacating the entirety of T-567/Blackwood Road on June 23, 1992. (Recommended Decision, p. 9, Finding of Fact No. 14.)

The ALJ correctly found that the Township enacted an ordinance purporting to vacate the entirety of T-567/Blackwood Road on June 23, 1992. See 2008 N.T., 466-468; Township Ex. 4; Township Cross Ex. 1.

Blackwood oddly argues that “[t]here was no evidence presented by any party that T-567 was vacated by the Township.” See Exceptions at p. 4. Although Blackwood concedes that the Township presented its 1992 ordinance vacating Blackwood Road into the record here, it argues that “the Township never confirmed that T-567 was properly vacated by its actions.” *Id.* Blackwood, however, fails to cite any legal authority for the proposition that a municipality must “confirm” its vacation of a road. See Exceptions, generally. Additionally, Blackwood simply ignores that the Township, through its legal representative in this matter, has represented that the entirety of Blackwood Road was – in fact – vacated pursuant to the 1992 ordinance. See Township Ex. 4; Township Cross Ex. 1; RBMN Cross Ex. 10 (1992 Township Ordinance vacating T-567 by omission; RBMN Cross Ex. 15

(2008 General Highway Map for Schuylkill County showing that T-567 or Blackwood Road is no longer listed as a Township Road); see also 2008 N.T., 466-467.

D. Reply to Exception No. 4: The ALJ correctly found that the portion of T-567/Blackwood Road encompassing the Crossing is not maintained for general public use and is impassible on both sides of the Crossing. (Recommended Decision, p. 9, Finding of Fact No. 15).

The ALJ correctly found that the portion of T-567/Blackwood Road encompassing the Crossing is not maintained for general public use and is impassible on both sides of the Crossing. See 2008 N.T., 62, 68, 85, 108, 627-629; RBMN Exs. 8A-8G; RBMN Cross Ex. 14 (1990 General Highway Map for Schuylkill County showing that T-567/Blackwood Road is an impassible road). The record is replete with evidence of the same.

In support of its argument here, Blackwood apparently faults the ALJ for relying upon the 1990 General Highway Map showing that T-567/Blackwood Road is an impassible road. See Exceptions at p. 5. Blackwood, however, simply ignores the fact that Mr. Perin testified that when it purchased the subject property in 1999, he could not cross the subject railroad tracks because “there was nothing there[,] and there were no crossing mechanisms, no rubber installations or concrete to drive over, and the railroad ties were nine (9) inches above the ground. See 2008 N.T. 42-43.

T-567, in its entire existence, has never been a paved road, rather “it’s basically dirt” and “dirt north and south” of the purported crossing. See 2008 N.T., 59-60, 65.

Additionally, Blackwood loosely claims that RBMN “stated vehicles were travelling over the Crossing. See Exceptions at p. 5 (citing 2008 N.T., 371-373). A review of the cited record, however, reveals that an RBMN employee – Mr. Engle – testified that he witnessed an ATV cross the railroad on one (1) occasion. See 2008, N.T., 371.

Although Blackwood concedes that “T-567 is in poor condition,” it accuses RBMN of causing these conditions because of RBMN’s “illegal abolishment of the Crossing coupled with the Township’s invalid attempt to vacate the road.” See Exceptions at p. 6. Once again, Blackwood fails to cite to any evidence of record – or any legal authority – to support its outrageous claims. Id. Blackwood again claims RBMN committed “abolishing acts” without any citation to “who, what, when or where” regarding such purported acts of RBMN. Id.

E. Reply to Exceptions Nos. 5 and 6: The ALJ did not misinterpret the precise nature of the dispute, nor did the ALJ rule arbitrarily or capriciously. (Recommended Decision, pp. 16-17).

The ALJ did not misinterpret the nature of the dispute, nor did the ALJ rule arbitrarily or capriciously. In its Exceptions in support of its claim that the ALJ misinterpreted the nature of the dispute, Blackwood argues that “the Crossing existed and RBMN abolished it without PUC authority. Had RBMN properly gone

through the PUC to abolish the Crossing when it was removed, it would not have succeeded because there was no evidence presented demonstrating the need for the abolishment at the time of the [purported] illegal abolishment.” See Exceptions at p. 7.

