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



ALLIED INDUSTRIAL DEVELOPMENT CORPORATION,

Petitioner,

v.

STB Docket No. FD 35477

OHIO CENTRAL RAILROAD, INC.,  
OHIO & PENNSYLVANIA RAILROAD  
COMPANY, THE WARREN &  
TRUMBULL RAILROAD COMPANY,  
YOUNGSTOWN & AUSTINTOWN  
RAILROAD, INC., THE YOUNGSTOWN  
BELT RAILROAD COMPANY, THE  
MAHONING VALLEY RAILWAY  
COMPANY, and SUMMIT VIEW, INC.,  
collectively d/b/a The Ohio Central Railroad  
System, and GENESEE & WYOMING,  
INC.,

Respondents.

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TRANSPORTATION BOARD**

PETITION FOR DECLARATORY ORDER

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STB Docket No. \_\_\_\_\_

**PETITION FOR DECLARATORY ORDER**

Petitioner, Allied Industrial Development Corporation (“Allied”), by its attorneys, files this Petition For Declaratory Order pursuant to the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101 *et seq.* In support of the Petition, Allied states as follows:

**I. Introduction**

The instant Petition arises out of an action which is presently pending in the Court of Common Pleas of Mahoning County, Ohio at civil action no. 2009-cv-2835 (the “State Court Action”). The State Court Action is stayed pending the resolution of certain issues which have been referred to the Surface Transportation Board (the “Board”). It is Allied’s position that these

issues have been improvidently referred to the Board, and that the case should be remanded to the Court of Common Pleas of Mahoning County for further proceedings.<sup>1</sup>

## **II. The Parties**

Allied is a corporation organized and existing under the laws of the State of Ohio, with a principal place of business at 2100 Poland Avenue, Youngstown, Ohio 44502. The Ohio Central Railroad System is an unincorporated and unregistered association of eleven railroads that operate throughout east central and northeastern Ohio and in the Pittsburgh, Pennsylvania area, with a principal place of business at 47849 Papermill Road, Coshocton, Ohio 43812. Respondents Ohio Central Railroad, Inc., Ohio & Pennsylvania Railroad Company, The Warren & Trumbull Railroad Company, Youngstown & Austintown Railroad, Inc., The Youngstown Belt Railroad Company, and The Mahoning Valley Railway Company (collectively “Ohio Central”) are corporations organized and existing under the laws of the State of Ohio, and are six of the eleven railroads of the Ohio Central Railroad System. Respondents Summit View, Inc. (“Summit View”) and Genesee & Wyoming, Inc. (“Genesee & Wyoming”) are the owners, operators and corporate parents of the railroads which operate as the Ohio Central Railroad System. Ohio Central, Summit View and Genesee and Wyoming will be collectively referred to herein as the “Ohio Central Defendants” or “Respondents.”

## **III. Factual Background**

By Purchase Agreement dated March 26, 2009, Allied purchased from Gearmar Properties, Inc. (“Gearmar”) two (2) parcels of industrial property located in the City of Youngstown, Ohio and known as Youngstown City Lot Nos. 62320 and 62188, as well as all appurtenances pertaining to the property, all improvements pertaining to the property, certain

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<sup>1</sup> The parties to this Petition are also parties to a Declaratory Order Proceeding before the Board at Docket No. FD 35316. The Declaratory Order Proceeding at Docket No. FD 35316 involves whether Ohio Central has violated easement rights over adjacent parcels of property which are owned by Allied and Allied Erecting and Dismantling Co., Inc., a related company.

personal property located on or about the property, and all other property rights (collectively the “Gearmar Purchase”). It is undisputed that Allied is the owner of Lot No. 62320. However, there is a dispute between the parties regarding the ownership of Lot No. 62188. Allied contends that it is the rightful owner of Lot No. 62188 due to the Gearmar Purchase. The Ohio Central Defendants contend that Allied’s purchase of Lot No. 62188 was legally ineffective because Ohio Central had mistakenly conveyed Lot No. 62188 to Gearmar in connection with the prior sale of Lot No. 62320 (which is adjacent to Lot No. 62188) to Gearmar. In short, Ohio Central argues that Gearmar did not have “good title” to Lot No. 62188 to transfer to Allied. This is clearly not an issue which is within the Board’s statutory jurisdiction and must be resolved by the state court.

At the time of the Gearmar Purchase, Ohio Central occupied an office building located on Lot No. 62188, despite having no legal or contractual rights to the possession, operation or use of these offices on Allied’s property. Ohio Central was also utilizing the property located on Lot No. 62188 and a building located on Lot No. 62320 to store various materials, third party rail cars and other railroad equipment despite the lack of any lease, contract, agreement or other legal right to continue to use the property. In addition, Ohio Central was performing limited operations over industrial, spur and/or yard tracks which were the former internal tracks of the previous owners of the property, namely Republic Steel and LTV Steel. By letter dated May 5, 2009, Allied informed Ohio Central of the Gearmar Purchase and requested that Ohio Central vacate Lot Nos. 62320 and 62188 on or before June 5, 2009.<sup>2</sup> Ohio Central did not vacate the properties prior to this time.

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<sup>2</sup> A true and correct copy of the May 5, 2009 letter to Ohio Central is included in the accompanying Appendix as Exhibit A.

#### IV. The State Court Action

On July 27, 2009, Allied commenced the State Court Action by filing a Complaint for Forcible Entry and Detainer against Ohio Central in the Court of Common Pleas of Mahoning County, Ohio.<sup>3</sup> The Complaint for Forcible Entry and Detainer states two (2) causes of action: (1) forcible entry and detainer/ejectment pursuant to the Ohio Forcible Entry and Detainer statute, O.R.C. §1923.01 et seq.; and (2) trespass pursuant to Ohio common law.

On August 13, 2009, Ohio Central removed the State Court Action to the Northern District of Ohio pursuant to 28 U.S.C. § 1446 on the grounds that Allied's claims were completely preempted by the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. §§ 10101 et seq.<sup>4</sup> The Case was docketed before Judge James S. Gwin at civil action no. 4:09-cv-1904.

While the State Court Action was pending in the Northern District of Ohio, Allied amended its Complaint to add respondents Summit View and Genesee and Wyoming as parties.<sup>5</sup> The Ohio Central Defendants also brought counterclaims against Allied and a Third Party Complaint against Gearmar Properties, Inc. The Ohio Central Defendants' Amended Counterclaim and Third Party Complaint sought to quiet title to the disputed property, sought a declaratory judgment that Allied's purchase of Lot No. 62188 is void for lack of STB approval, and, in the event that Allied was found to be the rightful owner of Lot No. 62188, sought the

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<sup>3</sup> A true and correct copy of the Complaint for Forcible Entry and Detainer is included in the Appendix as Exhibit B.

<sup>4</sup> A true and correct copy of the case docket from the Northern District of Ohio is included in the Appendix as Exhibit C.

<sup>5</sup> A true and correct copy of the Amended Complaint for Forcible Entry and Detainer is included in the Appendix as Exhibit D.

imposition of an easement across Lot No. 62188 to access other “landlocked” property<sup>6</sup> owned by Ohio Central.<sup>7</sup>

The State Court Action was remanded to the Court of Common Pleas of Mahoning County on March 15, 2010 due to having been improperly removed by Ohio Central.<sup>8</sup> Significantly, Judge Gwin found that:

[N]either of Allied Industrial’s claims comes within the scope of the ICCTA’s preemption clause. That clause’s central concern is ‘regulation of rail transportation’ – not the incidental effect on rail transportation caused by a landowner’s right to exclude others from its property.”

Opinion and Order dated March 15, 2010, p. 5. Judge Gwin also found that:

Allied Industrial’s Ohio law claims cannot be said to ‘regulate’ the abandonment of rail lines. It is true that the upshot of Allied Industrial’s claims (if successful) might affect certain of the defendants’ rail lines. But the cause of that outcome is not Ohio’s direct regulation of the defendants’ rail lines; rather, the cause is the defendants’ sale of the two parcels at issue to Gearmar.

Opinion and Order dated March 15, 2010, p. 6. Accordingly, Judge Gwin rejected Respondents’ claim that the case was properly removed on the basis of “federal question” jurisdiction under ICCTA. Judge Gwin also found that Respondents’ removal of the case was not “objectively reasonable,” and therefore awarded Allied \$16,035.50 in attorneys’ fees, which fees were incurred in connection with the wrongful removal.<sup>9</sup>

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<sup>6</sup> Ohio Central is the owner of Youngstown City Lot No. 62189, which contains a locomotive repair shop. See the maps which are included in the accompanying Appendix, specifically Exhibits 2 and 8 to Exhibit J (which itself is an appendix from briefing in the State Court Action).

<sup>7</sup> A true and correct copy of Ohio Central’s Amended Counterclaim and Third Party Complaint against Gearmar Properties, Inc. is included in the Appendix as Exhibit E.

<sup>8</sup> A true and correct copy of the Opinion and Order remanding the case to the Court of Common Pleas of Mahoning County due to Ohio Central’s wrongful removal is included in the Appendix as Exhibit F.

<sup>9</sup> A true and correct copy of the Opinion and Order denying Ohio Central’s motion for reconsideration regarding Allied’s entitlement to attorneys’ fees under 28 U.S.C. § 1447(c), and awarding Allied its’ attorneys’ fees, is included in the Appendix as Exhibit G.

The Ohio Central Defendants subsequently filed a “Motion to Dismiss or in the Alternative Refer to the Surface Transportation Board” (the “Motion to Dismiss”) in the Court of Common Pleas of Mahoning County on the grounds that Allied’s claims were preempted by the Interstate Commerce Commission Termination Act, 49 U.S.C. §10101 et seq. Allied opposed the relief sought by the Motion to Dismiss.<sup>10</sup> On September 22, 2010, the Court of Common Pleas of Mahoning County decided the Motion to Dismiss by issuing a “Judgment Entry” referring the State Court Action “to the Surface Transportation Board for its adjudication of all issues within its jurisdiction,” and staying the State Court Action pending the resolution of said issues.<sup>11</sup>

**V. The State Court Action Was Improvidently Referred to the Board.**

Allied’s position is that the Mahoning County Court of Common Pleas erred in referring the case to the Board. As demonstrated below, this action involves a dispute between the parties as to the ownership of the Lot No. 62188, which issue does not fall within the Board’s jurisdiction. Additionally, even if there are issues that ultimately must be determined by the Board, such issues cannot be decided at the present time because of the (alleged) uncertainty of the ownership of Lot No. 62188. Thus, if the Board determines that certain issues do fall within its jurisdiction, it should nevertheless decline to decide the issues until such time as the ownership of Lot No. 62188 and the character of the tracks located thereon have been determined in the Court of Common Pleas of Mahoning County. See Central Kansas Railway, LLC-Abandonment Exemption—In Marion and McPherson Counties, KS, STB Finance Docket AB-406 (Sub-No. 6X) (Served May 8, 2001), and cases therein cited.

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<sup>10</sup> A true and correct copy of the Motion to Dismiss, Allied’s response brief and accompanying Appendix, and the Ohio Central Defendants’ reply brief from the Court of Common Pleas of Mahoning County are included in the Appendix as Exhibits H, I, J and K.

<sup>11</sup> A true and correct copy of the Judgment Entry is included in the Appendix as Exhibit L.

A. **ICCTA Preemption Is Not as Broad as Respondents Will Contend.**

Respondents will likely contend that the Board’s jurisdiction under ICCTA is so broad as to encompass any and all matters which have any relation whatsoever to the operation of a railroad. However, case law makes it clear that the Board does not have jurisdiction over the subject matter of this action, *i.e.*, the enforcement of agreements concerning private property rights. For example, in PCS Phosphate Company, Inc. v. Norfolk Southern Corp., 559 F.3d 212 (4th Cir. 2009), the United States Court of Appeals for the Fourth Circuit held that judicial enforcement of an easement granted by a landowner to the predecessors in interest of the railroad is not preempted by the ICCTA “because it is not the sort of rail ‘regulation’ contemplated by the statute and, as a voluntary agreement, does not ‘unreasonably interfere’ with rail transportation.” PCS Phosphate, 559 F.3d at 214. In that case, predecessors to the owners of a phosphate mine granted an easement to a predecessor railroad to construct a rail line over the mine property. Id. at 215. The easement contained a covenant whereby the railroad agreed to relocate the rail line, at its expense, if the mine owners deemed relocation to be necessary to mine operations. Id. Many years later, the mine owners determined that mining under the rail line was necessary, and requested the railroad to relocate the rail line pursuant to the easement. Id. at 216. After the railroad refused to relocate the rail line, the mine owners relocated the line at their own expense and sued the railroad to recover their expenses. Id.

On appeal, the U.S. Court of Appeals held (as did the district court) that the enforcement of the easement was not preempted by the ICCTA, and rejected an overly broad construction of the ICCTA preemption clause. First, the Court of Appeals observed that ICCTA’s preemption clause “focuses specifically on regulation,” and that “Congress narrowly tailored the ICCTA preemption provision to displace only regulation, *i.e.*, those state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the

continued application of laws having a more remote or incidental effect on rail transportation.”

Id. at 218. The Court of Appeals’ further analysis is instructive on what is and is not preempted by the ICCTA:

Voluntary agreements between private parties, however, are not presumptively regulatory acts, and we are doubtful that most private contracts constitute the sort of “regulation” expressly preempted by [ICCTA]. If contracts were by definition “regulation,” then enforcement of every contract with “rail transportation” as its subject would be preempted as a state law remedy “with respect to regulation of rail transportation.” 49 U.S.C. §10501(b). Given the statutory definition of “transportation,” this would include all voluntary agreements about “equipment of any kind related to the movement of passengers and property, or both, by rail.” See 49 U.S.C. §10102(9) (defining “transportation”). If enforcement of these agreements were preempted, the contracting parties’ only recourse would be the “exclusive” ICCTA remedies. But the ICCTA does not include a general contract remedy. Such a broad reading of the preemption clause would make it virtually impossible to conduct business, and Congress surely would have spoken more clearly, and not used the word “regulation,” if it intended that result.

Id. at 218-19 (emphasis added).

The Court of Appeals went on to review the legislative history of the ICCTA, which makes clear that the intent of Congress was simply to preempt “State economic regulation of railroads,” not to preempt enforcement of “all voluntary agreements about rail transportation.” Id. at 220 (emphasis in original). As the court observed, “[t]he STB itself has emphasized that courts, not the STB, are the proper forum for contract disputes, even when those contracts cover subjects that seem to fit within the definition of ‘rail transportation.’” Id. (citing The N.Y., Susquehanna & W. Ry. Corp. – Discontinuance of Service Exemption, 2008 WL 4415853 (STB Sept. 30, 2008)).

Additionally, the Board has held that a party to a contract involving real estate cannot escape its voluntary contractual commitments by invoking the preemptive effect of §10501 of the ICCTA. Township of Woodbridge v. Consolidated Rail Corp., STB Docket No. 42053 (STB served December 1, 2000), clarified (STB served March 23, 2001), and available at 2000 STB LEXIS 709, 2000 WL 1771044 and 2001 STB LEXIS 299, 2001 WL 283507, respectively. In

Woodbridge, a railroad company entered into a valid and enforceable agreement curtailing the “idling of locomotives and switching of rail cars . . . between 10:00 p.m. and 6 a.m.” as part of a settlement of a lawsuit filed by the Township of Woodbridge (the “Township”). 2000 WL 1771044, \*1. The Township later filed an action with the Board seeking a declaration that the railroad company was bound by the settlement agreement, and that the settlement agreement could be enforced in federal or state courts. Id. The Board agreed with the Township. Id. at \*3-4. In declining to rule on the merits of the contract disputes, the Board noted that while regulatory action that affected railroad operations was preempted, commitments entered into by way of voluntary contracts are not. Id. at \*3. The Board further declined to consider preemption issues that “would have been involved” if the case were one of legislative regulation. Id. Such voluntary agreements, the Board indicated, could be seen as indicating the railroad’s own “determination and admission that the agreements would not unreasonably interfere with interstate commerce.” Id.

Similarly, in Pejepscot Industrial Park, Inc. v. Maine Central Railroad Co., the United States District Court for the District of Maine explained:

In its initial decision, the STB concluded that a rail carrier that voluntarily enters into an otherwise valid and enforceable agreement cannot use the preemptive effect of section 10501(b) to shield it from its own commitments, provided that the agreement does not unreasonably interfere with interstate commerce. In clarifying that earlier decision, the STB subsequently noted that a rail carrier that enters into such agreements is not precluded from arguing “as a matter of contract interpretation that: (1) unreasonable interference with interstate commerce would result if these voluntary agreements are interpreted [in the manner sought by the plaintiff], and (2) in considering enforcement, the court should give due regard to the impact on interstate commerce.”

297 F.Supp.2d 326, 330, 332-333 (D. Me. 2003) (internal citations omitted).

The court in Pejepscot held that the plaintiff’s breach of contract claim was not preempted by the ICCTA and, therefore, would not be dismissed. Id. at 333; see also Pejepscot Industrial Park, Inc. – Petition for Declaratory Order, STB Finance Docket No. 33989, 2003 STB

LEXIS 253 (STB served May 15, 2003) (“[W]e in the past determined that a carrier cannot invoke the preemption provisions of 49 U.S.C. 10501(b) to avoid its obligations under a presumably valid and otherwise enforceable agreement that it has entered into voluntarily, where enforcement of the agreement would not unreasonably interfere with interstate commerce.”); see also CSX Transportation, Inc. – Petition for Declaratory Order, STB Finance Docket No. 34662 n. 14, 2005 STB LEXIS 134 n. 14 (STB served March 14, 2005).

**B. The Issue of Which Party Owns the Disputed Property Falls Outside of the Jurisdiction of the Board Under the ICCTA.**

The Board’s own case law makes it clear that the Board does not involve itself in disputes over the ownership of real estate. Preliminarily, there is a “presumption that areas of law traditionally reserved to the states, like police powers or property law, are not to be disturbed absent the clear and manifest purpose of Congress.” New Orleans & Gulf Coast Railway Co. v. Barrois, 533 F.3d 321, 334 (5th Cir. 2008). Consistent with this presumption, the Board itself has emphasized that “[i]t is well settled that the interpretation of deeds and the determination of who owns good title are issues of State law that are outside the expertise of this Board.” Central Kansas Railway LLC--Abandonment Exemption, Marion & McPherson Counties, KS, 2001 WL 489991 at 2, 4-6. In Central Kansas, the Board, when presented with a dispute involving title to property, refused to rule on state property law questions and stated that the parties first had to seek a court ruling on the underlying state property law issues. “Once a state court has ruled on the ownership disputes as to the parcels at issue, a party may submit the state court’s ruling to [the Board] with a request for a determination of whether all or part of the line has been abandoned as a result....” Id. at 5.

The main dispute in the present case centers upon whether Allied lawfully owns Lot 62188 as a result of a purchase from Gearmar. Respondents contend that Allied does not, saying that they never intended to convey Lot 62188 and that a mistake was made when the property

was conveyed to Gearmar. Clearly, these are state law issues that the Board cannot and should not answer for the parties.

**C. Under 49 U.S.C. § 10906, the Board Has No Jurisdiction Over the Abandonment of Industrial, Team, Switching, or Side Tracks.**

Should the Board disregard its precedent and attempt to resolve this matter before the ownership of Lot 62188 is determined by the Court of Common Pleas of Mahoning County, Respondents will likely contend that the Board must approve any abandonment of their tracks located on Lot 62188 pursuant to 9 U.S.C. §§ 10901-10903. However, 49 U.S.C. § 10906, entitled “Exception,” plainly provides that “[t]he Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.” Courts that have interpreted Section 10906, and in particular its impact on Section 10501, have concluded that Congress “specifically withdrew regulation of [industrial or spur] lines from the STB, leaving their management solely to the respective railroads.” Port City Properties v. Union Pacific Railroad, 518 F.3d 1186, 1189 (10<sup>th</sup> Cir. 2008). As a result, the Board has “no authority over the regulation of spur or industrial ‘tracks’ as opposed to main railroad ‘lines.’ That authority is left entirely to railroad management who may contract services as they see fit.” Id. (ruling that there was no requirement that Union Pacific request authorization for abandonment from the STB); see also Cities of Auburn and Kent, 2 S.T.B. 330, 1997 WL 362017 at \*7 (1997) (“When sections 10906 and 10501(b)(2) are read together, it is clear that Congress intended to remove [Board] authority over the entry and exit of these auxiliary tracks, while still preempting state jurisdiction over them, leaving the construction and disposition of them entirely to railroad management.”). Because the Board does not oversee the transfer of (or otherwise regulate) industrial, team, switching or side tracks, the Board should not adjudicate the issues raised by the State Court Action.

**D. The Tracks On Youngstown City Lot No. 62188 Are Not Main Lines, But Instead Are Industrial, Spur, Team, Switching or Side Tracks.**

Whether or not railroad trackage is a “line” of railroad or instead is in the excepted category of “industrial, spur, team, switching or side track” is a question for a court of law to determine. See, e.g., Powell v. United States, 300 U.S. 276 (1937); Louisiana & Arkansas Railway Company v. Missouri Pacific Railroad Company, 288 F.Supp. 320, 323 (E.D. La. 1968) (“If, however, the trackage is used in the loading, reloading, storage and switching of cars incidental to the receipt of shipments by the carrier or their delivery to the consignee, then such trackage is spur, industrial, team, switching or side tracks ...”); see also Port City Properties, 518 F.3d at 1189 (track was properly found to be industrial or spur track where, inter alia, there was no evidence that the track was a main line). Therefore, based upon the plain language of 49 U.S.C. § 10906, Board approval was not required for Lot 62188 to be transferred from MVRV to Gearmar, or from Gearmar to Allied, and there is no need for the Board to determine any issues which are in dispute. 49 U.S.C. § 10906; Port City Properties, 518 F.3d at 1189 (“[T]he STB has no authority over the regulation of spur and industrial tracks as opposed to main railroad lines.”). Evidence developed in discovery in the State Court Action clearly shows that the tracks are industrial tracks, rather than main lines or “lines of railroad.”<sup>12</sup>

“Factors used to determine whether a section of track is an extension of a regular railroad line, as opposed to a ‘spur’ or ‘industrial’ track, include whether the railroad maintains a track schedule or regular service over the track; furnishes express, passenger or mail service; maintains buildings, loading platforms, or an agent along the trackage; and who completes the bills of lading.” Port City Properties, 518 F.3d at 1189. “It is also relevant whether the track has been or is to be used for anything other than industrial delivery, ... the length of the track, whether the

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<sup>12</sup> The evidence which follows is set forth in Plaintiff’s Appendix in Support of Brief in Opposition to Defendants’ Motion to Dismiss Or, in the Alternative, Refer to the Surface Transportation Board, which is attached to the Appendix to the instant Petition as Exhibit J.

track serves only a single customer, and whether the customer requested the carrier to provide service.” *Id.* By contrast, “so-called main or branch lines of railroad” have been described as “lines designed and used for continuous transportation service by through, full trains between different points of shipment or travel,” but excluding “all that mass of tracks (as distinguished from ‘lines’) naturally and necessarily designed and used for loading, unloading, switching, and other purposes connected with, and incidental to, but not actually and directly used for, such transportation service.” *Nicholson v. I.C.C.*, 711 F.2d 364, 367-68 (D.C. Cir. 1983) (italics omitted).

The following evidence<sup>13</sup> demonstrates that the tracks on Lot No. 62188 are industrial tracks. Prior to August 23, 2009, Terry Feichtenbinder was a Senior General Manager of The Ohio Central Railroad System and had “direct responsibility for all things relative to the operation of the Youngstown Division” of The Ohio Central Railroad System, which was comprised of Respondents Ohio & Pennsylvania Railroad Company, Mahoning Valley Railway Company, the Youngstown Belt Railroad, the Warren & Trumbull Railroad, and the Youngstown & Austintown Railroad. Feichtenbinder Dep. p. 29.<sup>14</sup> Mr. Feichtenbinder discussed the tracks located on Lot No. 62188 at length in his depositions. He characterized the tracks as “industrial yard tracks” because Lot No. 62188 and the surrounding area “is an industrial area, and the form of operation over the trackage is what, within the [railroad] industry, we would generally characterize as being yard operations.” Feichtenbinder Dep. p. 70. Mr. Feichtenbinder testified that the terms “industrial track” and “industrial yard track” are “very synonymous,” and he also characterized the tracks on Lot No. 62188 as being “just industrial tracks.” Feichtenbinder Dep. p. 71. Mr. Feichtenbinder also testified that, with regard to the track which is denominated

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<sup>13</sup> The depositions were taken while the case was pending in the Northern District of Ohio.

<sup>14</sup> Appendix in Support of Brief in Opposition to Defendants’ Motion to Dismiss Or, in the Alternative, Refer to the Surface Transportation Board, Exhibit 5.

as the “# 3 Main” on Lot No. 62188, “there is a whopping difference in the purpose of the # 3 Main versus the purpose of the CSX main” line from Baltimore, Maryland to Chicago, Illinois. Feichtenbiner Dep. p. 72-73. It was also noted that the tracks were “not labeled main lines” by the Ohio Central Defendants. Feichtenbiner Dep. p. 68. Mr. Feichtenbiner’s testimony makes it clear that, regardless of how tracks on Lot No. 62188 were denominated, they simply were not “lines designed and used for continuous transportation service by through, full trains between different points of shipment or travel ...” Nicholson, 711 F.2d at 367-68.

With respect to the uses of the tracks located on Lot No. 62188, Mr. Feichtenbiner testified that prior to the sale to Gearmar the tracks had been used as follows:

1. to access the Ohio Central Defendants’ locomotive shop located on Lot No. 62189;
2. for the staging and storage of railroad equipment;
3. for interchanging with the Norfolk Southern Railway at Norfolk Southern Railway’s Haselton Yard, which is east of Lot Nos. 62320, 62188 and 62189, on the east side of the Center Street Bridge; and
4. for interchanging with the CSX railroad to the west of Lot No. 62188 by way of the track described by the Ohio Central Defendants as the “MVRV tail track.”

Feichtenbiner Dep. p. 42, 44, 66.

Mr. Feichtenbiner also testified that the tracks were used for “transloading,” which he defined as “tak[ing] the material out of the railcar and put[ting] it in a truck for distribution.” Feichtenbiner Dep. p. 46-47. More specifically, Mr. Feichtenbiner testified that The Bloom Plastics Company regularly transloaded plastic pellets out of rail cars located on the “240” track, which is one of the tracks on Lot No. 62188, and into a Bloom Plastics Company truck for delivery to various locations. Feichtenbiner Dep. p. 46. He also testified that Track Nos. 292 and 298 were also used for transloading purposes. Id. At p. 47. This testimony makes it all the more clear that the tracks are not main or branch lines, but instead are within “all that mass of

tracks (as distinguished from ‘lines’) naturally and necessarily designed and used for loading, unloading, switching, and other purposes connected with, and incidental to, but not actually and directly used for, such transportation service.” Nicholson, 711 F.2d at 367-68.

Finally, Mr. Feichtenbiner testified that the tracks located on Lot No. 62188 had no formal schedule governing or establishing when trains would arrive and depart, and had no “block signal indicators,” which are present on main line tracks and “are like traffic lights at intersections when you drive on the roads.” Feichtenbiner Dep. p. 60. Furthermore, the tracks had not been used for express, passenger or mail service, the majority of the bills of lading for rail cars on the tracks were completed by the customer, and the customers who were serviced through the tracks would request that the Ohio Central Defendants provide service to them. Feichtenbiner Dep. p. 61, 63.

The industrial history of Lot Nos. 62320 and 62188 confirms Mr. Feichtenbiner’s testimony that the tracks are spur, industrial or switching tracks. Lot Nos. 62320 and 62188 are the location of the former Republic Steel tube mill site, and the tracks on Lot No. 62188 (such as Track Nos. 273, 274, 275 and 277) are the former plant’s internal tracks. John Ramun Dep. p. 13, 18, 39; Dep. Ex. 2. The Republic Steel mill, which sits on Lot No. 62320, was transferred to LTV Steel Company, then to Maverick Tube, and then to Ohio & Pennsylvania Railroad, which sold the property to Gearmar. John Ramun Dep. p. 13, 14, 18, 35, 39; Dep. Ex. 2; Dep. Ex. 10.<sup>15</sup> This history further demonstrates that Lot Nos. 62320 and 62188 are simply industrial parcels of property with no “main lines” of railroad located thereon.

Ohio Central’s limited rights to operate over the LTV Easement are further limited by its Stock Purchase Agreement and the accompanying Transportation Services Agreement with LTV

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<sup>15</sup> Deposition Exhibit 10 is attached to the Appendix in Support of Brief in Opposition to Defendants’ Motion to Dismiss Or, in the Alternative, Refer to the Surface Transportation Board as Exhibit 6.

Steel Company.<sup>16</sup> At the time of the creation of the LTV Easement, LTV Steel Company owned other real property adjacent to, and in the vicinity of, the property it conveyed to Allied Industrial, namely the LTV “Copperweld” facility. Transportation Services Agreement, p. 1 (unnumbered).<sup>17</sup> In connection with the sale of the Mahoning Valley Railway Company to Summit View, LTV Steel Company and the Mahoning Valley Railway Company entered into the Transportation Services Agreement in order for the Mahoning Valley Railway Company to provide “transportation services at its LTV Copperweld facilities ...” Transportation Services Agreement, p. 1 (unnumbered). The Stock Purchase Agreement provides the following limitation on Mahoning Valley Railway Company’s right to operate: “following the Closing, the [Mahoning Valley Railway Company] will not have the right to operate within the Youngstown Facilities (except to the extent expressly provided in Transportation Services Agreement appended hereto as Exhibit E).” Stock Purchase Agreement, p. 9, ¶ 3.2.5(a). The Transportation Services Agreement, in turn, defines the “Youngstown Facilities” as the “LTV Copperweld facilities at Youngstown, Ohio, and/or at new facilities that may be built on the real property occupied by LTV Copperweld in Youngstown, Ohio (together, the ‘Youngstown Facilities,’ a map of which is attached hereto as Exhibit A).” See Transportation Services Agreement, p. 1. The map attached to the Transportation Services Agreement at Exhibit A covers numerous large parcels of industrial land along the Mahoning River, including (on unnumbered page 4 of the map) the tracks which are subject to the LTV easement. Because the Mahoning Valley Railway Company is not providing services to the LTV Copperweld facility (which Allied owns), its rights over the LTV Easement are limited to merely passing across the LTV Tracks.

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<sup>16</sup> A copy of the Transportation Services Agreement is attached to the Appendix as Exhibit M.

<sup>17</sup> Allied now owns the LTV Copperweld facility, which is located on Youngstown City Lot No. 62320.

Based upon all of the foregoing facts, there is no genuine issue of material fact regarding the character of the tracks located on Lot 62188. See Port City Properties, 518 F.3d at 1189 (“Factors used to determine whether a section of track is an extension of a regular railroad line, as opposed to a ‘spur’ or ‘industrial’ track, include whether the railroad maintains a track schedule or regular service over the track; furnishes express, passenger or mail service; maintains buildings, loading platforms, or an agent along the trackage; and who completes the bills of lading.”). Indeed, the facts can lead only to the conclusion that the tracks are either spur, industrial or switching tracks. Louisiana & Arkansas Railway Co. v. Missouri Pacific Railway Co., 288 F.Supp. at 324.

Ohio Central’s present management likewise confirmed that the tracks at issue are not main lines. David Collins, the Senior Vice President of New York, Pennsylvania and Ohio Region for Genesee and Wyoming, testified that there is no schedule for service over the tracks on the disputed property. Collins Dep. at 126; see also Feichtenbiner Dep. at 60. Only about ten cars or less come onto these tracks per week, and activity is limited to about once a week. Collins Dep. at 126-27. At the time of his deposition (December 22, 2009), there was no through-traffic for these tracks. Collins Dep. at 170. The tracks are primarily used for the storage of railcars. Collins Dep. at 169. Indeed, Respondents have no customers that require service over these tracks; Cantar Poly was the last customer who did and they have had no business and been inactive since Genesee and Wyoming bought the railroad. Collins Dep. at 140-41. Most importantly, the other customers in Castlo Industrial Park, many of whom have only required occasional service, can be served without crossing the tracks on Allied’s property, using the Norfolk Southern Main Line and crossing over into Norfolk Southern’s Hazelton Yard.

Collins Dep. at 134, 136-38, 140.<sup>18</sup> Mr. Collins admitted that tracks are not main lines if the practice or pattern is to park or store cars on the tracks. Collins Dep. 121, 124. As Mr. Collins acknowledged, the primary use of the tracks on the disputed property is to store cars. Collins Dep. at 169-170. All of Mr. Collins' testimony was consistent with Mr. Feichtenbiner's deposition testimony, as well as Mr. William Strawn's, who readily characterized the disputed tracks as not mainlines, but industrial tracks. Strawn Dep. at 64<sup>19</sup>; Feichtenbiner Dep. at 61, 63, 70, 71, 73. Finally, Mr. Jerry Jacobson, the former owner of defendant Summit View, Inc. (which owned the subsidiary Ohio Central railroads), confirmed that the tracks on Lot No. 62188 are "yard tracks," as opposed to main line tracks. Jacobson Dep. p. 69-72.<sup>20</sup> Therefore, the Board does not have any authority or jurisdiction over the tracks on Lot 62188. Respondents were free to dispose of these tracks as they saw fit, and the clear evidence shows that they voluntarily sold Lot 62188 and the tracks thereon to Gearmar, which subsequently sold the property to Allied.<sup>21</sup>

Last, note should be taken regarding Respondents' attempt in their Counter-Claim to have an easement imposed across Lot 62188 to access other "landlocked" property owned by Ohio Central. That is a clear concession that Respondents recognize that they voluntarily forfeited any right to operate on all tracks located on Lot 62188 when they sold it and all

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<sup>18</sup> Exhibit 8 to the Appendix in Support of Brief in Opposition to Defendants' Motion to Dismiss Or, in the Alternative, Refer to the Surface Transportation Board is a Google Earth Image of portions of the Mahoning Valley Railway, including the property sold to Allied west of the Center Street Bridge (Lots 62188 and 62320), the CSX main line interchange to the far left (west) of the map, the Norfolk Southern Hazelton Yard, and tracks leading to the Castlo Industrial Park to the far right (east) of the map. This image or Map was prepared by Ohio Central.

<sup>19</sup> Appendix in Support of Brief in Opposition to Defendants' Motion to Dismiss Or, in the Alternative, Refer to the Surface Transportation Board, Exhibit 9.

<sup>20</sup> Appendix in Support of Brief in Opposition to Defendants' Motion to Dismiss Or, in the Alternative, Refer to the Surface Transportation Board, Exhibit 10.

<sup>21</sup> In prior briefing Ohio Central has contended that the transfer of Youngstown City Lot No. 62188 from Gearmar to Allied is invalid because the STB did not approve the transaction. However, there is no evidence that Ohio Central's prior acquisition of this parcel of property from Maverick C&P, Inc. was ever approved by the STB.

appurtenances to Gearmar without retaining an easement. The Board should enforce Respondents' voluntary agreement to sell the property and tracks, and refer the case back to the Court of Common Pleas of Mahoning County, Ohio.

**E. Allied's Claims Under The Amended Complaint Are Not Preempted Under ICCTA Because The Relief Requested By Allied Does Not Unreasonably Interfere With Interstate Railroad Operations, But Simply Seeks the Enforcement of Respondents' Voluntary Conveyance of Property.**

As explained above in Section V(A), the scope of ICCTA preemption is not limitless. Indeed, ICCTA only preempts state remedies that would unreasonably interfere with interstate rail operations. See PCS Phosphate Company, supra. Respondents simply cannot meet that standard here. First, Allied seeks only to enforce private property rights that are the result of Respondents' voluntary sale of the disputed property; there is no "regulation" of "railroad operations" involved. The courts and the Board have consistently stated that the railroads cannot shield themselves from their own actions by claiming preemption under the ICCTA in these circumstances. See Woodbridge, supra. The Respondents' sale of both Lots 62320 and 62188 shows not only that the tracks thereon are not lines of railroad (no Board approval was sought for the transfers), but also that, from the railroad's standpoint, no unreasonable interference with rail operations would occur by voluntarily transferring the property. In this regard, this situation is just like any other contractual commitment undertaken by Respondents.

Second, as Respondents' Google Earth map confirms, the tracks on Lot 62188 are industrial tracks designed for localized purposes. There is no impact to Respondents' interstate rail operations. Mr. Collins conceded that Mahoning Valley Railway operates in the specific locale of Youngstown and does not operate over or cross interstate lines. Collins Dep. at 181-182. Private property rights emanating from a voluntary conveyance simply cannot be preempted without a showing of interference with interstate commerce. Moreover, coming from

Youngstown (the west), Respondents can service their customers east of Allied's property by using the Norfolk Southern Mainline and crossing into the NS Hazelton Yard; similarly, coming from the East and Castlo Industrial Park, Defendants can get to the CSX main line either through the NS Hazelton Yard or at other interchanges. Collins Dep. at 134, 136-38, 140. The only difference is cost and convenience. While Respondents find it more convenient and cost-effective to store cars on Allied's property and cross Allied's property, prohibiting such conduct does not amount to unreasonable interference with rail operations, or interstate commerce. Instead, it amounts to no more than the enforcement of time-honored private property rights.

Third, if a railroad has no property rights, whether by ownership of the land or an easement, or a trackage agreement to pass over tracks, then it cannot operate there. Accordingly, a railroad cannot claim to be suffering under an unreasonable interference if it has no right to operate over the property in the first place. Respondents have shown no authority that would simply allow the Board to grant rights for the railroad to operate over property where it has no ownership, easement rights, or trackage agreement. Indeed, Mr. Collins even agreed that a railroad needs permission to store cars on industrial property that it does not own or have an easement to access. Collins Dep. at 151, 157. The railroad cannot simply store cars wherever it wants to, with impunity. Prohibiting that conduct and recognizing Allied's private property rights (the result of Respondents' voluntary transfer) surely cannot amount to unreasonable interference with rail operations that mandates ICCTA preemption in this case.

**VI. The Board Should Order Respondents to Reimburse the Cost of the Filing Fee.**

Allied requests that the Board order the Respondents to reimburse Allied for the \$1,000.00 filing fee which Allied incurred to file its Petition. As the facts and case law make clear, the instant dispute is not within the Board's jurisdiction to decide at this time, if at all. Allied has incurred considerable attorneys' fees and costs in connection with filing this needless

Petition. The Board should exercise its inherent discretion and require Respondents to pay Allied the \$1,000.00 filing fee, which is only a small portion of the costs which are involved in filing this Petition.

**VII. Conclusion.**

If the Board does find that some issues may be resolved by the Board, Allied respectfully submits that those issue should be resolved after the ownership of Lot No. 62188 has been adjudicated in the Court of Common Pleas of Mahoning County. In the unlikely event that Respondents were to prevail on the issue of who owns Lot No. 62188, there will likely be no need for Respondents to seek any relief from the Board. Thus, at this juncture, the Board can do no more than render an advisory opinion based on hypothetical facts. In the interest of judicial and administrative economy, the Board should decline to do so.

**VIII. Relief Requested by Allied.**

Based upon the foregoing, Allied respectfully requests that the Board issue a declaratory order finding that the State Court Action does not implicate any issues which fall within the Board's jurisdiction, and that the case should proceed in the Court of Common Pleas of Mahoning County. Alternatively, if the Board does find that some issues may be resolved by the Board, Allied respectfully submits that those issues should be heard by the Board after the ownership of Lot No. 62188 has been adjudicated in the Court of Common Pleas of Mahoning County.<sup>22</sup>

WHEREFORE, Allied respectfully requests that the Board issue a declaratory order finding that the State Court Action was improvidently referred to the Board and should proceed in the Court of Common Pleas of Mahoning County, and that Ohio Central must reimburse

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<sup>22</sup> In the event that the Board initiates a declaratory order proceeding and requests further briefing, Allied respectfully requests that the Board set the briefing schedule as follows: Allied's Opening Statement is due 90 days from the initiation of the proceeding; Respondents' reply is due 120 days from the initiation of the proceeding, and Allied's rebuttal is due 150 days from the initiation of the proceeding. This schedule should allow the parties ample time to fully brief any issues which the Board finds to be within its jurisdiction and justiciable at the present time.

Allied for the filing fee for this Petition. Alternatively, if the Board does find that some issues may be resolved by the Board, Allied respectfully submits that those issues should be decided by the Board after the ownership of Lot No. 62188 and the character of the railroad tracks located thereon have been adjudicated in the Court of Common Pleas of Mahoning County.

Respectfully submitted,

  
Richard H. Streeter (s)

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202-363-2011 (*telephone*)  
202-363-4899 (*facsimile*)

Christopher R. Opalinski, Esquire  
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Eckert Seamans Cherin & Mellott, LLC  
U.S. Steel Tower, 44<sup>th</sup> Floor  
600 Grant Street  
Pittsburgh, Pennsylvania 15219  
412-566-6000 (*telephone*)  
412-566-6099 (*facsimile*)

*Attorneys for Allied Industrial Development  
Corporation*

Dated: March 21, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Petition for Declaratory Order and Appendices were served upon the following counsel by first class United States mail, this 22nd day of March, 2011.

C. Scott Lanz, Esquire  
Thomas Lipka, Esquire  
Manchester, Bennett, Powers & Ullman  
Atrium Level Two, The Commerce Building  
201 East Commerce Street  
Youngstown, Ohio 44503

Eric M. Hocky, Esquire  
Thorp Reed & Armstrong, LLP  
One Commerce Square, Suite 1000  
2005 Market Street  
Philadelphia, Pennsylvania 19103

Michael L. Wiery, Esquire  
Sikora Law, LLC  
Ohio Real Estate Building  
8532 Mentor Avenue  
Mentor, OH 44060

Amelia Bower, Esquire  
David Van Slyke, Esquire  
Plunkett Cooney  
300 East Broad Street, Suite 590  
Columbus, OH 43215

Richard H. Streeter /s/  
Richard H. Streeter, Esquire

**BEFORE THE SURFACE TRANSPORTATION BOARD  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C. 20423**

ALLIED INDUSTRIAL  
DEVELOPMENT CORPORATION,

Petitioner,

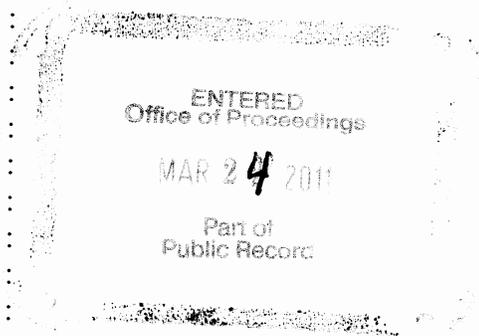
v.

STB Docket No. FD 35477

MAR 22 2011

OHIO CENTRAL RAILROAD, INC.,  
OHIO & PENNSYLVANIA  
RAILROAD COMPANY, THE  
WARREN & TRUMBULL RAILROAD  
COMPANY, YOUNGSTOWN &  
AUSTINTOWN RAILROAD, INC.,  
THE YOUNGSTOWN BELT  
RAILROAD COMPANY, THE  
MAHONING VALLEY RAILWAY  
COMPANY, and SUMMIT VIEW, INC.,  
collectively d/b/a The Ohio Central  
Railroad System, and GENESEE &  
WYOMING, INC.,

Respondents.



**PETITIONER'S APPENDIX IN SUPPORT  
OF PETITION FOR DECLARATORY ORDER**

- 1..... May 5, 2009 letter to  
C. Scott Lanz and Thomas Lipka..... Appendix Exhibit A
- 2..... Complaint for  
Forcible Entry and Detainer..... Appendix Exhibit B
- 3..... Northern District of  
Ohio Court Docket..... Appendix Exhibit C
- 4..... Amended Complaint  
for Forcible Entry and Detainer ..... Appendix Exhibit D

5.....Amended  
Counterclaim and Third Party Complaint.....Appendix Exhibit E

6.....Opinion and Order  
Dated March 15, 2010.....Appendix Exhibit F

7.....Opinion and Order  
Dated April 15, 2010.....Appendix Exhibit G

8.....Ohio Central’s  
Motion to Dismiss or Refer to STB .....Appendix Exhibit H

9.....Plaintiff’s Brief in  
Opposition to Motion to Dismiss.....Appendix Exhibit I

10.....Plaintiff’s Appendix  
in Support of Brief in Opposition .....Appendix Exhibit J

11.....Ohio Central’s Reply  
to Plaintiff’s Brief in Opposition .....Appendix Exhibit K

12.....Judgment Entry Dated  
September 22, 2010 .....Appendix Exhibit L

13.....Transportation  
Services Agreement .....Appendix Exhibit M

Respectfully submitted,

Richard H. Streeter /s/

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Richard H. Streeter, Esquire  
5255 Partridge Lane, N.W.  
Washington, D.C. 20016  
202-363-2011 (telephone)  
202-363-4899 (facsimile)

Christopher R. Opalinski, Esquire  
F. Timothy Grieco, Esquire  
Jacob C. McCrea, Esquire  
Eckert Seamans Cherin & Mellott, LLC  
U.S. Steel Tower, 44<sup>th</sup> Floor  
600 Grant Street  
Pittsburgh, Pennsylvania 15219  
412-566-6000 (telephone)  
412-566-6099 (facsimile)

*Attorneys for Allied Industrial Development  
Corporation*

Dated: March 22, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Petitioner's Appendix in Support of Petition for Declaratory Order was served upon the following counsel by first class United States mail, this 22nd day of March, 2011.

C. Scott Lanz, Esquire  
Thomas Lipka, Esquire  
Manchester, Bennett, Powers & Ullman  
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Amelia Bower, Esquire  
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Plunkett Cooney  
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Columbus, OH 43215

Richard H. Streeter /s/

---

Richard H. Streeter, Esquire

A

# ECKERT SEAMANS

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Christopher R. Opalinski  
412-566-5963  
copalinski@eckertseamans.com

**Certified Mail No. 7005 1820 0006 1329 7689**  
**SLanz@mbpu.com/TLipka@mbpu.com**

May 5, 2009

C. Scott Lanz, Esquire  
Thomas J. Lipka, Esquire  
Manchester Bennett Powers & Ullman  
Atrium Level Two, The Commerce Building  
201 E. Commerce St.  
Youngstown, OH 44503

Re: Youngstown City Lot Nos. 62320 & 62188

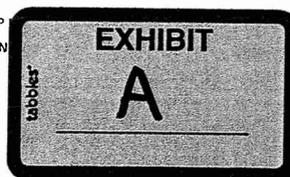
Dear Messrs. Lanz and Lipka:

As you know, our firm represents Allied Industrial Development Corporation ("Allied"). By Purchase Agreement dated March 26, 2009, Allied purchased from Gearmar Properties, Inc. ("Gearmar") two (2) parcels of property located in the City of Youngstown known as Youngstown City Lot Nos. 62320 and 62188, as well as any and all easements benefitting the property, any and all rights and appurtenances pertaining to the property, all improvements to the property (including the railroad tracks located thereon), and certain personal property located on or about the property (collectively, the "Gearmar Purchase"). The deeds transferring the property to Allied were filed with the Mahoning County Recorder's Office on Monday, April 13, 2009.

It is Allied's understanding that the Ohio Central Railroad System and/or its subsidiary railroads (collectively "Ohio Central") presently occupy offices located on Lot No. 62188, despite having no current legal or contractual rights for the continued occupation or use of these offices on Allied's property. It is also Allied's understanding that Ohio Central is utilizing a building located on Lot No. 62320 to store various locomotive equipment and parts and utilizing the property located on Lot No. 62188 to store materials (i.e., loose ballast, stockpiled rail, plates, fabric).

As a result of the Gearmar Purchase, Ohio Central has no current right to occupy Lot Nos. 62320 and 62188, to travel over any of the rail lines and/or roads located thereon, or to store any equipment or materials in any of the buildings located thereon or otherwise on Allied's property. Ohio Central's present legal status on the property is that of a trespasser and/or squatter. Therefore, Allied hereby demands that Ohio Central immediately cease any and all operations on Lot Nos. 62320 and 62188 and vacate these premises and remove all loose and unaffixed equipment and materials currently stored there within thirty (30) days of the date of this letter. Any Ohio Central property or equipment not removed within thirty (30) days of the date of this

PITTSBURGH, PA HARRISBURG, PA P A WASHINGTON, DC WILMINGTON, DE  
MORGANTOWN, WV WHITE PLAINS, NY



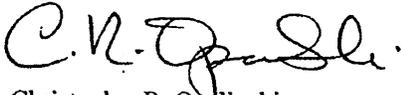
**ECKERT  
SEAMANS**

C. Scott Lanz, Esquire  
Thomas J. Lipka, Esquire  
Manchester Bennett Powers & Ullman  
May 5, 2009  
Page 2

letter will be considered to have been abandoned and Allied will take any necessary actions to dispose of this property, and will then seek recovery of all costs and expenses it incurs in connection therewith from Ohio Central. If the premises are not vacated and all property removed within thirty days, you are hereby advised that Allied will immediately commence an action to remove Ohio Central from the property and seek all available legal remedies, including the recovery of compensatory damages, punitive damages and attorneys' fees due to Ohio Central's willful and unlawful trespass on Allied's property. Furthermore, you are hereby advised that Ohio Central has no right to remove any improvements to the property which are now owned by Allied, including all railroad tracks, ties, spikes and ballast.

I would request that you or your client advise me of your intentions as soon as possible so that Allied can begin to immediately take whatever steps may be required to protect its property and its interests.

Very truly yours,



Christopher R. Opalinski

CRO/bjm

cc: Mr. John Ramun  
Jay Skolnick, Esquire  
Ed Smith, Esquire

**B**

IN THE COURT OF COMMON PLEAS  
MAHONING COUNTY, OHIO

ALLIED INDUSTRIAL DEVELOPMENT  
CORPORATION, 2100 Poland Avenue, Youngstown, OH  
44502,

Plaintiff,

v.

OHIO CENTRAL RAILROAD, INC., Individually and  
d/b/a The Ohio Central Railroad System, an unincorporated  
and unregistered association, 47849 Papermill Road,  
Coshocton, OH 43812,

and

OHIO & PENNSYLVANIA RAILROAD COMPANY,  
Individually and d/b/a The Ohio Central Railroad System,  
an unincorporated and unregistered association, 47849  
Papermill Road, Coshocton, OH 43812,

and

THE WARREN & TRUMBALL RAILROAD  
COMPANY, Individually and d/b/a The Ohio Central  
Railroad System, an unincorporated and unregistered  
association, 47849 Papermill Road, Coshocton, OH 43812,

and,

YOUNGSTOWN & AUSTINTOWN RAILROAD, INC.,  
Individually and d/b/a The Ohio Central Railroad System,  
an unincorporated and unregistered association, 47849  
Papermill Road, Coshocton, OH 43812,

and

THE YOUNGSTOWN BELT RAILROAD COMPANY,  
Individually and d/b/a The Ohio Central Railroad System,  
an unincorporated and unregistered association, 47849  
Papermill Road, Coshocton, OH 43812,

and

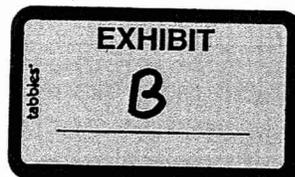
THE MAHONING VALLEY RAILWAY COMPANY,  
Individually and d/b/a The Ohio Central Railroad System,  
an unincorporated and unregistered association, 47849  
Papermill Road, Coshocton, OH 43812,

{J1294253.1}

Case No. 2009-CV-\_\_\_\_\_

Jury Trial Endorsement

**COMPLAINT FOR  
FORCIBLE ENTRY AND  
DETAINER**





5. Allied is informed, believes and therefore avers that The Warren & Trumbull Railroad Company is a corporation organized and existing under the laws of the State of Ohio, with a principal place of business at 47849 Papermill Road, Coshocton, Ohio 43812.

6. Allied is informed, believes and therefore avers that Youngstown & Austintown Railroad, Inc. is a corporation organized and existing under the laws of the State of Ohio, with a principal place of business at 47849 Papermill Road, Coshocton, Ohio 43812.

7. Allied is informed, believes and therefore avers that Youngstown Belt Railroad Company is a corporation organized and existing under the laws of the State of Ohio, with a principal place of business at 47849 Papermill Road, Coshocton, Ohio 43812.

8. Allied is informed, believes and therefore avers that The Mahoning Valley Railroad Company is a corporation organized and existing under the laws of the State of Ohio, with a principal place of business at 47849 Papermill Road, Coshocton, Ohio 43812.

9. Allied is informed, believes and therefore avers that Genesee & Wyoming, Inc. is a corporation organized and existing under the laws of the State of Delaware, with a principal place of business at 66 Field Point Road, Greenwich, Connecticut 06830.

10. Allied is informed, believes and therefore avers that Genesee & Wyoming, Inc. is the owner, operator and corporate parent of the various named Ohio corporations doing business as The Ohio Central Railroad System.

#### **JURISDICTION AND VENUE**

11. This Court has jurisdiction over this matter and over the Defendants pursuant to Ohio Revised Code § 2307.382. Venue in this Court is proper pursuant to Ohio Rule of Civil Procedure 3(B).

### **BACKGROUND**

12. By Purchase Agreement dated March 26, 2009, Allied purchased from Gearmar Properties, Inc. ("Gearmar") two (2) parcels of property located in the City of Youngstown known as Youngstown City Lot Nos. 62320 and 62188, as well as all appurtenances pertaining to the property, all improvements pertaining to the property, certain personal property located on or about the property, and all other property rights (collectively the "Gearmar Purchase").

13. Lot No. 62320 is also identified as Parcel Id. No. 53-040-0-015.01-0 by the Mahoning County Geographical Information System website.

14. Lot No. 62188 is also identified as Parcel Id. No. 53-042-0-010.01-0 by the Mahoning County Geographical Information System website.

15. The deeds transferring Youngstown City Lot Nos. 62320 and 62188 from Gearmar to Allied were filed with the Mahoning County Recorder's Office on Monday, April 13, 2009.

16. Defendants presently occupy an office building located on Lot No. 62188, despite having no current legal or contractual rights for the continued possession, operation or use of these offices on Allied's property.

17. Defendants are also utilizing the property located on Lot No. 62188 to store various materials (e.g., loose ballast, stockpiled rails, plates and fabric) and park or store third party rail cars despite the lack of any lease, contract, agreement or other legal right to continue to use the property.

18. Defendants are also utilizing a building located on Lot No. 62320 to store various locomotive materials and parts, despite the lack of any lease, contract, agreement or other legal right to continue to use the property.

19. By letter dated May 5, 2009, Allied informed Defendants of the Gearmar Purchase and requested that Ohio Central vacate Lot Nos. 62320 and 62188 on or before June 5, 2009. A true and correct copy of the May 5, 2009 letter to Ohio Central is attached hereto as Exhibit 1.

20. As of the date of the filing of this lawsuit, Defendants are still in possession of the office building located on Lot No. 62188, and has not otherwise completely removed its various materials and third party rail cars from Lot Nos. 62320 and 62188.

21. Allied has performed all conditions precedent to filing this lawsuit.

### COUNT I

#### FORCIBLE ENTRY AND DETAINER/ EJECTMENT

22. Paragraphs 1-19 are hereby incorporated by reference as if fully set forth at length.

23. Due to the Gearmar Purchase, Defendants have no current right to use, occupy or possess Lot Nos. 62320 and 62188, or to store any materials or equipment in any of the buildings located thereon, to park or store third party rail cars, or to otherwise use, occupy or possess Allied's property in any manner.

24. Due to the Gearmar Purchase and Allied's subsequent written notice to vacate, Defendants' present legal status on the property is that of a trespasser.

25. Pursuant to the Ohio Forcible Entry and Detainer Statute, O.R.C. §§ 1923.01 et seq., Defendants have unlawfully and forcibly detained Lot Nos. 62320 and 62188, without color of title or other legal or contractual right to occupy the property, and Allied has the right to immediate possession of the property.

26. Defendants have willfully failed, neglected and refused to vacate Lot Nos. 62320 and 62188, despite Allied's reasonable demand that Defendants vacate the property within thirty (30) days.

27. Due to the Gearmar Purchase, Defendants are legally obligated to immediately take the following actions:

- a. Vacate Lot Nos. 62320 and 62188;
- b. Remove all loose and unaffixed equipment, materials, and third party rail cars from Lot Nos. 62320 and 62188; and
- c. Vacate the office building located on Lot No. 62188.

WHEREFORE, Plaintiff Allied Industrial Development Corporation respectfully requests that the Court order that Defendants immediately vacate Lot Nos. 62320 and 62188 as set forth above, and award Allied its costs and expenses incurred in removing Defendants from Allied's property, as well damages and attorneys' fees for Defendants' willful trespass on Allied's property.

## COUNT II

### TRESPASS

28. Paragraphs 1-25 are hereby incorporated by reference as if fully set forth at length.

29. After the purchase of Lot Nos. 62320 and 62188 by Allied, Defendants continued to occupy the properties as a trespasser, and paid no fair rental value to compensate Allied for the use of the properties.

30. Allied is entitled to the fair rental value of the property during Defendants' unlawful trespass upon the property.

31. Allied is informed, believes, and therefore avers that Defendants contaminated the properties by improperly disposing of contaminated, regulated or controlled substances on the properties, which substances Allied will now be required to remediate.

32. By improperly disposing of contaminated, regulated or controlled substances on Lot Nos. 62320 and 62188, Defendants have damaged Allied's property, without Allied's consent, and against Allied's will.

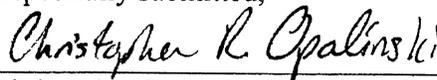
33. Defendants' continuing and wrongful trespass, as well as the improper disposal of contaminated, regulated or controlled substances on Allied's property, have caused damage to Allied's property and have deprived Allied of the beneficial use and enjoyment of its property.

WHEREFORE, Plaintiff Allied Industrial Development Corporation, respectfully requests that the Court award Allied damages in excess of \$25,0000, plus punitive damages and attorneys' fees for Defendants' willful trespass on Allied's property.

**JURY DEMAND**

Plaintiff demands that this case be tried by a jury.

Respectfully submitted,



Christopher R. Opalinski, Esquire  
Ohio Bar No. 0084504  
copalinski@eckertseamans.com

Eckert Seamans Cherin & Mellott, LLC  
Pa. Firm No. 075  
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Of Counsel:

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Ohio Bar No. 0006767  
jmskolnick@nnblaw.com

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20 Federal Plaza West, Suite 600  
Youngstown, OH 44503- 1423  
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Attorneys for Plaintiff  
Allied Industrial Development Corporation

Dated: July 24, 2009

# ECKERT SEAMANS

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**Certified Mail No. 7005 1820 0006 1329 7689**  
**SLanz@mbpu.com/TLipka@mbpu.com**

May 5, 2009

C. Scott Lanz, Esquire  
Thomas J. Lipka, Esquire  
Manchester Bennett Powers & Ullman  
Atrium Level Two, The Commerce Building  
201 E. Commerce St.  
Youngstown, OH 44503

Re: Youngstown City Lot Nos. 62320 & 62188

Dear Messrs. Lanz and Lipka:

As you know, our firm represents Allied Industrial Development Corporation ("Allied"). By Purchase Agreement dated March 26, 2009, Allied purchased from Gearmar Properties, Inc. ("Gearmar") two (2) parcels of property located in the City of Youngstown known as Youngstown City Lot Nos. 62320 and 62188, as well as any and all easements benefitting the property, any and all rights and appurtenances pertaining to the property, all improvements to the property (including the railroad tracks located thereon), and certain personal property located on or about the property (collectively, the "Gearmar Purchase"). The deeds transferring the property to Allied were filed with the Mahoning County Recorder's Office on Monday, April 13, 2009.

It is Allied's understanding that the Ohio Central Railroad System and/or its subsidiary railroads (collectively "Ohio Central") presently occupy offices located on Lot No. 62188, despite having no current legal or contractual rights for the continued occupation or use of these offices on Allied's property. It is also Allied's understanding that Ohio Central is utilizing a building located on Lot No. 62320 to store various locomotive equipment and parts and utilizing the property located on Lot No. 62188 to store materials (i.e., loose ballast, stockpiled rail, plates, fabric).

As a result of the Gearmar Purchase, Ohio Central has no current right to occupy Lot Nos. 62320 and 62188, to travel over any of the rail lines and/or roads located thereon, or to store any equipment or materials in any of the buildings located thereon or otherwise on Allied's property. Ohio Central's present legal status on the property is that of a trespasser and/or squatter. Therefore, Allied hereby demands that Ohio Central immediately cease any and all operations on Lot Nos. 62320 and 62188 and vacate these premises and remove all loose and unaffixed equipment and materials currently stored there within thirty (30) days of the date of this letter. Any Ohio Central property or equipment not removed within thirty (30) days of the date of this



**ECKERT  
SEAMANS**

C. Scott Lanz, Esquire  
Thomas J. Lipka, Esquire  
Manchester Bennett Powers & Ullman  
May 5, 2009  
Page 2

letter will be considered to have been abandoned and Allied will take any necessary actions to dispose of this property, and will then seek recovery of all costs and expenses it incurs in connection therewith from Ohio Central. If the premises are not vacated and all property removed within thirty days, you are hereby advised that Allied will immediately commence an action to remove Ohio Central from the property and seek all available legal remedies, including the recovery of compensatory damages, punitive damages and attorneys' fees due to Ohio Central's willful and unlawful trespass on Allied's property. Furthermore, you are hereby advised that Ohio Central has no right to remove any improvements to the property which are now owned by Allied, including all railroad tracks, ties, spikes and ballast.

I would request that you or your client advise me of your intentions as soon as possible so that Allied can begin to immediately take whatever steps may be required to protect its property and its interests.

Very truly yours,



Christopher R. Opalinski

CRO/bjm

cc: Mr. John Ramun  
Jay Skolnick, Esquire  
Ed Smith, Esquire

(i) REQUEST FOR SERVICE

TO THE CLERK:

Please serve Summons and a copy of the Complaint for Forcible Entry and Detainer upon each of the Defendants at the addresses listed for them in the caption of the Complaint by both ordinary United States Mail and by Certified United States Mail, Return Receipt Requested, as provided for in the Ohio Rules of Civil Procedure and the Ohio Forcible Entry and Detainer Statute, O.R.C. §§ 1923.01 et seq.

Christopher R. Opalinski  
Christopher R. Opalinski, Esquire  
Ohio Bar No. 0084504

Eckert Seamans Cherin & Mellott, LLC  
44<sup>th</sup> Floor, 600 Grant Street  
Pittsburgh, PA 15219

Attorneys for Plaintiff  
Allied Industrial Development Corporation

C

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Baughman,Cat12,Remand,Standard,Termed

**U.S. District Court  
Northern District of Ohio (Youngstown)  
CIVIL DOCKET FOR CASE #: 4:09-cv-01904-JG**

Allied Industrial Development Corporation v. Ohio Central  
Railroad, Inc. et al

Assigned to: Judge James S. Gwin

Case in other court: Mahoning County Court of Common  
Pleas, 2009-CV-2835

Cause: 28:1441 Petition for Removal

Date Filed: 08/13/2009

Date Terminated: 03/15/2010

Jury Demand: Plaintiff

Nature of Suit: 230 Rent Lease &  
Ejectment

Jurisdiction: Federal Question

**Plaintiff**

**Allied Industrial Development  
Corporation**

*also known as*

Allied Industrial Development

represented by **Amelia A. Bower**

Plunkett & Cooney - Columbus  
Ste. 590

300 East Broad Street

Columbus, OH 43215

614-629-3004

Fax: 614-629-3019

Email: abower@plunkettcooney.com

*ATTORNEY TO BE NOTICED*

**Christopher R. Opalinski**

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Email: copalinski@eckertseamans.com

*ATTORNEY TO BE NOTICED*

**David L. Van Slyke**

Plunkett & Cooney - Columbus

Ste. 590

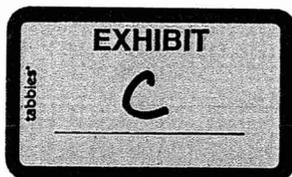
300 East Broad Street

Columbus, OH 43215

614-629-3000

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*ATTORNEY TO BE NOTICED*



**F. Timothy Grieco**

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**Jay M. Skolnick , Sr.**  
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*ATTORNEY TO BE NOTICED*

**Robert S. Hartford , Jr.**  
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Youngstown, OH 44503  
330-744-0247  
Fax: 330-744-8690  
Email: rsh2@nnblaw.com  
*ATTORNEY TO BE NOTICED*

V.

**Defendant**

**Ohio Central Railroad, Inc.**  
*Individually and  
doing business as*  
Ohio Central Railroad System, an  
unincorporated and unregistered

represented by **Thomas J. Lipka**  
Manchester, Bennett, Powers & Ullman  
  
Atrium Level Two  
The Commerce Building

association

Youngstown, OH 44503-1641  
330-743-1171  
Fax: 330-743-1190  
Email: tlipka@mbpu.com  
*ATTORNEY TO BE NOTICED*

**C. Scott Lanz**  
Manchester, Bennett, Powers & Ullman

Atrium Level Two  
201 East Commerce Street  
Youngstown, OH 44503  
330-743-1171  
Fax: 330-743-1190  
Email: slanz@mbpu.com  
*ATTORNEY TO BE NOTICED*

**Defendant**

**Ohio & Pennsylvania Railroad Company**

*Individually and doing business as*

Ohio Central Railroad System, an unincorporated and unregistered association

represented by **Thomas J. Lipka**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**C. Scott Lanz**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**Defendant**

**Warren & Trumbull Railroad Company**

*Individually and doing business as*

Ohio Central Railroad System, an unincorporated and unregistered association

represented by **Thomas J. Lipka**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**C. Scott Lanz**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**Defendant**

**Youngstown & Austintown Railroad, Inc.**

*Individually and doing business as*

Ohio Central Railroad System, an unincorporated and unregistered association

represented by **Thomas J. Lipka**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**C. Scott Lanz**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**Defendant**

**Youngstown Belt Railroad Company**

*Individually and doing business as*

Ohio Central Railroad System, an unincorporated and unregistered association

represented by **Thomas J. Lipka**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**C. Scott Lanz**

association

(See above for address)  
*ATTORNEY TO BE NOTICED*

**Defendant**

**Mahoning Valley Railway Company**  
*Individually and  
doing business as*  
Ohio Central Railroad System, an  
unincorporated and unregistered  
association

represented by **Thomas J. Lipka**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**C. Scott Lanz**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**Defendant**

**Genesee & Wyoming, Inc.**

represented by **Thomas J. Lipka**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**C. Scott Lanz**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**Defendant**

**Summit View, Inc**

represented by **C. Scott Lanz**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**Thomas J. Lipka**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**3rd Party Plaintiff**

**Ohio & Pennsylvania Railroad  
Company**  
*Individually and*

represented by **Thomas J. Lipka**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**C. Scott Lanz**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**3rd Party Plaintiff**

**Mahoning Valley Railway Company**  
*Individually and*

represented by **Thomas J. Lipka**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**C. Scott Lanz**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

V.

**3rd Pty Defendant**

**Gearmar Properties, Inc.**

represented by **Daniel G. Keating**  
Keating, Keating & Kuzman  
170 Monroe Street, NW  
Warren, OH 44483  
330-393-4611  
Fax: 330-394-0101  
Email: dgkeatinglaw@earthlink.net  
*ATTORNEY TO BE NOTICED*

**W. Leo Keating**  
Keating, Keating & Kuzman  
170 Monroe Street, NW  
Warren, OH 44483  
330-393-4611  
Fax: 394-0101  
Email: wlkeatinglaw@earthlink.net  
*ATTORNEY TO BE NOTICED*

**Counter-Claimant**

**Ohio & Pennsylvania Railroad  
Company**  
*Individually and*

represented by **Thomas J. Lipka**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**C. Scott Lanz**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**Counter-Claimant**

**Mahoning Valley Railway Company**  
*Individually and*

represented by **Thomas J. Lipka**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**C. Scott Lanz**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

V.

**Counter-Defendant**

**Allied Industrial Development  
Corporation**

represented by **Amelia A. Bower**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**Christopher R. Opalinski**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**David L. Van Slyke**

(See above for address)  
*ATTORNEY TO BE NOTICED*

**F. Timothy Grieco**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**Jacob C. McCrea**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**Jay M. Skolnick , Sr.**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**Robert S. Hartford , Jr.**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**Cross-Claimant**

**Allied Industrial Development  
Corporation**

represented by **Amelia A. Bower**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**Christopher R. Opalinski**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**David L. Van Slyke**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**F. Timothy Grieco**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**Jacob C. McCrea**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**Jay M. Skolnick , Sr.**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**Robert S. Hartford , Jr.**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

V.

