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235508

February 20, 2014

Via E-filing

Cynthia T. Brown
Surface Transportation Board
Washington, D.C. 20423

ENTERED
Office of Proceedings
February 20, 2014
Part of
Public Record

Re: Allied Erecting and Dismantling Co., Inc., and Allied Industrial Development Corporation – Petition for Declaratory Order – Rail Easements in Mahoning County, Ohio

Dear Ms. Brown,

Please be advised that a Petition to Reopen and Supplement the Record is being filed on behalf of Petitioners accompanied by Verified Statements of Matthew Schiedel and William C. Spiker Sr. and a series of maps reflecting the location of tracks of the Mahoning Valley Railway in the Cities of Youngstown, Campbell and Struthers, Ohio. Because this matter has been pending before the Board for over three years, expedited consideration is respectfully requested.

Please note that Petitioners have filed a Petition for Review with the United States Court of Appeals for the 6th Circuit that has been docketed as Case No. 14-3094, Allied Erecting, et al v. STB, et al. Petitioners intend to request that the briefing schedule in this case be held in abeyance.

The filing fee of \$250 has been paid. If you have any questions, please give me a call.

Very truly yours,

/s/ Richard H. Streeter

Richard H. Streeter

FILED
February 20, 2014
Surface Transportation Board

RHS:rs
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FEE RECEIVED
February 20, 2014
Surface Transportation Board

BEFORE THE SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C. 20423

Docket No. FD 35316

ALLIED ERECTING AND DISMANTLING CO., INC., AND
ALLIED INDUSTRIAL DEVELOPMENT CORPORATION
--PETITION FOR DECLARATORY ORDER—
RAIL EASEMENTS IN MAHONING COUNTY, OHIO

PETITION TO REOPEN AND SUPPLEMENT THE RECORD

Allied Erecting and Dismantling Co., Inc. and Allied Industrial Development Corporation (collectively “Allied”), by and through counsel, respectfully file this Petition to Reopen the Board’s decision served December 20, 2013 in this proceeding (“*December Decision*”). This petition is governed by 49 U.S.C. § 722(c) and 49 C.F.R § 1115.4, which provide that a petition to reopen “must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances and must include a request that the Board make such a determination.” Allied hereby requests that the Board, following consideration of the evidence and arguments set forth herein, determine that its prior decision should be vacated for reasons of material error, new evidence and substantially changed circumstances, and that reopening is required.

INTRODUCTION

Allied has conducted a thorough review of the various documents upon which the Board relied in reaching its decision. These documents include: (i) Mahoning Valley Railway’s (“MVRV”) Articles of Incorporation; (ii) the previously unavailable Questionnaire and the supporting shipper statements that identify

the tracks over which MVRV was authorized to provide common carrier service by the are contained therein; and (iii) the Federal Register Notice, 46 FR 40097, that was published on August 6, 1981. In addition, Allied has identified highly relevant materials that clarify the geographical scope of the Interstate Commerce Commission's ("ICC") grant of authority to MVRV in 1982. The Board is also asked to consider the incontrovertible new evidence in the Verified Statement of William C. Spikes Sr., who was employed by MVRV when it, pursuant to the ICC's grant of authority, first instituted common carrier operations over Jones & Laughlin Steel Corporation's ("Jones & Laughlin") extensive system of tracks in the Campbell Works and in Struthers, Ohio. In his Verified Statement, Mr. Spikes confirms that MVRV's tracks could not reach Republic Steel Corporation's ("Republic Steel") facility in Youngstown, which was located on the south side of the Mahoning River.

Although the Board, for simplicity, focused on LTV Steel Company ("LTV") as a successor to Jones & Laughlin, it disregarded the fact that in 1981, LTV did not own the large tract of land on the south side of the Mahoning River that is the subject of this proceeding. That tract of land was owned by Republic Steel, which operated its own in-plant railroad. Most importantly, the Jones & Laughlin tracks never connected with the massive system of tracks within the Republic Steel facilities. Although MVRV would years later become involved with the in-plant operations at the Republic Steel facility after the merger of Jones & Laughlin into Republic Steel, it could not reach Republic Steel until it reached an agreement with Conrail in mid-

September 1990 that authorized it to operate its locomotives through Conrail's Hazelton Yard. However, MVRV never acquired any common carrier authority from the ICC or the STB to perform service at that facility.

Furthermore, MVRV never acquired ownership of any of the tracks that were located on that facility. Instead, in 1992, LTV conveyed its real property and tracks located on the east side of the Center Street Bridge to Allied. In return, Allied granted a non-exclusive easement to LTV to "operate, use, maintain, repair, restore, replace and abandon (at LTV's sole cost and expense) the railroad tracks and related equipment located on the property that the Mahoning Valley Railway Company leases from LTV".¹ That easement further provides that LTV and Allied would relocate or vacate those easements "to facilitate the development of either LTV Property or Allied Property, provided relocation or vacation will not adversely interfere with either parties' then existing operations or access to their properties." Because LTV has long since discontinued all operations and vacated the property and because MVRV never sought or needed ICC or STB common carrier authority to perform the in-plant switching operations that it briefly provided for LTV at the now abandoned facilities, the Board has no authority over Allied's tracks. 49 U.S.C. § 10906.²

¹ Respondents Appendix A, A-1, at p. 2-3.

² In order to assist the Board, Allied is also introducing a detailed aerial photograph that pinpoints (a) parcels of real estate containing MVRV's rights-of-way (which LTV conveyed to MVRV in 2001 in anticipation of the sale of the MVRV to Summit View, Inc.); (b) the dates and locations of parcels of real estate that Allied acquired from LTV Steel and from the Pittsburgh & Lake Erie Railroad ("P&LE") and from the Pittsburgh & Lake Erie Properties ("P&LEP"); and (c) the relevant boundaries of Youngstown, Campbell and Struthers, Ohio. The real property MVRV conveyed in 2001 to Summit View that is located on

I. THE BOARD’S ANALYSIS OF THE “LTV” TRACKS IS BASED ON AN ERRONEOUS MISCONCEPTION OF THE LOCATION OF THE TRACKS COVERED BY THE ICC’S GRANT OF OPERATING AUTHORITY TO THE MAHONING VALLEY RAILWAY IN JANUARY 1982.

The Board’s *December Decision* is based on the erroneous conclusion that MVRV was granted authority by the ICC to operate over Allied’s property that is located on the **south** side of the Mahoning River.³ That erroneous conclusion, which provides the foundation of the Board’s conclusion that MVRV can stop and store cars throughout Allied’s property, must be vacated.

In reaching its conclusion, the Board relied on an erroneous presumption regarding MVRV’s 1981 application that sought operating authority from the ICC. *Mahoning Valley Ry.—Operating a Line of R.R. in Mahoning Cnty, Ohio, (MVRV-Operating)*, FD 29658 (Sub-No. 1). As the Board has acknowledged, it could not locate a copy of the actual application. Therefore, the Board relied on a Return to Questionnaire to attempt to define the operating rights that were granted to MVRV.