Regardless of the speculative nature of Blackwood’s argument, the ALJ did in fact summarize and analyze Blackwood’s position nearly word-for-word. See Recommended Decision at pp. 10, 16 (The crux of Blackwood’s argument is that the Crossing existed in the past as a public crossing, and was abolished without Commission approval, RBMN should be held responsible to reconstruct the Crossing today...Blackwood argues that the Commission would have denied approval of the abolishment had such approval been sought at the time the Crossing was abolished.).

In considering Blackwood’s argument, the ALJ correctly found that “Blackwood provided very limited evidence of any benefits the public would enjoy today if the Crossing was constructed.” See Recommended Decision at pp. 16-17. The legitimacy of the ALJ’s finding is further supported by the fact that Blackwood fails to cite to any evidence of record in its instant Exceptions that the public would benefit if the Crossing were reconstructed today. See Exceptions at pp. 7-9. Blackwood does not, because it cannot.

In further support of its argument, Blackwood claims that if it had “known the ALJ would only look at circumstances surrounding the Crossing in the present, or over thirty years later, Blackwood would have objected to staying the proceeding for almost twenty years.” See Exceptions at p. 8. Notwithstanding the fact that Blackwood moved to stay the proceedings in 2008, see Recommended Decision at p. 5, there were two (2) full days of testimony in this matter in 2008. Id. On the second day of hearings, Blackwood rested its case. See 2008 N.T., 365. The evidence of record from approximately seventeen (17) years ago in 2008 – as well as the testimony in 2025 – is devoid of any facts that the subject Crossing would serve a public purpose. See 2008 N.T., generally. Moreover, the ALJ’s decision was based upon the entirety of the record, which included testimony about the subject property beginning in the 1940’s through the present day. See Recommended Decision at pp. 8-9.

Further, Blackwood argues that “people who would have used the road and the Crossing adapted to the change in circumstances over all those years.” See Exceptions at p. 9. Blackwood’s argument makes claims that are simply fantasy and not of record. See record, generally. In fact, the evidence of record is that Blackwood Road previously existed to service the now extinct Village of Blackwood, but “there’s nothing there anymore except a couple of building

remnants.” See N.T. 2008, 44, 454:2-6 (the Village of Blackwood ceased to exist in the 1950’s and all of those houses are gone).

Moreover, the ALJ correctly concluded that Blackwood did not provide any legal authority to support its position the Crossing should be reconstructed today simply because it existed in the past. See Recommended Decision at p. 16. This was not an arbitrary finding made by the ALJ. Id. Rather, the ALJ soundly based the recommended decision on applicable case law, wherein the Commission analyzed current facts and circumstances in deciding whether the crossing was necessary and proper for the service, accommodation, convenience, or safety of the public. Id. Contrary to the claims made by Blackwood, the ALJ did not “create his own precedent.” See Exceptions at p. 9.

F. Reply to Exception No. 7: The ALJ correctly found that RBMN satisfied its burden of proof that it is in the public interest to abolish the subject Crossing. (Recommended Decision, p. 19).

For the reasons outlined in RBMN’s post-hearing brief, as well for the reasons outlined in the Recommended Decision, the ALJ correctly found that RBMN satisfied its burden of proof that it is in the public interest to abolish the subject Crossing. In its Exception No. 7, Blackwood’s sole issue is that “[i]n regard to economic feasibility, there is nothing in the record about the cost to reconstruct the Crossing.” See Exceptions at p. 12. Blackwood’s understanding of the standard when considering an application to abolish a crossing is mistaken. “Factors to be

considered in applying this standard include traffic congestion, access for emergency responders, any impact on businesses, and the economic feasibility of the proposed change.” Pennsylvania PUC v. Borough of Souderton, 231 A.2d 875 (Pa. Super. 1967). Thus, the economic feasibility of the proposed change is just one of several factors to be considered. Id.

B. Conclusion.

For any or all of the foregoing reasons, Reading, Blue Mountain and Northern Railroad respectfully requests that the Public Utility Commission dismiss Blackwood, Inc.’s Exceptions to the Recommended Decision of Administrative Law Judge F. Joseph Brady dated January 6, 2026, in their entirety and enter an Order adopting the Recommended Decision as final.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Matthew J. Carmody, hereby certify that I have caused to be served this day a true and correct copy of the foregoing Reply to the Exceptions to the recommended decision of Administrative Law Judge F. Joseph Brady via email as follows:

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DATE: January 16, 2026