**Cross Defendant****Gearmar Properties, Inc.**represented by **W. Leo Keating**

(See above for address)

*ATTORNEY TO BE NOTICED*

<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
08/13/2009	<u>1</u>	<b>Notice of Removal</b> from Mahoning County Court of Common Pleas, case number 2009-cv-2835. Filing fee \$ 350, receipt number 0647-3690673.. Filed by Warren & Trumbull Railroad Company, Ohio Central Railroad, Inc., Mahoning Valley Railway Company, Genesee & Wyoming, Inc., Youngstown & Austintown Railroad, Inc., Ohio & Pennsylvania Railroad Company, Youngstown Belt Railroad Company. (Attachments: # <u>1</u> Exhibit 1, # <u>2</u> Exhibit 2, # <u>3</u> Civil Cover Sheet) (Lanz, C.) (Entered: 08/13/2009)
08/13/2009	<u>2</u>	Corporate Disclosure Statement by Ohio Central Railroad, Inc. identifying Other Affiliate Genesee & Wyoming Inc. for Ohio Central Railroad, Inc.. filed by Ohio Central Railroad, Inc.. (Lanz, C.) (Entered: 08/13/2009)
08/13/2009	<u>3</u>	Corporate Disclosure Statement by Ohio & Pennsylvania Railroad Company identifying Other Affiliate Genesee & Wyoming Inc. for Ohio & Pennsylvania Railroad Company. filed by Ohio & Pennsylvania Railroad Company. (Lanz, C.) (Entered: 08/13/2009)
08/13/2009	<u>4</u>	Corporate Disclosure Statement by Warren & Trumbull Railroad Company identifying Other Affiliate Genesee & Wyoming Inc. for Warren & Trumbull Railroad Company. filed by Warren & Trumbull Railroad Company. (Lanz, C.) (Entered: 08/13/2009)
08/13/2009	<u>5</u>	Corporate Disclosure Statement by Youngstown & Austintown Railroad, Inc. identifying Other Affiliate Genesee & Wyoming Inc. for Youngstown & Austintown Railroad, Inc.. filed by Youngstown & Austintown Railroad, Inc.. (Lanz, C.) (Entered: 08/13/2009)
08/13/2009	<u>6</u>	Corporate Disclosure Statement by Youngstown Belt Railroad Company identifying Other Affiliate Genesee & Wyoming Inc. for Youngstown Belt Railroad Company. filed by Youngstown Belt Railroad Company. (Lanz, C.) (Entered: 08/13/2009)
08/13/2009	<u>7</u>	Corporate Disclosure Statement by Mahoning Valley Railway Company identifying Other Affiliate Genesee & Wyoming Inc. for Mahoning Valley Railway Company. filed by Mahoning Valley Railway Company. (Lanz, C.) (Entered: 08/13/2009)
08/13/2009	<u>8</u>	Corporate Disclosure Statement by Genesee & Wyoming, Inc. filed by Genesee & Wyoming, Inc.. (Lanz, C.) (Entered: 08/13/2009)
08/13/2009		Judge James S. Gwin assigned to case. (H,LA) (Entered: 08/13/2009)
08/13/2009		Random Assignment of Magistrate Judge pursuant to Local Rule 3.1. In the event of a referral, case will be assigned to Magistrate Judge William H. Baughman, Jr. (H,LA) (Entered: 08/13/2009)

08/18/2009	<u>9</u>	Attorney Appearance by Jacob C. McCrea filed by on behalf of Allied Industrial Development Corporation. (McCrea, Jacob) (Entered: 08/18/2009)
08/20/2009	<u>10</u>	Notice of Magistrate Consent form issued 8/20/09. (M,G) (Entered: 08/20/2009)
08/20/2009	<u>11</u>	<b>Case Management Conference Scheduling Order</b> signed by Judge James S. Gwin on 8/20/09 setting a conference for 9/30/09 at 9:30 a.m., Chambers 18A (Cleveland). (Attachments: # <u>1</u> Local Rule 30.1)(M,G) (Entered: 08/20/2009)
08/20/2009	<u>12</u>	DUPLICATE FILING IN ERROR OF DOC. 10. Notice of Magistrate Consent form issued 8/20/09. (M,G) Modified text on 8/20/2009 (M,G). (Entered: 08/20/2009)
08/28/2009	<u>13</u>	<b>Motion</b> for extension of time until 09/21/2009 to answer <i>complaint</i> filed by Genesee & Wyoming, Inc., Mahoning Valley Railway Company, Ohio & Pennsylvania Railroad Company, Ohio Central Railroad, Inc., Warren & Trumbull Railroad Company, Youngstown & Austintown Railroad, Inc., Youngstown Belt Railroad Company. (Lanz, C.) (Entered: 08/28/2009)
08/31/2009	<u>14</u>	<b>Marginal Entry Order</b> signed by Judge James S. Gwin on 8/31/09 granting defendants' motion for an extension of time until 9/21/09 to file answers to the complaint. There will be no further extensions. (Related Doc. <u>13</u> ) (M,G) (Entered: 08/31/2009)
09/01/2009	<u>15</u>	<b>Motion</b> for attorney Christopher R. Opalinski to Appear Pro Hac Vice. Filing fee \$ 100, receipt number 0647-3718901, filed by Plaintiff Allied Industrial Development Corporation. (Attachments: # <u>1</u> Affidavit, # <u>2</u> Proposed Order) (McCrea, Jacob) (Entered: 09/01/2009)
09/01/2009	<u>16</u>	<b>Motion</b> for attorney Frank Timothy Grieco to Appear Pro Hac Vice. Filing fee \$ 100, receipt number 0647-3718907, filed by Plaintiff Allied Industrial Development Corporation. (Attachments: # <u>1</u> Affidavit, # <u>2</u> Proposed Order) (McCrea, Jacob) (Entered: 09/01/2009)
09/03/2009	<u>17</u>	<b>Marginal Entry Order</b> signed by Judge James S. Gwin on 9/3/09 granting the motion for admission pro hac vice of Attorney Christopher R. Opalinski on behalf of plaintiff. (Related Doc. <u>15</u> ) (M,G) (Entered: 09/03/2009)
09/03/2009	<u>18</u>	<b>Marginal Entry Order</b> signed by Judge James S. Gwin on 9/3/09 granting the motion for admission pro hac vice of Attorney F. Timothy Grieco on behalf of plaintiff. (Related Doc. <u>16</u> ) (M,G) (Entered: 09/03/2009)
09/21/2009	<u>19</u>	<b>Answer</b> to Complaint (Related Doc # <u>1</u> ), <b>Third party complaint</b> against Gearmar Properties, Inc., <b>Counterclaim</b> against Allied Industrial Development Corporation filed by Ohio & Pennsylvania Railroad Company, Mahoning Valley Railway Company. (Attachments: # <u>1</u> Exhibit A -C, # <u>2</u> Exhibit D & E) (Lipka, Thomas) (Entered: 09/21/2009)
09/21/2009	<u>20</u>	FILED IN ERROR. ATTORNEY TO REFILE. <b>Answer</b> to Complaint (Related Doc # <u>1</u> ) filed by Genesee & Wyoming, Inc., Ohio Central Railroad, Inc., Warren & Trumbull Railroad Company, Youngstown & Austintown Railroad, Inc., Youngstown Belt Railroad Company. (Attachments: # <u>1</u> Exhibit A-C, # <u>2</u> Exhibit D & E)(Lipka, Thomas) Modified on 9/22/2009 as instructed by

		counsel. (H,LA). (Entered: 09/21/2009)
09/22/2009	<u>21</u>	<b>Motion</b> for extension of time until September 22, 2009 to answer filed by Genesee & Wyoming, Inc., Ohio Central Railroad, Inc., Warren & Trumbull Railroad Company, Youngstown & Austintown Railroad, Inc., Youngstown Belt Railroad Company. Related document(s) <u>1</u> . (Attachments: # <u>1</u> Proposed Order)(Lipka, Thomas) (Entered: 09/22/2009)
09/22/2009	<u>22</u>	<b>Answer</b> to Complaint (Related Doc # <u>1</u> ) filed by Genesee & Wyoming, Inc., Ohio Central Railroad, Inc., Warren & Trumbull Railroad Company, Youngstown & Austintown Railroad, Inc., Youngstown Belt Railroad Company. (Attachments: # <u>1</u> Exhibit A-C, # <u>2</u> Exhibit D-E)(Lipka, Thomas) (Entered: 09/22/2009)
09/22/2009	<u>23</u>	<b>Marginal Entry Order</b> signed by Judge James S. Gwin on 9/22/09 granting until 9/22/09 for the filing of an answer by Genesee & Wyoming, Inc., Ohio Central Railroad, Inc., Warren & Trumbull Railroad Company, Youngstown & Austintown Railroad, Inc., and Youngstown Belt Railroad Company. Answer docketed on 9/22/09 accepted as filed. (Related Docs. <u>21</u> , <u>22</u> ) (M,G) Modified text on 9/23/2009. (M,G) (Entered: 09/22/2009)
09/23/2009	<u>24</u>	Corporate Disclosure Statement by Allied Industrial Development Corporation filed by Allied Industrial Development Corporation. (McCrea, Jacob) (Entered: 09/23/2009)
09/25/2009	<u>25</u>	Report of Parties' Planning Meeting <i>Under Fed. R. Civ. P. 26(f) and LR 16.3 (b)(3)</i> . Parties do not consent to this case being assigned to the magistrate judge, filed by Gearmar Properties, Inc., Genesee & Wyoming, Inc., Mahoning Valley Railway Company, Ohio & Pennsylvania Railroad Company, Ohio Central Railroad, Inc., Warren & Trumbull Railroad Company, Youngstown & Austintown Railroad, Inc., Youngstown Belt Railroad Company, Allied Industrial Development Corporation. (Lipka, Thomas) Modified filers on 9/28/2009 (H,KR). (Entered: 09/25/2009)
09/29/2009	<u>26</u>	Waiver of Service Returned Executed by Mahoning Valley Railway Company, Ohio & Pennsylvania Railroad Company. Gearmar Properties, Inc. waiver sent on 9/21/2009, answer due 11/20/2009. filed on behalf of Mahoning Valley Railway Company; Ohio & Pennsylvania Railroad Company (Lipka, Thomas) (Entered: 09/29/2009)
09/30/2009	<u>27</u>	<b>Minutes of case management conference</b> before Judge James S. Gwin on 9/30/09. (Court Reporter: none; Time: 45 min.) (M,G) (Entered: 09/30/2009)
10/01/2009	<u>28</u>	<b>Case Management Conference Plan/Order</b> signed by Judge James S. Gwin on 10/1/09. Case assigned to the Standard Track. Parties to be joined and pleadings amended by 10/26/09. Preliminary discovery to be completed by 12/28/09. Dispositive motions to be filed by 1/4/10 with responses due by 1/18/10 and replies by 1/25/10. All discovery to be completed by 3/8/10. Status conference set for 12/22/09 at 12:30 p.m., and final pretrial conference set for 3/17/10 at 12:00 noon, both in Chambers 18A (Cleveland). Jury trial is assigned on a two-week standby basis beginning 3/22/10 at 8:00 a.m., Courtroom 18A (Cleveland). (M,G) (Entered: 10/01/2009)

10/01/2009	<u>29</u>	<b>Order</b> signed by Judge James S. Gwin on 10/1/09 that plaintiff identify experts by 10/19/09 and defendants identify experts by 11/2/09. (M,G) (Entered: 10/01/2009)
10/02/2009	<u>30</u>	Notice that the status conference has been reassigned for 12/21/09 at 8:30 a.m., Chambers 18A (Cleveland) before Judge James S. Gwin. (M,G) (Entered: 10/02/2009)
10/07/2009	<u>31</u>	Consent <b>Motion</b> for extension of time until 10/26/09 to Move or Plead to Defendant's Counterclaim filed by Plaintiff Allied Industrial Development Corporation. Related document(s) <u>19</u> . (Attachments: # <u>1</u> Proposed Order) (Grieco, F.) (Entered: 10/07/2009)
10/08/2009	<u>32</u>	<b>Answer</b> to <u>19</u> Third party complaint, Counterclaim filed by Gearmar Properties, Inc. (Keating, W.) Modified text on 10/9/2009 (H,KR). (Entered: 10/08/2009)
10/10/2009	<u>33</u>	Attorney Appearance by Amelia A. Bower filed by on behalf of Allied Industrial Development Corporation. (Bower, Amelia) (Entered: 10/10/2009)
10/13/2009	<u>34</u>	<b>Marginal Entry Order</b> signed by Judge James S. Gwin on 10/13/09 granting the parties' consent motion for an extension of time until 10/26/09 for plaintiff to file answer to defendants' counterclaim. (Related Doc. <u>31</u> ) (M,G) (Entered: 10/13/2009)
10/26/2009	<u>35</u>	<b>Reply</b> to <u>19</u> Answer to Complaint, Third party complaint, Counterclaim against Gearmar Properties, Inc. filed by Allied Industrial Development Corporation. (McCrea, Jacob) Modified text on 10/27/2009 (H,KR). (Entered: 10/26/2009)
10/26/2009	<u>36</u>	Amended <b>Counterclaim and Third Party Complaint</b> against Allied Industrial Development Corporation, Gearmar Properties, Inc.. Filed by Mahoning Valley Railway Company, Ohio & Pennsylvania Railroad Company. (Attachments: # <u>1</u> Exhibit A-C, # <u>2</u> Exhibit D-E) (Lipka, Thomas) (Entered: 10/26/2009)
10/26/2009	<u>37</u>	<b>Motion</b> to amend complaint filed by Plaintiff Allied Industrial Development Corporation. Related document(s) <u>1</u> . (Attachments: # <u>1</u> Proposed Order to Motion for Leave of Court to Amend Complaint)(McCrea, Jacob) (Entered: 10/26/2009)
10/26/2009	<u>38</u>	Memorandum in Support of <u>37</u> Motion for Leave of Court to Amend Complaint filed by Allied Industrial Development Corporation. (McCrea, Jacob) Modified text on 10/27/2009 (H,KR). (Entered: 10/26/2009)
10/29/2009	<u>39</u>	<b>Marginal Entry Order</b> signed by Judge James S. Gwin on 10/29/09 granting plaintiff's motion for leave to amend the complaint; amended complaint to be filed upon receipt of this marginal entry. (Related Doc. <u>37</u> ) (M,G) (Entered: 10/29/2009)
10/30/2009	<u>40</u>	<b>Motion</b> for leave to <i>File Amended Counterclaim</i> filed by Mahoning Valley Railway Company, Ohio & Pennsylvania Railroad Company. (Lipka, Thomas) (Entered: 10/30/2009)

10/30/2009	<u>41</u>	<b>Amended complaint for Forcible Entry and Detainer</b> against Genesee & Wyoming, Inc., Ohio Central Railroad, Inc., Summit View, Inc, and adding new party defendant(s) Summit View, Inc.. Filed by Allied Industrial Development Corporation. (Attachments: # <u>1</u> Exhibit 1) (McCrea, Jacob) (Entered: 10/30/2009)
11/03/2009	<u>42</u>	<i>Third-Party Defendant's Answer</i> to <u>35</u> Answer/Reply to counterclaim, Crossclaim filed by Gearmar Properties, Inc.. (Keating, W.) (Entered: 11/03/2009)
11/13/2009	<u>43</u>	<b>Answer</b> to <u>41</u> Amended complaint, filed by Genesee & Wyoming, Inc., Mahoning Valley Railway Company, Ohio & Pennsylvania Railroad Company, Ohio Central Railroad, Inc., Summit View, Inc, Warren & Trumbull Railroad Company, Youngstown & Austintown Railroad, Inc., Youngstown Belt Railroad Company. (Lanz, C.) (Entered: 11/13/2009)
11/30/2009	<u>44</u>	<b>Marginal Entry Order</b> signed by Judge James S. Gwin on 11/30/09 granting motion for leave to file amended counterclaim filed by Mahoning Valley Railway Company and The Ohio and Pennsylvania Railroad Company. Amended counterclaim to be filed upon receipt of this marginal entry. (Related Doc. <u>40</u> ) (M,G) (Entered: 11/30/2009)
12/01/2009	<u>45</u>	Amended <b>Counterclaim and Third Party Complaint</b> against Allied Industrial Development Corporation, Gearmar Properties, Inc.. Filed by Ohio & Pennsylvania Railroad Company, Mahoning Valley Railway Company. (Attachments: # <u>1</u> Exhibit A,B,C - Maps and Purchase Agreement, # <u>2</u> Exhibit D&E- Legal Records) (Lipka, Thomas) Modified on 12/1/2009 (H,KR). (Entered: 12/01/2009)
12/11/2009	<u>46</u>	<b>Answer to Defendants' Amended Counterclaim and Third Party Complaint</b> filed by Allied Industrial Development Corporation. Related document(s) <u>45</u> . (McCrea, Jacob) (Entered: 12/11/2009)
12/15/2009	<u>47</u>	Notice that the status conference has been rescheduled to 1/5/10 at 4:00 p.m., before Judge James S. Gwin, Chambers 18A (Cleveland). (M,G) (Entered: 12/15/2009)
01/04/2010	<u>48</u>	Notice that due to a conflict on the Court's calendar the status conference has been reset to 1/6/10 at 10:00 a.m., Chambers 18A (Cleveland) before Judge James S. Gwin. (M,G) (Entered: 01/04/2010)
01/04/2010	<u>49</u>	Attorney Appearance <i>as Co-Counsel</i> by Daniel G. Keating filed by on behalf of Gearmar Properties, Inc.. (Keating, Daniel) (Entered: 01/04/2010)
01/04/2010	<u>50</u>	<b>Motion</b> to dismiss or in the Alternative <b>Motion</b> to Refer to the Surface Transportation Board, and Memorandum in Support filed by Genesee & Wyoming, Inc., Mahoning Valley Railway Company, Ohio & Pennsylvania Railroad Company, Ohio Central Railroad, Inc., Summit View, Inc, Warren & Trumbull Railroad Company, Youngstown & Austintown Railroad, Inc., Youngstown Belt Railroad Company. (Attachments: # <u>1</u> Exhibit A-C)(Lipka, Thomas). (Entered: 01/04/2010)
01/04/2010	<u>51</u>	<b>Motion</b> for partial summary judgment filed by Plaintiff Allied Industrial

		Development Corporation. (Attachments: # <u>1</u> Proposed Order)(McCrea, Jacob) (Entered: 01/04/2010)
01/04/2010	<u>52</u>	Appendix <i>in Support of Motion for Partial Summary Judgment</i> filed by Allied Industrial Development Corporation. Related document(s) <u>51</u> . (Attachments: # <u>1</u> Pages of Deposition of John R. Ramun , Vol. 1, # <u>2</u> Pages of Deposition of Terry Feichtenbiner, # <u>3</u> Deposition Exhibit 2 (Replat of Lots 62188 and 62320), # <u>4</u> Deposition Exhibit 10 (Deed from O&P/MVRY to Gearmar), # <u>5</u> Pages of Deposition of William Strawn, # <u>6</u> Deposition Exhibit 3 (Gearmar/Allied Purchase Agreement), # <u>7</u> Deposition Exhibit 17 (Deed from Gearmar to Allied), # <u>8</u> Pages of Deposition of William Marsteller, # <u>9</u> Pages of Deposition of Dean Gearhart, # <u>10</u> Deposition Exhibit 7 (Deed from Maverick C&P, Inc. to O&P), # <u>11</u> Pages of Deposition of Joanne Lewis) (McCrea, Jacob) Modified exhibit names on 1/5/2010 (H,KR). (Entered: 01/04/2010)
01/04/2010	<u>53</u>	Statement of Facts filed by Allied Industrial Development Corporation. Related document(s) <u>51</u> . (McCrea, Jacob) (Entered: 01/04/2010)
01/04/2010	<u>54</u>	Memorandum In Support of <u>51</u> <b>Motion</b> for partial summary judgment filed by Allied Industrial Development Corporation. (McCrea, Jacob) (Entered: 01/04/2010)
01/06/2010	<u>55</u>	<b>Minutes of status conference</b> before Judge James S. Gwin on 1/6/10. (Court Reporter: none; Time: 30 min.) (M,G) (Entered: 01/06/2010)
01/13/2010	<u>56</u>	<b>Motion</b> for leave <i>to file Motion for Summary Judgment</i> filed by 3rd Pty Defendant Gearmar Properties, Inc.. (Keating, Daniel) (Entered: 01/13/2010)
01/13/2010	<u>57</u>	<b>Motion</b> for summary judgment filed by 3rd Pty Defendant Gearmar Properties, Inc.. (Keating, Daniel) (Entered: 01/13/2010)
01/13/2010	<u>58</u>	Memorandum In Support of <u>57</u> <b>Motion</b> for summary judgment filed by Gearmar Properties, Inc.. (Keating, Daniel) (Entered: 01/13/2010)
01/15/2010	<u>59</u>	Amended Affidavit/Declaration of <i>Dean Gearhart</i> filed by Gearmar Properties, Inc.. Related document(s) <u>58</u> . (Keating, Daniel) (Entered: 01/15/2010)
01/18/2010	<u>60</u>	<b>Response</b> to <u>51</u> <b>Motion</b> for partial summary judgment filed by Genesee & Wyoming, Inc., Mahoning Valley Railway Company, Ohio & Pennsylvania Railroad Company, Ohio Central Railroad, Inc., Summit View, Inc, Warren & Trumbull Railroad Company, Youngstown & Austintown Railroad, Inc., Youngstown Belt Railroad Company. (Lipka, Thomas) (Entered: 01/18/2010)
01/18/2010	<u>61</u>	Exhibit Appendix in Support of Defendants' Response to Plaintiff's Motion for Partial Summary Judgment filed by Genesee & Wyoming, Inc., Mahoning Valley Railway Company, Ohio & Pennsylvania Railroad Company, Ohio Central Railroad, Inc., Summit View, Inc, Warren & Trumbull Railroad Company, Youngstown & Austintown Railroad, Inc., Youngstown Belt Railroad Company. Related document(s) <u>60</u> . (Attachments: # <u>1</u> Pages of Deposition from John R. Ramun, Vol 1, # <u>2</u> Deposition Exhibit 2 (Replat of Lots 62188 and 62320), # <u>3</u> Affidavit of David J. Collins, # <u>4</u> Pages of Deposition from David J. Collins, # <u>5</u> Pages of Deposition from Williams

		Strawn, # 6 Pages of Deposition from Terry Feichtenbiner, # 7 Deposition Exhibit 9 (OHPA & Gearmar Purchase Agreement), # 8 Pages of Deposition from JoAnne Lewis, # 9 Deposition Exhibit 22(OHPA & Gearmar Purchase Agreement provided to Bauman Land Title), # 10 Deposition Exhibit 23, # 11 Pages of Deposition from William Marsteller, # 12 Deposition Exhibit 17 (Deed from Gearmar to Allied), # 13 Pages of Deposition from Dean Gearhart, # 14 Deposition Exhibit 4 (Gearmar to Jim Snyder Purchase Agreement), # 15 Pages of Deposition from John R. Ramun, Vol. II)(Lipka, Thomas) Modified on 1/19/2010 to describe exhibits. (H,KR). (Entered: 01/18/2010)
01/18/2010	<u>62</u>	<b>Opposition to 50 Motion</b> to dismiss <i>or in the Alternative Refer to the Surface Transportation Board, and Memorandum in Support</i> filed by Allied Industrial Development Corporation. (McCrea, Jacob) (Entered: 01/18/2010)
01/18/2010	<u>63</u>	Affidavit/Declaration of <i>Jacob McCrea In Opposition to Defendant's Motion to Dismiss or In The Alternative Refer To The Surface Transportation Board</i> filed by Allied Industrial Development Corporation. Related document(s) <u>62</u> . (Attachments: # <u>1</u> Excerpts of the deposition of David Collins, # <u>2</u> Excerpts of the deposition of David Collins , # <u>3</u> Excerpts of the deposition of Terry Feichtenbiner, # <u>4</u> Excerpt of the deposition of William Strawn)(McCrea, Jacob) Modified to describe exhibits on 1/19/2010 (H,KR). (Entered: 01/18/2010)
01/25/2010	<u>64</u>	<b>Marginal Entry Order</b> signed by Judge James S. Gwin on 1/25/10 granting motion of third party defendant Gearmar Properties, Inc., to file motion for summary judgment. Motion to be filed upon receipt of this marginal entry with response due 2/8/10 and reply due 2/15/10. (Related Doc. <u>56</u> ) (M,G) (Entered: 01/25/2010)
01/25/2010	<u>65</u>	<b>Reply</b> to response to <b>50 Motion</b> to dismiss or in the Alternative <b>Motion</b> to Refer to the Surface Transportation Board, and Memorandum in Support filed by Genesee & Wyoming, Inc., Mahoning Valley Railway Company, Ohio & Pennsylvania Railroad Company, Ohio Central Railroad, Inc., Summit View, Inc, Warren & Trumbull Railroad Company, Youngstown & Austintown Railroad, Inc., Youngstown Belt Railroad Company. (Attachments: # <u>1</u> Exhibit A-Pages from Mr. Strawn's deposition, # <u>2</u> Exhibit B-Pages from Mr. Collins' deposition)(Lipka, Thomas) Modified text on 1/26/2010 (H,KR). (Entered: 01/25/2010)
01/25/2010	<u>66</u>	(FILING ERROR) Reply Memorandum In Support of <u>51 Motion</u> for partial summary judgment filed by Allied Industrial Development Corporation. (Grieco, F.) Modified to add filing error because document is not text searchable. Attorney Grieco has been notified by email and phone that document must be refiled on 1/26/2010 (H,KR). (Entered: 01/25/2010)
01/25/2010	<u>67</u>	(FILING ERROR) Affidavit/Declaration of <i>F. Timothy Grieco In Support of Plaintiff's Motion for Partial Summary Judgment</i> filed by Allied Industrial Development Corporation. Related document(s) <u>51</u> . (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C, # <u>4</u> Exhibit D, # <u>5</u> Exhibit E, # <u>6</u> Exhibit F, # <u>7</u> Exhibit G, # <u>8</u> Exhibit H, # <u>9</u> Exhibit I, # <u>10</u> Exhibit J, # <u>11</u> Exhibit K, # <u>12</u> Exhibit L)(Grieco, F.) Modified to add filing error because document is not text searchable and exhibits are not properly identified. Attorney Grieco has

		been notified by email and phone that document must be refiled on 1/26/2010 (H,KR). (Entered: 01/25/2010)
01/26/2010	<u>68</u>	<b>Motion</b> for summary judgment filed by 3rd Pty Defendant Gearmar Properties, Inc.. Related document(s) <u>36</u> . (Keating, Daniel) (Entered: 01/26/2010)
01/26/2010	<u>69</u>	Memorandum In Support of <u>68 Motion</u> for summary judgment filed by Gearmar Properties, Inc.. (Keating, Daniel) (Entered: 01/26/2010)
01/26/2010	<u>70</u>	Reply Memorandum In Support of <u>51 Motion</u> for partial summary judgment filed by Allied Industrial Development Corporation. (Grieco, F.) (Entered: 01/26/2010)
01/26/2010	<u>71</u>	Affidavit/Declaration of <i>F. Timothy Grieco in Support of Plaintiff's Motion for Partial Summary Judgment</i> filed by Allied Industrial Development Corporation. Related document(s) <u>51</u> . (Attachments: # <u>1</u> Exhibit A - Stock Purchase Agreement, # <u>2</u> Exhibit B - Transportation Services Agreement, # <u>3</u> Exhibit C - Quit Claim Deed, # <u>4</u> Exhibit D - Plat Map for Lots 62320 and 62188, # <u>5</u> Exhibit E - Settlement Statement for Railroad/Gearmar Sale, # <u>6</u> Exhibit F - Deposition Excerpts of Jerry Jacobson, # <u>7</u> Exhibit G - Deposition Excerpts of Jonanne Lewis, # <u>8</u> Exhibit H - Deposition Excerpts of William Strawn, # <u>9</u> Exhibit I - Deposition Excerpts of Terry Feichtenbiner, # <u>10</u> Exhibit J - Deposition Excerpts of William Marsteller, # <u>11</u> Exhibit K - Deposition Excerpts of Dean Gearhart, # <u>12</u> Exhibit L - Letter from Ronald S. Kopp to Bauman Land Title Agency, Inc.)(Grieco, F.) (Entered: 01/26/2010)
02/04/2010	<u>72</u>	<b>Motion</b> for leave to <i>File Supplemental Declaration in Support of Motion for Partial Summary Judgment</i> filed by Plaintiff Allied Industrial Development Corporation. (Attachments: # <u>1</u> Supplemental Declaration of F. Timothy Grieco, # <u>2</u> Operations Bulletin, # <u>3</u> Proposed Order)(Grieco, F.) Modified exhibit names on 2/5/2010 (H,KR). (Entered: 02/04/2010)
02/08/2010	<u>73</u>	<b>Response</b> to <u>68 Motion</u> for summary judgment filed by Genesee & Wyoming, Inc., Mahoning Valley Railway Company, Ohio & Pennsylvania Railroad Company, Ohio Central Railroad, Inc., Summit View, Inc, Warren & Trumbull Railroad Company, Youngstown & Austintown Railroad, Inc., Youngstown Belt Railroad Company. (Attachments: # <u>1</u> Exhibit A-Deposition testimony of Joanne Lewis (Pgs. 85-86), # <u>2</u> Exhibit B-Re-recorded Deed (to Gearmar Properties, Inc.), # <u>3</u> Exhibit C-Quit Claim Deed (to MVRV), # <u>4</u> Exhibit D-Transportation Services Agmt.)(Lipka, Thomas) Modified text on 2/9/2010 (H,KR). (Entered: 02/08/2010)
02/12/2010	<u>74</u>	<b>Response</b> to <u>72 Motion</u> for leave to <i>File Supplemental Declaration in Support of Motion for Partial Summary Judgment</i> filed by All Defendants. (Attachments: # <u>1</u> Exhibit A-49 U.S.C. Section 10906, # <u>2</u> Exhibit B-Supplemental Affidavit of David Collins)(Lipka, Thomas) (Entered: 02/12/2010)
02/15/2010	<u>75</u>	Reply to <i>Defendants' Response to Gearmar's Motion for Summary Judgment</i> filed by Gearmar Properties, Inc.. Related document(s) <u>73</u> . (Keating, Daniel) (Entered: 02/15/2010)
02/25/2010	<u>76</u>	Notice that due to a conflict on the Court's calendar the final pretrial

		conference set for 3/17/10 has been rescheduled to 9:00 a.m., Chambers 18A (Cleveland) before Judge James S. Gwin. (M,G) (Entered: 02/25/2010)
03/11/2010	<u>77</u>	<b>Motion</b> to strike <i>Jury Demand</i> filed by Genesee & Wyoming, Inc., Mahoning Valley Railway Company, Ohio & Pennsylvania Railroad Company, Ohio Central Railroad, Inc., Summit View, Inc, Warren & Trumbull Railroad Company, Youngstown & Austintown Railroad, Inc., Youngstown Belt Railroad Company. (Lipka, Thomas) (Entered: 03/11/2010)
03/12/2010	<u>78</u>	Pre-Trial Brief filed by All Parties. (Attachments: # <u>1</u> Appendix B, # <u>2</u> Appendix C)(Grieco, F.) (Entered: 03/12/2010)
03/15/2010	<u>79</u>	<b>Opinion and Order of Remand</b> signed by Judge James S. Gwin on 3/15/10. The defendants' removal of the instant case being improper, the Court remands this matter to the Mahoning County Court of Common Pleas. Further, defendants shall pay plaintiff's actual expenses incurred as a result of said removal. (Related Docs. <u>50</u> , <u>62</u> , <u>65</u> ) (M,G) (Entered: 03/15/2010)
03/16/2010	<u>80</u>	Certified copy of order of remand and docket sheet mailed to Mahoning County Court of Common Pleas with acknowledgement of receipt enclosed. Related document(s) <u>79</u> . (H,KR) (Entered: 03/16/2010)
03/22/2010	<u>81</u>	Acknowledgment of receipt of record received by Mahoning County Court of Common Pleas. Related document(s) <u>80</u> , <u>79</u> . (H,KR) (Entered: 03/22/2010)
03/25/2010	<u>82</u>	<b>Motion</b> to reconsider (alter or amend) opinion & order filed by Genesee & Wyoming, Inc., Mahoning Valley Railway Company, Ohio & Pennsylvania Railroad Company, Ohio Central Railroad, Inc., Summit View, Inc, Warren & Trumbull Railroad Company, Youngstown & Austintown Railroad, Inc., Youngstown Belt Railroad Company. Related document(s) <u>79</u> . (Lanz, C.) Modified text on 3/26/2010 (H,KR). (Entered: 03/25/2010)
03/29/2010	<u>83</u>	<b>Motion</b> for attorney fees and costs by F. Timothy Grieco filed by Plaintiff Allied Industrial Development Corporation. (Attachments: # <u>1</u> Exhibit A - Order)(Grieco, F.) Modified text on 3/30/2010 (H,KR). (Entered: 03/29/2010)
03/29/2010	<u>84</u>	Proposed Order for Attorneys' Fees and Costs filed by Allied Industrial Development Corporation. Related document(s) <u>83</u> . (Grieco, F.) Modified text on 3/30/2010 (H,KR). (Entered: 03/29/2010)
03/29/2010	<u>85</u>	Affidavit/Declaration of F. Timothy Grieco in Support of 83 Motion for Attorneys' Fees and Costs filed by Allied Industrial Development Corporation. (Attachments: # <u>1</u> Exhibit A - Attorney Hours, # <u>2</u> Exhibit B - Attorney Invoice)(Grieco, F.) Modified text and exhibit names on 3/30/2010 (H,KR). (Entered: 03/29/2010)
04/12/2010	<u>86</u>	(FILING ERROR) <b>Opposition</b> to 83 <b>Motion</b> for attorney fees and costs by F. Timothy Grieco filed by All Defendants. (Lanz, C.) Modified on 04/13/10 to add filing error because document is not text searchable. Attorney Lanz has been notified that document is to be refiled (H,KR). (Entered: 04/12/2010)
04/12/2010	<u>87</u>	(FILING ERROR) <b>Opposition</b> to <u>82</u> <b>Motion</b> to reconsideration (alter or amend) opinion & order <b>Motion</b> to reconsideration (alter or amend) opinion & order filed by Allied Industrial Development Corporation. (McCrea, Jacob)

		Modified on 04/13/10 to add filing error because document is not text searchable. Attorney McCrea has been notified that document is to be refiled (H,KR). (Entered: 04/12/2010)
04/13/2010	<u>88</u>	<b>Opposition to <u>83</u> Motion</b> for attorney fees and costs by F. Timothy Grieco filed by All Defendants. (Lanz, C.) Modified on 4/13/2010 (H,KR). (Entered: 04/13/2010)
04/13/2010	<u>89</u>	<b>Opposition to <u>82</u> Motion</b> to reconsideration (alter or amend) opinion & order filed by Allied Industrial Development Corporation. (McCrea, Jacob) Modified text on 4/14/2010 (H,KR). (Entered: 04/13/2010)
04/15/2010	<u>90</u>	<b>Opinion and Order</b> signed by Judge James S. Gwin on 4/14/10. Defendants' motion for reconsideration is denied and plaintiff's motion for attorney's fees and costs in the amount of \$16,035.50 is granted. (Related Docs. <u>82</u> , <u>83</u> ) (M,G) Modified signature date on 4/16/2010 (H,KR). (Entered: 04/15/2010)

PACER Service Center			
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12/15/2010 17:40:49			
<b>PACER Login:</b>	es0024	<b>Client Code:</b>	999999-99999
<b>Description:</b>	Docket Report	<b>Search Criteria:</b>	4:09-cv-01904-JG
<b>Billable Pages:</b>	15	<b>Cost:</b>	1.20

**D**



3. Allied is informed, believes and therefore avers that Ohio Central Railroad, Inc. is a corporation organized and existing under the laws of the State of Ohio, with a principal place of business at 47849 Papermill Road, Coshocton, Ohio 43812.

4. Allied is informed, believes and therefore avers that Ohio & Pennsylvania Railroad Company is a corporation organized and existing under the laws of the State of Ohio, with a principal place of business at 47849 Papermill Road, Coshocton, Ohio 43812.

5. Allied is informed, believes and therefore avers that The Warren & Trumbull Railroad Company is a corporation organized and existing under the laws of the State of Ohio, with a principal place of business at 47849 Papermill Road, Coshocton, Ohio 43812.

6. Allied is informed, believes and therefore avers that Youngstown & Austintown Railroad, Inc. is a corporation organized and existing under the laws of the State of Ohio, with a principal place of business at 47849 Papermill Road, Coshocton, Ohio 43812.

7. Allied is informed, believes and therefore avers that Youngstown Belt Railroad Company is a corporation organized and existing under the laws of the State of Ohio, with a principal place of business at 47849 Papermill Road, Coshocton, Ohio 43812.

8. Allied is informed, believes and therefore avers that The Mahoning Valley Railroad Company is a corporation organized and existing under the laws of the State of Ohio, with a principal place of business at 47849 Papermill Road, Coshocton, Ohio 43812.

9. Allied is informed, believes and therefore avers that Genesee & Wyoming, Inc. is a corporation organized and existing under the laws of the State of Delaware, with a principal place of business at 66 Field Point Road, Greenwich, Connecticut 06830.

10. Allied is informed, believes and therefore avers that Summit View, Inc. is a corporation organized and existing under the laws of the State of Ohio, with a principal place of business at 47849 Papermill Road, Coshocton, Ohio 43812.

11. Allied is informed, believes and therefore avers that Summit View, Inc. and Genesee & Wyoming, Inc. are the owners, operators and corporate parents of the various named Ohio corporations doing business as The Ohio Central Railroad System.

#### **JURISDICTION AND VENUE**

12. This Court has jurisdiction over this matter and over the Defendants pursuant to Ohio Revised Code § 2307.382. Venue in this Court is proper pursuant to Ohio Rule of Civil Procedure 3(B).

#### **BACKGROUND**

13. By Purchase Agreement dated March 26, 2009, Allied purchased from Gearmar Properties, Inc. (“Gearmar”) two (2) parcels of property located in the City of Youngstown known as Youngstown City Lot Nos. 62320 and 62188, as well as all appurtenances pertaining to the property, all improvements pertaining to the property, certain personal property located on or about the property, and all other property rights (collectively the “Gearmar Purchase”).

14. Lot No. 62320 is also identified as Parcel Id. No. 53-040-0-015.01-0 by the Mahoning County Geographical Information System website.

15. Lot No. 62188 is also identified as Parcel Id. No. 53-042-0-010.01-0 by the Mahoning County Geographical Information System website.

16. The deeds transferring Youngstown City Lot Nos. 62320 and 62188 from Gearmar to Allied were filed with the Mahoning County Recorder’s Office on Monday, April 13, 2009.

17. Defendants presently occupy an office building located on Lot No. 62188, despite having no current legal or contractual rights for the continued possession, operation or use of these offices on Allied’s property.

18. Defendants are also utilizing the property located on Lot No. 62188 to store various materials (e.g., loose ballast, stockpiled rails, plates and fabric) and park or store third party rail cars despite the lack of any lease, contract, agreement or other legal right to continue to use the property.

19. Defendants are also utilizing a building located on Lot No. 62320 to store various locomotive materials and parts, despite the lack of any lease, contract, agreement or other legal right to continue to use the property.

20. By letter dated May 5, 2009, Allied informed Defendants of the Gearmar Purchase and requested that Ohio Central vacate Lot Nos. 62320 and 62188 on or before June 5, 2009. A true and correct copy of the May 5, 2009 letter to Ohio Central is attached hereto as Exhibit 1.

21. As of the date of the filing of this lawsuit, Defendants are still in possession of the office building located on Lot No. 62188, and have not otherwise completely removed various materials and third party rail cars from Lot Nos. 62320 and 62188.

22. Allied has performed all conditions precedent to filing this lawsuit.

### COUNT I

#### FORCIBLE ENTRY AND DETAINER/ EJECTMENT

23. Paragraphs 1-22 are hereby incorporated by reference as if fully set forth at length.

24. Due to the Gearmar Purchase, Defendants have no current right to use, occupy or possess Lot Nos. 62320 and 62188, or to store any materials or equipment in any of the buildings located thereon, to park or store third party rail cars, or to otherwise use, occupy or possess Allied's property in any manner.

25. Due to the Gearmar Purchase and Allied's subsequent written notice to vacate, Defendants' present legal status on the property is that of a trespasser.

26. Pursuant to the Ohio Forcible Entry and Detainer Statute, O.R.C. §§ 1923.01 et seq., Defendants have unlawfully and forcibly detained Lot Nos. 62320 and 62188, without color of title or other legal or contractual right to occupy the property, and Allied has the right to immediate possession of the property.

27. Defendants have willfully failed, neglected and refused to vacate Lot Nos. 62320 and 62188, despite Allied's reasonable demand that Defendants vacate the property within thirty (30) days.

28. Due to the Gearmar Purchase, Defendants are legally obligated to immediately take the following actions:

- a. Vacate Lot Nos. 62320 and 62188;
- b. Remove all loose and unaffixed equipment, materials, and third party rail cars from Lot Nos. 62320 and 62188; and
- c. Vacate the office building located on Lot No. 62188.

WHEREFORE, Plaintiff Allied Industrial Development Corporation respectfully requests that the Court order that Defendants immediately vacate Lot Nos. 62320 and 62188 as set forth above, and award Allied its costs and expenses incurred in removing Defendants from Allied's property, as well damages, court costs and attorneys' fees for Defendants' willful trespass on Allied's property.

**COUNT II**

**TRESPASS**

29. Paragraphs 1-28 are hereby incorporated by reference as if fully set forth at length.

30. After the purchase of Lot Nos. 62320 and 62188 by Allied, Defendants continued to occupy the properties as a trespasser, and paid no fair rental value to compensate Allied for the use of the properties.

31. Allied is entitled to the fair rental value of the property during Defendants' unlawful trespass upon the property.

32. Allied is informed, believes, and therefore avers that Defendants contaminated the properties by improperly disposing of contaminated, regulated or controlled substances on the properties, which substances Allied will now be required to remediate.

33. By improperly disposing of contaminated, regulated or controlled substances on Lot Nos. 62320 and 62188, Defendants have damaged Allied's property, without Allied's consent, and against Allied's will.

34. Defendants' continuing and wrongful trespass, as well as the improper disposal of contaminated, regulated or controlled substances on Allied's property, have caused damage to Allied's property and have deprived Allied of the beneficial use and enjoyment of its property.

WHEREFORE, Plaintiff Allied Industrial Development Corporation respectfully requests that the Court award Allied damages in excess of \$25,0000, plus punitive damages and attorneys' fees for Defendants' willful trespass on Allied's property.

**JURY DEMAND**

Plaintiff demands that this case be tried by a jury.

Respectfully submitted,

/s/ Jacob C. McCrea

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Attorneys for Plaintiff  
Allied Industrial Development Corporation

Dated: October 30, 2009

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Amended Complaint for Forcible Entry and Detainer was served via the Court's CM/ECF system, this 30th day of October, 2009, as follows:

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/s/ Jacob C. McCrea  
Jacob C. McCrea, Esquire

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May 5, 2009

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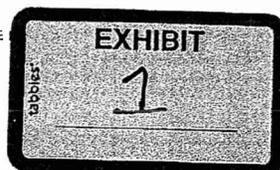
Re: Youngstown City Lot Nos. 62320 & 62188

Dear Messrs. Lanz and Lipka:

As you know, our firm represents Allied Industrial Development Corporation ("Allied"). By Purchase Agreement dated March 26, 2009, Allied purchased from Gearmar Properties, Inc. ("Gearmar") two (2) parcels of property located in the City of Youngstown known as Youngstown City Lot Nos. 62320 and 62188, as well as any and all easements benefitting the property, any and all rights and appurtenances pertaining to the property, all improvements to the property (including the railroad tracks located thereon), and certain personal property located on or about the property (collectively, the "Gearmar Purchase"). The deeds transferring the property to Allied were filed with the Mahoning County Recorder's Office on Monday, April 13, 2009.

It is Allied's understanding that the Ohio Central Railroad System and/or its subsidiary railroads (collectively "Ohio Central") presently occupy offices located on Lot No. 62188, despite having no current legal or contractual rights for the continued occupation or use of these offices on Allied's property. It is also Allied's understanding that Ohio Central is utilizing a building located on Lot No. 62320 to store various locomotive equipment and parts and utilizing the property located on Lot No. 62188 to store materials (i.e., loose ballast, stockpiled rail, plates, fabric).

As a result of the Gearmar Purchase, Ohio Central has no current right to occupy Lot Nos. 62320 and 62188, to travel over any of the rail lines and/or roads located thereon, or to store any equipment or materials in any of the buildings located thereon or otherwise on Allied's property. Ohio Central's present legal status on the property is that of a trespasser and/or squatter. Therefore, Allied hereby demands that Ohio Central immediately cease any and all operations on Lot Nos. 62320 and 62188 and vacate these premises and remove all loose and unaffixed equipment and materials currently stored there within thirty (30) days of the date of this letter. Any Ohio Central property or equipment not removed within thirty (30) days of the date of this



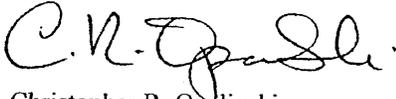
**ECKERT  
SEAMANS**

C. Scott Lanz, Esquire  
Thomas J. Lipka, Esquire  
Manchester Bennett Powers & Ullman  
May 5, 2009  
Page 2

letter will be considered to have been abandoned and Allied will take any necessary actions to dispose of this property, and will then seek recovery of all costs and expenses it incurs in connection therewith from Ohio Central. If the premises are not vacated and all property removed within thirty days, you are hereby advised that Allied will immediately commence an action to remove Ohio Central from the property and seek all available legal remedies, including the recovery of compensatory damages, punitive damages and attorneys' fees due to Ohio Central's willful and unlawful trespass on Allied's property. Furthermore, you are hereby advised that Ohio Central has no right to remove any improvements to the property which are now owned by Allied, including all railroad tracks, ties, spikes and ballast.

I would request that you or your client advise me of your intentions as soon as possible so that Allied can begin to immediately take whatever steps may be required to protect its property and its interests.

Very truly yours,



Christopher R. Opalinski

CRO/bjm

cc: Mr. John Ramun  
Jay Skolnick, Esquire  
Ed Smith, Esquire

E

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

ALLIED INDUSTRIAL DEVELOPMENT	)	CASE NO. 4:09 CV 01904
CORP.	)	
	)	JUDGE JAMES S. GWIN
Plaintiff	)	
Counterclaim Defendants	)	
	)	
vs.	)	
	)	
OHIO CENTRAL RAILROAD, INC., ET	)	
AL.,	)	<b>AMENDED COUNTERCLAIM</b>
	)	<b>AND THIRD PARTY COMPLAINT</b>
Defendants/Counterclaimants	)	
Third Party Plaintiffs	)	
	)	
vs.	)	
	)	
GEARMAR PROPERTIES, INC.	)	
	)	
Third Party Defendants	)	
	)	

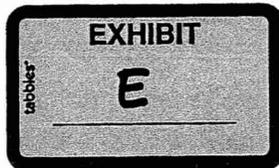
**COUNTERCLAIM AND THIRD PARTY COMPLAINT**

**PARTIES**

1. Plaintiff The Ohio and Pennsylvania Railroad Company, Inc. (“Ohio and Pennsylvania”) is an Ohio Corporation engaged in common carrier interstate freight rail service and is subject to the jurisdiction of the Surface Transportation Board (“STB”).

2. Plaintiff The Mahoning Valley Railway Company (“MVRV”) is an Ohio corporation engaged in common carrier interstate freight rail service and is subject to the jurisdiction of the STB.

{M0227221.1}



3. Defendant Allied Industrial Development Corporation (“Allied”) is, upon information and belief, an Ohio Corporation with its principal place of business located in Mahoning County, Ohio.

4. Defendant Gearmar Properties, Inc. (“Gearmar”) is, upon information and belief an Ohio Corporation with its principal place of business located in Mahoning County, Ohio.

**COUNT ONE**

**QUIET TITLE**

5. Plaintiffs seek to Quiet Title to certain real property located in the City of Youngstown, County of Mahoning, State of Ohio. The real property at issue is currently identified as Youngstown City Lot No. 62188 (“Lot 62188”).

6. Summit View, Inc (“Summit View”) is an Ohio corporation which wholly owns several corporations engaged in railroad operations in Ohio. The railroads collectively owned by Summit View do business under the name Ohio Central Railroad System (“Ohio Central Railroad System”). The Ohio and Pennsylvania and MVRV are two of the railroads owned by Summit View and which operate under the Ohio Central Railroad System trade name for limited business purposes.

7. In January of 2007, the Ohio and Pennsylvania and the MVRV were the owners of certain real property in the City of Youngstown. Attached as Exhibit A is the plat of Youngstown City Lots No. 62320, 62188 and 62189 as they were laid out prior to January of 2007. The Ohio and Pennsylvania was the titled owner of Lot 62320 as identified in Exhibit A. The MVRV was the titled owner of Lot 62188 and Lot 62189 as identified in Exhibit A.

8. The Ohio Central Railroad System acquired control of Lot Nos. 62188 and 62189 as part of its acquisition of the stock of MVRV in March, 2001. The Lots included part of

MVRY's main line railroad and other tracks and transportation facilities, and on Lot 62189, a locomotive repair shop. MVRY uses the tracks on Lot 62188 to serve its customers, to reach its interchange points with connecting railroads CSX Transportation, Inc. and Norfolk Southern Railway Company, to store and stage cars, and to access its locomotive repair shop.

9. The Ohio and Pennsylvania acquired Lot No. 62320 in 2004. Lot 62320 contains a large manufacturing plant which formerly housed a business known as "Maverick Tube". Adjacent to the former Maverick Tube plant is a small office building which had been used as Maverick Tube's headquarters, and some tracks that had been used to service the plant.

10. Following the purchase of Maverick Tube in 2004, the Ohio Central Railroad System moved the local offices of its Youngstown based railroads, including Ohio and Pennsylvania and MVRY, to the small office building which had been Maverick Tube's headquarters.

11. After a period of time, the Ohio Central Railroad System made the decision to sell the Maverick Tube plant (Lot 62320). However, the Ohio Central Railroad System decided that it wanted to keep the small office building to which it had moved its local corporate offices, as well as the property underlying all of the tracks being used by MVRY, and some additional property from Lot 62320.

12. In its desire to keep its corporate offices, tracks and the additional land, the Ohio Central Railroad System caused Lots 62188 and 62320 to be replatted to the current lot lines as shown on the replat attached hereto as Exhibit B. Once this replat was complete, it would then be possible for Ohio and Pennsylvania to sell the replatted Lot 62320 (the Maverick Tube plant) without disturbing its railroad operations, allowing MVRY and Ohio Central Railroad System to retain the office building, tracks and additional property.

13. In 2007, the Ohio and Pennsylvania reached an agreement with Gearmar to sell Gearmar certain real property located in the City of Youngstown. Pursuant to the terms of that agreement the Ohio and Pennsylvania agreed to sell to Gearmar the newly replatted Lot 62320. A draft copy of the Purchase Agreement is attached hereto as Exhibit C.

14. The sale between the Ohio and Pennsylvania and Gearmar was only intended to include the newly replatted Lot 62320. At no time did the parties discuss, contemplate, negotiate or agree to the sale of Lot 62188 which was owned by MVRVY.

15. On April 4, 2007, the Ohio and Pennsylvania executed a Deed transferring Lot 62320 to Gearmar. Deed from the Ohio and Pennsylvania to Gearmar attached hereto as Exhibit D.

16. Due to a mistake in conveyance or a scrivener's error in drafting the Deed, the Deed transferring Lot 62320 also included the legal description of Lot 62188. Upon information and belief, inclusion of the legal description to Lot 62188 was due to an error by the title company that handled the transaction including the preparation and recording of the Deed.

17. At no time did the Ohio and Pennsylvania, MVRVY or Gearmar ever agree to, or contemplate the transfer of, Lot 62188. The inclusion in the Deed of Lot 62188 was a mistake and was not a part of the agreement and no consideration for Lot 62188 was given by Gearmar or received by the Ohio and Pennsylvania or MVRVY.

18. The mistaken inclusion in the legal description contained in the Deed went unnoticed by both Gearmar and the Ohio and Pennsylvania and MVRVY.

19. As the inclusion of Lot 62188 in the Deed between the Ohio and Pennsylvania and Gearmar was included by mistake, Lot 62188 did not equitably transfer to Gearmar and Gearmar at no time had any estate, right, title, lien or interest whatever in or to Lot 62188.

20. After the sale to Gearmar and with the knowledge of Gearmar, MVRVY and Ohio Central Railroad System continued to use the office, tracks and other rail facilities located on replatted Lot 62188 on a daily basis. Such continuing use was known to Gearmar and open and visible to anyone inspecting the property. The MVRVY and Ohio Central Railroad Systems use of Lot 62188 was open and accepted by Gearmar for nearly 2 years.

21. Upon information and belief, in early 2009 Gearmar entered into an Agreement with Defendant Allied to sell the Maverick Tube building to Allied.

22. On April 13, 2009 a Deed from Gearmar to Allied was recorded. The property description copies the erroneous description in the Deed from Ohio and Pennsylvania to Gearmar, and includes both Lot 62320 and Lot 62188. Deed from Gearmar to Allied attached hereto as Exhibit E.

23. Allied was or should have been on notice, prior to its purchase, that MVRVY and Ohio Central Railroad System were continuing to use Lot 62188, and could have an ongoing interest in the property.

24. Gearmar had no authority to sell Allied Lot 62188 as it had only been transferred to Gearmar due to a clerical mistake. As Gearmar was not the equitable owner of Lot 62188 it could not transfer ownership of Lot 62188 to Allied, and Allied is not currently the true owner of Lot 62188.

25. Allied currently has no estate, right, title, lien or interest whatever in or to Lot 62188, and this Court should Order that Lot 62188 be transferred back to MVRVY.

**COUNT TWO**

**DECLARATORY JUDGMENT**

26. Plaintiffs incorporate paragraphs 1 through 25 of the Counterclaim and Third Party Complaint as if set forth fully herein.

27. Youngstown City Lot No. 62188 (“Lot 62188”) parcel contains, among other things, lines of railroad and other transportation facilities used by MVRVY in the course of its operations as a common carrier of freight in interstate commerce.

28. MVRVY and Ohio Central Railroad System have never had any intention of abandoning any of its lines or railroad or other transportation facilities.

29. Allied has brought this action claiming that it is the proper owner of Lot 62188, and seeking to eject MVRVY from Lot 62188.

30. If Lot 62188 is deemed to belong to Allied and MVRVY is forced to vacate Lot 62188, Allied will be interfering with railroad operations affecting interstate commerce, and MVRVY would have to abandon its operations, despite the fact that Lot 62188 was never to have been sold.

31. Allowing Allied to take Lot 62188 and forcing MVRVY to vacate Lot 62188 violates federal law because the STB never approved or consented the transfer of Lot 62188 and Allied’s actions constitute interference with the rail lines and interstate commerce.

32. Plaintiffs seek declaratory relief pursuant to 28 U.S.C. §2201(a) and Fed.R.Civ.P. 57, and injunctive relief pursuant to Fed.R.Civ.P. 65 to void the transfer of Lot 62188 and to prevent Allied from forcing Plaintiffs to vacate Lot 62188 and cease rail operations thereon.

33. Plaintiffs are “rail carriers” operating a “railroad” within the meaning of the ICCTA, which defines a “railroad” to include “the road used by a rail carrier” and any “switch,

spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation.” 49 U.S.C. §10102(5), (6)(B) and 6(C).

34. Plaintiffs’ rail services, specifically MVRV’s rail services at Lot 62188, are “transportation” activities within the meaning of the ICCTA, which defines “transportation” to include both facilities and equipment “related to the movement of . . . property . . . by rail,” 49 U.S.C. §10102(9)(A), and “services relating to that movement,” such as “receipt, delivery, . . . transfer in transit, storage, handling, and interchange of . . . property.” 49 U.S.C. §10102(9)(B).

35. Neither Gearmar nor Allied acquired authority from the STB to acquire Lot 62188 and the lines of railroad rail thereon, in violation of the ICCTA. 49 U.S.C. §10901.

36. Accordingly, the acquisition by Gearmar, and the subsequent acquisition of Allied should be declared void.

37. Allied’s actual and threatened enforcement actions to take Lot 62188 and force MVRV to vacate and abandon its rail services thereon, are prohibited by the ICCTA because, under federal law, MVRV or Allied must have applied for and obtained abandonment authority from the STB, which did not occur in this case at any time, including but not limited to in connection with the inadvertent transfers of Lot 62188. 49 U.S.C. §10903.

38. Because the STB did not, at any time, approve and/or consent to the transfer of Lot 62188 under either §10901 or §10903, Allied cannot force Plaintiffs to vacate Lot 62188, as to do so would disrupt and interfere with rail service and interstate commerce without the required STB authority.

39. Section 10501(b) of ICCTA, 49 USC §10501(b), the STB’s jurisdiction over, *inter alia*, transportation by rail carriers, and the acquisition, operation and abandonment of

tracks and other transportation facilities, is exclusive and preempts the remedies provided under Federal or State law.

40. The Commerce Clause of the United States Constitution prohibits unreasonable interference with interstate commerce.

41. The STB's jurisdiction over abandonments of lines of railroad and the cessation of service by rail carriers is plenary and exclusive.

42. Allied's attempted eviction of MVRVY under state law would violate the STB's exclusive jurisdiction, and unreasonably interfere with MVRVY's operations in interstate commerce in violation of the United States Constitution.

43. Actual and justiciable controversies exist between the parties with respect to the validity of the conveyances of Lot 62188, as the respective transfers of Lot 62188 were never approved or consented to by the STB, as well as in connection with Allied's attempts to take Lot 62188 and terminate MVRVY's operations on Lot 62188.

44. Plaintiffs have a direct and immediate need for relief, and lack an adequate remedy at law.

45. The Court's intervention is necessary and will be of practical help in ending the controversy between the parties.

### COUNT THREE

46. Plaintiffs incorporate paragraphs 1 through 45 of the Counterclaim and Third Party Complaint as if set forth fully herein.

47. Plaintiff MVRVY owns certain real property in Youngstown, Ohio, known as Youngstown City Lot 62189. Lot 62189 is indicated and marked on the Replat attached hereto as Exhibit B.

48. MVRV operates a locomotive repair facility on Lot 62189. MVRV uses this shop to service and repair locomotive engines and other equipment, and to store locomotives and other equipment, and requires rail access to Lot 62189 in order to bring the engines and equipment in for service and repair. MVRV further requires land access to Lot 62189 in order for its employees, vendors and contractors to reach the property by vehicle.

49. Lot 62189 does not have direct access to a public street. It is surrounded on one side by the Mahoning River. On all other sides it is surrounded by other Youngstown City Lots. If Allied were determined to be the owner of Lot 62188, then all of the real property surrounding Lot 62189 would be owned by Allied.

50. Youngstown City Lots 62188 and 62189 are contiguous and were in the past owned by the same entity. Prior to the mistaken conveyance of Lot 62188 to Gearmar, Plaintiff would travel over Lot 62188 and Lot 62320 in order to access Poland Avenue which is the closest public street to Lot 62189. The purported conveyance of Lot 62188 to Allied's predecessor in ownership would leave Lot 62189 "landlocked" so that Plaintiff would have no access to city streets and more particularly to Poland Avenue. Thus Lot 62189 would be cut-off from access to a road to the outer world.

51. Further, Plaintiff used rail lines located over Lot 62188 to bring in locomotives for service and repair on Lot 62189. Without use of the rail lines traversing Lot 62188 it is not currently possible for locomotives to reach the repair and service facility on Lot 62189.

52. By reason of the foregoing, if Allied were determined to be the owner of Lot 62188, then Plaintiff would be entitled to an easement by necessity for vehicle traffic along, through, or over Allied's land to a public street or highway. The exact route of such easement is unknown to Plaintiff.

53. By reason of the foregoing, if Allied were determined to be the owner of Lot 62188, then Plaintiff would be entitled to an easement by necessity for the use of rail lines along, through, or over Allied's land in order to move locomotives and other equipment to the Lot 62189 repair facility.

54. An actual controversy has arisen and now exists between Plaintiff and Allied concerning their respective rights and duties.

55. If Allied were determined to be the owner of Lot 62188, then Plaintiff desires a judicial determination of its rights and duties, and a declaration as to the extent and parameters of its easements.

WHEREFORE, Plaintiffs pray for the following relief:

I. As to Count One An Order:

- a. Finding and determining that the transfer of Youngstown City Lot No. 62188 to Gearmar Properties, Inc. was the result of a mistake and was not the intent of the parties; and
- b. Finding and determining that The Mahoning Valley Railway Company is the true owner of Youngstown City Lot No. 62188 in fee simple together with all appurtenances and appurtenant rights; and
- c. Determining that no other party has any interest in fee simple or otherwise in Youngstown City Lot No. 62188; and
- d. Ordering that Allied Industrial Development Corporation execute a Deed or other applicable instrument granting Lot 62188 back to The Mahoning Valley Railway Company.

- e. Award Plaintiffs costs and attorneys' fees; and
- f. order such other and further relief as the Court deems equitable and just.

2. As to Count Two an Order:

- a. declaring that under the facts of this case, Allied cannot force the Plaintiffs to vacate Lot 62188 and cease rail operations thereon due to the failure of Allied to conform with federal law, specifically, Allied's failure to obtain authority from the STB to acquire rail lines located on Lot 62188 as well as the failure to obtain adverse abandonment authority from the STB;
- b. declaring that under the facts of this case, Allied has violated and threatens to continue violating federal law by interfering with the operation of the rail lines located on the property due to its demands that the Plaintiffs vacate Lot 62188 and cease the rail service that it provides absent authority from the STB;
- d. Award Plaintiffs costs and attorneys' fees; and
- e. order such other and further relief as the Court deems equitable and just.

3. As to Court Three an Order: if it is determined that Allied is the owner of Lot 62188:

- a. declaring that the Mahoning Valley Railway Company is entitled to an easement along, through, and over Allied's land such that it

can access Youngstown City Lots Nos. 62189 from a public street or highway.

- b. declaring that the Mahoning Valley Railway Company has an easement to use rail lines traversing Youngstown City Lot 62188 in order to move locomotives and equipment to and from Youngstown City Lot 62189.
- c. award Plaintiffs costs and attorneys' fees; and
- d. order such other and further relief as the Court deems equitable and just.

Respectfully submitted,

/s/Thomas J. Lipka

Thomas J. Lipka (# 0067310)

Counsel for Plaintiffs

MANCHESTER, BENNETT, POWERS  
& ULLMAN

A Legal Professional Association

The Commerce Building

Atrium Level Two

Youngstown, Ohio 44503

Telephone (330) 743-1171

tlipka@mbpu.com

OF COUNSEL

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served upon the following counsel of record by operation of the Court's CM/ECF system this 26<sup>th</sup> day of October, 2009 to:

Jacob C. McCrea, Esq.  
Christopher R. Opalinski, Esq.  
F. Timothy Grieco, Esq.  
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Amelia A. Bower, Esq.  
David Van Slyke, Esq.  
Plunkett Cooney  
300 East Broad Street, Suite 590  
Columbus, Ohio 43215

/s/Thomas J. Lipka  
Thomas J. Lipka (# 0067310)







PURCHASE AND SALE AGREEMENT

THIS PURCHASE AND SALE AGREEMENT ("the Agreement") is made and dated as of this \_\_\_\_th day of \_\_\_\_\_, 2007 by and between THE OHIO AND PENNSYLVANIA RAILROAD COMPANY, INC., an Ohio Corporation ("Seller"), and GEARMAR INDUSTRIES, INC.

WITNESSETH:

WHEREAS, Seller is the legal or equitable owner of certain real estate located on 1290 Poland Ave., in the City of Youngstown, county of Mahoning, State of Ohio.

WHEREAS, Sell desires to sell the real estate, including the buildings, improvements and structures thereon (but excluding any equipment or personal property that Seller desires to remove, including but not limited to those items set forth in Exhibit B attached hereto and incorporated herein by reference), and the easements, access rights, appurtenances and hereditaments thereto (all being hereinafter collectively referred to as the "Property"), subject to any approved liens and other exceptions thereto; and

WHEREAS, Buyer desires to buy and Seller desires to sell the Property, on the terms and conditions herein set forth;

NOW, THEREFORE, in consideration of the premises and of the mutual covenants of the parties hereinafter expressed, it is hereby agreed as follows:

ARTICLE I

PURCHASE AND SALE

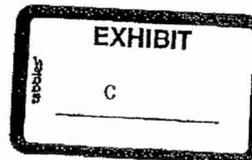
1.1 Agreement to Sell and Purchase. In accordance with and subject to the terms and conditions hereof, on the date of Closing (as hereinafter defined), Seller agrees to sell to Buyer, and Buyer agrees to purchase from Seller, the Property.

1.2 Purchase Price. The purchase price (the "Purchase Price") to be paid to Seller for the sale of the Property to Buyer as provided for herein shall be \$750,000.

The Purchase Price shall be paid by Buyer, subject to credit, debit and adjustment as hereinafter provided and subject to all the terms and conditions herein contained, as follows:

- (a) On the date hereof, Buyer shall deposit s earnest money in escrow the sum of \$30,000.00 in cash (such sum, together with any interest thereon, being hereinafter collectively referred to and held as the "Deposit"), with "The "Seller." shall hold the Deposit.

If the sale of the Property is closed by the date fixed therefore (or any extension date provided for by the mutual written consent of the parties hereto) monies held as the Deposit shall be applied (and paid over to the Seller) on the date of Closing. If the sale of the Property is not closed by the date fixed therefore (or any such extension date) owing to failure of satisfaction of a



condition precedent to Buyer's or Seller's obligations, the Deposit shall be returned and refunded to Buyer, and neither party shall have any further Liability hereunder (except as otherwise provided herein). If the sale of the Property is not closed by the date fixed therefore (or any such extension date) owing to failure of performance by Seller, the Deposit shall be returned and refunded to Buyer (without prejudice to other rights or remedies of Buyer at law or in equity). If the sale of the Property is not closed by the date fixed therefore (or any such extension date) owing to failure of performance by Buyer, the Deposit shall be forfeited by Buyer and the sum thereof shall go to Seller as partial damages (Buyer hereby releasing all claim to such sum) for a portion of the lost opportunity costs and transactions expensed incurred by Seller (without prejudice to other rights or remedies of Seller at law or in equity).

(b) Buyer shall, on the date of Closing, pay the Purchase Price, subject to credit for application of the amount of the Deposit paid to Seller as provided in subsection (a) of this Section 1.2 and subject to credit and adjustment as provided in Section 1.3 hereof, which shall be payable to Seller in cash or cash equivalent (i.e., wiretransfer of good current funds).

1.3 **Adjustments.** The following items shall be credited, debited and otherwise adjusted, and the resulting calculation shall be an adjustment to the Purchase Price payable at Closing pursuant to Section 1.2 (b) hereof (where appropriate, such adjustments shall be made on the basis of a year of 12 months, 30 days to the month, Seller to have the last day, unless otherwise provided):

(a) General property taxes (state, county, municipal, and school and fire district) for the then current tax fiscal year based upon the latest available tax bills or assessment information, whether for that year or the preceding year.

(b) Special taxes or assessments, if any, upon the Property assessed or becoming a lien prior to the date hereof (but only a pro rata share of the then current installment of such special taxes or assessment, if any, shall be charged as a credit against the Purchase Price, Buyer agreeing to assume all liability for future installments and deferred payments).

(c) Fuel, electricity, water, sewer, gas, electric, telephone and other utility charges (such proration to be based upon meter readings, where possible, within 2 days prior to the date of Closing), and assigned deposits, Buyer agreeing to assume all liability for such utility payment (subject Section 8.13).

In the event on the date of Closing, the precise figures necessary for any of the foregoing adjustments are not capable of determination, the adjustments shall be made based on good faith estimates of the parties, and such adjustments shall be final and binding on the parties.

In addition, certain costs incidental hereto and to the transactions contemplated hereby shall be borne such as at (or prior to) Closing, Buyer shall pay all recording fees and costs, all title commitment and title insurance premiums, all mortgage taxes or intangible taxes, if any; and Seller shall pay all transfer taxes or revenue stamps incidental to recordation of the Quit claim Deed.

Except as expressly provided in this Section 1.3 or as expressly provided elsewhere in this Agreement, Buyer and Seller shall pay their own respective costs and expenses, including attorneys' fees, incidental to this Agreement and the transaction contemplated hereby.

1.4 Possession. Seller shall transfer possession of the Property to Buyer at 12:01 p.m. on the date of Closing.

1.5 Closing. The closing (herein referred to as the "Closing") of the transactions contemplated hereby shall be on or before January 31, 2007, (or such other date as may be agreed to by Buyer and Seller in writing). The Closing shall take place at the offices of Bauman Land Title Agency.

1.6 Documents at Closing.

(a) On the date of Closing, Seller shall execute and deliver or cause to be delivered to Buyer, the following documents:

(i) Quit Claim Deed, transferring and conveying to Buyer all of Seller's right, title and interest in and to the Property (Seller's record title to govern for purposes of the legal description), subject to the lien of general real estate taxes for the then current tax fiscal year, and all easements, restrictions, conditions, reservations, encroachments and other matters of fact or record ("Permitted Exceptions"), which Quit Claim Deed shall be in substantially the same form attached hereto as Exhibit C.

(ii) A standard-form Seller's affidavit, against mechanics liens and against parties in possession (other than Seller), and such other documents, if any, as may be reasonably required by the Title Company, on forms customarily used by the Title Company and reasonably satisfactory to Seller, in order to issue an owner's policy of title insurance.

(b) On the date of Closing, Buyer and Seller shall execute and deliver to one another an/or the Title Company counterpart originals of the following documents:

(i) Closing Statements.

ARTICLE II

REPRESENTATIONS AND WARRANTIES OF SELLER

Seller make the following representations and warranties, which representations and warranties are true and correct on the date hereof and will be true and correct on the date to Closing, and which representations and warranties shall not survive the Closing but shall be merged into the delivery of the Quit Claim Deed.

2.1 Corporate Authority. With respect to Seller and its business, Seller represents and warrants, in particular, that:

- (a) Seller is a corporation duly organized, validly existing and in good standing under the laws of the State of Ohio.
- (b) Seller has all necessary power and authority to own, use and transfer its properties (including the Property) and to transact the business in which it is engaged, and has full power and authority to enter into this Agreement, to execute and deliver the documents required to Seller herein, and to perform its obligations hereunder.
- (c) Seller is duly authorized to execute, deliver and perform this Agreement and all documents and instruments transactions contemplated hereby or incidental hereto.

2.2 Commissions. Seller has dealt with no broker, finder or other person in connections with the sale or negotiation of the sale of the Property in any manner that might give rise to any claim for commission against Buyer.

### ARTICLE III

#### REPRESENTATIONS AND WARRANTIES OF BUYER

Buyer make the following representations and warranties, which representations and warranties are true and correct on the date hereof and will be true and correct on the date to Closing, and which representations and warranties shall not survive the Closing but shall be merged into the delivery of the Quit Claim Deed.

3.1 Corporate Authority. With respect to Buyer and its business, Buyer represents and warrants, in particular, that:

- (a) Buyer is a corporation duly organized, validly existing and in good standing under the laws of the State of Ohio.
- (b) Buyer has all necessary power and authority to own, use and its properties and to transact business in which it is engaged, and has full power and authority to enter into this Agreement, to execute and deliver the documents and instruments required to Buyer herein, and to perform its obligations hereunder.
- (c) Buyer is duly authorized to execute, and deliver and perform this Agreement and all documents and instruments and transactions contemplated hereby or incidental hereto.

3.2 Commissions. Buyer has dealt with no broker, finder or other person in connections with the purchase of or negotiation of the purchase of the Property that might give rise to any claim for commission against Buyer or lien or claim against the Property.

ARTICLE IV

CONDITIONS TO OBLIGATIONS

4.1 Conditions to the Buyer's Obligations. The obligations of Buyer to consummate the transactions provided for in this Agreement shall be subject to the satisfaction of each of the following conditions on or before the dates specified, subject to the right of Buyer to waive any on or more of such conditions:

(a) Seller shall have, on or before the date of Closing, performed all of its covenants, obligations and agreement under this Agreement.

4.2 Conditions to the Seller's Obligations. The obligations of Seller to consummate the transactions provided for in this Agreement shall be subject to the satisfaction of each of the following conditions on or before the dates specified, subject to the right of Seller to waive any on or more of such conditions:

(a) Buyer shall have, on or before the date of Closing, performed all of its covenants, obligations and agreements under this Agreement.

4.3 Failure of Satisfaction of Conditions. In the event that either of the conditions set forth above in Section 4.1 or 4.2 has not been satisfied on or before the date of Closing, Buyer or Seller (as the case may be) may, at its option, elect to terminate this Agreement. In the event that on or prior to the date of Closing any such condition is not expressly designated as satisfied or unsatisfied in writing by Buyer or Seller (as the case may be), then such condition shall conclusively deemed satisfied.

ARTICLE V

COVENANTS OF SELLER

Seller covenants and agrees that from and after the date of this Agreement and until the date of Closing:

5.1 Operation of Property. Seller shall continue to maintain the buildings and improvements that comprise or that are upon the Property in "AS IS" condition and repair, normal wear and tear and casualty damage excepted.

5.2 Insurance of Property. Seller will cause the Property to be insured in a prudent manner against ordinary risks in accordance with its current insurance program.

ARTICLE VI

MISCELLANEOUS PROVISIONS

6.1 Binding Agreement. This Agreement shall be binding on and shall inure to the benefit of the parties named herein and to their respective heirs, administrators, executors, personal representatives successors and assigns.

6.2 Assignment. Seller may assign its rights and interests hereunder. Buyer may not assign its rights and interests hereunder without the prior written consent of Seller.

6.3 Notices. All notices, requests, demands and other communications hereunder shall be deemed to have been duly given if the same shall be in writing and shall be delivered personally or sent by registered or certified mail, postage pre-paid, and addressed as set forth below:

(a) If to Seller:

Ohio & Pennsylvania Railroad  
C/o William A. Strawn II  
47849 Paper Mill Rd.  
Coshocton, Ohio 43812

If to Buyer:

Gearmar Industries, Inc.  
c/o William Marstelar

Any party may change the address to which notices are to be addressed by giving the other parties notice in the manner herein set forth.

6.4 Environmental.

(a) The following defined terms used in this Section 8.4 shall have the following meanings:

"Hazardous Materials" include: (i) oil or other petroleum products (ii) "hazardous wastes," as defined by the Resources Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 et seq., or similar state or local law, ordinance, regulation or order, (iii) "hazardous substances," as defined by the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. 9601 et seq., or similar state or local law, ordinance, regulation, or order, (iv) "hazardous materials," as defined by the Hazardous Materials Transportation Act (HMTA), 49 U.S.C. 1802, or similar state or local law, ordinance, regulation or order, (v) radioactive materials subject to the Atomic Energy Act (AEA), 42 U.S.C. 2011 et seq., or similar state or local law, ordinance, regulation or order, and (vi) any other pollutant, contaminant, chemical, or substance whose presence creates or could create a hazard to health or the environment or violation of any federal, state or local Environmental Law.

"Environmental Liability" means any and all liability, claim, demand, obligation, cause of action, accusation, allegation, order, violation, damage, loss, cost, expense, injury, judgment, penalty, or fine alleged by any third party (including, without limitation, any private party or governmental entity), arising out of, relating to, or resulting from, directly or indirectly, in whole or in part: (i) the presence, generation, transport, disposal, treatment, storage or Release of Hazardous Materials, (ii) the violation or alleged violation of

Environmental Law, or (iii) any Enforcement or Remedial Action. This liability includes any cost of removing or disposing of any Hazardous Materials, any cost of enforcement, cost of investigation and/or remedial action, and any other cost or expense whatsoever, including, without limitation, reasonable attorney' accountants' engineers, and consultants' fees disbursements, interest, and medical expenses.

"Environmental Law" means any past, present, or future federal, state, or local laws, ordinances, regulations, judgments, and orders and the common law, including the law of strict liability and the law of abnormally dangerous activities, relating to environmental matters, including, without limitation, provisions pertaining to or regulating air pollution, water pollution, noise control, wetlands, watercourse, wildlife, Hazardous Materials, or any other activities or conditions which impact or relate to the environment or nature.

"Enforcement or Remedial Actions" include any step taken by any person or entity (i) to cleanup, remedy, or remove any Release of Hazardous Materials, or (ii) to enforce compliance with or to collect or impose penalties, fines, or other sanctions provided by any Environmental Law.

"Release" includes any and all releasing, spilling, leaking, pumping, pouring, emitting, discharging, injecting, escaping, leaching, disposing, dumping, and any other means by which any Hazardous Material or other substance may be introduced into or travel through the environment.

(b) (Intentionally Omitted)

(c) Buyer acknowledges that Seller is delivering the Property to Buyer without any representations or warranties of any kind as to: (i) the presence or Release of Hazardous Materials on, in, under, or adjacent to the Property, (ii) the Property's compliance with Environmental Laws, and (iii) any potential Environmental Liability associated with Property or any activities conducted on the Property; and Seller hereby expressly disclaims any such representations or warranties.

(d) After the Closing, the Buyer shall be solely responsible and liable for the Property's compliance with all Environmental Laws. Buyer assumes all liability with respect to the cleanup and/or remediation of any existing or future Hazardous Material, whether currently known or unknown, affecting the Property or migrating onto or under adjoining property or migrating from adjoining property, including those items identified in correspondence from the Ohio EPA dated May 20, 2004.

(e) After the Closing, the Seller shall not bear any responsibility or liability contractually, under common law, or under federal, state, or local laws or regulations for: (i) any Hazardous Materials which have been, are, or may be present, generated or Released in, on, under, or adjacent to the Property or the disposal of such Hazardous Materials, or (ii) any Environmental Liability associated with the Property or past, present or future activities conducted on the Property.

(f) Buyer, for itself, its partners or shareholders, all persons or entities that control, are controlled by or under common control with Buyer and its partners or shareholders (each, an "Affiliate"), and all of their respective successors and assigns, expressly waives any and all rights against Seller pertaining to any Environmental Liability or pursuant to any Environmental Law, including, without limitation, any claim alleged under CERCLA.

(g) Buyer, for itself, its partners or shareholders, their respective Affiliates, and all of their respective successors and assigns, agrees to reimburse, indemnify and hold harmless the Seller, its subsidiaries and affiliates and their respective successors and assigns, officers, directors, employees and agents from and against any and all losses, costs, expenses, claims, demands, obligations and liabilities (including, without limitation, cleanup costs, reasonable attorneys' and consultants' fees and expenses) (collectively, "Liabilities") arising from or related to, directly or indirectly, in whole or in part (i) the threatened or actual Release of any Hazardous Materials in, on, under or from the Property, and (ii) any Environmental Liability or Enforcement or Remedial Action associated with the Property or any past, present or future activities conducted on the Property or any adjacent property; provided, however, that notwithstanding the foregoing (or anything else contained herein), Buyer's obligation to indemnify Seller (as set forth hereinabove) shall not include the cost of Seller's attorneys' fees, if any, incurred by Seller in connection with any Enforcement or Remedial Action brought against Seller by any unrelated third party or governmental entity. This indemnification shall survive the include any Liabilities Closing of the transactions described in this Agreement and shall include any Liabilities attributable, in whole or in part, to Seller's acts or omissions, including the negligence or gross negligence of Seller, or those of third parties.

(h) If, at any time prior to Closing Buyer desires to report, disclose or deliver any information related to this Agreement, the Seller or the Property to any governmental agency, authority or entity of any type, including, but in no way limited to, any environmental agency, Buyer must first obtain Seller's prior written consent. After obtaining such consent, Buyer shall simultaneously provide Seller with a complete copy of the information and related correspondence, together with a copy of all supporting materials related to the information. This provision shall survive any termination or cancellation of this Agreement.

(i) In the event Buyer obtains any environmental reports, surveys or audits of the Property of any type or nature prior to Closing (the "Environmental Reports"), then within five (5) days of Seller's written request therefore, Buyer shall furnish to Seller a complete copy of the Environmental Reports requested by Seller. This provision shall survive the Closing hereunder or any other termination or cancellation of this Agreement.

THEREUNDER, BUYER SHALL RELY SOLELY ON ITS OWN INVESTIGATION OF THE PROPERTY AND NOT ANY INFORMATION PROVIDED OR TO BE PROVIDED BY SELLER, ITS AGENTS OR CONTRACTORS. SELLER SHALL NOT BE LIABLE OR BOUND IN ANY MANNER BY ANY VERBAL OR WRITTEN STATEMENTS, REPRESENTATIONS OR INFORMATION PERTAINING TO THE PROPERTY OR THE OPERATION THEREOF, FURNISHED BY ANY PARTY PURPORTING TO ACT ON BEHALF OF SELLER. THIS PROVISION SHALL SURVIVE CLOSING HEREUNDER OR ANY OTHER TERMINATION OR CANCELLATION OF THIS AGREEMENT.

6.11 Confidentiality. Buyer agrees that all of the terms, conditions and other provisions of this Agreement and all surveys, reports and the like, including, without limitations, environmental reports, submitted to Buyer in the course of the inspections and evaluations of the Property shall be held in strict confidence.

6.12 Legal Fees. In the event that Buyer or Seller brings action or suit against the other by reason of any breach of (or in the order to enforce) any of the representations, indemnities, covenants or obligations contained in the Agreement, the prevailing party in such action or dispute, whether by final judgment or out of court settlement, shall be entitled to have and recover of and from the other all costs and expenses of such suit, including reasonable attorney's fees and costs.

6.13 Financial Information. The persons signing this Agreement on behalf of Buyer hereby personally represent and warrant to Seller that the financial statements, bank letters and/or other financial information relating to Buyer, if any, delivered to Seller prior to the execution of this Agreement are true and correct in all material respects. Buyer acknowledges that in entering into this Agreement, Seller is relying upon any such statements, letters and information.

6.14 Waiver of Due Diligence. BUYER ACKNOWLEDGES AND AGREES THAT IT HAS BEEN GIVEN THE OPPORTUNITY TO FULLY INSPECT THE PHYSICAL AND ENVIRONMENTAL CONDITION OF THE PROPERTY'S WELL AS MATTERS AFFECTING TITLE, SURVEY, ZONING AND ALL OTHER MATTERS DEEMED RELEVANT BY BUYER WITH RESPECT TO OR AFFECTING THE PROPERTY (COLLECTIVELY, "DUE DILIGENCE ITEMS"). BUYER FURTHER ACKNOWLEDGES AND AGREES THAT IT IS SATISFIED WITH ALL SUCH MATTERS AND IS WILLING TO CLOSE ON THE PURCHASE AND SALE OF THE PROPERTY IN ACCORDANCE HERewith WITHOUT FURTHER INQUIRY OR INVESTIGATION INTO SUCH MATTERS. BUYER HEREBY EXPRESSLY WAIVES THE RIGHT TO INSPECT AND/OR FURTHER INSPECT THE PROPERTY WITH RESPECT TO ANY SUCH DUE DILIGENCE ITEMS.

6.15 Acceptance. This Agreement shall not be effective unless one fully executed copy of this Agreement is delivered to and received by Seller on or prior to 5:00 p.m. (CST) on January 1<sup>st</sup>, 2007.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

**"SELLER"**

**OHIO AND PENNSYLVANIA RAILROAD COMPANY, INC.**  
an Ohio Corporation

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**"BUYER"**

**GEARMAR INDUSTRIES, INC.**  
An Ohio Corporation

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

NEED A NEW DESCRIPTION BASED  
ON NEW SURVEY BY MLS.

EXHIBIT C

QUIT-CLAIM DEED

KNOW ALL MEN BY THESE PRESENTS, that the Ohio & Pennsylvania Railroad Company, Inc., an Ohio Corporation (the "Grantor"), for the sum of Ohio Dollar (\$1.00) and other good and valuable consideration received to its full satisfaction of GEARMAR INDUSTRIES, INC., an Ohio corporation (the "Grantee"), whose tax mailing address is \_\_\_\_\_, does hereby GIVE, GRANT, REMISE, RELEASE AND FOREVER QUIT-CLAIM unto the Grantee, its successors and assigns, all such right, title and interest as the Grantor has in and to the certain real property and all improvements located thereon located in Mahoning County, Ohio, as more particularly described on Exhibit A attached hereto and made a part hereof.

TO HAVE AND TO HOLD the above granted and bargained premises, with the appurtenances thereunto belonging, unto the Grantee, its successors and assigns, so that neither the Grantor, nor its successors or assigns, nor any other persons claiming title through or under it shall or will hereafter claim or demand any right or title to the premises, or any part thereof; but they and every one of them shall by these presents be excluded and forever barred.

GRANTEE ACKNOWLEDGES THAT GRANTOR HAS NOT MADE, NOT MAKE, AND SPECIFICALLY NEGATES AND DISCLAIMS ANY REPRESENTATIONS, WARRANTIES PROMISES, COVENANTS, AGREEMENTS OR GUARANTIES OF ANY KIND OR CHARACTER WHATSOEVER, WHETHER EXPRESS OR IMPLIED, ORAL OR WRITTEN, OF, AS TO, CONCERNING, OR WITH RESPECT TO (i) THE VALUE, NATURE, QUALITY OR CONDITION OF THE PROPERTY INCLUDING, WITHOUT LIMITATION, THE WATER, SOIL AND GEOLOGY, (ii) THE SUITABILITY OF THE PROPERTY FOR ANY AND ALL ACTIVITIES AND USES WHICH MAY BE CONDUCTED THEREON, (iii) THE COMPLIANCE OF OR BY THE PROPERTY WITH ANY LAWS, RULES, ORDINANCES OR REGULATIONS OF ANY APPLICABLE GOVERNMENT AUTHORITY OR BODY, (iv) THE HABITABILITY, MERCHANTABILITY, MARKETABILITY, PROFITABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF THE PROPERTY, OR (v) ANY OTHER MATTER WITH RESPECT TO THE PROPERTY, AND SPECIFICALLY, THAT GRANTOR HAS NOT MADE, DOES NOT MAKE AND SPECIFICALLY NEGATES AND DISCLAIMS ANY REPRESENTATIONS OR WARRANTIES REGARDING COMPLIANCE OF THE PROPERTY WITH ANY ENVIRONMENTAL PROTECTION, POLLUTION OR LAND USE LAWS, RULES, REGULATIONS, ORDER OR REQUIREMENTS, INCLUDING, WITHOUT LIMITATION, THOSE PERTAINING TO SOLID WASTE, AS DEFINED BY THE U.S. ENVIRONMENTAL PROTECTION AGENCY REGULATION AT 40 C.F.R. 261, OR THE DISPOSAL OR EXISTENCE, IN OR THE PROPERTY, OF ANY HAZARDOUS SUBSTANCES, AS DEFINED BY THE COMPREHENSIVE ENVIRONMENTAL RESPONSE COMPENSATION AND LIABILITY ACT OF 1980, AS AMENDED, AND THE REGULATIONS PROMULGATED THEREUNDER. GRANTEE SHALL RELY SOLELY ON ITS OWN INVESTIGATION OF THE PROPERTY AND NOT ON ANY INFORMATION PROVIDED OR TO BE PROVIDED

BY GRANTOR, ITS AGENTS OR CONTRACTORS. GRANTOR SHALL NOT BE LIABLE OR BOUND IN ANY MANNER BY ANY VERBAL OR WRITTEN STATEMENTS. REPRESENTATIONS OR INFORMATION PERTAINING TO THE PROPERTY OR THE OPERATION THEREOF, FURNISHED BY ANY PARTY PURPORTING TO ACT ON BEHALF OF GRANTOR.

For the same consideration, Grantor hereby conveys to Grantee, without any representation or warranty as to title, express or implied, Grantor's interest, if any, in and to adjacent streets, alleys or rights-of-way pertaining to the property.

Permanent Parcel Nos: 53-040-0-008.1, 53-040-0-001, 53-040-0-002, 53-040-0-003, 53-040-0-004, 53-040-0-005, 53-040-0-009, 53-040-0-010, 53-040-0-011, 53-040-0-012, 53-040-0-13, 53-040-0-014, 53-040-0-015, 53-040-0-018, 53-040-0-019, 53-040-0-020, 53-040-0-021, 53-040-0-022, 53-040-0-023, 53-040-0-024, 53-040-0-025, 53-040-0-026, 53-043-0-001, 53-043-0-002, 53-043-0-003, 53-043-0-004, 53-042-0-008, 53-042-0-009, 53-042-0-010

IN WITNESS WHEREOF, the Grantor has executed this Deed this \_\_\_\_\_ day of \_\_\_\_\_ 2007.

OHIO AND PENNSYLVANIA RAILROAD COMPANY, INC.

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

CONSENTED AND AGREED TO:

GEARMAR INDUSTRIES, INC.

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

STATE OF )  
 ) SS:  
COUNTY OF )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2007, by William A. Strawn II, the President of The Ohio & Pennsylvania Railroad, Company, Inc. and Ohio Corporation who acknowledged that he/she executed the foregoing instrument on behalf of such corporation.

My Commission Expires: \_\_\_\_\_  
Notary Public

STATE OF )  
 ) SS:  
COUNTY OF )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2007, by \_\_\_\_\_, the \_\_\_\_\_ of GEARMAR INDUSTRIES, INC., a Ohio Corporation, who acknowledged that he/she executed the foregoing instrument on behalf of such corporation.

