

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Reading, Blue Mountain and Northern Railroad Company, :
Petitioner :
v. :
Pennsylvania Public Utility :
Commission, : No. 2168 C.D. 2009
Respondent : Submitted: April 30, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: July 23, 2010

Reading Blue Mountain and Northern Railroad Company (Railroad) petition for review from an order of the Pennsylvania Public Utility Commission's (PUC's) denial of the Railroad's request for reconsideration.

On August 1, 2008, the Railroad petitioned for reconsideration¹ and alleged:

1. On February 14, 2008, Secretary James J. McNulty adopted and approved the recommended decision of Administrative Law Judge Ember S. Jandebour issued in this matter, dated November 18, 2007.
2. The provisions of that Order required that . . . [the Railroad] replace 171 feet of retaining wall along its right-of-way in the approach to the Susquehanna Street

¹ The Railroad filed a Petition to Reopen the Record or in the Alternative Grant Leave to File an Appeal Nunc Pro Tunc. The PUC considered the petition as a request for reconsideration because a final order was entered in the present matter.

Bridge in White Haven Borough, Schuylkill County, Pennsylvania.

3. Said Order provided that the work was to be completed within one year of the date of the Order.

4. . . . [Railroad] believes and therefore avers that there are substantive and procedural errors with respect to the decision of the administrative law judge and the subsequent adoption of that determination by the Commission [PUC].

5. Your Petitioner's [Railroad] current counsel, Paul R. Ober, Esquire of Paul R. Ober & Associates, was not counsel of record at the time of these proceedings.

6. Gregory F. Lepore, Esquire, formerly of Holl & Associates, originally entered his appearance in this matter.

7. Attorney Lepore originally listed his address as 450 East Main Street, Lansdale, PA 19446

8. Beginning at least by November 28, 2007, Attorney Lepore's address, as reflected in filings with the Commission [PUC], changed to 1860 Geryville Pike, Pennsburg, PA 18037, which address he utilized in all subsequent filings with the Commission [PUC] (emphasis in original).

9. New counsel was retained by Petitioner [Railroad] for the preparation and filing of Exceptions to the Recommended Decision of Administrative Law Judge Jandebaur; to wit: Renardo Hicks, Esquire, of Stevens & Lee, 17 North Second Street, 16th Floor, Harrisburg, PA 17101.

10. Attorney Hicks of Stevens & Lee entered his appearance on December 10, 2007

11. The service list utilized by the PUC and, Petitioner [Railroad] believes and therefore avers, all other parties to the within action included not only Attorney Lepore,

but . . . [the] Railroad and Wesley Westenhoefer, Vice President of the . . . Railroad

12. Despite the inclusion of . . . Westenhoefer . . . despite the inclusion of the . . . Railroad . . . despite the Entry of Appearance of Renardo Hicks . . . and despite the address utilized by Greg Lepore . . . in Pennsburg, PA since at least November 28, 2007, service of the within Order was made on none of them (emphasis in original).

. . . .
25. Up to and including the date of the filing of this Petition, no attorney for the . . . [Railroad] nor the . . . Railroad has ever been served.

26. The Secretary to the . . . [PUC] failed abjectly in meeting the requirements of the Commission's [PUC] own rules, the Pennsylvania Rules of Civil Procedure, its traditional practice and common courtesy.

27. There is no justification for the Commission [PUC] to have:

a) Failed to serve the most recent attorney of record (Renardo Hicks, Esquire of Stevens & Lee);

b) Failed to serve the prior attorney of record at his most recent address as it appears in the Commission's [PUC's] own records (Gregory Lepore, Esquire at his Pennsburg, PA address);

c) Failed to serve the Railroad itself;

d) Failed to serve Wesley Westenhoefer, Vice President of the Railroad.

28. As a consequence of the Commission's [PUC's] failure to properly serve, Notice of the Entry of the Order was not timely given, and, in fact, has never been given.

29. Because service has not yet occurred, the statutory period of thirty (30) days has not yet begun to run.

30. Even if the alleged mailing of a copy of the Order to Attorney Lepore's prior address might satisfy service requirements (which Petitioner [Railroad] vehemently denies) both equity and good conscience require that Petitioner [Railroad] be granted leave to file an appeal from the Order *Nunc Pro Tunc* because of administrative breakdown.

Petition to Reopen the Record or in the Alternative Grant Leave to File an Appeal *Nunc Pro Tunc*, August 1, 2008, Paragraphs 1-12 and 25-30 at 1-3 and 5; Certified Record (C.R.).

The PUC denied the Railroad's request for reconsideration and concluded:

Before the Commission for disposition is a Petition for Reconsideration . . . relative to the above-captioned proceeding. On August 15, 2008, White Haven Borough (Borough) filed a Reply to the Petition.

