

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 35648

PENN-OHIO TRANSPORTATION, LLC  
—EXEMPTION FOR PURCHASE OF LEASE,  
ASSIGNMENTS OF OPERATING RIGHTS AND ACQUISITION OF LEASED  
LINE—EASTERN STATES RAILROAD, LLC AND  
COLUMBIANA COUNTY PORT AUTHORITY

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PETITION TO REVOKE EXEMPTION  
AND RELATED RELIEF

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232966  
ENTERED  
Office of Proceedings  
September 13, 2012  
Part of  
Public Record

Columbiana County Port Authority (CCPA), by and through its undersigned counsel of record, files this Petition to Revoke the above-entitled Exemption pursuant to the provisions of 49 U.S.C. 10502(d) and 49 C.F.R. § 1150.32(c). CCPA respectfully submits that the Verified Notice filed by Penn-Ohio Transportation, LLC (Penn-Ohio), a non-carrier, contains misleading statements and is void *ab initio*.

**I. The Verified Notice Is Void *Ab Initio*.**

Penn-Ohio's Verified Notice, which was filed on July 13, 2012, contains the following verified representations:

Pursuant to 49 C.F.R. § 1150.31, *et seq.*, Penn-Ohio Transportation, LLC ("Penn-Ohio"), a non-carrier, hereby files this Verified Notice of Exemption to (1) purchase the operating and lease rights on a line running from Youngstown, Ohio to Darlington, Pennsylvania (which lease includes an agreement to acquire the leased line) of Eastern States Railroad, LLC ("ESRR"), (2) receive permanent assignments of operating rights on continuous segments of lines connected to the leased line, (3) purchase the leased line and all operating rights thereon from Columbiana County Port Authority ("CCPA").

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The operating rights mentioned at (2) were identified at page 3 and 4 of Penn-Ohio's Verified Notice as follows:

(A) Overhead Trackage Rights Agreement dated May 7, 2001 between Ohio & Pennsylvania Railroad Company (which, together with its parent and all affiliates, "OHPA") and CQPA, to which ESRR is successor;

(B) Letter Agreement dated November 30, 2001 between OHPA, CQPA and CCPA, to which ESRR is successor;

(C) Interchange Agreement dated July 23, 2002, as amended and in effect, among CSX, OHPA and CQPA and Interline Service Agreement, effective date April 1, 2004, between CSX and CQPA, to which ESRR is successor;

(D) Land Lease dated August 8, 2003 between CSX and CQPA, to which ESRR is successor;

(E) Interchange Agreement dated May 1, 2001, and Interline Service Agreement, effective date October 5, 2004 between CQPA and NS, to which ESRR is successor;

(F) Easements granted by Allied Erecting & Dismantling Company, Inc. ("Allied") to The Pittsburgh and Lake Erie Railroad Company ("PLE") by agreements dated June 3, 1992, and November 10, 1993, and easements retained by PLE in deeds dated June 3, 1992, and November 10, 1993, from PLE to Allied (collectively, the "Allied Easements"), which Allied Easements were conveyed by Youngstown and Southern Railway Company (successor-in-interest to PLE) to Railroad Ventures, Inc. ("RVI") by deed dated November 8, 1996, and by RVI to CCPA by deed dated January 23, 2001, and were included in the rights granted to CQPA by CCPA, including rights over the C.P. Graham Interlocking, and which collective rights were also conferred on CCPA by order of the Bankruptcy Court dated March 28, 2002 in In re: Pittsburgh & Lake Erie Properties, Inc., Case No. 96-406 (MFW), and to which ESRR is successor; and

(G) Operating Rights Agreement between Matteson Equipment Company ("Matteson") and CQPA, to which ESRR is successor; and Operating Rights Agreement between ESRR and Matteson dated July 14, 2006.

The Verified Notice also represents that "Penn-Ohio intends to obtain all these rights and agreements described herein pursuant to Purchase Agreements with ESRR and CCPA, respectively, and commence operations on

August 12, 2012.” The statement that Penn-Ohio would “commence operations on August 12, 2012” was subsequently repudiated by Tervita, LLC (“Tervita”), the Manager of Penn-Ohio Penn-Ohio, which declined to consummate the proposed agreement with CCPA.