The Questionnaire was made available to Allied *after* the release of the *December Decision*. As the Questionnaire and related documents, including the ICC’s Federal Register Notice of August 6, 1981, and MVRV’s Reply Statement

the north side of the Mahoning River is the same right-of-way that was involved in the 1981 application that MVRV filed with the ICC. The other real property conveyed to MVRV and subsequently to Summit View in 2001 is located on the south side of the Mahoning River and consists of Lot #1 (subsequently renumbered 62188) and Lot #2 (subsequently renumbered 62189). Those two lots, which are located to the west of the Center Street Bridge, are the focus of FD 35477, *Allied Indus. Dev. Corp.—Petition for Declaratory Order*.

³ *December Decision* at 3, 11-13.

in Support of Application, filed November 17, 1981, conclusively demonstrate, MVRV sought common carrier authority to operate on approximately eighteen (18) miles of existing tracks owned by Jones & Laughlin that were primarily located in its Campbell Works on the **north** side of the Mahoning River, as well as approximately twenty-five miles of tracks located in Struthers, Ohio. As MVRV's Reply Statement explained, MVRV sought authority to provide service in Struthers, Ohio, over tracks located in the 120-acre steel mill complex, once known as the Struthers Rod and Wire Division of the former Youngstown Sheet and Tube Company, which had been acquired by the CASTLO Community Improvement Corporation, Inc. on April 1, 1980.

None of those existing tracks allowed MVRV to reach the Republic Steel's property on the south side of the river that was sold to Allied in 1992. In order to authorize MVRV to reach Republic Steel over existing tracks, the ICC would have had to have granted MVRV authority to operate over lines of railroad owned by Consolidated Rail Corporation ("Conrail"), the Pittsburgh & Lake Erie Railroad Company ("P&LE") or the Baltimore and Ohio Railroad Company ("B&O"). The ICC did not do so. Nor did it authorize MVRV to construct its own track that would have given it direct access to Republic Steel's facilities.

A. The tracks over which MVRV was authorized to operate by the ICC were primarily located on the north side of the Mahoning River and did not include any tracks that are located on the property that Allied acquired from LTV in 1992.

As the Questionnaire also reveals, consistent with its Articles of Incorporation that defined the geographical scope of its potential operations,⁴ MVRV sought authority to operate over **existing** tracks from a point on the **north** side of the Mahoning River that is 300 feet to the east of Center Street to a point that is approximately five hundred (500) feet west of the Poland Township boundary, in the City of Struthers, on the south side of the river.

At page 13 of its *December Decision*, the Board cites language from MVRV's Articles of Incorporation indicating that "MVRV intended to operate East of Center Street in the City of Youngstown ... and running thence in a Southeasterly direction to a point at the Eastern end of {Jones & Laughlin's} panther run pipe storage facility on the South Bank of the Mahoning River." There is no question that the Articles of Incorporation clearly defined the scope of MVRV's application. In his transmittal letter to the ICC, dated August 27, 1981, Donald A. Wall, counsel for the MVRV, explicitly stated that:

I have reviewed the Articles of Incorporation of the Mahoning Valley Railway Company. The operation of a line of railroad in a portion of Mahoning County, Ohio is within the stated powers of The Mahoning Valley Railway Company as set forth in its Articles of Incorporation.

As MVRV's Federal Register notice, 46 Fed. Reg. 40097, dated August 6, 1981, also explained (emphases added):

Applicant does propose to acquire *industrial rail facilities owned by Jones & Laughlin Steel Corporation* and not presently being operated by a common carrier,

⁴ A copy of MVRV's Articles of Incorporation from 1981, which was filed with the ICC in *Mahoning Valley Ry. & Cuyahoga Valley Ry.—Exemption*, FD 29736 (ICC served Dec. 11, 1981), is attached hereto.

and to operate over *additional railroad tracks owned by industries being served.*

The Questionnaire (page 6) also contains the specific statement that the “proposed line of railroad will not be a branch, connecting rack, cutoff, or extension of any existing railroad.” And at page 7 of the Questionnaire, MVRVY acknowledged that no new construction would be required. Those statements confirm that the lines over which MVRVY was seeking to operate as a common carrier were at the time private industrial tracks owned by J&L or the shippers it would service as a common carrier.⁵

While it correctly focused on MVRVY’s Articles of Incorporation in its *December Decision*,⁶ the Board failed to understand that the western terminus of the line, which is 300 feet to the east of Center Street in City of Youngstown, is located on *the north side of the Mahoning River* and **not** on the south side as the Board has erroneously assumed. Furthermore, the Board failed to recognize that the eastern terminus of MVRVY’s track was to the east of the point at which MVRVY crossed the Mahoning River in order to serve Jones & Laughlin’s former panther run pipe storage facility and the CASTLO facilities.⁷

⁵ The Board’s attention is also invited to the statement in the contemporaneously filed Notice of Exemption involving Cuyahoga Valley Railway’s acquisition of MVRVY that the “only impact” of the interrelated applications would be “in the industrial yard containing J&L and several other industrial operations.” F.D. No. 29726, Petition of the Mahoning Valley Railway Company and the Cuyahoga Valley Railway Company, and their Corporate Affiliates, Pursuant to 49 U.S.C. §§11343-11347 and the Provisions of 49 U.S.C. §322, p. 6, filed September 13, 1981.

⁶ *December Decision* at 13.

⁷ After crossing the river over a short bridge at a point that is adjacent to the Graham Interlocking near the eastern boundary of Allied’s property, the line turned eastward where it crossed over Bridge Street in Struthers and entered

Because MVRY would have been required to operate over Conrail or P&LE lines to reach Republic Steel's facility in Youngstown, which is to the west of Struthers, the conclusion cannot be avoided that MVRY did **not** seek any authority to operate over Republic Steel's extensive system of intra-plant industrial tracks on the south side of the Mahoning River. That system extended from west of the Center Street Bridge to the eastern terminus of Republic Steel's property at Graham Interlocking, all of which is now owned by Allied. Although Republic Steel's in-plant railroad interchanged cars with Conrail, P&LE and B&O, it did not connect in any fashion with the tracks over which MVRY operated. As was the case of tracks located within the confines of most large steel facilities, Republic Steels' tracks were not part of the general rail transportation system and, therefore, were not subject to the ICC's or the Federal Railroad Administration's jurisdiction.⁸

B. The supporting shippers' statements included in the Questionnaire do not support the Board's conclusions.

the CASTLO property. After passing through the CASTLO facilities, the line continued to the east until it reached the pipe storage yard.

⁸ Courts have long recognized that where an industry maintains a complicated intra-plant system, such as Republic Steel's rail operations, those rail operations will be regarded as plant facilities rather than those of a common carrier. See, e.g., *Lone Star Steel Company v. McGee*, 380 F.2d 640 (5th Cir. 1967). Where no other industries located within a large manufacturing facility owned by a particular industry are served by an in-plant railroad owned by the facility, the movement of freight within the plant is not common carriage but rather industrial plant usage. It is only when other industries are also served that common carriage results. See also, *New York Cent. & H. R.R. Co. v. General Elec. Co.*, 219 N.Y. 227, 114 N.E. 115 (1916), cert. den. 343 U.S. 636 (1917). See also, *Solvay Process Co. v. D., L. & W. R. R. Co.*, 14 I.C.C. 246 (1908); and *Crane Iron Works v. United States*, 17 I.C.C. 514 (1910), to demonstrate the ICC's consistent approach that the court followed.