. . . .

The history of this proceeding dates back to September 18, 2000, when the Borough [White Haven Borough] filed a formal complaint against the Railroad concerning two specific areas along the Railroad's tracks. One of the areas involved the railroad trestle bridge at Susquehanna Street and the associated retaining walls.

After hearings, the Recommended Decision of ALJ Richard Lovenwirth was issued on October 10, 2001. By opinion and Order entered February 8, 2002, the Commission, *inter alia*, sustained the Complaint relative to the Susquehanna Street below-grade crossing and associated retaining walls.

. . . .

The Railroad employed an engineer, Mr. Timothy S. Benner, P.E., to inspect the retaining wall and to make recommendations as to how to maintain the integrity of the wall during its remaining service life. The engineer's report (the Benner Report), dated June 24, 2004, was provided to the Railroad and to the other Parties of

record. The Benner report indicated that the retaining wall was decrepit and in need of repair and/or replacement.

When efforts to resolve the issues proved unsuccessful, the Commission's [PUC] Law Bureau Prosecutory Staff (Prosecutory Staff), on behalf of the Bureau of Transportation and Safety (BTS), submitted a Letter to ALJ Jandebaur which averred that the Railroad had failed to make the necessary repairs in order to comply with the Commission's order. The Letter also recommended that a hearing be scheduled.

On October 18, 2006, a hearing was held attended by the Borough, Prosecutory Staff, PennDot, and the Railroad. PennDot was subsequently released from this proceeding with respect to the issues related to the retaining wall. Tr. at 103.

At the hearing . . . [t]he Borough and Prosecutory Staff agreed that the recommendations contained in the Benner Report had not been implemented and the Railroad should immediately undertake to do the recommended work. The Railroad took the position that the retaining wall is sufficient as it stands and that continued monitoring is all that is necessary. (emphasis added).

In her Recommended Decision, issued on November 8, 2007, the ALJ concluded, *inter alia*, that within six months of the Commission's order herein, the Railroad should prepare complete and detailed construction plans for replacement of the retaining wall and that the Railroad should thereafter, be directed to do the necessary work at its sole cost and expense (emphasis added).

By Order entered . . . on February 19, 2008, the Commission, *inter alia*, adopted the Recommended Decision of ALJ Jandebaur, as modified, and denied the Railroad's Exceptions The Railroad filed the instant Petition on August 1, 2008 (emphasis added).

.....

Our Order entered February 19, 2008, included Ordering Paragraphs No. 4, as follows:

4. That Reading Blue Mountain & Northern Railroad Company shall, at its sole cost and expense, replace 171' retaining wall approaching Susquehanna Street Bridge, in White Haven Borough, Pennsylvania. That work on the retaining wall shall be completed within one (1) year of the date of entry of the instant Opinion and Order.

Opinion and Order at 8.

We note that the Railroad's current counsel entered his appearance on behalf of the Railroad on or about July 30, 2008. The instant Petition was filed on August 1, 2008.

We also note that, per the terms of our Order entered herein on February 19, 2008, the pertinent work was to be completed by February 19, 2009. (emphasis added).

....

The Railroad also asserted that procedural errors were committed in the service of the February 19 Order. On review of that assertion, we conclude that the Order was properly served upon the Railroad, and that the statutory period of thirty days has lapsed. Specifically, we note that Mr. Gregory F. Lepore, Esquire, entered his appearance for the Railroad on September 14, 2005, and noted that all service on and communications to the Railroad in this proceeding should be directed to him at his address in Landsdale, Pennsylvania. Although subsequent filings with the Commission listed a different address for Mr. Lepore, he never directed the Commission to redirect its communications to the Railroad to that address. The Railroad, through its attorneys, failed to follow Pennsylvania's Rules of Civil Procedure by duly withdrawing the appearances of its former attorneys when new counsel was obtained and became counsel of record. (emphasis added).

Accordingly, we find no basis on which to grant reconsideration in this proceeding. Additionally, we note that the work at issue herein was originally scheduled to be completed by February 19, 2009, per the terms of our

Order entered on February 19, 2008 We will therefore direct the Railroad to expeditiously complete the relevant work by August 31, 2009, or face the risks of sanctions, pursuant to Section 3301 of the Public Utility Code, 66 Pa. C.S. § 3301. (emphasis added).

Opinion and Order of the PUC, April 30, 2009, at 2-6.

I. Was The PUC’s Denial Of The Railroad’s Request For Reconsideration An Abuse Of Discretion?

A. Whether The PUC Failed To Properly Serve The Railroad’s Counsel of Record?

Initially, the Railroad contends² that the PUC abused its discretion when it improperly served the Railroad’s counsel of record concerning its February 19, 2008, order. Specifically, the Railroad asserts that the PUC “sought to serve a defunct law firm at a different address” instead of the address of current counsel, Renardo Hicks. Amended Brief of the Railroad at 15 (emphasis in original). The Railroad states that because of the PUC’s error it was denied due process.