My Commission Expires: \_\_\_\_\_  
Notary Public



~~OR 5686 PD 0066~~

**LEGAL DESCRIPTION**  
New Lot No. 62320

Situated in the City of Youngstown, County of Mahoning, and State of Ohio, and known as being Youngstown City Lot No. 62320 as shown in the Replat Youngstown City Lot No. 62188 and 62320, as recorded in Plat Book    at Page    of the Mahoning County Record of Plats, and being more fully described as follows: OR115 at Page 29

Commencing at a monument found at the intersection of the centerlines of Poland Avenue and Center Street;

thence along the centerline of Center Street by the arc of a curve to the right, having a radius of 1,066.27 feet, a chord bearing of N 30°45'45" E, a chord length of 260.04 feet, for an arc length of 260.69 feet to a point on said Center Street centerline;

thence N 37°46'00" E, along said centerline, for a distance of 132.10 feet to a point on the southerly line of New Lot No. 62188 as appears on said replat;

thence N 52°36'28" W, along said Lot No. 62188, for a distance of 317.10 feet to an iron pin set and being the TRUE POINT OF BEGINNING of the parcel herein described;

thence along the southerly line of Lot No. 62320, as appears on said replat by the next three (3) courses and distances;

- 1) N 52°36'28" W, for a distance of 1,290.96 feet to an iron pin set at a point of curve;
- 2) on a curve to the right having a radius of 5,689.00 feet, a chord bearing of N 49°52'54" W, a chord distance of 541.11 feet, for an arc length of 541.31 feet to an iron pin set;
- 3) N 47°09'21" W, for a distance of 80.15 feet to a P.K. nail found at the southwesterly corner of said Lot No 62320;

thence N 38°17'41" E, along the northwesterly line of said Lot No 62320, for a distance of 667.76 feet to an iron pin set between said lot and Lot No. 62188;

thence along the line between Lots 62320 and 62188 by the following twelve (12) courses and distances;

- 1) on a curve to the left having a radius of 1,066.30 feet, a chord bearing of N 61°11'00" W, a chord distance of 161.69 feet, for an arc length of 161.84 feet to an iron pin set;
- 2) S 65°31'53" E, for a distance of 165.25 feet to an iron pin set;

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MS746 M2016

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- 3) on a curve to the right having a radius of 526.11 feet, a chord bearing of N 56°21'38" W, a chord distance of 167.70 feet, for an arc length of 168.42 feet to an iron pin set;
- 4) S 47°11'23" E, for a distance of 764.07 feet to an iron pin set;
- 5) on a curve to the left having a radius of 1,543.81 feet, a chord bearing of S 50°12'05" E, a chord distance of 162.22 feet, for an arc length of 162.30 feet to an iron pin set;
- 6) on a curve to the right, having a radius of 674.44 feet, a chord bearing of S 28°49'25" E, a chord distance of 375.21 feet, for an arc length of 380.22 feet to an iron pin set;
- 7) on a curve to the right having a radius of 2,957.08 , a chord bearing of S 10°42'53" E, a chord distance of 202.10 feet, for an arc length of 202.14 feet to an iron pin set;
- 8) S 38°00'27" W, for a distance of 283.27 feet to an iron pin set;
- 9) N 51°09'55" W, for a distance of 225.01 feet to an iron pin set;
- 10) S 38°00'27" W, for a distance of 102.27 feet to an iron pin set;
- 11) S 52°39'13" E, for a distance of 225.00 feet to an iron pin set;
- 12) S 37°23'32" W, for a distance of 28.18 feet to the **TRUE POINT OF BEGINNING** and containing within said bounds 1,300,469.34 square feet or 29.854 acres, more or less.

'NORTH' for the above description is based on the Ohio State Plane Co-Ordinate System, North Zone NAD83.

All iron pins noted throughout this description as being set are 5/8" x 30" rebar with plastic ID cap inscribed 'ms cons. Inc.'

The above description was prepared by Richard John Swan, Registered Professional Surveyor No. 6574 in February 2007 and is based on a survey made by ms consultants, inc. in January 2007.

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~~OR 5686 PL 0068~~

**LEGAL DESCRIPTION**  
New Lot No. 62188

Situated in the City of Youngstown, County of Mahoning, and State of Ohio, and known as being Youngstown City Lot No. 62188 as shown in the Replat of Youngstown City Lot No. 62188 and 62320, as recorded in Plat Book \_\_\_ at Page \_\_\_ of the Mahoning County Record of Plats, and being more fully described as follows: OR115 at Page 29.

Commencing at a monument found at the intersection of the centerlines of Poland Avenue and Center Street;

thence along the centerline of Center Street by the arc of a curve to the right having a radius of 1,066.27 feet, a chord bearing of N 30°45'45" E, a chord distance of 260.04 feet, for an arc length of 260.69 feet to a point on said Center Street centerline;

thence continuing along said centerline N 37°46'00" E, for a distance of 132.10 feet to a point, said point located on the northerly line of land now or formerly owned by Allied Erecting and Dismantling Inc. as found in volume O.R. 2080 at page 53 of the Mahoning County Official Records of Deeds and on the southerly line of New Lot No. 62188, said point being the TRUE POINT OF BEGINNING of the parcel herein described;

thence leaving said centerline of Center Street N 52°36'28" W, along the line between said Allied Erecting and Dismantling Inc. and New Lot No. 62188, for a distance of 317.10 feet to an iron pin set, said iron pin located on the southeasterly corner of New Lot No. 62320 and the southwesterly corner of New Lot No. 62188;

thence leaving the northerly line of said Allied Erecting and Dismantling Inc. N 37°23'32" E, along the line between New Lot No. 62320 and New Lot No. 62188, for a distance of 28.18 feet to an iron pin set;

thence continuing along the line between New Lot No. 62320 and New Lot No. 62188 by the following eleven (11) courses and distances:

- 1) N 52°39'13" W, for a distance of 225.00 feet to an iron pin set;
- 2) N 38°00'27" E, for a distance of 102.27 feet to an iron pin set;
- 3) S 51°09'55" E, for a distance of 225.01 feet to an iron pin set;
- 4) N 38°00'27" E, for a distance of 283.27 feet to an iron pin set
- 5) along a curve to the left, having a radius of 2,957.08 feet, a chord bearing of N 10°42'53" W, a chord distance of 202.10 feet, for an arc length of 202.14 feet to an iron pin set;
- 6) along a curve to the left, having a radius of 674.44 feet, a chord bearing of N 28°49'25" W, a chord distance of 375.21 feet, for an arc length of 380.22 feet to an iron pin set;
- 7) along a non tangent curve to the right, having a radius of 1,543.81 feet, a chord bearing of N 50°12'05" W, a chord distance of 162.22 feet, for an arc length of 162.30 feet to an iron pin set;
- 8) N 47°11'23" W, a distance of 764.07 feet to an iron pin set;

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- 9) along a curve to the left having a radius of 526.11 feet, a chord bearing of N 56°21'38" W, a chord distance of 167.70 feet, for an arc length of 168.42 feet to an iron pin set;
- 10) N 65°31'53" W, for a distance of 165.25 feet to an iron pin set;
- 11) along a curve to the right having a radius of 1,066.30 feet, a chord bearing of N 61°11'00" W, a chord distance of 161.69 feet, for an arc length of 161.84 feet to an iron pin set, said iron pin being located at the northwesterly corner of New Lot No. 62320, the southwesterly corner of New Lot No. 62188, and the southeasterly line of City Lot No. 61996 as recorded in Plat Book 91 at Page 236 of the Mahoning County Record of Plats;

thence leaving said lot line of New Lot No. 62320 N 38°17'41" E, along the line between said City Lot No. 61996 and New Lot No. 62188, and passing over an iron pin found at a distance of 47.24 feet, for a total distance of 148.54 feet to a point, said point lying within the bed of the Mahoning River and on the southerly line of Out Lot No. 680, the northeasterly corner of said City Lot No. 61996, and the northwesterly corner of New Lot No. 62188;

thence along the line between Out Lot No. 680 and New Lot No. 62188 S 68°59'14" E, for a distance of 750.86 feet to a point in the Mahoning River;

thence continuing along the line between Out Lot No. 680 and New Lot No. 62188 S 47°26'09" E, and along the southerly line of Out Lot No. 683 and Out Lot No. 685, for a distance of 1,020.31 feet to a point in the Mahoning River, said point located on the southerly line of said Out Lot No. 685, the northeasterly corner of New Lot No. 62188, and the northwesterly corner of City Lot No. 62189 as recorded in Plat Book 100 at Page 83 of the Mahoning County Record of Plats;

thence leaving said line of Out Lot No. 685 S 42°33'51" W, along the line between New Lot No. 62188 and City Lot No. 62189, and passing over an iron pin found at a distance of 60.00 feet, for a total distance of 349.00 feet to an iron pin found;

thence continuing along the line between New Lot No. 62188 and City Lot No. 62189 by the following three (3) courses and distances:

- 1) S 47°26'09" E, for a distance of 183.00 feet to an iron pin found;
- 2) S 42°33'51" W, for a distance of 30.00 feet to an iron pin found;
- 3) S 47°26'09" E, for a distance of 295.63 feet to an iron pin found, said iron pin located on the southwesterly corner of City Lot No. 62189, northeasterly corner of New Lot No. 62188, and on the westerly right of way line of Center Street;

thence along the line between the westerly right of way of Center Street and New Lot No. 62188 by the following four (4) courses and distances:

- 1) S 37°46'00" W, for a distance of 204.30 feet to an iron pin found;
- 2) N 52°14'00" W, for a distance of 9.21 feet to a point;
- 3) S 37°46'00" W, for a distance of 8.17 feet to a point;
- 4) S 52°14'00" E, for a distance of 80.21 feet to an iron pin found, said iron pin located on the line between land now or formerly owned by Allied Industrial Development Corp.

MS706 PL 2538  
MS746 PL 2019

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

ALLIED INDUSTRIAL DEVELOPMENT )	CASE NO. 4:09 CV 01904
CORP. )	
Plaintiff )	JUDGE JAMES S. GWIN
Counterclaim Defendants )	
vs. )	
OHIO CENTRAL RAILROAD, INC., ET )	
AL., )	<b>AMENDED COUNTERCLAIM</b>
Defendants/Counterclaimants )	<b>AND THIRD PARTY COMPLAINT</b>
Third Party Plaintiffs )	
vs. )	
GEARMAR PROPERTIES, INC. )	
Third Party Defendants )	

**COUNTERCLAIM AND THIRD PARTY COMPLAINT**

**PARTIES**

1. Plaintiff The Ohio and Pennsylvania Railroad Company, Inc. (“Ohio and Pennsylvania”) is an Ohio Corporation engaged in common carrier interstate freight rail service and is subject to the jurisdiction of the Surface Transportation Board (“STB”).

2. Plaintiff The Mahoning Valley Railway Company (“MVRV”) is an Ohio corporation engaged in common carrier interstate freight rail service and is subject to the jurisdiction of the STB.

3. Defendant Allied Industrial Development Corporation (“Allied”) is, upon information and belief, an Ohio Corporation with its principal place of business located in Mahoning County, Ohio.

4. Defendant Gearmar Properties, Inc. (“Gearmar”) is, upon information and belief an Ohio Corporation with its principal place of business located in Mahoning County, Ohio.

**COUNT ONE**

**QUIET TITLE**

5. Plaintiffs seek to Quiet Title to certain real property located in the City of Youngstown, County of Mahoning, State of Ohio. The real property at issue is currently identified as Youngstown City Lot No. 62188 (“Lot 62188”).

6. Summit View, Inc (“Summit View”) is an Ohio corporation which wholly owns several corporations engaged in railroad operations in Ohio. The railroads collectively owned by Summit View do business under the name Ohio Central Railroad System (“Ohio Central Railroad System”). The Ohio and Pennsylvania and MVRV are two of the railroads owned by Summit View and which operate under the Ohio Central Railroad System trade name for limited business purposes.

7. In January of 2007, the Ohio and Pennsylvania and the MVRV were the owners of certain real property in the City of Youngstown. Attached as Exhibit A is the plat of Youngstown City Lots No. 62320, 62188 and 62189 as they were laid out prior to January of 2007. The Ohio and Pennsylvania was the titled owner of Lot 62320 as identified in Exhibit A. The MVRV was the titled owner of Lot 62188 and Lot 62189 as identified in Exhibit A.

8. The Ohio Central Railroad System acquired control of Lot Nos. 62188 and 62189 as part of its acquisition of the stock of MVRV in March, 2001. The Lots included part of

MVRY's main line railroad and other tracks and transportation facilities, and on Lot 62189, a locomotive repair shop. MVRY uses the tracks on Lot 62188 to serve its customers, to reach its interchange points with connecting railroads CSX Transportation, Inc. and Norfolk Southern Railway Company, to store and stage cars, and to access its locomotive repair shop.

9. The Ohio and Pennsylvania acquired Lot No. 62320 in 2004. Lot 62320 contains a large manufacturing plant which formerly housed a business known as "Maverick Tube". Adjacent to the former Maverick Tube plant is a small office building which had been used as Maverick Tube's headquarters, and some tracks that had been used to service the plant.

10. Following the purchase of Maverick Tube in 2004, the Ohio Central Railroad System moved the local offices of its Youngstown based railroads, including Ohio and Pennsylvania and MVRY, to the small office building which had been Maverick Tube's headquarters.

11. After a period of time, the Ohio Central Railroad System made the decision to sell the Maverick Tube plant (Lot 62320). However, the Ohio Central Railroad System decided that it wanted to keep the small office building to which it had moved its local corporate offices, as well as the property underlying all of the tracks being used by MVRY, and some additional property from Lot 62320.

12. In its desire to keep its corporate offices, tracks and the additional land, the Ohio Central Railroad System caused Lots 62188 and 62320 to be replatted to the current lot lines as shown on the replat attached hereto as Exhibit B. Once this replat was complete, it would then be possible for Ohio and Pennsylvania to sell the replatted Lot 62320 (the Maverick Tube plant) without disturbing its railroad operations, allowing MVRY and Ohio Central Railroad System to retain the office building, tracks and additional property.

13. In 2007, the Ohio and Pennsylvania reached an agreement with Gearmar to sell Gearmar certain real property located in the City of Youngstown. Pursuant to the terms of that agreement the Ohio and Pennsylvania agreed to sell to Gearmar the newly replatted Lot 62320. A draft copy of the Purchase Agreement is attached hereto as Exhibit C.

14. The sale between the Ohio and Pennsylvania and Gearmar was only intended to include the newly replatted Lot 62320. At no time did the parties discuss, contemplate, negotiate or agree to the sale of Lot 62188 which was owned by MVRVY.

15. On April 4, 2007, the Ohio and Pennsylvania executed a Deed transferring Lot 62320 to Gearmar. Deed from the Ohio and Pennsylvania to Gearmar attached hereto as Exhibit D.

16. Due to a mistake in conveyance or a scrivener's error in drafting the Deed, the Deed transferring Lot 62320 also included the legal description of Lot 62188. Upon information and belief, inclusion of the legal description to Lot 62188 was due to an error by the title company that handled the transaction including the preparation and recording of the Deed.

17. At no time did the Ohio and Pennsylvania, MVRVY or Gearmar ever agree to, or contemplate the transfer of, Lot 62188. The inclusion in the Deed of Lot 62188 was a mistake and was not a part of the agreement and no consideration for Lot 62188 was given by Gearmar or received by the Ohio and Pennsylvania or MVRVY.

18. The mistaken inclusion in the legal description contained in the Deed went unnoticed by both Gearmar and the Ohio and Pennsylvania and MVRVY.

19. As the inclusion of Lot 62188 in the Deed between the Ohio and Pennsylvania and Gearmar was included by mistake, Lot 62188 did not equitably transfer to Gearmar and Gearmar at no time had any estate, right, title, lien or interest whatever in or to Lot 62188.

20. After the sale to Gearmar and with the knowledge of Gearmar, MVRV and Ohio Central Railroad System continued to use the office, tracks and other rail facilities located on replatted Lot 62188 on a daily basis. Such continuing use was known to Gearmar and open and visible to anyone inspecting the property. The MVRV and Ohio Central Railroad Systems use of Lot 62188 was open and accepted by Gearmar for nearly 2 years.

21. Upon information and belief, in early 2009 Gearmar entered into an Agreement with Defendant Allied to sell the Maverick Tube building to Allied.

22. On April 13, 2009 a Deed from Gearmar to Allied was recorded. The property description copies the erroneous description in the Deed from Ohio and Pennsylvania to Gearmar, and includes both Lot 62320 and Lot 62188. Deed from Gearmar to Allied attached hereto as Exhibit E.

23. Allied was or should have been on notice, prior to its purchase, that MVRV and Ohio Central Railroad System were continuing to use Lot 62188, and could have an ongoing interest in the property.

24. Gearmar had no authority to sell Allied Lot 62188 as it had only been transferred to Gearmar due to a clerical mistake. As Gearmar was not the equitable owner of Lot 62188 it could not transfer ownership of Lot 62188 to Allied, and Allied is not currently the true owner of Lot 62188.

25. Allied currently has no estate, right, title, lien or interest whatever in or to Lot 62188, and this Court should Order that Lot 62188 be transferred back to MVRV.

**COUNT TWO**

**DECLARATORY JUDGMENT**

26. Plaintiffs incorporate paragraphs 1 through 25 of the Counterclaim and Third Party Complaint as if set forth fully herein.

27. Youngstown City Lot No. 62188 ("Lot 62188") parcel contains, among other things, lines of railroad and other transportation facilities used by MVRVY in the course of its operations as a common carrier of freight in interstate commerce.

28. MVRVY and Ohio Central Railroad System have never had any intention of abandoning any of its lines or railroad or other transportation facilities.

29. Allied has brought this action claiming that it is the proper owner of Lot 62188, and seeking to eject MVRVY from Lot 62188.

30. If Lot 62188 is deemed to belong to Allied and MVRVY is forced to vacate Lot 62188, Allied will be interfering with railroad operations affecting interstate commerce, and MVRVY would have to abandon its operations, despite the fact that Lot 62188 was never to have been sold.

31. Allowing Allied to take Lot 62188 and forcing MVRVY to vacate Lot 62188 violates federal law because the STB never approved or consented the transfer of Lot 62188 and Allied's actions constitute interference with the rail lines and interstate commerce.

32. Plaintiffs seek declaratory relief pursuant to 28 U.S.C. §2201(a) and Fed.R.Civ.P. 57, and injunctive relief pursuant to Fed.R.Civ.P. 65 to void the transfer of Lot 62188 and to prevent Allied from forcing Plaintiffs to vacate Lot 62188 and cease rail operations thereon.

33. Plaintiffs are "rail carriers" operating a "railroad" within the meaning of the ICCTA, which defines a "railroad" to include "the road used by a rail carrier" and any "switch,

spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation.” 49 U.S.C. §10102(5), (6)(B) and 6(C).

34. Plaintiffs’ rail services, specifically MVRVY’s rail services at Lot 62188, are “transportation” activities within the meaning of the ICCTA, which defines “transportation” to include both facilities and equipment “related to the movement of . . . property . . . by rail,” 49 U.S.C. §10102(9)(A), and “services relating to that movement,” such as “receipt, delivery, . . . transfer in transit, storage, handling, and interchange of . . . property.” 49 U.S.C. §10102(9)(B).

35. Neither Gearmar nor Allied acquired authority from the STB to acquire Lot 62188 and the lines of railroad rail thereon, in violation of the ICCTA. 49 U.S.C. §10901.

36. Accordingly, the acquisition by Gearmar, and the subsequent acquisition of Allied should be declared void.

37. Allied’s actual and threatened enforcement actions to take Lot 62188 and force MVRVY to vacate and abandon its rail services thereon, are prohibited by the ICCTA because, under federal law, MVRVY or Allied must have applied for and obtained abandonment authority from the STB, which did not occur in this case at any time, including but not limited to in connection with the inadvertent transfers of Lot 62188. 49 U.S.C. §10903.

38. Because the STB did not, at any time, approve and/or consent to the transfer of Lot 62188 under either §10901 or §10903, Allied cannot force Plaintiffs to vacate Lot 62188, as to do so would disrupt and interfere with rail service and interstate commerce without the required STB authority.

39. Section 10501(b) of ICCTA, 49 USC §10501(b), the STB’s jurisdiction over, *inter alia*, transportation by rail carriers, and the acquisition, operation and abandonment of

tracks and other transportation facilities, is exclusive and preempts the remedies provided under Federal or State law.

40. The Commerce Clause of the United States Constitution prohibits unreasonable interference with interstate commerce.

41. The STB's jurisdiction over abandonments of lines of railroad and the cessation of service by rail carriers is plenary and exclusive.

42. Allied's attempted eviction of MVRV under state law would violate the STB's exclusive jurisdiction, and unreasonably interfere with MVRV's operations in interstate commerce in violation of the United States Constitution.

43. Actual and justiciable controversies exist between the parties with respect to the validity of the conveyances of Lot 62188, as the respective transfers of Lot 62188 were never approved or consented to by the STB, as well as in connection with Allied's attempts to take Lot 62188 and terminate MVRV's operations on Lot 62188.

44. Plaintiffs have a direct and immediate need for relief, and lack an adequate remedy at law.

45. The Court's intervention is necessary and will be of practical help in ending the controversy between the parties.

### COUNT THREE

46. Plaintiffs incorporate paragraphs 1 through 45 of the Counterclaim and Third Party Complaint as if set forth fully herein.

47. Plaintiff MVRV owns certain real property in Youngstown, Ohio, known as Youngstown City Lot 62189. Lot 62189 is indicated and marked on the Replat attached hereto as Exhibit B.

48. MVRV operates a locomotive repair facility on Lot 62189. MVRV uses this shop to service and repair locomotive engines and other equipment, and to store locomotives and other equipment, and requires rail access to Lot 62189 in order to bring the engines and equipment in for service and repair. MVRV further requires land access to Lot 62189 in order for its employees, vendors and contractors to reach the property by vehicle.

49. Lot 62189 does not have direct access to a public street. It is surrounded on one side by the Mahoning River. On all other sides it is surrounded by other Youngstown City Lots. If Allied were determined to be the owner of Lot 62188, then all of the real property surrounding Lot 62189 would be owned by Allied.

50. Youngstown City Lots 62188 and 62189 are contiguous and were in the past owned by the same entity. Prior to the mistaken conveyance of Lot 62188 to Gearmar, Plaintiff would travel over Lot 62188 and Lot 62320 in order to access Poland Avenue which is the closest public street to Lot 62189. The purported conveyance of Lot 62188 to Allied's predecessor in ownership would leave Lot 62189 "landlocked" so that Plaintiff would have no access to city streets and more particularly to Poland Avenue. Thus Lot 62189 would be cut-off from access to a road to the outer world.

51. Further, Plaintiff used rail lines located over Lot 62188 to bring in locomotives for service and repair on Lot 62189. Without use of the rail lines traversing Lot 62188 it is not currently possible for locomotives to reach the repair and service facility on Lot 62189.

52. By reason of the foregoing, if Allied were determined to be the owner of Lot 62188, then Plaintiff would be entitled to an easement by necessity for vehicle traffic along, through, or over Allied's land to a public street or highway. The exact route of such easement is unknown to Plaintiff.

53. By reason of the foregoing, if Allied were determined to be the owner of Lot 62188, then Plaintiff would be entitled to an easement by necessity for the use of rail lines along, through, or over Allied's land in order to move locomotives and other equipment to the Lot 62189 repair facility.

54. An actual controversy has arisen and now exists between Plaintiff and Allied concerning their respective rights and duties.

55. If Allied were determined to be the owner of Lot 62188, then Plaintiff desires a judicial determination of its rights and duties, and a declaration as to the extent and parameters of its easements.

WHEREFORE, Plaintiffs pray for the following relief:

1. As to Count One An Order:
  - a. Finding and determining that the transfer of Youngstown City Lot No. 62188 to Gearmar Properties, Inc. was the result of a mistake and was not the intent of the parties; and
  - b. Finding and determining that The Mahoning Valley Railway Company is the true owner of Youngstown City Lot No. 62188 in fee simple together with all appurtenances and appurtenant rights; and
  - c. Determining that no other party has any interest in fee simple or otherwise in Youngstown City Lot No. 62188; and
  - d. Ordering that Allied Industrial Development Corporation execute a Deed or other applicable instrument granting Lot 62188 back to The Mahoning Valley Railway Company.

- e. Award Plaintiffs costs and attorneys' fees; and
  - f. order such other and further relief as the Court deems equitable and just.
2. As to Count Two an Order:
- a. declaring that under the facts of this case, Allied cannot force the Plaintiffs to vacate Lot 62188 and cease rail operations thereon due to the failure of Allied to conform with federal law, specifically, Allied's failure to obtain authority from the STB to acquire rail lines located on Lot 62188 as well as the failure to obtain adverse abandonment authority from the STB;
  - b. declaring that under the facts of this case, Allied has violated and threatens to continue violating federal law by interfering with the operation of the rail lines located on the property due to its demands that the Plaintiffs vacate Lot 62188 and cease the rail service that it provides absent authority from the STB;
  - d. Award Plaintiffs costs and attorneys' fees; and
  - e. order such other and further relief as the Court deems equitable and just.
3. As to Court Three an Order: if it is determined that Allied is the owner of Lot 62188:
- a. declaring that the Mahoning Valley Railway Company is entitled to an easement along, through, and over Allied's land such that it

can access Youngstown City Lots Nos. 62189 from a public street or highway.

- b. declaring that the Mahoning Valley Railway Company has an easement to use rail lines traversing Youngstown City Lot 62188 in order to move locomotives and equipment to and from Youngstown City Lot 62189.
- c. award Plaintiffs costs and attorneys' fees; and
- d. order such other and further relief as the Court deems equitable and just.

Respectfully submitted,

/s/Thomas J. Lipka

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OF COUNSEL

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served upon the following counsel of record by operation of the Court's CM/ECF system this 26<sup>th</sup> day of October, 2009 to:

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F

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO

ALLIED INDUSTRIAL  
DEVELOPMENT CORPORATION,

Plaintiff,

v.

OHIO CENTRAL  
RAILROAD, INC., *et al.*,

Defendants.

CASE NO. 4:09-CV-01904

OPINION & ORDER

[Resolving Doc. Nos. 50, 62 & 65.]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

In this trespass action, the defendant railroad companies removed the case to federal court and now move to dismiss the case for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1). [Doc. 1; Doc. 50.] In the alternative, the defendants ask the Court to refer certain issues in the case to the Surface Transportation Board. [Doc. 50.] The plaintiff opposes the defendants' motion. [Doc. 62.] For the reasons that follow, the Court REMANDS this case to the Mahoning County Court of Common Pleas.

I.

In its complaint, plaintiff Allied Industrial Development Corp. alleges that it purchased two parcels of property in Youngstown from third-party defendant Gearmar Properties, Inc., who had previously purchased the parcels from defendants The Ohio & Pennsylvania Railroad Company and The Mahoning Valley Railway Company. [Doc. 1-1.] Allied Industrial alleges that, without its



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consent, the defendants currently occupy an office building on one of the parcels and are using the other parcel for storage. [Doc. 1-1.] Allied Industrial has asked the defendants to vacate the parcels, but the defendants remain on the land. [Doc. 1-1.]

As a result, Allied Industrial filed this state-law action in the Mahoning County Court of Common Pleas. [Doc. 1-1.] Allied Industrial's complaint seeks (1) forcible entry and detainer/ejectment under Ohio statutory and common law; (2) the fair rental value of the parcels during the defendants' unlawful trespass; and (3) damages caused by the defendants during their unlawful trespass. [Doc. 1-1.]

In response, the defendants removed the case to this Court on the basis of federal question jurisdiction. [Doc. 1.] See 28 U.S.C. § 1441(a) (“[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.”); 28 U.S.C. § 1331 (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”). The defendants' removal notice states that because Allied Industrial's requested relief would force them to abandon service over the rail lines on the parcels in question, and because the Interstate Commerce Commission Termination Act (“ICCTA”) explicitly preempts state law regulating rail transportation, this action “aris[es] under” federal law. [Doc. 1 at ¶ 7. (citing 49 U.S.C. § 10501(b) (“[T]he remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.”)).]

The defendants now move to dismiss this action for lack of jurisdiction on the ground that the ICCTA vests exclusive jurisdiction in the Surface Transportation Board. [Doc. 50 at 5-15 (citing

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49 U.S.C. § 10501(b) (“The jurisdiction of the [Surface Transportation] Board over . . . [the] operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities . . . is exclusive.”).] In the alternative, the defendants ask the Court to refer the ICCTA issues in this case to the Surface Transportation Board. [Doc. 50 at 16-18.]

## II.

A fundamental principle of federal procedure is that federal courts have limited subject-matter jurisdiction and are powerless to decide cases beyond that limited jurisdiction. Consequently, as the Supreme Court has explained:

“Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” . . . The requirement that jurisdiction be established as a threshold matter “spring[s] from the nature and limits of the judicial power of the United States” and is “inflexible and without exception.”

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94-95 (1997) (internal citations omitted).

Because federal jurisdiction is a “threshold matter,” *id.* at 94, federal courts must raise the jurisdictional issue *sua sponte* whenever their lack of jurisdiction becomes apparent. *See, e.g., Mansfield C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884); Fed. R. Civ. P. 12(h)(3) (“Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”). Further, a court of appeals must vacate any federal district court judgment entered absent jurisdiction and dismiss the action. Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 154 (1908). With these principles in mind, the Court turns to whether it has jurisdiction over any part of this case.

Under the “well-pleaded complaint” rule, an action “aris[es] under” federal law—conferring

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federal jurisdiction under 28 U.S.C. § 1331—“only when the plaintiff’s statement of his own cause of action shows that it is based upon” federal law. Mottley, 211 U.S. at 152. Here, Allied Industrial, master of its complaint, named only state-law claims: forcible entry and detainer under Ohio Rev. Code Ann. §§ 1923.01 et seq. and trespass under Ohio common law. [Doc. 1-1.]

The defendants’ notice of removal contends that because the ICCTA preempts Allied Industrial’s claims, this Court has jurisdiction under § 1331. [Doc. 1.] But preemption is generally a defense, and the interposition of a federal-law defense against a state-law claim is insufficient to confer federal jurisdiction. See Franchise Tax Bd. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 14 (1983) (“[S]ince 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption.”).

Nor does the “complete preemption” exception to the well-pleaded complaint rule apply here. Under that exception, if “the pre-emptive force of a [federal] statute is so ‘extraordinary’ that it ‘converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule,’” then “any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law.” Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987) (noting that § 301 of Labor Management Relations Act completely preempts state claims for violation of collective bargaining agreements). See also 13D Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Richard D. Freer, Federal Practice & Procedure § 3566 (3d ed. 2008) (“[The doctrine of “complete preemption”] is based on the theory that some federal statutes have such an overwhelming preemptive effect that they do more than merely provide a defense to a state-law claim. Rather, they take over an entire substantive subject matter area, supplant state law, and make the area inherently federal. Any claim asserted in that

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substantive area—even a claim ostensibly based upon state law—is thus federal and the claim necessarily arises under federal law and invokes federal question jurisdiction.”) (footnote omitted).

In this case, the “complete preemption” exception does not apply because neither of Allied Industrial’s claims comes within the scope of the ICCTA’s preemption clause. That clause’s central concern is “*regulation of rail transportation*”—not the incidental effect on rail transportation caused by a landowner’s right to exclude others from its property. 49 U.S.C. § 10501(b) (emphasis added). As the Sixth Circuit has explained, the ICCTA “preempts all ‘state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation.’” *Adrian & Blissfield R.R. Co. v. City of Blissfield*, 550 F.3d 533, 539 (6th Cir. 2008) (citation omitted) (holding, in context of conflict preemption, that ICCTA does not preempt state statutes requiring railroads to pay for maintenance of pedestrian sidewalks); *see also* *PCS Phosphate Co., Inc. v. Norfolk S. Corp.*, 559 F.3d 212, 218 (4th Cir. 2009) (Wilkinson, J.) (holding, in context of express and conflict preemption, that ICCTA does not preempt state contract claims that may affect railroad operations).

Moreover, the Surface Transportation Board’s own interpretation of the ICCTA preemption clause reinforces the limited nature of the ICCTA’s complete preemptive reach. That clause recognizes only two categories of categorically preempted state actions: (1) “any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized,” and (2) “state or local regulation of matters directly regulated by the Board—such as the construction, operation, and abandonment of rail lines; railroad mergers, line acquisition, and other forms of consolidation; and railroad rates and service.” *CSX Transp., Inc.*, STB Finance Docket No. 34662,

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2005 WL 1024490, at \*2 (May 3, 2005).

Here, Allied Industrial's Ohio law claims cannot be said to "regulate" the abandonment of rail lines. It is true that the upshot of Allied Industrial's claims (if successful) might affect certain of the defendants' rail lines. But the cause of that outcome is not Ohio's direct regulation of the defendants' rail lines; rather, the cause is the defendants' sale of the two parcels at issue to Gearmar. Cf. New Orleans & Gulf Coast Ry. Co. v. Barrios, 533 F.3d 321, 334 (5th Cir. 2008) ("The fatal defect in the Railroad's argument is that the Railroad fails to establish that any unreasonable interference with railroad operations is caused by operation or application of the Louisiana state law as opposed to the independent actions of private parties."); PCS Phosphate Co., 559 F.3d at 218 ("Voluntary agreements between private parties . . . are not presumptively regulatory acts, and we are doubtful that most private contracts constitute the sort of 'regulation' expressly preempted by the statute. If contracts were by definition 'regulation,' then enforcement of every contract with 'rail transportation' as its subject would be preempted as a state law remedy 'with respect to regulation of rail transportation.'") (footnote omitted). Thus, the "complete preemption" exception does not apply in this case.

Because the ICCTA does not completely preempt Allied Industrial's state claims for purposes of the well-pleaded complaint rule, this case does not "aris[e] under" federal law. 28 U.S.C. § 1331. Thus, the defendants' removal of this case under 28 U.S.C. § 1441 was improper, and the Court must remand the case to state court. See 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.").

To clarify, the conclusion that the ICCTA does not "completely preempt" Allied Industrial's state-law claims applies only to the jurisdictional question. See 13D Wright, Miller, Cooper & Freer

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§ 3566 (“The name [‘complete preemption’] is misleading and this doctrine should be contrasted with ‘ordinary’ or ‘conflict’ preemption, under which federal law provides a defense to a state-law claim. ‘Complete preemption,’ in contrast, is actually a doctrine of subject matter jurisdiction.”). The Court does not resolve the separate issue of whether the ICCTA’s preemption clause provides a defense to Allied Industrial’s claims—an issue that the defendants are free to raise in the state court.

Finally, because the defendants’ improper removal of this case has caused Allied Industrial to incur significant expenses, the Court orders that the defendants pay Allied Industrial’s costs, including attorney’s fees, incurred in defending against their 12(b)(1) motion. [Doc. 50.] See 28 U.S.C. § 1447(c) (“An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal”). However, this order does not include the costs Allied Industrial incurred in preparing its summary judgment motion because Allied Industrial can likely re-use much of that motion to move for summary judgment in the state court. [Doc. 54.]

### III.

In sum, because this case does not “aris[e] under” federal law, the defendants’ removal of the case was improper. As a result, the Court **REMANDS** the case to the Mahoning County Court of Common Pleas and **ORDERS** that the defendants pay Allied Industrial’s actual expenses incurred

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as a result of removal.

IT IS SO ORDERED.

Dated: March 15, 2010

*s/ James S. Gwin*  
\_\_\_\_\_  
JAMES S. GWIN  
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO

ALLIED INDUSTRIAL  
DEVELOPMENT CORPORATION,

Plaintiff,

v.

OHIO CENTRAL  
RAILROAD, INC., *et al.*,

Defendants.

CASE NO. 4:09-CV-01904

OPINION & ORDER

[Resolving Doc. Nos. 82, 83, 88 & 89.]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

The defendant railroad companies in this trespass action move this Court to reconsider its award of attorney's fees that Plaintiff Allied Industrial Development Corporation incurred as a result of the defendants' improper removal of this case from state court. [Doc. 82; Doc. 79 (remand order).] Because the defendants' ground for removing this case was not objectively reasonable, the Court DENIES their reconsideration motion.

The case law interpreting 28 U.S.C. § 1447(c) entrusts the award of costs and attorney's fees to the district court's sound discretion. *See, e.g., Morris v. Bridgestone/Firestone, Inc.*, 985 F.2d 238, 240 (6th Cir. 1993). The Sixth Circuit has held that an award of costs under § 1447(c) does not require a finding that the removing party had an improper purpose. *Id.* at 240. Rather, the normal rule, according to the Supreme Court, is that district courts may award fees "when the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*,



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546 U.S. 132, 141 (2005). Here, the defendants lacked an objectively reasonable basis for removal.

The defendants removed this case on the ground that it “ar[is]es under” federal law because the Interstate Commerce Commission Termination Act explicitly preempts state laws regulating rail transportation—like Ohio trespass law, which could force the defendants to abandon rail service over the rail lines on the property in question. [Doc. 1 at ¶ 7. (citing 49 U.S.C. § 10501(b) (“[T]he remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.”)).]

This ground for removal was not objectively reasonable because the “well-pleaded complaint rule” disallows removal on the basis of a federal-law defense—like preemption—to a state-law cause of action. See Franchise Tax Bd. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 14 (1983) (“[S]ince 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption.”).

The defendants pin their counterargument on the “complete preemption” exception to the well-pleaded complaint rule. [Doc. 82 at 3-8.] But that argument flounders because Ohio trespass law falls outside the ICCTA’s preemptive scope, which covers only “*regulation* of rail transportation.” 49 U.S.C. § 10501(b) (emphasis added). A law that merely has the *incidental effect* of rail line abandonment does not “regulat[e]” rail transportation.<sup>1/</sup> *Id.* Accordingly, courts have limited the scope of ICCTA preemption to “state laws that may reasonably be said to have the effect

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<sup>1/</sup>If the contrary were true, as the defendants argue, then the scope of ICCTA preemption would be staggering, sweeping away state contract, tort, and property law. Indeed, it is difficult to imagine a state law that could not, in some circumstance, incidentally cause rail line abandonment. *But cf. Fayard v. Ne. Vehicle Servs., LLC*, 533 F.3d 42, 47 (1st Cir. 2008) (Boudin, J.) (“No one supposes that a railroad sued under state law for unpaid bills by a supplier of diesel fuel or ticket forms can remove the case based on complete preemption simply because the railroad is subject to the ICCTA.”).

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of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation.” Adrian & Blissfield R.R. Co. v. City of Blissfield, 550 F.3d 533, 539 (6th Cir. 2008) (citation omitted) (state tax for maintenance of public sidewalks); *see also, e.g., PCS Phosphate Co., Inc. v. Norfolk S. Corp.*, 559 F.3d 212, 218 (4th Cir. 2009) (Wilkinson, J.) (state contract law); New Orleans & Gulf Coast Ry. Co. v. Barrios, 533 F.3d 321, 334 (5th Cir. 2008) (state law authorizing private railroad crossings); Fayard v. Ne. Vehicle Servs., LLC, 533 F.3d 42, 47 (1st Cir. 2008) (Boudin, J.) (state nuisance law).<sup>2f</sup>

In the alternative, the defendants argue that even if their basis for removal was not objectively unreasonable, a fee award is not appropriate because Allied Industrial did not seek remand in a

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<sup>2f</sup>Many of the cases cited by the defendants are distinguishable because—unlike here—the state laws in question specifically targeted rail transportation. *See, e.g., State v. Ill. Cent. R.R. Co.*, 928 So.2d 60 (La. Ct. App. 2005) (holding, in context of conflict preemption, that ICCTA preempted state statute directly governing ownership of particular parcel containing railroad tracks); Rawls v. Union Pac. R.R. Co., No. 09-CV-1037, 2010 WL 892115, at \*1 (W.D. Ark. Mar. 9, 2010) (holding that ICCTA completely preempted state-law claims for “inadequate audible warnings; inadequate visual warnings; failure to exercise reasonable care in [defendant’s] train operations; failure to inspect and repair unsafe crossing conditions; specific unsafe crossing conditions; failure to report unsafe crossing conditions; failure to work with state and local authorities to maintain proper signs, signals, and markings; and, failure to properly train, instruct and manage its employees with respect to its operating practices and rules”); South Dakota ex rel. S.D. R.R. Auth. v. Burlington N. & Santa Fe Ry. Co., 280 F. Supp. 2d 919, 929 (D.S.D. 2003) (holding that ICCTA completely preempted “state contract and tort law remedies arising out of contracts which were previously approved by the ICC and the STB pursuant to federal law”).

In PCI Transportation v. Fort Worth & Western Railroad Co., 418 F.3d 535 (5th Cir. 2005), the Fifth Circuit erroneously failed to analyze the complete preemption issue from the perspective of the plaintiff’s cause of action—instead giving dispositive weight to the fact that the ICCTA’s remedies are exclusive. *Id.* at 544-45. That analysis misses the point. Yes, the ICCTA’s remedies are exclusive—but only within the domain of “regulation of rail transportation.” 49 U.S.C. § 10501(b). Thus, the complete preemption inquiry must ask whether the state law on which the plaintiff’s claim is based in fact “regulat[es] . . . rail transportation.” *Id.* *See also Fayard*, 533 F.3d at 47 (“But even where a federal statute can completely preempt some state law claims, the question remains which claims are so preempted. . . . For complete preemption, the critical question is whether federal law provides an exclusive substitute federal cause of action that a federal court (or possibly a federal agency) can employ for the kind of claim or wrong at issue. Accordingly, we narrow our focus to the nuisance claims brought by the [plaintiffs].”) (emphasis in original; footnote deleted).

Finally, the court in Cedarapids, Inc. v. Chicago, Central & Pacific Railroad Co., 265 F. Supp. 2d 1005 (N.D. Iowa 2003), concluded that the ICCTA preempts any state law claim that would have the effect of rail line abandonment. As explained above, that construction reads the scope of ICCTA’s preemption clause too broadly.

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timely manner. *See, e.g., Martin, 546 U.S. at 141* (“[A] plaintiff’s delay in seeking remand . . . may affect the decision to award attorney’s fees.”). But the Court’s remand order took this factor into account by awarding Allied Industrial only the “costs, including attorney’s fees, incurred in defending against the[ defendants’] 12(b)(1) motion.” [Doc. 79 at 7.] The order expressly disallowed “the costs Allied Industrial incurred in preparing its summary judgment motion . . . .” [Doc. 79 at 7.] In other words, by limiting the fee award to the costs incurred against defending against the defendants’ Rule 12(b)(1) motion, the Court’s remand order did not award any fees attributable to Allied Industrial’s failure to expeditiously seek remand.

Finally, the defendants argue that the fee award should not include Allied Industrial’s costs of defending against their 12(b)(1) motion because they would have filed that motion—forcing Allied Industrial to defend against it—even if the case had remained in state court. As evidence, the defendants point to another case in state court between the same parties in which the defendants successfully moved the state court to refer certain issues to the Surface Transportation Board. [Doc. 50-1 at 6-12.] The flaw in this argument is that even if the defendants had made the same motion in state court, Allied Industrial might not have opposed the motion; after all, that court had already decided the issue against Allied Industrial. And even if Allied Industrial did oppose the motion, motion practice on the issue would likely be less comprehensive before that court than before this Court, which had not yet expressed an opinion on the 12(b)(1) issue.

Thus, because the defendants’ ground for removing this case was not objectively reasonable, and because no “unusual circumstances warrant a departure from the [normal] rule,” *Martin, 546 U.S. at 141*, the Court **DENIES** their reconsideration motion. [Doc. 82.] Further, the Court

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**GRANTS** Allied Industrial's motion for attorney's fees and costs in the amount of \$16,035.50.<sup>3/</sup>

[Doc. 83.]

IT IS SO ORDERED.

Dated: April 14, 2010

s/ James S. Gwin  
JAMES S. GWIN  
UNITED STATES DISTRICT JUDGE

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<sup>3/</sup>The defendants advance three additional arguments for why Allied Industrial's claimed fees are excessive. [Doc. 88 at 6.] All three fail.

First, the defendants claim that Richard Streeter's legal services were for STB jurisdiction issues. However, Streeter's time entry descriptions refer to federal jurisdiction and plausibly stem from defending against the defendants' Rule 12(b)(1) motion.

Second, the defendants argue that "there is no verification that Mr. Streeter's hourly rate is reasonable." [Doc. 88 at 6.] But they do not offer any ground for believing that Mr. Streeter's hourly rate is unreasonable.

Third, the defendants argue that Allied Industrial's opposition to their reconsideration motion was untimely, and thus Allied Industrial's cost of preparing that opposition is not recoverable. [Doc. 88 at 6.] But as Allied Industrial points out, its opposition was not due until April 12th. [Doc. 89 at 7 n.3.]

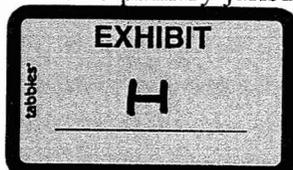
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IN THE COURT OF COMMON PLEAS  
MAHONING COUNTY, OHIO

ALLIED INDUSTRIAL DEVELOPMENT )  
CORPORATION )  
 )  
Plaintiff )  
 )  
 )  
JUDGE: MAUREEN A. SWEENEY  
 )  
MAGISTRATE: DENNIS SARISKY  
vs. )  
 )  
 )  
THE OHIO AND PENNSYLVANIA )  
RAILROAD COMPANY, INC., et al )  
 )  
 )  
 )  
Defendants )

**MOTION TO DISMISS OR IN THE ALTERNATIVE REFER TO THE SURFACE  
TRANSPORTATION BOARD, AND MEMORANDUM IN SUPPORT**

NOW COME Defendants, The Ohio Central Railroad, Inc., The Ohio & Pennsylvania Railroad Company ("OHPA"), The Warren & Trumbull Railroad Company, Youngstown & Austintown Railroad, Inc., The Youngstown Belt Railroad Company, and The Mahoning Valley Railway Company ("MVRV"), (collectively, the "Railroad Defendants") and Genesee & Wyoming, Inc. ("GWI"), and Summit View, Inc. ("Summit View") (Railroad Defendants together with GWI and Summit View being collectively, "Defendants"), by and through their counsel, pursuant to Rule 12(b)(1) of the Ohio Rules of Civil Procedure, and move the Court to dismiss Plaintiff's Complaint for lack of subject matter jurisdiction on the grounds that Plaintiff's claims are preempted by the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. §§10101 *et seq.* ("ICCTA"). In the alternative, Defendants move the Court to stay all proceedings and refer this case to the Surface Transportation Board ("STB" or "Board") for the resolution of issues within the Board's primary jurisdiction or expertise. The grounds



supporting this Motion are more fully set forth in the Memorandum attached hereto and hereby incorporated by reference.

Respectfully Submitted,

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## MEMORANDUM IN SUPPORT

### I. STATEMENT OF FACTS

Plaintiff's Amended Complaint alleges that by Purchase Agreement dated March 26, 2009, Plaintiff purchased from Third Party Defendant Gearmar Properties ("Gearmar") two parcels of land known as Youngstown City Lots 62320 and 62188. Amended Complaint ¶13. Plaintiff alleges that Defendants are using an office building on Lot 62188 and are utilizing both parcels to store railcars and other railroad related equipment. Id., ¶17-19. Plaintiff further claims that defendants have no right to be on the property and are trespassing. Id., Count II. Pursuant to the Ohio Forcible Entry and Detainer Statute, Plaintiff seeks an order requiring Defendants to remove all equipment and materials and immediately vacate Lots 62320 and 62188. Plaintiff also seeks damages allegedly resulting from Defendants' alleged trespass. Id., Count III.

For purposes of this Motion only, Defendants assume the above recited facts are true.<sup>1</sup> Defendants further state, however, that Lot 62188 contains a portion of MVRV's main line, several yard tracks and switching tracks, and other rail facilities which have been used by Defendant MVRV since 1981. See Mahoning Valley Railway Co. – Operation of a Line of Railroad in Mahoning County, OH, ICC Finance Docket No. 29658 (Sub-1), 46 Federal Register 4007 (August 6, 1981), attached hereto as Exhibit A. See also affidavit of David Collins (hereinafter "Collins Affidavit"), ¶3, attached hereto as Exhibit B. In addition, MVRV is the owner of Youngstown City Lot 62189 ("Lot 62189") which is contiguous to Lot 62188 and contains a shop which is used by the Railroad Defendants for repairs of locomotives and other

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<sup>1</sup> There is no dispute that Plaintiff purchased and owns Lot 62320. Defendants, dispute, however, Plaintiff's ownership of Lot 62188, and Defendants further dispute whether Plaintiff can exclude Defendants from use of the rail lines and the office building located thereon. As set forth in Defendants' Answer to Plaintiff's Amended Complaint, and its Amended Counterclaim and Third Party Complaint, Lot 62188, which was owned by Defendant MVRV, was never intended to be sold to Gearmar, and was instead included in the deed transferring Lot 62320 to Gearmar as a result of a mistake.

equipment, and for required Federal Railroad Administration (“FRA”) inspections of locomotives. Id., ¶4. MVRVY uses the tracks on Lot 62188 to serve its customers (including one located on Lot 62320), to reach its interchange points with connecting railroads, CSX Transportation, Inc and Norfolk Southern Railroad Company, to store and stage cars, and to access its locomotive repair shop on Lot 62189. Id., ¶7. Railroad Defendants also used the office building on Lot 62188 as the headquarters for the Youngstown-based Railroad Defendant operations. MVRVY and the Railroad Defendants had been making daily use of the tracks, facilities and property prior to the 2007 sale of Lot 62320 to Gearmar Properties, Inc., and continued to do so thereafter.<sup>2</sup> Id. Railroad Defendants never intended to transfer or abandon the use of any of the railroad facilities on Lot 62188. Id., ¶11. Without the use of such facilities, MVRVY would not be able to move traffic from one side of Lot 62188, or make any use of its locomotive shop on Lot 62189, which would materially interfere with its ability to meet its common carrier obligations. Id., ¶¶8, 11.

All of the Defendants other than Summit View and GWI are Class III rail carriers authorized to operate as common carriers by the Surface Transportation Board (“STB”), or its predecessor the Interstate Commerce Commission (“ICC”), and all are engaged in interstate commerce. Id., ¶9. Summit View and GWI are the respective direct parent and indirect corporate parent of the Railroad Defendants; they are not operating railroads and do not directly use any of the rail lines, tracks, other railroad facilities or property at issue in this proceeding. Id., ¶10.

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<sup>2</sup> As a result of threatened lock-out by Allied, Defendants voluntarily vacated the office building under protest until the issues in this proceeding are resolved. Id.

## II. LAW AND ARGUMENT

### A. THE COURT SHOULD DISMISS PLAINTIFF'S COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION.

#### 1. Legal Standard for Rule 12(b)(1) Dismissal.

A motion to dismiss for lack of subject matter jurisdiction under Civil Rule 12(B)(1) challenges the court's legal authority to adjudicate the issues and claims raised in the complaint. A Rule 12(B)(1) motion must be granted when plaintiff has alleged causes of action which the court has no authority to decide. Salvation Army v. Blue Cross and Blue Shield of Northern Ohio (1993), 92 Ohio App.3d 571, 576; McHenry v. Industrial Commission (1990), 68 Ohio App.3d 56, 62. The plaintiff bears the burden of proving, by a preponderance of evidence, that the court possesses subject matter jurisdiction. O'Shea v. Fayard (August 14, 2003), Cuyahoga App. No. 81791, unreported, 2003 Ohio 4340, 2003 Ohio App. LEXIS 3841; Collins v. Hamilton County DHS (March 21, 2002), Franklin App. No. 01AP-1194, unreported, 2002 Ohio 1325, 2002 Ohio App. LEXIS 1291. Under Ohio law, a motion to dismiss tort claims for lack of subject matter jurisdiction based on preemption, though filed after defendant's answer in violation of procedural rules, could nonetheless be considered by the trial court, as a federal preemption claims may be made at any time. Jones v. Shannon, et al. (2000), 139 Ohio App.3d 508, 510, 744 N.E.2d 776. When ruling on a 12(B)(1) motion, the trial court is not confined to the allegations of the complaint and may consider material pertinent to such inquiry without converting the motion into one for summary judgment. Southgate Development Corp. v. Columbia Gas Transmission Corp. (1976), 48 Ohio St.2d 211; Salvation Army, 92 Ohio App.3d at 577.

2. **The Scope of Preemption Under the ICCTA.**

Pursuant to the Supremacy Clause of the United States Constitution, U.S. Const. art. 6, cl.

2, federal law preempts state or local law in various ways, including by:

(1) express preemption where the intent of Congress to preempt state law is clear and explicit; (2) field preemption where Congress' regulation of a field is so pervasive or the federal interest is so dominant that an intent can be inferred for federal law to occupy the field exclusively; and (3) conflict preemption, where federal and state law so conflict that it is impossible for a party to comply with both simultaneously, or where enforcement of state law prevents the accomplishment of the full purposes and objectives of federal law.

Railroad Ventures, Inc. v. Surface Transp. Bd., 299 F.3d 523, 561 (6<sup>th</sup> Cir. 2002)(citing Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992); Friberg v. Kansas City S. Ry. Co., 267 F.3d 439, 442 (5th Cir.(2001)). In this case, the ICCTA expressly preempts Plaintiff's state law claims. This is because the ICCTA expressly grants the STB exclusive jurisdiction over transportation by rail carriers, including the abandonment or discontinuance of rail lines (both main line tracks as well as spurs, sidetracks and yard tracks). The ICCTA's preemption provision 49 U.S.C. §10501(b), expressly provides:

(b) *The jurisdiction of the [Surface Transportation] Board over—*

(1) *transportation by rail carriers, and the remedies provided in this part* [49 U.S.C. §§10101 et seq.] with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, *services, and facilities* of such carriers; and

(2) the construction, *acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities*, even if the tracks are located, or intended to be located, entirely in one State,

*is exclusive.* Except as otherwise provided in this part [49 U.S.C. §§10101 et seq.], *the remedies provided under this part* [49

**U.S.C. §§10101 et seq.] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.**

49 U.S.C. §10501 (emphasis added). “To come within the preemptive scope of 49 U.S.C. 10501(b), these activities must be both: (1) transportation; and (2) performed by, or under the auspices of, a rail carrier.” Canadian Nat’l Railway Co. v. City of Rockwood, Docket No. 04-40323, 2005 WL 1349077, \*3 (E.D.Mich. June 1, 2005). The term “rail carrier” means “a person providing common carrier railroad transportation for compensation.” 49 U.S.C. §10102(5). Additionally, the term “transportation” is expansively defined to include the following:

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

49 U.S.C. §10102(9).

Courts interpreting 49 U.S.C. §10501(b) and considering its preemptive scope “have consistently found that the foregoing preemption clause is both clear and broad.” Columbiana Cty. Port Auth. V. Boardman Tp. Park, 154 F. Supp. 2d 1165, 1180 (N.D. Ohio 2001). The United States Court of Appeals for the Sixth Circuit has stated that:

it is manifestly clear that Congress intended to preempt the Ohio state statutes, and any claims arising therefrom, to the extent that they intrude upon the STB’s exclusive jurisdiction over “transportation by rail carriers” and “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State.”

Railroad Ventures, Inc., 299 F.3d at 562 (quoting 49 U.S.C. §10501(b)). Further, the United States District Court for the Northern District of Ohio has stated that the “ICCTA also evidences the intent of Congress to preempt the field in which state law previously operated with respect to railroads.” Columbiana Cty. Port Auth., 154 F. Supp. 2d at 1180.

Courts outside of the Sixth District have also found the preemptive scope of the ICCTA to be extremely broad. In Wisconsin Central Ltd. v. The City of Marshfield, the court stated “it is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.” 160 F. Supp. 2d 1009, 1013 (W.D. Wisc. 2000)(quoting CSX Transp. Inc. v. Georgia Pub. Serv. Comm’n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)). In City of Auburn v. United States Government, the Ninth Circuit noted that “the Supreme Court repeatedly has recognized the preclusive effect of federal legislation in this area.” 154 F. 3d 1025, 1029. In Rushing v. Kansas City S. Ry. Co., the court found that “the clear and manifest purpose of Congress when it enacted the ICCTA was to place certain areas of railroad regulation within the exclusive jurisdiction of the STB and to preempt remedies otherwise provided under federal or state law.” 194 F. Supp. 2d 493, 498 (S.D. Miss. 2001). Finally, the Fifth District has stated that the preemptive language of 49 U.S.C. §10501 is “so certain and unambiguous as to preclude any need to look beyond that language for congressional intent.” Friberg, 267 F. 3d at 443. The court in Friberg further observed that the “regulation of railroad operations has long been a federal endeavor..., and it appears manifest that Congress intended the ICCTA to further that exclusively federal effort...” Id.

The STB itself has likewise recognized the preemptive effect of the ICCTA. As stated by the STB, “[e]very court that has examined the statutory language has concluded that the preemptive effect of section 10501(b) is broad and sweeping, and that it blocks actions by states

or localities that would impinge on the Board's jurisdiction or a railroad's ability to conduct its rail operations." CSX Transp., Inc., 2005 STB LEXIS 134, \*16 (citing Friberg, 267 F. 3d at 443).<sup>3</sup>

3. **Subject Matter Jurisdiction Lies with the Surface Transportation Board.**

Plaintiff's Complaint seeks a declaration that Defendants have no rights to the City Lots and the rail lines or the railroad facilities thereon. It is, in essence, an attempt to force Defendants to vacate railroad property and abandon rail lines and railroad facilities. Railroad Defendants, however, are Class III rail carriers authorized to operate as common carriers by the STB or the ICC. Further, Railroad Defendants are engaged in interstate commerce, and have used the office building on Lot 62188 for their operations. MVRVY uses the rail lines and other tracks on Lot 62188 to serve its customers, to reach its interchange points with connecting carriers, and to store and stage cars. MVRVY also uses the rail lines to access its locomotive repair shop on Lot 62189, including moving locomotives for itself and the other Railroad Defendants for repairs and required FRA inspections. MVRVY and the other Railroad Defendants never intended to abandon any of the tracks or other railroad facilities on Lot 62188 or Lot

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<sup>3</sup> The STB opinion included the following citations as further supporting ICCTA preemption: City of Auburn, 154 F. 3d at 1029-31 (state and local environmental and land use regulation preempted); Wisconsin Cent. Ltd., 160 F. Supp. 2d at 1014 (attempt to use a state's general eminent domain law to condemn an actively used railroad passing track preempted); Dakota, Minn. & E. R.R. v. State of South Dakota, 236 F. Supp. 2d 989, 1005-08 (S. S.D. 2002), aff'd. on other grounds, 362 F. 3d 512 (8th Cir. 2004) (revisions to state's eminent domain law preempted where revisions added new burdensome qualifying requirements to the railroad eminent domain power that would have the effect of state "regulation" of railroads); CSX Transp. Inc., 944 F. Supp. at 1573 (state regulation of a railroad's closing of its railroad agent locations preempted); Soo Line R.R. v. City of Minneapolis, 38 F. Supp. 2d 1096 (D. Minn. 1998) (local permitting regulation regarding the demolition of railroad buildings preempted); Cedarapids, Inc. v. Chicago, Cent. & Pac. R.R., 265 F. Supp. 2d 1005, 1013-14 (N.D. Iowa 2003) (ICCTA preemption applies broadly to operations on both main line and auxiliary spur and industrial track); Norfolk S. Ry. v. City of Austell, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236 (N.D. Ga. 1997) (local zoning and land use regulations preempted); Village of Ridgefield Park v. New York, Susquehanna & W. Ry., 750 A.2d 57 (N.J. 2000) (amended complaints about rail operations under local nuisance law preempted). CSX Transp., Inc., 2005 STB LEXIS 134, \*16-18 (STB 2005).

62189. Forcing abandonment of the tracks and other railroad facilities would materially interfere with their ability to the needs of their customers, and their common carrier obligations.

It is undisputed that the Railroad Defendants are “rail carriers” as defined by the ICCTA, and that the use of the property and rail lines contained on Lot 62188 falls within the ICCTA’s definition of “transportation.” Since Plaintiff’s state law claims for possession and damages would “regulate” Defendants in their use of the property, Plaintiff’s claims are clearly preempted.

The relief requested by the Plaintiff (i.e., Defendants’ forced abandonment or discontinuance of the use of the rail lines on Lot 62188) can only be accomplished pursuant to the rules, regulations, and authority of the STB. Under the ICCTA, rail lines may not be abandoned or discontinued unless authorized by the STB. As stated in the ICCTA:

(a)(1) A rail carrier providing transportation subject to the jurisdiction of the

Board under this part who intends to –

(A) abandon any part of its railroad lines; or

(B) discontinue the operation of all rail transportation over any part of its railroad lines,

must file an application relating thereto with the Board. An abandonment or discontinuance may be carried out *only as authorized under this chapter.*

49 U.S.C. §10903(a)(1) (emphasis added). The authority of the STB (and before it the ICC) over abandonments has long been held to be both plenary and exclusive, even before the express preemption of Section 10501(b) was enacted. Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co. (“Kalo Brick”), 450 US 311, 318-319 (1980). This is true whether the tracks are “main lines” or spurs, sidetracks or yard tracks. See Port City Properties v. Union

Pacific Railroad Company, 518 F.3d 1186, 1188 (10<sup>th</sup> Cir. 2008).<sup>4</sup> And it is true regardless of the interest of the railroad in the underlying property.<sup>5</sup> As such, Plaintiff would be required to obtain a certificate of abandonment from the STB allowing abandonment of the line of railroad on Lot 62188 (and a determination from the STB that the spurs, sidetracks and yard tracks, and other railroad facilities on the property (including the office) have been abandoned by MVRV and the other Railroad Defendants) before Plaintiff may pursue any remedies based on state law.<sup>6</sup>

In State of Louisiana v. Illinois Central Railroad, 928 So.2d 60 (La.App. 1 Cir. 2005), the State of Louisiana sought to be declared owner of certain property, to have competing interests in the property declared invalid, and to recover monetary awards for trespass and environmental damages. Id. at 62. The defendant railroad argued that the State's suit was an improper attempt to force a railroad to abandon its tracks, an issue committed to the exclusive jurisdiction of the STB. The court held that because the railroad was using railroad tracks over the property, jurisdiction of the STB was triggered regardless of whether the railroad had a valid ownership or servitude interest in the property. Id. at 70. Citing the Sixth Circuit in Railroad Ventures, Inc. v. Surface Transp. Board, 299 F.3d at 563, the Louisiana appeals court stated that "[b]ased on the language of Section 10501(b) ... it is manifestly clear that Congress intended to preempt...state statutes, and any claims arising therefrom, to the extent that they intrude upon the STB's

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<sup>4</sup> The Court of Appeals explained: "[Section] 10906 [of Title 49] has been interpreted to preclude *all* regulation of industrial or spur tracks. 'When sections 10906 and 10501(b)(2) are read together, it is clear that Congress intended to remove [STB] authority over the entry and exit of these auxiliary tracks, while still preempting state jurisdiction over them, leaving the construction and disposition of [them] entirely to railroad management.' ... In short, read together §10501 and §10906 completely preempt [plaintiff's] state law tort claims with respect to spur or industrial tracks." (Emphasis in original; citations omitted).

<sup>5</sup> "Transportation" as defined in 49 USC §10102(9) expressly includes "yard, property, facility, [or] instrumentality...of any kind related to the movement of ...property...by rail, *regardless of ownership or an agreement regarding use.*" (Emphasis added.)

<sup>6</sup> See Seminole Gulf Railway, L.P. – Adverse Discontinuance – In Lee County, FL, STB Docket No. AB-400 (sub-No. 4) (served November 18, 2004), slip op. at 4-5, 2004 STB LEXIS 742 at 8-10; Cheatham County Rail Authority "Application and Petition" for Adverse Discontinuance, ICC Finance Docket No. 32049 (served August 31, 1992), slip op. at 2 (considering state court order for rail carrier to cease operations based on expiration of railroad's lease).

exclusive jurisdiction over ‘transportation by rail carries’ and ‘the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State.’” 928 So.2d at 71. Noting that “[a]bandonment ‘is characterized by an intention of the carrier to cease permanently or indefinitely all transportation service on the relevant line’” (citing Kalo Brick, supra, 450 U.S. at 311 n. 2), the court then stated that a railroad line may be abandoned only upon a determination by the STB under 49 U.S.C. §10903(d) that abandonment is consistent with “present or future public convenience and necessity”. Id. The court concluded that because the purpose of the case before it was to oust the railroad from the property and require it to abandon its tracks, it “was appropriate to treat the claim as a ‘forced’ or ‘adverse’ abandonment claim” precluded by the ICCTA. Id. at 72. See also Cedarrapids, supra, 265 F. Supp. 2d 1005, 1016 (N.D. Iowa 2003) (finding issues of classification and abandonment of tracks in question to be within exclusive jurisdiction of STB, and dismissing state law claims seeking to enjoin use of tracks); Louisiana & Arkansas Ry. Co. v. Bickham, 602 F. Supp. 383 (M.D.La. 1985), aff’d, 775 F.2d 300 (5<sup>th</sup> Cir. 1985) (holding that the property owner’s interference with a railroad’s use of servitude was unlawful and that the owner should have filed an application with the ICC to have the railroad line declared abandoned prior to destroying tracks that remained on the property in question).

The STB has had recent occasion to review and discuss its jurisdiction in the face of similar state law claims. In Mark Lange – Petition for Declaratory Order, STB Finance Docket No. 35037 (served January 28, 2008), 2008 STB LEXIS 45 at 8-9; Lange (on referral from a Wisconsin state court) sought a declaratory order that his state law trespass claims seeking to have the railroad (Wisconsin Central, Ltd. (“WCL”)) remove a fence and equipment from

property allegedly owned by Lange, or damages, were not preempted by Section 10501(b). The

STB held:

In his trespass suit, Lange seeks immediate possession of the disputed property and the removal of the railroad's fence and other equipment. Granting this relief would deprive WCL of the ability to continue to use the property, which WCL maintains is needed for its rail operations. Accordingly, to the extent that Lange's trespass suit seeks to dispossess WCL of property that is being used for railroad operations, the state law claims would effectively regulate rail transportation, and thus are preempted under section 10501(b). See Wisconsin Cent. Ltd. v. City of Marshfield, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000); City of Lincoln—Petition for Declaratory Order, STB Finance Docket No. 34425 (STB served Aug. 12, 2004), aff'd, City of Lincoln v. STB, 414 F.3d 858 (8th Cir. 2005) (Lincoln).

Lange argues that, because the activities WCL conducts on the property are "remote to the operation of the switch," Lange's attempt to remove WCL from the property does not fall within the scope of the federal preemption. But WCL has shown that it uses the property for rail maintenance and snow removal activities and access to switching lead tracks and switches, as well as for conductors to walk alongside trains while they perform switching duties. Denying WCL access to the property would interfere with or prevent these activities, all of which are part of "transportation" by rail under 49 U.S.C. 10102(9).

Id., slip op at 3-4. Thus, the STB concluded that both claims to evict the railroad, and claims for damages arising from the railroad's use of the property were preempted by ICCTA.

More recently, the STB addressed the question of whether a railroad could be ordered to remove yard tracks that an adjacent landowner claimed had been abandoned and become a nuisance, but that the railroad was continuing to use. The STB had no problem in finding the state law claims preempted:

Industrial yard track, while excepted under 49 USC 10906, from the need to obtain Board authority for construction, abandonment, or operation, is nevertheless subject to the Board's jurisdiction and is not subject to state or local regulation. Indeed, although prior to the passage of ICCTA, state regulatory agencies had some

authority over excepted track, ICCTA added a new provision that specifically establishes the exclusivity of the Board's jurisdiction over "transportation by rail carriers." This jurisdiction includes exclusive jurisdiction over "the construction, acquisition, operation, abandonment or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State." 49 USC 10501(b)(2). when sections 10501(b) and 10906 are read together, it is clear that Congress intended to occupy the field and preempt state jurisdiction over excepted track such as yard track, even though Congress allowed rail carriers to construct, operate, and remove such facilities without Board approval. See ICCTA Conf. Rpt., H.R. Rep. No. 311, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. at 95 (1995). Therefore, Federal courts have uniformly held that state law tort claims such as those brought by Mr. Fox – which would interfere with rail carrier operations, including operations involving spur, industrial, team, switching, or side tracks – are preempted.

Joseph R. Fox – Petition for Declaratory Order, STB Finance Docket No. 35161 (served May 18, 2009), slip op at 4 (footnotes omitted), 2009 STB LEXIS 180 at 8-10. The STB found that the railroad's use of the segment for staging and storing rail equipment for customers, as a car repair site, and storing cabooses contradicted any intent to take abandon the track segment. Id., slip op at 5.

There is no dispute that Railroad Defendants continued to use the tracks and other railroad facilities on Lot 62188 after the disputed sale to Gearmar (and then to Plaintiff), and that they never abandoned use of such facilities. The relief Plaintiff seeks in this case would directly and materially interfere with the use of the tracks and other railroad facilities, and thus is squarely within the STB's exclusive authority. Plaintiff seeks an order requiring Defendants to vacate railroad property and cease to use (i.e., abandon) operating rail lines (both main lines as well as yard tracks and switching tracks) and other railroad facilities (including the office building). Under the provisions of the ICCTA, 49 U.S.C. §10501 and §10903, Plaintiff's action is clearly completely preempted.

4. **The ICCTA also Preempts Civil Actions Seeking Damages or Equitable Relief.**

It has been repeatedly held that ICCTA's preemption clause applies not only to state statutes and regulations which have the effect of regulating interstate rail operations, but also to civil actions brought in state court by private parties seeking equitable or monetary relief based on state common law. ICCTA provides that the remedies set forth in ICCTA are exclusive. 49 U.S.C. §10501(b). Courts have consistently applied ICCTA preemption to dismiss claims, like those asserted herein (which are not based on violations of ICCTA), brought by property owners against railroads based on the alleged misuse of rails running over or adjacent to the plaintiffs' property. See Friberg, supra; Suchon v. Wis. Cent. Ltd., No. 04-C-0379-C, 2005 WL 568057 (W.D. Wis. Feb. 23, 2005); Maynard v. CSX Transp., Inc., 360 F. Supp. 2d 836, 842 (E.D. Ky. 2004); Guckenberg v. Wis. Cent. Ltd., 178 F. Supp. 2d 954 (E.D. Wis. 2001); Rushing, supra; Lange, supra.

B. **ALTERNATIVELY, THE COURT SHOULD REFER THE TRANSPORTATION ISSUES UNDERLYING THE COMPLAINT TO THE STB.**

As shown above, this Court lacks subject matter jurisdiction and should dismiss this case. However, in the event the Court finds that it in fact has subject matter jurisdiction in the instant matter over some or all of Plaintiff's claims, Defendants request the Court to stay all proceedings and refer<sup>7</sup> the issues discussed below to the STB for resolution, pursuant to the doctrine of primary jurisdiction.

Defendants are rail carriers' subject to the jurisdiction of the STB pursuant to 49 U.S.C. §10101, *et seq.* The STB is the administrative agency charged with expert skill and knowledge

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<sup>7</sup> The term "referral" as used herein describes the procedure by which the district court stays further action in a case "so as to give (the party) a reasonable opportunity within which to apply to (the STB) for a ruling." Reiter v. Cooper, 507 U.S. 258, 268 n.3 (1993).

of the interstate transportation industry, including rail carriers. F.P. Corp. v. Ken Way Transp., Inc., 821 F. Supp. 1032, 1036 (E.D. Pa. 1993) (referring to the ICC); see also 49 U.S.C. §10501. Courts developed the doctrine of primary jurisdiction to avoid conflicts between the courts and administrative agencies charged with particular regulatory duties. United States v. Western Pacific R.R. Co., 352 U.S. 59, 63 (1956). The doctrine of primary jurisdiction applies to claims that are originally cognizable in a federal court. Id. at 64. Primary jurisdiction comes into play when judicial enforcement of a claim requires the resolution of issues which, under the regulatory scheme, have been placed within the special competence of an administrative body. Id. In such a case, the court should suspend the case pending referral of such issues to the administrative body. Id. In general, a court should refer a matter to an administrative agency for resolution if it appears that the matter involves technical or policy considerations that are beyond the court's ordinary competence and within the agency's particular field of expertise, or where there is the possibility of contradictory rulings from the agency and the court. MCI Communications Corp. v. AT&T, 496 F.2d 214, 220 (3d Cir. 1974).

If the Court determines to refer questions to the STB, then Defendants request the opportunity to submit, for the Court's consideration, the questions that they believe should be referred to the STB.<sup>8</sup>

Not only is the STB in the best position to determine Defendants' rights to the railroad lines, tracks, facilities and property at issue here, and the scope of preemption as it relates to

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<sup>8</sup> The types issues raised by Plaintiff's Complaint that could be referred include: (1) Which of the tracks on Lot 62188 are lines of railroad, and which are spurs, sidetracks, switching tracks, yard tracks or other excepted tracks under 49 U.S.C. §10906? (2) Are the tracks being used for transportation as defined by ICCTA? (3) Is the office building a railroad facility being used for transportation as defined by ICCTA? (4) Would the proposed ejection of Railroad Defendants from Lot 62188 interfere with interstate commerce? (5) Have the Railroad Defendants abandoned the lines of railroad on Lot 62188? (6) Have the Railroad Defendants evidenced an intent to abandon any of the tracks or railroad facilities on Lot 62188? (7) Are the state law claims presented by Plaintiff for ejection and for damages preempted by ICCTA?

Plaintiff's claims, but the parties to this case are already currently before the STB in a separate proceeding referred to the STB by this Court. On November 2, 2009, Plaintiffs filed a Petition For Declaratory Order with the STB, and on November 23, Defendants filed their response. (Additional filings regarding a proposed procedural schedule have since been filed with the STB.) The STB has not yet ruled on the Petition or set a schedule. Although the property involved and the issues are different, since the parties to this case are already before the STB, it would be particularly logical and appropriate to refer this case to the STB as well (if the Court determines not to dismiss the Plaintiff's Complaint).

**C. EFFECT OF COURT'S DECISION ON AMENDED COUNTERCLAIM AND THIRD PARTY COMPLAINT**

Defendants acknowledge that if the Court were to dismiss the Plaintiff's Complaint for lack of subject matter jurisdiction, it might also find that Count II of Defendants' Amended Counterclaim should also be dismissed on such grounds. Similarly, if the Court determines to refer certain issues to the STB, it might also determine that the transportation issues related to Count II should also be referred to the STB.<sup>9</sup> However, dismissal or referral should not result in a dismissal of the pendant state law claims raised by Defendants in their Amended Counterclaim and Third Party Complaint.

**III. CONCLUSION**

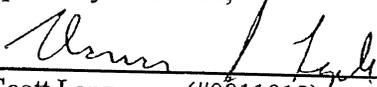
The claims in Plaintiffs' First Amended Complaint are completely preempted by the ICCTA and should therefore be dismissed pursuant to Rule 12(b)(1). In the alternative, if the Court determines that it has jurisdiction over some or all of Plaintiff's claims, then Defendants

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<sup>9</sup> Such questions could include, for example, the effect of a sale of property with active lines of railroad, tracks or other railroad facilities when the purchaser has not obtained STB authority to operate as a railroad.

request that the Court stay all proceedings and provide a Notice of Referral to the Surface Transportation Board to adjudicate the issues that are within the Board's primary jurisdiction.

Respectfully submitted,

  
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Thomas J. Lipka (#0067310)  
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The Commerce Building, Atrium Level Two  
Youngstown, Ohio 44503  
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OF COUNSEL

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was sent by regular U.S. mail, postage prepaid this 22 day of May, 2010 to:

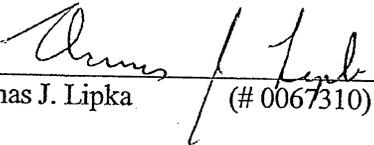
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Eckert Seamans Cherin & Mellott, LLC  
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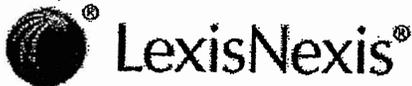
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INTERSTATE COMMERCE COMMISSION

[Finance Docket No. 29658 (Sub-1)]

46 FR 40097

August 6, 1981

Mahoning Valley Railway Co.; Operation of a Line of Railroad in Mahoning County, OH; Notice

**TEXT:** Mahoning Valley Railway Company (Applicant), represented by Mr. J. L. Hadley, Vice President, The Mahoning Valley Railway Company, P.O. Box 920, Youngstown, OH 44501, hereby gives notice that on the 5th day of June, 1981, it filed with the Interstate Commerce Commission at Washington, DC, an application pursuant to 49 U.S.C. 10901 for a decision approving and authorizing it to operate a line of railroad consisting of approximately eighteen (18) miles of track owned or leased by Mahoning Valley, with operations also over approximately twenty-five (25) miles owned by industries being served in Mahoning County, OH. No new construction is anticipated in the operation of this railroad, which will serve industrial concerns along the Mahoning River in the Cities of Youngstown, Campbell and Struthers, all located in Mahoning County, OH.

Applicant does not propose to construct a new line of railroad. Applicant does propose to acquire industrial rail facilities owned by Jones & Laughlin Steel Corporation and not presently being operated by a common carrier, and to operate over additional railroad tracks owned by industries being served. Applicant proposes to service Jones & Laughlin Steel Corporation, Youngstown Steel Corporation, Casey Equipment Corporation, Monroe & Sons Manufacturing Corporation, Hilti Steel Industry Products Corporation, and any other industries that may choose to locate along the tracks over which Applicant proposes to operate.

In accordance with the Commission's regulations (49 CFR 1108.8) in Ex Parte No. 55 (Sub-No. 4), *Implementation -- National Environmental Policy Act, 1969, 352 ICC 451 (1976)*, as amended by the Commission's decision in Ex Parte No. 55 (Sub-No. 22), *Revision of National Environmental Policy Act Guidelines, 363 ICC 653 (1980), 45 FR 79810 (December 2, 1980)*, any protests may include a statement indicating the presence or absence of any effect of the requested Commission action on the quality of the human environment. If any such effect is alleged to be present, the statement shall indicate with specific data the exact nature and degree of the anticipated impact. See *Implementation -- National Environmental Policy Act, 1969, supra, at p. 487*.

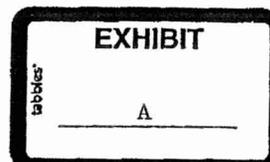
Pursuant to the provisions of the Interstate Commerce Act, as amended, the proceeding will be handled without public hearings unless comments in support or opposition on such application are filed with the Secretary, Interstate Commerce Commission, 12th and Constitution Avenue, NW., Washington, DC 20423, and the aforementioned counsel for applicant, within 30 days after date of publication of this notice in a newspaper of general circulation. Any interested person is entitled to recommend to the Commission that it approve, disapprove, or take any other specified action with respect to such application.

Agatha L. Mergenovich,

Secretary.

[FR Doc. 81-22959 Filed 8-5-81; 8:45 am]

BILLING CODE 7035-01-M





building that was used as the offices of the Youngstown Division. MVRV has owned Lot 62188 since 2001; prior to that it operated the tracks under a lease with the property owner. Lot 62188 also includes a small office building that was added in 2007 to Lot 62188 by means of a replat from the adjacent Lot 62320 that was at one time owned by OHPA. The office building has been used as the offices of the Youngstown Division since 2004 when OHPA acquired Lot 62320.

4. MVRV is also the owner of Youngstown City Lot 62189 which is contiguous to Lot 62188, and which contains a shop which is used by the Youngstown Division for repairs of locomotives and other equipment, and for required FRA inspections of locomotives.