In its *December Decision*, the statements of the shippers who supported the MVRV application are misconstrued. The Questionnaire confirms that MVRV only sought authority to serve various industries that either were located on Jones & Laughlin's existing lines or that were in the process of locating and expanding their own private facilities in the Campbell Works and in Struthers. They included Youngstown Steel Corporation, Hilti Steel Industry, Munroe & Sons Manufacturing Corporation, and Casey Equipment Corporation. Questionnaire at 5. Those same entities are identified in the Federal Register announcement of MVRV's application.

The comments of the supporting shippers repeatedly stress the "ability to develop a successful industrial park at Campbell"; "your approach to in plant rail service at the Campbell Works"; "your plans to install rail service through the Campbell Works ..." Furthermore, as explained in its letter of support, "The Facilities Development Team of Jones & Laughlin Steel Corporation endorses the efforts of the Mahoning Valley Railroad Company in attempting to provide full service railroad facilities *at the Campbell Works.*" Questionnaire at 9-10 (emphasis added).

At page 5 of the Questionnaire, in response to an inquiry regarding the industries to be served, the following statement was made:

Applicant anticipates, based upon the expectations of such industries, that they will both expand and become permanent operations. The current Jones & Laughlin Steel Corporation plant has been in operation for most of this century, and Jones & Laughlin Steel Corporation recently announced plans to spend \$150,000,000 at its Youngstown facility [not facilities] in the next several years.

And as explained in a letter from the Youngstown Industrial Corporation, “we are now negotiating with J&L to purchase the closed portion of the Campbell Works.” In addition, as noted above, MVRV’s application was also supported by the CASTLO Community Improvement Corporation.

The Verified Statement of William C. Spiker, a former employee of Youngstown Sheet and Tube Company, Jones & Laughlin, MVRV and LTV, corroborates the foregoing. Mr. Spiker was actively engaged in J&L’s in-plant railroad operation when MVRV was incorporated in 1981 to replace the private in-plant railroad operations that were then being performed. As Mr. Spiker has explained, it was only after MVRV obtained its common carrier authority from the ICC that MVRV commenced operations as a common carrier providing service to J&L and the shippers located in J&L’s Campbell Works that had supported its ICC application. As he notes, it was at that time that he was first covered by the Railroad Retirement Board, which only has jurisdiction over common carriers by rail. As he has also confirmed, MVRV never assumed that it was authorized to operate over the industrial tracks that were located wholly within Republic Steel’s facilities on the south side of the Mahoning River.

As he has explained, until an Agreement was finalized with Conrail in 1990, MVRV had no ability to operate between LTV’s welded and seamless steel mills over the tracks located in Conrail’s yard.⁹ As he has also explained, if

⁹ In December 1984, Jones & Laughlin was merged into Republic Steel Corporation. At that time, the name of the surviving corporation, Republic Steel Corporation, was changed to LTV Steel Company. See Certificate of Agreement of Merger, which is attached hereto.

MVRY wanted to move a locomotive between the Campbell Works and the LTV Welded Plant, Conrail had to shuttle them. His testimony is confirmed by the September 14, 1990 Agreement with Conrail. As that Agreement explains, as late as January 19, 1989 certain unspecified claims existed between “LTV Corporation, Jones & Laughlin Steel, Inc. and Republic Steel Corporation, their subsidiaries and affiliates (collectively “LTV”) and Consolidated Rail Corporation.”¹⁰ It was only after the mid-September 1990 that MVRY could operate through what is now NSR’s Hazelton Yard in order to connect the industrial lead tracks at the Campbell Works with the industrial lead tracks at the Welded Tube Plant.

C. MVRY never obtained additional operating authority to provide rail service from either the ICC or the Board.

There is nothing to indicate that MVRY ever sought additional authority to expand its operations into the former Republic Steel facilities. As the Board acknowledged at page 10 of its *December Decision*, “if Ohio Central never obtained the regulatory authority to operate over the tracks, then none of Allied’s state law claims against Ohio Central could be federally preempted.”

The foregoing statement controls in this case. First, at no point in its *December Decision* has the Board identified any ICC or STB decision that authorized MVRY to conduct common carrier operations over the Republic Steel tracks that are located on Allied’s property. Second, Allied’s independent search of ICC and STB records has not revealed any further grant of operating

¹⁰ Respondents App. A, A-8, at p. 1.

authority to MVRV after the original ICC decision in 1982. Third, there is no indication in the record of this proceeding that either LTV or MVRV ever bothered to seek additional operating authority from the ICC or the Board that would have authorized MVRV to extend its certificated, common-carrier service into the new operating territory south of the Mahoning River in which Republic Steel's facilities were located.

As Mr. Spiker's testimony confirms, MVRV's operations at the former Republic Steel facilities consisted of various types of in-plant movements for LTV. Of course, in the absence of additional ICC or STB authority, common carrier rail service for other than LTV would have involved unlawful, unauthorized operations.

D. Allied has never entered into any agreement with MVRV or with Ohio Central that would allow Ohio Central or any of its affiliated railroads to operate over its lines.

At no time did Allied enter into any agreement with MVRV. Instead, as the 1992 LTV/Allied Easement reflects, Allied granted LTV easements:

to operate, use, maintain, repair, restore, replace and abandon (at LTV's sole cost and expense) the railroad tracks and related equipment located on the property that the Mahoning Valley Railway Company leases from LTV [at specified locations].¹¹

Most importantly, LTV agreed, as part of the easement:

to relocate (or vacate if appropriate) any of the aforegranted easements to facilitate the development of either LTV Property or Allied Property, provided any relocation or vacation will not adversely interfere with

¹¹ Respondents App. A, A-3, at p. 2.

either parties' then existing operations or access to their properties.

In its *December Decision* the Board wholly failed to focus on this provision of the LTV/Allied Easement. Given the fact that Ohio Central has conceded that no shippers remain on any of the properties (either to the east or to the west of the Center Street Bridge) that are at issue and because the tracks have never been anything other than privately owned industrial tracks over which the ICC and the Board lacked authority, it is respectfully submitted that Allied, as the sole owner of the property, has the legal right to terminate the easement and to deny Ohio Central access to any of the tracks that are located on its property without obtaining any authority from the Board.

E. Newly discovered evidence reveals that Ohio Central has previously misled the Board regarding its alleged ownership of railroad lines and other matters.

In reviewing Ohio Central's claims regarding its ownership of tracks, the Board must proceed with caution and should require Ohio Central to present explicit documentation instead of accepting those claims at face value. There is nothing to suggest that MVRV ever acquired ownership of the tracks that are located on Allied's property east of the Center Street Bridge. However, Allied, in the course of preparing this Petition, has discovered that in 2001, MVRV, in F.D. No. 34034, *The Cuyahoga Valley Railway Company—Trackage Rights Exemption—The Mahoning Valley Railway Company*, falsely represented in a schematic map that it owned the tracks that LTV sold to Allied in 1992. MVRV never owned those tracks. Rather ironically, that same map reflects MVRV's

ownership of the tracks located on the north side of the Mahoning River that was the subject of its 1981 application.