On July 27, 2012, the Board issued its Decision in which it stated that “[t]he transaction may be consummated on or after August 12, 2012, the effective date of the exemption.” However, on August 3, 2012, before the exemption became effective, Tervita advised CCPA that it did not intend to consummate the acquisition of the Line or purchase the operating and lease rights on the line running from Youngstown to Darlington. Although Penn-Ohio has declined to acquire the Youngstown-Darlington Line, it is now claiming that it intends to acquire the related agreements from Eastern States Railroad, LLC (ESRR) that permit continuous rail operations over the 3 miles of track east of Youngstown that are needed to interchange traffic with CSX and NS.

As evidenced by the literal wording of the Verified Notice, Ohio-Penn never alerted the Board, CCPA or ESRR that it would seek to “receive permanent assignments of operating rights on continuous segments of lines connected to the leased line,” but would not purchase the operating and lease rights from ESRR or purchase the leased line from CCPA. Instead of alerting the Board to the fact that Penn-Ohio might jettison the acquisition of the Line following the Board’s approval of the overall transaction, the Verified Notice explicitly ties the acquisition of those agreements to the purchase of the

operating and lease rights now held by ESRR and the related acquisition of the Youngstown-Darlington Line. Verified Notice at 3. Hence, the only rational conclusion that can be drawn is that the Verified Notice contains misleading information. Therefore, the Board must confirm that it is void *ab initio*.<sup>1</sup>

In attempting to shift blame in order to avoid revocation, Tervita now contends that CCPA approved the wording of the Verified Notice before it was filed. The fact of the matter is that CCPA relied on the explicit wording of the Verified Notice and had no inkling whatsoever that Penn-Ohio would not acquire the operating and lease rights or purchase the line of railroad between Youngstown and Darlington. Had the Verified Notice revealed Penn-Ohio's true intent, which was only disclosed after the Board issued its Decision on July 27, 2012, CCPA would not have agreed to enter into the sales agreement with Penn-Ohio and would have strenuously protested ESRR's unauthorized transfer of the permanent assignments of operating rights on the contiguous segments of lines connected to CCPA's line of railroad. Furthermore, it would have immediately pursued legal remedies in state court against ESRR for breach of contract in order to prevent the operating rights from being transferred to any entity that does not intend to provide rail service over the Youngstown-Darlington Line.

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<sup>1</sup> As an alternative, the Board is requested to reopen the proceeding on the grounds that Tervita's decision not to acquire the line of railroad is a substantially changed circumstance under 49 C.F.R. § 1115.4.

## **Background**

As the Board is well aware, CCPA, in order to promote future rail operations, engaged in a lengthy battle to acquire the Line from Railroad Ventures, Inc. (RVI) along with the various easements, leases and trackage rights agreements that are identified above as (A) through (G). Those agreements, which allow rail operations to extend approximately 3 miles east of milepost 0.0 in Youngstown, are required in order to interchange traffic with CSXT and NS that either originates or terminates on the Youngstown-Darlington Line.

In April 2000, after it finally acquired the Youngstown-Darlington Line, CCPA entered into a Track Lease and Operating Agreement with Central Columbiana & Pennsylvania Railway, Inc. (CQPA). Under the terms of that Agreement, CQPA was also granted the future right, privilege and option to purchase the Youngstown-Darlington Line.

In 2006, after CQPA was forced to file for bankruptcy, CCPA entered into an agreement with ESRR to operate its line. In addition, CQPA agreed to sell its operating and lease rights to ESRR. *See ESRR's Verified Notice of exemption filed in F.D. No. 34934, Eastern States Railroad, LLC—Exemption for Purchase of Lease agreement to Acquire the Leased Line, and Assignment of Operating Rights—Central Columbiana & Pennsylvania Railway and Columbiana County Port Authority.*

As was also explained in ESRR's Verified Notice:

As part of this purchase of lease and operating rights, ESRR has entered into an agreement with CCPA to amend the CCPA

Agreement so that, subject to certain specified pre-conditions, ESR agrees to acquire the line from Milepost 0.0 in Youngstown to Milepost 35.7 in Darlington. In addition, as part of the transaction with ESR, CQPA, through the Trustee, and CCPA are also assigning to ESR all agreements and operating rights necessary or useful to enable ESR to operate from milepost 0.0 to interchanges with NS and CSX in Youngstown which agreements and operating rights are made part of this exemption ....