52 Pa. Code § 124. (**Notice of appearance or withdrawal**) provides:

(b) *Attorneys.*

(1) *Appearance by initial pleading.* An attorney who signs an initial pleading in a representative capacity shall be considered to have entered an appearance in that proceeding. (emphasis added).

² This Court’s review of a decision to either grant or deny a request for reconsideration is whether the agency committed an abuse of discretion. Georgia-Pacific v. Unemployment Compensation Board of Review, 630 A.2d 948 (Pa. Cmwlth. 1993). “An abuse of discretion occurs if the agency decision demonstrates evidence of bad faith, fraud, capricious action or abuse of power.” Id. at 951, citing J.A.M. Cab Company v. Pennsylvania Public Utility Commission, 572 A.2d 1317 (Pa. Cmwlth. 1990). “The party asserting such abuse of discretion has the burden of proving it occurred.” Id. at 951 (emphasis added).

(2) *Appearance by all other instances.* An attorney shall file with the Secretary a written notice of appearance.

(i) *Content of notice.* Initial pleadings, entries of appearance and notices of withdrawal must include:

(A) The attorney's name, mailing address and electronic mailing address, if available.

....
(C) Telephone number and telefacsimile number, if applicable.

(D) The name and address of the person represented.

(ii) *Filing.*

(A) *Appearance.* The notice of appearance shall be served on the parties to the proceeding, and a certificate of service shall be filed with the Secretary.

(B) *Change in address.* A change in address which occurs during the course of the proceeding shall be reported to the Secretary and the parties promptly. (emphasis added). . . .

(3) *Withdrawal.* An attorney may withdraw an appearance by filing a written notice of withdrawal with the Secretary. The notice shall be served on the parties and the presiding officer, if one has been designated. (emphasis added).

Here, the record reveals that Attorney Lepore was the Railroad's attorney of record and that he never formally withdrew his appearance as counsel pursuant to 52 Pa. Code § 124.(3).

First, Attorney Lepore filed the Railroad's Answer to the Borough's complaint on September 18, 2000.³ See Certified List of Documents, December 16, 2009, Item No.1 and Item 5 at 2.⁴ **Second**, the address listed by Attorney Lepore on the initial pleading was 920 South Broad Street, P.O. Box 807, Lansdale, Pennsylvania 19446. This responsive pleading filed by Attorney Lepore was considered his entry of appearance on behalf of the Railroad pursuant to 55 Pa. Code § 1.24(b)(1). **Third**, Attorney Lepore also filed an Answer and entry of appearance on behalf of the Railroad on April 16, 2005. See List of Documents, Item Nos. 35 and 36. The address that appeared on the pleading and entry of appearance was 450 E. Main Street, P.O. Box 807, Lansdale, PA 19446. Although Attorney Lepore's address on the 2000 initial pleadings and 2005 pleadings were different, P.O. Box 807 remained the same. **Fourth**, ALJ Jandebaur issued a Recommended Decision on November 8, 2007, which stated the Railroad complete a construction plans for the replacement of the retaining wall and then to complete the necessary repairs at the Railroad's expense. **Fifth**, On November 28, 2007, Attorney Lepore notified Secretary McNulty that the Railroad filed Exceptions to ALJ Jandebaur's Recommended Decision.⁵ The address listed on Attorney

³ Attorney Lepore notified Secretary James McNulty that "[e]nclosed please find an original Defendant's [Railroad's] Answer to Plaintiff's [Borough's] Complaint to be filed as well as two copies relative to the above matter . . . [a]lso enclosed is another copy to be time-stamped and returned to me in the enclosed self-addressed stamped envelope." Letter from Attorney Lepore to Secretary McNulty, September 28, 2000, at 1. Supplemental C.R. (Supp. C.R.).

⁴ This Court notes that the PUC and the Borough refer to September 28, 2000, as the date the Railroad responded. See PUC's Brief at 10 and the Borough's Brief at 5. The Certified List of Documents state that the Railroad's answer was filed on October 2, 2000. In any event, the parties do not challenge the date and regardless on what date is correct both dates are within the required twenty-day time period to respond to the September 18, 2000, complaint.