Moreover, the Board should note that a significant portion of more than two (2.0+) miles of MVRV track that previously stretched between Struthers and Youngstown on the north side of the Mahoning River has been removed. See Aerial Photo of MVRV rails and other facilities. Having removed the tracks, Ohio Central should not be heard to complain that it lacks adequate storage tracks in the Youngstown area and therefore must be able to store rail cars on Allied's tracks.

II. THE BOARD'S ANALYSIS OF THE "P&LE EASEMENT" IS FLAWED.

In seeking reopening, the Board is requested to review the full implications of OHPA's assumption of the lease and service obligations set forth in a Lease Agreement that P&LE and the Youngstown and Southern Railway Company ("Y&S") jointly entered into with the PL&W Railroad, Inc. ("PL&W") in April 1993. Before turning to that Agreement, it must be noted that later in 1993, Pittsburgh & Lake Erie Properties (P&LEP), which had then begun the process of dismantling P&LE, sold a segment of track to Allied that included the former Lake Erie & Eastern Railway ("LE&E") track that was at that time leased to PL&W. As the Limited Warranty Deed commemorating the transaction explains, Allied granted P&LEP, a non-exclusive easement "solely for the purpose of continuing the operation of a railroad over the main line located upon that portion ... between ... Survey Station 45+0± [in Struthers, Ohio] and the point of connection with the Youngstown & Southern Railway

Survey Station 136+00± [in Youngstown, Ohio], ... “a distance of approximately 1.913 miles”.¹²

The Easement Agreement, while acknowledging that the connecting point with the former Youngstown & Southern Railway Company was in the vicinity of Survey Station 146+00±, confirmed that P&LEP retained the future right to assign the operation of the Y&S Line to another railroad. It was noted, however, that as of that date, “operations are and will be conducted in accordance with the applicable terms of that certain LEASE dated April 19, 1993, between Grantor, The Youngstown and Southern Railway Company and PL&W Railroad, Inc.” *Id.* at p. 2.

Thereafter, on June 13, 1995, P&LEP and the Y&S entered into an “Amended and Restated Lease and Contract for Sale of Real Property,” with OHPA and PL&W.¹³ This Agreement provided that OHPA would assume PL&W’s rights and obligations under the April 1993 Lease Agreement and would lease and operate approximately 36± miles of Y&S rail lines *from Darlington, PA to Struthers, Ohio*. In other words, the Y&S line, as therein defined, did not abruptly stop at Milepost 0.0 in Youngstown. Instead, it extended eastward into Struthers and included the portion of the former LE&E main line between Survey Station 45+0± (in Struthers, Ohio) and the point of connection with the Youngstown & Southern Railway (Survey Station 146+00± (in Youngstown, Ohio), thereby permitting rail operations to reach the Graham

¹² Respondents App. B, B-2, at p. 2 of Limited Warranty Deed.

¹³ Respondents App. B, B-5.

Interlocking. The former LE&E spanned a distance of approximately 1.913 miles. The Amended and Restated Lease and Contract for Sale of Real Property also authorized OHPA to acquire an additional 2.65± miles of P&LE rail lines in the City of Youngstown and Village of Struthers, Ohio. The precise location of the additional 2.65± miles of P&LE rail lines was not described. The Board approved this Agreement in *Ohio & Pennsylvania Railroad Company—Lease and Operation Exemption—P&LE Properties, Inc.*, FD No. 32711 (STB served June 23, 1995).

Because P&LEP had previously sold the 1.913 miles of track between Survey Station 45+0± in Struthers, Ohio and Survey Station 146+00± in Youngstown, Ohio to Allied, P&LEP was unable to sell those same tracks to OHPA. Therefore, it necessarily follows that the 2.65± miles of track that OHPA acquired from P&LEP had nothing to do with the 1.913 segment of track that is owned by Allied.

The following year, OHPA decided that it would not acquire the Y&S Line from P&LEP. At which point, P&LEP entered into an agreement with Railroad Ventures, Inc. (“RVI”), which initially failed to seek Board approval to acquire the line.

When RVI finally sought approval from the Board to acquire the Y&S properties from P&LEP, it did not include OHPA in its Verified Notice for Exemption. Instead, it stated that OHPA could continue its operations in accordance with the Board’s prior authorization of OHPA’s lease interests

associated with the aforesaid Amended and Restated Lease. There is no documentation to show that OHPA entered into a separate lease with RVI.

In 1999, RVI filed for authority to abandon the line and for adverse discontinuance authority covering OHPA's operations. In granting the request for adverse discontinuance authority, the Board noted that OHPA "agrees that **its lease and service obligations** should be discontinued."¹⁴ Because OHPA's operating authority was based on its 1995 Lease Agreement with P&LEP, it does not follow that discontinuance of all service related to that Lease Agreement was not authorized in 1999.

Without question, OHPA's operations over the 1.913 miles of track were an indispensable component of OHPA's service obligations to shippers located on the Y&S line between Darlington and Youngstown. However, no shippers were located anywhere along the 1.913 miles of track. Hence, it is nonsensical to suggest that OHPA *sub silentio* intended to retain any lease obligation to provide service on that short segment of track when it agreed that its lease and service obligations should be discontinued.

In order to assure operations over Allied's track when it acquired the line from RVI in 2000, the Columbiana County Port Authority ("CCPA") contemporaneously acquired P&LE's easement rights from the P&LE bankruptcy estate. Since that time, those rights have been transferred, with

¹⁴ *The Ohio & Pennsylvania Railroad Company—Adverse Discontinuance of Service Exemption—Between Youngstown, OH, and Beaver County, PA*, AB-555 (Sub-No. 2X) STB served September 3, 1999, at p. 7, n.3. See also, 64 Fed. Reg. 30560, n.1, June 8, 1999 (emphasis added).

the Board's approval, to various would be purchasers and are now held by Mule Sidetracks, L.L.C.

At page 14 of its *December Decision*, the Board suggests that when OHPA sought authority to resume operations in 2004 following the bankruptcy of CCPA's operator, it "understood that it already had authority to operate over the P&LE Tracks." In order to lend credence to that assertion, the Board then suggests that its assumption was "confirmed by the OHPA's notice of exemption in that proceeding, in which it stated that it 'presently owns and operates approximately 2.65 miles of trackage and related facilities in Youngstown, Ohio, where its tracks connect with the {Y&S} Line.'"¹⁵ As noted above, however, the 2.65 miles of track were not related to OHPA's discontinued operations over the P&LE Easement and the former Y&S Line.

The fact of the matter is that there was no need for OHPA to rely on its prior authority, which it (and all other parties to the protracted legal battles involved with RVI's abandonment) believed had been the subject of the Board's 1999 grant of authority to discontinue operations. When it sought authority to replace the Central Columbiana & Pennsylvania Railroad, OHPA, as recounted at page 6 of its Verified Notice of Exemption, assumed "CCPR's rights, duties and obligations under the Track Lease and Operating Agreement." Although not fully spelled out in the Verified Notice, those rights included the easement that CCPA acquired from P&LEP. It should be noted that current operations over the former Y&S Line and over Allied's tracks are conducted by

¹⁵ *Id.*

Youngstown & Southeastern Railway Company (“Y&SE”) pursuant to the P&LE Easement that CCPA acquired from P&LEP.