The agreements and operating rights listed in ESRR's Verified Notice are the same agreements and operating rights that are the subject of the Verified Notice in the instant proceeding. CCPA's agreement to transfer its interests in the foregoing agreements and operating rights to ESRR was based on the underlying premise that if ESRR decided it would not acquire the Youngstown-Darlington Line, it would return the various easements and operating rights to CCPA. That basic premise is reflected in multiple provisions of the Track Lease and Operating Agreement that created ESRR's right to acquire the Line. The Track Lease and Operating Agreement was terminated in 2009 following ESRR's notice to CCPA that it would not acquire the line. In order to avoid disrupting rail service to Total Waste's landfill, CCPA took no steps that would have caused a disruption and continued to allow Youngstown & Southeastern Railway Company to operate over the line subject to its sublease with ESRR.

By deciding that it would not acquire the line, ESRR forfeited the ability to assign its rights under the Track and Lease Agreement. Section 21.03 expressly provides that if the operating railroad decided not to acquire the line, it would not be authorized to "assign its rights under this Agreement or any interest therein, or attempt to have any other person, firm or corporation assumes (sic) its rights or obligation under this Agreement, without the prior

written consent of [CCPA].” Furthermore, Section 14.02 of the Track Lease and Operating Agreement expressly provides that if it is terminated, the operating railroad “shall deliver ... all occupation agreements” to CCPA along with any other materials and data “related to the continued operation and maintenance of the Track and Other Property.”

### **The Current Situation**

Following Tervita’s decision to not acquire the Youngstown-Darlington Line and the operating and lease rights, CCPA renewed its efforts to attract a buyer that will acquire and operate the Line. Recognizing that the various trackage rights and interchange agreements constitute an integral component of continuous rail operations from the points of interchange with CSXT and NS to the termination of the Youngstown-Darlington Line at milepost 35.7 in Darlington, CCPA, in accordance with the contractual provisions in the Track Lease and Operating Agreement and Amendments thereto, has requested ESRR to deliver all occupation agreements, including the Overhead Trackage Rights, Letter Agreements, Land Leases, and easements back to CCPA.

When Tervita learned of CCPA’s efforts, it asserted that it has a pending contract with ESRR to acquire ESRR’s interests in the various agreements and that CCPA has no right to those operating rights. This position has been advanced even though the agreements are characterized in the Verified Notice as being “necessary or useful” to enable the operator over the Youngstown-Darlington Line “to operate from milepost 0.0 to interchanges with NS and CSXT in Youngstown.” Verified Notice at 3. Tervita’s position must be rejected.

**II. As An Alternative To Revoking The Verified Notice, The Board Should Void The Underlying Purchase Agreement Between Tervita and Waste Management Logistics, LLC Insofar As It Would Permit Waste Management Logistics, LLC To Transfer The Agreements And Operating Rights To Tervita or Penn-Ohio, even though Penn-Ohio Does Not Intend To Acquire The Operating And Lease Rights Over The Youngstown-Darlington Line.**

There is no sound reason to allow Penn-Ohio to acquire the above-listed agreements if it is not going to acquire and operate the Youngstown-Darlington Line. Given the fact that Penn-Ohio is a non-carrier, nothing is to be gained by permitting it to interfere in any manner with the future sale and operation of the Line or with the various agreements and operating rights that Penn-Ohio acknowledged in its Verified Notice are “necessary or useful” to enable rail operations “from milepost 0.0 to interchanges with NS and CSXT”. Verified Notice at 3.