5. MVRV became the owner of Lots 62188 and 62189 in 2001 just prior to the sale of the stock of MVRV to Defendant Summit View, Inc. ("Summit View") by LTV Steel Company ("LTV"), and its subsidiary The Cuyahoga Valley Railway Company. Prior to 2001, MVRV operated the tracks and facilities on Lots 62188 and 62189 under lease with LTV and its predecessors. Defendant Genesee & Wyoming, Inc. ("GWI") acquired the stock of Summit View, and indirect control of the Railroad Defendants, in January, 2009.

6. MVRV's main line continues over adjacent parcels east of Lot 62188 to a connection with Norfolk Southern Railway Company ("NSR"), and west of Lot 62188 to a connection with CSX Transportation, Inc. ("CSXT").

7. At the time this lawsuit was filed, MVRV was using the tracks on Lot 62188 to serve a customer located on Lot 62320, to access its other customers, to reach its interchange points with connecting railroads, CSXT, and NSR, to store and stage cars, and to access the locomotive repair shop located on Lot 62189. MVRV also used Lot 62188 to store railroad materials. MVRV and the Railroad Defendants were using the office building as the local headquarters for the Youngstown Division. MVRV and the Railroad Defendants had been

making daily use of the tracks, facilities and property prior to the 2007 sale of Lot 62320 to Gearmar, and continued to do so thereafter. Under threat of lockout by Allied, the Youngstown Division vacated the office building and removed the stored cars and materials from Lot 62188.

8. Without the use of the main line and tracks on Lot 62188, MVR Y would not be able to make any use of the locomotive shop on Lot 62189, and it would be unable to move traffic from one side of Lot 62188 to the other which is necessary for the movement of traffic between customers and the connections with NSR and CSXT.

9. Railroad Defendants are Class III rail carriers authorized to operate as common carriers by the Surface Transportation Board, or its predecessor the Interstate Commerce Commission. Each of these railroads are engaged in interstate commerce.

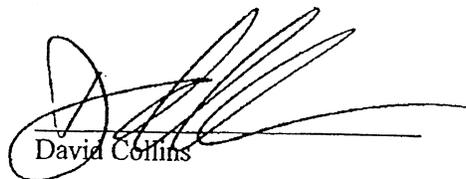
10. Summit View and GWI are not operating railroads and do not directly use any of the rail lines, tracks, other railroad facilities at issue.

11. MVR Y and the Railroad Defendants never intended to transfer or abandon use of the main line railroad, other tracks, and other facilities (including the office building) on Lot 62188.

12. The use of main line railroad, tracks, and other facilities located on Lot 62188 is in furtherance of interstate commerce. If MVR Y is dispossessed from the use of Lot 62188, it will materially interfere with its ability to meet its common carrier obligations.

AFFIANT FURTHER SAYETH NAUGHT.

Dated: 5/26/10

  
David Collins

STATE OF OHIO )  
                  *Coshocton* )  
COUNTY OF MAHONING )

SS:

Sworn to and subscribed before me this 26 day of May, 2010.

*Kimberly R. Wright*  
Notary Public  
My commission expires on:



Kimberly R. Wright  
Notary Public, State of Ohio  
My Commission Expires  
July 17, 2013

**I**

IN THE COURT OF COMMON PLEAS OF MAHONING COUNTY, OHIO

ALLIED INDUSTRIAL DEVELOPMENT CORPORATION,

Plaintiff/ Counterclaim Defendant,

v.

OHIO CENTRAL RAILROAD, INC., et al.,

Defendants/ Counterclaimants/ Third Party Plaintiffs,

v.

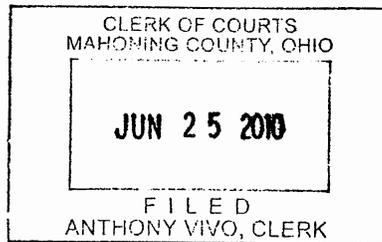
GEARMAR PROPERTIES, INC.,

Third Party Defendant.

: 2009 CV 2835

: Judge Maureen A. Sweeney

: Magistrate Dennis Sarisky

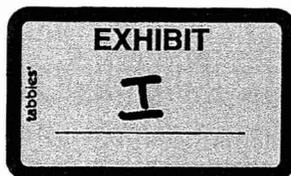


**PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, REFER TO THE SURFACE TRANSPORTATION BOARD**

Plaintiff, Allied Industrial Development Corporation ("Allied"), by and through its counsel, submits its Brief in Opposition to Defendants' Motion to Dismiss or, In the Alternative, Refer to the Surface Transportation Board.

**INTRODUCTION**

Defendants claim that Allied's state law claims for ejection and trespass are preempted by the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101 et seq. ("ICCTA"), and therefore the claims should be referred to the federal Surface Transportation Board ("STB"). Contrary to what is asserted in Defendants' Motion and accompanying Memorandum, Allied is not asking this Court to regulate or interfere with Defendants' rail operations in any manner which implicates the jurisdiction of the STB. Both the courts and the



STB have emphasized that the STB has no jurisdiction to determine state law property rights, or to decide the enforcement of a railroad's voluntary agreements. In short, Defendants cannot use the preemptive provisions of ICCTA to shield themselves from their own voluntary contractual commitments or, in this case, property transfers. It falls to this Court (and a jury), not the STB, to determine whether Defendants voluntarily and legally conveyed the disputed property to Gearmar Properties, Inc. ("Gearmar"), the Third Party Defendant, which then sold it to Allied.

If this Court determines, as the documentary record indisputably shows, that Allied owns Lot 62188 and the tracks thereon, then Defendants will have no right to operate over this property, absent an easement, right-of-way, or trackage agreement – all of which they have been unable to show. Furthermore, Defendants have provided no authority from any source that suggests that a railroad somehow has a right to operate over property for which it has no ownership rights, easement or right-of-way rights, or trackage agreement.

Contrary to Defendants' assertions, prohibiting the railroad from operating on land over which they have no underlying property right to operate is not a forced abandonment which implicates the jurisdiction of the STB. It is the natural outcome of Defendants' voluntary decision to sell the subject property. Moreover, even if the railroad's decision to sell the subject property amounts to an abandonment, there is no requirement that the STB approve such an abandonment, because the railroad tracks in dispute here are merely industrial, siding or yard tracks (*i.e.*, "excepted" tracks). Thus, there is no issue for the STB to decide, and the Court should deny Defendants' Motion in its entirety.

#### **FACTUAL BACKGROUND**

This action arises out of Allied's purchase of Youngstown City Lot Nos. 62320 and 62188 from Gearmar, which Gearmar previously purchased from defendants The Ohio &

Pennsylvania Railroad Company (“O&P”) and The Mahoning Valley Railway Company (“MVRV”), respectively. As described in the Amended Complaint, Allied’s purchase of these properties from Gearmar led to the parties’ subsequent dispute regarding the ownership of Lot No. 62188. Lot No. 62188, as it is presently platted, is approximately 15.811 acres and contains a small office building and various sets of railroad tracks which are the internal plant lines of the former Republic Steel tube mill site. Deposition of John Ramun, p. 13, 18; Deposition Exhibit 2.<sup>1</sup> Lot No. 62320, as it is presently platted, is approximately 29.855 acres, the majority of which is the former Republic Steel tube mill. Dep. Ex. 2.

On July 27, 2009, Allied filed its Complaint for Forcible Entry and Detainer (the “Complaint”) in the Court of Common Pleas of Mahoning County. The Complaint sought to eject all Defendants from Lot Nos. 62320 and 62188 on the grounds that they held no legal or equitable right to be on those properties due to Allied’s purchase of the lots (Count I), and to recover damages due to Defendants’ trespass on Lot Nos. 62320 and 62188 (Count II). On August 13, 2009, Defendants removed this action to the Northern District of Ohio on the grounds that the relief sought by Allied is preempted by ICCTA<sup>2</sup> because Allied seeks to remove Defendants from the railroad tracks located on Lot No. 62188. On September 21, 2009, Defendants filed an Answer and Third Party Complaint which added Gearmar to the case. On October 30, 2009, Allied filed an Amended Complaint in the Northern District of Ohio which added Summit View, Inc. as a defendant, but contained no other changes.

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<sup>1</sup> The relevant portions of the deposition of John Ramun, as well as the other exhibits submitted in support of this brief, are included in the accompanying Appendix. Deposition Exhibit 2 is attached to the Appendix as Exhibit 2.

<sup>2</sup> The ICCTA, which was enacted in 1995, abolished the Interstate Commerce Commission and established the Surface Transportation Board (“STB”) as the federal agency with jurisdiction over certain aspects of rail transportation. See generally Railroad Ventures, Inc. v. Surface Transportation Board, 299 F.3d 523 (6th Cir. 2002).

In the Northern District of Ohio, Defendants filed a Motion to Dismiss or In the Alternative Refer to the Surface Transportation Board, and a Memorandum in Support. This motion was essentially the same as the motion which is presently pending before this Court. In denying this motion, the Judge Gwin found that “neither of Allied Industrial’s claims comes within the scope of the ICCTA’s preemption clause. That clause’s central concern is ‘regulation of rail transportation’ – not the incidental effect on rail transportation caused by a landowner’s right to exclude others from its property.” Opinion and Order dated March 15, 2010, p. 5.<sup>3</sup> Judge Gwin also found that “Allied Industrial’s Ohio law claims cannot be said to ‘regulate’ the abandonment of rail lines. It is true that the upshot of Allied Industrial’s claims (if successful) might affect certain of the defendants’ rail lines. But the cause of that outcome is not Ohio’s direct regulation of the defendants’ rail lines; rather, the cause is the defendants’ sale of the two parcels at issue to Gearmar.” Opinion and Order dated March 15, 2010, p. 6. Accordingly, Judge Gwin rejected Defendants’ claim that the case was properly removed on the basis of “federal question” jurisdiction under ICCTA. Judge Gwin also found that Defendants’ removal of the case was not “objectively reasonable,” and therefore awarded Allied the attorneys’ fees which were incurred in connection with the wrongful removal. Opinion and Order dated April 15, 2010.<sup>4</sup>

### LEGAL ARGUMENT

#### A. ICCTA Preemption Is Not as Broad as Defendants Contend.

Defendants cite the ICCTA preemption provision, 49 U.S.C. § 10501(b), as well as numerous cases, for the proposition that ICCTA preemption is extremely broad. See Defendants’ Memorandum at 6-9. However, case law makes it clear that the STB does not have

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<sup>3</sup> Appendix Exhibit 3.

<sup>4</sup> Appendix Exhibit 4.

jurisdiction over the subject matter of this action, *i.e.*, the enforcement of agreements concerning private property rights. For example, in PCS Phosphate Company, Inc. v. Norfolk Southern Corp., 559 F.3d 212 (4th Cir. 2009), the United States Court of Appeals for the Fourth Circuit held that judicial enforcement of an easement granted by a landowner to the predecessors in interest of the railroad is not preempted by the ICCTA “because it is not the sort of rail ‘regulation’ contemplated by the statute and, as a voluntary agreement, does not ‘unreasonably interfere’ with rail transportation.” PCS Phosphate, 559 F.3d at 214. In that case, predecessors to the owners of a phosphate mine granted an easement to a predecessor railroad to construct a rail line over the mine property. *Id.* at 215. The easement contained a covenant whereby the railroad agreed to relocate the rail line, at its expense, if the mine owners deemed relocation to be necessary to mine operations. *Id.* Many years later, the mine owners determined that mining under the rail line was necessary, and requested the railroad to relocate the rail line pursuant to the easement. *Id.* at 216. After the railroad refused to relocate the rail line, the mine owners relocated the line at their own expense and sued the railroad to recover their expenses. *Id.*

On appeal, the U.S. Court of Appeals held (as did the district court) that the enforcement of the easement was not preempted by the ICCTA, and rejected an overly broad construction of the ICCTA preemption clause. First, the court observed that ICCTA’s preemption clause “focuses specifically on regulation,” and that “Congress narrowly tailored the ICCTA preemption provision to displace only regulation, *i.e.*, those state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation.” *Id.* at 218. The court’s further analysis is instructive on what is and is not preempted by ICCTA:

Voluntary agreements between private parties, however, are not presumptively regulatory acts, and we are doubtful that most private

contracts constitute the sort of “regulation” expressly preempted by [ICCTA]. If contracts were by definition “regulation,” then enforcement of every contract with “rail transportation” as its subject would be preempted as a state law remedy “with respect to regulation of rail transportation.” 49 U.S.C. § 10501(b). Given the statutory definition of “transportation,” this would include all voluntary agreements about “equipment of any kind related to the movement of passengers and property, or both, by rail.” See 49 U.S.C. § 10102(9) (defining “transportation”). **If enforcement of these agreements were preempted, the contracting parties’ only recourse would be the “exclusive” ICCTA remedies. But the ICCTA does not include a general contract remedy.** Such a broad reading of the preemption clause would make it virtually impossible to conduct business, and Congress surely would have spoken more clearly, and not used the word “regulation,” if it intended that result.

Id. at 218-19 (emphasis added).

The court went on to review the legislative history of ICCTA, which makes clear that the intent of Congress was simply to preempt “State economic regulation of railroads,” not to preempt enforcement of “all voluntary agreements about rail transportation.” Id. at 220 (emphasis in original). As the court observed, “[t]he STB itself has emphasized that courts, not the STB, are the proper forum for contract disputes, even when those contracts cover subjects that seem to fit within the definition of ‘rail transportation.’” Id. (citing The N.Y., Susquehanna & W. Ry. Corp. – Discontinuance of Service Exemption, 2008 WL 4415853 (STB Sept. 30, 2008)).

Additionally, the Surface Transportation Board (“STB”) has held that a party to a contract involving real estate cannot escape its voluntary contractual commitments by invoking the preemptive effect of § 10501 of ICCTA. Township of Woodbridge v. Consolidated Rail Corp., STB Docket No. 42053 (STB served December 1, 2000), clarified (STB served March 23, 2001), and available at 2000 STB LEXIS 709, 2000 WL 1771044 and 2001 STB LEXIS 299, 2001 WL 283507, respectively. In Woodbridge, a railroad company entered into a valid and

enforceable agreement curtailing the “idling of locomotives and switching of rail cars . . . between 10:00 p.m. and 6 a.m.” as part of a settlement of a lawsuit filed by the Township of Woodbridge (the “Township”). 2000 WL 1771044, \*1. The Township later filed an action with the STB seeking a declaration that the railroad company was bound by the settlement agreement, and that the settlement agreement could be enforced in federal or state courts. Id. The STB agreed with the Township. Id. at \*3-4. In declining to rule on the merits of the contract disputes, the STB noted that while regulatory action that affected railroad operations was preempted, commitments entered into by way of voluntary contracts are not. Id. at \*3. The STB further declined to consider preemption issues that “would have been involved” if the case were one of legislative regulation. Id. Such voluntary agreements, the STB indicated, could be seen as indicating the railroad’s own “determination and admission that the agreements would not unreasonably interfere with interstate commerce.” Id.

Similarly, in Pejepscot Industrial Park, Inc. v. Maine Central Railroad Co., the United States District Court for the District of Maine explained:

In its initial decision, the STB concluded that a rail carrier that voluntarily enters into an otherwise valid and enforceable agreement cannot use the preemptive effect of section 10501(b) to shield it from its own commitments, provided that the agreement does not unreasonably interfere with interstate commerce. In clarifying that earlier decision, the STB subsequently noted that a rail carrier that enters into such agreements is not precluded from arguing “as a matter of contract interpretation that: (1) unreasonable interference with interstate commerce would result if these voluntary agreements are interpreted [in the manner sought by the plaintiff], and (2) in considering enforcement, the court should give due regard to the impact on interstate commerce.”

297 F.Supp.2d 326, 330, 332-333 (D. Me. 2003) (internal citations omitted).

The court in Pejepscot held that the plaintiff’s breach of contract claim was not preempted by ICCTA and, therefore, would not be dismissed. Id. at 333. See also Pejepscot

Industrial Park, Inc. – Petition for Declaratory Order, STB Finance Docket No. 33989, 2003 STB LEXIS 253 (STB served May 15, 2003) (“[W]e in the past determined that a carrier cannot invoke the preemption provisions of 49 U.S.C. 10501(b) to avoid its obligations under a presumably valid and otherwise enforceable agreement that it has entered into voluntarily, where enforcement of the agreement would not unreasonably interfere with interstate commerce.”); see also CSX Transportation, Inc. – Petition for Declaratory Order, STB Finance Docket No. 34662 n. 14, 2005 STB LEXIS 134 n. 14 (STB served March 14, 2005).

**B. The Issue of Which Party Owns the Disputed Property Falls Outside of the Jurisdiction of the STB Under ICCTA.**

The STB’s own case law makes it clear that the STB does not involve itself in disputes over the ownership of real estate. Preliminarily, there is a “presumption that areas of law traditionally reserved to the states, like police powers or property law, are not to be disturbed absent the clear and manifest purpose of Congress.” New Orleans & Gulf Coast Railway Co. v. Barrois, 533 F.3d 321, 334 (5th Cir. 2008). Consistent with this presumption, the STB itself has emphasized that “[i]t is well settled that the interpretation of deeds and the determination of who owns good title are issues of State law that are outside the expertise of this Board.” Central Kansas Railway LLC--Abandonment Exemption, Marion & McPherson Counties, KS, STB Finance Docket AB-406 (Sub-No. 6X) (served May 8, 2001), 2001 WL 489991 at 2, 4-6. In Central Kansas, the STB, when presented with a dispute involving title to property, refused to rule on state property law questions and stated that the parties first had to seek a court ruling on the underlying state property law issues. “Once a state court has ruled on the ownership disputes as to the parcels at issue, a party may submit the state court’s ruling to [the STB] with a request for a determination of whether all or part of the line has been abandoned as a result....” Id. at 5.

The main dispute in the present case centers upon whether Allied lawfully owns Lot 62188 as a result of a purchase from Third-Party Defendant Gearmar. Defendants contend that Allied does not, saying that they never intended to convey Lot 62188 and that a mistake was made when the property was conveyed to Gearmar. Clearly, these are state law issues that the STB cannot and will not answer for the parties. Moreover, to the extent the STB needs to provide approval for the sale of Lot 62188 (which, as explained below, it does not), the STB clearly has held that a court should determine the ownership rights of the parties prior to sending the case to the STB.

In a misguided attempt to suggest that the STB somehow operates without regard to state law property rights, Defendants cite the case of State of Louisiana v. Illinois Central Railroad Co., et al., 928 So.2d 60 (La. App. 1<sup>st</sup> Cir. 2005). There, the State sought to be declared the owner of certain property, and the railroad contested that ownership. The disputed property contained mainline railroad tracks that had been continuously operated over the property for over 100 years. The court ruled that the State's claims were preempted and first had to be addressed by the STB. The court found that once the STB addressed the abandonment issue, the court would be in a position to determine the ownership issue for the parties.

The Illinois Central case is readily distinguishable from Allied's situation. In Illinois Central, the focus was not on a voluntary conveyance made by the railroad. Unlike here, the Court was not concerned with analyzing the railroad's agreement to sell the disputed property or any mistake made in connection with the transaction. There, the State's claim to ownership was based on a 1903 federal patent, which provided the property in dispute would transfer to the State "should said railroad cease to use and occupy the property." In other words, the State's claims "were interwoven with the issue of whether the Property has ceased to be used or

occupied as provided for in the patent.” Illinois Central, 928 So.2d at 74. Thus, according to the court, “whether a reversionary interest has been triggered [to the State] is dependent upon a determination regarding abandonment.” The court emphasized that for an abandonment to occur for a mainline, under ICCTA, STB approval must be obtained through a showing that the abandonment is consistent with “present or future public convenience and necessity.” 49 U.S.C. 10903(d).

In the present case, the disputed property does not contain main lines but merely industrial, switching or siding tracks, the abandonment of which falls outside of the jurisdiction of the STB. See 49 U.S.C. §10906 (discussed further below). Furthermore, unlike in Illinois Central, Allied’s ownership in the disputed property is not contingent on a determination of abandonment by the railroad, or the railroad’s ceasing to use or occupy the disputed property. On the contrary, what the Court and trier of fact need to analyze in this case is the voluntary conveyance of the property by Defendants, the lack of any mistake in that transaction, and Allied’s bona fide purchase of the property. None of these determinations hinges upon or requires the STB’s railroad expertise. Therefore, since the STB cannot and will not entertain questions of state property law, see Central Kansas, supra, this Court should retain jurisdiction over Allied’s Amended Complaint and deny Defendants’ Motion.

**C. Under 49 U.S.C. §10906, the STB Has No jurisdiction Over the Abandonment of Industrial, Team, Switching, or Side Tracks.**

Defendants insist that this case must be referred to the STB for a determination and approval of any abandonment by the railroads of their railroad tracks. See 49 U.S.C. 10901-10903. However, 49 U.S.C. §10906, entitled “Exception,” plainly provides that “[t]he Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.” Many

courts have interpreted Section 10906, and in particular its impact on Section 10501, and have concluded that Congress “specifically withdrew regulation of [industrial or spur] lines from the STB, leaving their management solely to the respective railroads.” Port City Properties v. Union Pacific Railroad, 518 F.3d 1186, 1189 (10<sup>th</sup> Cir. 2008). As a result, the STB has “no authority over the regulation of spur or industrial ‘tracks’ as opposed to main railroad ‘lines.’ That authority is left entirely to railroad management who may contract services as they see fit.” Id. (ruling that there was no requirement that Union Pacific request authorization for abandonment from the STB); see also Cities of Auburn and Kent, 2 S.T.B. 330, 1997 WL 362017 at \*7 (1997) (“When sections 10906 and 10501(b)(2) are read together, it is clear that Congress intended to remove [STB] authority over the entry and exit of these auxiliary tracks, while still preempting state jurisdiction over them, leaving the construction and disposition of them entirely to railroad management.”). Because the STB does not oversee the transfer of (or otherwise regulate) industrial, team, switching or side tracks, the STB will not adjudicate the issues raised by the Amended Complaint.

**D. The Tracks On Youngstown City Lot No. 62188 Are Not Main Lines, But Instead Are Industrial, Spur, Team, Switching or Side Tracks.**

Whether or not railroad trackage is a “line” of railroad or instead is in the excepted category of “industrial, spur, team, switching or side track” is a question for this Court, not the STB. See, e.g., Powell v. United States, 300 U.S. 276 (1937); Louisiana & Arkansas Railway Company v. Missouri Pacific Railroad Company, 288 F. Supp. 320, 323 (E.D. La. 1968). Evidence developed in discovery clearly shows that the tracks are industrial tracks, rather than main lines or “lines of railroad,” contrary to what is alleged by David Collins in his Affidavit.<sup>5</sup>

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<sup>5</sup> See Defendant’s Memorandum, Exhibit B.

“Factors used to determine whether a section of track is an extension of a regular railroad line, as opposed to a ‘spur’ or ‘industrial’ track, include whether the railroad maintains a track schedule or regular service over the track; furnishes express, passenger or mail service; maintains buildings, loading platforms, or an agent along the trackage; and who completes the bills of lading.” Port City Properties, 518 F.3d at 1189. “It is also relevant whether the track has been or is to be used for anything other than industrial delivery, ... the length of the track, whether the track serves only a single customer, and whether the customer requested the carrier to provide service.” Id. By contrast, “so-called main or branch lines of railroad” have been described as “lines designed and used for continuous transportation service by through, full trains between different points of shipment or travel,” but excluding “all that mass of tracks (as distinguished from ‘lines’) naturally and necessarily designed and used for loading, unloading, switching, and other purposes connected with, and incidental to, but not actually and directly used for, such transportation service.” Nicholson v. I.C.C., 711 F.2d 364, 367-68 (D.C. Cir. 1983) (italics omitted).

The following evidence of record<sup>6</sup> demonstrates that the tracks on Lot No. 62188 are industrial tracks. Prior to August 23, 2009, Terry Feichtenbiner was a Senior General Manager of The Ohio Central Railroad System and had “direct responsibility for all things relative to the operation of the Youngstown Division” of The Ohio Central Railroad System, which was comprised of defendants O&P, MVRV, the Youngstown Belt Railroad, the Warren & Trumbull Railroad, and the Youngstown & Austintown Railroad. Feichtenbiner Dep. p. 29.<sup>7</sup> Mr. Feichtenbiner discussed the tracks located on Lot No. 62188 at length in his depositions. He characterized the tracks as “industrial yard tracks” because Lot No. 62188 and the surrounding

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<sup>6</sup> The depositions were taken while the case was pending in the Northern District of Ohio.

<sup>7</sup> Appendix Exhibit 5.

area “is an industrial area, and the form of operation over the trackage is what, within the [railroad] industry, we would generally characterize as being yard operations.” Feichtenbiner Dep. p. 70. Mr. Feichtenbiner testified that the terms “industrial track” and “industrial yard track” are “very synonymous,” and he also characterized the tracks on Lot No. 62188 as being “just industrial tracks.” Feichtenbiner Dep. p. 71. Mr. Feichtenbiner also testified that, with regard to the tracks which are denominated as the “# 3 Main” on Lot No. 62188, “there is a whopping difference in the purpose of the # 3 Main versus the purpose of the CSX main” line from Baltimore, Maryland to Chicago, Illinois. Feichtenbiner Dep. p. 72-73. It was also noted that the tracks were “not labeled main lines” by the Ohio Central Defendants. Feichtenbiner Dep. p. 68. Mr. Feichtenbiner’s testimony makes it clear that, regardless of how tracks on Lot No. 62188 were denominated, they simply were not “lines designed and used for continuous transportation service by through, full trains between different points of shipment or travel ...” Nicholson, 711 F.2d at 367-68.

With respect to the uses of the tracks located on Lot No. 62188, Mr. Feichtenbiner testified that the tracks are used as follows:

1. to access the Ohio Central Defendants’ locomotive shop located on Lot No. 62189;
2. for the staging and storage of railroad equipment;
3. for interchanging with the Norfolk Southern Railway at Norfolk Southern Railway’s Haselton Yard, which is east of Lot Nos. 62320, 62188 and 62189, on the east side of the Center Street Bridge; and
4. for interchanging with the CSX railroad to the west of Lot No. 62188 by way of the track described by the Ohio Central Defendants as the “MVRT tail track.”

Feichtenbiner Dep. p. 42, 44, 66.

Mr. Feichtenbiner also testified that the tracks were used for "transloading," which he defined as "tak[ing] the material out of the railcar and put[ting] it in a truck for distribution." Feichtenbiner Dep. p. 46-47. More specifically, Mr. Feichtenbiner testified that The Bloom Plastics Company regularly transloaded plastic pellets out of rail cars located on the "240" track, which is one of the tracks on Lot No. 62188, and into a Bloom Plastics Company truck for delivery to various locations. Feichtenbiner Dep. p. 46. This testimony makes it all the more clear that the tracks are not main or branch lines, but instead are within "all that mass of tracks (as distinguished from 'lines') naturally and necessarily designed and used for loading, unloading, switching, and other purposes connected with, and incidental to, but not actually and directly used for, such transportation service." Nicholson, 711 F.2d at 367-68.

Finally, Mr. Feichtenbiner testified that the tracks located on Lot No. 62188 have no formal schedule governing or establishing when trains would arrive and depart, and have no "block signal indicators," which are present on main line tracks and "are like traffic lights at intersections when you drive on the roads." Feichtenbiner Dep. p. 60. Furthermore, the tracks are not used for express, passenger or mail service, the majority of the bills of lading for rail cars on the tracks were completed by the customer, and the customers who were serviced through tracks would request that the Ohio Central Defendants provide service to them. Feichtenbiner Dep. p. 61, 63.

The industrial history of Lot Nos. 62320 and 62188 confirms Mr. Feichtenbiner's testimony that the tracks are spur, industrial or switching tracks. Lot Nos. 62320 and 62188 are the location of the former Republic Steel tube mill site, and the tracks on Lot No. 62188 are the former plant's internal tracks. Ramun Dep. p. 13, 18, 39; Dep. Ex. 2. The Republic Steel mill, which sits on Lot No. 62320, was transferred to LTV Steel Company, then to Maverick Tube,

and then to O&P, which sold the property to Gearmar. Ramun Dep. p. 13, 14, 18, 35, 39; Dep. Ex. 2; Dep. Ex. 10.<sup>8</sup> This history further demonstrates that Lot Nos. 62320 and 62188 are simply industrial parcels of property with no “main lines” of railroad located thereon.

Based upon all of the foregoing facts, there is no genuine issue of material fact regarding the character of the tracks located on Lot 62188. See Port City Properties, 518 F.3d at 1189 (“Factors used to determine whether a section of track is an extension of a regular railroad line, as opposed to a ‘spur’ or ‘industrial’ track, include whether the railroad maintains a track schedule or regular service over the track; furnishes express, passenger or mail service; maintains buildings, loading platforms, or an agent along the trackage; and who completes the bills of lading.”). Indeed, the facts can lead only to the conclusion that the tracks are either spur, industrial or switching tracks. Louisiana & Arkansas Railway Co. v. Missouri Pacific Railway Co., 288 F.Supp. 320, 324 (E.D. La. 1968) (“If, however, the trackage is used in the loading, reloading, storage and switching of cars incidental to the receipt of shipments by the carrier or their delivery to the consignee, then such trackage is spur, industrial, team, switching or side tracks ...”); see also Port City Properties, 518 F.3d at 1189 (track was properly found to be industrial or spur track where, *inter alia*, there was no evidence that the track was a main line). Therefore, based upon the plain language of 49 U.S.C. § 10906, STB approval was not required for Lot 62188 to be transferred from MVR Y to Gearmar, or from Gearmar to Allied, and there is no need to refer this case to the STB to re. 49 U.S.C. § 10906; Port City Properties, 518 F.3d at 1189 (“[T]he STB has no authority over the regulation of spur and industrial tracks as opposed to main railroad lines.”).

Ohio Central’s present management likewise confirmed that the tracks at issue are not main lines. David Collins, the Senior Vice President of New York, Pennsylvania and Ohio

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<sup>8</sup> Deposition Exhibit 10 is attached to the Appendix as Exhibit 6.

Region for Genesee and Wyoming, testified that there is no schedule for service over the tracks on the disputed property. Collins Dep. at 126; Feichtenbiner Dep. at 60. Only about ten cars or less come onto these tracks per week, and activity is limited to about once a week. Collins Dep. at 126-27. Indeed, for the past recent months, there is no through-traffic for these tracks. Collins Dep. at 170. The tracks are primarily used for the storage of railcars, since slow business has caused Defendants' other storage sites to reach capacity. Collins Dep. at 169. Indeed, Defendants have no customers that require service over these tracks; Cantar Poly was the last customer who did and they have had no business and been inactive since Genesee and Wyoming bought the railroad. Collins Dep. at 140-41. The other customers in Castlo Industrial Park, many of whom have only required occasional service, can be served without crossing the tracks on Allied's property, using the Norfolk Southern Main Line and crossing over into Norfolk Southern's Hazelton Yard. Collins Dep. at 134, 136-38, 140.<sup>9</sup> Mr. Collins admits that tracks are not main lines if the practice or pattern is to park or store cars on the tracks. Collins Dep. 121, 124.) As Mr. Collins acknowledges, the primary use of the tracks on the disputed property is to store cars. Collins Dep. at 169-170. All of Mr. Collins' testimony was consistent with Mr. Feichtenbiner's deposition testimony, as well as Mr. William Strawn's, who readily characterized the disputed tracks as not mainlines, but industrial tracks. Strawn Dep. at 64<sup>10</sup>; Feichtenbiner Dep. at 61, 63, 70, 71, 73. Finally, Mr. Jerry Jacobson, the former owner of

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<sup>9</sup> Exhibit 8 to the Appendix is a Google Earth Image of portions of the Mahoning Valley Railway, including the property sold to Allied west of the Center Street Bridge (Lots 62188 and 62320), the CSX main line interchange to the far left (west) of the map, the Norfolk Southern Hazelton Yard, and tracks leading to the Castlo Industrial park to the far right (east) of the map; this image or Map was prepared by Ohio Central.

<sup>10</sup> Appendix Exhibit 9.

defendant Summit View, Inc. and its subsidiary railroads, confirmed that the tracks on Lot No. 62188 are “yard tracks,” as opposed to main line tracks. Jacobson Dep. p. 69-72.<sup>11</sup>

Defendants’ document titled “The Ohio Central Railroad System Youngstown Division Operations Bulletin No. 01,”<sup>12</sup> issued January 1, 2007, further confirms that the tracks at issue are not main lines and do not require STB approval for the transfer thereof. On page 11, Mr. Feichtenbinder (the author of the document) sets forth the various internal rules and regulations that govern the MVRV. Significantly, Mr. Feichtenbinder states that:

Effective immediately and until further advised, all trackage associated with the Mahoning Valley Railway (MVRV) is designated as “Excepted Track”. All requirements associated with tracks designated as such are also effective immediately. Speed must not exceed ten (10) miles per hour on any track associated with the MVRV and these instructions will not supercede any previous instructions in effect which set forth a lower speed for any given track associated with the MVRV.

“Excepted Track” is a reference to spur, industrial, or switching track “excepted” from the regulation of the STB under 49 U.S.C. §10906; see Port City Properties, 518 F.3d at 1189 (stating that Congress “specifically withdrew regulation of [excepted tracks] from the STB”). As an official railroad document, this Operations Bulletin’s statement as to the status and character of the MVRV tracks is entirely consistent with testimony provided by Mr. Feichtenbinder, Mr. Strawn, and Mr. Collins. The Operations Bulletin eliminates any doubt concerning the question of whether the disputed tracks involved in this case are “excepted” industrial tracks, not subject to the regulation of the STB. Therefore, there is no reason for this case to be referred to the STB because the STB does not have any authority or jurisdiction over the tracks on Lot 62188. Defendants were free to dispose of these tracks as they saw fit, and the clear evidence shows that they voluntarily sold Lot 62188 and the tracks thereon to Gearmar, which subsequently sold the

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<sup>11</sup> Appendix Exhibit 10.

<sup>12</sup> Appendix Exhibit 11.

property to Allied. This Court should enforce Defendants' voluntary agreement to sell the property and tracks, and decline to refer the case to the STB.

**E. Allied's Claims Under The Amended Complaint Are Not Preempted Under ICCTA Because The Relief Requested By Allied Does Not Unreasonably Interfere With Interstate Railroad Operations, But Simply Seeks the Enforcement of Defendants' Voluntary Conveyance of Property.**

As explained above in Section A, the scope of ICCTA preemption is not limitless, as Defendants seem to contend. Indeed, ICCTA only preempts state remedies that would unreasonably interfere with interstate rail operations. See PCS Phosphate Company, supra. Defendants simply cannot meet that standard here. First, Allied seeks only to enforce private property rights that are the result of Defendants' voluntary sale of the disputed property; there is no "regulation" of "railroad operations" involved. The courts and the STB have consistently stated that the railroads cannot shield themselves from their own actions by claiming preemption under ICCTA in these circumstances. See Woodbridge, supra. The Defendants' sale of both Lots 62320 and 62188 shows not only that the tracks thereon are not lines of railroad (no STB approval was sought for the transfers), but also that, from the railroad's standpoint, no unreasonable interference with rail operations would occur by voluntarily transferring the property. In this regard, this situation is just like any other contractual commitment undertaken by Defendants.

Second, as the Google Earth map confirms, the tracks on Lot 62188 are industrial tracks designed for localized purposes. There is no impact to Defendants' interstate rail operations. Mr. Collins conceded that Mahoning Valley Railway operates in the specific locale of Youngstown and does not operate over or cross interstate lines. Collins Dep. at 181-182. Private property rights emanating from a voluntary conveyance simply cannot be preempted without a showing of interference with interstate commerce. Moreover, coming from

Youngstown (the west), Defendants can service their customers east of Allied's property by using the Norfolk Southern Mainline and crossing into the NS Hazelton Yard; similarly, coming from the East and Castlo Industrial Park, Defendants can get to the CSX main line either through the NS Hazelton Yard or at other interchanges. Collins Dep. at 134, 136-38, 140. The only difference is cost and convenience. While Defendants find it more convenient and cost-effective to store cars on Allied's property and cross Allied's property, prohibiting such conduct does not amount to unreasonable interference with rail operations, or interstate commerce. Instead, it amounts to no more than the enforcement of time-honored private property rights.

Finally, if a railroad has no property rights, whether by ownership of the land or an easement, or a trackage agreement to pass over tracks, then it cannot operate there. Accordingly, a railroad cannot claim to be suffering under an unreasonable interference if it has no right to operate over the property in the first place. Defendants have shown no authority that would simply allow the STB to grant rights for the railroad to operate over property where it has no ownership, easement rights, or trackage agreement. Indeed, Mr. Collins even agreed that a railroad needs permission to store cars on industrial property that it does not own or have an easement for. Collins Dep. at 151, 157. And this is precisely what Allied is requesting in this case. The railroad cannot simply store cars wherever it wants to, with impunity. Prohibiting that conduct and recognizing Allied's private property rights (the result of Defendants' voluntary transfer) surely cannot amount to unreasonable interference with rail operations that mandates ICCTA preemption in this case.

It is also worth mentioning that referring this case to the STB will significantly delay its adjudication. As the Court is aware, an earlier-filed action between the parties<sup>13</sup> has been

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<sup>13</sup> This action, titled Allied Erecting & Dismantling, Inc. and Allied Industrial Development Corp., v. Ohio Central Railroad, Inc., et al., is docketed in this Court at No. 2006 CV 181 and is stayed pending the

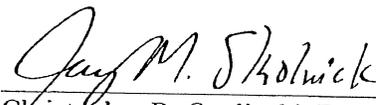
referred to the STB. On November 2, 2009, Allied and a related company, Allied Erecting and Dismantling, Inc., filed a Petition for Declaratory Order (the "Petition") with the STB pursuant to this Court's order. Defendants filed a response, which was followed by additional filings by the parties regarding a procedural schedule. At the present time, the STB has taken no action on the Petition, which indicates that the instant case will likewise languish before the STB. For this additional reason, the Court should not refer the case to the STB.

Finally, if the Court does find that some issues should be resolved by the STB, Allied respectfully submits that those issue should be referred after the ownership of Lot No. 62188 and the character of the railroad tracks located thereon have been adjudicated

### CONCLUSION

For all of the reasons set forth above, Plaintiff Allied Industrial Development Corporation respectfully requests that the Court deny, in its entirety, Defendants' Motion to Dismiss or in the Alternative Refer to the Surface Transportation Board. Alternatively, in the event that the Court determines that some issue(s) in this case should be referred to the Surface Transportation Board, Allied submits that those issue(s) should be referred after the ownership of Lot No. 62188 and the character of the railroad tracks located thereon have been adjudicated in this Court.

Respectfully submitted,



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Eckert Seamans Cherin & Mellott, LLC

---

STB's adjudication of the issues which have been referred to it (assuming that the STB agrees that it has jurisdiction over the issues which have been referred to it).

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Attorneys for Plaintiff, Allied Industrial  
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Date: June 24, 2010

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiff's Brief in Opposition to Defendants' Motion to Dismiss or, In the Alternative, Refer to the Surface Transportation Board was served by first-class mail, this 24th day of June, 2010, as follows:

C. Scott Lanz, Esq.  
Thomas Lipka, Esq.  
Manchester, Bennett, Powers & Ullman  
Atrium Level Two  
The Commerce Building  
201 East Commerce Street  
Youngstown, OH 44503

Daniel G. Keating, Esq.  
W. Leo Keating, Esq.  
Keating, Keating & Kuzman  
170 Monroe Street, N.W.  
Warren, OH 44483

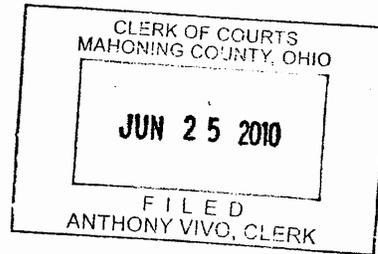
Amelia Bower, Esq.  
David Van Slyke, Esq.  
Plunkett Cooney  
300 East Broad Street, Suite 590  
Columbus, OH 43215

  
\_\_\_\_\_

**J**

IN THE COURT OF COMMON PLEAS OF MAHONING COUNTY, OHIO

ALLIED INDUSTRIAL DEVELOPMENT CORP.,	)	2009 CV 2835
	)	
Plaintiff/	)	Judge Maureen A. Sweeney
Counterclaim Defendant,	)	Magistrate Dennis Sarisky
	)	
vs.	)	
	)	
OHIO CENTRAL RAILROAD, INC., et al.,	)	
	)	
Defendants/Counterclaimants/ Third Party Plaintiffs,	)	
	)	
vs.	)	
	)	
GEARMAR PROPERTIES, INC.,	)	
	)	
Third Party Defendant.	)	

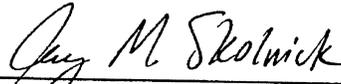


**PLAINTIFF'S APPENDIX IN SUPPORT OF  
BRIEF IN OPPOSITION TO DEFENDANTS'  
MOTION TO DISMISS OR, IN THE ALTERNATIVE,  
REFER TO THE SURFACE TRANSPORTATION BOARD**

1. Pages of Deposition of John R. Ramun, Vol. 1 ..... Appendix Exhibit 1
2. Deposition Exhibit 2 (Replat of Lots 62188 and 62320)..... Appendix Exhibit 2
3. March 15, 2010 Order of Court ..... Appendix Exhibit 3
4. April 15, 2010 Order of Court ..... Appendix Exhibit 4
5. Pages of Deposition of Terry Feichtenbiner ..... Appendix Exhibit 5
6. Deposition Exhibit 10 (Deed from O&P/MVRY to Gearmar) ..... Appendix Exhibit 6
7. Pages of Deposition of David Collins..... Appendix Exhibit 7
8. Google Earth Map..... Appendix Exhibit 8
9. Pages of Deposition of William Strawn..... Appendix Exhibit 9
10. Pages of Deposition of Jerry Jacobson ..... Appendix Exhibit 10



Respectfully submitted,

  
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Attorneys for Plaintiff  
Allied Industrial Development Corporation

Dated: June 24, 2010

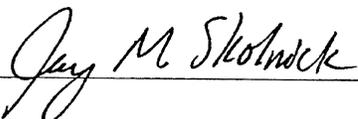
**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Plaintiff's Appendix in Support of Brief in Opposition to Defendants' Motion to Dismiss or, In the Alternative, Refer to the Surface Transportation Board was served by first class United States mail, this 24th day of June, 2010, as follows:

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\_\_\_\_\_

# APPENDIX EXHIBIT 1

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE NORTHERN DISTRICT OF OHIO  
3 EASTERN DIVISION

4 CASE NO. 4:09 CV 01904

5 ALLIED INDUSTRIAL DEVELOPMENT )  
6 CORP. )  
7 Plaintiff/Counterclaim )  
8 Defendants )  
9 VS )  
10 OHIO CENTRAL RAILROAD, INC., )  
11 ET AL., )  
12 Defendants/Counter- )  
13 Claimants/Third Party )  
14 Defendants )  
15 VS )  
16 GEARMAR PROPERTIES, INC., )  
17 Third Party Defendants )

18 DEPOSITION  
19 OF  
20 MR. JOHN RAMUN

21 APPEARANCES

22 F. TIMOTHY GRIECO, ESQ.,  
23 On Behalf of Plaintiff/Counterclaim  
24 Defendants  
25 THOMAS J. LIPKA, ESQ., and  
26 C. SCOTT LANZ, ESQ.,  
27 On Behalf of Defendants/Counterclaimants  
28 Third Party Defendants

29 DEPOSITION taken before me, Cynthia M. Nibert, a  
30 Notary Public within and for the State of Ohio, on the 11th  
31 day of December, A.D., 2009, pursuant to Notice, and at the  
32 time and place therein specified, to be read in evidence on  
33 behalf of the Defendants/Counterclaimants, Third Party  
34 Defendants, in the aforesaid cause of action, pending in the  
35 United States District Court for the Northern District of  
36 Ohio, Eastern Division.

37 DAVID R. BURTON & ASSOCS., COURT REPORTERS

38 DAVID R. BURTON & ASSOCS., COURT REPORTERS

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99 EXHIBITS

- 1001 1 - Replat Youngstown City Lot No. 62188 and 62320  
1002 2 - Smaller copy of Exhibit 1 with dates and signatures on  
1003 official document  
1004 3 - 3/26/09 purchase agreement between Allied Industrial  
1005 Development Corporation and Gearmar Properties, Inc.  
1006 4 - 12/29/08 purchase agreement between Gearmar Properties,  
1007 Inc., and Jim Snyder

1008 Reported and Transcribed by:  
1009 Cynthia M. Nibert  
1010 Registered Professional Reporter

1011 DAVID R. BURTON & ASSOCS., COURT REPORTERS

1012 STIPULATIONS

1013 It is stipulated and agreed by and between counsel  
1014 for the parties hereto that this deposition may be taken at  
1015 this time, 9:30 a.m., at the offices of Manchester, Bennett,  
1016 Powers & Ullman, Attorneys at Law, Youngstown, Ohio, without  
1017 the usual Notice to Take Deposition having been served,  
1018 service of the same being waived.

1019 It is further stipulated and agreed that the  
1020 deposition may be written in stenotype by Cynthia M. Nibert,  
1021 a Notary Public within and for the State of Ohio, and a  
1022 Registered Professional Reporter, and by her transcribed;  
1023 that the transcript be made available to the witness for  
1024 signature, and that the witness shall read the same and  
1025 subscribe thereto, and that the deposition may thereupon be  
1026 used on behalf of the Defendants/Counterclaimants, Third  
1027 Party Defendants in the aforesaid cause of action.

1028 DAVID R. BURTON & ASSOCS., COURT REPORTERS

1 talking about that one company.  
 2 Q Right, right. For right now, yeah. What's  
 3 the -- I think I know this. What's the business address of  
 4 Allied Erecting?  
 5 A The business address, as far as mailing, is 2100  
 6 Poland Avenue. But there is a lot of addresses, because  
 7 Allied owns about 250 acres on the river side of Poland  
 8 Avenue, and about 70 acres on the other side of Poland  
 9 Avenue. And it's acquired many, many parcels over the total  
 10 years we have been there.  
 11 Q Okay.  
 12 A Between Erecting and a sister company, Allied  
 13 Industrial Development.  
 14 Q Okay. Actually, that's a good point. The actual  
 15 Plaintiff in this case is Allied Industrial Development  
 16 Corp. So that's a, that's a sister company of Allied  
 17 Erecting?  
 18 A Yes.  
 19 Q And you're the owner of Allied Industrial  
 20 Development Corp?  
 21 A I'm not the owner of either of those companies.  
 22 Allied Consolidated Industry is the parent corporation of  
 23 these companies as, as they stand today.  
 24 Q Okay. I gotcha. Allied Consolidated Industries

DAVID R. BURTON & ASSOCS., COURT REPORTERS

11

1 Industrial Development Corp owns?  
 2 A As segregated, Allied Industrial Development owns  
 3 the former LTV properties, which I think is somewhere around  
 4 62, 65 acres. It owns the former Maverick/LTV tube plant,  
 5 which is 45.6 acres.  
 6 Q Okay. And would all that property be on the  
 7 Poland Avenue side of the river?  
 8 A Yes.  
 9 Q Okay. And would the, would the business address  
 10 of Allied Industrial Development Corp also be the 2100  
 11 Poland Avenue?  
 12 A As I stated before, there is a lot of different  
 13 addresses --  
 14 Q Sure.  
 15 A -- if you would look at different parcels.  
 16 However, for mailing purposes, 2100 has been assigned by the  
 17 Post Office as the address.  
 18 Q Does Allied Industrial Development Corp have any  
 19 employees?  
 20 A No. Not direct employees. They are, they  
 21 utilize employees from the Allied companies.  
 22 Q Okay.  
 23 A Or they use the other Allied companies to carry  
 24 out certain tasks that needs to be done.

DAVID R. BURTON & ASSOCS., COURT REPORTERS

1 is the parent corp; Allied Erecting and Dismantling, and  
 2 Allied Industrial Development are --  
 3 A Two of the sister, two of the subs.  
 4 Q Okay. All right. And I'm sorry if you said  
 5 this. You're the owner of Allied Consolidated Industries?  
 6 A I'm the majority stockholder in Allied  
 7 Consolidated Industries.  
 8 Q And would you be the -- you know, sometimes the  
 9 corporate formalities get me confused. Would you also be  
 10 the President of Allied Industrial Development Corp?  
 11 A Yes.  
 12 Q And what, I mean, what is -- you have described  
 13 to me a little bit, a few minutes ago what Allied  
 14 Industrial -- I'm sorry. I get confused. Allied Erecting  
 15 and Dismantling, I apologize, you have described to me what  
 16 they do.  
 17 What does Allied Industrial Development Corp do?  
 18 A They basically purchase, hold and develop  
 19 property, or have, have it developed. Primarily Allied  
 20 Erecting and Dismantling is utilized, along with other  
 21 Allied companies that are in that type of effort, that they  
 22 basically acquire properties, hold the deeds and -- while  
 23 the development is going on.  
 24 Q Do you know roughly how much property Allied

DAVID R. BURTON & ASSOCS., COURT REPORTERS

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1 MR. LIPKA: Just off the record for one minute,  
 2 Cyn.  
 3 (Whereupon, a discussion was held off the  
 4 record.)  
 5 Q Mr. Ramun, the property sort of at issue in this  
 6 case which, you know, are Youngstown City Lots 62320 and  
 7 62188, those are owned by Allied Industrial Development  
 8 Corp; is that correct?  
 9 A Could you restate that?  
 10 Q Sure. Did the lawsuit that we're here about  
 11 today --  
 12 A I don't know which lawsuit you're talking about.  
 13 Q I'm sorry. Well, this would be the Allied  
 14 Industrial Development Corp versus Ohio Central, et al., in  
 15 Federal Court in front of Judge Gwin.  
 16 A Okay.  
 17 Q And it's my understanding from being involved in  
 18 the lawsuit that there is a two city lots that are at issue;  
 19 one is Youngstown City Lot 62320, which is the old Maverick  
 20 Tube property, and then the other one is 62188, which is  
 21 property that abuts that. I mean, is that your  
 22 understanding as well as to why we're here today?  
 23 A They're both part of a replat.  
 24 Q Correct. And those two parcels, are they owned

DAVID R. BURTON & ASSOCS., COURT REPORTERS

1 by Allied Industrial Development Corp?  
 2 A Yes.  
 3 Q Okay. And it's my understanding that those were  
 4 purchased by Allied, and I'm going to say Allied now, and I  
 5 mean Industrial Development Corp. I will say Allied  
 6 Development.  
 7 A I understand.  
 8 Q Okay. Allied Development, when did they purchase  
 9 those parcels? And I'm not, I'm not trying to put you to  
 10 the test, Mr. Ramon. There was a deed filed on March 26,  
 11 2009, just to sort of refresh your memory. I mean, do you  
 12 remember how much earlier than that maybe there was a  
 13 purchase agreement that was executed?  
 14 A I know there was a purchase agreement executed.  
 15 Q All right.  
 16 A I know there was a deposit. If I saw the papers,  
 17 I --  
 18 Q No. That's fine. Let me ask it, let's take a  
 19 step back in time.  
 20 Prior to Allied's purchase of those two lots  
 21 from, I think it was Gearmar Properties, Property that, did  
 22 Allied ever make an attempt to purchase those lots prior to  
 23 doing the deal with Gearmar?  
 24 MR. GRIECO: From someone other than?

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1 was about 62, 65 acres involved.  
 2 Q And you purchased that property from LTV?  
 3 A Yes.  
 4 Q And when, roughly when did you purchase that?  
 5 A I don't have a date on it in my mind. But I  
 6 would say '83, '84, somewhere. It was related to their  
 7 bankruptcy.  
 8 Q All right.  
 9 A And I believe they were still operating the tube  
 10 mill.  
 11 Q And I'm sorry. You said that was roughly 65  
 12 acres?  
 13 A Sixty-two, 65, somewhere in that neighborhood.  
 14 Q All right. If you don't know -- if you know, you  
 15 know. Do you know when LTV sold Lot 62320 to Maverick Tube  
 16 or the company that operated Maverick Tube?  
 17 A Sometime after we purchased the open hearth, 62,  
 18 65 acres.  
 19 Q All right. So sometime after '84 or '85, around  
 20 there?  
 21 A Yeah. I'm not sure of the dates.  
 22 Q Okay. I'm sorry. I jumped back in time on you.  
 23 You had said that, while Maverick Tube was owned by -- for  
 24 what it's worth, I think the company was called -- well, I

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1 MR. LIPKA: From someone other than Gearmar,  
 2 correct.  
 3 A Yes.  
 4 Q Okay. Can you describe that for me.  
 5 A We inquired on those properties when Maverick  
 6 Tube was selling them.  
 7 Q Let me take you even a step farther back, I  
 8 guess. Youngstown City Lot 62320 where the Maverick Tube  
 9 plant is sitting, do you know who owned that prior to  
 10 Maverick Tube?  
 11 A Yes.  
 12 Q And who was that?  
 13 A LTV.  
 14 Q And do you have any idea how long LTV owned that?  
 15 A I will, I would guess 19 -- I have seen a map  
 16 with Skurik's name on it. But I, I don't know if that's  
 17 relevant or not. But I have seen in some of these documents  
 18 that have been going back and forth.  
 19 Q Okay. When LTV owned that parcel, 62320, did  
 20 Allied ever make an attempt to purchase it from LTV?  
 21 A I don't recall. I -- we purchased the property  
 22 east of the Center Street Bridge.  
 23 Q Okay.  
 24 A It was the former open hearth facility. There

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1 will find that.  
 2 Anyway, while Maverick Tube owned 62320, it --  
 3 just describe for me your efforts to buy that property.  
 4 A First of all, I don't know what lot numbers  
 5 Maverick Tube owned. I just know they had a plat there.  
 6 Q All right. Fair enough. Fair enough. Well,  
 7 describe your efforts for me to purchase the Maverick Tube  
 8 plant.  
 9 A I heard it was for sale. I called them. Nothing  
 10 ever really became of it.  
 11 Q Okay. Who did you hear it was for sale from?  
 12 A I think they had a for sale sign on it.  
 13 Q Who did you contact at Maverick Tube?  
 14 A I think I talked to one of the representatives in  
 15 St. Louis.  
 16 Q And do you remember when that was?  
 17 A No.  
 18 Q Okay. I mean, why did that sale ultimately not  
 19 occur?  
 20 A It never even got started.  
 21 Q I mean, was the price too high? Or what was the  
 22 problem?  
 23 A Don't know.  
 24 Q And is it your understanding that the Maverick

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1 Tube plant ultimately got sold to The Ohio Central Railroad?  
 2 A I know they owned it at one time.  
 3 Q Okay.  
 4 A I don't know anything about it.  
 5 Q Are you aware of any owners in between Maverick  
 6 and --  
 7 A I have no idea what transpired there.  
 8 MR. GRIECO: Tom, when you say "Ohio Central  
 9 Railroad" --  
 10 MR. LIPKA: I'm sorry. I think technically it's  
 11 actually The Ohio and Pennsylvania, but I was using Ohio  
 12 Central generically.  
 13 MR. GRIECO: Okay.  
 14 Q All right. Mr. Ramun, at some point in time one  
 15 of the subsidiaries of The Ohio Central Railroad, I believe  
 16 it was The Ohio and Pennsylvania, then sold the Maverick  
 17 Tube plant to Gearmar Properties. Were you aware of that  
 18 sale?  
 19 A At some point in time. But not, not, not when it  
 20 happened or anything like that. I, I don't really know that  
 21 much about that, other than what I have reviewed.  
 22 Q Are you aware at some point in time -- obviously  
 23 you were aware at some point in time that the railroad owned  
 24 that plant; is that correct?

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1 where Allied purchased the, those acreage from Gearmar  
 2 Properties. How did you know that the plant was for sale?  
 3 A Through discussions with Bill Marsteller.  
 4 MR. LIPKA: If you have to take it, take it.  
 5 A I could take a break.  
 6 MR. LIPKA: Go ahead.  
 7 A I will be back.  
 8 (Whereupon, a short break was taken.)  
 9 Q Mr. Ramun, prior to your negotiations with Bill  
 10 Marsteller regarding the sale of the Maverick plant, had you  
 11 ever met Bill Marsteller before?  
 12 A Yes.  
 13 Q When was the first time you met Bill Marsteller?  
 14 A Probably 1974, somewhere in that general area.  
 15 Q I mean, how did you know him? What was Bill  
 16 Marsteller doing back in 1974?  
 17 A I met him in Cuyahoga Falls at a dismantling  
 18 site. We were taking down Vaughn Machinery, V-a-u-g-h-n.  
 19 It was a wire drawing mill that the City was taking down.  
 20 We, we were doing the dismantling, and Bill  
 21 showed up and bought a structure from us. My understanding  
 22 was that he had a fab shop in Warren, and he wanted to add  
 23 on to it. And that's when I first met him.  
 24 Q Okay. Did you sell him something back then?

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1 MR. GRIECO: And I'm just going to interpose an  
 2 objection as to form of the question and use of the term  
 3 "railroad." You know, I'm not sure what you're trying to  
 4 gain as far as Mr. Ramun's understanding as to who actually  
 5 owned the Maverick Tube plant. So I will just place that  
 6 objection on the record.  
 7 But you can answer, if you understand.  
 8 MR. LIPKA: Fair enough. And I don't remember  
 9 what the question was.  
 10 (Whereupon, the last question was read back by  
 11 the court reporter.)  
 12 A I only know what I seen as far as reviewing the  
 13 documents. I don't particularly know who owned what, when  
 14 or how in between there.  
 15 Q Okay.  
 16 A Or for whatever purpose or anything like that.  
 17 Q Well, who did Allied buy the Maverick Tube plant  
 18 from?  
 19 A Allied purchased the Maverick Tube plant from  
 20 Gearmar Properties. And it included the 62320 and 62188  
 21 replatted, and 45.66 acres --  
 22 Q Okay.  
 23 A -- as I understand it. Forty-five, 46 acres..  
 24 Q Well, let me, I want to focus in on the sale

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1 A Yes.  
 2 Q I mean, after that deal in 1974, did you do any  
 3 other deals with Bill Marsteller?  
 4 A No. I, I seen him around. And then at some  
 5 point in time it seemed that he was in the leasing business  
 6 purchasing plants, old plants and re-leasing them, and  
 7 basically out of the fabrication business.  
 8 Q Okay.  
 9 A But I had no relationship with him, other than  
 10 that. One of his relatives worked for us for a while, but  
 11 it had no connection.  
 12 Q Okay. Prior to doing the deal where you  
 13 purchased the Maverick Tube plant, had you ever met, I think  
 14 his name is Dean Gearhart?  
 15 A No.  
 16 Q Have you ever met, even as of today, ever met  
 17 Dean Gearhart?  
 18 A Yes.  
 19 Q When was the first time you met him?  
 20 A I met him in conjunction with discussions related  
 21 to Allied's purchase of the property we have been  
 22 discussing.  
 23 Q Okay. And I guess that's a good point. I mean,  
 24 who did you -- I assume there were negotiations going back

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1 and he told me about, he kind of focused on a bay in the  
2 former Maverick Tube plant, and we discussed that. He had  
3 a, he had a tenant in there who defaulted on his lease, and  
4 so our discussions were about that. And then they  
5 gravitated into an offer in that he, he basically would like  
6 to sell all the property that he owned, the entire purchase.

7 Q Okay. So I'm sorry. Just maybe to recap. Your  
8 initial discussions involved Allied potentially leasing some  
9 space in the old Maverick Tube property?

10 A For a two, for a couple-year period.

11 Q Okay. And then you said that gravitated into an  
12 offer to purchase the property?

13 A No. An offer to sell the property. Why don't  
14 you just buy the whole property.

15 Q So that was an offer that was made by Bill  
16 Marsteller?

17 A Yes.

18 Q And that was on the subsequent phone call that  
19 you were talking about?

20 A No. It was -- we had -- I went down and met him,  
21 or met a couple of his workers. They opened the door, let  
22 me in, and I -- you know, we looked at it. And we -- I  
23 kept, I really was doing an assessment of what I was going  
24 to do with that.

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1 A Bill Marsteller.

2 Q What did Bill Marsteller represent to you with  
3 regard to his intent to sell?

4 A He said he had other interests, and he wanted to  
5 sell that property. He, he had put some money in it, and he  
6 just wanted to focus on another plant he was getting ready  
7 for some other tenant, which I didn't know the particulars  
8 of that. But --

9 Q Sure. And when you say that, when Bill  
10 Marsteller said that he wanted to sell that property, did he  
11 specify what property he was talking about?

12 A Yes.

13 Q What did he say?

14 A Everything that he had purchased.

15 Q And that's what he represented in the first  
16 conversation that you had regarding the sale?

17 A Yes. And, and I think he indicated it was more  
18 than 40 acres. But the, you know, his discussions were  
19 general. And I, I, again, at a point asked for information,  
20 more information. And --

21 Q Well, just jumping back maybe to that first  
22 conversation, what did you say to him about your interest in  
23 purchasing it?

24 A Well, he -- it was kind of -- it wasn't my goal

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1 And then when he said that, I started to look at,  
2 at maps and different things, and asking for more  
3 information from him as to exactly what we're talking about.

4 Q So the first discussions of the sale of the  
5 property occurred when, do you remember?

6 A It has to be in that time frame from the, when I  
7 went down and looked at it after that auction period of  
8 time. Because Bill Marsteller, sometimes he was in town,  
9 sometimes he wasn't in town. So I can't really, as I sit  
10 here today, give you those kind of dates.

11 Q You would have inspected the property with the  
12 intent of leasing the bay first before discussions of sale  
13 ever occurred?

14 A Yes.

15 Q Okay. And would the first discussions of a sale  
16 have occurred on site, or was it a phone call, or do you  
17 remember?

18 A I think it was both in phone calls and a  
19 discussion. It may have been phone calls mostly, and then,  
20 then basically a walk-through with him eventually.

21 Q When you had your first discussion with either  
22 Bill Marsteller or Dean Gearhart, the first discussion  
23 regarding the sale of the property, what was represented to  
24 you? Who were you speaking with? Let me ask that first.

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1 to do that originally. But being that it was an  
2 opportunity, and the fact that it adjoined our property,  
3 I -- that was, that got me interested.

4 Q And this was an in-person conversation you were  
5 having, this first conversation about the sale?

6 A I think so.

7 Q Okay.

8 A I mean, it could have been a phone call. But --

9 Q Do you recall the next conversation you had  
10 regarding the sale?

11 A I'm not -- the, the conversations I had with him,  
12 there were several of them, and I can't identify them all --

13 Q Okay.

14 A -- as I sit here today.

15 Q Do you remember if anyone else was present at any  
16 of these conversations?

17 A On the phone calls, I don't know. I doubt if  
18 anyone else was present. But I can tell you that I -- we  
19 discussed things. I needed to see certain information. All  
20 the information I could get I was interested in, an  
21 environmental study that was mentioned.

22 Once I saw the purchase agreement, I saw the  
23 mention of this, this environmental study, so I wanted to  
24 see that. It took them a while to get that. And I looked

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1 attorney.

2 Q Okay. And what was the title company that Bill  
3 said he worked with?

4 A Can't think of it right now. But it's in Warren.

5 Q Would it have been Bauman Land Title?

6 A Yes. That is the title.

7 Q All right. Mr. Ramon, you had said earlier, I  
8 think you said you had a good understanding of what property  
9 you were purchasing, you know, as part of the sale. What  
10 was the basis of your understanding?

11 A I believe I -- well, first of all, Allied, when  
12 my father and I started, it was on about four and a half or  
13 five acres. And since then we have bought a lot of property  
14 to get to, say 320 acres that's related to the Allied  
15 companies. So I learned how to, how to basically, you know,  
16 look at, find the lots on our staff, find the lots, look at  
17 them, look at the records. And, and we have attorneys that  
18 will, that could go back and pull, pull up information and,  
19 and do as much due diligence as we can.

20 We, we don't just buy things that -- you know,  
21 we, we are interested in a bona fide purchase when we're  
22 related to, when it's related to properties that we, we  
23 purchase. And I have a responsibility to look at what I'm  
24 doing, because I'm responsible for it once I get it.

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1 Q Okay. Let me ask it this way. What  
2 representations were made to you by anyone from Gearmar  
3 regarding what property they were selling?

4 A Representation was they were wanting to sell all  
5 property they purchased and owned.

6 Q Did they ever specifically mention the lot  
7 numbers, 62320 or 62188?

8 A I do not believe -- they gave me the maps. They  
9 gave me, they gave me their purchase agreements. They gave  
10 me their lease, leases. They gave me all the information  
11 that they had. And with our review of the, through our  
12 attorneys, it was all confirmed. I knew what I was  
13 purchasing.

14 Q Okay.

15 A And I had a lot of experience on Poland Avenue as  
16 to, like, generally where property lines are and such.

17 Q Okay. But did Gearmar ever specifically  
18 represent what property they owned?

19 A All, all that was represented, yes.

20 Q Okay. I mean, they just, they would tell you,  
21 Mr. Ramon, we're selling you all we own, but they never  
22 specifically mentioned this lot or that lot, or this  
23 building or that building?

24 A They represented that the maps that they got, the

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1 agreements, the documents they gave me, and where -- what  
2 their environmental responsibilities were. When you read  
3 that, and you look at the, the environmental survey, you can  
4 see that it's all on that property. And, and he did mention  
5 that it was 40 acres or more.

6 Q Okay. The building that sits on 62188 that at  
7 least at one point in time Ohio Central was using as its  
8 Youngstown corporate headquarters, was that building ever  
9 discussed between you and anyone from Gearmar?

10 A There was a general discussion that the railroad  
11 had certain things in the buildings, and that they were  
12 using some things, and there were some personal, people's  
13 cars parked there, and that he really didn't care because he  
14 didn't have a lease at that point. And had he had a lease,  
15 they would have to move. So generally that was our  
16 discussion.

17 Q Let me ask this. During the course of the entire  
18 negotiations of the sale, in what context was the railroads,  
19 was the railroad brought up?

20 A My understanding was that they had a, my  
21 understanding was that they had a, a locomotive engine shop  
22 there, and that was it.

23 Q Did anyone from Gearmar ever mention the  
24 railroad?

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1 A That they brought the cars in and out for the MHF  
2 lease, and that was about it.

3 Q During the period of time you were negotiating  
4 for the purchase of this property, Ohio Central was using  
5 that building on 62188; is that correct?

6 A I know they had a sign there, and they had, they  
7 had some office, they had a few office people in there.

8 But as, as I just testified, I was told by Mr.  
9 Marsteller that they were there, but there was no leases  
10 with them, that they were just basically there. And I know  
11 they were out mowing the grass and things like that, and  
12 kind of -- that's all I know.

13 Q Well, I mean, I don't want to put words in Bill  
14 Marsteller's mouth, but he represented to you that they were  
15 basically trespassing or squatting in that building?

16 A There was no discussion about that. I just told  
17 you what he told me. And, and that's all I know.

18 Q Well, did you do any due diligence regarding the  
19 railroad's right, or lack thereof, to be on that property?

20 MR. GRIECO: Object to the form of the question.  
21 You can answer.

22 A I don't really understand the question. I know  
23 they had no, they had no -- there was an MHF lease there  
24 that the railroad was bringing cars to them, taking them and

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1 then away. I know they were, they were doing that at that  
2 point in time. And I understood there was some cars of  
3 MHF's in the plant.

4 Q Well, were railcars traversing the property while  
5 you were in negotiations with Gearmar?

6 A No. Other than the MHF lease.

7 Q Did you ever have any discussions with Gearmar  
8 regarding the railroad's right to move railcars over those  
9 lots?

10 A No.

11 Q Did you ever see railcars being moved during the  
12 period of time when you were negotiating with Gearmar?

13 A Just the MHF cars.

14 Q Prior to your negotiations with Gearmar, were you  
15 aware of railcars being moved over those lines?

16 A I don't know what lines you're talking about.  
17 But I have had a 12-year nightmare in our other case with  
18 that particular railroad. So --

19 Q Well, sure. I guess --

20 A I don't know what you're asking me.

21 Q I guess that's my point. There is rail lines  
22 that are currently located on Lot 62188.

23 A Yes.

24 Q And I mean, are you aware that rail --

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1 answered?

2 MR. LIPKA: Yeah. What was the question?

3 (Whereupon, the last question was read back by  
4 the court reporter.)

5 Q All right. Well, to the extent, I guess if you  
6 could answer that, Mr. Ramon, we were in the middle of that  
7 when we took a break.

8 A I didn't know there was a Lot 62188 or 62320. I  
9 knew that site as the Republic Steel tube mill site, and  
10 where they had a, a locomotive shop. And trains would go in  
11 and out of there related to Republic Steel, and then LTV  
12 when they ran it, and Maverick Tube. That's the extent of  
13 my knowledge.

14 Q Let me just jump back to the office building.

15 A And the MHF lease, which the only other thing I  
16 knew was there was the railroad had leased materials located  
17 in the buildings, which I asked about, and they were at that  
18 site. And Bill Marsteller basically said he didn't have any  
19 other leases, and that they were there in that he didn't --  
20 he hadn't done another lease there, and didn't care if he  
21 was there until, you know, until he would lease or whatever.  
22 They just weren't in his way. So I left it at that.

23 Q Okay. As I understand your testimony, it was  
24 Marsteller and/or Gearhart told you that we're selling

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1 A And 62320.

2 Q Sure, sure. But let's just take 62188.

3 A And all over Allied's property. And they are the  
4 former Republic Steel plant, internal plant lines.

5 Q Okay. But during the last 12 years, have you  
6 been aware of railcars being moved over Lot 62188?

7 MR. GRIECO: I guess, Tom, I'm afraid here with  
8 the record that we're going to be --

9 A I'm going to take a break.

10 MR. LIPKA: That's fine.

11 MR. GRIECO: Is that all right?

12 MR. LIPKA: Yeah, that's fine.

13 MR. GRIECO: Maybe when we reconvene we can get  
14 the map out, just so we know exactly what we're talking  
15 about. When we talk about tracks over 188, I'm not sure  
16 later on --

17 MR. LIPKA: That's fine.

18 MR. GRIECO: Later on we will all know exactly  
19 what we're talking about.

20 MR. LIPKA: Okay.

21 (Whereupon, a short break was taken.)

22 Q All right. Jumping back, Mr. Ramon, I'm not sure  
23 where we ended.

24 MR. LANZ: Was there a question that wasn't

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1 whatever it is we own, and that's what we're selling, and  
2 then you then did some due diligence to determine what it is  
3 they owned; is that a fair summary?

4 A No. I -- they, they, they -- we walked the site.  
5 They showed me, they showed me generally what they had  
6 there. They had the lease. They had the, all the property  
7 there. I looked at it. I looked at the replats.

8 When I sat with them, this is the map, this is  
9 your land, right? Yes. Even at closing we had a discussion  
10 right in front of the title company, you know, that this is,  
11 you know, that this is the same map and so on, and we were  
12 purchasing what they owned.

13 Q So was there a point in time where they  
14 specifically represented to you that they owned the building  
15 that the railroad had been using as their headquarters?

16 A My understanding was they owned everything in  
17 there, except for the locomotive shop.

18 MR. LANZ: That wasn't the answer to the  
19 question. Let's answer the question.

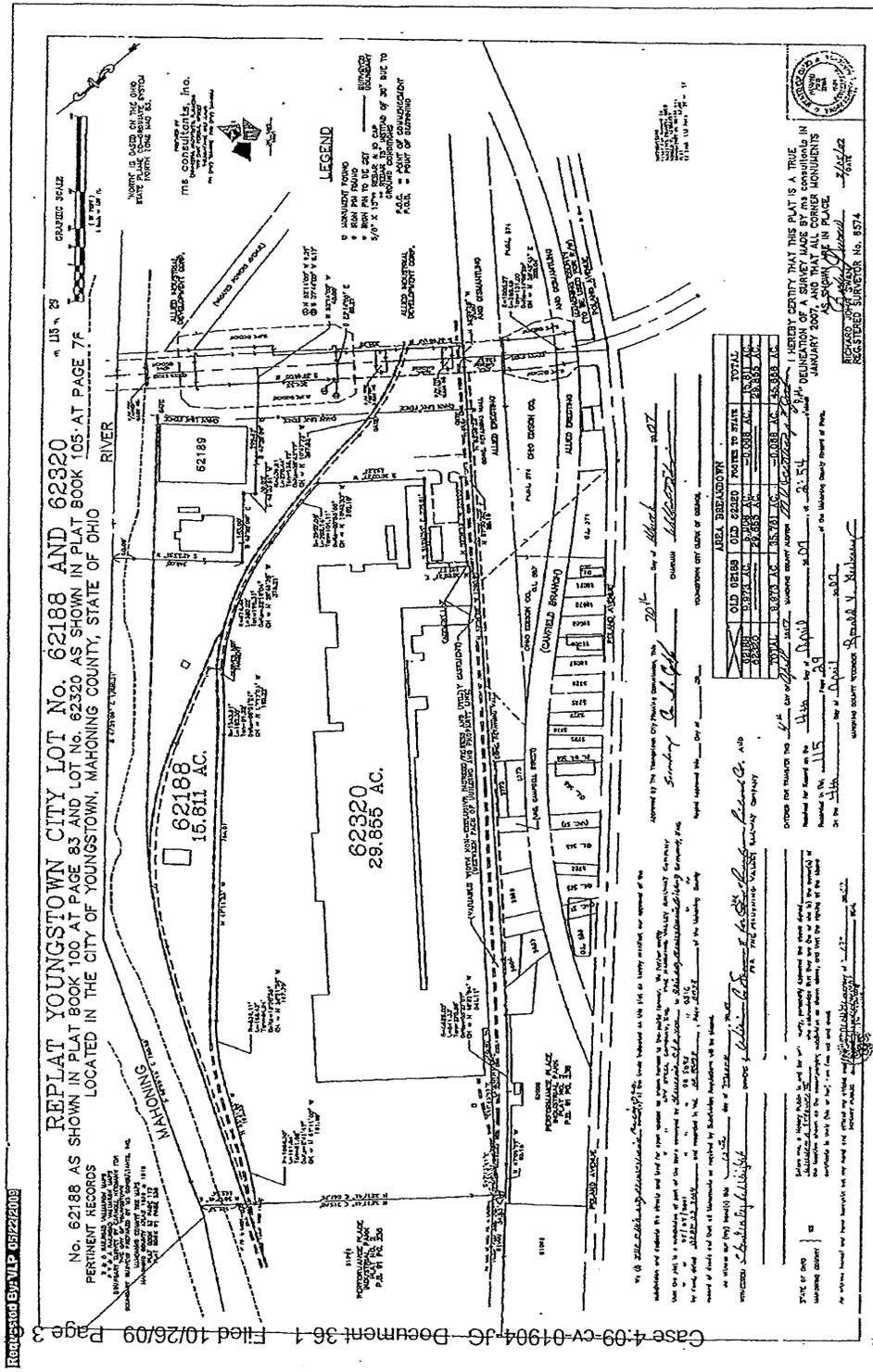
20 Q Did they ever represent to you that they owned  
21 the building on 62188 that the railroad had been using?

22 A They represented to me that they owned all the  
23 buildings. And the first time I heard anything different  
24 was in depositions later of Ohio Central, their, their

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## APPENDIX EXHIBIT 2

Ex. 6



REPLAT YOUNGSTOWN CITY LOT No. 62188 AND 62320 AS SHOWN IN PLAT BOOK 105 AT PAGE 76 LOCATED IN THE CITY OF YOUNGSTOWN, MAHONING COUNTY, STATE OF OHIO

No. 62188 AS SHOWN IN PLAT BOOK 100 AT PAGE 83 AND LOT No. 62320 AS SHOWN IN PLAT BOOK 105 AT PAGE 76 LOCATED IN THE CITY OF YOUNGSTOWN, MAHONING COUNTY, STATE OF OHIO

62188  
16.811 AC.

62320  
28.856 AC.

LEGEND

- UNIMPROVED EASEMENT
- RAIN PUMP TRAP
- ▲ MAN HOLE TO BE SET
- ▲ 1/2" X 1/2" TO BE SET IN PLACE TO BE SET TO FACE
- ▲ POINT OF COMMENCEMENT
- ▲ POINT OF BEGINNING

AREA BREAKDOWN	OLD DEEDS	OLD DEEDS	TOTAL
62188	16.811	16.811	16.811
62320	28.856	28.856	28.856
TOTAL	45.667	45.667	45.667

I HEREBY CERTIFY THAT THIS PLAT IS A TRUE AND CORRECT REPRESENTATION OF THE SURVEY MADE BY ME IN THE CITY OF YOUNGSTOWN, MAHONING COUNTY, STATE OF OHIO, ON THE 15th DAY OF DECEMBER, 2009.

Donald V. Miskowicz  
REGISTERED SURVEYOR No. 8574

Requested By: VLP 05/22/2010

# APPENDIX EXHIBIT 3

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO

ALLIED INDUSTRIAL  
DEVELOPMENT CORPORATION,

Plaintiff,

v.

OHIO CENTRAL  
RAILROAD, INC., *et al.*,

Defendants.

CASE NO. 4:09-CV-01904

OPINION & ORDER  
[Resolving Doc. Nos. 50, 62 & 65.]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

In this trespass action, the defendant railroad companies removed the case to federal court and now move to dismiss the case for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1). [Doc. 1; Doc. 50.] In the alternative, the defendants ask the Court to refer certain issues in the case to the Surface Transportation Board. [Doc. 50.] The plaintiff opposes the defendants' motion. [Doc. 62.] For the reasons that follow, the Court REMANDS this case to the Mahoning County Court of Common Pleas.

I.

In its complaint, plaintiff Allied Industrial Development Corp. alleges that it purchased two parcels of property in Youngstown from third-party defendant Gearmar Properties, Inc., who had previously purchased the parcels from defendants The Ohio & Pennsylvania Railroad Company and The Mahoning Valley Railway Company. [Doc. 1-1.] Allied Industrial alleges that, without its

Case No. 4:09-CV-01904  
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consent, the defendants currently occupy an office building on one of the parcels and are using the other parcel for storage. [Doc. 1-1.] Allied Industrial has asked the defendants to vacate the parcels, but the defendants remain on the land. [Doc. 1-1.]

As a result, Allied Industrial filed this state-law action in the Mahoning County Court of Common Pleas. [Doc. 1-1.] Allied Industrial's complaint seeks (1) forcible entry and detainer/ejectment under Ohio statutory and common law; (2) the fair rental value of the parcels during the defendants' unlawful trespass; and (3) damages caused by the defendants during their unlawful trespass. [Doc. 1-1.]

In response, the defendants removed the case to this Court on the basis of federal question jurisdiction. [Doc. 1.] See 28 U.S.C. § 1441(a) (“[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.”); 28 U.S.C. § 1331 (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”). The defendants' removal notice states that because Allied Industrial's requested relief would force them to abandon service over the rail lines on the parcels in question, and because the Interstate Commerce Commission Termination Act (“ICCTA”) explicitly preempts state law regulating rail transportation, this action “aris[es] under” federal law. [Doc. 1 at ¶ 7. (citing 49 U.S.C. § 10501(b) (“[T]he remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.”)).]