The bottom line is that when OHPA was relieved of its obligation to operate over the former Y&S Line from Milepost 0.0 in Youngstown to Milepost 35.7 in Darlington by virtue of the adverse discontinuance authority, it ceased to satisfy the explicit sole purpose of the Easement that Allied gave to P&LEP. As is made crystal clear by its express language, the non-exclusive easement over the 1.913 miles of Allied’s track was “for the sole purpose of providing railroad operations thereover as a part of the operation of the former Youngstown & Southern Railway system.” Therefore, even if OHPA holds some continuing “paper” authority because RVI failed to include a specific request for authority to discontinue OHPA’s lease obligation, any operation by OHPA over Allied’s track would be in blatant violation of the easement Allied granted to P&LEP that underlies any right to operate over Allied’s track.

Conclusion

Ohio Central’s unauthorized storage of railcars on Allied’s lines of industrial track has had a significant adverse impact on Allied’s ability to reclaim and develop the industrial property that it acquired from LTV in 1992 and from Gearmar Properties Inc. in 2009. Because the *December Decision* has been shown to be based on a fundamental misunderstanding of MVRY’s common carrier authority, there is no reason to perpetuate Ohio Central’s trespasses that have repeatedly interfered with Allied’s ability to develop its property in open violation of the easement that Allied granted to

LTV. Furthermore, because there are no remaining shippers located on the premises that Allied acquired from LTV and from Gearmar Properties, it serves no legitimate purpose to provide Ohio Central, in violation of the easement granted to LTV by Allied, any pretext to interfere with Allied's existing operations when it has no existing operations of its own. This is especially the case when it is noted that Ohio Central removed a substantial portion of MVRV's track that could be used to store cars.

Based on the new evidence submitted herewith that conclusively demonstrates that the Board misconstrued the Questionnaire (which was made available to Allied following the release of the December Decision), the Board should find that it has committed material error that requires it to vacate its *December Decision*. In particular, it should find that the ICC's grant of common carrier authority to MVRV did not authorize common carrier operations within the property on the south side of the Mahoning River that was the site of Republic Steel's extensive facilities that were only served by Republic's in-plant railroad. Furthermore, it should find that MVRV never sought or received common carrier authority to service Republic Steel's facility, which was acquired by LTV well after the grant of authority to MVRV. The Board should also find that it has no authority over the operation, abandonment, or discontinuance of the spur, industrial, team, switching, and side tracks that were and are now located on Allied's property east of the Center Street Bridge that Allied acquired from LTV in 1992.

Finally, the Board should find that it previously authorized the unopposed discontinuance of OHPA's lease and service obligations over the 1.913 segment of track that is owned by Allied and OHPA has no continuing rights to operate over Allied's track. Consistent with Allied's easement agreement with L&LEP, those tracks are exclusively used by Y&SE to provide service to shippers located on the former Y&S Line between Darlington and Struthers.

Respectfully submitted,

/s/ Richard H. Streeter

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Counsel for Allied Erecting and
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Development Corporation

Dated: February 20, 2014

ALLIED ERECTING AND DISMANTLING, INC., AND
ALLIED INDUSTRIAL DEVELOPMENT CORPORATION
--PETITION FOR DECLARATORY ORDER--
RAIL EASEMENTS IN MAHONING COUNTY, OHIO

VERIFIED STATEMENT OF WILLIAM C. SPIKER SR.

1. My name is William C. Spiker Sr. My home address is 462 West Omar, Struthers, Ohio. I have personal knowledge of the facts that I am presenting here.
2. I previously was employed by LTV Steel Company at the former facilities of Republic Steel Company located in Youngstown, Ohio. LTV acquired those facilities following the merger in late December 1984 of Jones & Laughlin Steel Incorporated into Republic Steel Corporation. The name of the merged company was then changed to LTV Steel Company. I was employed by LTV at that location from start up to 2001, when the Mahoning Valley Railway was sold. Thereafter I moved to Cleveland where I continued to work for one of LTV's other railroads. I began my working career at Youngstown Sheet and Tube Company, which was owned by Lykes Corporation, which announced in 1977 that it was closing down the Campbell Works. I thereafter worked for Jones & Laughlin, which took over the Campbell Works. My duties included Trackman, Assistant Locomotive Operator, Locomotive Operator, maintenance supervisor and General Supervisor. In 1981, following its incorporation, Mahoning Valley Railway took over the switching duties at the plant. I went to work for Mahoning Valley Railway in June of 1981. At the time, the railroad

acted as an in-plant private railroad. In February 1982, the railroad changed its status to a common carrier in order to service smaller industries that had moved into the Campbell Works. This caused me for the first time to be covered by Railroad Retirement. The MVRV served the J&L Campbell Works and the Struthers works, which is where the coke plant was located. In addition to providing service to Jones & Laughlin, we also serviced Casey Equipment Company and Monroe & Sons Manufacturing, as well as a couple of other companies who were located in Struthers, which handled lumber. The vast majority of MVRV's tracks were always located on the north side of the Mahoning River.

3. I have personal knowledge of Republic Steel's in-plant railroad system in Youngstown. LTV's in-plant railroad serviced the Electric Weld Plant located at the Republic Steel Youngstown works. In order to do so, locomotives were moved to that facility and we took over the locomotive shop, which was adjacent to the south shore of the Mahoning River just west of the Center Street Bridge. During that period of time, my title was General Supervisor of maintenance and I oversaw our rebuilding of locomotives for other companies, our car repair work and our track work. We did only minor track work and had outside companies do our major rebuild work, which I oversaw. Besides that, I occasionally worked as a yardmaster when the regulars were not available and also ran the locomotive when we needed an extra crew and did not have adequate manpower.

4. Although locomotives were occasionally shuttled back to the Campbell Works on the north side of the Mahoning River, they did not pull loaded or empty railcars until mid-1990. At that time an agreement was reached with Conrail that allowed us to travel through the Conrail yard to reach the Campbell Works on our own. At that point, we began doing our own interchange work between the Campbell Works and the Republic Steel facilities.

5. As late as the 1960's, Republic Steel had extensive facilities located on both sides of the Mahoning River. The blast furnaces were located on the north side of the river along with the ore yard. The Electric Weld Tube Mill (now known as the Copperweld facility), the Coal Storage Yard, the Locomotive Shop, the Machine Parts Shop and the 48 inch Strip Mill were located on the south side of the River to the west of the Center Street Bridge. The blast furnaces were connected with the facilities on the south side by the Hot Metal Bridge that spanned the river.

6. Republic's facilities also continued on the east side of the Center Street Bridge on the south side of the Mahoning River. The larger facilities on the east side of the bridge included the Open Hearth Building, the Blooming Mill, the Pit Furnace Building, and the Coke Plant. There were no other industries that maintained facilities within the Republic Steel plant area.