In order to prevent any interference with the agreements and future rail operations over the Line, the Board, as an alternative to revoking the exemption, should follow its past precedent in AB 556 (Sub-No. 2X), *Railroad Ventures, Inc.—Abandonment Exemption—Between Youngstown, OH, and Darlington, PA, in Mahoning and Columbiana Counties, OH, and Beaver County, PA, aff’d sub nom, Railroad Ventures, Inc. v. STB*, 299 F.3d 523 (6th Cir. 2002). In that proceeding, the Board voided various contractual agreements between RVI and Venture Properties of Boardman, Inc. (VPB), Boardman Township Park District and Boardman Township upon finding that they would have had a deleterious impact on railroad operations over this line of railroad. As the Board ruled, such agreements “are void as against public policy.” *January*

*2000 Decision* at 3-4 and *October 2000 Decision* at 11-13.

Consistent with its mandate to protect the public from an unnecessary discontinuance, cessation, interruption, or obstruction of available rail service,<sup>2</sup> the Board should void the agreement between Total Waste Logistics, LLC (Total Waste), which controls ESRR, and Tervita that transfers various agreements and operating rights from ESRR to Tervita or its nominee. If the Board does not void Total Waste's pending sale of the various operating rights to Tervita or Penn-Ohio, Tervita can be expected to impose potentially onerous terms and conditions on any entity that may wish to acquire the Line from CCPA. If it does, it would jeopardize CCPA's efforts to encourage continued rail operations over the Line, portions of which require costly rehabilitation. Any additional payment or discount that Tervita or Penn-Ohio would demand for the right to operate over the track that connects the Youngstown-Darlington Line with CSXT and NS will likely discourage a potential carrier from acquiring the line and leave CCPA with no alternative but to seek authority to abandon the line.

Voiding the Total Waste-Tervita/Penn-Ohio sales contract will not affect the price to be paid for the landfill. Based on information and belief, CCPA understands that Total Waste placed no value on the above-listed agreements and operating rights when it agreed to sell its landfill to Tervita. As a result, all consideration to be paid to Total Waste by Tervita is for Total Waste's landfill. Therefore, partial voiding of the agreement between Tervita/Penn-Ohio and

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<sup>2</sup> See, e.g., *Norfolk Southern Railway Company—Adverse Abandonment—St. Joseph County, IND, AB 290 (Sub-No. 286)*, slip op at \_ (STB served April 17, 2012). Although the issues in this proceeding do not arise in the context of an adverse abandonment, the Board should apply the same principle herein.

Total Waste will not have any adverse financial impact on the cost to Tervita or Penn-Ohio of acquiring Total Waste's landfill.

### **III. Expedited Consideration Is Requested.**

CCPA understands that Tervita anticipates closing on the deal with Total Waste in approximately 60 days. In order to prevent the sale of the above-listed agreements to Penn-Ohio, the Board is urged to establish a procedural schedule that would allow it act on this Petition to Revoke in an expedited fashion so as to be able to render its decision no later than November 26, 2012.

As stated above, CCPA is actively seeking a buyer to acquire and operate the entire Youngstown-Darlington Line from milepost 35.7 to the points of interchange with CSXT and NS. However, as long as there is any uncertainty regarding the disposition of the agreements and operating rights that are necessary to enable the potential buyer to operate from milepost 0.0 to the interchanges with NS and CSXT, CCPA's efforts to sell the Line and thereby assure continued rail service between Youngstown and Darlington will be hampered, if not totally destroyed.

### **CONCLUSION**

For all the above-stated reasons, the Board should find that the Verified Petition contains misleading information and declare it void *ab initio*. In addition, to avoid any possibility that Penn-Ohio and Tervita could interfere with the agreements and operating rights that are required to connect the Line to the points of interchange with CSXT and NS, the Board should void the provisions of the June 13, 2012 Agreement between ESRR and Tervita that

would allow Tervita or Penn-Ohio to acquire the subject agreements and operating rights without acquiring the Line from CCPA. Expedited consideration is requested.

Respectfully submitted,

Richard H. Streeter /s/

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Dated: September 14, 2012

CERTIFICATE OF SERVICE

I, Richard H. Streeter, do hereby certify that a true copy of the foregoing Petition to Revoke was served via email his 13th day of September, 2012, on the following named individuals:

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