The defendants now move to dismiss this action for lack of jurisdiction on the ground that the ICCTA vests exclusive jurisdiction in the Surface Transportation Board. [Doc. 50 at 5-15 (citing

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49 U.S.C. § 10501(b) (“The jurisdiction of the [Surface Transportation] Board over . . . [the] operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities . . . is exclusive.”)).] In the alternative, the defendants ask the Court to refer the ICCTA issues in this case to the Surface Transportation Board. [Doc. 50 at 16-18.]

## II.

A fundamental principle of federal procedure is that federal courts have limited subject-matter jurisdiction and are powerless to decide cases beyond that limited jurisdiction. Consequently, as the Supreme Court has explained:

“Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” . . . The requirement that jurisdiction be established as a threshold matter “spring[s] from the nature and limits of the judicial power of the United States” and is “inflexible and without exception.”

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94-95 (1997) (internal citations omitted).

Because federal jurisdiction is a “threshold matter,” *id.* at 94, federal courts must raise the jurisdictional issue *sua sponte* whenever their lack of jurisdiction becomes apparent. *See, e.g., Mansfield C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884); Fed. R. Civ. P. 12(h)(3) (“Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”). Further, a court of appeals must vacate any federal district court judgment entered absent jurisdiction and dismiss the action. Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 154 (1908). With these principles in mind, the Court turns to whether it has jurisdiction over any part of this case.

Under the “well-pleaded complaint” rule, an action “aris[es] under” federal law—conferring

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federal jurisdiction under 28 U.S.C. § 1331—“only when the plaintiff’s statement of his own cause of action shows that it is based upon” federal law. Mottley, 211 U.S. at 152. Here, Allied Industrial, master of its complaint, named only state-law claims: forcible entry and detainer under Ohio Rev. Code Ann. §§ 1923.01 et seq. and trespass under Ohio common law. [Doc. 1-1.]

The defendants’ notice of removal contends that because the ICCTA preempts Allied Industrial’s claims, this Court has jurisdiction under § 1331. [Doc. 1.] But preemption is generally a defense, and the interposition of a federal-law defense against a state-law claim is insufficient to confer federal jurisdiction. See Franchise Tax Bd. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 14 (1983) (“[S]ince 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption.”).

Nor does the “complete preemption” exception to the well-pleaded complaint rule apply here. Under that exception, if “the pre-emptive force of a [federal] statute is so ‘extraordinary’ that it ‘converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule,’” then “any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law.” Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987) (noting that § 301 of Labor Management Relations Act completely preempts state claims for violation of collective bargaining agreements). See also 13D Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Richard D. Freer, Federal Practice & Procedure § 3566 (3d ed. 2008) (“[The doctrine of “complete preemption”] is based on the theory that some federal statutes have such an overwhelming preemptive effect that they do more than merely provide a defense to a state-law claim. Rather, they take over an entire substantive subject matter area, supplant state law, and make the area inherently federal. Any claim asserted in that

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substantive area—even a claim ostensibly based upon state law—is thus federal and the claim necessarily arises under federal law and invokes federal question jurisdiction.”) (footnote omitted).

In this case, the “complete preemption” exception does not apply because neither of Allied Industrial’s claims comes within the scope of the ICCTA’s preemption clause. That clause’s central concern is “*regulation of rail transportation*”—not the incidental effect on rail transportation caused by a landowner’s right to exclude others from its property. 49 U.S.C. § 10501(b) (emphasis added). As the Sixth Circuit has explained, the ICCTA “preempts all ‘state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation.’” *Adrian & Blissfield R.R. Co. v. City of Blissfield*, 550 F.3d 533, 539 (6th Cir. 2008) (citation omitted) (holding, in context of conflict preemption, that ICCTA does not preempt state statutes requiring railroads to pay for maintenance of pedestrian sidewalks); *see also PCS Phosphate Co., Inc. v. Norfolk S. Corp.*, 559 F.3d 212, 218 (4th Cir. 2009) (Wilkinson, J.) (holding, in context of express and conflict preemption, that ICCTA does not preempt state contract claims that may affect railroad operations).

Moreover, the Surface Transportation Board’s own interpretation of the ICCTA preemption clause reinforces the limited nature of the ICCTA’s complete preemptive reach. That clause recognizes only two categories of categorically preempted state actions: (1) “any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized,” and (2) “state or local regulation of matters directly regulated by the Board—such as the construction, operation, and abandonment of rail lines; railroad mergers, line acquisition, and other forms of consolidation; and railroad rates and service.” *CSX Transp., Inc.*, STB Finance Docket No. 34662,

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2005 WL 1024490, at \*2 (May 3, 2005).

Here, Allied Industrial's Ohio law claims cannot be said to "regulate" the abandonment of rail lines. It is true that the upshot of Allied Industrial's claims (if successful) might affect certain of the defendants' rail lines. But the cause of that outcome is not Ohio's direct regulation of the defendants' rail lines; rather, the cause is the defendants' sale of the two parcels at issue to Gearmar. *Cf. New Orleans & Gulf Coast Ry. Co. v. Barrios*, 533 F.3d 321, 334 (5th Cir. 2008) ("The fatal defect in the Railroad's argument is that the Railroad fails to establish that any unreasonable interference with railroad operations is caused by operation or application of the Louisiana state law as opposed to the independent actions of private parties."); *PCS Phosphate Co.*, 559 F.3d at 218 ("Voluntary agreements between private parties . . . are not presumptively regulatory acts, and we are doubtful that most private contracts constitute the sort of 'regulation' expressly preempted by the statute. If contracts were by definition 'regulation,' then enforcement of every contract with 'rail transportation' as its subject would be preempted as a state law remedy 'with respect to regulation of rail transportation.'") (footnote omitted). Thus, the "complete preemption" exception does not apply in this case.

Because the ICCTA does not completely preempt Allied Industrial's state claims for purposes of the well-pleaded complaint rule, this case does not "aris[e] under" federal law. 28 U.S.C. § 1331. Thus, the defendants' removal of this case under 28 U.S.C. § 1441 was improper, and the Court must remand the case to state court. *See* 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.").

To clarify, the conclusion that the ICCTA does not "completely preempt" Allied Industrial's state-law claims applies only to the jurisdictional question. *See* 13D Wright, Miller, Cooper & Freer

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§ 3566 (“The name [‘complete preemption’] is misleading and this doctrine should be contrasted with ‘ordinary’ or ‘conflict’ preemption, under which federal law provides a defense to a state-law claim. ‘Complete preemption,’ in contrast, is actually a doctrine of subject matter jurisdiction.”). The Court does not resolve the separate issue of whether the ICCTA’s preemption clause provides a defense to Allied Industrial’s claims—an issue that the defendants are free to raise in the state court.

Finally, because the defendants’ improper removal of this case has caused Allied Industrial to incur significant expenses, the Court orders that the defendants pay Allied Industrial’s costs, including attorney’s fees, incurred in defending against their 12(b)(1) motion. [Doc. 50.] See 28 U.S.C. § 1447(c) (“An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal”). However, this order does not include the costs Allied Industrial incurred in preparing its summary judgment motion because Allied Industrial can likely re-use much of that motion to move for summary judgment in the state court. [Doc. 54.]

### III.

In sum, because this case does not “aris[e] under” federal law, the defendants’ removal of the case was improper. As a result, the Court **REMANDS** the case to the Mahoning County Court of Common Pleas and **ORDERS** that the defendants pay Allied Industrial’s actual expenses incurred

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as a result of removal.

IT IS SO ORDERED.

Dated: March 15, 2010

*s/ James S. Gwin*  
\_\_\_\_\_  
JAMES S. GWIN  
UNITED STATES DISTRICT JUDGE

# APPENDIX EXHIBIT 4

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO

ALLIED INDUSTRIAL  
DEVELOPMENT CORPORATION,

Plaintiff,

v.

OHIO CENTRAL  
RAILROAD, INC., *et al.*,

Defendants.

CASE NO. 4:09-CV-01904

OPINION & ORDER

[Resolving Doc. Nos. 82, 83, 88 & 89.]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

The defendant railroad companies in this trespass action move this Court to reconsider its award of attorney's fees that Plaintiff Allied Industrial Development Corporation incurred as a result of the defendants' improper removal of this case from state court. [Doc. 82; Doc. 79 (remand order).] Because the defendants' ground for removing this case was not objectively reasonable, the Court DENIES their reconsideration motion.

The case law interpreting 28 U.S.C. § 1447(c) entrusts the award of costs and attorney's fees to the district court's sound discretion. *See, e.g., Morris v. Bridgestone/Firestone, Inc.*, 985 F.2d 238, 240 (6th Cir. 1993). The Sixth Circuit has held that an award of costs under § 1447(c) does not require a finding that the removing party had an improper purpose. *Id.* at 240. Rather, the normal rule, according to the Supreme Court, is that district courts may award fees "when the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*,

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546 U.S. 132, 141 (2005). Here, the defendants lacked an objectively reasonable basis for removal.

The defendants removed this case on the ground that it “ar[is]e under” federal law because the Interstate Commerce Commission Termination Act explicitly preempts state laws regulating rail transportation—like Ohio trespass law, which could force the defendants to abandon rail service over the rail lines on the property in question. [Doc. 1 at ¶ 7. (citing 49 U.S.C. § 10501(b) (“[T]he remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.”)).]

This ground for removal was not objectively reasonable because the “well-pleaded complaint rule” disallows removal on the basis of a federal-law defense—like preemption—to a state-law cause of action. See Franchise Tax Bd. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 14 (1983) (“[S]ince 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption.”).

The defendants pin their counterargument on the “complete preemption” exception to the well-pleaded complaint rule. [Doc. 82 at 3-8.] But that argument flounders because Ohio trespass law falls outside the ICCTA’s preemptive scope, which covers only “*regulation* of rail transportation.” 49 U.S.C. § 10501(b) (emphasis added). A law that merely has the *incidental effect* of rail line abandonment does not “regulat[e]” rail transportation.<sup>11</sup> *Id.* Accordingly, courts have limited the scope of ICCTA preemption to “state laws that may reasonably be said to have the effect

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<sup>11</sup>If the contrary were true, as the defendants argue, then the scope of ICCTA preemption would be staggering, sweeping away state contract, tort, and property law. Indeed, it is difficult to imagine a state law that could not, in some circumstance, incidentally cause rail line abandonment. *But cf. Fayard v. Ne. Vehicle Servs., LLC*, 533 F.3d 42, 47 (1st Cir. 2008) (Boudin, J.) (“No one supposes that a railroad sued under state law for unpaid bills by a supplier of diesel fuel or ticket forms can remove the case based on complete preemption simply because the railroad is subject to the ICCTA.”).

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of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation.” Adrian & Blissfield R.R. Co. v. City of Blissfield, 550 F.3d 533, 539 (6th Cir. 2008) (citation omitted) (state tax for maintenance of public sidewalks); *see also, e.g., PCS Phosphate Co., Inc. v. Norfolk S. Corp.*, 559 F.3d 212, 218 (4th Cir. 2009) (Wilkinson, J.) (state contract law); New Orleans & Gulf Coast Ry. Co. v. Barrios, 533 F.3d 321, 334 (5th Cir. 2008) (state law authorizing private railroad crossings); Fayard v. Ne. Vehicle Servs., LLC, 533 F.3d 42, 47 (1st Cir. 2008) (Boudin, J.) (state nuisance law).<sup>2f</sup>

In the alternative, the defendants argue that even if their basis for removal was not objectively unreasonable, a fee award is not appropriate because Allied Industrial did not seek remand in a

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<sup>2f</sup>Many of the cases cited by the defendants are distinguishable because—unlike here—the state laws in question specifically targeted rail transportation. *See, e.g., State v. Ill. Cent. R.R. Co.*, 928 So.2d 60 (La. Ct. App. 2005) (holding, in context of conflict preemption, that ICCTA preempted state statute directly governing ownership of particular parcel containing railroad tracks); Rawls v. Union Pac. R.R. Co., No. 09-CV-1037, 2010 WL 892115, at \*1 (W.D. Ark. Mar. 9, 2010) (holding that ICCTA completely preempted state-law claims for “inadequate audible warnings; inadequate visual warnings; failure to exercise reasonable care in [defendant’s] train operations; failure to inspect and repair unsafe crossing conditions; specific unsafe crossing conditions; failure to report unsafe crossing conditions; failure to work with state and local authorities to maintain proper signs, signals, and markings; and, failure to properly train, instruct and manage its employees with respect to its operating practices and rules”); South Dakota ex rel. S.D. R.R. Auth. v. Burlington N. & Santa Fe Ry. Co., 280 F. Supp. 2d 919, 929 (D.S.D. 2003) (holding that ICCTA completely preempted “state contract and tort law remedies arising out of contracts which were previously approved by the ICC and the STB pursuant to federal law”).

In PCI Transportation v. Fort Worth & Western Railroad Co., 418 F.3d 535 (5th Cir. 2005), the Fifth Circuit erroneously failed to analyze the complete preemption issue from the perspective of the plaintiff’s cause of action—instead giving dispositive weight to the fact that the ICCTA’s remedies are exclusive. *Id.* at 544-45. That analysis misses the point. Yes, the ICCTA’s remedies are exclusive—but only within the domain of “regulation of rail transportation.” 49 U.S.C. § 10501(b). Thus, the complete preemption inquiry must ask whether the state law on which the plaintiff’s claim is based in fact “regulat[es] . . . rail transportation.” *Id.* *See also Fayard*, 533 F.3d at 47 (“But even where a federal statute can completely preempt some state law claims, the question remains *which* claims are so preempted. . . . For complete preemption, the critical question is whether federal law provides an exclusive substitute federal cause of action that a federal court (or possibly a federal agency) can employ for the kind of claim or wrong at issue. Accordingly, we narrow our focus to the nuisance claims brought by the [plaintiffs].”) (emphasis in original; footnote deleted).

Finally, the court in Cedarapids, Inc. v. Chicago, Central & Pacific Railroad Co., 265 F. Supp. 2d 1005 (N.D. Iowa 2003), concluded that the ICCTA preempts any state law claim that would have the effect of rail line abandonment. As explained above, that construction reads the scope of ICCTA’s preemption clause too broadly.

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timely manner. *See, e.g., Martin, 546 U.S. at 141* (“[A] plaintiff’s delay in seeking remand . . . may affect the decision to award attorney’s fees.”). But the Court’s remand order took this factor into account by awarding Allied Industrial only the “costs, including attorney’s fees, incurred in defending against the[ defendants’] 12(b)(1) motion.” [Doc. 79 at 7.] The order expressly disallowed “the costs Allied Industrial incurred in preparing its summary judgment motion . . . .” [Doc. 79 at 7.] In other words, by limiting the fee award to the costs incurred against defending against the defendants’ Rule 12(b)(1) motion, the Court’s remand order did not award any fees attributable to Allied Industrial’s failure to expeditiously seek remand.

Finally, the defendants argue that the fee award should not include Allied Industrial’s costs of defending against their 12(b)(1) motion because they would have filed that motion—forcing Allied Industrial to defend against it—even if the case had remained in state court. As evidence, the defendants point to another case in state court between the same parties in which the defendants successfully moved the state court to refer certain issues to the Surface Transportation Board. [Doc. 50-1 at 6-12.] The flaw in this argument is that even if the defendants had made the same motion in state court, Allied Industrial might not have opposed the motion; after all, that court had already decided the issue against Allied Industrial. And even if Allied Industrial did oppose the motion, motion practice on the issue would likely be less comprehensive before that court than before this Court, which had not yet expressed an opinion on the 12(b)(1) issue.

Thus, because the defendants’ ground for removing this case was not objectively reasonable, and because no “unusual circumstances warrant a departure from the [normal] rule,” *Martin, 546 U.S. at 141*, the Court **DENIES** their reconsideration motion. [Doc. 82.] Further, the Court

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GRANTS Allied Industrial's motion for attorney's fees and costs in the amount of \$16,035.50.<sup>3/</sup>

[Doc. 83.]

IT IS SO ORDERED.

Dated: April 14, 2010

*s/ James S. Gwin*  
\_\_\_\_\_  
JAMES S. GWIN  
UNITED STATES DISTRICT JUDGE

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<sup>3/</sup>The defendants advance three additional arguments for why Allied Industrial's claimed fees are excessive. [Doc. 88 at 6.] All three fail.

First, the defendants claim that Richard Streeter's legal services were for STB jurisdiction issues. However, Streeter's time entry descriptions refer to federal jurisdiction and plausibly stem from defending against the defendants' Rule 12(b)(1) motion.

Second, the defendants argue that "there is no verification that Mr. Streeter's hourly rate is reasonable." [Doc. 88 at 6.] But they do not offer any ground for believing that Mr. Streeter's hourly rate is unreasonable.

Third, the defendants argue that Allied Industrial's opposition to their reconsideration motion was untimely, and thus Allied Industrial's cost of preparing that opposition is not recoverable. [Doc. 88 at 6.] But as Allied Industrial points out, its opposition was not due until April 12th. [Doc. 89 at 7 n.3.]

# APPENDIX EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

CASE NO. 4:09 CV 01904

ALLIED INDUSTRIAL DEVELOPMENT )	
CORP, )	
Plaintiff/Counterclaim )	
Defendants )	DEPOSITION
VS )	OF
OHIO CENTRAL RAILROAD, INC., )	MR. TERRY FEICHTENBINER
ET AL., )	
Defendants/Counter- )	
Claimants/Third Party )	
Defendants )	
VS )	
GEARMAR PROPERTIES, INC., )	
Third Party Defendants )	

DEPOSITION taken before me, Cynthia M. Nibert, a Notary Public within and for the State of Ohio, on the 15th day of December, A.D., 2009, pursuant to Notice, and at the time and place therein specified, to be read in evidence on behalf of the Plaintiffs/Counterclaim Defendants in the aforesaid cause of action, pending in the United States District Court for the Northern District of Ohio, Eastern Division.

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Reported and Transcribed by:  
Cynthia M. Nibert  
Registered Professional Reporter

APPEARANCES

F. TIMOTHY GRIECO, ESQ.,  
On Behalf of Plaintiff/Counterclaim  
Defendants

THOMAS J. LIPKA, ESQ.,  
On Behalf of Defendants/Counterclaimants  
Third Party Defendants

RONALD KOPP, ESQ.,  
On Behalf of William Strawn

ALSO PRESENT:  
John Ramun, President, Allied Industrial Development Corp

STIPULATIONS

It is stipulated and agreed by and between counsel for the parties hereto that this deposition may be taken at this time, 10:00 a.m., at the offices of Manchester, Bennett, Powers & Ullman, Attorneys at Law, Youngstown, Ohio, by Notice of Deposition.

It is further stipulated and agreed that the deposition may be written in stenotype by Cynthia M. Nibert, a Notary Public within and for the State of Ohio, and a Registered Professional Reporter, and by her transcribed; that the transcript be made available to the witness for signature, and that the witness shall read the same and subscribe thereto, and that the deposition may thereupon be used on behalf of the Defendants/Counterclaimants, Third Party Defendants in the aforesaid cause of action.

\* \* \*

1 other deposition, but for the record here, can you tell me  
2 what your position was, and your role and responsibilities  
3 in that position.

4 **A My position with The Ohio Central Railroad  
5 System?**

6 **Q Correct.**

7 **A Was Senior General Manager with direct  
8 responsibility for all things relative to the operation of  
9 the Youngstown Division, which included five of the  
10 individual incorporated properties under The Ohio Central  
11 Railroad System banner.**

12 **Q You say five individually incorporated  
13 properties? Is that the term you used?**

14 **A Yes.**

15 **Q What do you mean by that?**

16 **A Five different railroads.**

17 **Q Five different railroads.**

18 **A Uh-huh.**

19 **Q And which were those?**

20 **A It would be The Ohio and Pennsylvania Railroad,  
21 The Mahoning Valley Railway, The Youngstown Belt Railroad,  
22 The Warren and Trumbull Railroad, and the fifth one would be  
23 The Youngstown and Austintown Railroad.**

24 **Q And in your position as General Manager, would**

**A The, the company made the decision that, due to  
business levels, that the business levels could not justify  
my position, and I was severed from the company.**

**Q Did anyone else from your location down there at  
the Youngstown Division leave at the same time you did?**

**A No, not that I'm aware of.**

**Q Who was still working in that office down there  
on Poland Avenue with you at the time -- well, at least  
before that that the office was moved, or vacated or  
whatever? Who was still working with you down there?**

**A It would be the market manager, the general  
agent.**

**Q And could you give me names?**

**A Sure. Market manager is Brian Freeman. The  
general agent/trainmaster is Rick McCracken,  
M-c-C-r-a-c-k-e-n. The locomotive manager maintainer was  
Nick Mundisev, M-u-n-d-u-s-i-v -- just a minute. I'm sorry.  
M-u-n-d-i-s-e-v. I'm sorry. And of course myself.**

**And then as other corporate people would visit  
regularly, there was office space kept for them as well when  
they were here.**

**Q Now, any of those other folks you mentioned, are  
they still employed with the railroad?**

**A As far as I know. But I have no contact with the**

1 you be involved in property transactions that any of those  
2 five railroads would be involved in?

3 **A Only to the extent of how it affected my  
4 operation. But once again, any of the actual business  
5 transactions were handled through headquarters.**

6 **Q And I understand on a certain level what you're  
7 saying, but break it down for me. What is the business part  
8 you're not involved with versus, it sounds like the  
9 operational aspect that you are involved with?**

10 **A Well, to the subject matter of this case, I would  
11 use, as an example, and say that I was involved in having  
12 the replat executed and produced, and then forwarded on to  
13 the next points, in other words, headquarters and obviously  
14 Bauman Land and Title and so forth.**

15 **But the property transaction or sale agreement  
16 and so forth, I had nothing to do with negotiating price,  
17 negotiating exactly what got sold, what didn't get sold. I  
18 had nothing to do with those negotiations.**

19 **Q Okay. You wouldn't be involved in any  
20 discussions regarding, you know, negotiating the terms of  
21 the sale of the property?**

22 **A No, sir.**

23 **Q Okay. Why did you leave your position as General  
24 Manager in August of 2009?**

**railroad since the 23rd of August 2009. So I don't know  
factual details who is or is not employed.**

**Q At least as the time you left, all of those folks  
were still employed?**

**A That's correct.**

**Q And you weren't aware of any discussion to let  
them go as well?**

**A Not that I'm aware of.**

**Q Now, you used the term "business levels,"  
correct, in talking about the reason they gave you for  
wanting to let you go from the railroad, right? The word  
was "business levels"?**

**A I believe so.**

**Q What do you mean by that, "business levels"?**

**A Obviously railroads are transporter of freight  
that involves all things that are consumed and used in the  
production of consumables. And with the current  
catastrophic economic conditions in the United States, which  
I must say in my 35 years of operating railroads, I have  
never seen business levels across the country, not just at  
Ohio Central, drop as they have. They're starting back up  
now. Things are looking a little better, but it has been  
catastrophic.**

**Q And I mean for the business of a railroad,**

1 Mahoning Valley Railway area is like a hub and a spoke for a  
2 number of different functions on the railroad as a whole.

3 Q Okay. That's fair. I'm going to let you  
4 continue. But when you talk about The Mahoning Valley  
5 Railway area, and I think that's the term you used, --

6 A Yes.

7 Q -- are you referring to something that's  
8 encompassed within this map? And I know you have seen it  
9 before. This is Exhibit 5 we have marked in this  
10 litigation. Or would it encompass something outside of this  
11 map?

12 MR. LIPKA: Actually, sorry. This is Exhibit 5,  
13 because there is a difference.

14 MR. GRIECO: There is a difference. There is  
15 writing.

16 A Just look and see what I'm looking at here. This  
17 Google Earth image that we call The Mahoning Valley Railway  
18 Territory - West End is indicative of a portion of what I  
19 would refer to as Mahoning Valley Railway territory as a  
20 whole.

21 Q Okay. So this portion isn't necessarily the hub  
22 and the spoke -- or the, I'm sorry, what was the term you  
23 used?

24 A A hub and spoke.

and the CSX interchange here.

Q Okay. Now, you brought this up to say that the  
drop off was not as pronounced in what we will just call  
this hub area as it was for other parts of the Youngstown  
Division?

A That is correct.

Q And why do you say that, or what do you base that  
on?

A Because the volume of the drop off relative to  
customers located on other parts of the railroad was more  
dramatic than it was for customers located here on this  
Mahoning Valley Railway territory.

Q Now, remember, we have talked about this, and  
even in the other case, it's hard to talk about just a  
portion of these tracks or a portion of this territory. But  
you seem to be able to make a distinction between a drop off  
in one area between, and another area.

Is there some way internally, whether by  
reporting or certain data, that you can focus on this hub  
area and distinguish the carload levels for that area as  
opposed to other areas of The Mahoning Valley Railway? Or  
is that just a gut feeling you're going on?

A No. Certainly it's, it's not just a gut, not at  
all. There are customers that are definitely related to

1 Q Okay. It would be even a wider territory than  
2 what's depicted on Exhibit 5?

3 A It is. However, when I spoke about the real hub  
4 of the operation, this west end segment of the Google image  
5 would be the one that I would direct your attention to  
6 because of the fact that the locomotive shop is here, the  
7 main office is here, the volume of trackage that is here for  
8 staging, equipment, railroad equipment and so forth, plus  
9 the interchange with CSX is up here to the west at the tail  
10 track, what we call the MVRV tail track, as it's labeled.

11 An then of course it's the proximity to, it is  
12 The Mahoning Valley Railway's proximity to the interchange  
13 with the Norfolk Southern Railway at Haselton Yard, which,  
14 of note, is that it's the only interchange with NS, Norfolk  
15 Southern, that the whole division had.

16 So anything that originated or terminated on the  
17 Youngstown Division that was relative to Norfolk Southern  
18 had to come and go here.

19 Q Okay. So is it fair to say, based on what you  
20 just said, that if someone were to ask you, what was the  
21 main hub for The Mahoning Valley Railway territory as a  
22 whole, you would point to this area by the Maverick, the old  
23 Maverick plant?

24 A Yes. Inclusive of the Haselton Yard interchange

this territory that data could likely be produced that would  
show traffic levels for those customers. But then there is  
also activity that's relative to this Mahoning Valley  
Railway territory that's not going to be on record, and that  
is, like I mentioned earlier, the locomotive servicing.

Locomotives are required to have what we call by  
the Federal Railroad Administration, which is part of the  
United States Department of Transportation, you have to have  
a 92-day inspection of each locomotive, every 92 days. You  
have to have annual inspections, biannual inspections.

Then of course, in addition to that, there is  
running, you got repairs for locomotives, which means  
repairs that are done, the locomotive moves into the shop,  
gets the repair done, and heads back out for service. It's  
not heavy work, like getting the diesel replaced or major  
car body work, something like that, that would have the  
locomotive out of service for a long period of time.

The customer, for instance, MHF Logistics, their  
business was considerable. It was related both to  
interchange at Norfolk Southern and up here at CSX. And  
there were many movements that were required to be made with  
our locomotive and crew for MHF Logistics that would not be  
shown as a revenue interchange move to or from Norfolk  
Southern or to or from CSX, because they were moves, respots

1 and so forth of equipment within their repair facility.

2 Q Well, is Ohio Central compensated for those  
3 moves?

4 A Yes.

5 Q Okay. And how is that recorded?

6 A There are certainly records at the end of the  
7 month produced that bills the customers. But I just wanted  
8 to make certain that you didn't understand those would be in  
9 rail connect, for instance.

10 Q Rail connect?

11 A Because they don't involve an interchange.

12 Q Interchange, okay. Fair enough. For instance,  
13 with the MHF customer, if you wanted to look at what the  
14 monthly, or semiannually or annual revenue for that customer  
15 was, can you get that data from any system at The Ohio  
16 Central Railroad?

17 A I would say it's likely that Ohio Central could  
18 produce that information.

19 Q And could it be produced in a summary fashion,  
20 without having to go through all of the, what I will call  
21 primary source documents, whether it be bills of lading or  
22 receipts and that level of detail? Could you get summary  
23 level printouts that would show the revenue for that  
24 customer?

track? I mean, Warren is quite some ways away, correct?

A It is. But when traffic -- I should say when  
movement of the inbound traffic to Bloom would be over the  
road longer than what Bloom could tolerate or what they  
needed, for the convenience sake of the customer, we would  
allow them to transload plastic here instead of transloading  
out in Warren, because they can get to the material, and  
they have a vacuum truck that they would then take the  
material to other injection mold operations, other than  
Warren, Ohio.

Q And so when you say transload, what does that  
mean specifically?

A Means take the material out of the railcar and  
put it in a truck for distribution.

Q And that would occur right here on this premises?

A It would typically occur on 240 track. There  
were times when it was done on 292, and there were times  
when it was done on 298. For some reason the 298 is not  
labeled on here, but there was the available use of 298, 292  
or 240.

Q And as of the time you left the railroad company,  
was that type of business still going on with that plastics  
company?

A Yes. In fact, I personally, in the last weeks

1 A I would say that that's, that's feasible.

2 Q Okay. I'm glad you brought up customers, because  
3 I want to go over that real quick. MHF is no longer there?

4 A That's my understanding.

5 Q Okay. Were they there and operating at the time  
6 you left the company?

7 A Yes, they were.

8 Q Okay. Other than MHF, can you tell me what other  
9 customers are served by this area of rail that I think you  
10 previously described as a hub?

11 A Okay. MHF Logistics, down here on 240 track we  
12 would regularly allow a plastic customer from Warren, Ohio,  
13 to transload plastic pellets out of railcars into his  
14 hydrovac truck for delivery to various locations. There is  
15 Cantar Poly Air.

16 Q Can I stop you, Terry, for one --

17 A Sure.

18 Q Who was the plastic company?

19 A Bloom, B-l-o-o-m, Plastics, Bloom Plastics.

20 Q Where are they located?

21 A They're located out in Warren, Ohio, their actual  
22 plant is. But they distribute plastic to a number of  
23 different locations, consumers.

24 Q And what would you be doing for them on this

that I was there, I personally placed two cars for Bloom to  
unload.

Q Okay. And could the quantity of that business or  
revenue be measured in the same way you described for MHF?

A That might be tough because of the fact that  
Bloom is, is considered a customer in Warren, Ohio, and the  
traffic is going to be shown as going to Bloom, and it's  
likely that it's not going to be shown being short circuited  
to this location.

Q But we could do the search by customer, right? I  
mean, you could just go into the database by customer?

A And see what he does plastic-wise. But you  
wouldn't be able to differentiate which cars, or how many  
actually stayed here and how many went out to Warren.

Q Okay. Other than the two we have talked about,  
any other customers served by this hub of tracks?

A Okay. MHF. Then down out of sight of this  
Google Earth image is Castlo Industrial Park.

Q Who is served there?

A I'm sorry?

Q Who is served there?

A The Drywall Barn, and Industrial Timber and Land.  
And they would receive cars and send the cars out via NS and  
CSX. So in other words, all this physical plant was

necessary to get to the Mahoning Valley interchange track with CSX up here called the tail track.

Q How would the Castlo folks get to CSX? Can you point that out?

A Well, it's not completely on this map. But the Ohio Central Struthers lead takes you over and connects you into Castlo Industrial Park, and then the Mahoning Valley Railway has operating rights through the Norfolk Southern trackage known as CP Graham, Haselton Yard, and on across the 220 track or #4 Main to 239, and then on up to Trivel, and 294 up to the interchange.

Q Gotcha. Now, at this point, though, using their rights up into the NS Yard, could they come up across the river and connect with CSX at a point north of the Mahoning River?

A Well, first off, I can say physically that's possible. But you're never going to -- CSX is never going to allow that to occur, because there are 40 or 50 trains a day on that track of theirs, plus it's competing traffic.

Q So they would require payment of some sort?

A Absolutely.

Q Is that something in your experience, though, you recall having to do for some reason or another?

A Never.

Q Casey Equipment is a former LTV facility, correct?

A It's a former steel plant, but I don't know the exact heritage of it.

Q Okay. Anybody else, any other customers served by these rail lines?

A Right now I can't think of any. That's, I believe I listed all of them.

Q Who -- what about up here? Who's up here?

A This plant -- let me look here. That's the old west yard. That plant is being dismantled right now, I believe.

Q Okay.

A Part of the old seamless mill.

Q Now, all the customers you mentioned were being served at the time you left the railroad in the summer?

A Yes.

Q Okay.

A According to demand, according to demand.

Q Right. Now, defining -- well, had any of the business with these customers that we have talked about for these tracks dropped off in the recent months or years?

A To some degree. And I, and I would add, I did err in missing one other customer. There is also a customer

Q Never?

A And as I say, I want to make sure it's understood that we are just talking conceptually, it's possible to route that way. But CSX would never allow that to occur.

Q And you say that's because it's competing traffic?

A That's correct. Plus the volume of traffic that's on it, this is a, this is their Baltimore to Chicago main line.

Q Okay. So we talked about the Castlo folks, MHF, the plastic company. Any other customers served by these tracks?

A Okay. Then there is, over here there is Casey Equipment. There is Quality Bar and Allegheny Heat Treating. And then down further into the old Gateway yard facility is Gateway Car Shop, and they repair railcars.

Q Is that a former LTV or steel plant?

A Which?

Q The one you just mentioned, Gateway.

A Up in Gateway?

Q Yes.

A No. That's an old Pittsburgh and Lake Erie classification yard, Pittsburgh and Lake Erie Railroad classification yard.

called Lally, L-a-l-l-y, Pipe and Tube, and they were located on east of the Castlo Industrial Park. In other words, we operated through the Castlo Industrial Park in order to get to Lally Pipe and Tube. And they brought in multiple grades and sizes of pipe for resizing and then secondary sale.

Q Did you -- I don't know if it was you or Mr. Strawn that used the term "nerve center." Did you use the term "nerve center" to describe this?

A I don't recall that I did.

Q Or you used the term hub?

A Hub, right.

Q All right. You said you were let go because of dropping business levels, correct?

A That's correct.

Q Wouldn't you expect that you would be judged based on the traffic that's occurring at the hub of this operation?

MR. LIPKA: Objection. You can answer, Terry.

Q You can answer.

MR. LIPKA: You can answer. I'm sorry.

Q If you understand.

A The territory that I was responsible to, for management was the Youngstown Division. And the Youngstown

1 All of these tracks here, whether, you know, from the 292  
2 track right outside the plant up to the river to the, to the  
3 #3 Main, do you consider any of these tracks to be main  
4 line?

5 **A What context are we describing or using the term  
6 "main line"?**

7 **Q Yeah. I -- problem with definitions in this  
8 case. Where do you understand a main line within the  
9 context of the railroad business to be? Does that term have  
10 any meaning to you, a main line?**

11 **A The term main line and its definition is going to  
12 vary with the context in which you're using the term "main  
13 line."**

14 **Q Okay. I mean, for instance, I think you used the  
15 term "main line" in describing the CSX track up north of the  
16 river.**

17 **A Yeah. That, for instance, is CSX's main line  
18 from Baltimore to Chicago.**

19 **Q Why do you know that's a main line, and why do  
20 you readily describe that as a main line?**

21 **A It's just information that you just gain by  
22 osmosis, being in the industry for 35 years. It's just  
23 industry knowledge.**

24 **I mean, the railroad may sound like it's a huge**

**CSX track that we're talking about being described as a main  
line differs from these tracks here that are west of Center  
Street on the --**

**Q On the --**

**A -- on the Mahoning Valley.**

**Q Right, on Lot 62188 and Lot 62320?**

**A Okay. Obviously speed, number of trains,  
occupancy authority, control of occupancy, and all that sort  
of thing. All right?**

**The CSX track, trains run according to what we  
call block signal indications that are controlled by a train  
dispatcher in Jacksonville, Florida. The passenger trains  
run 79 miles per hour, freight trains run 60. These tracks  
over here in the Mahoning Valley territory are for, or  
within the context of the operation of The Mahoning Valley  
Railway, no less important than the CSX's main line is to  
their whole.**

**In other words, this CSX main line is just as  
important to their whole system as these tracks were to The  
Ohio Central Railroad System, Youngstown Division --**

**Q Sure.**

**A -- as a whole.**

**Q But there are differences between the lines?**

**A There are differences.**

1 **industry, but you would be surprised how small it is within  
2 the country, and how many people you know, and how much you  
3 know about all other carriers.**

4 **Q Well, all right. There are so many different  
5 ways to slice this. Let me try it this way.**

6 **What are the characteristics that are different  
7 between a main line, like that CSX track that we discussed  
8 previously, and these tracks in here west of the Center  
9 Street Bridge, and between Poland Avenue and the Mahoning  
10 River?**

11 **A Okay. And being as how these are labeled, can  
12 you -- west of Center Street, which ones would you like me  
13 to refer to?**

14 **Q Well, I mean, if there is ones you want to carve  
15 out because you believe they, you know, deserve a different  
16 type of description, that's fine. I don't know how else to  
17 word the question, because I don't want to take up more time  
18 than we have to by going over each track.**

19 **But I mean, I think you're a better position to  
20 tell me if some of these tracks can be grouped one way, and  
21 if you need to carve one out another way, that's fine. I  
22 mean, do you understand what I'm saying? Or I got to try to  
23 reask the question?**

24 **A Well, you asked initially how, for instance, the**

**Q Okay. So let's break down a few. This CSX line  
up here would be governed by a former train schedule; is  
that your understanding?**

**A It's, it's governed by block signal indications  
that are like traffic lights at intersections when you drive  
on the roads. And those, the colors of the signals and the  
combinations of those colors tell the engineers what to do  
with their trains.**

**Q Now, there is no such similar signal system or  
regular rail schedule that governs these Mahoning Valley  
Railway tracks over here south of the river?**

**A Well --**

**Q Is that right?**

**A Mahoning Valley Railway tracks were certainly not  
signaled, but they were controlled. Their occupancy was  
controlled by my management or my proxy. And typically it  
was daylight work, according to the demands of the customer.**

**Q Was there any formal schedule that governed those  
tracks?**

**A Not a formal schedule in the context of a train  
will be here at such and such a time, a train will be here  
at such and such a time and so forth. But there was a  
performance schedule that was in place for the customers, in  
that they knew that at least five days per week, Monday**

1 through Friday, they could ask for a switch or service,  
2 whatever you want to refer to it as, and it would be  
3 provided.

4 Q You say pro forma schedule. You mean like a look  
5 ahead schedule?

6 A Just a, an operating plan for the Youngstown  
7 Division as a whole as to what train assignments operate on  
8 what day, and what territory they operate and so forth.

9 Q And that would be in writing?

10 A Yes.

11 Q Okay. And do you recall whether that would have  
12 existed at the time you left the railroad, that type of  
13 schedule?

14 A There was an operating plan that I had put  
15 together that explained to the Genesee and Wyoming folks, as  
16 the new owners, how we operated the division on a daily  
17 basis, and what was done every day on a daily basis.

18 Q That's in writing?

19 A Yes, sir.

20 Q Okay. You would agree with me there is no  
21 express passenger or mail service over any of these Mahoning  
22 Valley Railway lines, again, south of Mahoning River, north  
23 of Poland Avenue?

24 A No, no.

1 Q When we talk about a, a railroad or train agent,  
2 what does that term mean to you if I, if I said railroad or  
3 train agent?

4 A Well, the agent that we have had in my employment  
5 at Youngstown was a person that front line managed the  
6 crews, the train crews, directed where they would go, when  
7 they would go, and what the scope of their business would be  
8 for that day and so forth.

9 Q Okay. And there would be an agent in this area  
10 here that we have been talking about?

11 A The agent worked out of this office right here on  
12 the 62188 parcel. That's, that office, that's the reason  
13 that we had that property replatted to include the office,  
14 to be retained by us when we sold to, to Gearmar, so that we  
15 would have an operating headquarters for the division.

16 Q Okay. What's a bill of lading? I know that's  
17 kind of a simplistic question. But --

18 A A bill of lading, in real general terms, just  
19 lists what the, the given conveyance is carrying, whether  
20 it's a tractor trailer, or, or an ocean-going container or a  
21 railroad freight car.

22 Q And in connection with the traffic over the  
23 tracks we have been talking about here, Mahoning Valley  
24 Railway tracks, who would complete the bill of lading?

A It depends on the customer and the traffic.  
Some, some of it was done by customers, and then dumped  
directly into the nation-wide electronic pool system, and  
some were still done by our local agent, which were very  
much in the minority.

Most customers now are tied into the electronic  
billing arrangement, and the bills go directly into a big  
mailbox.

Q Okay. Fair to say for The Mahoning Valley  
Railway tracks we have been talking about, the majority of  
the bills of lading were completed by the customer; is that  
right?

A That's correct.

Q Okay. And with respect to the traffic that would  
go over The Mahoning Valley Railway tracks, the service -- I  
think you got into this before -- but the service would be  
requested by the customer in advance, correct? They would  
contact Ohio Central, say they have a need for XYZ, and then  
you would reply as to what you were able to do for them?

A Well, that was one of the things that took place  
relative to customers, yes.

Q Okay. What's the other thing?

A When traffic would be received for a given  
customer, either at CSX or NS, we would have that

information advanced to us electronically, then we would  
notify the customer and act accordingly to their  
instructions, whether they wanted the shipment delivered, or  
if they wanted, excuse me, wanted us to hold it or whatever.

Q Okay.

A Whatever the customer wanted to be done is what  
was incumbent upon us to do.

Q Were there any customers up here in Performance  
Park that are served by these?

A Cantar Poly Air.

Q Cantar Poly, okay, you did mention. And that's  
the only customer that's up there that's served by these  
tracks?

A Yes. Well, up above here is Indolex -- no, no,  
not Indolex. Scratch that, please. Not Indolex. It's an  
aluminum extrusion operation, and right now the name escapes  
me. But they have a brand-new technology for extruding  
aluminum bottles in the shape of long neck, for instance,  
like beer bottles are the only manufacturer of them.

Q Right.

A And the railroad would very much -- I know when I  
was there -- like to penetrate that lane of traffic, and  
would do so thereby with this track, this extension of  
track.

1 Q Okay. Was there service to that customer at the  
2 time you left the railroad?

3 A **No. But I know that it was being --**

4 Q Explored?

5 A **-- explored, and attempting to develop it.**

6 Q Was there still business with Cantar Poly at the  
7 time you left the railroad?

8 A **As far as I know there was. But I don't know for  
9 certain.**

10 Q Had it dropped off in recent memory?

11 A **Yes. Like all traffic, yes.**

12 Q I don't recall if it was your former deposition  
13 or Mr. Strawn, I don't recall where this comes from. I  
14 remember someone talking about in the recent months, say  
15 from, you know, spring of '09 into the summer, that traffic  
16 had been reduced through these lines to a couple of carloads  
17 per week. I believe that was the term that was used. And  
18 again, I don't recall who said it. It could have been in  
19 our negotiations to try to settle the case.

20 Is that consistent with your recollection leading  
21 up to the time when you left the railroad that, at least as  
22 of the summer of '09, there were only a couple of carloads  
23 per week going through these rail lines?

24 A **Well, first off, I, I wouldn't feel comfortable**

there been any other areas, whether controlled by other  
entities or not, where you have stored or staged cars and  
perhaps had to pay to do so?

A **No.**

Q No? We went through a discussion of these  
different characteristics which, at least based on the case  
how I look at, you know, speaks to whether it's a main line.

I still want to get back to the question we, we  
started off with, though, your understanding of a main line.  
And I guess I don't know how else to, to ask the question.  
I mean, if you think a different railroad term is applicable  
to describe these tracks here, again, west of the Center  
Street Bridge, south of the Mahoning River, north of Poland  
Avenue, let me know. But I will, I will again just ask you.

Do you consider these tracks to be main line  
tracks?

MR. KOPP: Well, I'm going to object now, because  
you're talking about reading case law, and so perhaps trying  
to draw legal conclusions from this witness. He said that  
different terms may be used in his industry dependent  
upon -- I forget your word -- context or something.

A **Yeah, context.**

MR. GRIECO: That's fine. I'm sorry, Ron. Go  
ahead.

1 **characterizing a number. But I would also return to my  
2 explanation that there was far more going on here than a  
3 carload in and carload out.**

4 **There was MHF Logistics, there was the locomotive  
5 shop, there was the staging of equipment here for Castlo  
6 Industrial Park, in and outbound of Castlo, in and outbound  
7 of Norfolk Southern, Haselton Yard --**

8 COURT REPORTER: I'm sorry.

9 A **And Haselton Yard, Norfolk Southern. And I  
10 forgot. I'm sorry. I got to going mighty fast.**

11 Q For the Youngstown Division, which I know is a  
12 little broader than what's on this map, is there any other  
13 area that can be used to stage or store cars, other than  
14 this area right outside the old Maverick plant?

15 A **No. I will tell you, that's, that is  
16 characteristic of the Youngstown Division, particularly  
17 areas not involved with the Mahoning Valley territory.  
18 There is limited to no available holding space, so things  
19 have to move every day. In other words, things have to be  
20 advanced to their distension daily. There is just not  
21 holding space.**

22 Q Well, but relative to the Youngstown Division in  
23 recent memory, I understand it's limited. But other than  
24 storing and staging cars here by the Maverick plant, have

MR. KOPP: I don't mean to make a speaking  
objection, but in an effort to really be helpful, I think  
that what he's saying is there is a difference in context  
between a line, like up here north and a short line down  
here south, and how those terms are used. And if I'm wrong,  
I'm wrong. But I think that's where you're missing each  
other.

Q That's fine. But I just want to know your  
understanding, and I don't want to have you make a legal  
analysis. I want to go based on your experience, terms you  
would use in the ordinary course of business. Okay?

In any context, would you consider these tracks  
here we have been talking about as main line tracks?

A **Well, they're not labeled main lines.**

Q Is that what's controlling, what they're labeled  
on the relevant maps?

A **No. These, these names like 240, 239, #4 Main,  
275, those are all numbers and names that existed when we  
bought the property.**

Q Where did they come from? From LTV?

A **I can assume either the entity we purchased them  
from or, you know, prior to their ownership.**

Q So the, the labels for these tracks were on maps  
or plats prepared by the previous owners of this land; is

1 that fair?

2 A A, a person that was employed by the previous  
3 owner elected to come to work for The Ohio Central Railroad  
4 System at the time that we purchased the property. And he  
5 was very helpful in apprising us of the names and so forth  
6 of all the tracks, together with diagrams that we had  
7 received from LTV.

8 Q What was his name? Was it Grant, or Gant  
9 something?

10 A No.

11 Q Do you recall his name?

12 A Yeah. John Pokopatz.

13 Q John Pokopatz. It wasn't even close.

14 MR. KOPP: Do you have a spelling of the last  
15 name?

16 A Yeah. P-o-k-o-p-a-t-z.

17 Q Is he still employed with the railroad?

18 A As far as I know.

19 Q He was at the time you left?

20 A Yes.

21 Q Where was he based out of?

22 A Here.

23 Q Okay. Okay. Then other than the previous owner  
24 designations, I mean, if you were asked to describe in a

had been in operations their entire life, and ask him what a  
spur track was, they would probably answer something similar  
to that, that it is a track that is pertinent to another  
track, but that it just goes out a certain distance and  
comes to an end, just stops.

Q What's a side track?

A A side track, once again, within the industry, is  
going to be typically described as a track that is, once  
again, pertinent to another track that is connected at both  
ends. In other words, you can access the side track from  
both ends. It's east end or it's west end, north end, south  
end, whatever, whatever compass direction is of the track.

Q Okay. For all intent and purposes, from your  
perspective, would the terms "industrial track" and  
"industrial yard track" refer to the same thing?

A Very synonymous, I would say.

Q Okay. This P&LE, PL&E line, or LE&E that's right  
in front of Poland Avenue, that's a main line, correct?

A It was known as the Lake Erie and Eastern main  
track at one time prior to my arrival in this area. But at  
this stage of the game, that track is, like most of the  
other ones that are yellow here, they're just industrial  
tracks.

Q Is it fair to say that, whatever the context

1 submission, I don't know what it would be, either to your  
2 superiors or -- I don't know what the context would be. If  
3 you had to describe to someone what these tracks are  
4 characterized as, what would you, what would you say?

5 A Industrial yard tracks.

6 Q Industrial yard tracks.

7 A In general terms. But I must, once again, say  
8 that, in 35 years of railroading in several different states  
9 and on several different properties, the naming of these  
10 tracks is very consistent with what you typically see within  
11 the industry.

12 Q Right. And why would you call them industrial  
13 yard tracks?

14 A Because this is an industrial area, and the form  
15 of operation over the trackage is what, within the industry,  
16 we would generally characterize as being yard operations.

17 Q Would another reason be because the tracks only  
18 involve industrial delivery?

19 A That could be a component of it. But not solely,  
20 no.

21 Q Are any of these tracks spur tracks?

22 A Well, a spur track, in general, is one that comes  
23 off of another track and dead ends. So once again, within  
24 the industry, if you asked 10 different railroad people that

would be, you, in conversation, would not refer to any of  
these tracks as a main line? Is that fair to say?

A It would depend on if we were talking in the  
context of the CSX main Baltimore to Chicago, or 239 track,  
or #3 Main or #4 Main.

Amongst a group of railroad people, railroad  
operating people that would be discussing it, it would be  
well understood amongst them in a conversation what you were  
describing if you described #4 Main in the Mahoning Valley  
Railway versus the CSX Baltimore to Chicago.

Q Fair enough. I understand. There could be  
another way to effectively make sure everybody knows what  
you're talking about. But --

A That's right.

Q But my question is a little different. And you  
know, it's a complicated subject. I'm not sure how else to  
ask it but just to try to simplify it this way and say, in  
any conversation, any context, could you imagine a scenario  
where you would refer to any of these tracks here as a main  
line?

MR. KOPP: Objection; that's asked and answered.  
He just said that he would, number one, and number two, I  
think you're truly calling for a legal conclusion to  
coincide with the research you have done on that definition.

1 But go ahead and answer differently, or again,  
 2 however you would like to proceed. But go ahead.  
 3 **A Respectfully, I just have to say it would depend**  
 4 **on the context of the conversation that I was having;**  
 5 **however, amongst railroad familiar people like myself, I**  
 6 **could discuss the names of these tracks just as they are**  
 7 **right now, and they would understand that, even though we**  
 8 **call this #3 Main here, that there is a whopping difference**  
 9 **in the purpose of #3 Main versus the purpose of the CSX**  
 10 **main.**

11 **And again, I'm not attempting to be difficult.**  
 12 **But it's an industry parlance that, unless you have been in**  
 13 **the industry as long as I have, just like I am not --**

14 Q I understand.

15 A -- in the legal business.

16 Q I understand.

17 A You have your own speak, you know.

18 Q Okay. Here are the exhibits we marked yesterday.

19 A Okay.

20 Q And actually, this is a Number 6 that just needs  
 21 to be inserted here. I'm going to show you Exhibit 1. And  
 22 do you recognize that as a version of the replat of Lot  
 23 62188 and 62320, which of course had not been yet executed?  
 24 But do you, do you -- well, go ahead.

that has the plant on it right now as replatted, and  
 obviously 188 to refer to the parcel that now, as replatted,  
 has a lot of the railroad tracks and the office.

MR. KOPP: Let me see if I can help, also. Just  
 go ahead and assume that those were the numbers --

A All right.

MR. KOPP: -- that were there before.

A All right.

MR. KOPP: It won't matter. Just assume that for  
 purposes of the question.

Q Just assume that. So do you have an  
 understanding that Lot 62320, before the replat, contained  
 railroad track?

A Perhaps could have.

Q Okay. And it contained the office building,  
 which your office used to be in, correct?

A It certainly, perhaps it could have. But I don't  
 know that for sure.

Q Okay. There is also shown on this Exhibit 1 a  
 Lot 62189. And can you tell me what's on that lot?

A My, my understanding of that lot was always that  
 that was the locomotive shop and adjacent acreage over  
 toward the footprint of the Center Street Bridge.

Q Okay. So if we go to Exhibit 5, kind of reading

1 **A Well, it appears to be the replat that we, The**  
 2 **Ohio Central Railroad System, had MS Consultants do so that**  
 3 **we would retain 62188, inclusive of the office, and the**  
 4 **grass area and the parking lot, when we sold property that**  
 5 **was supposed to be 62320 to Gearmar.**

6 Q Okay. And do you have an understanding of what  
 7 the original boundaries of 62188 and 62320 were prior to  
 8 this replat?

9 A I could develop that if I had all the old plats.  
 10 But at this point, I can't recall how they were laid out.

11 Q Without holding it to you, and understanding that  
 12 qualification, do you have a general understanding, though,  
 13 of how the redrawn lines affected the original layout of the  
 14 boundaries?

15 A No, I don't.

16 Q Do you have the understanding that originally Lot  
 17 62320 on which the Maverick plant stands also included  
 18 additional track that was then added to the 62188 lot? Does  
 19 that comport with your understanding?

20 A I have to say that I don't recall if the numbers  
 21 that we're speaking of were designated numbers, like 62188  
 22 and 62320, are the original numbers or not.

23 Q Well, apart from the numbers, though, I mean, I'm  
 24 just referring to 62320 to basically identify the parcel

these in tandem, the locomotive shop is right here?

A That is correct, yes.

Q As far as how you access that locomotive shop by  
 rail line, can you point that out to me?

A Well, typically you would use 239 track, stay  
 right on 239 up here to 279, and then reverse direction  
 right here at this switch, come down here, and line that  
 switch properly off of #3 Main, and run into whatever of the  
 five locomotive tracks that you would select.

Q Okay. Could you access the locomotive shop  
 coming in from the east on #3 Main?

A Theoretically speaking you could, yes.

Q Why do you say "theoretically"?

A Obviously, obviously, as you can see, the track,  
 if you came in this way on #3, came west, you come right  
 down here along the river bank, and you would stop once  
 again at this #3 Main switch where the shop ties in, and  
 line the switch reverse direction into the shop.

Q At the time you left the employ of the railroad,  
 was #3 Main passable across or underneath the Center Street  
 Bridge?

A Well, there was a part right underneath the  
 Center Street Bridge that was damaged due to a derailment at  
 one time, and because of the dispute with Allied Erecting

1 Q Suffice it to say, at least with respect to the,  
2 the actual property conveyances you were involved with on  
3 behalf of the railroad, you did not get involved with either  
4 obtaining or discussing the necessity for STB or ICC  
5 approval?

6 A No, sir, I was not.

7 Q Do you recall when you first learned about the  
8 possible availability for sale of the Maverick plant? So  
9 we're talking before the railroad owned it, do you recall  
10 when you became first aware that that Maverick plant was  
11 going to be available for sale?

12 A I would estimate that it was in the early 2000s.

13 Q Do you recall the circumstances under which you  
14 learned that it was available for sale?

15 A No, I don't.

16 Q Do you recall when anyone on behalf of the  
17 railroad, whether yourself or Mr. Strawn, got involved in  
18 making a possible bid for the purchase of the Maverick  
19 plant?

20 A Do I remember when it occurred?

21 Q Or the circumstance. If you don't remember the  
22 date, then if you remember the circumstances surrounding  
23 that, I would appreciate that.

24 A All I can say is that I recall Bill Strawn

you described it?

A What do you mean his efforts? You mean -- can  
you elaborate a little bit?

Q Any steps he took to, you know, reach out to the  
seller of that property and --

A Oh, no.

Q -- and buy it?

A I wouldn't know the exact details. I just know  
he was in contact with someone at Maverick.

Q Okay. You weren't at all involved in  
negotiations with Maverick for the sale of the Maverick  
plant?

A No, sir.

Q Now, at some point in time did you become aware  
that Bill Marsteller -- and again, this is before the  
railroad bought the plant -- had an interest in buying the  
plant?

A No, I did not know that.

Q Let me broaden it. Does that include anyone from  
Gearmar? You weren't aware that --

A I just think of Bill Marsteller.

Q As Gearmar?

A Yeah. And, and I didn't -- I was not aware of  
Gearmar until Bill Marsteller purchased this property. I

1 informing me that we were going to seek purchase of that,  
2 the rest of that property.

3 Q And when you say "the rest of that property,"  
4 what do you mean?

5 A Well, we, of course The Ohio Central System  
6 purchased The Mahoning Valley Railway from LTV back roughly  
7 in 2001.

8 Q Correct, okay.

9 A And then subsequent to that, that the remainder  
10 of the LTV property in this vicinity, west of Center Street,  
11 and east of Center Street trackage and so forth became  
12 available.

13 Q Okay.

14 A And Bill just, would have just mentioned it to me  
15 and said we were going to go for it. So --

16 Q So Mr. Strawn would have been the first one to  
17 inform you then?

18 A Likely, yes.

19 Q You don't recall anybody else bringing it to your  
20 attention?

21 A No. That would have come from his office.

22 Q And do you recall what Mr. Strawn's first efforts  
23 were, either from him telling you or involving you, to  
24 possibly buy that plant, the remainder of the property, as

had never even heard of Gearmar Enterprises.

Q Okay. Before the railroad purchased the  
property, were you made aware of a bid or offer that Bill  
Marsteller had made on the Maverick plant?

A No, I was not aware of it.

Q You were not aware of that. Help me out here.  
Bill Strawn testified as to a handwritten agreement that he  
had worked out with Bill Marsteller regarding assistance  
that the railroad would provide to Mr. Marsteller in buying  
that plant, and it involved in exchange for that assistance,  
a recognition --

MR. GRIECO: Pardon me for one second.

Q I'm sorry. I had a mind lapse there. He said in  
exchange for that assistance, that Marsteller would reserve  
back to the railroad the office, the office in which you sat  
and the tracks which were subsequently added in to 188. Do  
you recall any such written agreement, handwritten  
agreement, typewritten agreement that Bill Strawn had with  
Mr. Marsteller regarding the subject that is described?

MR. LIPKA: Objection.

MR. KOPP: I'm just going to object to the  
characterization.

But go ahead and answer if you can.

A I am not able to, to pinpoint a date. But I, I

# APPENDIX EXHIBIT 6

20070001067  
 Filed for Record in  
 MAHONING COUNTY, OHIO  
 MORALYNN PALERHO  
 07-19-2007 At 02:51 pm.  
 DEED 72.00  
 OR Book 5706 Page 2534 - 2540

200700023758  
 Filed for Record in  
 MAHONING COUNTY, OHIO  
 MORALYNN PALERHO  
 07-19-2007 At 02:51 pm.  
 DEED 72.00  
 OR Book 5706 Page 2534 - 2540

RE-RECORDED  
 RE-RECORDED  
 RE-RECORDED  
 RE-RECORDED

258  
 2250  
 Date: 12/1/09  
 Deputy

# Know all Men by these Presents

BY [Signature] GRANTOR AND PENNSYLVANIA RAILROAD COMPANY, INC, an Ohio Corporation, the Grantor, who  
 is the sole owner of the above described property, for the consideration of \$0 received to his/her full satisfaction of GRAMMAR PROPERTIES, . INC.  
 Grantee, whose TAX MAILING ADDRESS will be 1290 POLAND AVENUE, YOUNGSTOWN, Ohio 44502

have Given, Granted, Revised, Released and Forever Quit-Claimed, and do by these presents absolutely give,  
 grant, remise, release and forever quit-claim unto the said grantee, his/her heirs and assigns forever, all such  
 right and title as he/she/it, the said grantor, have or ought to have in and to the following described piece(s) or  
 parcel(s) of land, situated in the of YOUNGSTOWN, County of and State of Ohio: SEE EXHIBIT

This conveyance is made by Grantor and accepted to Grantee subject to the following disclosures and restrictions:

The soil of the Property and the groundwater beneath the Property contains contaminants identified in the  
 report titled the "Final Phase II Environmental Site Assessment and response action program Evaluation"  
 dated April 16, 2003 and prepared by MECX.

The Property is not to be used for residential purposes.

Restrictions shall constitute covenants running with the land and shall extends to on be binding upon  
 the grantor and successive future owners and occupants of the Property and their heirs, legal representatives,  
 assigns and assigns, and shall be enforced by Grantor or Grantees and their heirs, legal representatives,  
 assigns and assigns.

To Have and to hold the above granted and bargained premises, with the appurtenances therunto belonging, unto the  
 Grantee, its successors and assigns, so that neither the grantor, nor its successors or assigns, nor any other persons  
 claiming title through or under it shall or will hereafter claim or demand any right or title to the premises, or any  
 part thereof; but they and every one of them shall by these presents be excluded and forever barred.

GRANTEE ACKNOWLEDGES THAT GRANTOR HAS NOT MADE, DOES NOT MAKE, AND SPECIFICALLY  
 NEGATES AND DISCLAIMS ANY REPRESENTATIONS, WARRANTIES, PROMISES, COVENANTS,  
 AGREEMENTS OR GUARANTIES OF ANY KIND OR CHARACTER WHATSOEVER, WHETHER EXPRESS OR  
 IMPLIED, ORAL OR WRITTEN, OR, AS TO, CONCERNING, OR WITH RESPECT TO (i) THE VALUE, NATURE,  
 QUALITY OR CONDITION OF THE PROPERTY INCLUDING, WITHOUT LIMITATION, THE WATER, SOIL  
 AND GEOLOGY, (ii) THE SUITABILITY OF THE PROPERTY FOR ANY AND ALL ACTIVITIES AND USES  
 WHICH MAY BE CONDUCTED THEREON, (iii) THE COMPLIANCE OF OR BY THE PROPERTY WITH ANY  
 LAWS, RULES, ORDINANCES OR REGULATIONS OF ANY APPLICABLE GOVERNMENTAL AUTHORITY OR  
 BODY, (iv) THE HABITABILITY, MERCHANTABILITY, MARKETABILITY, PROFITABILITY OR FITNESS FOR  
 A PARTICULAR PURPOSE OF THE PROPERTY, OR (v) ANY OTHER MATTER WITH RESPECT TO THE  
 PROPERTY, AND SPECIFICALLY, THAT GRANTOR HAS NOT MADE, DOES NOT MAKE AND SPECIFICALLY  
 NEGATES AND DISCLAIMS ANY REPRESENTATIONS OR WARRANTIES REGARDING COMPLIANCE OF THE  
 PROPERTY WITH ANY ENVIRONMENTAL PROTECTION, POLLUTION OR LAND USE LAWS, RULES,  
 REGULATIONS, ORDER OR REQUIREMENTS, INCLUDING, WITHOUT LIMITATION, THOSE PERTAINING  
 TO SOLID WASTER, AS DEFINED BY THE U.S. ENVIRONMENTAL PROTECTION AGENCY REGULATIONS  
 AT 40 C.F.R., PART 261, OR THE DISPOSAL OR EXISTENCE, IN OR ON THE PROPERTY, OF ANY  
 HAZARDOUS SUBSTANCES, AS DEFINED BY THE COMPREHENSIVE ENVIRONMENTAL RESPONSE  
 COMPENSATION AND LIABILITY ACT OF 1980, AS AMENDED, AND THE REGULATIONS PROMULGATED  
 THEREUNDER, GRANTEE SHALL RELY SOLELY ON ITS OWN INVESTIGATION OF THE PROPERTY AND  
 NOT ON ANY INFORMATION PROVIDED OR TO BE PROVIDED BY GRANTOR, ITS AGENTS OR  
 CONTRACTORS. GRANTOR SHALL NOT BE LIABLE OR BOUND IN ANY MANNER BY ANY VERBAL OR  
 WRITTEN STATEMENTS, REPRESENTATIONS OR INFORMATION PERTAINING TO THE PROPERTY OR THE  
 OPERATION THEREOF, FURNISHED BY ANY PARTY PURPORTING TO ACT ON BEHALF OF GRANTOR.

FOR THE SAME CONSIDERATION, GRANTOR HEREBY CONVEYS TO GRANTEE, WITHOUT ANY  
 REPRESENTATION OR WARRANTY AS TO TITLE, EXPRESS OR IMPLIED, GRANTOR'S INTEREST, IF ANY,  
 IN THE ADJACENT STREETS, ALLEYS OR RIGHT OF WAY PERTAINING TO THE PROPERTY.

To Have and to Hold the premises aforesaid, with the appurtenances therunto belonging to the said grantee,  
 his heirs and assigns, so that neither the said grantor, nor his/her/its heirs, nor any other persons claiming

20080008705  
 Filed for Record in  
 MAHONING COUNTY, OHIO  
 MORALYNN PALERHO  
 03-14-2008 At 10:37 am.  
 DEED 76.00  
 OR Book 5746 Page 2015 - 2021

This Conveyance has Complied with Section 3133  
 Receipt # 258

This document is being re-recorded to add signature  
 Fee \$

This Conveyance has Complied with Section 3133  
 Receipt # 2250

MS706-2534

MS746-2015



OR 5686 PD 0066

**LEGAL DESCRIPTION**

New Plat No. 62320

Situated in the City of Youngstown, County of Mahoning, and State of Ohio, and known as being Youngstown City Lot No. 62320 as shown in the Replat Youngstown City Lot No. 62188 and 62320, as recorded in Plat Book / at Page of the Mahoning County Record of Plats, and being more fully described as follows: OR115 at Page 29

Commencing at a monument found at the intersection of the centerlines of Poland Avenue and Center Street;

thence along the centerline of Center Street by the arc of a curve to the right, having a radius of 1,066.27 feet, a chord bearing of N 30°45'45" E, a chord length of 260.04 feet, for an arc length of 260.69 feet to a point on said Center Street centerline;

thence N 37°46'00" E, along said centerline, for a distance of 132.10 feet to a point on the southerly line of New Lot No. 62188 as appears on said replat;

thence N 52°36'28" W, along said Lot No. 62188, for a distance of 317.10 feet to an iron pin set and being the TRUE POINT OF BEGINNING of the parcel herein described;

thence along the southerly line of Lot No. 62320, as appears on said replat by the next three (3) courses and distances;

- 1) N 52°36'28" W, for a distance of 1,290.96 feet to an iron pin set at a point of curve;
- 2) on a curve to the right having a radius of 5,689.00 feet, a chord bearing of N 49°52'54" W, a chord distance of 541.11 feet, for an arc length of 541.31 feet to an iron pin set;
- 3) N 47°09'21" W, for a distance of 80.15 feet to a P.K. nail found at the southwesterly corner of said Lot No 62320;

thence N 38°17'41" E, along the northwesterly line of said Lot No 62320, for a distance of 667.76 feet to an iron pin set between said lot and Lot No. 62188;

thence along the line between Lots 62320 and 62188 by the following twelve (12) courses and distances;

- 1) on a curve to the left having a radius of 1,066.30 feet, a chord bearing of N 61°11'00" W, a chord distance of 161.69 feet, for an arc length of 161.84 feet to an iron pin set;
- 2) S 65°31'53" E, for a distance of 165.25 feet to an iron pin set;

OR 5706 PD 2535  
MS 746 PL 2016

BR5686-00067

- 3) on a curve to the right having a radius of 526.11 feet, a chord bearing of N 56°21'38" W, a chord distance of 167.70 feet, for an arc length of 168.42 feet to an iron pin set;
- 4) S 47°11'23" E, for a distance of 764.07 feet to an iron pin set;
- 5) on a curve to the left having a radius of 1,543.81 feet, a chord bearing of S 50°12'05" E, a chord distance of 162.22 feet, for an arc length of 162.30 feet to an iron pin set;
- 6) on a curve to the right, having a radius of 674.44 feet, a chord bearing of S 28°49'25" E, a chord distance of 375.21 feet, for an arc length of 380.22 feet to an iron pin set;
- 7) on a curve to the right having a radius of 2,957.08, a chord bearing of S 10°42'53" E, a chord distance of 202.10 feet, for an arc length of 202.14 feet to an iron pin set;
- 8) S 38°00'27" W, for a distance of 283.27 feet to an iron pin set;
- 9) N 51°09'55" W, for a distance of 225.01 feet to an iron pin set;
- 10) S 38°00'27" W, for a distance of 102.27 feet to an iron pin set;
- 11) S 52°39'13" E, for a distance of 225.00 feet to an iron pin set;
- 12) S 37°23'32" W, for a distance of 28.18 feet to the TRUE POINT OF BEGINNING and containing within said bounds 1,300,469.34 square feet or 29.854 acres, more or less.

'NORTH' for the above description is based on the Ohio State Plane Co-Ordinate System, North Zone NAD83.

All iron pins noted throughout this description as being set are 5/8" x 30" rebar with plastic ID cap inscribed 'ms cons. Inc.'

The above description was prepared by Richard John Swan, Registered Professional Surveyor No. 6574 in February 2007 and is based on a survey made by ms consultants, inc. in January 2007.

MS706 M2536

MS746 M2017

DR5686 PL.0068

LEGAL DESCRIPTION

New Lot No. 62188

Situated in the City of Youngstown, County of Mahoning, and State of Ohio, and known as being Youngstown City Lot No. 62188 as shown in the Replat of Youngstown City Lot No. 62188 and 62320, as recorded in Plat Book / at Page 26 of the Mahoning County Record of Plats, and being more fully described as follows: OR115 at Page 29.

Commencing at a monument found at the intersection of the centerlines of Poland Avenue and Center Street;

thence along the centerline of Center Street by the arc of a curve to the right having a radius of 1,066.27 feet, a chord bearing of N 30°45'45" E, a chord distance of 260.04 feet, for an arc length of 260.69 feet to a point on said Center Street centerline;

thence continuing along said centerline N 37°46'00" E, for a distance of 132.10 feet to a point, said point located on the northerly line of land now or formerly owned by Allied Erecting and Dismantling Inc. as found in volume O.R. 2080 at page 53 of the Mahoning County Official Records of Deeds and on the southerly line of New Lot No. 62188, said point being the TRUE POINT OF BEGINNING of the parcel herein described;

thence leaving said centerline of Center Street N 52°36'28" W, along the line between said Allied Erecting and Dismantling Inc. and New Lot No. 62188, for a distance of 317.10 feet to an iron pin set, said iron pin located on the southeasterly corner of New Lot No. 62320 and the southwesterly corner of New Lot No. 62188;

thence leaving the northerly line of said Allied Erecting and Dismantling Inc. N 37°23'32" E, along the line between New Lot No. 62320 and New Lot No. 62188, for a distance of 28.18 feet to an iron pin set;

thence continuing along the line between New Lot No. 62320 and New Lot No. 62188 by the following eleven (11) courses and distances:

- 1) N 52°39'13" W, for a distance of 225.00 feet to an iron pin set;
- 2) N 38°00'27" E, for a distance of 102.27 feet to an iron pin set;
- 3) S 51°09'55" E, for a distance of 225.01 feet to an iron pin set;
- 4) N 38°00'27" E, for a distance of 283.27 feet to an iron pin set;
- 5) along a curve to the left, having a radius of 2,957.08 feet, a chord bearing of N 10°42'53" W, a chord distance of 202.10 feet, for an arc length of 202.14 feet to an iron pin set;
- 6) along a curve to the left, having a radius of 674.44 feet, a chord bearing of N 28°49'25" W, a chord distance of 375.21 feet, for an arc length of 380.22 feet to an iron pin set;
- 7) along a non tangent curve to the right, having a radius of 1,543.31 feet, a chord bearing of N 50°12'05" W, a chord distance of 162.22 feet, for an arc length of 162.30 feet to an iron pin set;
- 8) N 47°11'23" W, a distance of 764.07 feet to an iron pin set;

DR5706 PL.2537

DR5746 PL.2018

DR5686-PL0069

- 9) along a curve to the left having a radius of 526.11 feet, a chord bearing of N 56°21'38" W, a chord distance of 167.70 feet, for an arc length of 168.42 feet to an iron pin set;
- 10) N 65°31'53" W, for a distance of 165.25 feet to an iron pin set;
- 11) along a curve to the right having a radius of 1,066.30 feet, a chord bearing of N 61°11'00" W, a chord distance of 161.69 feet, for an arc length of 161.84 feet to an iron pin set, said iron pin being located at the northwesterly corner of New Lot No. 62320, the southwesterly corner of New Lot No. 62188, and the southeasterly line of City Lot No. 61996 as recorded in Plat Book 91 at Page 236 of the Mahoning County Record of Plats;

thence leaving said lot line of New Lot No. 62320 N 38°17'41" E, along the line between said City Lot No. 61996 and New Lot No. 62188, and passing over an iron pin found at a distance of 47.24 feet, for a total distance of 148.54 feet to a point, said point lying within the bed of the Mahoning River and on the southerly line of Out Lot No. 680, the northeasterly corner of said City Lot No. 61996, and the northwesterly corner of New Lot No. 62188;

thence along the line between Out Lot No. 680 and New Lot No. 62188 S 68°59'14" E, for a distance of 750.86 feet to a point in the Mahoning River;

thence continuing along the line between Out Lot No. 680 and New Lot No. 62188 S 47°26'09" E, and along the southerly line of Out Lot No. 683 and Out Lot No. 685, for a distance of 1,020.31 feet to a point in the Mahoning River, said point located on the southerly line of said Out Lot No. 685, the northeasterly corner of New Lot No. 62188, and the northwesterly corner of City Lot No. 62189 as recorded in Plat Book 100 at Page 83 of the Mahoning County Record of Plats;

thence leaving said line of Out Lot No. 685 S 42°33'51" W, along the line between New Lot No. 62188 and City Lot No. 62189, and passing over an iron pin found at a distance of 60.00 feet, for a total distance of 349.00 feet to an iron pin found;

thence continuing along the line between New Lot No. 62188 and City Lot No. 62189 by the following three (3) courses and distances:

- 1) S 47°26'09" E, for a distance of 183.00 feet to an iron pin found;
- 2) S 42°33'51" W, for a distance of 30.00 feet to an iron pin found;
- 3) S 47°26'09" E, for a distance of 295.63 feet to an iron pin found, said iron pin located on the southwesterly corner of City Lot No. 62189, northeasterly corner of New Lot No. 62188, and on the westerly right of way line of Center Street;

thence along the line between the westerly right of way of Center Street and New Lot No. 62188 by the following four (4) courses and distances:

- 1) S 37°46'00" W, for a distance of 204.30 feet to an iron pin found;
- 2) N 52°14'00" W, for a distance of 9.21 feet to a point;
- 3) S 37°46'00" W, for a distance of 8.17 feet to a point;
- 4) S 52°14'00" E, for a distance of 80.21 feet to an iron pin found, said iron pin located on the line between land now or formerly owned by Allied Industrial Development Corp.

DR5706-PL2538  
DR5746-PL2019

MS 686 PL0070

as found in volume O.R. 1905 at page 134 of the Mahoning County Official Records of Deeds and New Lot No. 62188;

thence along said line between Allied Industrial Development Corp. and New Lot No. 62188 S 37°46'00" W, for a distance of 335.79 feet to an iron pin set, said iron pin located at the southwesterly corner of said land now or formerly owned by Allied Industrial Development Corp., the southeasterly corner of New Lot No. 62188, and on the northerly line of land now or formerly owned by Allied Erecting and Dismantling Inc. as found in volume O.R. 2080 at page 53 of the Mahoning County Official Records of Deeds;

thence along said line between Allied Erecting and Dismantling Inc. and New Lot No. 62188 N 52°36'28" W, for a distance of 31.00 feet to the TRUE POINT OF BEGINNING and containing within said bounds 15.879 acres of land, more or less.

Excepting from the above described parcel of land a parcel to Mahoning County for bridge footers as found in volume OR 3505 at page 47 of the Mahoning County Official Records, for 0.068 acres of land, leaving a total area for the above described parcel of 15.811 acres of land, more or less.

Subject to a slope easement to Mahoning County as found in volume OR 3505 at page 60 of the Mahoning County Official Records covering 0.427 acres of land, leaving a total usable area for the above described parcel of 15.384 acres of land.

"NORTH" for the above description is based on the Ohio State Plane Co-ordinate System, north zone NAD 83. Bearings are used to denote angles between adjacent courses only.

All iron pins noted as being set throughout this description are 5/8" X 15" rebar, due to ground conditions, with plastic ID cap inscribed 'ms cons. inc.'

The above description was prepared under the direct supervision of Richard John Swan, Registered Professional Surveyor No. 6574 in January 2007, and is based on a survey made by JMS Consultants, Inc. in January 2007.

MS 706 PL 2539  
MS 746 PL 2020

05686 00071

title through or under him/her/it, shall or will hereafter claim or demand any right or title to the premises, or any part thereof; but they and every one of them shall by these presents be excluded and forever barred.

In Witness Whereof, I have hereunto set my hand, this March 7, 2007

OHIO AND PENNSYLVANIA RAILROAD  
COMPANY, INC. an Ohio Corporation  
MAHONING PARKS RECREATION CENTER  
By: William A. Strawn II

WILLIAM A. STRAWN II

PRESIDENT

Dated: March 7, 2007

Before me, a Notary Public in and for said County and State, personally appeared

the above named OHIO AND PENNSYLVANIA RAILROAD COMPANY, INC. an Ohio Corporation who under penalty of perjury in violation of Section 2921.04 of the Revised Code represented to me to be said person(s) and who acknowledged that he/she did sign the foregoing instrument and that the same is their free act and deed.

In Testimony Whereof, I have hereunto set my hand and official seal, at Warren, Ohio, this

Kimberly R. Wright  
Notary Public

My commission expires: June 5, 2008

State of Ohio }  
County, } ss.



KIMBERLY R. WRIGHT  
Notary Public, State of Ohio  
My Commission Expires  
June 5, 2008

Recorded by HAUMAN AND TITELAGENCY INC  
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# APPENDIX EXHIBIT 7

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

CASE NO. 4:09 CV 01904

ALLIED INDUSTRIAL DEVELOPMENT )  
CORP, )

Plaintiff/Counterclaim )  
Defendants ) DEPOSITION

VS ) OF

OHIO CENTRAL RAILROAD, INC., ) MR. DAVID COLLINS  
ET AL., )

Defendants/Counter- )  
Claimants/Third Party )  
Defendants )

VS )

GEARMAR PROPERTIES, INC., )  
Third Party Defendants )

DEPOSITION taken before me, Cynthia M. Nibert, a  
Notary Public within and for the State of Ohio, on the 22nd  
day of December, A.D., 2009, pursuant to Notice, and at the  
time and place therein specified, to be read in evidence on  
behalf of the Plaintiffs/Counterclaim Defendants in the  
aforesaid cause of action, pending in the United States  
District Court for the Northern District of Ohio, Eastern  
Division.

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EXHIBITS

- 12 29 - Defendants' response to Plaintiff's first set of
- 13 requests for production of documents
- 14 30 - Storage/Demurrage for tracks entirely in the lots
- 15 31 - 9/10/08 Amended and restated stock purchase agreement
- 16 by and among Summit View, Inc., Jerry Joe Jacobson and
- 17 Genesee & Wyoming, Inc.
- 18 32 - Section 3.11(a) Owned Real Property document
- 19 33 - 12/4/09 letter to Thomas J. Lipka from Jacob C. McCrea
- 20 34 - 12/16/09 letter to F. Timothy Grieco from Thomas J.
- 21 Lipka

Reported and Transcribed by:  
Cynthia M. Nibert  
Registered Professional Reporter

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APPEARANCES

F. TIMOTHY GRIECO, ESQ.,  
On Behalf of Plaintiff/Counterclaim  
Defendants

THOMAS J. LIPKA, ESQ.,  
On Behalf of Defendants/Counterclaimants  
Third Party Defendants

ALSO PRESENT:

John Ramun, President, Allied Industrial Development Corp

STIPULATIONS

It is stipulated and agreed by and between counsel  
for the parties hereto that this deposition may be taken at  
this time, 10:00 a.m., at the offices of Allied Industrial  
Development Corp, Youngstown, Ohio, by Notice of Deposition.