7. All of the facilities on the south side of the river were connected by an extensive system of industrial tracks on which Republic's in-plant railroad

solely operated. Such tracks were used to switch cars, for storage, for loading and unloading and for shunting raw materials and partly manufactured products among the appropriate shops, mills and storehouses that were located within Republic Steels property. The tracks were also used to move finished goods to the set-out tracks where they would be interchanged with the trunk lines for delivery to customers. While the trunk line railroads, such as the Pittsburgh & Lake Erie, the B&O Railroad, and the Pennsylvania Railroad delivered and picked up cars at the set out and delivery tracks on the edges of the Republic Steel facilities, they did not operate beyond those interchange tracks.

8. By the time that I started working for LTV at what had earlier been the Republic Steel plant, the steel industry in the Youngstown area was in a decline. Some of the Republic Steel facilities had been closed and removed and others were in the process of being dismantled. As those facilities were removed and demolished, the surrounding tracks were also removed. Nevertheless, the private, in-plant railroad operations continued and no common carrier railroads were allowed to enter the remaining plant facilities except to deliver and pick up railcars at the designated set off and delivery tracks.

9. At some time in 1987, MVRV commenced operating and doing all the switching at the Welded Tube Plant. In order to move locomotives from the Campbell Works, it was necessary to have Conrail shuttle the locomotives back and forth as need. We kept a couple at the Welded tube plant at all times and

eventually moved them all over there when the Campbell plant was completely shut down by LTV. We did all the interchange work with Conrail or CSX, but did not have access to their main tracks at that time. As noted above, it was only after Conrail entered into an Agreement with MVRV in September 1990, that we were able to operate over its yard tracks that were located between the Campbell Works and the Welded Tube Plant.

FURTHER SAYETH THE AFFIANT NOT.

VERIFICATION

I, William C. Spiker, Sr., hereby declare under penalty of perjury that the foregoing is true and correct. Executed on February 17, 2014.

/s/ William C. Spiker Sr.
William C. Spiker Sr.

Docket No. FD 35316

ALLIED ERECTING AND DISMANTLING, INC., AND
ALLIED INDUSTRIAL DEVELOPMENT CORPORATION
--PETITION FOR DECLARATORY ORDER—
RAIL EASEMENTS IN MAHONING COUNTY, OHIO

VERIFIED STATEMENT OF MATTHEW SCHIEDEL

My name is Matthew Schiedel and I have been employed by Strenn Consulting Inc., a subsidiary of Allied Consolidated Industries Inc., since April, 2009. I am a registered Professional Surveyor in the State of Ohio with a Civil Engineering background. I completed my Bachelors degree of Civil Engineering Technology in 2008 from Youngstown State University and continued to achieve my Bachelors of Surveying from The University of Akron in 2010. I am working on my Masters of Civil Engineering at Youngstown State University with a tentative graduation date of December 2014. I was previous employed by Kurtanich Engineers & Associates Inc., in Hermitage, Pennsylvania from July 2006 to April 2009, which specializes in site development. My responsibilities were to complete a variety of surveys that included; boundary, topographic, ALTA, construction stakeout, and G.P.S. control. My responsibilities also included designing and inspecting storm and sanitary sewers for the City of Sharon and Mercer Bourbon in Pennsylvania.

As a surveyor and engineer with Strenn, my responsibilities are to assist with the industrial site development of Allied Erecting & Dismantling Co. Inc., and Allied Industrial Development Corporation (collectively, Allied). This includes the survey, design, layout, inspection, and As-Built of the utilities and

structures on Allied's property on Poland Avenue in Youngstown, Ohio. I am also the custodian of Allied's property deeds and easements, many of which are from the purchase of former steel mills and railroads.

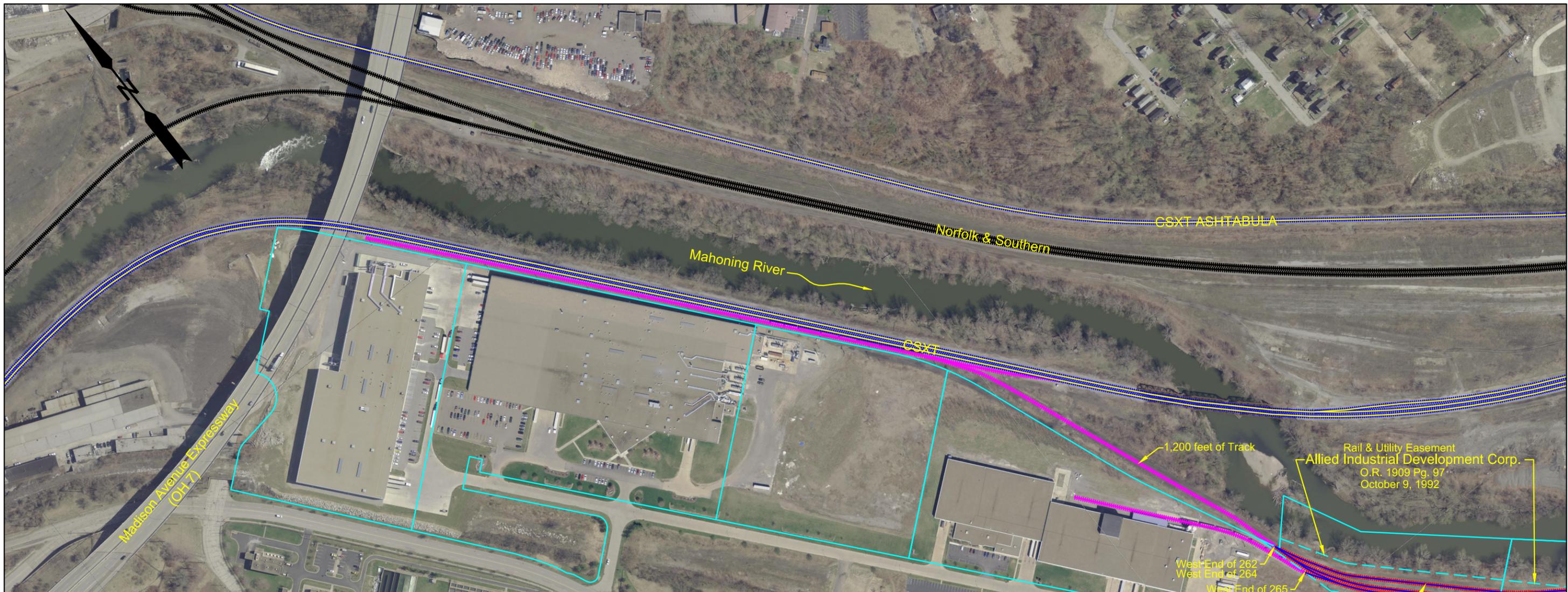
I prepared Exhibit 1 from collecting the various deeds, easements, plats, and tax maps, all of which are of record at the Mahoning County Court House and overlaid the property information and rail information from Republic Steel drawings and rail valuation maps on to a 2008 aerial photo in AutoCAD. The exhibit reflects the various railroads along the Mahoning River from the Madison Avenue Expressway (OH 7) near downtown Youngstown passing through the City of Campbell and to Bridge Street (OH 616) in Struthers, Ohio.

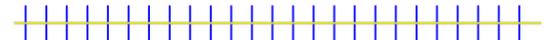
FURTHER SAYETH THE AFFIANT NOT.

VERIFICATION

I, Matthew Schiedel, hereby declare under penalty of perjury that the foregoing is true and correct. Executed on February 20, 2014.