⁵ Attorney Lepore stated to Secretary McNulty that "[e]nclosed please find Exceptions to the Recommended Decision issued 11/08/07 in the above, along with a Petition for Leave to file **(Footnote continued on next page...)**

Lepore's letter and Exceptions was 1860 Geryville Pike, Pennsburg, PA 18073. **Sixth**, Attorney Renardo L. Hicks (Attorney Hicks) filed his notice of appearance on behalf of the Railroad on December 10, 2007. On the certificate of service, Attorney Hicks listed the name of Attorney Lepore, the Railroad's attorney of record, and his address at 920 S. Broad Street, P.O. Box 807, Lansdale, PA 19446. See Reply Exceptions of the Railroad, December 10, 2007, Certificate of Service at 12; C.R. The 920 S. Broad Street, P.O. Box 807, Lansdale, PA 19446 was the original address used by Attorney Lepore when he first appeared as the Railroad's attorney pursuant to 52 Pa. Code § 124.(b)(1) and was evidence that the Railroad considered this as Attorney Lepore's current address. **Seventh**, Attorney Lepore never withdrew his appearance in writing with the PUC and, as result, was still the Railroad's counsel of record when service was affected upon him. **Eighth**, Attorney Lepore was properly served and acknowledged receipt of the PUC's February 19, 2008, final order as evidenced by Attorney Lepore's signed return receipt. See Appendix A of the Commission's Brief Return Receipt of Attorney Lepore, February 28, 2008.⁶

In conclusion, the record established that Attorney Lepore was the Railroad's counsel of record since September 18, 2000, and that he continued as the Railroad's legal representative throughout this litigation. At each stage of the

(continued...)

additional exceptions Nunc Pro Tunc, and a certificate of service relative to the same." Letter from Attorney Lepore to Secretary McNulty, November 28, 2007, at 1. Supp. C.R. at 59.

⁶ Although Attorney Lepore did refer to a change of address in the pleadings filed on November 28, 2007, (see Appendix B of the PUC's Brief), this did not constitute proper notice to the Secretary and the parties pursuant to 52 Pa. Code § 1.24(B) and 52 Pa. Code § 1.53(d).

proceedings, Attorney Lepore properly responded, first by filing an Answer on behalf of the Railroad to the Borough's Complaint in 2000, and culminating by filing Exceptions to the Recommended Decision of ALJ Jandebaur in 2005. Last, Attorney Lepore, upon receipt of the PUC's February 19, 2008, Final Order, was still counsel of record for the Railroad. At no time, from the commencement of the Borough's action until the PUC's Final Order, did Attorney Lepore file a written notice of withdrawal with the PUC. The PUC did not abuse its discretion when it denied the Railroad's request for reconsideration.

B. Whether The Board Was Required To Serve The Legal Representative Of The Railroad?

Last, the Railroad contends that the PUC was required to affect proper service on the Vice-President of the Railroad.

52 Pa. Code § 1.55(b) provides that “[w]hen a party is represented by an attorney, service upon the attorney shall be deemed service upon the party . . . [s]eparate service on the party may be omitted.” (emphasis added). Further, Pa. R.C.P. No. 440(a)(1)(i) provides that “[s]ervice shall be made . . . by handing or mailing a copy to or leaving a copy for each party's attorney of record endorsed on an appearance or prior pleading of the party” (emphasis added).

Again, the Railroad was represented by Attorney Lepore who first entered his appearance in the present matter when he filed the Railroad's initial pleading on September 28, 2000. Attorney Lepore also filed an answer and entry of appearance on September 16, 2005, on behalf of the Railroad. Therefore, pursuant to 52 Pa. Code § 1.55(b) personal service upon the Railroad was not

required. The PUC did not abuse its discretion because it was not required to serve an additional copy of the February 19, 2008, final order on an officer of the Railroad or another attorney who filed an entry of appearance.⁷

Accordingly, this Court affirms.

BERNARD L. McGINLEY, Judge

⁷ The PUC rejected an amendment to 52 Pa. Code § 1.24 to include multiple service on more than one attorney:

The vast majority of proceedings before the Commission [PUC] involve *pro se* litigants without counsel. Multiple appearances by a party represented by more than one attorney typically occur in high-profile or costly proceedings like rate cases. Multiple service requirements will increase the cost and burden of service on the Commission [PUC]. This invites the submission of more pleadings raising [sic], and resources devoted to deciding, claims of defective or imperfect service. This also requires more staff and resources than is the case today when the only apparent benefit seems to be the private litigant's ability to shift the cost and burden of duplication and service to the Commission [PUC] even though those costs are recovered in assessments and rates.

Brief of the PUC, Argument Section, n.4 at 14. (emphasis in original).

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Reading, Blue Mountain and	:	
Northern Railroad Company,	:	
Petitioner	:	
	:	
v.	:	
	:	
Pennsylvania Public Utility	:	
Commission,	:	No. 2168 C.D. 2009
Respondent	:	

ORDER

AND NOW, this 23rd day of July, 2010, the order of Pennsylvania Public Utility Commission in the above-captioned matter is affirmed.

BERNARD L. McGINLEY, Judge