It is further stipulated and agreed that the  
deposition may be written in stenotype by Cynthia M. Nibert,  
a Notary Public within and for the State of Ohio, and a  
Registered Professional Reporter, and by her transcribed;  
that the transcript be made available to the witness for  
signature, and that the witness shall read the same and  
subscribe thereto, and that the deposition may thereupon be  
used on behalf of the Defendants/Counterclaimants, Third  
Party Defendants in the aforesaid cause of action.

\* \* \*

1 the right definition, is the route that you have to get  
 2 across your railroad, okay, you have to leave a main line  
 3 clear, otherwise you can't run from one end of your railroad  
 4 to the other. If you leave cars in the middle of it, now  
 5 you're stuck. You got no place to go. You're boxed in.  
 6 Q So, okay. So if, if a track was regularly --  
 7 MR. GRIECO: Strike that.  
 8 Q If a railroad regularly kept cars parked or  
 9 stationary on certain tracks, would it be fair then to  
 10 characterize those tracks as non-main line? I just --  
 11 A Yeah.  
 12 Q Based on what you told me?  
 13 A That's generically probably the case, yes.  
 14 Q Okay. What about the term "industrial track,"  
 15 does that mean anything to you?  
 16 A It's, industrial track is a siding, traveling --  
 17 I think industrial track might mean one that goes and serves  
 18 an industry.  
 19 Q Would you equate siding and industrial tracks?  
 20 Would you equate those two?  
 21 A I would call an industrial track a siding. I  
 22 don't know that I would call a siding an industrial track.  
 23 Q Why is that?  
 24 A Because a siding might be used for something not

1 A That's correct. It's not a main line.  
 2 Q Do you have any knowledge regarding the original  
 3 purpose of the Mahoning Valley Railway Company?  
 4 A I know it was here to -- well, I don't know. I  
 5 know LTV used to be here. I don't know if they were the  
 6 Mahoning Valley Railroad at that time or not, or if LTV had  
 7 its own railroad and called it something different. I don't  
 8 know.  
 9 Q Okay. I mean, you're not knowledgeable as to  
 10 whether the Mahoning Valley Railway was a, you know, a  
 11 captive small carrier that just served the interplant needs  
 12 of the steel company on tracks that the steel company built  
 13 to serve those plants?  
 14 A All I can tell you is it's a common carrier  
 15 today. And I don't know when, or if or how.  
 16 Q Okay. And when you say it's a common carrier  
 17 today, what -- why do you say that? What do you base that  
 18 on?  
 19 A Because we have customers that we are required to  
 20 provide service to on the line, and do provide service and  
 21 interstate commerce with.  
 22 Q Okay. And we will talk about those in a sec.  
 23 Let me -- before we jump ahead to that, I want to make sure  
 24 that we have this definition issue down. There is a CSX

1 to serve a specific industry.  
 2 Q Okay.  
 3 A So one is a subset of the other, I guess is all  
 4 I'm saying.  
 5 Q I'm just trying to get all these definitions  
 6 straight, to the best, you know -- you know more than I  
 7 know. You should.  
 8 A All I'm saying is -- yes. It's my business.  
 9 Q Is it fair to say siding track is not synonymous  
 10 with main line? Those are two different things; is that  
 11 fair to say?  
 12 A You mean -- there are times when you have, like,  
 13 a passing siding that would be considered the main line. In  
 14 other words, if you have got a single main line, and you  
 15 have to have an area where you have got east and westbound  
 16 trains coming on the same line, you have to have a place  
 17 where you can pull one train over to let the other one pass.  
 18 That would be a siding, but I would call that part of the  
 19 main.  
 20 Q Okay. What about industrial tracks and main  
 21 line, could those be one and the same thing?  
 22 A No. I would say an industrial track has a  
 23 specific use, to serve an industry.  
 24 Q It's not a main line?

1 connection that you talked about?  
 2 A Correct.  
 3 Q So this is a CSX line that's depicted here --  
 4 A Yes.  
 5 Q -- at the northern part of this Exhibit 5?  
 6 A Right.  
 7 Q What's your understanding as to what that line of  
 8 rail track is? How would that be characterized?  
 9 A It's the main line.  
 10 Q And why do you so easily characterize that as a  
 11 main line?  
 12 A Because they have regular freight service that  
 13 runs over it, and it's not used to park cars or hold cars.  
 14 Q When you say "regular freight service," what do  
 15 you mean?  
 16 A They're running trains on it. They don't block  
 17 it. They don't stop trains in the middle of it, not like  
 18 you would on a siding or something else and leave them  
 19 there.  
 20 Q Well, I mean, you know, whether it's been in off-  
 21 the-record discussions or in these papers, I mean, I think  
 22 we know what the issues are. I'm just trying to get to the  
 23 bottom of what these are characterized as.  
 24 A I think you're looking for a distinction that

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1 you're going to have a hard time figuring out how to make  
2 that work.

3 Q Well, I mean, but here's what I'm trying to now  
4 kind of meld together. You have entered into the  
5 discussion, you know, this factor as to is it passable, do  
6 you hold cars there, do you park cars.

7 You're aware, aren't you, that there has been a  
8 history on these Mahoning Valley Railway lines of parking  
9 cars, storing cars and that type of thing? Are you aware of  
10 that?

11 A Uh-huh, yeah.

12 Q Okay. Does that in any way, I mean, regardless  
13 of whatever, where these come from, #4 Main or #3 Main, does  
14 that in any way lead you to believe that these Mahoning  
15 Valley Railway tracks are not main lines, but are siding or  
16 industrial tracks?

17 A No, no.

18 Q Why not?

19 A You still have to have a main route through  
20 property, even if you could leave cars on a main, you just  
21 have to clear it to be able to run your trains on it. I  
22 mean, that's where I'm saying the distinction you're trying  
23 to make doesn't make sense in this. There -- with the  
24 property of this size, with this volume on it, leaving a car

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1 on the main is not like you have got seven trains coming  
2 through the next day.

3 You leave a car out here on the CSX main, they  
4 may have 20 trains going through there, you can't do that on  
5 that main. Doesn't mean that this isn't the main just  
6 because you left a car there and you have to clear it to be  
7 able to run through it.

8 Q Okay. Let me go through a few factors with you.  
9 And I covered these with Terry, and I'm going to go through  
10 these with you. These are all questions with respect to  
11 these Mahoning Valley Railway tracks. Okay?

12 To your knowledge, either based on your due  
13 diligence of what was done in the period leading up to GW's  
14 acquisition or what's done now, I don't care, either way,  
15 for these tracks, does the railroad maintain a formal train  
16 schedule for those tracks?

17 A No, not currently.

18 Q And in your experience, there is such a thing as  
19 a formal train schedule that can be maintained for a line of  
20 track, correct?

21 A You can, yes.

22 Q Okay. For instance, for like a main line up here  
23 for the CSX, would you expect that there is a formal train  
24 schedule for that main line?

1 A They probably have a schedule of trains to go  
2 across that, and then they also have unscheduled.

3 Q Okay. And is there a particular reason why a  
4 schedule would not be needed for the Mahoning Valley Railway  
5 tracks? It's because the --

6 A The volume isn't there.

7 Q The volume?

8 A I mean, I think our schedule right now is we  
9 operate about once a week over here.

10 Q Okay.

11 MR. LIPKA: Tim, are you asking about the  
12 Mahoning Valley Railway tracks as they pertain to even areas  
13 off this map? Or are you just referring to --

14 MR. GRIECO: No. Just Exhibit 5.

15 MR. LIPKA: Exhibit 5.

16 MR. GRIECO: Yeah.

17 A Well, you can't, you can't look at it that way.

18 I'm sorry. But I mean, the track on the other side of CP  
19 Graham is part of the Mahoning Valley, and those are where  
20 our customers are. And there is very little track over  
21 there, so this is needed to be able to serve those  
22 customers.

23 Q We're going to, I'm going to get into that. You  
24 can tell me all about that in a second. But you mentioned

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1 the current volume is, you said once a week?

2 A Uh-huh.

3 Q What do you mean by that? What's measured?

4 A One day a week we come over and do our  
5 interchange with the NS at Haselton Yard. If there is  
6 anything to interchange at CSX, we will go get that, and we  
7 will move the car to the customer's siding, or we will bring  
8 it over here to the yard tracks here, the 270 yard, and  
9 maybe pull cars from our customers, whatever has to be done,  
10 whatever business is there to be done.

11 Q Okay. And is there any other way in which you  
12 measure volume in terms of carloads or anything like that?

13 A Yeah. Carloads are the, are the volume.

14 Q And is that done on, you know, a weekly basis? A  
15 monthly basis? Annual? I mean, if I was going to have a  
16 discussion with you over a beer and just, we're two railroad  
17 guys talking about, you know, --

18 A Yeah.

19 Q -- what level of business we do in this area,  
20 what are the likely terms you're going to describe that in?

21 A Any of those terms, weekly, monthly, annually,  
22 depending on the type of business. There is some business  
23 that is very cyclical.

24 Stone business, for instance, moves well in the

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1 A **That's correct.**

2 Q With respect to the Mahoning Valley Railway  
3 tracks, what customers are currently being served?

4 A **Well, it would be Cantar Poly, and it's listed on**  
5 **here, Lally Pipe, Impact Metals, Gateway Car Shop, Castlo**  
6 **Industrial Park and Casey Equipment Company.**

7 Q Okay. Any others?

8 A **Well, we used to have MHF. I don't know if there**  
9 **is still anything going on here with MHF. There may be.**  
10 **But I, I, I don't know at this point in time. Those are the**  
11 **main ones.**

12 Q Okay. Now, is it necessary to go over the 270  
13 yard, or what I'm just going to refer to for ease of  
14 reference, Allied's property to serve those customers down  
15 in Castlo?

16 A **That depends.**

17 Q Well, I mean, describe for me why it would be  
18 necessary for -- just let me finish -- to serve the  
19 customers in Castlo to cross over into Allied's property.

20 A **Let's use Gateway, for instance. Gateway gets a**  
21 **contract with some company to do repairs on railcars, and**  
22 **they shipped 40 cars to us. Okay? There is no way that**  
23 **Gateway can hold more than, I think, three or four cars. So**  
24 **we have to put three or four cars in there, then we put the**

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1 **rest here and wait until they have room to take the others.**

2 Q Okay. I appreciate that. And your answer went  
3 more to, I guess, the storage or staging of cars, right?

4 A **Yes.**

5 Q Okay. And I'm talking about kind of  
6 directionally how, how you would get to that customer. Say  
7 that wasn't the issue. Say it was just one car. Could you  
8 service them with that one car without having to come over  
9 Allied's property?

10 A **If they only went with one car at a time, and**  
11 **they didn't have a, you know, their siding full, no, you**  
12 **wouldn't need to. You could go right from Haselton Yard or**  
13 **from your CSX across there to get to them, if they delivered**  
14 **here.**

15 **Usually what happens, I believe, with this**  
16 **interchange is, it's more for the Cantar Poly. And I don't**  
17 **know if there was something else up here or not.**

18 Q Okay.

19 A **There is another interchange down at that end.**

20 Q We went fast there for a second. Again,  
21 assuming, you know, you don't have a situation with them not  
22 being able to take the cars, if you were going to serve any  
23 of the Castlo customers, any of the ones you listed, would  
24 you be able to take them the cars that they could take

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1 without even crossing through Allied's property?

2 A **If we could go directly, yes.**

3 Q Okay. Could you point out to me on Exhibit 5 how  
4 you would do that?

5 A **If the cars were interchanged to us from and to**  
6 **Norfolk Southern -- actually, we hold our engine here on**  
7 **this property. So the crew goes on duty here, goes into the**  
8 **Norfolk Southern's yard, grabs the car, the one car that**  
9 **you're limiting me to, then they would pull across here and**  
10 **go to the customer. They may have to run around the car**  
11 **because now they're on the wrong end of the engine, and then**  
12 **deliver it to --**

13 Q And the property you described at the beginning  
14 of your answer was the 189 locomotive shop?

15 A **Yeah. I think we keep the locomotive on track**  
16 **240, if I recall right.**

17 Q So the locomotive would have to come out of there  
18 and then get into the NS Haselton Yard?

19 A **Uh-huh.**

20 Q Now, what if you're connecting up here, though,  
21 at the CSX?

22 A **Same thing. You got to go from here, go to your**  
23 **locomotive, go up to CSX, pull the car to wherever it's**  
24 **going to go. Could be down there.**

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1 Q But you were pointing back across the lines over  
2 the 270?

3 A **Yes, across the main there.**

4 MR. LIPKA: I think his question -- I'm sorry,  
5 Tim. I think his question, though, is: Could you get to  
6 Castlo without going across Allied's property.

7 A **No.**

8 MR. LIPKA: Which would be right there.

9 A **You can't, you can't go from here to here without**  
10 **going across this property.**

11 Q Is there -- well, where else are your locomotives  
12 kept, other than 189? Because I thought we talked about --

13 A **Briar Hill. Youngstown and Austintown has a**  
14 **locomotive. There is a couple up at Briar Hill.**

15 Q So if Briar Hill -- where would Briar Hill be? I  
16 mean, over this way?

17 A **Yeah.**

18 Q Okay. If the locomotive that's going to pick up  
19 the car to take it to Castlo emanates from Briar Hill,  
20 what's the path once we come on --

21 A **You would have to come down the NS main into**  
22 **Haselton to get to it. But then you would have to come**  
23 **back, if there was anything up on this end, you would still**  
24 **have to come across the property.**

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- 1 Q Now, what you just -- I want to be clear as to  
2 what you just pointed to. You said NS main.
- 3 A **Uh-huh.**
- 4 Q Did you mean CSX main?
- 5 A **No. I said NS main.**
- 6 Q Oh, you mean NS main. So where would you pick up  
7 the NS main?
- 8 A **Up at Briar Hill.**
- 9 Q Okay.
- 10 A **And you would come down -- actually, they call**  
11 **this the Lordstown secondary. How is that for confusing**  
12 **you? Once you come down across here and into Haselton Yard.**
- 13 Q Okay. So you're pointing to the northern most  
14 tracks shown on Exhibit 5. In fact, it's not even in color.
- 15 A **That's correct.**
- 16 Q But you see the track at the northern part of the  
17 photograph, and you can come down going east, and cross the  
18 Mahoning River right into the NS Haselton Yard?
- 19 A **Correct.**
- 20 Q Okay. What about coming from the other  
21 direction? And again, I'm struggling to just get the right  
22 examples to you so I understand, and I think I understand  
23 that better now using that example from Briar Hill. If  
24 you're coming from the east, --

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- 1 A **Okay.**
- 2 Q -- and you needed to get a car to Cantar Poly,  
3 which way would you go?
- 4 A **You would come across through CP Graham up**  
5 **through here, #4 Main up through here, and to Cantar Poly.**
- 6 Q Okay. Is there any alternative route, however  
7 for the moment you think would be unlikely or impractical,  
8 is there any alternative route, though, that physically  
9 could accomplish that?
- 10 A **Physically?**
- 11 Q Yes.
- 12 A **You know, you're trying to get me to say we're**  
13 **going to run on the CSX line. That's the only physical way**  
14 **to do it.**
- 15 Q Just how would that occur, though?
- 16 A **It won't. They would never let us out there to**  
17 **move one or two cars. That's a busy line.**
- 18 Q Okay. But assuming that permission, -- you're  
19 safe, I'm not trying to trick you -- how would it occur on  
20 the map, though? Can you just point out the line of  
21 traffic?
- 22 A **You would have to go, you would have to go out**  
23 **here to the east. You would have to get -- there is a small**  
24 **yard maybe out there, a couple tracks that can be used for**

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- 1 **interchange.**
- 2 Q Do you know what that's called?
- 3 A **I don't remember what it's called. And then you**  
4 **would have to get permission to get on their main and come**  
5 **up, cross here onto the blue line, and then come into here.**
- 6 Q Okay. And the problem with that, from a  
7 practicality standpoint, is what? How would you describe  
8 that?
- 9 A **Impossible.**
- 10 Q But why?
- 11 A **CSX has too much traffic, and they're not going**  
12 **to give up slots of their track for that business when, when**  
13 **they have no reason to.**
- 14 Q To your knowledge, has that ever been done? Has  
15 the CSX line, going again from east to west, ever been used  
16 by your railroad?
- 17 A **By Mahoning Valley?**
- 18 Q Yes.
- 19 A **No. I will -- I would almost tell you that there**  
20 **is -- that it's never happened. But I can't say that.**
- 21 Q Would, would Mahoning Valley be able to pay CSX  
22 for the right to move over there, to move over those tracks?  
23 I mean, is that how it works, you can pay another railroad?
- 24 A **Well, you're making it sound like if I say here**

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- 1 is \$2, let me get across.
- 2 Q Tell me how it is.
- 3 A **But yeah, you would pay. You would pay a steep**  
4 **price if they were to let you do that. But you know,**  
5 **they're -- they would have no reason to let us do that. We**  
6 **couldn't pay them enough, to be honest with you.**
- 7 Q Because they have more productive --
- 8 A **Yeah. If they're running a stack train across**  
9 **that line, they're going to hold it up and have delays on**  
10 **that while we move two cars, three cars across the line?**  
11 **They're going to say that's, no matter what you pay me, it**  
12 **delays my other traffic, and yet there is no economic return**  
13 **for them.**
- 14 Q Okay. I understand what you're saying. With  
15 respect to Cantar Poly, what is the volume of business that  
16 they have been doing with you guys?
- 17 A **They haven't been doing any.**
- 18 Q Since when?
- 19 A **I don't know when their last car was.**
- 20 Q Do you know if they have even had a carload since  
21 you guys took over?
- 22 A **I don't know.**
- 23 Q It's possible they don't?
- 24 A **It's possible they don't.**

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- 1 Q Do you know why they're not doing anything?  
 2 A **No, I don't know.**  
 3 Q All right. So currently the railroad is not  
 4 servicing Cantar Poly through these tracks?  
 5 A **It's inactive.**  
 6 Q It's inactive. What about with respect to those  
 7 Castlo customers? Any of those that are inactive?  
 8 A **Yeah.**  
 9 Q Which ones?  
 10 A **Those are all getting occasional cars. Gateway**  
 11 **has been our biggest one. But Lally Pipe, Impact Metals,**  
 12 **Castlo Industrial occasionally get cars.**  
 13 Q So none are inactive the same way Cantar is?  
 14 A **I'm not sure. No, I don't believe so. Casey,**  
 15 **I'm not sure about. They might. When you have so little**  
 16 **volume, it's hard to tell when someone is inactive.**  
 17 Q If I -- if Allied wanted to look into, obviously,  
 18 we want to dig down and see what the actual volume, no  
 19 matter how small or whatever, is with these particular  
 20 customers, would there be a way to determine that?  
 21 A **Yeah.**  
 22 Q What would you look at?  
 23 A **Be the volume of cars delivered.**  
 24 Q I mean, is that something you could get on a

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- 1 summary level report from a computer?  
 2 A **Yeah, yeah.**  
 3 Q If Cantar -- how does the carload process work?  
 4 Kind of just take me, I mean, if Cantar needs service or  
 5 something, how does it work? Who calls who? How does the  
 6 process work?  
 7 A **Depending on the business, it could be the**  
 8 **shipper or the receiver who is in charge of calling the**  
 9 **railroad, getting a freight rig, working out the logistics**  
 10 **of how they're going to do that, whose railcars they're**  
 11 **going to use, looking at alternatives for routings. You**  
 12 **know, sometimes if you're going from California to here, you**  
 13 **know, you may have UP, Union Pacific Railroad or the**  
 14 **Burlington Northern, who could move it to any one of 20**  
 15 **gateways along the Mississippi basically, and could hand it**  
 16 **to either CSX or NS, who then could deliver it to us.**  
 17 **They would have to -- the railroads go out, they**  
 18 **get pricing from all those alternatives, go back to the**  
 19 **customer and say this is what we have got. These are the**  
 20 **equipment, the equipment that we can move it in, does that**  
 21 **make sense to you, is it competitive. And at that point**  
 22 **they would say yes or no.**  
 23 **Or if you were a receiver of that traffic, you**  
 24 **could do the same thing. At the same time Cantar, or**

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- 1 **whoever would be in charge of the freight would be the one**  
 2 **who would be out there looking at alternative modes of**  
 3 **traffic, you know, float it up the river and truck it in, or**  
 4 **truck it totally, or they would work that out. But they**  
 5 **would be working with typically -- their serving carrier is**  
 6 **the one that does the work as far as putting together**  
 7 **packages. And then once that that's done, they publish**  
 8 **rates.**  
 9 **Doesn't require them to ship anything to have a**  
 10 **rate published. There are a lot, thousands and thousands of**  
 11 **rates that are out there between points to move various**  
 12 **commodities.**  
 13 **And then what will happen is someone will decide**  
 14 **to ship. They will order a railcar from the railroad that**  
 15 **serves that customer. They will load that railcar, and send**  
 16 **it on a way bill to us. And we may not know that we have**  
 17 **got that car coming until it's almost here --**  
 18 Q Okay.  
 19 A **-- if we're the delivering carrier, deliverer of**  
 20 **the loaded car.**  
 21 Q You mentioned the term "serving carrier."  
 22 A **Right.**  
 23 Q Right? What's a serving carrier?  
 24 A **It's the railroad that serves that customer.**

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- 1 Q So is the Mahoning Valley Railway Company a  
 2 serving carrier for any customer?  
 3 A **Well, all railroads are serving carriers. You**  
 4 **have customers that you serve. Norfolk Southern can't serve**  
 5 **Cantar Poly. CSX can't serve Cantar Poly. That's how our**  
 6 **railroad -- we're the common carrier responsible for serving**  
 7 **that customer; so therefore, we are the serving railroad of**  
 8 **that customer.**  
 9 Q Would you say the same thing for the customers in  
 10 Castlo?  
 11 A **Yes.**  
 12 Q No other railroad can serve those customers?  
 13 A **Not directly, no. There are plants like the**  
 14 **Lordstown plant, GM's Lordstown plant that are served by**  
 15 **both CSX and us. You can have dual serve customers or**  
 16 **tri-serve.**  
 17 Q Right.  
 18 A **But you have to have the right to serve them to**  
 19 **be able to.**  
 20 Q Right. And your belief, even as to recently with  
 21 the Castlo customers, is they may be low, but there is at  
 22 least some carloads going into those customers, even up to  
 23 current day?  
 24 A **Some of them, yes.**

149	<p>1 A -- in order to get the right to do it. That</p> <p>2 doesn't mean -- we haven't run a train on there in years.</p> <p>3 Q I know. But at some point you did, and you had</p> <p>4 customers on there?</p> <p>5 A Well, very few customers on the line.</p> <p>6 Q But it was a main line?</p> <p>7 A It was a main line, and it was how we got south.</p> <p>8 Q Do you have the understanding, though, that with</p> <p>9 respect to certain railroad tracks that are not main lines,</p> <p>10 you don't need permission to, quote/unquote, "abandon" those</p> <p>11 tracks?</p> <p>12 A That's correct.</p> <p>13 Q That's what I'm trying to get at. Maybe we get</p> <p>14 lost in the definitions. Maybe you can just tell me what</p> <p>15 the characteristics of those type of tracks would be. So</p> <p>16 let me rephrase the question.</p> <p>17 With respect to tracks for which you would not</p> <p>18 need permission from the STB to abandon or make some other</p> <p>19 disposition of, what would the characteristics of those type</p> <p>20 of tracks be?</p> <p>21 MR. LIPKA: Objection for the legal conclusion.</p> <p>22 But go ahead.</p> <p>23 A Well, to be honest, when we do that, if we're</p> <p>24 going to do that, one -- well, let me give you an example.</p>	151	<p>1 there tracks anywhere you're familiar with that your</p> <p>2 railroad operates over on which it cannot store or stage</p> <p>3 cars at its own discretion?</p> <p>4 A Not that I'm aware of.</p> <p>5 Q So your testimony is, any railroad tracks or</p> <p>6 lines, whatever you want to call them, over which GWI or any</p> <p>7 of its subsidiaries operate, they similarly then are allowed</p> <p>8 to, at their discretion, stage or store cars on those same</p> <p>9 tracks?</p> <p>10 A Let me, let me give you one qualifier for that.</p> <p>11 If we own the track. In other words, if we're going into a</p> <p>12 Lordstown or a GM plant, for instance, they may have their</p> <p>13 own track that they own that we can operate on, but they</p> <p>14 would have to give us permission to store cars on their</p> <p>15 property.</p> <p>16 Q So if you're operating over tracks that are on</p> <p>17 the property of another company --</p> <p>18 A You're not going to get there. You're making one</p> <p>19 leap.</p> <p>20 Q What's the difference?</p> <p>21 A It depends on whether or not you have the, the --</p> <p>22 you can have an easement. You can have other rights on that</p> <p>23 property that you would have the common carrier</p> <p>24 responsibility for.</p>
150	<p>1 We have got a passing siding on a, on a track,</p> <p>2 obviously, or we have a double main, and we want to shorten</p> <p>3 the passing siding or take up that passing siding</p> <p>4 completely. That's not a requirement, to my knowledge, it's</p> <p>5 not a requirement by the STB. But if we were to do that, we</p> <p>6 always check with our STB counsel to make sure that we're</p> <p>7 correct in our assumptions there. So I'm not an expert on</p> <p>8 that, by far, as to what determines that as a track that I</p> <p>9 can pull up.</p> <p>10 I know if I shorten it, you still haven't,</p> <p>11 because you haven't affected access to a customer. I guess</p> <p>12 that would be the, the issue. You can still serve the</p> <p>13 customers that are along the, the right-of-way.</p> <p>14 Q These are some tough questions to formulate. I'm</p> <p>15 trying to think. Does your common carrier status enable you</p> <p>16 to have --</p> <p>17 MR. GRIECO: Strike that.</p> <p>18 Q Does your common carrier status, from your</p> <p>19 perspective, give you the right to store or stage cars on</p> <p>20 the same line that you travel over to get to that customer?</p> <p>21 A Yes.</p> <p>22 MR. LIPKA: Objection. Go ahead, Dave.</p> <p>23 A Yes.</p> <p>24 Q Here's the next question I wanted to ask. Are</p>	152	<p>1 Q So in your example involving Lordstown, you're</p> <p>2 saying there is no common carrier obligation there?</p> <p>3 A It goes to wherever there is a ownership change</p> <p>4 of the track itself, not just the underlying property.</p> <p>5 Q So the ownership of the track is the key?</p> <p>6 A You're getting me into a legal area that I'm</p> <p>7 going to quickly find myself without a lot of ground</p> <p>8 underneath my feet.</p> <p>9 Q Well, I don't want to do that. I don't want to</p> <p>10 ask you about anything you're not comfortable. I mean, I</p> <p>11 simply want to gain your understanding.</p> <p>12 I mean, you know, at first you mentioned example</p> <p>13 Lordstown -- and I understand we have a lot of ifs here.</p> <p>14 But if Allied owns this property over which these tracks</p> <p>15 run, what right would the railroad have to stop, store or</p> <p>16 stage cars on those tracks? And that's an if, if they own</p> <p>17 it, if they own the property, what right would the railroad</p> <p>18 company, in your understanding, have to stop or stage cars</p> <p>19 on these tracks on 188?</p> <p>20 MR. LIPKA: Legal conclusion, objection. Go</p> <p>21 ahead, Dave.</p> <p>22 A It would be the common carrier responsibilities</p> <p>23 in this area. And just because you buy the property</p> <p>24 underlying a railroad doesn't mean that you own the</p>

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1 MR. LIPKA: Well, that, I think the testimony was  
2 Mark Hastings or Allison Fergus from before. But  
3 regardless, it's not Dave Collins. So --  
4 Q All right. I apologize. It's thick, cumbersome  
5 stuff here. So I think we, we got off on a little bit of a  
6 tangent.  
7 I started off with the question as to what track  
8 do you have experience with that the railroad could not  
9 just, at their discretion, stop or store, stage cars on.  
10 You gave me an example regarding -- I'm sorry. I forget  
11 your -- you gave me an example regarding siding track?  
12 MR. LIPKA: Lordstown.  
13 A I said any, if it was, the track was owned by a  
14 customer, we would have to get permission from them to store  
15 cars there.  
16 Q I'm sorry. You're right. And so with an example  
17 like Lordstown, there is no track where you're going through  
18 their property to connect to somewhere else?  
19 A Well, we don't go over there. So I, in my  
20 example, whether Lordstown fits that or not, that would be  
21 the premise, is that there is no --  
22 Q Pass through?  
23 A -- pass through.  
24 Q Okay. Fair enough. I think I understand what

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1 you're saying. I don't agree with it, but I understand.  
2 A If we all agreed, we wouldn't be here.  
3 Q All right. Let me see where we're at here.  
4 Other than what we have been referring to as the 270 yard,  
5 is there any other property or tracks that the railroad has  
6 access to, at least in this vicinity, the vicinity of the  
7 Youngstown Division, that can accommodate the parking,  
8 storing or staging of cars?  
9 And let me further qualify it. I guess with  
10 respect to the service of the customers you have identified,  
11 including whether Cantar or the people down in Castlo, is  
12 there any other tracks or property in this vicinity of the  
13 Youngstown Division that could accommodate the parking,  
14 storing or staging of railroad cars?  
15 A What is the Youngstown Division? Are you talking  
16 the MVRV?  
17 Q Well, you know, it's a tough question. I don't  
18 know if I should give you a, you know, a perimeter of so  
19 many miles, or I don't know what to give you. I mean, I'm  
20 trying to figure out whether, other than right here --  
21 A Let me make it easy for you. Yes.  
22 Q Okay.  
23 A We hold them up on the Y and A. We hold cars and  
24 store cars on the YB, the Youngstown Belt for this very

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1 purpose. And we have run out of room there, which is one of  
2 the reasons we brought them down here.  
3 Q The two that you identified, you used acronyms.  
4 Can you just say --  
5 A Youngstown and Austintown, and the Youngstown  
6 Belt.  
7 Q Okay. And you're referring to particular yards?  
8 A Tracks.  
9 Q Tracks, okay. And where are these located?  
10 A Briar Hill is really, Briar Hill is the only  
11 place, now that I think about it. Youngstown and Austintown  
12 doesn't have anyplace that you can use for a storage track.  
13 Q How far away is Briar Hill?  
14 A Seven miles.  
15 Q Okay.  
16 A I mean, in relative, you know, under 10, put it  
17 that way.  
18 Q And can you describe the property characteristics  
19 for me, the track characteristics, how much can be stored  
20 there, compare it to this lot?  
21 A More, a lot more than here.  
22 Q So for instance, we talked about the David  
23 Joseph's cars, which I think came from VM Star; is that  
24 right?

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1 A They are cars leased by us with main purpose  
2 being for handling traffic with V and M Star, yes.  
3 Q And V and M Star is a lot closer to Briar Hill  
4 than it is to here, correct?  
5 A Yeah. It's served by the Youngstown Belt.  
6 Q But you're saying, because Briar Hill is filled  
7 up, that there is a need to store those cars on Allied's  
8 property?  
9 A That, and some of those cars are going to the  
10 Gateway Car Shop for repairs.  
11 Q And Gateway Car Shop would have -- well, you  
12 would have records of Gateway Car Shop's work on which cars,  
13 correct?  
14 A Yes.  
15 Q The situation at Briar Hill, has it been like  
16 that since you guys took over?  
17 A No. Briar Hill, or V and M was very strong until  
18 March, and then they went from very strong to shut down for  
19 six or eight weeks, and they have been running at probably  
20 30 percent of their, what they had been doing historically  
21 since then, 30, 40 percent, varying. They make pipe for the  
22 oil and gas business, pipelines.  
23 Q Okay. So most of the cars stored at Briar Hill  
24 are the V and M Star, V and M Star cars?

<p style="text-align: right;">165</p> <p>1 MR. LIPKA: That calls for a legal conclusion.</p> <p>2 A I, I mean, my understanding is that we have</p> <p>3 common carrier responsibility on the tracks that we operate</p> <p>4 on. But again, I'm not the legal guy to be able to tell</p> <p>5 you.</p> <p>6 Q At the time Genesee purchased the Mahoning Valley</p> <p>7 Railway and the other railroad companies, were you made</p> <p>8 aware of the railroad's use of this Maverick facility, any</p> <p>9 activities they had going on in there?</p> <p>10 A I was made aware that there was, I think, like,</p> <p>11 three or four locomotive engines in that facility, and one</p> <p>12 of the bays of one of the buildings back in the back end</p> <p>13 here somewhere.</p> <p>14 Q And did anyone ever say anything to you as to</p> <p>15 under what right or color of authority the railway, railroad</p> <p>16 was operating or storing equipment in that Maverick</p> <p>17 facility?</p> <p>18 A Well, I think we probably asked either</p> <p>19 Feichtenbiner or Strawn about storing them there.</p> <p>20 Q Did they say anything about the arrangement they</p> <p>21 had with Gearmar?</p> <p>22 A The only thing I can think of would have been</p> <p>23 something to the effect of it's okay, they're letting us, or</p> <p>24 something along those lines. But we since moved that out.</p>	<p style="text-align: right;">167</p> <p>1 don't. So --</p> <p>2 Q Okay. All right.</p> <p>3 A Obviously that's got to be the case at some</p> <p>4 point.</p> <p>5 Q And you believe, in that situation you just</p> <p>6 described, that would be based on some, you know, agreement</p> <p>7 that conveyed those rights to the railroad?</p> <p>8 A Yes. Agreement, arrangement, I don't know.</p> <p>9 Q Okay. Look at the letter, Exhibit 34. This is</p> <p>10 just for the record, because I think we have backed into</p> <p>11 most of these subjects already.</p> <p>12 A Okay.</p> <p>13 Q My understanding is you have been designated as</p> <p>14 the representative for items 3, 4, 5, 6, 9, 12, 13, 14 and</p> <p>15 15 to testify on behalf of the Defendants in this case. Is</p> <p>16 that your understanding?</p> <p>17 A Yes.</p> <p>18 MR. LIPKA: Just an objection to the extent I</p> <p>19 think the second half of number three, upon further review</p> <p>20 today, appears that was synonymous with number two, and he</p> <p>21 was not competent to testify about that. So although the</p> <p>22 letter doesn't mention the second half of number three, I</p> <p>23 guess we're going to carve that out. But I don't know, was</p> <p>24 there a question pending?</p>
<p style="text-align: right;">166</p> <p>1 Q Yeah. Did they ever say anything like that with</p> <p>2 respect to the office they were in, that that also was, you</p> <p>3 know, some informal arrangement they had with Gearmar to</p> <p>4 continue to use the office?</p> <p>5 A Not to my recollection.</p> <p>6 Q What about the tracks, did they ever say anything</p> <p>7 about the use of the tracks, that that was also pursuant to</p> <p>8 some arrangement they had with Gearmar to operate over the</p> <p>9 tracks?</p> <p>10 A No.</p> <p>11 Q They always maintained they owned the tracks?</p> <p>12 A That's right.</p> <p>13 Q Does the ownership of tracks, meaning the</p> <p>14 physical tracks, spikes, ties, ballasts, all that stuff,</p> <p>15 usually, in your experience, go along with the transfer of</p> <p>16 the land on which the tracks sit? Does the ownership of the</p> <p>17 actual tracks go along, pass along with the transfer of the</p> <p>18 ownership of the --</p> <p>19 A Underlying land?</p> <p>20 Q Yes.</p> <p>21 A Sometimes.</p> <p>22 Q Just depends on the agreement?</p> <p>23 A Yeah. I mean, because there are times when, like</p> <p>24 I said, we're operating on track that we own on land that we</p>	<p style="text-align: right;">168</p> <p>1 MR. GRIECO: No. He already answered it.</p> <p>2 MR. LIPKA: Okay. Fine.</p> <p>3 Q. Number 12 in the 30(b)6, says any communications</p> <p>4 with representatives of Gearmar Properties, Inc., regarding</p> <p>5 the lots in question. I think we already covered that, but</p> <p>6 I just wanted to make sure, because this represents, maybe</p> <p>7 impliedly, you had some knowledge. But do you have any</p> <p>8 knowledge regarding communications with the Gearmar folks?</p> <p>9 A No.</p> <p>10 Q Okay. And I think we covered the rest. Let me</p> <p>11 ask you this question, Dave. Why does this property right</p> <p>12 here, Lot 188, remain valuable in any way to the railroad?</p> <p>13 A For the tracks that are on it.</p> <p>14 Q For what?</p> <p>15 A Use to serve our customers, potential new</p> <p>16 customers, or storage of equipment or whatever. He's</p> <p>17 wearing me out.</p> <p>18 Q What about the office building, the old office</p> <p>19 building, does that have any value to the railroad?</p> <p>20 A It's, it's an office building that was bigger</p> <p>21 than we needed. It's a lot better than the trailer that we</p> <p>22 operate out of, but it's something that was not required for</p> <p>23 our operation.</p> <p>24 Q The operations that did emanate out of that</p>

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1 office building, where are they now housed?

2 **A We have a trailer up at Briar Hill where two of**

3 **the three people that were in that office have their office**

4 **now, and the third person works out of his home.**

5 **Q The two people that work in the trailer are whom?**

6 **Brian?**

7 **A Brian Freeman works out of his home. Rick**

8 **McCracken, who had his office in here, is up at Briar Hill.**

9 **And well, with Terry gone, Rich Rupp spends part of his time**

10 **here and part of his time in Pittsburgh, and he has an**

11 **office there.**

12 **Q Does the railroad have any interest in moving**

13 **back into that office on Poland Avenue?**

14 **MR. LIPKA: Objection; calls for speculation.**

15 **Answer if you can, Dave.**

16 **A Only if we had friendly relationships with**

17 **Allied.**

18 **Q The tracks here along Lot 188, how are they**

19 **currently used, if at all now? I know we have talked about**

20 **a lot of use that has occurred. But how are they currently**

21 **used, if at all now?**

22 **A I would have to go down and look. But they're**

23 **probably mostly used for storing cars.**

24 **Q Because of the backup at the other areas?**

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1 **A (Witness nods head affirmatively.)**

2 **Q I mean, they're really not being used for any**

3 **pass-through traffic recently; is that fair?**

4 **A Probably not in the last few months.**

5 **Q Is there a way to track at any given time how**

6 **many cars are stored on those tracks?**

7 **A Yes.**

8 **Q How do you do that?**

9 **A We have our, our RMI system ready to just pull up**

10 **all the cars on all tracks of the MVRV at any given time, or**

11 **today, right now. It's an active, current time issue.**

12 **Q Okay. And it, it could tell you what part of the**

13 **track it's on? Because the MVRV tracks go off of this map,**

14 **right?**

15 **A Typically they're, the cars are placed on a**

16 **track. Whether that's accurate or not is dependent upon how**

17 **good our conductors convey that back to our customer service**

18 **people who, in the computer, put them on that track.**

19 **Q Theoretically, though, if you needed to find out**

20 **right now how many cars were on Allied's property here on**

21 **the 274 track, could you figure that out?**

22 **A Uh-huh.**

23 **Q That's yes?**

24 **A Yes.**

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1 **Q And that would just be from the RMI system?**

2 **A Yes. Or we could walk out and walk the track.**

3 **Q I know. But you could --**

4 **A It isn't that long of track.**

5 **Q Too much snow. John's taking me out there. I'm**

6 **not sure. So if there is 15 cars on that track, you could**

7 **tell there is 15 cars there?**

8 **A Track's probably not long enough. If I saw 15**

9 **cars on that track, I would wonder if somebody wasn't just**

10 **throwing them on the track in the computer to keep**

11 **themselves from having to actually distinguish which track**

12 **they're on.**

13 **Q That happens sometimes?**

14 **A It does. We don't have the exact feet of each**

15 **track in the computer system to say, wait a minute, just**

16 **filled that track up.**

17 **Q Okay. As you recall, after Allied purchased the**

18 **property, sent a notice letter to you all, there was an**

19 **issue regarding getting railcars off of that land. Do you**

20 **recall that?**

21 **A Yes.**

22 **Q Through your records, would there be a, would**

23 **there be a way to tell historically, I guess at least going**

24 **back six months, it's not like we're going back years, but**

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1 **at least going six months of how many cars were on those**

2 **tracks at a certain point in time, and when they were**

3 **removed?**

4 **A I would have to ask John if he could do that.**

5 **Q John Craft?**

6 **A Yeah.**

7 **Q Okay. That might be something that's possible?**

8 **A It may be. I mean, he got stuff that I didn't**

9 **think was possible in your Exhibit 30.**

10 **Q And I guess in the weeks and months after April**

11 **of '09, Ohio Central essentially vacated Lot 62188 by**

12 **vacating the office and removing all railcars; is that your**

13 **understanding?**

14 **A We never removed all the railcars.**

15 **MR. LIPKA: Objection.**

16 **Q Which railcars didn't you remove?**

17 **A There has always been cars, I believe, on these**

18 **270 tracks back here. We removed the cars that were on the**

19 **track along the driveway. And --**

20 **Q You mean, just for the record, the track on the**

21 **south side of the facility close to Poland Avenue?**

22 **A #4 Main, #4 Main.**

23 **Q Okay.**

24 **A And MHF was still doing business, significant**

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1 easement by necessity. And my question is: What would be  
 2 the path of that access to the locomotive shop?  
 3 **A Did you get that?**  
 4 **Q** I won't even try to describe on the record. But  
 5 I mean, you described the #4 Main looping down under the  
 6 lip, as we call it, coming into Lot 188 and then going back  
 7 into Lot 189.  
 8 **A Correct.**  
 9 **Q** Now, access could be had to locomotive shop  
 10 through the #3 Main if it was passable by coming across #3  
 11 Main and coming back into the locomotive shop?  
 12 **A Yes.**  
 13 **Q** Am I correct that the Mahoning Valley Railway  
 14 operates within basically the specific locale of Youngstown,  
 15 and does not cross interstate lines; is that correct?  
 16 **A That's correct.**  
 17 **Q** Okay. So I think I got into it with Mr. Strawn  
 18 about, well, how some cars from here may go to, you know,  
 19 Maine or something, or California. But if that's the case,  
 20 you would be -- Mahoning Valley Railway would get you to a  
 21 point with another larger carrier who then will take it the  
 22 rest of the way?  
 23 **A Correct.**  
 24 **Q** To that farther distance, right?

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1  
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7  
8 **REPORTER'S CERTIFICATE**  
9  
10 I DO HEREBY CERTIFY that the above and foregoing is a  
11 full, true, and correct transcript of all the testimony  
12 introduced and proceedings had in the taking of the within  
13 named deposition, as shown by stenotype notes written by me,  
14 in the presence of the witness, at the time the said  
15 deposition was being taken.  
16  
17  
18  
19  
20 **Cynthia M. Nibert**  
**Registered Professional Reporter**  
21  
22  
23  
24

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1 **A Yes.**  
 2 **Q** Okay. But Mahoning Valley Railway itself does  
 3 not operate across state lines?  
 4 **A Correct.**  
 5 **Q** There is also an allegation in your counterclaim  
 6 that if Allied was deemed to own Lot 188 -- and I guess let  
 7 me find out here. I think the allegation is -- Tom can  
 8 correct me if I'm wrong -- if Allied was deemed to own 188,  
 9 the railroad would have to abandon operations for the  
 10 Mahoning Valley Railway, at least with respect to the  
 11 traffic, you know, that would come over these lots. Is that  
 12 your understanding?  
 13 **A Yes.**  
 14 **MR. LIPKA:** Just objection to the extent the  
 15 pleading speaks for itself. Go ahead.  
 16 **MR. GRIECO:** We have covered that in the earlier  
 17 part, too. I think I have a good understanding, or at least  
 18 according to David, how the tracks work now.  
 19 All right. Thanks, David. That's all the  
 20 questions I have.  
 21 **MR. LIPKA:** I got an hour tops, Dave. So -- just  
 22 kidding. We will read.  
 23 **SIGNATURE NOT WAIVED**  
 24 \* \* \*

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1 STATE OF OHIO )  
 ) SS CERTIFICATE  
 2 MAHONING COUNTY )  
 3  
 4 I, Cynthia M. Nibert, a Notary Public within and for  
 5 the State of Ohio, duly commissioned and qualified, do  
 6 hereby certify that the above named MR. DAVID COLLINS was by  
 7 me first duly sworn to testify the truth, the whole truth,  
 8 and nothing but the truth, and that the foregoing deposition  
 9 was written by me in stenotype in the presence of the  
 10 witness, and by me transcribed; that the transcript of his  
 11 testimony will be made available to said witness for  
 12 signature; that the said witness shall read said transcript  
 13 and affix his signature, at the end thereof, and that the  
 14 said deposition was taken pursuant to agreement and at the  
 15 time and place therein specified.  
 16 I do further certify that I am not of counsel,  
 17 attorney or relative of either party or otherwise interested  
 18 in the event of this action or proceeding.  
 19 IN WITNESS WHEREOF, I have hereunto set my hand and  
 20 seal of office at Youngstown, Ohio this 5th day of January,  
 21 A.D., 2010.  
 22  
 23 **CYNTHIA M. NIBERT (WISE), NOTARY PUBLIC**  
 24 **My Commission Expires 11/09/10**

# APPENDIX EXHIBIT 8

(Oversized Map – Enclosed But Not Bound)

# APPENDIX EXHIBIT 9

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

CASE NO. 4:09 CV 01904

ALLIED INDUSTRIAL DEVELOPMENT )  
CORP, )  
Plaintiff/Counterclaim )  
Defendants )

VS

OHIO CENTRAL RAILROAD, INC., )  
ET AL., )

Defendants/Counter- )  
Claimants, Third Party )  
Defendants )

VS

GEARMAR PROPERTIES, INC., )  
Third Party Defendants )

DEPOSITION

OF

MR. WILLIAM STRAWN

DEPOSITION taken before me, Cynthia M. Nibert, a Notary Public within and for the State of Ohio, on the 14th day of December, A.D., 2009, pursuant to Notice, and at the time and place therein specified, to be read in evidence on behalf of the Plaintiffs/Counterclaim Defendants in the aforesaid cause of action, pending in the United States District Court for the Northern District of Ohio, Eastern Division.

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William Strawn	Cross	Mr. Grieco	5

EXHIBITS

- 6 - Youngstown LTV plat and another unidentified plat
- 7 - Quitclaim deed from Maverick C&P to Ohio and Pennsylvania Railroad Company, Inc.
- 8 - Lease between Ohio and Pennsylvania Railroad Company, Inc., and MHF-LS Equipment, Inc.
- 9 - Blank purchase and sale agreement between The Ohio and Pennsylvania Railroad Company, Inc., and Gearmar Industries, Inc.
- 10 - Copy of Deed re-recorded twice
- 11 - Settlement statement for Gearmar Industries, Inc., and The Ohio and Pennsylvania Railroad Company, Inc.
- 12 - Real estate tax bill, 1st half 2006 for 53-042-0-010.01-0
- 13 - Real property conveyance fee statement of value and receipt for Exhibit 12
- 14 - Settlement statement for Gearmar Industries and The Ohio and Pennsylvania Railroad Company, Inc.
- 15 - Fax cover sheet from Bauman Land Title Agency, Inc.

Reported and Transcribed by:  
Cynthia M. Nibert  
Registered Professional Reporter

APPEARANCES

F. TIMOTHY GRIECO, ESQ., and  
AMELIA A. BOWER, ESQ.,  
On Behalf of Plaintiff/Counterclaim  
Defendants  
THOMAS J. LIPKA, ESQ.,  
On Behalf of Defendants/Counterclaimants  
Third Party Defendants  
RONALD S. KOPP, ESQ.,  
On Behalf of William Strawn

ALSO PRESENT:

John Ramun, President, Allied Industrial Development Corp.  
Jerry Jacobson, President, Trackage Investments

STIPULATIONS

It is stipulated and agreed by and between counsel for the parties hereto that this deposition may be taken at this time, 10:00 a.m., at the offices of Roetzel & Andress, Attorneys at Law, Akron, Ohio, without the usual Notice to Take Deposition having been served, service of the same being waived.

It is further stipulated and agreed that the deposition may be written in stenotype by Cynthia M. Nibert, a Notary Public within and for the State of Ohio, and a Registered Professional Reporter, and by her transcribed; that the transcript be made available to the witness for signature, and that the witness shall read the same and subscribe thereto, and that the deposition may thereupon be used on behalf of the Plaintiff/Counterclaim Defendants in the aforesaid cause of action.

\* \* \*

Q Now, the tracks that you showed me on Exhibit 5, including the 240 track, 273 track, 275 track, 274 track, 277 track, 239 track, those are all included within Lot 188?

A They appear to be, yes.

Q And did you have an understanding whether those were considered main line tracks, or what is termed spur or industrial tracks?

MR. LIPKA: Just objection to the extent you're calling for a legal conclusion.

A They're definitely not spur tracks.

Q Why do you say that?

A There is no end to them. A spur ends.

Q Kind of dead ends into --

A They're not spur tracks.

MR. JACOBSON: Spur isn't a through track.

A These are all through tracks. I apologize. These are all through tracks for building trains, train departure. They're all through tracks.

Q How would you define a through track?

A A track that does not end. It is a contiguous piece of rail running both directions, or numerous directions with no physical barrier, no end of a track device where the track has been severed, where the track ends. It's part of the network. It's part of the system of

you -- would it be accurate to call those tracks that we delineated industrial tracks?

A No.

Q Why not?

A I don't view them as industrial. They don't serve an industry. They're yard tracks. There is no building. There is no end of the track. There is no customers. Those are yard tracks.

Q Well, weren't the lines that are depicted here on this map, Exhibit 5, that Mahoning Valley Railway operates over, weren't those the lines that were set up originally by LTV to serve interplant between the different LTV plants?

A I don't know.

MR. KOPP: Objection.

A I don't know.

Q You don't know?

A I don't know.

MR. LIPKA: Can we just go off the record for one minute?

(Whereupon, a discussion was held off the record.)

Q Now, I want to talk to you about the term main line, though. What is a main line track, in your view?

A A main line track is generally a track that is of

the railroad operations.

Q What would you call an industrial track?

A An industrial track would be a track inside a building that goes in to serve the industry.

Q What about a track that would serve two plants or go interplant?

A That could be given a whole host of names, and in fact, is given a whole host of names.

Q Would it be fair to call that an industrial track?

A Only with regards, if the track was within the same complex of two mills on the same piece of land, I would call it an industrial track.

Q Would you describe any of these tracks that I just delineated as industrial tracks?

A I called those yard tracks.

Q Okay. We got another new term. What's a yard track?

A There are thousands of terms. A yard track is, is railroad terminology for the place where railroads make up and break their trains for purposes of transporting them to further destinations. Those are yard tracks. Those are active yard tracks.

Q Okay. So you, you call it a yard track. Would

a higher speed which railroads use to take their large, larger trains to areas such as this yard to back them off, and then disseminate those cars, switch them out to take them to the various customers in the area.

Q Okay. Fair enough. So you would agree with me that none of the tracks that I recently delineated, including 239 track, 240, 273, 275, 274, 277, 239, that none of those are main line tracks, correct?

A I would call those yard tracks.

Q But they're not main line tracks, correct?

A I would, I would view them as yard tracks.

Others may view them as main line. I would view them as yard tracks.

Q But you, Mr. Bill Strawn, would not consider the tracks I just delineated main line tracks, right?

A Not those particular tracks.

Q Okay. Is there any main line track, to your knowledge, depicted on Exhibit 5?

A Yes.

Q Okay. The LE&E main track is a main line; is that right?

A The Mahoning Valley Railway #4 Main, which is labeled as a main line, Mahoning Valley #3 Main, which is labeled, Mahoning Valley #1 Main, and there is actually a #2

# APPENDIX EXHIBIT 10

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

CASE NO. 4:09 CV 01904

ALLIED INDUSTRIAL DEVELOPMENT )  
CORP. )

Plaintiff/Counterclaim )  
Defendants ) DEPOSITION

VS ) OF

OHIO CENTRAL RAILROAD, INC., ) MR. JERRY JOE JACOBSON  
ET AL., )

Defendants/Counter- )  
Claimants/Third Party )  
Defendants )

VS )

GEARMAR PROPERTIES, INC., )

Third Party Defendants )

DEPOSITION taken before me, Cynthia M. Nibert, a  
Notary Public within and for the State of Ohio, on the 6th  
day of January, A.D., 2010, pursuant to Notice, and at the  
time and place therein specified, to be read in evidence on  
behalf of the Plaintiffs/Counterclaim Defendants in the  
aforesaid cause of action, pending in the United States  
District Court for the Northern District of Ohio, Eastern  
Division.

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Witness	Exam	Attorney	Page
J. Jacobson	Cross	Mr. Grieco	5

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Reported and Transcribed by:  
Cynthia M. Nibert  
Registered Professional Reporter

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STIPULATIONS

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APPEARANCES

F. TIMOTHY GRIECO, ESQ.,  
On Behalf of Plaintiff/Counterclaim  
Defendants

THOMAS J. LIPKA, ESQ.,  
On Behalf of Defendants/Counterclaimants  
Third Party Defendants

RONALD KOPP, ESQ.,  
On Behalf of Jerry Joe Jacobson, William  
Strawn and Terry Feichtenbiner

ALSO PRESENT:

John Ramun, President, Allied Industrial Development Corp

\*\*\*

1 A Not particularly, no.  
 2 Q Okay.  
 3 A There is no -- you can have a great rail, and the  
 4 railroad doesn't maintain it, but it's still a good rail.  
 5 Q Okay. Are you familiar at all with the NS and  
 6 CSX lines that run up on the northern part of this Exhibit  
 7 5?  
 8 A Well, let's see. Where are you referring to?  
 9 Q This CSX line here, and these NS lines here.  
 10 A I'm a little bit, yes.  
 11 Q Are those main line tracks?  
 12 A Yes, they are.  
 13 Q And why do you --  
 14 A You're asking me that.  
 15 Q Sure.  
 16 A That's my opinion.  
 17 Q And why do you understand those to be main line  
 18 tracks?  
 19 A Heavy-duty rail, well maintained, and speeds,  
 20 speeds are high.  
 21 Q Okay. Am I correct that these Mahoning Valley  
 22 Railway tracks that we have been talking about that come in  
 23 to here, they split like this, and they go in to this Lot  
 24 188 --

1 Q But in any event, would your description of what  
 2 were not main line but yard tracks encompass both this 292  
 3 track the 240 track, and then these 270 tracks?  
 4 A Don't get track and rail mixed up. Okay? I  
 5 think that's the problem. This is heavy-duty rail. You can  
 6 take this and make it over here a main line track, or you  
 7 can leave it in the yard and it's a yard track.  
 8 Q Okay.  
 9 A So there is a big difference there. Light rail  
 10 is not main line rail. Light rail is 90, 110, below, and  
 11 it's not high-speed rail. It's not for heavy trains.  
 12 Q Okay.  
 13 A Okay. Did I confuse you?  
 14 Q Well, somewhat. But you had described to me  
 15 tracks that you considered yard tracks in the vicinity of  
 16 the Maverick plant. All I'm trying to do is, just for the  
 17 record, so we don't get confused when we go back to read it,  
 18 what specific tracks you're referring to. I thought you  
 19 were referring to the tracks that are represented here on  
 20 Lot 188 what we called the 270 tracks. Is that fair?  
 21 A You could call these tracks. You say is that  
 22 clear? What's the question again?  
 23 Q Are those the tracks that you were referring to  
 24 as the yard tracks?

1 A Uh-huh.  
 2 Q -- are not main line tracks?  
 3 MR. KOPP: Objection.  
 4 A No. I -- okay. These are yard tracks, in my  
 5 opinion.  
 6 Q As opposed to main line tracks?  
 7 A As opposed to main line tracks, yes.  
 8 Q What's a yard track?  
 9 A Yard track has a definite speed, lower speed  
 10 restriction, and has a lot of switches, as you can see here,  
 11 aren't real long, as a rule, and are just basically for  
 12 storing and idling cars rather than moving them constantly  
 13 through on a track.  
 14 Q Okay. And am I correct that, with regard to the  
 15 description you just gave, that would apply to specifically  
 16 these tracks that, as your counsel pointed out to us, are  
 17 encompassed by what's now Lot 188, including this 292 track,  
 18 240 track and what we have referred to as kind of the 270  
 19 track?  
 20 MR. KOPP: Just so that we're clear, I did not  
 21 point to the 292 track. I pointed to these areas up here as  
 22 my agreement with you that those were on the 188 property.  
 23 I did not point to 292.  
 24 MR. GRIECO: Fair enough.

1 A These right here?  
 2 Q Yes.  
 3 A Those are yard, those are what I would consider  
 4 yard tracks. But they can have good rail.  
 5 Q Okay. I'm going to talk to you for a second  
 6 about the use of regulated or hazardous substances on the  
 7 property that's in dispute.  
 8 A Okay. How do you define "hazardous"?  
 9 Q Well, and we can pull out one of the agreements  
 10 that gives, like, a paragraph-long definition.  
 11 MR. KOPP: Let's just listen to his question, and  
 12 we will see if it can be answered, and we will go from  
 13 there.  
 14 Q Do you have any recollection during your time of  
 15 owning the property in dispute, which, again, included the  
 16 Maverick plant, Lot 62320, the property north of the plant  
 17 where the tracks are, Lot 62188, and the locomotive shop on  
 18 Lot, what is 62189. Okay?  
 19 A Uh-huh.  
 20 Q At any time during your ownership of those  
 21 properties, do you recall anything regarding the use of any  
 22 hazardous or environmentally harmful substances on those  
 23 properties?  
 24 MR. KOPP: I'm going to object. Go ahead and

# APPENDIX EXHIBIT 11

**THE OHIO CENTRAL RAILROAD SYSTEM**  
*Youngstown Division*

OPERATIONS BULLETIN No. 01

Date Issued: 0001, January 1<sup>st</sup>, 2007

Operations Bulletins will be issued as necessary with regard to the addition, deletion and/or modification of information contained therein. Operations Bulletins will contain, but not be limited to, information pertaining to the daily operation of the entire Youngstown Division. Each Operations Bulletin will be identified in chronological order by number, beginning at 0001 on January 1<sup>st</sup> of each year and will become effective at 0001 on the date shown on the Operations Bulletin as "Date Issued".

Information added to the current Operations Bulletin, but not included in the previous Operations Bulletin, will be printed in *boldface italics* and included along with information remaining in effect and therefore carried over to the current Operations Bulletin from the immediately previous Operations Bulletin.

When necessary the chronological order by number, beginning with January of each year, may be modified to restart at 01 with another month of the year in order to correspond with various changes in organization of the railroad territories, etc.

Operations Bulletin Supplements will be issued for information that is to be added, deleted and/or modified by the next chronological Operations Bulletin but which becomes effective prior to issuance of the next chronological Operations Bulletin and subsequent to the current Operations Bulletin.

Operations Bulletin Supplements will be identified with the same number as the current Operations Bulletin together with an alphabetic letter beginning with the first letter of the alphabet for the first Supplement to any current Operations Bulletin. Subsequent Supplements to the same Operations Bulletin will follow in alphabetic order.

Information included in Operations Bulletin Supplements will be included in the next chronological Operations Bulletin as applicable, and such Operations Bulletin Supplements will automatically be cancelled upon publication of the next chronological Operations Bulletin.

**OPERATIONS BULLETIN No. 01, Date Issued: 0001, January 1<sup>st</sup> 2007, continued**

**Effective Immediately:**

**GENERAL**

- 1) All previous Operations Bulletins and Operations Bulletin Supplements pertaining to the Ohio Central Railroad System Eastern Region, Northern Lines and Youngstown Division are cancelled.
- 2) *All territory of the Ohio Central Railroad System currently identified as the "Youngstown Division" of the "Eastern Region" is designated as simply the "Youngstown Division."*
- 3) *The Ohio Central Railroad System lines comprising the Youngstown Division are as follows:*
  - (a) *The Mahoning Valley Railway*
  - (b) *The Ohio & Pennsylvania Railroad*
  - (c) *The Warren & Trumbull Railroad*
  - (d) *The Youngstown & Austintown Railroad*
  - (e) *The Youngstown Belt Railroad*
- 4) For information that is to be included in either an Operations Bulletin or Supplement and that is of a nature that requires its immediate dissemination, the Youngstown Division Main Office in Youngstown, Ohio will ensure that such information is provided verbally to each effected Ohio Central Railroad System person performing service on the Youngstown Division. The Youngstown Division Main Office will also make written note in the Daily Log Book of the information, date, time and to whom such information was verbally conveyed.
- 5) *The former Northern Lines MVRV Office is now officially referred to as the "Youngstown Division Main Office". For the purposes of two-way radio communication with the Youngstown Division Main Office, such office will be addressed as the "Ohio Central MV Base".*
- 6) Each Operations Bulletin will remain in effect until cancelled by a subsequent new Operations Bulletin. All Ohio Central Railroad System persons performing service on the Youngstown Division must retain a copy of the most current Operations Bulletin and all applicable Operations Bulletin Supplements in effect while on duty and performing service on any territory of the Youngstown Division. When needed, the number and date of issue of the current Operations Bulletin and Supplement in effect will be secured by contacting the Youngstown Division Main Office. Supply of the current Operations Bulletin and Supplements will be maintained at the Youngstown Division Main Office and Brier Hill Office.

**OPERATIONS BULLETIN No. 01, Date Issued: 0001, January 1<sup>st</sup>, 2007,**  
**GENERAL, continued**

- 10) Information contained in the Operations Bulletins will be organized by applicable Youngstown Division railroad entity in addition to a "GENERAL" category for information applicable to all Youngstown Division territories.
- 11) As with all written and verbal instructions pertaining to the operation of the Youngstown Division, all information included in the Operations Bulletin is confidential and for the use of Ohio Central Railroad System employees only.
- 12) Effective 0001, Tuesday November 22<sup>nd</sup>, 2005, Federal Railroad Administration (FRA) Emergency Order (EO) No. 24 is effective. All Ohio Central Railroad System (O CRS) Youngstown Division persons involved with the movement of trains must have in his/her possession a copy of such EO when on duty and in such service anytime thereafter that date. While formal instruction of each O CRS Youngstown Division person involved with the movement of trains regarding FRA EO No. 24 has been performed prior to the effective date of such EO, any person needing additional explanation or information regarding FRA EO No. 24 must immediately make contact with the proper O CRS authority for such explanation or information. Supply of FRA EO No. 24 will be maintained at the Youngstown Division Main Office and the Brier Hill Office.  
  
FRA Emergency Order No. 24 is applicable to all operations only on the following O CRS Youngstown Division Track Sections:
  - (a) Ohio & Pennsylvania Railroad Industrial Track;
  - (b) Warren Running Track;
  - (c) Warren & Trumbull Railroad Industrial Track;
  - (d) Warren & Trumbull Railroad Leavittsburg Line Industrial Track;
  - (e) Youngstown & Austintown Industrial Track;
- 13) The normal position of all switches located on the Ohio & Pennsylvania Railroad Industrial Track, the Warren Running Track, the Warren & Trumbull Railroad Industrial Track, the Warren & Trumbull Railroad Leavittsburg Line Industrial Track and the Youngstown & Austintown Railroad Industrial Track is lined and locked for straight-away movement on the applicable Industrial Track, unless specified otherwise by Special Instructions.
- 14) Effective immediately all Ohio Central Railroad System (O CRS) Youngstown Division employees must have in their possession when on duty a copy of the current O CRS Security Plan which became effective June 1<sup>st</sup>, 2005. Supply of the

**OPERATIONS BULLETIN No. 01, Date Issued: 0001, January 1<sup>st</sup>, 2007,**  
**GENERAL, No.14, continued**

current OCRS Security Plan will be maintained at the Youngstown Division Main Office.

15) Effective immediately all Ohio Central Railroad System (OCRS) Youngstown Division employees must have in their possession when on duty a copy of the current OCRS Hazardous Materials Training Requirements Book. Supply of the current OCRS Hazardous Materials Training Requirements Book will be maintained at the Youngstown Division Main Office and the Brier Hill Office.

16) Please add the following phone numbers to your Hazardous Materials Training Requirements book:

Struthers Police: Emergencies—911; Non-emergencies—330-755-9849

Campbell Police: Emergencies—911; Non-emergencies—330-755-1411

17) Unless directed otherwise by the Youngstown Division Main Office, each crew will take only one (1) Company-issued cell phone for their tour of duty.

18) When operating multiple unit (MU'd) locomotive consists, any unit(s) not needed to handle the tonnage will be shut-down to conserve fuel. When outdoor temperatures prohibit the shut-down of applicable unit(s), such unit(s) will be then isolated to conserve fuel.

19) Whenever two or more locomotives are coupled, all multiple unit (MU) appurtenances will be properly coupled and set-up in order that all electrical and air systems on the locomotives may be operated and/or controlled from the controlling unit of the multiple unit consist. This instruction is effective whether units are all running as power, idling isolated or dead-in-tow (DIT).

20) When locomotive(s) is/are running and/or being used as power, all ground, gauge, platform, cross-walk and engine room lights will be illuminated day and night.

21) Locomotive cab awnings, wing glasses and/or rearview mirrors must be properly folded down or back on all trailing units of multiple unit locomotive consists.

22) When operating multiple unit locomotive consists, only the unit identifying the train or movement will display lighted number boards.

23) When operating multiple unit locomotive consists, it is the responsibility of the crew in charge of such consist to ensure that all cab windows and doors of all trailing units are securely closed. In addition it is also the responsibility of the crew in charge of such consist to ensure all engine room doors of all units included in the consist are closed and latched.

**OPERATIONS BULLETIN No. 01, Date Issued: 0001, January 1<sup>st</sup>, 2007,**  
**GENERAL, continued**

- 24) Unless directed specifically to do so by the Youngstown Division Main Office, locomotives will never be left standing blocked-in in any track by Maintenance of Way equipment or other equipment that will preclude train crews from moving the locomotive(s) from the track as necessary.
- 25) Reminder: The normal (*unattended*) position for all derailleurs is lined and locked in the derailing position whether or not the track is occupied by cars, locomotives or on-track-equipment. Locks on switches and derailleurs will always be locked appropriately when switch and/or derailer is unattended.
- 26) At various locations specified in Special Instructions on the Youngstown Division the use of wheel skates is required in addition to hand brakes to secure unattended car(s). The proper positioning of wheel skates requires that the leading wheel of the extreme downgrade end of the unattended car(s) be rolled completely into the wheel pocket of the skate. All persons involved with the process of positioning wheel skates, and all persons within one hundred (100) feet, must position themselves so as to not be in the potential path of a skate in the event it is ejected during the process of properly positioning such skate. Skates will also be used per the judgment of employees at locations not specified in Special Instructions.
- 27) Before connecting or disconnecting locomotive Hot-Start cables, be sure circuit breakers and lock-out switches are open (*off*). Do not close (*turn-on*) circuit breakers and lock-out switches until you are certain the Hot-Start cables are securely connected. Where applicable, cables must be stowed in the container provided and such container locked when cables are unattended and not in use.
- 28) To disconnect Locomotive Hot-Start Equipment prior to starting unit:
- (a) Turn off the electric power (480volts, 3 phase) by unlocking the the electrical switch breaker handle and pulling the handle down. At Hot-Start locations equipped with multiple Hot-Start receptacles for simultaneous operation of more than one Hot-Start, cables, breaker box receptacles and switch handles are color-coded to ensure the proper breakers are turned on or off, whichever is applicable;
  - (b) Unlock the plug securement bracket and disconnect the plug from the receptacle on the locomotive and (if applicable) the electrical breaker box;
  - (c) Roll the cable onto the hanger provided on the pole or place rolled cable inside lockable box (whichever is applicable) located in the pole vicinity;
  - (d) Lock the box, if applicable;

**OPERATIONS BULLETIN No. 01, Date Issued: 0001, January 1<sup>st</sup>, 2007,**  
**GENERAL, No.28, continued**

(e) Lock the electrical switch breaker handle, if applicable.

29) To connect the Locomotive Hot-Start Equipment following unit shut-down:

- (a) Unlock cable storage box (if applicable) and remove cable or unroll cable as needed from the hanger provided on the pole (if applicable).  
At Hot-Start locations equipped with multiple Hot-Start receptacles for simultaneous operation of more than one Hot-Start, cables, breaker box receptacles and switch handles are color-coded to ensure the proper breakers are turned on or off, whichever is applicable;
- (b) Insert cable plug into receptacle on breaker box (if applicable) and receptacle on locomotive and attach plug securement bracket(s) and lock into place;
- (c) Unlock the electrical switch breaker handle and move handle upward to the "ON" position;
- (d) Lock the electrical switch breaker handle (if applicable) in the "ON" position to prevent the system from being turned "OFF" by an unauthorized person;
- (e) Open the locomotive engine room doors on the left side and nearest the Hot-Start receptacle;
- (f) Confirm that the breaker switch on the Hot-Start control panel is in the "ON" position and the red light is on;

30) By observation and touch, confirm that the Hot-Start water pump is operating and the water heating element is warming up in the heating cylinder;

31) If any problem is encountered or suspected, please contact Nick Mundisev by cell phone at 330-770-5923 or John Hancock at 330-770-6447 immediately, or the MVRVY office for further instructions in the event contact cannot be made with Nick Mundisev or John Hancock.

32) Any time weather conditions exist that would likely promote the formation of frozen conditions, extreme caution must be exercised at road crossings at grade and/or other paved or filled areas such as customer driveways to prevent wheels from being lifted off the rail (derailed) account flange-ways being filled with ice and/or other frozen debris.

**OPERATIONS BULLETIN No. 01, Date Issued: 0001, January 1<sup>st</sup>, 2007,**  
**GENERAL, continued**

- 33) In general, and during any type of weather conditions, extreme caution must be exercised to prevent derailment caused by build-up of foreign materials in flange-ways at locations such as gravel roadways and/or customer driveways, etc., or where ever such conditions are present.
- 34) Train crews may make brief stops at appropriate times and locations in order to purchase food items on a take-out basis for consumption while on duty. However, under no conditions will train crews make stops for the purpose of ordering a meal for consumption at the restaurant without specific prior authority received from the Youngstown Division Main Office.
- 35) Effective immediately and until further advised, no locomotives, railcars or on-track-equipment of any type will be left standing on any track in position to foul movement on any adjacent track.

Leaving locomotives, railcars or on-track-equipment of any type in a position on any track so as to foul movement on any adjacent track creates a fixed obstruction that may contribute to other circumstances ultimately precipitating a collision, personal injury and/or substantial damage to equipment.

Of course personal injury of any nature is of paramount importance to prevent, but the disruption to our service, tangible and intangible costs and the domino effects of a collision are also very important to prevent for the preservation of the continuity and overall success of our operation. We must each take an active part in assuring immediate and 100% compliance with these instructions.

- 36) Because one of our Company's primary sources of revenue is the haulage of various scrap materials, it is not uncommon for pieces of such materials to be left-over from the unloading process in the respective cars we handle daily.

Please be aware and understand clearly that such materials are absolutely not the property of our Company, nor the property of any individual or entity other than the shipper of record as listed on the latest waybill for movement of the car.

This means that no one is to be removing these materials from "empty" cars for any reason.

- 37) Per our existing rules and procedures for mounting and dismounting railroad equipment, whether such equipment is moving or standing still, we are all aware we must always exercise care, judgment and common sense in order to do so safely. Occasionally specific conditions exist or develop that require an extra measure of those virtues, and such is the case with various cars moving in Construction & Demolition Debris (C&DD) service to our Negley and Girard customers. Primarily

**OPERATIONS BULLETIN No. 01, Date Issued: 0001, January 1<sup>st</sup>, 2007,**  
**GENERAL, No.37, continued**

one of our C&DD origins on the East Coast of the United States utilizes a slurry material sprayed onto the top layer of C&DD in the railcar to control dust, etc., while en route from the origin to our customers here on our Youngstown Lines. During the application process this slurry material is over-sprayed to other areas on the railcar including, but not limited to, ladders, step treads, hand brakes and platforms.

When dry this material may flake-off and become airborne and when wet it may produce slippery conditions. Whether wet or dry, these conditions may pose a challenge to being able to safely mount, dismount and/or ride the railcar involved or railcar being handled closely with a railcar so involved.

Be mindful of these conditions and govern yourself accordingly when involved in handling these effected railcars. If you detect conditions caused by the slurry material to be present and it is your judgment that your safety is improved by refraining from mounting, dismounting and/or riding such cars, you must take the safe course and follow your judgment and common sense. Action has been initiated to cease use of this slurry material as soon as possible.

Remember that no service is so urgent or task so important that it should not be performed to the safest possible degree.

38) Radio frequency use will be as follows:

- (a) The Haselton Job, Brier Hill Job, Y&S Job, MV1 & MV2 Jobs, YARR Job, West End Job and any extra train assignments will all use OHCR Channel 1 (AAR Channel 07) unless specifically authorized to use another channel;
- (b) The Stone Train Crew will use OHCR Channel 1 (AAR Channel 07) until the loaded train is spotted for unloading. At that point the Stone Train Crew will change to OHCR Channel 2 (AAR channel 49) for the unloading work. When ready to move the empty train back to interchange at Ohio Junction, the crew will change back to OHCR Channel 1 (AAR Channel 07) to communicate as necessary with other crews and the MV Office.
- (c) Crews working either Mahoning Valley Job will use OHCR Channel 4 (AAR Channel 27) when performing switching duties in the Mahoning Valley Railway yard area, Phoenix Logistics, or Castlo Industrial Park, etc.;
- (d) When operating on CSXT or NS property, the engineer must monitor the applicable road channel of the foreign line road. In compliance with this instruction, the locomotive radio must be set on the applicable foreign line

**OPERATIONS BULLETIN No. 01, Date Issued: 0001, January 1<sup>st</sup>, 2007,**  
**GENERAL, No.38, (d), continued**

road channel and a hand-held radio will be used to receive and transmit communication with the conductor. Locations where this instruction must be applied includes, but is not limited to, YANDA (CSXT/AAR Channel 08); Ohio Junction (CSXT/AAR Channel 08); NS Hasleton Yard, Youngstown Line and Lordstown Secondary Track (NS/AAR Channel 46).

- 39) Consistent with good judgment and compliance with all applicable rules, special instructions and equipment restrictions, and together with awareness of the ground conditions and equipment involved, employees may exercise the option to mount and/or dismount moving equipment as they see fit while operating within the confines of Ohio Central Railroad System, Youngstown Division property.
- 40) Approved safety glasses and ear plugs are provided by the Company for use by employees in order to comply with the requirements of connecting carriers. Where stipulated by connecting carrier instructions, use of the safety glasses and ear plugs is mandatory but is optional while operating within the confines of Ohio Central Railroad System, Youngstown Division property.
- 41) When operating Company-owned vehicles, the employee operating the vehicle is responsible for ensuring that the vehicle is in proper operating order including engine lube oil level, engine coolant level, transmission fluid level, windshield washer fluid, tire inflation and lighting, etc., prior to beginning the trip or use of vehicle.

Beginning on July 1, 2006, all drivers of company vehicles will be required to complete a Vehicle Mileage Report. A Vehicle Report Form will be provided for each vehicle. It is printed on yellow card stock and protected by a plastic slide-in envelope. Entries should be made on this form at the beginning and end of each day the vehicle is driven. These mileage reports are to be completed on a daily basis.

Fuel purchases should also be entered on the report form, indicating the amount of fuel purchased and how much the fuel cost. Drivers are also required to complete a weekly report on the status of various vehicle fluids, such as oil, water, transmission fluid, window washer fluid, etc. A space has been provided on the mileage report form for this information.

If a vehicle requires repairs, those entries will be made on the back of the form. Please make sure to inform me about any vehicles needing repair so I can assist in the logistics of getting the vehicle to the shop and make preparations to pay for the repairs. These forms must be submitted to the Youngstown Division Main Office on or about the 1<sup>st</sup> of every month.

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**GENERAL, continued**

- 42) All train and switching movements on the OCRS Youngstown Division will be performed with total trainline air brake continuity maintained at all times throughout the entire train or cut of cars being handled. However, this does not preclude "kicking" cars and/or executing gravity "roll-bys" when and where conditions ensure such moves are able to be completed in a safe and prudent manner.
- 43) Unless directed otherwise by the proper authority, cars to be left standing in any tracks will be coupled solid with all trainline air hoses coupled and trainline angle cocks positioned properly for trainline air brake continuity. In addition, the trainline angle cock on at least one end of the cars to be left standing must be positioned open to the atmosphere to ensure trainline air cannot become "bottled".
- 44) Anytime a cut of one or more cars is left standing, a sufficient number of effective handbrakes must be applied. Unless specified otherwise in Special Instructions, the minimum required percentage of effective hand brakes is ten (10) per cent, or at least one (1) effective hand brake per block of ten (10) cars or any fraction thereof. When various conditions (grade; rail conditions; type of brake, etc.) render it prudent or when in the judgment of the employee that additional hand brake application is warranted, such action must be taken to ensure the car(s) will remain securely standing.

Also, certain locations require a higher percentage of hand brake application and are so noted in Special Instructions.

- 45) When locomotives are left standing unattended, each locomotive in the consist must have an effective hand brake applied. In the event that a locomotive hand brake is found to be ineffective or inoperative, an immediate report must be made by cell phone or radio to the Youngstown Division locomotive department and the Youngstown Division Main Office. The affected locomotive must be secured by use of a wheel skate, chock or other substantial wooden item placed on the lead wheel of the downgrade end of the unit. Also, in order that the wheel chock cannot be removed by a vandal, employees must have the engineer move slightly enough to position the wheel so that it is pinching the wheel chock securely.

Locomotive hand brakes are not to be included when calculating the total number of brakes necessary to properly secure one or more cars left standing.

- 46) In general daily practice, when ever and where ever cars are left standing, and when specifically designed wheel chocking devices are not available, employees must make a reasonable effort to locate a substantial wooden item to place ahead of the lead wheel of the downgrade end of the car(s) to provide the same effect as a specifically designed wheel chocking device. Also, in order that the wheel chock cannot be

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**GENERAL, No.46, continued**

removed by a vandal, employees must have the engineer move slightly enough to position the wheel so that it is pinching the wheel chock securely.

**MAHONING VALLEY RAILWAY (MVRV)**

- 1) Derails have been installed on No.3 Main Shop. This is the track that was used in 2004 by AMERIGAS to unload propane tank cars.
- 2) Loaded and/or empty gondolas exceeding 52 feet in length must not be handled individually or in multiples to Quality Bar in the Casey Building.
- 3) The easternmost five (5) car lengths (50 ft/car) of Track No. 280 must not be used or occupied.
- 4) Loaded and/or empty 89 foot container flats will be restricted to MVRV tracks as follows: No. 4 Main, No. 3 Main-Shop, No. 262, Dravo, No. 239, No. 240, No. 292-east end only.
- 5) Effective immediately and until further advised, all trackage associated with the Mahoning Valley Railway (MVRV) is designated as "Excepted Track". All requirements associated with tracks designated as such are also effective immediately. Speed must not exceed ten (10) miles per hour on any track associated with the MVRV and these instructions will not supercede any previous instructions in effect which set forth a lower speed for any given track associated with the MVRV.
- 6) The Struthers Industrial Track (OHPA) and the Shortline Track (MVRV) have been reconfigured and connected as follows: Proceeding northward on the Struthers Industrial Track between CP 61 and the Sheet & Tube Runner Switch, immediately prior to entering the right-hand curve in advance of the Mahoning River bridge, a right-hand facing point switch has been installed approximately nine-hundred (900) feet north of the southward absolute signal at CP 61. This switch will be referred to as "The Woodburn Connection Switch" and is in service effective immediately. The right-hand diverging route of this switch forms a new connection to the Shortline Track and this new connection track will be referred to as the "Woodburn Connection" and is also in service effective immediately.