/s/ Matthew Schiedel
Matthew Schiedel



-  ALLIED ERECTING & DISMANTLING (LE&E)
-  ALLIED ERECTING & DISMANTLING (CANFIELD BRANCH)
-  ALLIED ERECTING & DISMANTLING (PRIVATE TRACK)
-  ALLIED INDUSTRIAL DEVELOPMENT CORP.
-  ALLIED INDUSTRIAL DEVELOPMENT CORP.(REMOVED)
-  ALLIED INDUSTRIAL DEVELOPMENT CORP. (EASEMENT)
-  OHIO & PENNSYLVANIA RAILROAD
-  MAHONING VALLEY RAILWAY
-  OHIO CENTRAL RAILROAD
-  NORFOLK & SOUTHERN
-  CSXT
-  OTHER

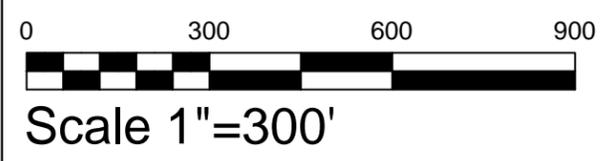
Rail & Utility Easement
 Allied Industrial Development Corp.
 O.R. 1909 Pg. 97
 October 9, 1992

West End of 262
 West End of 264
 West End of 265

262 (1,040 feet)
 264 (800 feet)
 265 (735 feet)

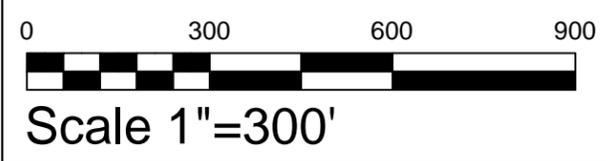
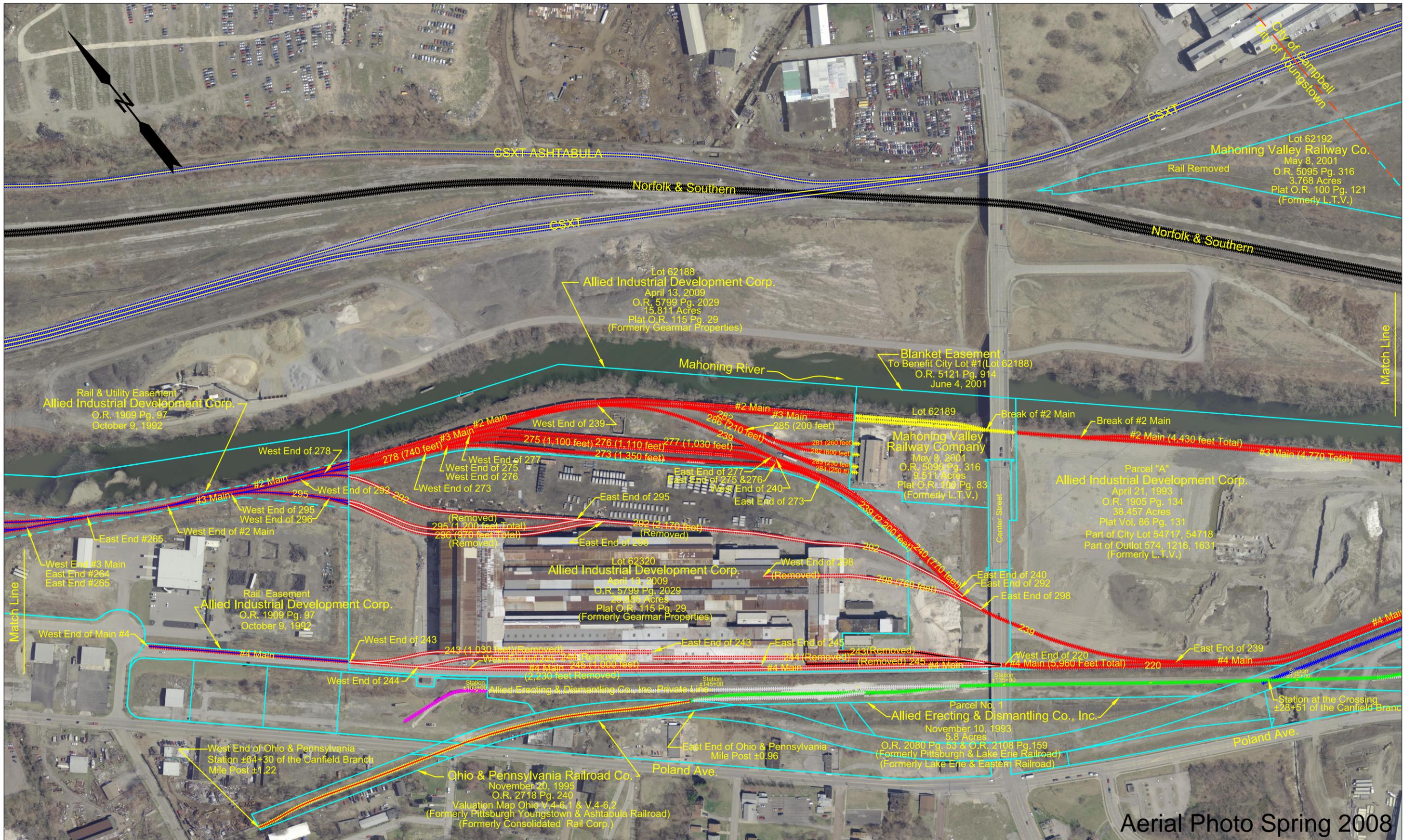
Match Line

Aerial Photo Spring 2008



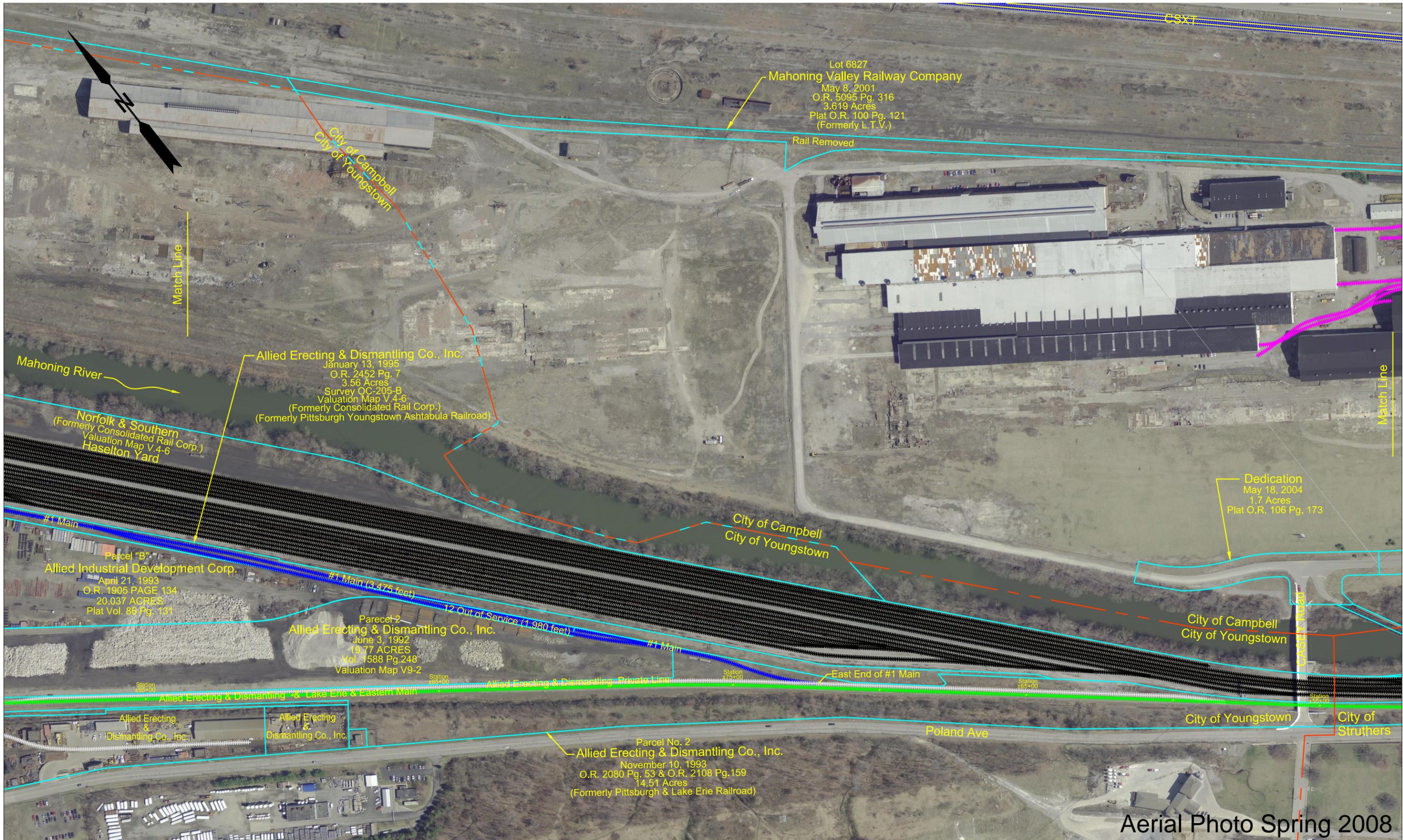
Railroads along the Mahoning River 1 of 5

Feb. 14, 2014

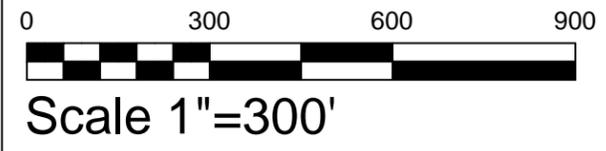


Railroads along the Mahoning River 2 of 5

Feb. 14, 2014

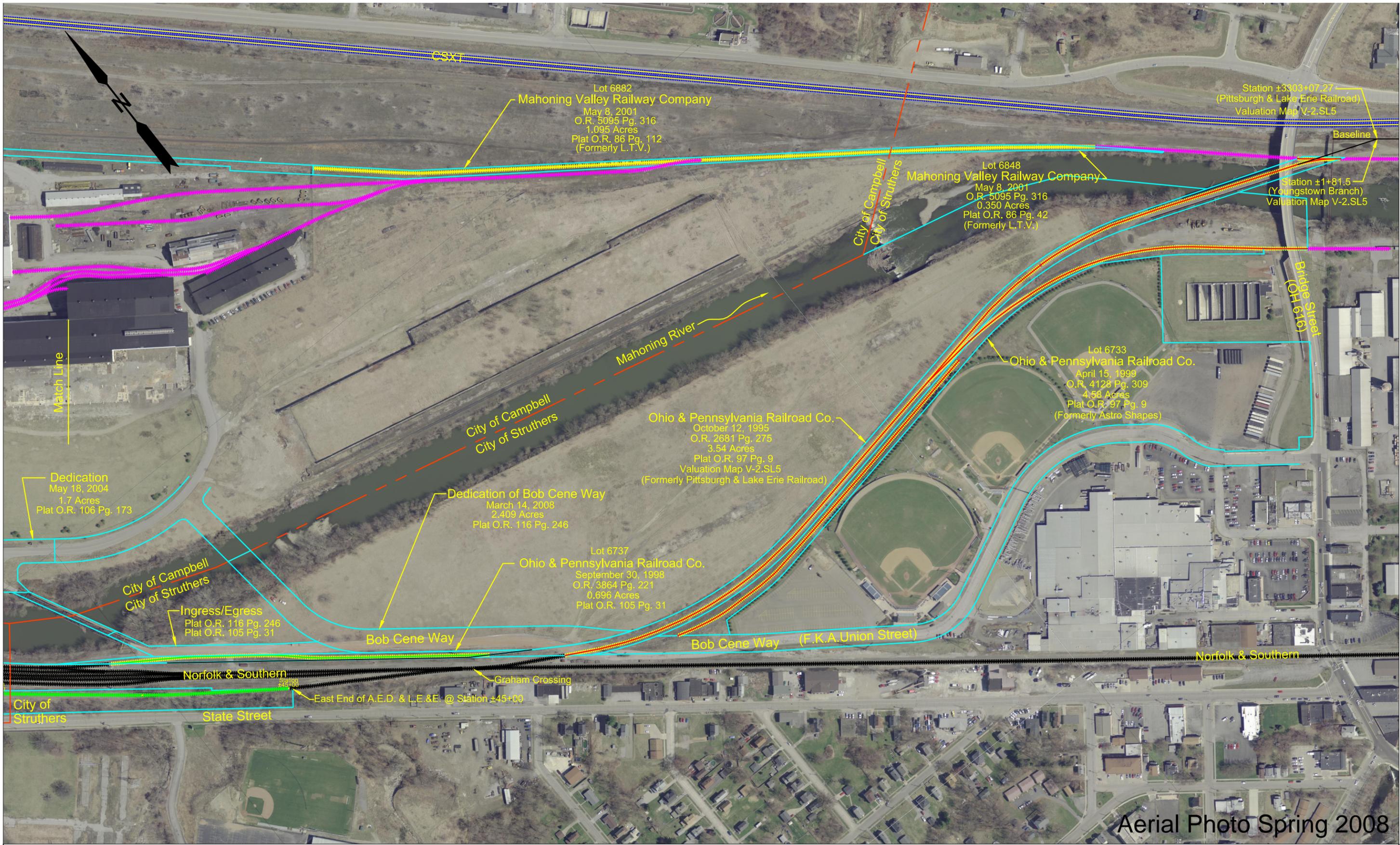


Aerial Photo Spring 2008

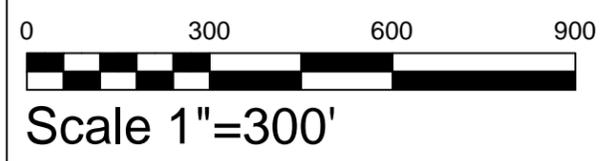


Railroads along the Mahoning River 4 of 5

Feb. 14, 2014



Aerial Photo Spring 2008



Railroads along the Mahoning River 5 of 5

Feb. 14, 2014