The normal position for the Woodburn Connection Switch is lined and locked for straight-away movement on the Struthers Industrial Track;

That part of the Shortline extending southward from the Woodburn Connection to the southward absolute signal at CP 61 is removed from service and is now disconnected and inaccessible. The remaining portion of the Shortline Track extending northward

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No.6, continued**

between the Woodburn Connection and the CASTLO Industrial Park gate remains in service and will continue to be referred to as the Shortline Track.

- 7) The following MVRV tracks must not be used for holding any cars, locomotives or on-track-equipment: No.220; No.1 Main; No.2 & No.3 Main east of the Center Street bridge; No.4 Main Pocket.
- 8) The east end of No.292 has been restored to service therefore making the entire track available for service.

**OHIO & PENNSYLVANIA RAILROAD (OHPA)**

- 1) *This line is divided into three segments defined as follows:*
  - (a) *The southern-most segment of this line is referred to as the "LE&E Lead" and extends between its southern-most point 300 feet south of Jones Street at OHPA MP 0.35 and its northern-most point at the fouling point of the Darlington Junction Switch;*
  - (b) *The middle segment of this line is referred to as the "Struthers Lead" and extends between its southern-most point at the absolute signal governing entrance to the Norfolk Southern CP 61 and its northern-most point at its end-to-end connection with the "River Track" at the south switch of the Gateway Cab Track;*
  - (c) *The northern-most segment of this line is referred to as the "River Track" and extends between its southern-most point at its end-to-end connection with the "Struthers Lead" at the south switch of the Gateway Cab Track and its northern-most point at the fouling point of the Lally Pipe Switch;*
- 2) *Authority for Movement on all three track segments associated with the Ohio & Pennsylvania Railroad will be as follows: Trains, engines and on-track-equipment may occupy any of the track segments with permission received from the MV Base.*
- 3) *Maximum Authorized Speed on all three track segments associated with the Ohio & Pennsylvania Railroad will be as follows: Proceed able to stop within one-half the range of vision, not exceeding 25 MPH. Speed restrictions for this track section will be listed below:*
  - (a) *Speed on the LE&E Lead will be restricted to: Able to stop within one-half the range of vision not exceeding 10 MPH;*

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No.3, continued**

- (b) Speed on the Struthers Lead will be restricted to: Able to stop \_\_\_\_\_  
within one-half the range of vision not exceeding 10 MPH;
- (c) Speed on the River Track will be restricted to: Able to stop within  
one-half the range of vision not exceeding 10 MPH;
- 4) Maximum Authorized Speed on all sidings and spur tracks associated with the Ohio & Pennsylvania Railroad will be: Able to stop within one-half the range of vision, not exceeding 5 MPH.
- 5) Approach all road crossings at grade equipped with Automatic Grade Crossing Warning Devices prepared to stop before any portion of the movement fouls such crossings in the event such devices fail to properly activate. In the event activation failure occurs, flag protection per the operating rules must be provided prior to any portion of movement fouling the crossing and a report must be made of such occurrence to the MVRVY Office as soon as possible.
- 6) Until further advised all track associated with the "Ohio & Pennsylvania Railroad" is designated as Excepted Track.
- 7) The Center Street Pocket Track is out-of-service.
- 8) *The section of former Lake Erie & Eastern Railway (LE&E) track extending between the Darlington Junction Switch and its connection to the NS CP 61 is not owned nor controlled by the Ohio Central Railroad System (OCRS). The owning entity has provided written authority to multiple entities for use of this section of the former LE&E as a thoroughfare and such use must be considered to be on a "first-come, first-served" basis only. Use of any trackage appurtenant to this section of track is prohibited. Any OCRS use of this track must be performed at a speed which will allow stopping within one-half the range of vision not exceeding 10 MPH.*
- 9) The Struthers Industrial Track (OHPA) and the Shortline Track (MVRVY) have been reconfigured and connected as follows: Proceeding northward on the Struthers Industrial Track between CP 61 and the Sheet & Tube Runner Switch, immediately prior to entering the right-hand curve in advance of the Mahoning River bridge, a right-hand facing point switch has been installed approximately nine-hundred (900) feet north of the southward absolute signal at CP 61. This switch will be referred to as "The Woodburn Connection Switch" and is in service effective immediately. The right-hand diverging route of this switch forms a new connection to the Shortline Track and this new connection track will be referred to as the "Woodburn Connection" and is also in service effective immediately;

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**No.9, continued**

The normal position for the Woodburn Connection Switch is lined and locked for straight-away movement on the Struthers Industrial Track;

That part of the Shortline extending southward from the Woodburn Connection to the southward absolute signal at CP 61 is removed from service and will eventually be physically removed. The remaining portion of the Shortline Track extending northward between the Woodburn Connection and the CASTLO Industrial Park gate remains in service and will continue to be referred to as the Shortline Track;

**WARREN & TRUMBULL RAILROAD (WTRM)**

- 1) Car spots at Bloom Industries are numbered from the Mahoning Avenue road crossing Nos. 1 through 5.
- 2) The Vernon Street Crossing has been permanently closed and abandoned. The Automatic Grade Crossing Warning Devices located at Vernon Street are out-of-service and retired also.
- 3) The Automatic Grade Crossing Warning Devices located at North Park Street are in-service but are activated only by an island circuit extending a short distance to each side of the crossing. All movements must first stop within the limits of this island circuit and allow the Automatic Grade Crossing Warning Devices to operate for a minimum of twenty (20) seconds prior to any portion of movement fouling the crossing.
- 4) The main track is out-of-service from the immediate east side of the Mahoning Avenue crossing, adjacent to Bloom Industries, the entire distance to derailer at MP 183.3, near Lover's Lane in Ravenna. A barricade has been installed across the track at this location in order to prevent any movement to this section of track;
- 5) Atlantis Plastics cars will not be stored on the Paige Avenue Siding but rather in the Dana Avenue Spur Track;
- 6) The main track is out-of-service from the connection switch with the Bloom Industries Track to the north End-of-Track north of Refractories Drive. A portion of rail has been removed immediately north of the connection switch in order to prevent any movement to this section of track. The switch has been spiked for movement only to and from the main track crossover;
- 7) The entire K Mart Lead is out of service. The diverging switch point at the K Mart Lead switch on the main track near Paige Avenue has been removed and the straight side switch point spiked for movement straight-away on the main track only;

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continued

- 8) The west switch of the Bloom Industries Track is out-of-service.

YOUNGSTOWN & AUSTINTOWN RAILROAD (YARR)

- 1) Any car(s) left unattended on the Stambaugh Siding or YARR Connection Track must have the northern-most wheel set properly positioned on a wheel skate in addition to 100% of the hand brakes applied. Wheel skate is provided at this location.
- 2) The Y&A Connection Track bridge over the Mahoning River has been removed for reconstruction. Any movements made on the Y&A Connection Track from either end will be very limited and must be made with extreme caution account this condition.
- 3) Derailer has been installed at the north (*downhill*) end of the Stambaugh Siding
- 4) The outside light located on the building over the entrance door to the YARR Locomotive Shop office must be left "on" at all times. In addition, the fluorescent ceiling light fixtures in the office portion of the building and similar lighting in the south end of the locomotive stall will be left "on" at all times.
- 5) When unattended, the Main Steel switch will be left lined for movement straight-away on the Industrial Track instead of movement from the Industrial Track to the Main Steel track, and the Main Steel rail entrance gate must be closed and locked.
- 6) Watch for irregular walking conditions in the vicinity of the Main Steel switch on the Industrial Track.
- 7) Recently Penn-Ohio Logistics expanded their operations and opened a new rail transload center in the former Youngstown Steel Door (YSD) facility on our Youngstown & Austintown Railroad (YARR).

The YARR trackage providing access to this new customer had been informally known as the "GE Lead" and had been out-of-service for many years but was completely rehabilitated in order to accommodate this new customer. This lead will now be referred to as the "Penn Ohio Lead".

Derailers were installed on the Penn Ohio Lead at its clearance point with the YARR main track and on the Penn Ohio Lead at the clearance point of the spur accessing the Penn Ohio (YSD) facility.

In the course of servicing Penn-Ohio, railcars will not be left standing unattended at points on the Penn Ohio Lead other than between the derailer at the clearance point of

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continued

the Penn-Ohio spur and the End-of-Track. Under no circumstances will cars be left unattended on the Penn-Ohio spur between the switch and the overhead door accessing the Penn-Ohio facility.

The usual move will be to pull the cars up from YANDA and run-around them in the Stambaugh Siding. This is the double-ended siding that lies to the west of the main track between Meridian and Henricks Road.

Cars left standing unattended in the Stambaugh Siding during the run-around move and/or for later handling require 100% hand brake application. Also, the northernmost wheel of the northernmost car will be placed on a skate anytime cars are left unattended, whether work is finished or you are simply spotting Penn Ohio. No exceptions to this instruction.

The skate which is to be used at the Stambaugh Siding, as stipulated above, will be carried aboard the locomotive until needed. This is a high-theft area and the skate will not be left on the ground when the Stambaugh Siding is empty and the skate is not needed per the instructions above.

The move to spot cars at Penn Ohio involves a shove move across Henricks Road. Per the operating rules, this will require proper flagging procedures to be applied.

There is a 260 foot-long tail beyond the Penn Ohio switch on the Penn Ohio Lead. The track existing beyond the 260 foot point is out-of-service and cannot be used. A large pile of earthen material has been placed on the track at the 260 foot point. Empty and loaded cars may be placed on this track as needed, however no more than four (4) cars are able to be accommodated on this track. 100% handbrake application is required on this tail track also. No exceptions.

All cars left unattended must be properly secured to prevent movement per all applicable operating rules and special instructions pertaining to general circumstances and those specific to the YARR and/or Penn-Ohio.

- 8) When unattended, the YARR Austintown Shop Lead switch will be left lined and locked for movement straight-away on the Industrial Track instead of movement from the Industrial Track to the Shop Lead.

**YOUNGSTOWN BELT RAILROAD (YBRR)**

- 1) Switch locks on the Girard Cut-Off, FIT Track-West End and the Canal Branch (C&D Lead) switches will be left locked onto the switch latch whenever the switches are left unattended.

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No.7, continued

- 2) Effective immediately and until further advised, certain track sections associated with the Youngstown Belt Railroad (YBRR) are designated as "Excepted Track". All requirements associated with track designated as such are also effective immediately.

The track sections effected are as follows:

- (a) The entire Ward Track, located in Niles, Ohio, from its connection with the Norfolk Southern Railway Niles Industrial Track to its connection with the YBRR former Erie Lackawanna main track near Pratt Street;
  - (b) The entire YBRR former Erie Lackawanna main track, located in Niles, Ohio, from its east end at Depot Street to its west end of track approximately two hundred (200) feet west of the Champion Injection Mould Switch;
- 3) We occasionally leave a locomotive at Genmak for use in making repetitive spot moves as needed. When doing so the locomotive must be left properly secured on the straight track west of (toward Midwest Steel) the Genmak switch.
- 4) When performing switching service at General Electric in Niles, only the cars applicable to the General Electric spot will be handled into the General Electric facility.
- 5) When applicable, any SPAF forms (Switch Position Awareness Forms) used in conjunction with compliance with FRA Emergency Order No.24 must be telefaxed or hand-delivered to the MV Office promptly at the completion of the tour of duty to which the SPAF form pertains.
- 6) We have found that overall the most prudent and effective procedure for handling and controlling the City Stone Unit Stone Train (CSUST) includes maintaining a light (5-10 lb) trainline brakepipe reduction continuously during the unloading process. However, we have also experienced that in unloading approximately the last one-third of the train that the combination of grade and tonnage changes causes the available motive power to have difficulty moving the train against the trainline brake pipe reduction.

In view of this condition CSUST crews are authorized to employ a modified method of unloading the remainder of the train when experiencing this condition as follows: Upon closure of the V&M Star main entrance road crossing for the day (approximately 1500) the entire CSUST may be pulled west of the under-track dumper and then shoved back (eastward) to spot the rear (easternmost) car for unloading. A light trainline brake pipe reduction must be made prior to this shove for

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No. 6, continued

spot and then held continuously to properly control the train and provide the necessary precision for spotting. Then each remaining loaded car from the rear toward the head of the train will be shoved to spot in lieu of pulled to a spot

CSUST crews must make prior arrangements with City Stone unloading personnel well prior to employing this modified method of unloading the remainder of the train.

- 7) The Automatic Grade Crossing Warning Devices located at Furnace Lane, approximately MP 62.95 on the former Erie Main, are in-service but are activated only by an island circuit extending a short distance to each side of the crossing. All movements must first stop within the limits of this island circuit and allow the Automatic Grade Crossing Warning Devices to operate for a minimum of twenty (20) seconds prior to any portion of movement fouling the crossing.
- 8) Atlantis Plastics cars will not be stored on the Paekard Lead or Stub
- 9) When spotting C&D loads for unloading on the west end of the FIT Track, the west car must be one (1) car length from the road crossing. This will allow four (4) coupled cars to be unloaded. A fifth car, separated from the other four, will then be placed for unloading east of the overhead wires.
- 10) Concord Steel cannot accept 65 foot gondolas for outbound loading. Their destination customer cannot unload them. Unless specifically instructed by the Youngstown Division Main Office otherwise, crews will not spot 65 foot gondolas for loading at Concord Steel.
- 11) Do not exceed ten (10) MPH between the Division Street (SR 711) overhead bridge and the east end of the City Stone unloading pit.
- 12) The oldest C&D loads will always be placed for unloading at Total Waste Logistics (TWL) unless otherwise instructed in writing by TWL.
- 13) Train crews, whether traveling by train or highway vehicle, will not depart Warren without first receiving verbal clearance to do so from the MVRV Office.
- 14) The entire Eastbound Main Track from the crossover at the west end of Brier Hill to VO will be kept clear, except in the case of emergencies.
- 15) All loaded cars destined to General Electric in Niles received from connecting carriers must be inspected for leaks, open/unsecured top hatches, etc., and other defects prior to being brought on-line and/or accepted in interchange. If any such defects are found, the car(s) must not be accepted in interchange or brought on-line.

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continued

- 16) Unless directed otherwise by the Youngstown Division Main Office, loaded pipe cars delivered to the Norfolk Southern Railway at Haselton will be delivered in one (1) solid block positioned southern-most in the train being delivered. When the southern-most loaded pipe car is a gondola without an end-of-car bulkhead extending above the highest layer of pipe, an approved "cover car" must be coupled immediately south of the southern-most loaded pipe car.
- 17) The Y&A Connection Track bridge over the Mahoning River has been removed pending eventual reconstruction. Any movements made on the Y&A Connection Track and/or Leadville Connection Track will be very limited by the absence of this bridge and must be made with extreme caution account this condition.
- 18) The Sherman Lead Track is out of service from the Sherman Spur Track to the east. End-of-Track account large volume of debris on track from failure of adjacent retaining wall.

Terry L. Feichtenbinder  
General Manager  
*Youngstown Division*

**K**

IN THE COURT OF COMMON PLEAS  
MAHONING COUNTY, OHIO

ALLIED INDUSTRIAL DEVELOPMENT  
CORP.

Plaintiff

vs.

OHIO CENTRAL RAILROAD, INC., ET  
AL.,

Defendants

vs.

GEARMAR PROPERTIES, INC.

And

BAUMAN LAND TITLE AGENCY, INC.  
108 MAIN AVENUE SW  
WARREN, OHIO 44481

) CASE NO. 09 CV 2835

) JUDGE MAUREEN A. SWEENEY

) MAGISTRATE DENNIS SARISKY

)  
)  
) **DEFENDANTS' REPLY TO**  
) **PLAINTIFF'S BRIEF IN OPPOSITION**  
) **TO MOTION TO DISMISS OR IN THE**  
) **ALTERNATIVE REFER TO THE**  
) **SURFACE TRANSPORTATION**  
) **BOARD**

**I. INTRODUCTION**

Allied's arguments against dismissal or referral to the Surface Transportation Board ("STB") are without merit. While Allied argues that this Court should not dismiss the case or refer the transportation issues to the STB because preemption under the ICCTA is "not as broad as Defendants contend," and "does not extend to the enforcement of voluntary contracts concerning private property rights," the fact is that ICCTA's preemption statute, 49 U.S.C.



10501, broadly and expressly preempts the exercise of state jurisdiction over railroad property and tracks. Plaintiff's assertions notwithstanding, the STB has exclusive jurisdiction over Defendants' use of the tracks on 62188, and the Court should dismiss Plaintiff's complaint or refer this matter to the STB.

## II. LAW and ARGUMENT

### A. **The Federal District Court's Remand Order has no Relevance to Defendant's Motion to Dismiss/Refer.**

In its recitation of facts, Allied puts great weight on the federal District Court's remand order ("Remand Order"). However, the Remand Order only decided whether this case was properly removed to federal court under 28 U.S.C. § 1441. The District Court concluded that it had no jurisdiction over the case because removal was improper. Consequently, the federal court expressly deferred deciding whether dismissal and/or referral to the STB was appropriate, noting that Defendants "were free" to raise their ICCTA preemption defense after remand:

The Court does not resolve the separate issues of whether the ICCTA's preemption clause provides a defense to Allied Industrial's claims- an issue that the defendants are free to raise in the state court.

(Order p. 6-7)

Because the federal court lacked jurisdiction to decide the factual and legal issues raised in this Motion to Dismiss, it is now for this Court to determine whether the case should be dismissed or referred to the STB.

### B. **Plaintiff Attempts to Minimize the Jurisdiction of the STB are Contrary to Law.**

Plaintiff's attempt to minimize the jurisdiction of the STB is inconsistent with the overwhelming authority that supports the broad scope of STB jurisdiction. Courts have

consistently upheld the extremely broad nature of STB preemption under the ICCTA. As noted in CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n., 944 F. Supp. 1573, 1581 (N.D. Ga. 1996), “it is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.” In Columbiana County Port Auth. v. Boardman Township Park Dist., 154 F. Supp. 2d 1165, 1180, the Court stated that the “ICCTA...evidences the intent of Congress to preempt the field...with respect to railroads” and that “Congress granted the STB exclusive jurisdiction over all matters of rail transportation...” In City of Auburn v. United States Government, the Ninth Circuit noted that “the Supreme Court repeatedly has recognized the preclusive effect of federal legislation in this area.” 154 F. 3d 1025, 1029. In Rushing v. Kansas City S. Ry. Co., the court found that “the clear and manifest purpose of Congress when it enacted the ICCTA was to place certain areas of railroad regulation within the exclusive jurisdiction of the STB and to preempt remedies otherwise provided under federal or state law.” 194 F. Supp. 2d 493, 498 (S.D. Miss. 2001). In Friberg v. Kansas City S. Ry. Co., 267 F.3d 439 (5<sup>th</sup> Cir. 2001), the court stated that the preemptive language of 49 U.S.C. §10501 is “so certain and unambiguous as to preclude any need to look beyond that language for congressional intent.” Friberg, 267 F. 3d at 443. The court in Friberg further observed that the “regulation of railroad operations has long been a federal endeavor..., and it appears manifest that Congress intended the ICCTA to further that exclusively federal effort...” Id.

The STB itself has likewise recognized the preemptive effect of the ICCTA. As stated by the STB, “[e]very court that has examined the statutory language has concluded that the preemptive effect of section 10501(b) is broad and sweeping, and that it blocks actions by states or localities that would impinge on the Board’s jurisdiction or a railroad’s ability to conduct its rail operations.” CSX Transp., Inc., 2005 STB LEXIS 134, \*16 (citing Friberg, 267 F. 3d at

443).<sup>1</sup>

**C. Issues of Ownership of Private Property do not Fall Outside the Jurisdiction of the STB when the Property Contains Rail Lines and Transfer of the Property Would Cause Abandonment of Rail Lines and Interference with Interstate Rail Operations.**

While Allied contends that preemption does not extend to the enforcement of agreements concerning private property rights, even the cases cited by Allied make it clear that state judicial enforcement of private property rights is only appropriate where it will not interfere with rail transportation. In this instance, where Allied seeks to eject Defendants from Lot 62188 and force them to stop operating over the tracks on that property, there is no question that the relief sought would improperly interfere with the rail transportation being provided by Defendants.<sup>2</sup>

The cases cited by Allied are readily distinguishable from the case before this court. They involve interpretation of contracts that may limit, but do not interfere, with the performance of common carrier obligations. They do not seek to completely eject a rail carrier from rail lines. See PCS Phosphate Company, Inc. v. Norfolk Southern Corp., 559 F.3d 212 (4<sup>th</sup> Cir. 2009)

<sup>1</sup> The STB opinion included the following citations as further supporting ICCTA preemption: City of Auburn, 154 F. 3d at 1029-31 (state and local environmental and land use regulation preempted); Wisconsin Cent. Ltd., 160 F. Supp. 2d at 1014 (attempt to use a state's general eminent domain law to condemn an actively used railroad passing track preempted); Dakota, Minn. & E. R.R. v. State of South Dakota, 236 F. Supp. 2d 989, 1005-08 (S. S.D. 2002), aff'd. on other grounds, 362 F. 3d 512 (8th Cir. 2004) (revisions to state's eminent domain law preempted where revisions added new burdensome qualifying requirements to the railroad eminent domain power that would have the effect of state "regulation" of railroads); CSX Transp. Inc., 944 F. Supp. at 1573 (state regulation of a railroad's closing of its railroad agent locations preempted); Soo Line R.R. v. City of Minneapolis, 38 F. Supp. 2d 1096 (D. Minn. 1998) (local permitting regulation regarding the demolition of railroad buildings preempted); Cedarapids, Inc. v. Chicago, Cent. & Pac. R.R., 265 F. Supp. 2d 1005, 1013-14 (N.D. Iowa 2003) (ICCTA preemption applies broadly to operations on both main line and auxiliary spur and industrial track); Norfolk S. Ry. v. City of Austell, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236 (N.D. Ga. 1997) (local zoning and land use regulations preempted); Village of Ridgefield Park v. New York, Susquehanna & W. Ry., 750 A.2d 57 (N.J. 2000) (amended complaints about rail operations under local nuisance law preempted). CSX Transp., Inc., 2005 STB LEXIS 134, \*16-18 (STB 2005).

<sup>2</sup> Contrary to Allied's assertion, the Google Map Exhibit attached to Allied's memorandum shows that the tracks on Lot 62188 are necessary for traffic to traverse between shippers on one side of the property and potential Class I connections on the other side of the property. Although Defendants may theoretically be able to use tracks of the connecting carriers to provide service, Defendants do not have any rights to use those tracks, and it is unlikely that they would provide such access. See Collins Deposition at 138-140 attached as Exhibit A. Further, the fact that the tracks are located in one state do not affect whether the traffic is "interstate" or whether the tracks are subject to the jurisdiction of the STB. See 49 U.S.C. §10501(b).

(obligation to relocate tracks under easement agreement); Township of Woodbridge v. Consolidated Rail Corp., STB Docket No. 42053 (served December 1, 2000), 2000 STB LEXIS 709, clarified (served March 23, 2001) 2001 STB LEXIS 299 (limitations on hours of use of yard tracks); Pejepscot Industrial Park, Inc. v. Maine Central Railroad Co., 297 F. Supp.2d 326 (D. Me. 2003) (remanding third party beneficiary claim of shipper for service based on state funded repairs to line). Moreover, in all of these cases, it was still necessary for the STB to determine whether enforcement of the agreement would unreasonably interfere with railroad operations. *See, for example, Pejepscot, supra* at 326, cited in Allied Memorandum in Opposition at 8 (rail carrier is not precluded from arguing that contract obligations would result in unreasonable interference with interstate commerce).

Allied argues that Defendants cannot operate over the tracks because Defendants transferred the property. Defendants, however, maintain that there was never any an agreement for MVRV to transfer Lot 62188, and the deed is void because of mutual mistake, improper execution and acknowledgement, and material alteration.<sup>3</sup> It is Defendants' position that the purported transfer to Gearmar is void, and that MVRV remains the owner of Lot 62188. *See* Defendants' Answer.

This disputed property issue, however, is immaterial to Defendants' motion to dismiss/refer. MVRV has common carrier obligations with respect to its operations over Lot 62188, and it cannot abandon those operations without STB authority. *See* Defendants' Motion to Dismiss or Refer at 11-15. It has the right and obligation to continue operating notwithstanding the dispute over ownership of the property. This has been made clear in numerous decisions relating to potentially expired or breached contracts (Thompson v Texas

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<sup>3</sup> There is uncontroverted evidence that the title company added the description of Lot 62188, and interlineated references to MVRV, after the deed was executed on behalf of OHPA only in order to transfer Lot 62320 to Gearmar.

Mexican R. Co., 328 US 134, 145 (1946)) (even if trackage rights agreement terminated under its terms, still need discontinuance certificate from ICC); Union Pacific Railroad Company – Petition for Declaratory Order, STB Finance Docket No. 34090 (served November 9, 2001), 2001 STB LEXIS 853 (alleged breach of franchise agreement); Cheatham County Rail Authority – “Application and Petition” for Adverse Discontinuance, ICC Finance Docket No. 32049 (served August 31, 1992), 1992 ICC LEXIS 181, at \*3-4 (expiration of railroad’s lease), and in situations where the title to the property is disputed (State of Louisiana v. Illinois Central Railroad, 928 So.2d 60 (La.App. 1 Cir. 2005); Mark Lange – Petition for Declaratory Order, STB Finance Docket No. 35037 (served January 28, 2008), 2008 STB LEXIS 45 at \*8-9)<sup>4</sup>. As the STB explained in Union Pacific, *supra*:

Congress gave the Board exclusive and plenary authority over rail line abandonments and Board authority is required before a railroad line can be lawfully abandoned. . . . The courts have been clear that “[a]bsent . . . valid . . . abandonment [authority] . . . a state may not require a railroad to cease operations over a right-of-way.” . . .

The City’s actions are admittedly to prevent reactivation of, and operation over, the Line. The City argues that the Franchise Agreement allows it to terminate UP’s franchise rights with respect to the right-of-way and require UP to remove its tracks. Yet, even assuming that the City’s interpretation is correct, its enforcement of the Franchise Agreement is no less an attempt to regulate the abandonment of an interstate line of railroad than if the City promulgated laws for the same purpose. The Board and the courts have consistently found that such local regulation is precluded.

2001 STB LEXIS 853, at \*7-8 (citations and footnotes omitted).

The STB has the exclusive jurisdiction to grant abandonments, and to review property transfers to determine if sufficient operating rights have been retained. Thus, even if the ultimate contract or title issues are left for the courts to decide, it is clear that the any state law actions that would cause a railroad to abandon its operations without STB authority is preempted. Because

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<sup>4</sup> See also discussion of these cases and others in Defendants’ Motion to Dismiss or Refer at 11-15.

the relief sought in this case (ejectment of the Defendants from the property currently operated by Defendants) would result in the abandonment of rail lines used in Defendants' interstate rail operations (see Collins affidavit, ¶¶ 11-12, attached to Defendants' Motion), it invokes STB jurisdiction and authority.

Citing Central Kansas Railway LLC – Abandonment Exemption – In Marion and McPherson Counties, KS, STB Finance Docket No. AB-406 (Sub-No. 6X) (served May 8, 2001), 2001 STB LEXIS 472, Allied contends that title to disputed property should be ruled on by a state court before issues related to abandonment of rail lines are referred to the STB. However, the property at issue in Central Kansas Railway was property that had been authorized for abandonment, and the question was whether subsequent property sales would interfere with the use of the property for a trail or future rail service. Significantly, as discussed in an earlier decision in the same case, the STB itself examined sales of “excess property” that took place prior to the abandonment filing and the sale for trail use, and determined that the railroad had retained sufficient right-of way in all instances to allow an uninterrupted rail corridor. Central Kansas Railway LLC – Abandonment Exemption – In Marion and McPherson Counties, KS, STB Finance Docket No. AB-406 (Sub-No. 6X) (served December 8, 1999), 1999 STB LEXIS 673, at \*11, \*12 fn.8. This finding was undisputed on a previous appeal to the District of Columbia Circuit in Jost v. STB, 194 F.3d 79 (D.C. Cir. 1999). Id., slip op at 4. This case demonstrates that while it is possible for a railroad to transfer property without STB approval, it can only do so if it reserves sufficient rights (such as a permanent and unconditional easement) to continue common carrier obligations, including the full right and necessary access to maintain, operate and renew the lines on the property. See State of Maine, Department of Transportation – Acquisition and Operation Exemption – Maine Central Railroad Company, 8 I.C.C.2d 835

(1991) (dismissing acquisition exemption as unnecessary). A railroad cannot simply cease to offer service with respect to the line without STB approval. *Id.*, 8 I.C.C.2d at 837 (referring to the ICC, the STB's predecessor). As stated by the ICC, "Because of the significant possibility that this sort of transaction could affect the carrier's ability to meet its common carrier obligations, unless there are adequate protections built into the transaction, we intend to examine these transactions closely and will make a determination based on the facts and circumstances of each case." *Id.*, 8 I.C.C.2d at 838. Thus, to the extent that a state court may be called upon to determine a title issue, that determination is subject to the STB's determination of the effect of a proposed transfer on railroad operations.<sup>5</sup>

In summary, the STB has the power to protect its jurisdiction and to independently void a transaction which, as here, would cause an abandonment of rail lines and would interfere with interstate commerce. Thus, while Plaintiff contends that its claims arise from a private contract for the sale of real property and that the transaction is exempt from ICCTA preemption, because the issue is ownership of railroad property and tracks, and because Plaintiff seeks to evict a rail carrier from rail lines used to meet its common carrier obligations, Plaintiff's state law claims are preempted under 49 U.S.C. § 10501, and this case falls under the exclusive jurisdiction of the STB.

**D. The STB has Jurisdiction over the Tracks on Lot 62188.**

Plaintiff next argues that the tracks on Lot 62188 are spur or industrial tracks which are

<sup>5</sup> Allied also questions the power of the STB to void a transfer; however, the STB clearly has the power to protect its jurisdiction over railroad property, and to void sales of railroad property in connection therewith. See Railroad Ventures, Inc. – Abandonment Exemption, STB Docket No. AB-556 (Sub-No. 2X), served October 4, 2000, slip op. at 11-12 (voiding, among other transfers, sale of right-of-way property to Park District, as a violation of jurisdiction of STB over railroad line prior to abandonment); aff'd sub nom. Railroad Ventures, Inc. v. Boardman Township, 299 F.3d 523, 563-564 (6<sup>th</sup> Cir. 2002). See also; Pyco Industries, Inc. – Feeder Line Application, STB Finance Docket No. 34890, served January 24, 2007 (voiding purported transfer by railroad of track leased by customer to avoid feeder line application) and *Id.*, served August 3, 2006 (voiding transfers by railroad of real estate, tracks and other property interests in railroad lines to evade STB jurisdiction and authority).

“excepted” from STB jurisdiction. Plaintiff is wrong for two reasons. First, the tracks are not side or spur lines. At the very least, this is for the STB to decide. Second, even spur, side and industrial tracks fall are exempt from state court jurisdiction. These issues are discussed in more detail below.

The issue of whether a rail track is characterized as a “line of railroad”<sup>6</sup> or as a “spur, sidetrack or yard track” is a mixed question of law and fact (Hughes v. Consol-Pennsylvania Coal Co., 945 F. 2d 594, 612 (1991)), and one best left to the expertise of the STB. What individuals (including John Ramun and former employees of MVRVY) label the tracks on Lot 2188 does not determine their legal character.<sup>7</sup> Using descriptions from older cases of what constitutes a “line of railroad” is also not useful. Since the passage of the Staggers Rail Act of 1980, P.L. 96-448, which deregulated and facilitated the establishment and transfer of rail lines, many short line railroads (such as MVRVY, OHPA and the other Railroad Defendants) have been formed to operate lines of railroad that traverse shorter distances between customers and their long haul larger (Class I) railroad connections. The railroad lines operated by short lines are no less part of the interstate railroad network, and short lines have common carrier obligations with respect to those lines of railroad.<sup>8</sup>

Plaintiff contends that the tracks on Lot 62188 go back to a period prior to 1981 when

<sup>6</sup> Allied refers to “main line” track which is not a term used in ICCTA. Defendants will use the term “line of railroad” or “railroad line” in this Memorandum. See 49 U.S.C. §§10901, 10903.

<sup>7</sup> In Nicholson v. ICC, 711 F.2d 364, (D.C. Cir. 1983), cert. denied, 464 U.S. 1056 (1984), cited by Allied in its Memorandum at pp. 9-11, the Court noted that the question of whether the ICC has jurisdiction turns on the intended use and not the label it is given. See Id. at 368 fn 11 (if traffic movements are part of the through transportation haul from shipper to consignee, then the tracks are subject to Commission jurisdiction); and Id. at 368 fn 12 (“industrial” track held subject to Commission jurisdiction). It should be noted that in Nicholson, it was the ICC that made the initial determination of whether the classification yard tracks to be constructed were a “railroad line.”

<sup>8</sup> Even tracks that would otherwise be considered “excepted tracks” are subject to the jurisdiction of the STB as a line of railroad when they are the only tracks to be operated by a non-carrier commencing operations. See Ohio Valley Railroad Company – Acquisition and Operation Exemption – Harwood Properties, Inc., STB Finance Docket No. 34486 (served September 28, 2004) (former switching, industrial or private track in a yard); Effingham Railroad Company – Petition for Declaratory Order, 2 STB 606 (1997), aff’d sub nom. United Transportation Union v. STB, 183 F.3d 606 (7<sup>th</sup> Cir. 1999 (construction and operation of tracks constructed in new industrial park subject to STB jurisdiction)).

one of the operating steel companies in the area was Jones & Laughlin Steel Corporation (“Jones & Laughlin”). Jones & Laughlin formed MVRV in 1981 as a subsidiary of its existing rail carrier The Cuyahoga Valley Railway Company. However, MVRV was formed not just to serve Jones & Laughlin, but also to serve other industries in the area which were identified in the notice issued by the ICC. *See Mahoning Valley Railway Co. – Operation of a Line of Railroad in Mahoning County, OH – Notice*, 46 FR40097 (August 6, 1981). MVRV received ICC authority to operate as a common carrier by rail subject to the jurisdiction of the ICC, and certain of its tracks, including the track marked as the “#3 main” on Lot 62188, served as its line of railroad, allowing service to customers, and the handling of traffic between its customers and connecting class I railroads at either end of its lines. Thus, by the time LTV Steel took over the steel facilities in the area, MVRV was operating, and continued to operate, the tracks as a common carrier, and the tracks were not internal plant lines of LTV Steel. When LTV Steel transferred Lots 62188 and 62189 to MVRV in 2001, MVRV was acting as a common carrier and serving customers beyond the steel facilities.

In determining the character of the track in question, the issue is not what use is being made of the tracks now, but rather what use was being made and contemplated when MVRV was first authorized to operate as a common carrier in 1981. The character of a track as a “railroad line” does not change with subsequent changes in use. Once common carrier obligations have been assumed with respect to a particular line, those obligations remain until abandonment authority from the STB has been obtained. (This is true even if the carrier terminates service or removes track – neither of which is present here.) The ICC explained this long standing principle:

Because this track was clearly part of a rail line at one time, we find that it cannot be converted into an exempt spur and the

Commission divested of jurisdiction over it solely through the railroad's unilateral decision to change its use of the track segment over time. To find that this is a spur would be inconsistent with our well-established policy that where a carrier decides to reduce or cease service and/or remove track, the carrier's common carrier obligation remains until appropriate abandonment authority is obtained. ... Based on well-established case law in this area, discussed supra, we find that this track remains a railroad line until the Commission authorizes its abandonment.

The Atchison, Topeka and Santa Fe Railway Company – Abandonment Exemption – In Lyon County, KS, ICC Docket No. AB-52 (Sub-No. 71X), served June 17, 1991, slip op at 5 (footnote and citations omitted).

Significantly, Allied did not address the fact that MVRV applied for and obtained authority to operate as a common carrier (Mahoning Valley Railway Co. – Operation of a Line of Railroad in Mahoning County, OH, ICC Finance Docket No. 29658 (Sub-1), 46 FR 40097 (August 6, 1981)), and that as a result MVRV has common carrier obligations with respect to the lines of railroad that are on Lot 62188. Once tracks become a line of railroad they cannot be converted to excepted tracks under 49 U.S.C. §10906 merely through change of use.

Defendants' Motion to Dismiss or Refer makes it clear that because MVRV is a common carrier railroad, and because the property is used for rail transportation, the STB has exclusive jurisdiction over the tracks and other facilities on Lot 62188, railroad operations, and all remedies related thereto. *See* Defendants' Motion to Dismiss or Refer at 9-15. Moreover, the character of the lines is for the STB to determine, as are issues related to preemption. Id., at 16.

Moreover, although the characterization of the tracks on Lot 62188 by individuals is not determinative, and cannot serve to change the legal character of the tracks, the quotes attributed to the Defendants by Allied are incomplete and misleading. Part of the problem stems from Allied's insistence on using the term "main line" tracks which is not a term used in ICCTA, and

which can have different meanings depending on whether you are talking about a “main line” of CSXT that may run for hundreds of miles, or the “main line” of a short line railroad such as MVRV which may only run for a relatively short distance. See Strawn Deposition 63-67, and Collins Deposition 117 - 128 (variously describing portions of #2 main, #3 main, #4 main and tracks 239 and 280 as “main line” tracks). See Exhibits B and C attached hereto. See also Map, Deposition, submitted with Allied’s Brief in Opposition. The important factor is whether the operator of the tracks has common carrier obligations to provide service over and from the tracks, and whether the tracks are used as part of the interstate rail network to move traffic. MVRV was authorized by the ICC to provide common carrier service over its tracks, including tracks on Lot 62188, and the tracks are clearly used to move traffic to and from the interstate rail network via MVRV’s connections with CSXT to the west of Lot 62188, and Norfolk Southern Railway to the east of Lot 62188.

The term “excepted track” also has different meanings. Plaintiff asserts that the tracks on Lot 62188 are spur, industrial or switching tracks which are “excepted” under 49 U.S.C. §10906 from regulation by the STB. The title of Section 10906 is “Exception.” It provides that certain tracks are exempted from regulation by the STB. However, this does not make the tracks subject to state court jurisdiction, as Plaintiff claims. It does not change the fact that the ICCTA preemption statute, 49 U.S.C. § 10501(b), expressly provides that “the jurisdiction of the Board over...spur, industrial, team, switching, or side tracks...is exclusive.” Port City Properties v. Union Pacific Railroad Company, 518 F. 3d 1186 (10<sup>th</sup> Cir. 2008), cited by Allied, makes this clear.

In Port City Properties, Plaintiff contended that 49 § U.S.C. 10906 conflicts with 49 § U.S.C. 10501(b), and created a “jurisdictional void” which allows state causes of action relating

to spur lines. The Tenth District disagreed, stating that “read together, § 10501 and § 10906 completely preempt [plaintiff’s] state law tort claims with respect to spur or industrial tracks.” The court in Port City Properties held that with excepted tracks, state law remedies are preempted, and it is left up to railroad management to determine whether to abandon the tracks and service. *Id* at 1188. Here there is no evidence that the Defendants ever intended to abandon their operations or use of the tracks, office and other railroad facilities on Lot 62188. On the contrary, they have continuously used them in the regular and ordinary course of business despite the purported transfer to Gearmar in 2007. Thus, even if Allied were correct in its assertion that Lot 62188 contains only excepted tracks under Section 10906, because MVRV has not abandoned its use of the tracks on Lot 62188 (regardless of their character, and regardless of whether the deed to Gearmar is voided), the question of continuing rights to use the tracks is clearly preempted under the ICCTA.

Allied next asserts that the Defendants’ Operations Bulletin supports its argument that the tracks of on Lot 62188 are spur, industrial or switching tracks. What Allied misconstrues is that the “excepted track” referenced in the Operations Bulletin does not refer to the character of the track under 49 U.S.C. § 10906, but rather to the safety class of the tracks under the regulations of the Federal Railroad Administration (“FRA”). *See* Collins Supplemental Affidavit, ¶5; 49 C.F.R. §213.4 (“Excepted track”) (a copy of which is attached hereto as Exhibit E) and §213.9 (“Classes of track; operating speed limits”). The FRA has jurisdiction over the safety of tracks, and as such has issued regulations governing “minimum safety requirements for railroad track that is part of the general railroad system of transportation” 49 C.F.R. 213.1(a).<sup>9</sup> Railroads place track in the “excepted track” category when the amount and types of traffic and the needs of the

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<sup>9</sup> “General railroad system of transportation” refers to “the network of standard gage track over which goods may be transported throughout the nation ...” 49 C.F.R. Part 209, Appendix A.

customers do not require the railroad to maintain the track in a higher class. Collins Supplemental Affidavit, ¶6.

The FRA also requires railroads to have a set of operating rules and practices in effect. 49 C.F.R. Part 217. Class III railroads (such as the Railroad Defendants) must keep a copy of its code of operating rules, timetables and special instructions must be kept at its system headquarters. 49 C.F.R. §217.8(c). The Operating Bulletin that Allied seeks to introduce was likely issued as an amendment to the operating rules of the various individual railroads that comprise the Ohio Railroad System Youngstown Division. Collins Supplemental Affidavit, ¶4. Among other purposes, by announcing that the tracks of the MVRVY (which would include the tracks on Lot 62188 at issue in this case) are “excepted track,” it notifies railroad operating personnel of the speed and operating restrictions required by the FRA for that class of track. Compare Operating Bulletin, p. 11, ¶5 and 49 C.F.R. §213.9. Collins Supplemental Affidavit, ¶5.

In fact, the fact that an Operating Bulletin was issued for the MVRVY is evidence that the tracks were not solely industrial tracks. FRA regulations specifically provide that the operating rule requirements apply only to “railroads that operate trains or other rolling equipment on standard gage track which is part of the general railroad system of transportation” (49 C.F.R. §217.3(a)) and specifically do not apply to “a railroad that operates only on track inside an installation which is not part of the general railroad system of transportation.” 49 C.F.R. §217.3(b)(1). By inference, since MVRVY and the other Railroad Defendants have codes of operating rules as required by the FRA, they are acknowledged to be operating on tracks that go beyond mere industrial tracks.

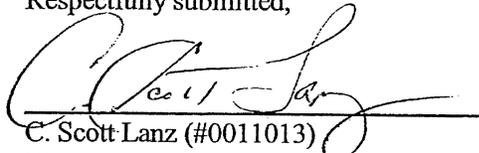
For all of the foregoing reasons, the Operating Bulletin is consistent with Defendants’

position that the tracks on Lot 62188 include lines of railroad that MVRV operates as part of the interstate rail network, and that they are not limited to spur, industrial and switching tracks.

**III. CONCLUSION**

For all of the foregoing reasons and the reasons set forth in the Motion to Dismiss or Refer, the claims in Plaintiffs' First Amended Complaint are completely preempted by the ICCTA and should therefore be dismissed pursuant to Rule 12(b)(1). In the alternative, if the Court determines that it has jurisdiction over some or all of Plaintiff's claims, Defendants request the Court to stay all proceedings and provide a Notice of Referral to the Surface Transportation Board to adjudicate the issues that are within the Board's primary jurisdiction.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was sent by regular U.S. mail, postage prepaid this 28 day of July, 2010 to:

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Christopher R. Opalinski, Esq.  
F. Timothy Grieco, Esq.  
Eckert Seamans Cherin & Mellott, LLC

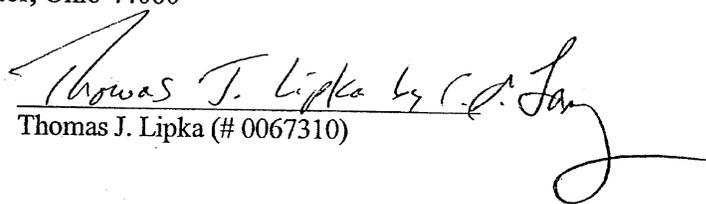
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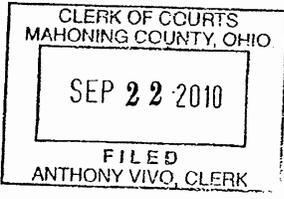
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**IN THE COURT OF COMMON PLEAS  
MAHONING COUNTY, OHIO**

ALLIED INDUSTRIAL	)	CASE NO. 09 CV 2835
DEVELOPMENT CORP.	)	
	)	
	)	
Plaintiff	)	JUDGE MAUREEN A. SWEENEY
	)	
vs.	)	
	)	JUDGMENT ENTRY
THE OHIO AND PENNSYLVANIA	)	
RAILROAD CO., INC., et al.	)	
	)	
Defendants	)	

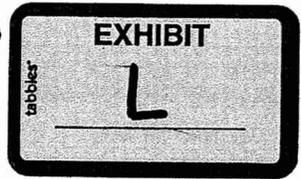
This matter came before the Court on Defendants, The Ohio Central Railroad, Inc., The Ohio & Pennsylvania Railroad Company, The Warren & Trumbull Railroad Company, Youngstown & Austintown Railroad Inc., The Youngstown Belt Railroad Company, The Mahoning Valley Railway Company, Genesee & Wyoming, Inc., and Summit View, Inc.'s Motion to Dismiss or in the Alternative, refer to the Surface Transportation Board. Plaintiff filed a brief in Opposition and the Defendants filed a reply to Plaintiff's Brief.

The Court has reviewed the respective party's Motion and Briefs and finds that the claims should not be dismissed. However, the Court further finds that the state issues should be stayed and all issues regarding railways and other related issues within the Surface Transportation Board's jurisdiction be resolved first.



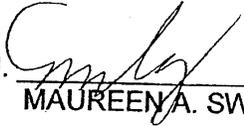
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Therefore, this Case is hereby stayed and the matter referred to the Surface Transportation Board for its adjudication of all issues within its jurisdiction.

9/24/18  
DATE

HON.   
MAUREEN A. SWEENEY

THE CLERK SHALL SERVE NOTICE  
OF THIS ORDER UPON ALL PARTIES  
WITHIN THREE (3) DAYS PER CIVIL R. 5.

000396

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TRANSPORTATION SERVICES AGREEMENT

THIS AGREEMENT ("Agreement"), dated as of this 3<sup>rd</sup> day of May 2001, by and between THE MAHONING VALLEY RAILWAY COMPANY (hereinafter called "Railroad"), an Ohio corporation with offices at 136 South Fifth Street, Coshocton, Ohio 43812 ("Railroad"), and LTV STEEL COMPANY, INC., a New Jersey corporation with offices at 200 Public Square, Cleveland, OH 44114 ("LTV"). (Railroad and LTV are referred to herein together as the "Parties," and individually as a "Party").

WITNESSETH:

WHEREAS, The Cuyahoga Valley Railway Company ("CVR"), which is an affiliate of LTV, has entered into that certain Stock Purchase Agreement among Railroad, CVR and Summit View, Inc. ("Summit") dated March 30, 2001 (the "Purchase Agreement"), whereby CVR has sold and transferred to Summit all of the issued and outstanding capital stock of Railroad (the "Transaction");

WHEREAS, following the Transaction, LTV has a continuing need for transportation services at its LTV Copperweld facilities at Youngstown, Ohio, and/or at new facilities that may be built on the real property occupied by LTV Copperweld in Youngstown, Ohio (together, the "Youngstown Facilities," a map of which is appended hereto as Exhibit A);

WHEREAS, Railroad desires and is able to provide the levels of service set forth herein, and LTV desires such service; and

WHEREAS, pursuant to Section 2.5 of the Purchase Agreement, and as part of the consideration for the Transaction, Railroad and LTV are entering into this Agreement.



NOW, THEREFORE, in consideration of the premises, the Purchase Agreement and the mutual undertakings set forth herein, and other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

## ARTICLE I

### SCOPE

Section 1.01. Scope. This Agreement sets forth the understandings of the Parties concerning rail service to be provided by Railroad to, from and in the Youngstown Facilities, following the closing of the Transaction.

Section 1.02. Prior Transportation Agreements. All oral and written agreements between LTV and Railroad for transportation services that also are the subject of this Agreement or for services ancillary to transportation services (including, without limitation, rail car repair, maintenance of rail facilities, rail car leasing and the like), that were in effect prior to the date hereof shall be and hereby are terminated and of no further effect as of 11:59 p.m. on the day immediately prior to the date hereof; *provided*, that with respect to any such agreements (i) prior to the date hereof, each Party shall pay all amounts due under such agreements on account of services rendered by one Party to the other, (ii) to the extent that a Party has received consideration prior to the date hereof on account of services that have not been rendered as of the date hereof, such Party shall render services as agreed or shall refund the consideration in full, and (iii) each Party shall be responsible for any contractually allocated liability arising prior to the date hereof. Nothing in this Section 1.02 shall be construed as terminating or otherwise affecting agreements between LTV and Railroad regarding matters other than transportation services and services ancillary thereto.

## ARTICLE II

### TERM

Section 2.01. This Agreement shall be effective as of the date first above written and shall remain in effect for an initial term consisting of the period from such date through December 31, 2040 (the "Initial Term"), and thereafter unless and until terminated by either of the Parties upon ninety (90) days' written notice (the "Extended Term"); *provided*, that if LTV sells all or any portion of the Youngstown Facilities ("Transferred Facilities") to one or more third parties ("Acquirer(s)"), and if LTV makes a full or partial assignment of this Agreement to the Acquirer(s) pursuant to Section 12.01 hereof, the Initial Term of this Agreement, to the extent of such assignment, shall end upon the earlier of (i) the fifth (5<sup>th</sup>) anniversary of the closing date of the sale of the Transferred Facilities, or (ii) December 31, 2040.

Section 2.02. The termination of this Agreement shall not cause the termination of any transportation agreements or other agreements between LTV and Railroad entered into pursuant to the terms of this Agreement or otherwise (except to the extent that an agreement expressly provides for termination upon termination of this Agreement).

## ARTICLE III

### SERVICES

Section 3.01. Rail Service.

(a) During the term of this Agreement, Railroad shall provide rail services to, from and in the Youngstown Facilities (together, the "Service") as set forth in Sections 3.02 through 3.05 hereof.

(b) For purposes of this Article III, the term "interchange" shall be broadly construed to include any dealings between railroads that result in the delivery of rail cars by one railroad to the other, for handling by the other, irrespective of whether such cars remain in the account of the delivering railroad or a third party.

Section 3.02. Switching Service.

(a) Railroad shall (i) pick up loaded and empty rail cars at the locations in or adjacent to the Youngstown Facilities identified on Schedule 3.02(a), or at any such other locations in or adjacent to the Youngstown Facilities as LTV shall designate from time to time (together, the "Set-Out/Delivery Tracks"), for movement to and interchange with connecting carriers (including, without limitation, the successors and assigns of the connecting carriers as of the date of this Agreement) at its interchange locations with connecting carriers, including, without limitation, at Hazelton Yard with Norfolk Southern Railway Company ("NS"), on such tracks in Hazelton Yard as identified by NS from time to time, at the CSXT Tail Track with CSXT Transportation, Inc. ("CSXT"), and at the west portion of the old LE&E with Ohio & Pennsylvania Railroad ("O&P") (the "Existing Interchanges"), and (ii) pick up loaded and empty rail cars at the Existing Interchanges for movement and delivery to the Set-Out/Delivery Tracks (together, the "Switching Service"). NS, CSXT and O&P shall be referred to herein together as the "Connecting Carriers," and such term shall include the successors and assigns of such entities and any railroad that following the date of this Agreement obtains physical access to the rail lines of Railroad (including, without limitation, access obtained by constructing rail lines or by entering into operating or marketing arrangements with other carriers) and with which Railroad has the ability to interchange traffic. If Railroad acquires or obtains operating rights over rail line(s) that are contiguous to the rail lines owned and/or operated by Railroad as of the date of this Agreement, and if such

acquisition or operating rights requires a change of interchange locations with one or more Connecting Carriers, then (x) subject to clause (y) below, the interchange locations shall be changed in a manner that minimizes any adverse effect on LTV, and (y) Railroad shall not change the interchange location unless Railroad secures the necessary rights to ensure that LTV (or its designee) can utilize the trackage rights set forth in the Interim Trackage Rights Agreement appended hereto as Exhibit D to access such new interchange locations.

(b) The Switching Service will be provided with the frequency set forth on the Service Schedule, as defined in Section 4.03(a) hereof.

(c) During the term of this Agreement, (x) Railroad shall maintain and keep open the Existing Interchanges, and (y) Railroad shall not initiate or facilitate any change in the location of its interchanges with Connecting Carriers from the Existing Interchanges if such change would have a material adverse effect on service to the Youngstown Facilities or on Railroad's ability to provide service in accordance with the Service Schedule; *provided*, that nothing in this Section 3.02(c) shall be construed as prohibiting Railroad from imposing a lawful embargo (subject to LTV's rights in Section 4.02 and 9.02 hereof, and as otherwise provided in this Agreement). If a Connecting Carrier refuses to interchange at an Existing Interchange, Railroad will support any regulatory or judicial action initiated by LTV to prevent the change of interchange location and/or to secure some other remedy in connection therewith.

(d) For the Switching Service, LTV shall pay to Railroad the fees and charges set forth in Section 5.01(a) hereof.

Section 3.03. Local Service.

(a) Railroad shall (i) pick up loaded and empty rail cars at the Set-Out/Delivery Tracks for movement from the Youngstown Facilities to all stations, sidings, team tracks and industries

that may be served directly by Railroad, and (ii) pick up loaded and empty rail cars at such stations, sidings, team tracks and industries for movement from such locations to the Set-Out/Delivery Tracks (the "Local Service"). If Railroad acquires, or obtains operating rights over, rail line(s) that are contiguous to the rail lines owned and/or operated by Railroad as of the date of this Agreement, then the Local Service shall include service to and from any additional stations, sidings, team tracks and industries served by Railroad; *provided, however*, that if Railroad's cost of providing such service to such additional stations, sidings, team tracks and industries increases relative to the cost of providing the Local Service to the stations, sidings, team tracks and industries that can be served by Railroad as of the date of this Agreement, then Railroad and LTV shall negotiate in good faith for an increase in the applicable fees and charges for service to and from such additional stations, sidings, team tracks and industries, prior to the commencement of the new service.

(b) The Local Service will be provided by Railroad with the frequency set forth on the Service Schedule.

(c) For the Local Service, LTV shall pay to Railroad the fees and charges set forth in Section 5.01(b) hereof.

Section 3.04. Intra-Plant Service.

(a) Upon request from LTV from time to time, Railroad shall perform the following services on behalf of LTV within the Youngstown Facilities (together, the "Intra-Plant Service"):

(i) re-railing of derailed rail cars or locomotives; (ii) track repair service for track and related facilities within the Youngstown Facilities; and (iii) switching of rail cars into, out of and within the Youngstown Facilities (other than Switching Service).

(b) The Intra-Plant Service will be provided by Railroad with the frequency set forth on the Service Schedule.

(c) The Intra-Plant Service shall be contract service and not common carriage, and neither Party shall take the contrary position in any regulatory or judicial proceeding or arbitration.

(d) For the Intra-Plant Service, LTV shall pay to Railroad the fees and charges set forth in Section 5.01(c) hereof.

Section 3.05. Ancillary Services.

(a) During the term of this Agreement, Railroad shall provide the following maintenance and other services (together, the "Ancillary Services"):

(i) Repair of the rail cars leased by LTV from Railroad pursuant to Article VII hereof; and

(ii) Cleaning of rail cars.

(b) For the Ancillary Services, LTV shall pay to Railroad the fees and charges set forth in Section 5.01(d) hereof.

(c) The Ancillary Services will be provided by Railroad with the frequency set forth on the Service Schedule.

ARTICLE IV

SERVICE COMMITMENTS

Section 4.01. General. In addition to, and not in limitation of, the service commitments of Railroad more specifically set forth below, Railroad covenants and agrees that, during the term hereof, it shall at all times keep and maintain its track and related infrastructure, locomotives and equipment and employment levels such that it can meet the service obligations set forth herein.

Section 4.02. Maintenance. Railroad shall maintain: (i) the main line tracks identified in Schedule 4.02 and any other rail lines of Railroad necessary to effect interchange with the Connecting Carriers (collectively, "Main Line") to FRA class 1 standards or better; and (ii) the yard

tracks identified in Schedule 4.02 ("Yards") to the condition set forth in Schedule 4.02 hereof (together, the "Maintenance Standards"). In the event that a casualty loss or *force majeure* event shall cause the Main Line and/or Yards not to be in compliance with the Maintenance Standards, Railroad shall promptly take reasonable, appropriate steps to bring the facilities into compliance. If Railroad is out of compliance with the Maintenance Standards for five (5) consecutive days following written notice from LTV, LTV shall have the right (but not the obligation), in addition to all other remedies available to LTV under this Agreement or otherwise, to perform the repairs itself or cause a third party to perform such repairs, in each case at LTV's expense, and Railroad shall cooperate in good faith to facilitate the performance of the repairs. If LTV performs repairs pursuant to this Section 4.02, Railroad shall have the right, at its option, either to (i) reimburse LTV for the full cost of such repairs within thirty (30) days after receipt of an invoice for same, or (ii) not reimburse LTV for the full cost of the repairs, in which case LTV shall have the right to exercise the remedy in Section 9.02 for up to two (2) years.

Section 4.03. Transportation Service Requirements and Commitments.

(a) During the Initial Term and any Extended Term, Railroad shall provide Switching Service, Local Service, Intra-Plant Service and Ancillary Services to the Youngstown Facilities as set forth on the service schedule appended hereto as Schedule 4.03(a) (the "Service Schedule"). Railroad acknowledges and agrees that time is of the essence with respect to providing service as set forth on the Service Schedule. Railroad's performance under the Service Schedule shall be measured separately on a monthly basis for Switching Service, Local Service, Intra-Plant Service and Ancillary Services. If Railroad's on-time performance for any of the Switching Service, Local Service, Intra-Plant Service or Ancillary Services is less than ninety-five percent (95%) in two (2) consecutive full months, or if Railroad's on-time performance for any such category is less than

ninety percent (90%) in any single full month, and in neither case is the cause (i) an event of *force majeure*; (ii) acts of LTV; (iii) wrongful acts or other rail carriers beyond the control of Railroad; or (iv) the material failure of LTV to provide timely forecasts under Section 4.03(b), or a material understatement by LTV in a forecast of the actual volume of traffic tendered, then such performance shall constitute a service failure ("Service Failure"). In the event of a Service Failure, LTV shall have the right (but not the obligation) to exercise the remedy set forth in Section 9.02 hereof. Beginning on the first (1<sup>st</sup>) anniversary of this Agreement, and on each anniversary thereafter, representatives of the Parties shall meet to review and discuss the Service Schedule. The frequency of service shall be increased to the extent warranted by traffic levels to and from the Youngstown Facilities. Service levels on the Service Schedule shall be reduced only if annual revenue carloads handled by the Railroad to and from the Youngstown Facilities fall below one thousand (1,000) carloads during any traffic year (each 12-month period commencing the first day of the month in which the date of the Agreement falls, which shall be referred to herein as a "Traffic Year"). The Service Schedule shall be reviewed and adjusted to the extent appropriate following any Traffic year in which the revenue carloads handled by Railroad to and from the Youngstown Facilities exceeds three thousand (3,000).

(b) Each week during the term of this Agreement, LTV shall provide to Railroad by facsimile or email transmission, on a good faith efforts basis, a written forecast of the anticipated transportation service requirements of the Youngstown Facilities for the ensuing week. Such forecasts will include (i) proposed loading and unloading schedules and other relevant schedules and related information for Switching Service, Local Service, Intra-Plant Service and Ancillary Services (and any additional services that LTV may desire from time to time), and (ii) biweekly and weekly empty car requirements by car type. Such forecasts shall, where necessary or

appropriate, be updated daily by written or oral adjustments communicated by LTV to Railroad. Such adjustments shall be communicated, if in writing by facsimile, email or by hand, and if orally by telephone or in person, to the local office or individual from time to time designated by Railroad. Railroad shall provide to LTV on a daily basis trunkline railroad car movement information related to the forecasted categories of Service.

Section 4.04. Data Access and Information Services. Railroad shall provide LTV with loaded and empty car movement data, in the format and frequency provided to LTV as of the date of this Agreement.

Section 4.05. Car Supply. Upon request by LTV and subject to availability, Railroad shall provide to LTV, empty rail cars of the appropriate type for loading by LTV. Notwithstanding the foregoing, if Railroad is unable or unwilling to provide appropriate cars in a timely manner, and Railroad fails to cure such situation within the time frame set forth in Section 8.01(a) hereof, then LTV shall have the right (but not the obligation) to purchase, lease or otherwise procure rail cars for use in handling traffic to, from and in the Youngstown Facilities.

## ARTICLE V

### FEES AND CHARGES

Section 5.01. Fees. During the term of this Agreement, LTV shall pay Railroad the following fees and charges (the "Fees") for the respective Services:

(a) (i) For the Switching Service, Railroad's compensation shall be in the amount of the Switch Charge set forth in Freight Tariff MVRVY 8015-I (the "Tariff," a copy of which is appended hereto as Exhibit B), as adjusted annually pursuant to Section 5.02 hereof. Railroad shall secure such compensation through absorption of the Switch Charge by the carrier(s) that participate

in a line haul move to and from the Youngstown Facilities. Only in the event that such carriers decline to absorb the Switch Charge, or cancel such absorption and Railroad is not successful in restoring such absorption through available legal means, Railroad may assess the Switch Charge directly upon LTV for services rendered hereunder, and LTV shall pay the same when and as due; *provided*, that Railroad shall use good faith efforts to cause the carrier(s) participating in the line haul move to continue to absorb the Switch Charge, and shall cooperate with LTV in its efforts to cause Connecting Carrier(s) participating in the line haul move to do so (including without limitation regulatory or judicial actions). During the term of this Agreement, Railroad shall keep the Tariff in full force and effect. If at any time statutory or regulatory changes render it impracticable for Railroad to establish the Switch Charge in the form of the Tariff, or if carriers participating in a line haul move to or from the Youngstown Facilities refuse to absorb the Switch Charge, then Railroad and LTV shall take all appropriate steps (including, without limitation, entering into a contract) to ensure that its compensation for the Switching Service does not exceed the amount set forth in the Tariff (as adjusted annually pursuant to Section 5.02 hereof). Subject to Section 5.03, in connection with the Switching Service, Railroad shall not impose upon LTV, a Connecting Carrier or any third party any fees or charges over and above the Switch Charge, whether in the form of surcharges, interchange fees or other types of fees or charges.

(ii) So long as revenue carloads handled by the Railroad to and from the Youngstown Facilities exceeds one thousand (1,000) during the immediately preceding Traffic Year, if Railroad sells, leases or otherwise transfers any portion of its rail line to a third party, or if any portion of its rail line is abandoned or otherwise is taken out of service, and the result of such sale, lease, transfer or out-of-service line is that Railroad cannot directly access the Set-Out/Delivery Tracks or directly interchange with the Connecting Carriers, Railroad shall make the

necessary arrangements, and pay any intermediate switching charge, division or transload charge that must be incurred in order to effect interchange with the Connecting Carriers or to obtain access to the appropriate Set-Out/Delivery Tracks.

(b) For the Local Service, Railroad's compensation shall be on the basis of a switching charge assessed by Railroad either to the consignor or the consignee (the "Local Service Charge"). The amount of the Local Service Charge shall be as set forth in the Tariff, as adjusted annually pursuant to Section 5.02 hereof, and subject to Section 5.03.

(c) For the Intra-Plant Service, the Fees for services shall be as set forth on Schedule 5.01(c) hereto, as adjusted pursuant to Section 5.02 hereof, and subject to Section 5.03.

(d) For the Ancillary Services, the Fees for services shall be as set forth on Schedule 5.01(d) hereto, as adjusted pursuant to Section 5.02 hereof, and subject to Section 5.03.

(e) To the extent that the Tariff conflicts with this Agreement, the terms and provisions of this Agreement shall control.

Section 5.02 Annual Adjustment. (a) The Fees shall be revised upward or downward each year, as of the anniversary of the date of this Agreement, by the percentage change in the Rail Cost Adjustment Factor, unadjusted for productivity ("RCAF-U"), published by the Surface Transportation Board (the "Board"), or if the RCAF-U ceases to be published by the Board or successor agency, by some other similar rail cost index. If the RCAF-U ceases to be published, and if LTV and Railroad are unable to agree on a substitute index, the selection of the substitute index shall be resolved by arbitration pursuant to Section 9.05 hereof.

(b) The Fees shall be adjusted annually by calculating the percentage increase or decrease in the RCAF-U for the most recently completed calendar year (*i.e.*, the RCAF-U for calendar year 2001 for the adjustment made as of the first anniversary of this Agreement) as

compared to the RCAF-U for the immediately preceding year (*i.e.*, the RCAF-U for calendar year 2000 for the adjustment made as of the first anniversary of this Agreement), and applying it to the then-prevailing Fees. By way of example, if "A" is the final RCAF-U for 2000; "B" is the final RCAF-U for 2001; "C" is the then-prevailing Fee; and "D" is the percentage increase or decrease; the adjusted Fee, effective as of the first anniversary of this Agreement, would be computed as follows:

1.  $(B-A)/A = D$
2.  $C + C \times D = \text{adjusted Fee}$

Section 5.03 Renegotiation. The Parties intend that the annual adjustment mechanism set forth in Section 5.02 will generally reflect the changes in railroad operating costs over time, and that the annual adjustment mechanism will result in the Fees generally reflecting over the Initial Term and any Extended Term of this Agreement the balance of economic value to the Parties that exists as of the effective date of this Agreement. The Parties acknowledge and agree that over the Initial Term or any Extended Term of this Agreement, the annual adjustment mechanism set forth in Section 5.02 may unduly favor one Party or the other because the RCAF-U reflects class I railroad cost data rather than class III railroad cost data (an "Adjustment Distortion"). In the ninety (90) day period commencing on the seventh (7<sup>th</sup>) anniversary of the date of this Agreement, and in the ninety (90) day period commencing on each seventh (7<sup>th</sup>) anniversary thereafter, either Party may provide written notice to the other Party (an "Adjustment Request") that it believes there exists an Adjustment Distortion, and that the Fees should be adjusted as a result. The Adjustment Request shall include proposed revised Fees, and a justification for such Fees. Railroad shall also have the right to include in an Adjustment Request a proposed adjustment based upon unanticipated capital expenditures made by Railroad to rebuild, replace or repair the rail line on the Railroad

("Unanticipated Capital Expense") as a direct result of a *force majeure* event (and not as a result of capital expenditures incurred in the ordinary course of business, regardless of the magnitude of those expenses). Any adjustment on the account of Unanticipated Capital Expenses shall be reasonable and shall take into account insurance proceeds, if any, available to Railroad, and shall not (i) shift the risk of ownership of the Railroad to LTV, or (ii) deprive LTV of the benefit of the long-term arrangement on Fees set forth in this Agreement.

Should the Parties, within ninety (90) days after the date of the Adjustment Request, fail to reach agreement on (i) whether an Adjustment Distortion and/or Unanticipated Capital Expenses exists, or (ii) the appropriate adjustment to the Fees if an Adjustment Distortion and/or Unanticipated Capital Expenses exists, then at the written election of either Party made within fifteen (15) days after the expiration of such 90-day period, the matter shall be determined by arbitration pursuant to Section 9.05 hereof. The adjusted Fee(s), if any, whether set by agreement or by arbitration, shall be effective retroactively as of the date of the Adjustment Request, and the Parties thereafter may invoice one another for any resulting balances or refunds due.

## ARTICLE VI

### CAR HIRE REIMBURSEMENT

Section 6.01. No Demurrage. During the term of this Agreement, Railroad shall not impose upon LTV, by tariff or otherwise, demurrage or any other charge or fee on account of detention of loaded or empty rail cars delivered to or constructively placed at the Set-Out /Delivery Tracks, except as set forth in Section 6.02 hereof.

Section 6.02 Net-Car Hire Reimbursement. As to empty rail cars (ordered by LTV) and loaded rail cars, delivered to, or constructively placed at, the Set-Out/Delivery Tracks as a result of a car order by LTV, the charges assessed by Railroad shall be as follows:

(a) For the first one hundred twenty (120) hours after delivery or constructive placement of a loaded car to the Set-Out/Delivery Tracks, and for the first one hundred twenty (120) hours after delivery or constructive placement on the Set-Out Delivery Tracks of an empty car ordered by LTV, there shall be no charge assessed to LTV; *provided*, that, if Railroad delivers or constructively places a rail car to the Set-Out/Delivery Tracks from 4:01 p.m. Friday through 5:59 a.m. Monday and the Youngstown Facilities are not open and operating for production and loading during such period, the 120-hour period during which no charge applies shall commence at 6:00 a.m. on Monday. The period described in this Section 6.02 during which no charge will be assessed to LTV is referred to herein as the "Free Time Period."

(b) In the event that LTV does not release an ordered car prior to the expiration of the Free Time Period, then for the period from the end of the Free Time Period through the release of the car by LTV (the "Detention Period"), LTV shall be reimburse Railroad for the actual car hire charges paid by Railroad to a third party for such car for the Detention Period, net of all free time provided to Railroad by the car owner (or party whose reporting marks are on the car) in the form of reclaim, rebate, reimbursement or other form of payment in cash or in kind. LTV shall pay car hire reimbursement due under this Section 6.02 within fifteen (15) calendar days after receipt of invoices (and appropriate supporting documentation) from Railroad. For any cars bearing the marks of Railroad or any carrier that controls, is controlled by, or is under common control with Railroad ("Affiliates"), LTV shall pay car hire reimbursement at a rate equal to the lowest rate (net

of free time in the form of reclaim, rebate, reimbursement or other form of payment in cash or in kind) that Railroad or any of its Affiliates charges for the type and age of the car in question.

(c) Railroad shall negotiate car hire rates for cars supplied by it to LTV in good faith, in the ordinary course of business and consistent with small railroad industry practices. LTV shall have the right, at its own cost and with reasonable prior notice, to audit Railroad's car hire records.

## ARTICLE VII

### CAR LEASE

Section 7.01. Car Lease. Railroad shall lease to LTV the fifty-five (55) rail cars identified on Schedule 7.01 pursuant to the terms and conditions of the Equipment Lease Agreement appended hereto as Exhibit C.

## ARTICLE VIII

### DEFAULT

Section 8.01. Each of the following shall constitute an event of default by Railroad:

(a) Breach of Agreement. Except to the extent expressly provided otherwise hereto, failure by Railroad to observe or to timely perform any obligation under this Agreement, which failure is not cured by Railroad within fifteen (15) days after receipt of written notice from LTV describing in reasonable detail the failure by Railroad to observe or perform its obligation; *provided*, that nothing in this Section 8.01(a) shall be construed as providing Railroad with a 15-day cure period prior to LTV's exercise of its rights under Section 9.02 hereof.

(b) Breach of Railroad Transportation Contracts. Failure by Railroad to observe or timely perform any obligation under any transportation agreement between Railroad and LTV which failure is not cured by Railroad within fifteen (15) days (or such longer period provided in

the transportation agreement in issue) after receipt of written notice from LTV describing in reasonable detail the failure by Railroad to observe or perform its obligation.

(c) Unauthorized Assignment. Any assignment of this Agreement or of the interest of Railroad hereunder without compliance with any and all requirements therefor set forth in this Agreement.

Section 8.02. Breach of Agreement. Failure by LTV to observe or timely perform any obligation under this Agreement, which failure is not cured by LTV within fifteen (15) days after receipt of written notice from Railroad describing in reasonable detail the failure by LTV to observe or perform its obligation, shall constitute an event of default by LTV.

## ARTICLE IX

### REMEDIES IN THE EVENT OF DEFAULT

Section 9.01. Indemnity. The defaulting Party ("defaulter") shall indemnify and hold harmless the other Party against all claims, damages, judgments, demands, losses, liabilities or expenses (including without limitation reasonable attorneys' fees) ("Losses") arising out of or in connection with any breach or event of default by the defaulter. In furtherance of the foregoing indemnity and not in limitation thereof, each Party agrees that:

(a) The non-defaulting party shall be entitled to all incidental damages resulting from a breach or default by the defaulter, including, but not limited to, any commercially reasonable charges, expenses or commissions incurred in effecting cover, and any other reasonable expenses incident to such breach or default; *provided*, that in no event shall the defaulter be liable for consequential damages, including, without limitation, economic loss or loss of profits.

(b) In addition to and not in limitation of the remedies set forth herein or otherwise available to the Parties hereunder in the event of a default, a non-defaulting Party shall be entitled to terminate this Agreement, upon written notice to the defaulter, if the defaulter fails to cure an event of default within thirty (30) days after written demand from the non-defaulting Party that it do so.

Section 9.02. Cover. (a) In addition to and not in limitation of the remedies set forth herein or otherwise available to LTV, in the event that Railroad fails to provide service to the Youngstown Facilities for three (3) consecutive days, other than for reasons of *force majeure* or a cause attributable to LTV, or in the event of a Service Failure, LTV (or LTV's designee) shall have the right upon written notice from LTV, to exercise interim trackage rights to serve the Youngstown Facilities (including without limitation the right to conduct the Switching Service, Local Service, Intra-Plant Service and Ancillary Services, to the extent provided in the Interim Trackage Rights Agreement) until such time as Railroad is ready, willing and able to restore service to the levels of service required under this Agreement; *provided*, that if LTV or its designee exercises the interim trackage rights pursuant to this Section 9.02(a), it shall have the right (but not the obligation) to serve the Youngstown Facilities for a minimum of thirty (30) days. LTV or its designee shall exercise such rights in accordance with the terms and conditions set forth in the Interim Trackage Rights Agreement.

(b) In addition to and not in limitation of the remedies set forth herein or otherwise available to LTV, in the event that Railroad fails to provide service to the Youngstown Facilities for five (5) consecutive days as a result of *force majeure* event, LTV (or LTV's designee) shall have the right, upon written notice from LTV, to exercise the interim trackage rights, pursuant to the Interim Trackage Rights Agreement, until such time as Railroad is ready, willing and able to

restore service to the levels of service required under this Agreement; *provided*, that if LTV or its designee exercises the interim trackage rights pursuant to this Section 9.02(b), it shall have the right (but not the obligation) to serve the Youngstown Facilities for a minimum of fifteen (15) days.

(c) Railroad shall cooperate with LTV (or its designee) in obtaining such Board authorization or exemption as is necessary, if any, for LTV (or its designee) to exercise the rights set forth in the Interim Trackage Rights Agreement.

(d) Notwithstanding anything in this Agreement to the contrary, if LTV has the right to exercise the remedies in this Section 9.02 more than three (3) times in any eighteen (18) month period during the Initial Term or Extended Term, then, in addition to all remedies available to LTV hereunder, LTV (or its designee) shall have the right (but not the obligation) to exercise the rights under the Interim Trackage Rights Agreement for a minimum of one (1) year.

Section 9.03 Specific Performance. In addition to and not in limitation of the remedies set forth herein or otherwise available to LTV, Railroad agrees that LTV shall be entitled to the equitable remedy of specific performance with regard to Railroad's obligation to permit the exercise by LTV of its rights hereunder to provide service under the Interim Trackage Rights Agreement.

Section 9.04. Remedies Cumulative. LTV's remedies hereunder shall be cumulative and in addition to any other or further remedies provided by law or equity or by this Agreement (including the agreements appended hereto as exhibits or schedules) in respect of any breach or event of default.

Section 9.05. Arbitration. All disputes arising between LTV and Railroad with respect to this Agreement shall be submitted for binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association ("AAA"). The arbitration shall take place in Cleveland,

Ohio. The Parties shall attempt to agree upon an arbitrator knowledgeable and experienced in transportation agreements between shippers and railroads ("Transportation Agreements"). If the Parties are unable to agree on an arbitrator within thirty (30) days after the Party initiating the arbitration provides written notice of the commencement of the arbitration to the other Party and to the AAA, then either Party may request that the AAA select an arbitrator knowledgeable and experienced in Transportation Agreements and the AAA's selection shall be binding and nonreviewable. The arbitration shall be "baseball style," with each Party presenting its proposed resolution of the dispute, and with the arbitrator selecting the proposed resolution (without material modification) that it determines is the most consistent with the terms and conditions of this Agreement. The arbitrator's award shall be rendered within one hundred eighty (180) days after the aforescribed written notice of the commencement of arbitration. Each Party shall pay the compensation, costs, fees and expenses of its own witnesses, experts and counsel. The compensation, costs, fees and expenses of the arbitrator will be borne as determined by the arbitrator. The arbitrator shall not have the power to award consequential or punitive damages, to reform this Agreement, or to determine violations of criminal or antitrust laws. Pending the award of the arbitrator, there shall be no interruption in the transaction of business under this Agreement (or termination of this Agreement pursuant to Section 9.01(b) hereof), and all payments in respect thereto shall be made in the same manner as prior to the dispute until the matter in dispute shall be finally determined by the arbitrator, and thereupon such payment or restitution shall be made in accordance with the decision or award of the arbitrator.

Section 9.06. Abandonment Rights. (a) Prior to making any regulatory filing seeking authority (including an exemption) to abandon or discontinue service on all or any portion of the rail lines owned and/or operated by Railroad (a "Filing") that are necessary to effect interchange

with any Connecting Carriers, Railroad shall notify LTV in writing of its intention to do so ("Abandonment Notice"), and provide LTV (or its designee) with an opportunity to negotiate in good faith for the purchase of the rail line(s) in question. So long as the process set forth in this Section 9.06 is ongoing, Railroad shall refrain from making a Filing. If within fifteen (15) days following receipt of an Abandonment Notice, LTV notifies Railroad of LTV's desire to acquire (or to have its designee acquire) the rail line(s) in question, then Railroad shall refrain from making any regulatory filing related to the line(s) in question pending a thirty (30)-day period (the "Negotiation Period") during which the parties shall attempt to negotiate for purchase of the line(s).

(b) If Railroad and LTV do not agree upon the terms for purchase of the line(s) in question within the Negotiation Period, then LTV shall have the right, by providing written notice to Railroad within ten (10) days after the end of the Negotiation Period, to commence an arbitration pursuant to Section 9.05 hereof (as modified by this Section 9.06(b)), to establish the net liquidation value ("NLV") of the line(s) in question. The arbitrator shall be instructed to adopt an arbitration schedule no longer than ninety (90) days, including the issuance of the arbitration decision establishing the NLV. The sale of the line(s) in question shall incorporate the following terms: (i) the conveyance of the subject line(s) shall be by quitclaim deed, free and clear of all liens and encumbrances (other than Permitted Liens, as that term is defined in the Purchase Agreement); (ii) Railroad shall provide representations and warranties concerning the subject line(s) and related contractual rights substantially similar to the representations and warranties provided by CVR to Summit in the Purchase Agreement (with appropriate adjustments to account for the fact that the line(s) in question will be conveyed as an asset sale and not as part of a stock sale); and (iii) the Parties will provide indemnification to each other substantially as provided in the indemnification provisions in the Purchase Agreement (with Railroad providing the seller indemnification and LTV

providing the buyer indemnification). The sale of the subject line(s) shall be consummated within forty-five (45) days after the decision of the arbitration establishing NLV.

## ARTICLE X

### WAIVER OF BREACH

Section 10.01. The failure of either Party, in any one or more instances, to insist upon performance of any of the terms, covenants or conditions of this Agreement, shall not operate or be construed as a waiver or relinquishment of same or any future right to performance of such term covenant or condition and the other Parties' obligations with respect to future performance of the same and all other terms, covenants and conditions shall continue in full force and effect.

## ARTICLE XI

### NOTICES

Section 11.01. All notices, demands and other communications ("Notice") to be given or delivered by reason of the provisions of this Agreement shall be in writing and shall be deemed to have been received on the date such Notice is personally delivered, on the first business day following the date on which such Notice is sent by a national overnight delivery service, on the third business day following the date such Notice is mailed by registered or certified mail, return receipt requested, or on any date using any other method of delivery as the Parties agree. A Notice to Railroad or LTV shall, unless another address is specified in writing, be sent to the address indicated below:

If to LTV:

The LTV Corporation  
200 Public Square  
Cleveland, OH 44114  
Attention: General Counsel

With a copy to:

Weiner Brodsky Sidman Kider PC  
1300 19<sup>th</sup> Street, NW 5<sup>th</sup> Floor  
Washington, D.C. 20036-1609  
Attention: Mark H. Sidman

If to Railroad:

The Mahoning Valley Railway Company  
136 South Fifth Street  
Coshocton, OH 43812  
Attention: W.A. Strawn

With a copy to:

Slover & Loftus  
1224 Seventh Street, NW  
Washington, D.C. 20036  
Attention: Kelvin J. Dowd

## ARTICLE XII

### ASSIGNMENT

Section 12.01. (a) This Agreement shall be binding upon and inure to the benefit of the successors and permitted assigns of the Parties hereto. Subject to Section 12.01(b) hereof, this Agreement may not be assigned by either Party except upon the prior written consent of the other Party. Without limiting the foregoing, in any sale, lease or other disposition by Railroad of all or any portion of its rail lines to a third party, Railroad shall require as a condition of sale that the buyer, lessee or transferee assume the obligations of Railroad hereunder.

(b) In the event that LTV transfers, leases or assigns to a third party all or a portion of the Youngstown Facilities, LTV shall have the right to assign this Agreement in whole (in the event of a transfer, lease or assignment of all of the Youngstown Facilities) or in part (in the event of a transfer, lease or assignment of part of the Youngstown Facilities) to the transferee, lessee or

assignee, as applicable. If there is a partial assignment of this Agreement, and such assignment causes Railroad to incur additional expense, the parties shall negotiate an equitable adjustment to the Fees.

### ARTICLE XIII

#### INDEMNITY AND INSURANCE

Section 13.01. Indemnity. Railroad shall keep LTV, its successors and assigns, free and harmless from and indemnify them against any and all claims for or in respect of injury (including death) or damage of any kind or nature to the person or property of each of them or of any employee thereof or of any other person caused by or arising out of acts or omissions by Railroad in the course of the performance of services hereunder, including, without limitation, any and all claims under Federal Employers' Liability Act or similar statutes, for or in respect of injury to or death of any employee of Railroad or of any representative of Railroad suffered or incurred while in or on the premises of LTV, its successors or assigns, in the course of the performance of services hereunder. The term "LTV" as used in this paragraph, shall be deemed to include LTV Steel, Inc. and companies and corporations that are from time to time subsidiary to, or affiliated with, LTV Steel, Inc.

Section 13.02. Insurance. Railroad shall procure and maintain in force at its expense during the term hereof the following policies of insurance:

- (a) Federal Employers' Liability Act insurance in the amount of not less than Five Hundred Thousand Dollars (\$500,000) for each accident.
- (b) Commercial General Liability insurance with limits of not less than Ten Million Dollars (\$10,000,000) per occurrence and Twenty-Five Million Dollars in annual aggregate, and a

self-insured retention of not more than One Hundred Thousand Dollars (\$100,000). The policy shall include the following coverages: bodily injury or death; property damage; independent contractors coverage; personal injury; contractual liability; products and completed operations; broad form property damage; and sudden and accidental. The policy shall have an additional insured endorsement naming LTV as an additional insured.

(c) Property insurance covering property owned by LTV and in Railroad's care, custody and control, with limits of not less than Ten Million (\$10,000,000), and a deductible not to exceed One Hundred Thousand Dollars (\$100,000).

(d) Automobile Liability insurance in a combined single limit of not less than One Million Dollars (\$1,000,000) covering owned, non-owned, leased or hired vehicles for each occurrence for bodily injury or death of persons and/or loss of or damage to property.

The terms and coverage of the foregoing insurance shall be evidenced by certificates to be furnished to LTV. Such certificates shall provide that (i) the insurance listed above is in full force and effect, (ii) the insurer insures against the liability assumed by Railroad under the provisions of Article XIII hereof, (iii) LTV is an additional insured, and (iv) not less than thirty (30) days' prior written notice shall be given to LTV prior to cancellation or material change of any policy. Prior to Railroad's entering upon the Youngstown Facilities, Railroad shall cause such certificates to be delivered to LTV at the address set forth in Section 11.01 hereof or at such address as LTV may from time to time specify.

ARTICLE XIV

MISCELLANEOUS

Section 14.01. Entire Agreement. This Agreement constitutes the full and complete agreement of the Parties with respect to the subject matter hereof, and supercedes all prior understandings or agreements, oral or written, with respect to the subject matter hereof that have not been set forth in this Agreement.

Section 14.02. Amendments. This Agreement shall not be amended or modified except by an instrument in writing executed by both Parties.

Section 14.03. Severability. If any of the provisions of this Agreement are deemed or adjudicated to be invalid, void or unenforceable under any applicable statute or rule of law, they are, to that extent deemed omitted from this Agreement, without invalidating or rendering unenforceable or ineffective the remainder of such provisions or the remaining provisions of this Agreement, which shall remain in full force and effect.

Section 14.04. Governing Law. This Agreement shall be governed by and construed under the laws of the State of Ohio, without regard to doctrines of conflict of laws.

Section 14.05. Headings. The Article and Section headings in this Agreement are for convenience only and shall not be deemed to alter or affect the meaning or interpretation of the provisions thereof.

Section 14.06. Product of Negotiation. This Agreement is the product of negotiation and no one Party shall be deemed to be the drafter of this Agreement or any part hereof.

Section 14.07. Authority. Each Party represents to the other that it has full power and authority to enter into this Agreement and that the person signing below on behalf of it has been duly authorized to execute this Agreement.

Section 14.08. Condition. This Agreement is conditioned upon the contemporaneous consummation of the Transaction.

Section 14.09. Binding Agreement. This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their successors and permitted assigns.

Section 14.10. No Third Party Beneficiary. This Agreement and every provision hereof is for the exclusive benefit of the Parties hereto and not for the benefit of any third party. Nothing in this Agreement shall be construed as creating or expanding any right of any third party to recover by way of damages or otherwise against either of the Parties hereto.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of the day and year first above written.

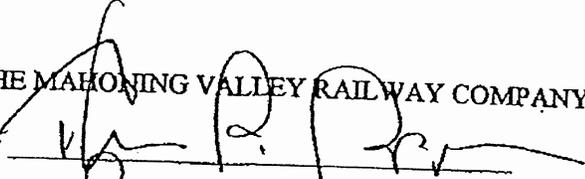
ATTEST:

\_\_\_\_\_

THE MAHONING VALLEY RAILWAY COMPANY

By

Title

  
PRESIDENT

ATTEST:



LTV STEEL COMPANY, INC.

By

Title

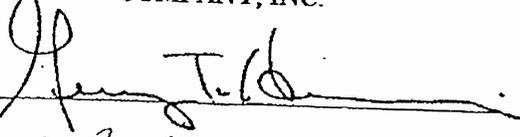
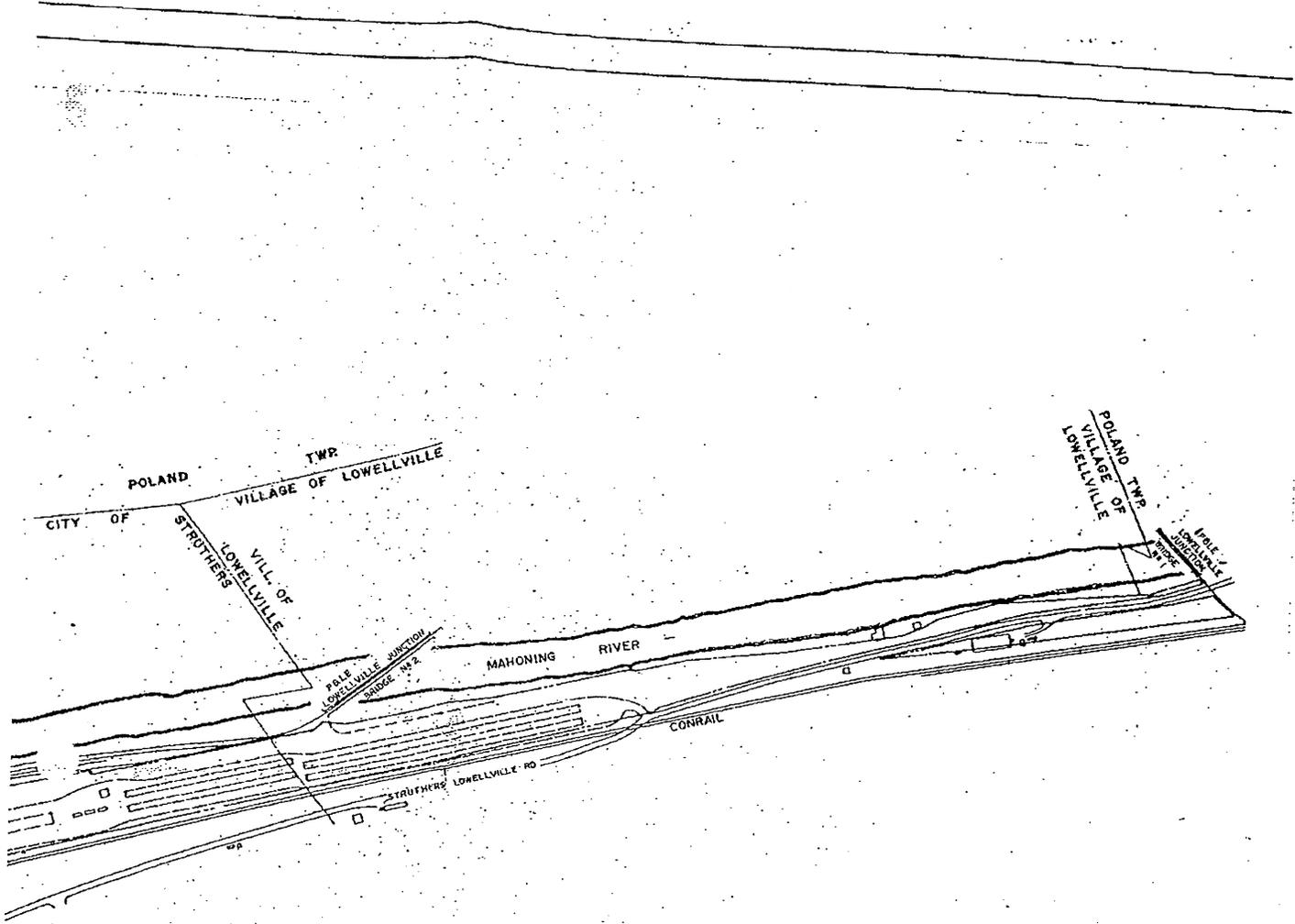
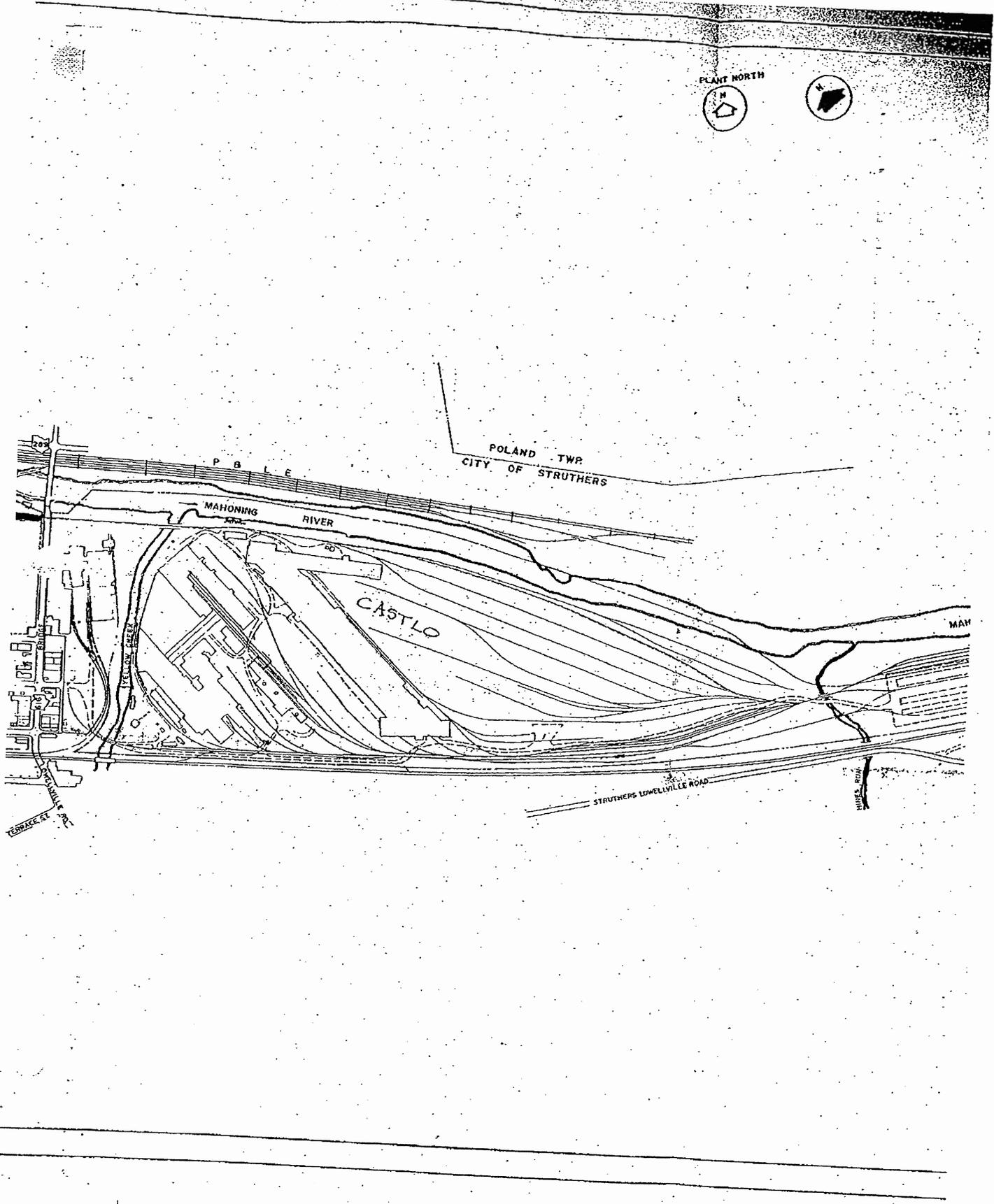
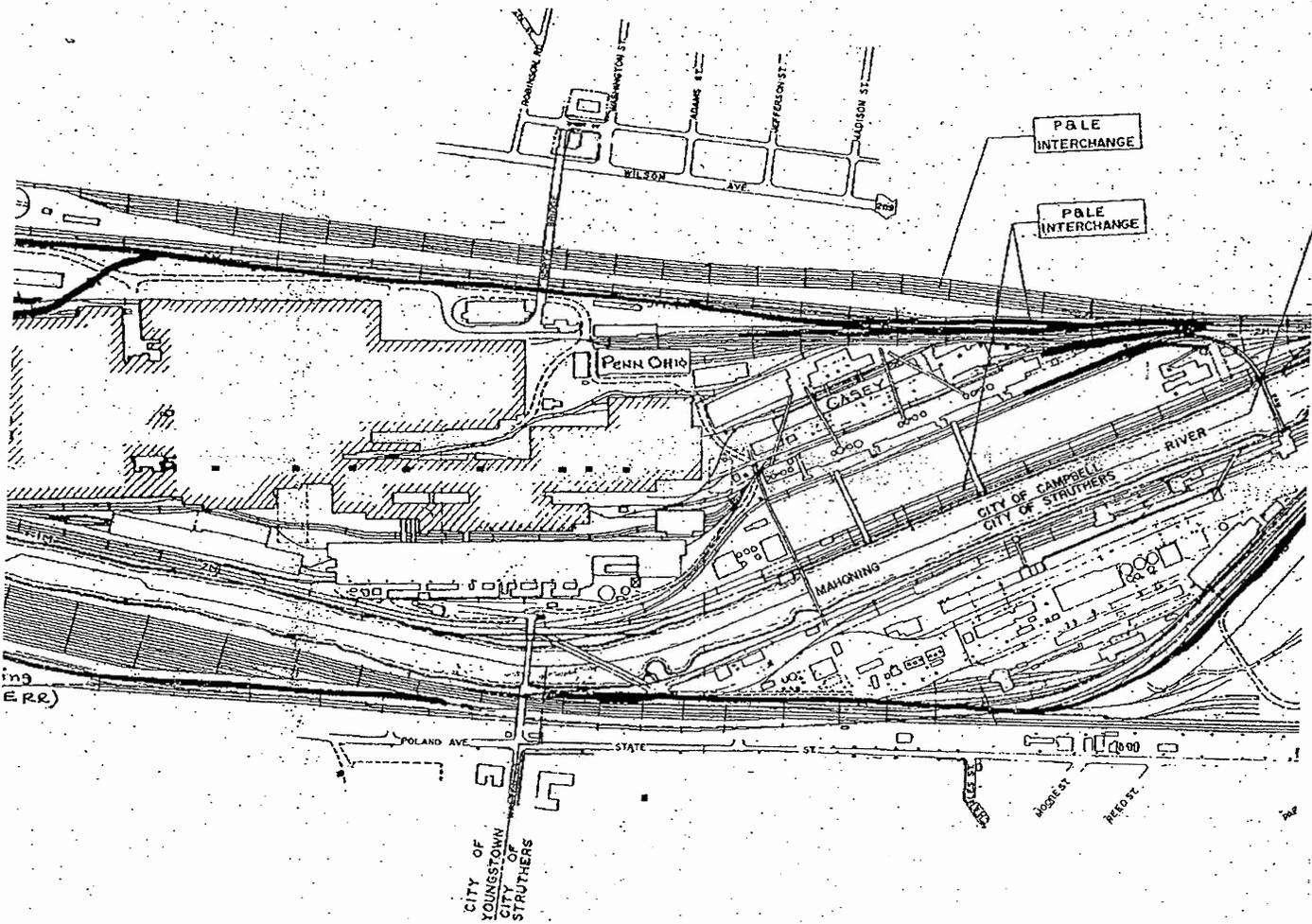
  
V.P. & CFO

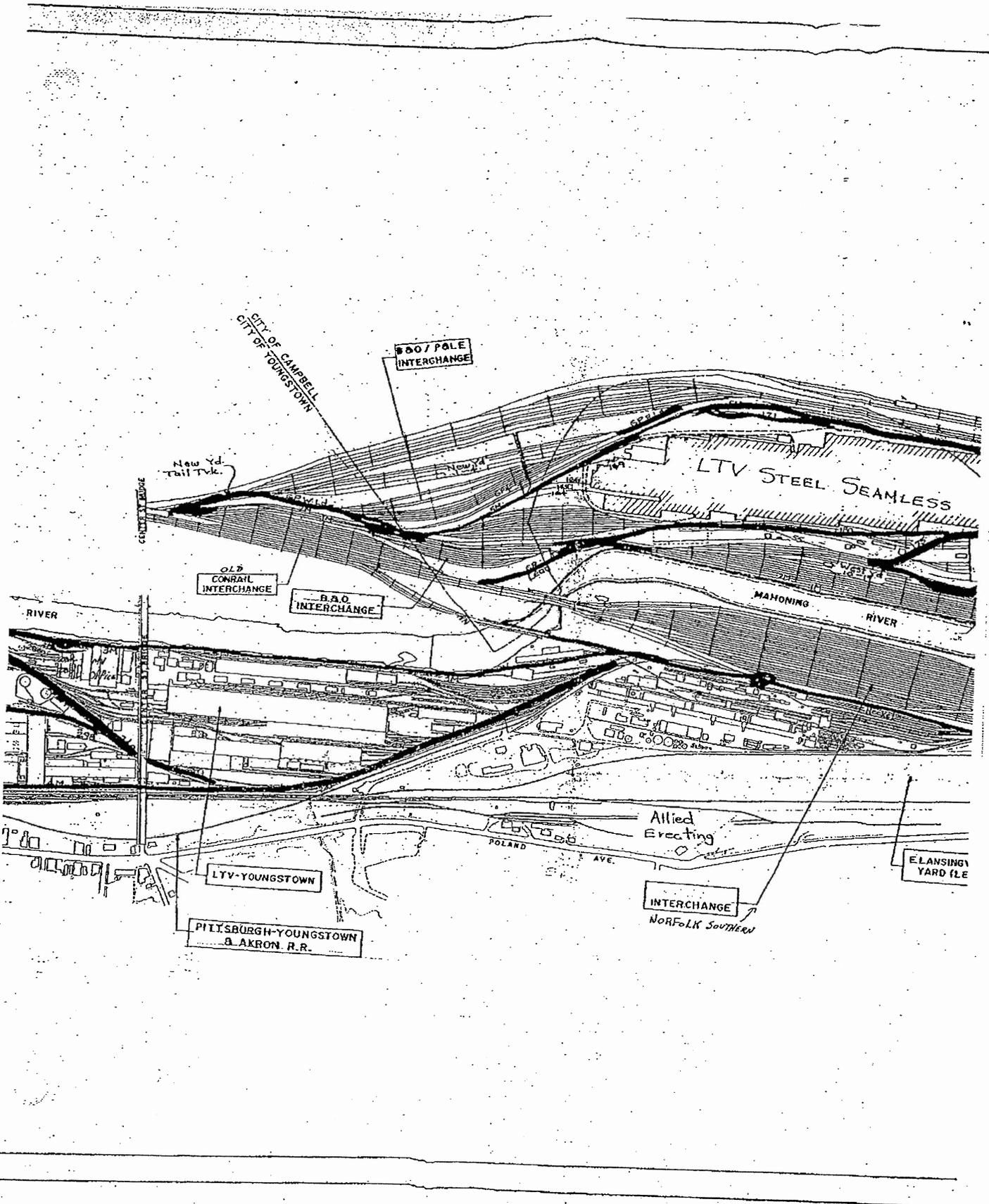
EXHIBIT A  
TO EXHIBIT D

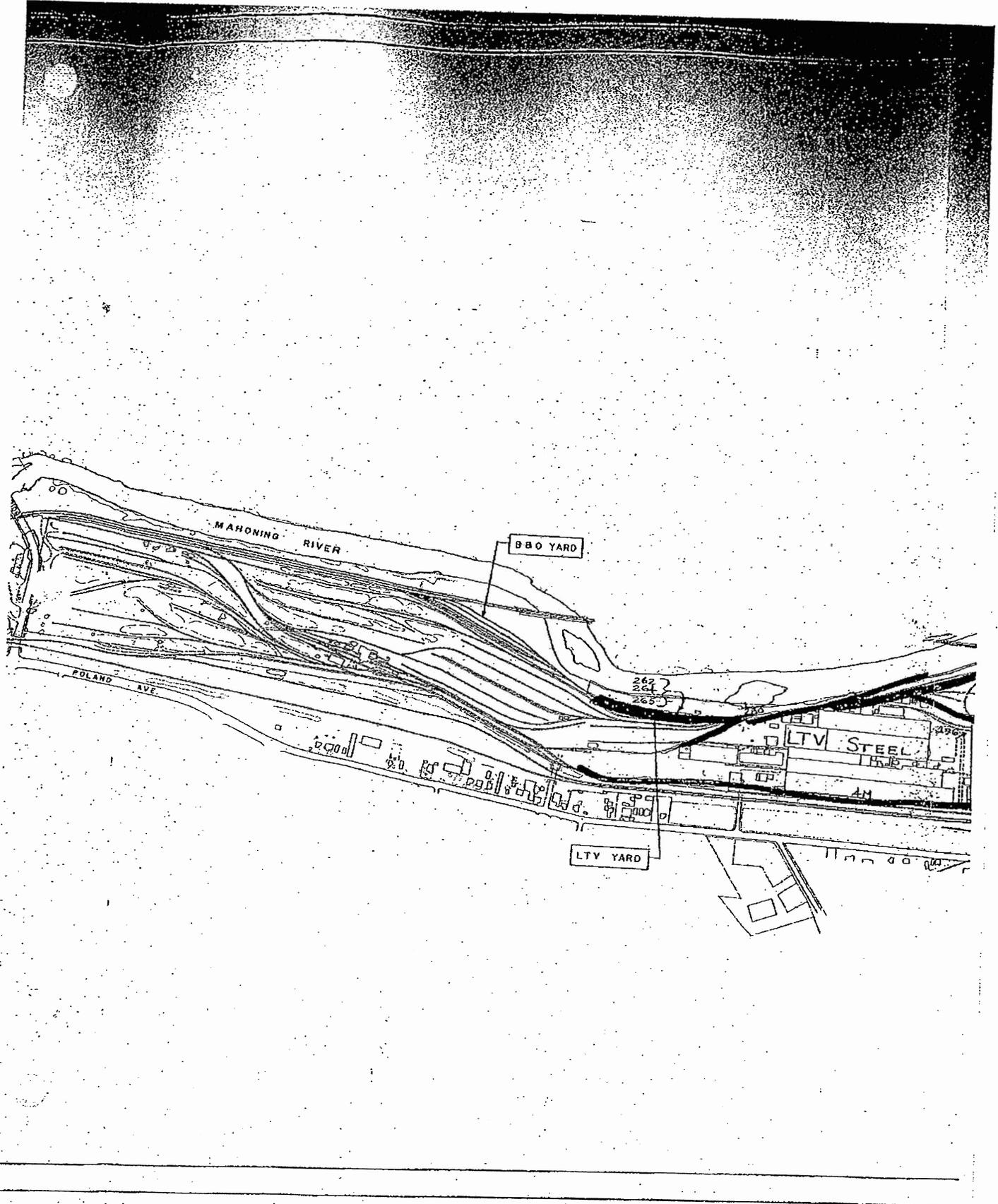


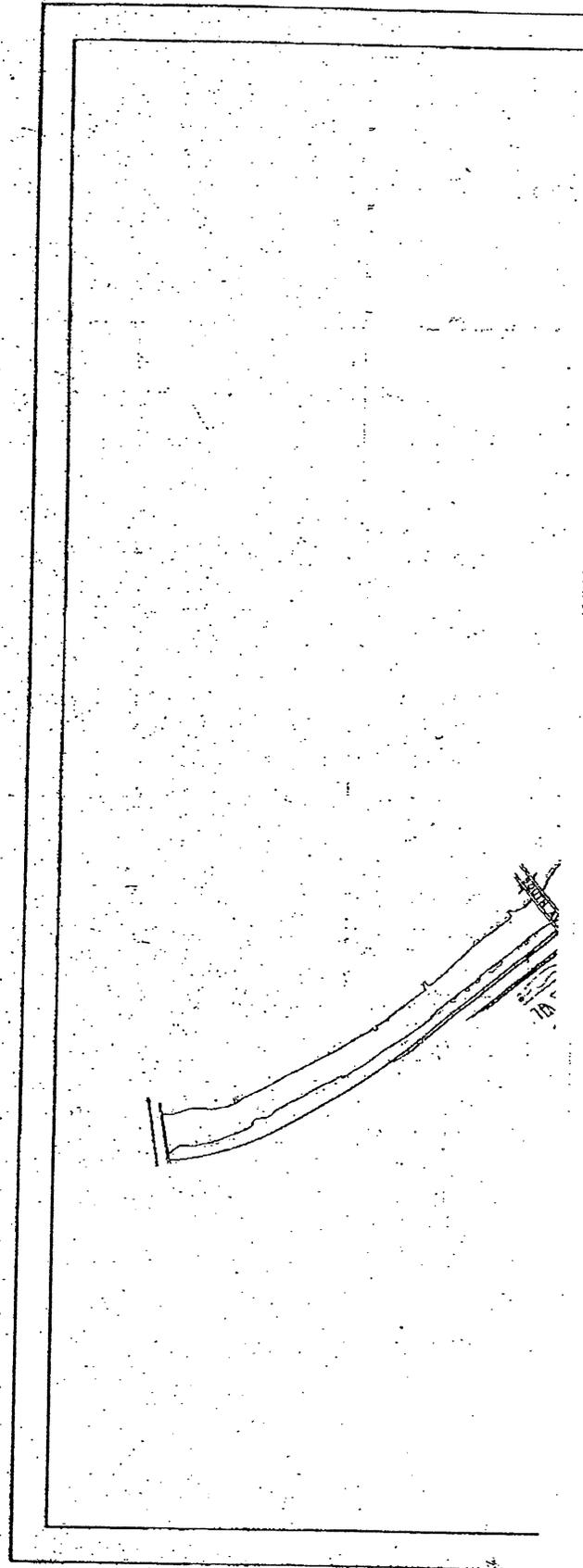
T-3  
TRACK MAP  
MAHONING VALLEY RAILWAY C  
YOUNGSTOWN, MAHONING CO. OHIO  
SCALE: 1" = 300' DATE: 4-27











**EXHIBIT B  
TO EXHIBIT D**

The rates in this tariff are NOT subject to RCCR TARIFFS.

MVRY 8015-I

EXHIBIT B

Cancels

ICC MVRY 8015-H

+ Supp I, II-III

## THE MAHONING VALLEY RAILWAY COMPANY

### FREIGHT TARIFF MVRY 8015-I

LOCAL AND INTERCHANGE FREIGHT TARIFF  
NAMING SWITCHING RATES ON ALL TRAFFIC

BETWEEN  
INDIVIDUAL SIDINGS, PUBLIC TEAM TRACKS AND INDUSTRIES  
LOCATED ON  
THE MAHONING VALLEY RAILWAY COMPANY  
(SECTION 1)

ALSO

TO AND FROM JUNCTIONS WITH CONNECTING CARRIERS  
(SECTION 2)

ALSO

SPECIAL AND STAND-BY LOCOMOTIVE SERVICE  
(SECTION 3)

This tariff is governed by itself.

ISSUED: November 26, 1996

EFFECTIVE: January 1, 1997

ISSUED BY:  
D. C. Curtis  
Manager, Traffic and Marketing  
P. O. Box 589  
Campbell, OH 44405-0024

## FREIGHT TARIFF MVRV 8015-H

### RULES AND REGULATIONS

#### GENERAL RULES AND REGULATIONS

5

##### GENERAL APPLICATION

The rules and charges published in this tariff will apply for the detention of all cars consigned to, or ordered by, subscribers served by the Mahoning Valley Railway Co.  
The disposition of a car at its point of detention determines the purpose for which the car is held and rules applicable thereto, except where there are specific tariff provisions to the contrary.

10

##### STATION LIST AND CONDITIONS

This tariff is governed by the Official List of Open and Prepay Stations ICC OPSL 6000 Series, to the extent shown below:

###### PREPAY REQUIREMENTS AND STATION CONDITIONS

For additions and abandonments of stations, and except as otherwise shown herein, for prepay requirements, changes in names of stations, restrictions as to acceptance or delivery of freight, and changes in station facilities.

###### GEOGRAPHICAL LIST OF STATIONS

For geographical locations of stations referred to in this tariff.

15

##### EXPLOSIVES, DANGEROUS ARTICLES

The rates in this tariff, insofar as same are to apply on explosives and other dangerous articles, will be applied in connection and in compliance with regulations governing the transportation thereof, as published in Freight Tariff ICC BOE 6000 Series.

20

##### REFERENCE TO TARIFFS, ITEMS, NOTES, RULES, ETC.

A. Where reference is made in this tariff to tariffs, items, notes, rules, etc., such references are continuous and include supplements to and successive issues of such tariffs and reissues of such items, notes, rules, etc.

▲B. Where reference is made in this tariff to another tariff, such reference applies also to such tariff to the extent it may be applicable on intrastate traffic.

22

##### CONSECUTIVE NUMBERS

Where consecutive numbers are represented in this tariff by the first and last numbers connected by the word "to" or a hyphen they will be understood to include both of the numbers shown.

If the first number only bears a reference mark, such reference mark also applies to the last number shown and to all numbers between the first and last numbers.

▲45

##### CAPACITIES AND DIMENSIONS OF CARS

For marked capacities, lengths, dimensions and cubical capacities of cars, see Official Railway Equipment Register.

▲60

##### NATIONAL SERVICE ORDER TARIFF

This tariff is subject to provisions of various General Permits as shown in National Service Order Tariff, ICC NSO 6100 Series.

For explanation of abbreviations and reference marks, see last page of tariff.

## FREIGHT TARIFF MVRV 8015-H

### RULES AND REGULATIONS

75

#### METHOD OF CANCELING ITEMS

As this tariff is supplemented, numbered items with letter suffixes cancel correspondingly numbered items in the original tariff or in a prior supplement. Letter suffixes will be used in alphabetical sequence starting with "A". Example: Item 445-A cancels Item 445, and Item 300-B cancels 300-A, in a prior supplement, which in turn, cancelled Item 300.

100

#### METHOD OF DENOTING REISSUED MATTER IN SUPPLEMENTS

Matter brought forward with change from one supplement to another will be designated as "Reissued" by a reference mark in the form of a square enclosing a number or letter, the number (or letter in the case of intrastate supplements), the number (or letter, or number and letter) being that of the supplement in which the reissued matter first appeared in its currently effective form. To determine its original effective date, consult the supplement in which the reissued matter first became effective.

### SPECIAL RULES AND REGULATIONS—UNLIMITED

▲105

#### APPLICATION OF RATES

When the rates as published in Section 2 are not absorbed, in whole or in part, by Connecting Lines as provided in their individual tariffs, such unabsorbed portion of rates published in Section 2 will be in addition to line-haul rates applicable to point of interchange.

⊖110

#### CAR DEMURRAGE RULES AND CHARGES

The car service rules as provided in Freight Tariff ICC ASLG 6004 Series, published by The American Short Line Railroad Association, Agent, will govern all cars handled or switched under this tariff.

This space intentionally left blank.

For explanation of abbreviations and reference marks, see last page of tariff.

## FREIGHT TARIFF MVRV 8015-H

### Section 1 LOCAL SWITCHING RATES

ITEM	APPLICATION	RATES
200	All commodities, other than shown in Item 205, between all individual sidings, public team tracks and industries reached directly by Mahoning Valley Railway Company.	\$140.00 per car
205	EMPTY CARS, (railway standard gauge, on own wheels):	
	(a) Of private or railroad ownership, placed for loading and not loaded, the charge per round trip will be:	\$140.00 per car
	(b) Of private or railroad ownership, moved at request of industries, not in connection with a loaded revenue movement, the charge per movement will be:	\$140.00 per car

### Section 2 INTERCHANGE SWITCHING RATES

Covering all traffic, interchanged with CSX Transportation, Consolidated Rail Corporation and the Ohio & Pennsylvania Railroad, or from all individual sidings, public team tracks and industries reached directly by Mahoning Valley Railway Company.

ITEM	APPLICATION	RATES
300	ALL COMMODITIES, other than shown in Items 301 and 302	♦\$99.00 per car
301	ALL COMMODITIES, Destined to or originating at industries in Struthers, Ohio	♦\$170.00 per car
302	ALL COMMODITIES, Destined to or originating on the Ohio & Pennsylvania Railroad	♦\$170.00 per car

### Section 3 SPECIAL AND STAND-BY LOCOMOTIVE SERVICE

ITEM	SUBJECT
400	<p>SPECIAL LOCOMOTIVE SERVICE</p> <p>Special locomotive service is that service requested by an industry necessitating the assignment of a locomotive and crew for purposes other than routine switching of this Railroad, including such service rendered on the tracks of such industry and, or the tracks of this Railroad Company.</p>
405	<p>STAND-BY LOCOMOTIVE SERVICE</p> <p>Stand-by locomotive service is the standing-by or waiting of a locomotive during the performance of routine or special switching service, when such stand-by or waiting is required for the convenience of the industry.</p>

For explanation of abbreviations and reference marks, see last page of tariff

## FREIGHT TARIFF MVRV 8015-H

### RATES

ITEM	SUBJECT	RATES
410	<b>CONTINUOUS SERVICE:</b>  When special locomotive service or stand-by locomotive service is required, on a full turn basis, including rerailment of cars or other equipment, or for any purpose agreed to by the Railroad, the charge for each locomotive, including crew, will be:  For each eight (8) hours or less .....  For each additional one-half (1/2) hour or less in excess of the first eight (8) hours .....  See Notes 1 and 3.	    ♦\$931.96  ♦\$77.69
415	<b>OCCASIONAL OR SHORT TIME SERVICES:</b>  When special locomotive service or stand-by locomotive service including rerailment of cars or other equipment or for any purpose other than switching is required for less than one (1) eight (8) hour turn, such service will be furnished, at the discretion of the Management of this Railroad, at the following charges:  Per hour .....  For each five (5) minutes or less .....  See Notes 2 and 3.	    ♦\$116.50  ♦\$9.72

NOTE 1: Time will commence when crew reports for duty and will continue until crew is released by the industry and has returned to its starting point.

NOTE 2: Time will commence when crew is instructed to proceed to point where special locomotive service or stand-by service is required and will continue until locomotive and crew are released for other service.

NOTE 3: Charges named herein will be in addition to all other applicable tariff charges of this railroad.

For explanation of abbreviations and reference marks, see last page of tariff.

## FREIGHT TARIFF MVRV 8015-G

### EXPLANATION OF ABBREVIATIONS AND REFERENCE MARKS

Abbreviation	Participating carrier
--------------	-----------------------

CSXT	CSX Transportation, Inc.
CR	Consolidated Rail Corporation
⊕OHPA	Ohio & Pennsylvania Railroad

Abbreviation	Explanation
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BOE	Bureau of Explosives
MVRV	Mahoning Valley Railway Company
NSO	National Service Order
OPSL	Open and Prepay Stations
RER	Railway Equipment Register
RPS	Railroad Publication Services

Reference mark	Explanation
----------------	-------------

∴	Reduction
◆	Increase
●	No change in rate
▲	Change in wording which results in neither an increase nor reduction in rate
⊕	New or Addition
⊘	Cancel
○	Intrastate

For explanation of abbreviations and reference marks, see last page of tariff.

Provisions herein will not result in an effect on the validity of the railroad's operations.

The rates in this tariff are NOT subject to RCCR TARIFFS.

MVRY 8015-I  
Supplement No. 1

## THE MAHONING VALLEY RAILWAY COMPANY

### SUPPLEMENT NO. 1 TO FREIGHT TARIFF MVRY 8015-I

①115 INTERCHANGE ERROR DELIVERIES  
Cars, empty or loaded, delivered to the MVRY in error will be returned to the delivering carrier at a charge of \$99.00 per car.  
NOTE: For cars, empty or loaded, delivered to Struthers, OH that must be returned due to the delivering carrier's error, the charge will be \$170.00 per car.

①120 EMPTY CARS, UNFIT FOR LOADING  
Empty cars furnished on orders for return loading and subsequently:  
1. Rejected by the shipper, account unsuitable for loading as specified when ordered.  
2. Refused, account cancellation of order, or  
3. Refused, account other causes for which railroads are responsible  
will be returned to the railroad furnishing the car or the car owner, and a charge of \$99.00 per car will be made against the railroad furnishing the car.

ISSUED: March 27, 1997

EFFECTIVE: March 27, 1997

ISSUED BY:  
D. C. Curtis  
Manager, Traffic and Marketing  
P. O. Box 589  
Campbell, OH 44405-0024

Provisions herein will not result in an effect on the quality of the human environment or on energy consumption.

The rates in this tariff are NOT subject to RCCR TARIFFS.

MVRY 8015-1  
Supplement No. 2

## THE MAHONING VALLEY RAILWAY COMPANY

### SUPPLEMENT NO. 2 TO FREIGHT TARIFF MVRY 8015-1

ITEM	APPLICATION	RATES
300	ALL COMMODITIES, other than shown in Items 301 and 302	\$99.00 per car
	ⓈNOTE 1: Cars interchanged with Conrail at their Hazelton Yard	\$129.00 per car
301	ALL COMMODITIES destined to or originating at industries in Struthers, OH	\$170.00 per car
	ⓈNOTE 1: Cars interchanged with Conrail at their Hazelton Yard	\$200.00 per car
Section 5		
TERMINAL SWITCHING CHARGES		
ⓈOn traffic interchanged with connecting lines and on traffic originating at points located on or connecting with the track of this Railroad, the following charges will be made in addition to all other applicable tariff charges.		
ITEM	APPLICATION	RATES
HOLDING LOADED CARS		
Ⓢ500	For loaded cars ordered from loading point and either designated by shipper to "HOLD" or held by this Railroad account of insufficient billing instructions to move cars to destination, the charge for setting off and holding will be	\$60.00 per car

ISSUED: September 17, 1997

EFFECTIVE: September 18, 1997

ISSUED BY:  
D. C. Curtis  
Manager, Traffic and Marketing  
P. O. Box 589  
Campbell, OH 44405-0024

Provisions herein will not result in an effect on the validity of the existing rates.

The rates in this tariff are NOT subject to RCCR TARIFFS.

MVRY 8015-1  
Supplement No. 3

## THE MAHONING VALLEY RAILWAY COMPANY

### SUPPLEMENT NO. 3 TO FREIGHT TARIFF MVRY 8015-1

#### Interchange Switching Rates

ITEM	APPLICATION	RATES
5303	ALL COMMODITIES, destined to or originating at industries in Campbell, OH	\$200.00 per car

ISSUED: March 18, 1999

EFFECTIVE: March 18, 1999

ISSUED BY:  
T. H. Shank  
Manager, Traffic and Marketing  
P. O. Box 589  
Campbell, OH 44405-0024

EXHIBIT C  
TO EXHIBIT D

EXHIBIT C

**EQUIPMENT LEASE AGREEMENT**

THIS LEASE, dated as of \_\_\_\_\_, 2001, between THE MAHONING VALLEY RAILWAY COMPANY, an Ohio corporation ("Lessor"), and LTV STEEL COMPANY, INC., a New Jersey corporation ("Lessee"). (Lessor and Lessee are referred to herein together as the "Parties," and individually as a "Party").

WITNESSETH:

WHEREAS, The Cuyahoga Valley Railway Company ("CVR"), which is an affiliate of Lessee, has entered into that certain Stock Purchase Agreement among Lessor, CVR and Summit View, Inc. ("Summit") dated \_\_\_\_\_ (the "Purchase Agreement"), whereby CVR has sold and transferred to Summit all of the issued and outstanding capital stock of Lessor (the "Transaction");

WHEREAS, pursuant to Section 2.5 of the Purchase Agreement, and as part of the consideration for the Transaction, Lessor entered into that certain Transportation Services Agreement between Lessee and Lessor dated \_\_\_\_\_ (the "Services Agreement"), whereby Lessor agreed to provide Lessee with common carrier freight rail service at the levels of service set forth in the Services Agreement.

WHEREAS, following the consummation of the Transaction, Lessee will have a continuing need for rail cars for storage and intraplant movements;

WHEREAS, pursuant to Section 7.01 of the Services Agreement, and as part of the consideration for the Transaction, Lessor and Lessee are entering into this Lease.

NOW, THEREFORE, in consideration of the premises, the Purchase Agreement and the mutual undertakings set forth herein, and other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. Lease of Equipment. Lessor hereby agrees to lease to Lessee, and Lessee hereby agrees to lease from Lessor, the railroad cars set forth on Schedule 1 attached hereto ("Rail Cars"), subject to the terms and conditions of this Lease. Title to the Rail Cars shall be vested in Lessor to the exclusion of Lessee, and the delivery of the Rail Cars to Lessee and Lessee's possession thereof shall constitute a letting only. Capitalized terms used but not otherwise defined herein shall have the meanings assigned to them in the Services Agreement.

2. Use of Rail Cars. The Rail Cars shall be used by Lessee solely for (i) intraplant transportation of material within the Youngstown Facilities, and/or (ii) storage of LTV material within the Youngstown Facilities or on the MVR tracks identified on Schedule 2 hereto (the "MVR Tracks"). Lessor shall perform, at the appropriate tariff or contract rate (as set forth in the Services Agreement), all movements of the Rail Cars on Lessor's Main Line and all movements from the MVR Tracks to the Youngstown Facilities; *provided, however,* that, at Lessee's option, Lessee shall be permitted to move Rail Cars from the MVR Tracks to the Youngstown Facilities.

3. Commencement of Lease. This Lease shall become effective as to each Rail Car upon the date of this Lease, and shall remain in effect for an initial term of three (3) years (the "Initial Term"). Unless either Party terminates this Agreement upon written notice to the other not more than ninety (90) days nor less thirty (30) days prior to the end of the Initial Term (or Extended Term, as applicable), this Agreement shall roll over for successive one (1) year extended terms (each of which shall be referred to herein as an "Extended Term"). As to any

particular Rail Car, this Lease shall terminate upon an Event of Loss and payment by Lessee of the Residual Value for such Rail Car in accordance with Section 11 hereof. Upon termination of the Lease, whether in whole or in part, Lessee shall no longer be responsible for rent as to the Rail Car(s) subject to such termination, and Lessor shall remove such Rail Cars(s) from the Youngstown Facilities within five (5) days after the termination date.

4. Rent.

(a) During the Initial Term, Lessee agrees to pay Lessor rent in the amount of Three Dollars (\$3.00) per Rail Car for each day during which such Rail Car is used either for the intraplant movement of materials or the storage of materials (the "Rent"). The Rent shall include the use by LTV of the MVR Tracks. The Rent shall be payable monthly, in arrears, by the fifth (5<sup>th</sup>) day of each month.

(b) During each Extended Term, the Rent shall be an amount negotiated by the Parties. If the Parties fail to negotiate a new Rent amount prior to the commencement of an Extended Term, then the Rent during that Extended Term shall be the Rent amount in effect during the immediately preceding Initial Term or Extended Term, as applicable.

(c) Lessee shall keep written records, in a format mutually agreeable to the Parties, that show which Rail Cars are loaded for storage and intraplant movements each day. Such daily records shall be made available to Lessor, at Lessor's request, during normal business hours at the Youngstown Facilities. With each Rent payment, Lessee shall include a summary of the daily records for that month.

(d) This is a true lease. Lessee's obligation to pay Rent and any other amount payable under this Lease shall be as set forth herein.

5. Maintenance and Repairs. Lessee, at its sole expense, shall provide the necessary maintenance and repairs to preserve the Rail Cars in the same condition, ordinary wear and tear excepted, as when delivered to Lessee by Lessor pursuant to this Lease. Lessor acknowledges that the Rail Cars do not meet the applicable AAR Interchange Rules.

6. Indemnification.

(a) Lessee shall indemnify and hold harmless Lessor, its parent corporation, subsidiaries and affiliates, and all of their respective directors, officers, agents and employees from and against any and all claims, losses, liabilities, damages, judgments, and any and all costs and expenses in connection therewith (including reasonable attorneys' fees) (collectively, "Loss") arising out of or in connection with the possession, use, maintenance and repair of Rail Cars during the period of time when such Rail Cars are subject to this Lease, including without limitation, claims for injury to or death of persons, for damage and loss to property, and for violation of any law, rule or regulation of any public authority; *provided*, that Lessee's indemnity obligation under this Section 6(a) shall not apply to the extent that a Loss is caused by the negligence or wrongful intentional act of Lessor.

(b) If any suit or action shall be brought against Lessor for Loss which under the provisions of this Lease is the responsibility of Lessee, Lessor shall promptly notify Lessee in writing, and Lessee shall have the right and be obligated to take over the defense of such suit or action.

7. Demurrage. Lessor shall not impose upon Lessee, by tariff or otherwise, any demurrage, storage or other charge or fee on account of detention of loaded or empty Rail Cars within the Youngstown Facilities or on the MVR Tracks.

8. No Warranties. LESSOR HAS NOT MADE AND DOES NOT MAKE ANY REPRESENTATION OR WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, WITH RESPECT TO THE DESIGN, OPERATION OR CONDITION OF THE RAIL CARS OR ANY PART THEREOF, ITS MERCHANTABILITY, ITS FITNESS FOR A PARTICULAR PURPOSE, OR WITH RESPECT TO PATENT INFRINGEMENT, TITLE OR THE LIKE.

Lessor assumes no liability for and makes no representations as to the treatment by Lessee of this Lease, Rail Cars or Rent for financial statements or tax purposes.

9. Liens. Lessee shall not directly or indirectly, create or incur or suffer to be created or incurred or to exist any lien, mortgage, charge, encumbrance, security interest or other adverse claim (a "Lien") on any Rail Car or on any of its rights under this Lease, and if any such Lien shall come to exist, Lessee shall, at its sole cost and expense, promptly remove the same and provide Lessor written evidence of such removal as Lessor may reasonably request. Notwithstanding the foregoing, Lessor hereby agrees that Lessee may make collateral assignment of this Lease to its lender ("Lender"); *provided*, that such assignment shall obligate Lender to assume, in writing, all of Lessee's obligations under the terms of this Lease in the event that Lender forecloses on Lessee's interests hereunder.

10. Sole Possession. So long as No Event of Default (as defined in Section 12 hereof) has occurred and is continuing, Lessee shall have sole possession and peaceful enjoyment of the Rail Cars.

11. Loss/Condemnation. Lessee shall be solely responsible for any loss, theft, condemnation, governmental seizure or damage to any Rail Car. If a Rail Car is lost, stolen, condemned, seized by a governmental authority or damaged beyond repair or is otherwise not useful for any purpose (each event being an "Event of Loss"), then Lessee shall, not later than

thirty (30) days after such occurrence, pay Lessor or cause Lessor to be paid the Residual Value set forth in Schedule 11 hereto opposite the number of the affected Rail Car. On receipt of such payment and all other amounts due under this Lease with respect to the Rail Car subject to the Event of Loss, Lessee's obligations to pay Rent for such Rail Car shall cease, and Lessor shall convey to Lessee title to the Rail Car "AS IS, WHERE IS," WITHOUT REPRESENTATION OF, OR RECOURSE TO, LESSOR, its agents, servants, employees or representatives, except for the warranties of good, indefeasible and unencumbered title.

12. Events of Default. The following shall constitute Events of Default:

(a) Lessee shall fail to pay all or any part of Rent due within five (5) business days after Lessee's receipt of written notice thereof from Lessor; or

(b) Lessee shall fail to perform or shall breach any of the other covenants herein and shall continue to fail to observe or perform the same for a period of thirty (30) days after Lessee's receipt of written notice thereof from Lessor; or

(c) Without Lessor's consent, Lessee, sells, leases or transfers any Rail Car to a third party; or

(d) Lessee creates, incurs, suffers to exist any Lien upon or affecting the Rail Cars, and fails to remove such Lien within thirty (30) days after Lessee's receipt of written notice thereof from Lessor; or

(e) Lessee becomes insolvent, makes an assignment for the benefit of creditors, ceases or suspends its business, admits in writing its inability to pay its debts as they mature; or bankruptcy, reorganization or other proceedings for the relief of debtors or benefit of creditors shall be instituted by or against Lessee.

13. Remedies upon Default. Upon the occurrence of any Event of Default and at any time thereafter, Lessor may do any one or more of the following with or without terminating this Lease:

- (a) Accelerate the due date so that all outstanding Rent owed by Lessee to Lessor shall be due five (5) days after Lessee's receipt of written notice from Lessor that specifies the Event of Default;
- (b) Upon five (5) days' written notice to Lessee, sell or lease any Rail Cars or otherwise dispose, hold or use such Rail Cars at Lessor's sole discretion;
- (c) Upon five (5) days' written notice to Lessee, demand payment of all reasonable, additional costs incurred by Lessor in the course of correcting any default;
- (d) Upon five (5) days' written notice to Lessee, terminate this Lease and, upon such termination, take immediate possession of the Rail Cars;
- (e) Enforce performance by Lessee of the terms hereof; and
- (f) Exercise any other right or remedy available to Lessor under any applicable law.

14. Assignment.

(a) With the exception of collateral assignment of this Lease by Lessee to its Lender in accordance with the provisions of Section 9 hereof, to which Lessor hereby agrees, Lessee may not, without Lessor's prior written consent, sublease, transfer, dispose of or assign any part of its rights or interest in and to this Lease (or any obligations thereunder) or the Rail Cars, except to a successor in interest to all or substantially all of the business of Lessee to which the Rail Cars relate.

15. Taxes. Lessee shall be responsible for payment of all local, state, and federal taxes (other than net income taxes) and other fees or assessments imposed upon or with respect to Lessee's acceptance, possession, lease, or return of the Rail Cars (collectively, "Taxes"). Without limiting the foregoing, Lessee shall promptly pay all sale, use or similar taxes imposed on the leasing (but not on Lessor's acquisition) of the Rail Cars hereunder. Lessee may contest any Taxes *provided* that: (a) Lessee does so in its own name and at its own expense unless it is necessary to join Lessor in the contest or bring the contest in Lessor's name; (b) the contest does not and will not result in any Lien attaching to any Rail Car or otherwise jeopardize Lessor's rights to any Rail Car; and (c) Lessee indemnifies Lessor for all expenses (including reasonable legal fees and costs), liabilities and losses that Lessor incurs as a result of any such contest. Lessee does not warrant, or indemnify Lessor against the loss of the availability of cost recovery deductions, tax credits or other tax benefits associated with Lessor's ownership of the Rail Cars.

16. STB Filing. Within forty-five (45) days of the closing of the Purchase Agreement, Lessee shall record with the Surface Transportation Board notice of this Lease, in accordance with 49 U.S.C. § 11301.

17. Notice. All notices, demands and other communications ("Notice") to be given or delivered by reason of the provisions of this Agreement shall be in writing and shall be deemed to have been received on the date such Notice is personally delivered, on the first business day following the date on which such Notice is sent by a national overnight delivery service, on the third business day following the date such Notice is mailed by registered or certified mail, return receipt requested, or on any date using any other method of delivery as the Parties agree. A Notice to Lessee or Lessor shall, unless another address is specified in writing, be sent to the address indicated below:

If to Lessee:

The LTV Corporation  
200 Public Square  
Cleveland, OH 44114  
Attention: General Counsel

With a copy to:

Weiner Brodsky Sidman Kider PC  
1300 19<sup>th</sup> Street, NW, 5<sup>th</sup> Floor  
Washington, D.C. 20036-1609  
Attention: Mark H. Sidman

If to Lessor:

The Mahoning Valley Railway Company  
136 South Fifth Street  
Coshocton, OH 43812  
Attention: W.A. Strawn

With a copy to:

Slover & Loftus  
1224 Seventh Street, NW  
Washington, D.C. 20036  
Attention: Kelvin J. Dowd

18. Governing Law. This Lease shall be governed by the laws of the State of Ohio, without regard to doctrines of conflict of laws.
19. Headings. All section headings in this Lease are inserted for convenience only and shall not be deemed to alter or affect the meaning or interpretation of the provisions thereof.
20. Interpretation. This Lease is the result of mutual negotiations of the Parties hereto, neither of whom shall be deemed the drafter of this Lease or any portion hereof.

21. Severability. Whenever possible, each provision of this Lease shall be interpreted in such manner as to be effective, valid and enforceable under applicable statute or rule of law. If any of the provisions of this Lease are deemed or adjudicated to be invalid, ineffective or unenforceable under any applicable statute or rule of law, they are, to that extent, deemed omitted from this Lease, without invalidating or rendering unenforceable or ineffective the remainder of such provisions or the remaining provisions of this Lease, which shall remain in full force and effect.

22. Entire Agreement. This Lease constitutes the entire agreement between the Parties hereto and supercedes any and all understandings or agreements, whether oral or written, between the Parties with respect to the subject matter hereof that have not been set forth in this Lease.

23. Survival. Lessee's and Lessor's obligations hereunder shall survive the termination of the Lease to the extent required for full performance and satisfaction thereof.

24. Counterparts. This Lease may be executed by the Parties hereto in separate counterparts, each of which when so executed and delivered shall be an original, but all such counterparts shall together constitute one and the same instrument; *provided, however,* that to the extent, if any, that this Lease constitutes chattel paper (as such term is defined in the Uniform Commercial Code, as adopted by the State of Ohio) no security interest in this Lease may be created through the transfer or possession of any counterpart of this Lease other than the original executed counterpart of this Lease, which shall be identified as such counterpart.

25. Amendments and Waivers. None of the provisions of this Lease may be amended, modified or waived except in writing signed by Lessor and Lessee.

IN WITNESS WHEREOF, the Parties hereto have caused this Lease to be executed by their respective duly authorized officers as of the date first above written.

LTV STEEL COMPANY, INC.

THE MAHONING VALLEY  
RAILWAY COMPANY

By: \_\_\_\_\_

By: \_\_\_\_\_

Its: \_\_\_\_\_

Its: \_\_\_\_\_

Schedule 1

<u>NO.</u>	<u>CAR INITIAL</u>	<u>CAR NUMBER</u>	<u>NO.</u>	<u>CAR INITIAL</u>	<u>CAR NUMBER</u>
1	MV	900	29	MV	929
2	MV	901	30	MV	930
3	MV	903	31	MV	931
4	MV	904	32	MV	932
5	MV	905	33	MV	933
6	MV	906	34	MV	934
7	MV	907	35	MV	935
8	MV	908	36	MV	936
9	MV	909	37	MV	937
10	MV	910	38	MV	938
11	MV	911	39	MV	940
12	MV	912	40	MV	941
13	MV	913	41	MV	942
14	MV	914	42	MV	943
15	MV	915	43	MV	944
16	MV	916	44	MV	945
17	MV	917	45	MV	946
18	MV	918	46	MV	947
19	MV	919	47	MV	948
20	MV	920	48	MV	949
21	MV	921	49	YS	317
22	MV	922	50	YS	316
23	MV	923	51	YS	3019
24	MV	924	52	YS	227
25	MV	925	53	YS	202
26	MV	926	54	YS	217
27	MV	927	55	YS	319
28	MV	928			

**Schedule 2**

**MVR TRACKS**

All tracks identified on Schedule 4.02 of the Transportation Services Agreement between The Mahoning Valley Railway Company ("MVR") and LTV Steel Company, Inc., dated as of \_\_\_\_\_, 2001 that are In-Service tracks, which tracks may change from time to time in MVR's reasonable discretion.

**Schedule 11**

**RESIDUAL VALUE  
FOR RAIL CARS**

Two Thousand Dollars (\$2,000) per Rail Car

**EXHIBIT D  
TO EXHIBIT D**

EXHIBIT D

INTERIM TRACKAGE RIGHTS

THIS AGREEMENT is made as of \_\_\_\_\_, 2001, by and between Mahoning Valley Railway Company, an Ohio corporation with offices at 136 South Fifth Street, Coshocton, Ohio 43812 ("Railroad") and LTV Steel Company, Inc., a New Jersey corporation with offices at 200 Public Square, Cleveland, OH 44114 ("LTV"). (Railroad and LTV are referred together herein as the "Parties" and individually as a "Party").

WITNESSETH:

WHEREAS, The Cuyahoga Valley Railway Company ("CVR"), which is an affiliate of LTV, has entered into that certain Stock Purchase Agreement among Railroad, CVR and Summit View, Inc. ("Summit"), dated \_\_\_\_\_ (the "Purchase Agreement"), whereby CVR has sold and transferred to Summit all of the issued and outstanding capital stock of Railroad (the "Transaction");

WHEREAS, following the consummation of the Transaction, LTV has a continuing need for transportation services at its LTV Copperweld facilities at Youngstown, Ohio (the "Youngstown Facilities, as that term is further defined in the Services Agreement"), which are served by Railroad;

WHEREAS, pursuant to Section 2.5 of the Purchase Agreement, and as part of the consideration for the Transaction, Railroad entered into that certain Transportation Services Agreement between LTV and Railroad dated \_\_\_\_\_ (the "Services Agreement"),

whereby Railroad has agreed to provide LTV with common carrier freight rail service at the levels of service set forth in the Services Agreement, and to provide LTV with certain remedies in the event that Railroad fails to fulfill its service commitments; and

WHEREAS, pursuant to Section 9.02 of the Services Agreement, and as part of the consideration for the Transaction, Railroad and LTV are entering into this Agreement.

NOW, THEREFORE, in consideration of the premises, the Purchase Agreement and the mutual undertakings set forth herein, and other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. Defined Terms. Capitalized terms used but not otherwise defined herein shall have the meanings assigned to them in the Services Agreement. For purposes of this Agreement, Youngstown Facilities shall also include Transferred Facilities, as applicable.

2. Scope.

(a) This Agreement sets forth the understandings of the Parties concerning the grant of limited, non-exclusive trackage rights by Railroad to LTV ("Trackage Rights"), to become effective in the event that Railroad fails to provide the Youngstown Facilities with rail service at the service levels set forth in the Services Agreement.

(b) The Trackage Rights may be exercised by LTV, or at LTV's election, by either (i) any common carrier railroad company affiliate of LTV, or (ii) with the prior consent of Railroad, a common carrier railroad company that is unaffiliated with LTV. If and when LTV elects a designee, such designee shall assume all the rights and obligations of LTV under this Agreement that are related or incidental to its exercise of the Trackage Rights; *provided, however,* that, for administrative convenience, Railroad shall satisfy any notice or payment obligation to LTV's designee by providing such notice or payment to LTV. Nothing in this

Agreement shall restrict LTV's right to replace, substitute or otherwise change designees at any time; *provided*, that LTV shall not change designees more than once within any 6-month period.

3. Grant of Trackage Rights. The grant of Trackage Rights hereunder shall be for the sole purpose of LTV providing rail service to, from and in the Youngstown Facilities, including, without limitation, the rail service described in Sections 3.02 through 3.05 of the Services Agreement ("Rail Service"). This Agreement shall not confer on LTV either the right or the obligation to provide any rail services to any rail customers, other than to the Youngstown Facilities.

4. Effectiveness of Trackage Rights. The Trackage Rights will be effective only in the event that a Service Failure occurs or that Railroad otherwise fails to provide Rail Service as set forth in Sections 9.02(a) and (b) of the Services Agreement (collectively, "Trigger Events").

5. Commencement of Trackage Rights. Should a Trigger Event occur, the Trackage Rights shall become effective upon Railroad's receipt of written notice by LTV, and upon the issuance of such regulatory authority or exemption as may be necessary to permit the exercise of said Trackage Rights. Should Railroad dispute the occurrence of a Trigger Event, Railroad may initiate arbitration in accordance with Section 13 of this Agreement, *provided*, that LTV shall have the right to exercise the Trackage Rights pending the arbitrator's decision. If the arbitrator determines that a Trigger Event had not occurred, then LTV immediately shall cease operating under the Trackage Rights, and LTV shall pay Railroad liquidated damages in an amount equal to the difference between (A) the product of (i) thirty-five one hundredths (0.35), multiplied by (ii) the freight revenue that Railroad would have been entitled to had it handled the traffic to and from the Youngstown Facilities that was handled by LTV pursuant to this Agreement during the

timeframe in question, and (B) the amount expended by LTV on account of maintenance pursuant to Section 8 hereof during the timeframe in question.

6. No Railroad Fees or Charges. Railroad shall not be entitled to collect (i) any fees in connection with the use by LTV of the Main Line and Yards under this Agreement, including but not limited to any type of trackage rights fees, or (ii) any fees or charges in connection with the performance of Rail Service, including, but not limited to, any Switch Charges, Local Service charges, Intra-Plant Service fees and Ancillary Service fees, as further described in Section 5.01 of the Services Agreement.

7. Rail Operations.

(a) When operating over the Main Line and Yards pursuant to the Trackage Rights, the locomotives and crews of LTV will be equipped to communicate with Railroad on radio frequencies normally used by Railroad in directing train movements on the Main Line and Yards.

(b) LTV shall exercise the Trackage Rights in accordance with all safety rules, operating rules and other regulations of Railroad, and the movement of trains, locomotives, cars and equipment by LTV pursuant to its exercise of the Trackage Rights shall at all times be subject to the orders of the transportation officers of Railroad; *provided* that such transportation officers will use reasonable efforts to facilitate the performance of Rail Service by LTV.

(c) During its exercise of the Trackage Rights, LTV shall comply with any applicable federal, state and local laws, regulations and rules regarding the operation, condition, inspection and safety of its trains, locomotives, cars, cabooses, vehicles, machinery and other equipment (the "Equipment").

(d) In the event that a train or locomotive of LTV shall be forced to stop on the Main Line, due to a mechanical failure of its equipment, or any cause not resulting from an accident or derailment, and such train or locomotive is unable to proceed, or if in emergencies, crippled or otherwise defective cars are set out of trains of LTV on the Main Line. Railroad shall have the option to furnish motive power or such other assistance as may be necessary to haul, help or push such trains, locomotives or cars, or to properly move the disabled equipment off the Main Line, and LTV shall reimburse Railroad for the cost of rendering any such assistance.

8. Maintenance. In any period during which LTV is exercising the Trackage Rights, if Railroad is not performing necessary maintenance and/or repairs on the Main Line and Yards consistent with the Maintenance Standards, LTV shall have the right, but not the obligation, to perform, or arrange for the performance of, any maintenance and repairs that are necessary to restore the Main Line and Yards to, or maintain the Main Line and Yards at, the Maintenance Standards. In such event, Railroad shall cooperate in good faith to facilitate the performance of such maintenance and repairs and reimburse LTV for the reasonable cost of the maintenance and repairs within thirty (30) days after receipt of an invoice for the same.

9. Liability Definitions.

(a) During the exercise of the Trackage Rights by LTV, the responsibility and liability as between Railroad and LTV for (i) any personal injury to or death of any person (including employees of the Parties and third persons); (ii) any damage to or destruction of real or personal property of any person; (iii) any damage or destruction to the environment (including land, air, water, wildlife and vegetation), (iv) any claims of third parties for damages, and (v) all cleanup and remediation expenses, court and regulatory costs, litigation and administrative proceeding expenses and reasonable attorneys' fees resulting from the use of rail line by either

Party, all of which (and all costs, judgments and expenses incurred in connection therewith) are collectively referred to as a "Loss," shall be apportioned as set forth in Section 10 hereof.

(b) As used in this Agreement, whenever reference is made to the Equipment of one of the Parties hereto, such expression means the Equipment in the possession of or operated by one of the Parties and includes Equipment which is owned by, leased to, or in the account of such Party. Whenever such Equipment is owned or leased by one Party to this Agreement and is in the possession or account of the other Party to this Agreement, such Equipment shall be considered that of the other Party under this Agreement.

(c) For purposes of Section 10, hereof, Employees shall be defined to include employees, officers, agents and contractors.

(d) For purposes of Section 10, hereof, the Main Line and Yards shall be deemed property of Railroad.

10. Allocation of Liability

(a) Each Party shall bear all Losses in connection with injury to or death of its own Employees, or in connection with damage to or destruction of its property and Equipment; *provided*, that to the extent that injuries to or death of one Party's Employee(s), or damage to or destruction of one Party's property or Equipment is caused solely by the negligence or intentional act of the other Party, then such other Party shall bear all Losses in connection therewith.

(b) For Losses to third parties where only the Employees, property and Equipment of LTV are involved, all such Losses shall be apportioned to LTV. For Losses to third parties where only the Employees, property and Equipment of Railroad are involved, all such Losses shall be apportioned to Railroad.

(c) For Losses to third parties where the Employees, property or Equipment of both Railroad and LTV are involved, such Losses shall be apportioned equally between the Parties; *provided*, that to the extent Losses to third parties are caused solely by the negligence or intentional act of either Railroad or LTV, then such Party shall bear all Losses in connection therewith.

(d) Solely as between Railroad and LTV, Railroad shall be responsible for any Loss that is not apportioned to LTV under Section 10(a) through (c).

(e) Whenever any Loss or any other damage is apportioned to a Party hereto under the provisions of this Agreement, that first Party shall forever protect, defend, indemnify and save harmless the other Party to this Agreement and its parent corporation, subsidiaries and affiliates, and all of their respective directors, officers, agents, and employees from and against that Loss or other damage apportioned to that first Party.

(f) In every case of death or injury suffered by an employee of Railroad or of LTV, where compensation to such employee or employee's dependents is required to be paid under any workmen's compensation, occupational disease, employers' liability or other law, and either Railroad or LTV, under the provisions of this Agreement, is required to pay said compensation, and such compensation is required to be paid in installments over a period of time, the paying Party shall not be released from paying any such future installments by reason of the expiration or other termination of this Agreement prior to any of the respective dates upon which any such future installments are to be paid.

(g) If a claim or suit is made against either Party hereto, the liability of which under the Agreement is allocated solely to the other Party, such Party (the "Indemnatee") shall notify immediately in writing the other Party to whom the liability is allocated hereunder (the

"Indemnitor"), and the Indemnitor shall bear all Losses in connection with such claim or suit: *provided*, that the Indemnitee shall have the right to participate in the defense of the claim or suit at its own expense, and that the Indemnitee shall have the right to control the defense of such claim or suit at Indemnitor's expense, if an adverse outcome would threaten its continued existence (but not the existence of the Indemnitor.)

(h) If a judgment is recovered against and satisfied by one Party, but involves liability that should under this Agreement be borne entirely by the other Party, then all Losses connected with such judgment and with the prosecution of the suit or other proceeding upon which it was based, shall be settled between the Parties in strict accordance with the provisions of this Agreement, and the Party against which such judgment is recovered shall be promptly reimbursed by the other Party.

11. Cessation of Trackage Rights.

(a) If a Trigger Event of the type described in Section 9.02(a) of the Services Agreement occurs, LTV shall have the right (but not the obligation) to serve the Youngstown Facilities for the longer period of (i) thirty (30) days, or (ii) five (5) days after LTV receives written notice from Railroad, with appropriate supporting documentation, stating that Railroad is ready, willing and able to provide Rail Service in accordance with the requirements of the Services Agreement. Thereupon, LTV's exercise of the Trackage Rights shall cease and LTV shall vacate the Main Line and Yards. LTV shall secure any regulatory approval or exemption incident to such cessation as may be necessary, as promptly as possible.

(b) If the Trigger Event of the type described in Section 9.02(b) of the Services Agreement occurs, LTV shall have the right (but not the obligation) to serve the Youngstown Facilities for the longer period of (i) fifteen (15) days, or (ii) five (5) days after LTV

receives written notice from Railroad, with appropriate supporting documentation, stating that Railroad is ready, willing and able to provide Rail Service in accordance with the requirements of the Services Agreement. Thereupon, LTV's exercise of the Trackage Rights shall cease and LTV shall vacate the Main Line and Yards. LTV shall secure any regulatory approval or exemption incident to such cessation as may be necessary, as promptly as possible.

(c) The cessation by LTV of the right to exercise the Trackage Rights, in accordance with this Section 11, shall in no way prohibit the subsequent exercise of the Trackage Rights by LTV if another Trigger Event occurs.

12. Termination. Except as otherwise provided in this Agreement, this Agreement shall terminate upon the termination of the Services Agreement. To the extent that regulatory approval or exemption is necessary in connection with the termination of this Agreement, each Party shall promptly file the appropriate pleadings, and cooperate with the other Party in connection with its pleadings.

13. Arbitration. All disputes arising between LTV and Railroad with respect to this Agreement shall be submitted for binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association ("AAA"). The arbitration shall take place in Cleveland, Ohio. The Parties shall attempt to agree upon an arbitrator knowledgeable and experienced in transportation agreements between shippers and railroads ("Transportation Agreements"). If the Parties are unable to agree on an arbitrator within thirty (30) days after the Party initiating the arbitration provides written notice of the commencement of the arbitration to the other Party and to the AAA, then either Party may request that the AAA select an arbitrator knowledgeable and experienced in Transportation Agreements and the AAA's selection shall be binding and nonreviewable. The arbitration shall be "baseball style," with each Party presenting its proposed

resolution of the dispute, and with the arbitrator selecting the proposed resolution (without material modification) that it determines is the most consistent with the terms and conditions of this Agreement. The arbitrator's award shall be rendered within one hundred eighty (180) days after the aforescribed written notice of the commencement of arbitration. Each Party shall pay the compensation, costs, fees and expenses of its own witnesses, experts and counsel. The compensation, costs, fees and expenses of the arbitrator will be borne as determined by the arbitrator. The arbitrator shall not have the power to award consequential or punitive damages, to reform this Agreement, or to determine violations of criminal or antitrust laws. Pending the award of the arbitrator, there shall be no interruption in the transaction of business under this Agreement (or termination of this Agreement), and all payments in respect thereto shall be made in the same manner as prior to the dispute until the matter in dispute shall be finally determined by the arbitrator, and thereupon such payment or restitution shall be made in accordance with the decision or award of the arbitrator.

14. Regulatory Approval. Prior to, and as a condition of, the closing of the Transaction, LTV shall file, or shall cause one of its rail affiliates to file, with the Surface Transportation Board (the "Board") for regulatory approvals or exemptions necessary for LTV or its designee to exercise the Trackage Rights pursuant to the Agreement (the "Filing"). Railroad agrees to assist and support the efforts of LTV to obtain such authority. The Filing shall be substantially in the form attached hereto as Exhibit A. At any time, irrespective of whether a Trigger Event has occurred, LTV may submit, as it deems appropriate, additional regulatory filings with the Board (or its successor agency) in connection with its rights and obligations under this Agreement, and Railroad shall support such filings (including, without limitation, one

or more filings in which LTV takes the position that the Trackage Rights are not regulated under the ICC Termination Act of 1995).

15. Notice. All notices, demands and other communications ("Notice") to be given or delivered by reason of the provisions of this Agreement shall be in writing and shall be deemed to have been received on the date such Notice is personally delivered, on the first business day following the date on which such Notice is sent by a national overnight delivery service, on the third business day following the date such Notice is mailed by registered or certified mail, return receipt requested, or on any date using any other method of delivery as the Parties agree. A Notice to Railroad or LTV shall, unless another address is specified in writing, be sent to the address indicated below:

If to LTV:

The LTV Corporation  
200 Public Square  
Cleveland, OH 44114  
Attention: General Counsel

With a copy to:

Weiner Brodsky Sidman & Kider PC  
1300 19<sup>th</sup> Street, NW, 5<sup>th</sup> Floor  
Washington, D.C. 20036-1609  
Attention: Mark H. Sidman

If to Railroad:

Mahoning Valley Railway Co.  
136 South Fifth Street  
Coshocton, OH 43812  
Attention: Mr. W.J. Strawn

With a copy to:

Slover & Loftus  
1224 Seventeenth Street, NW

Washington, DC 20036  
Attention: Kelvin J. Dowd

16. Assignment. This Agreement shall be binding upon and inure to the benefit of the successors and permitted assigns of the Parties hereto. To the extent the Parties hereto are permitted or required to assign the Services Agreement, they shall be so permitted or required to assign this Agreement.

17. General Provisions.

(a) This Agreement and each provision hereof is for the exclusive benefit of the Parties hereto and not for the benefit of any third party. Nothing herein contained shall be taken as creating or increasing any right of any third party to recover by way of damages or otherwise against either of the Parties hereto; *provided, however,* that this Section 17(a) shall not apply to a designee elected by LTV pursuant to Section 2(b) of this Agreement.

(b) This Agreement contains the entire understanding of the Parties hereto and supercedes any and all understandings or agreements, whether oral or written, between the Parties with respect to the subject matter hereof that have not been set forth in this Agreement.

(c) All words, terms and phrases used in this Agreement that are not capitalized or otherwise defined in this Agreement shall be construed in accordance with the generally applicable definition or meaning of such words, terms and phrases in the railroad industry.

(d) No term or provision of this Agreement may be changed, waived, discharged or terminated except by an instrument in writing and signed by both Parties to this Agreement.

(e) All section headings in this Agreement are inserted for convenience only and shall not be deemed to alter or affect the meaning or interpretation of the provisions thereof.

(f) This Agreement is the result of mutual negotiations of the Parties hereto, neither of whom shall be deemed the drafter of this Agreement or any portion hereof.

(g) Whenever possible, each provision of this Agreement shall be interpreted in such manner as to be effective, valid and enforceable under applicable statute or rule of law. If any of the provisions of this Agreement are deemed or adjudicated to be invalid, ineffective or unenforceable under any applicable statute or rule of law, they are, to that extent, deemed omitted from this Agreement, without invalidating or rendering unenforceable or ineffective the remainder of such provisions or the remaining provisions of this Agreement, which shall remain in full force and effect.

(h) This Agreement shall be governed by and construed under the laws of the State of Ohio, without regard to doctrines of conflict of laws.

(i) Each Party represents to the other that it has full power and authority to enter into this Agreement and that the person signing below or on behalf of it has been duly authorized to execute this Agreement.

(j) This Agreement is conditioned upon the contemporaneous closing of (i) the Purchase Agreement; and (ii) the Services Agreement.

(k) This Agreement shall be binding upon and inure to the benefit of the Parties hereto.

(l) The failure of either Party, in any one or more instance, to insist upon performance of any of the terms, covenants or conditions of this Agreement shall not operate or

be construed as a waiver or relinquishment of same or any future performance of the same and all other terms, covenants and conditions shall continue in full force and effect.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be duly executed as of the date first above written.

LTV STEEL COMPANY, INC.

By: \_\_\_\_\_

Its: \_\_\_\_\_

MAHONING VALLEY RAILWAY  
COMPANY

By: \_\_\_\_\_

Its: \_\_\_\_\_

Schedule 3.02(a)

**LTV TUBULAR  
SET-OUT/DELIVERY TRACKS**

Set-out/Delivery Tracks

- #243 Tracks
- #296 Tracks
- #298 Tracks

Schedule 4.02  
1 OF 5

# Mahoning Valley Railway LTV's Welded Tube Track

TRACK NUMBER	TRACK LENGTH			REMARKS SEE NOTE 1	SEE NOTE 2
	LEASED TRACK	LTV TRACK OWNED	TENANT TRACK		
1 - Main	3,680			I/S - Easement on Allied R/W	X
Hockett	1,800			O/S - Easement on Allied R/W	
2 - Main	4,400			I/S - Easement on Allied R/W	X
3 - Main	9,163			I/S - Easement Allied/LTV/Yghtown	X
4 - Main	9,163			I/S - Easement Allied/LTV/Yghtown	X
220	2,200			I/S - Easement on Allied R/W - 60' O/S	X
239	2,100			I/S - Part Easement on Allied R/W	X
240	700			I/S - LTV R/W	X
243		1,000		I/S - LTV R/W	
245 - West	1,000			I/S - LTV R/W	
262	1,000			I/S - Easement on Yghtown	X
264	650			I/S - Easement on Yghtown	X
265	700			I/S - Easement on Yghtown	X
273	1,200			I/S - LTV R/W	
275	1,050			I/S - LTV R/W	
276	1,000			I/S - LTV R/W	
277	950			I/S - LTV R/W	
278	750			I/S - LTV R/W	
280	1,800			I/S - Easement on LTV/Yghtown	
281	250			I/S - LTV R/W	
282	150			I/S - LTV R/W - Shop	
283	500			I/S - LTV R/W - Shop	
284	200			I/S - LTV R/W - Shop	
285	300			I/S - LTV R/W - Shop	
286	200			I/S - LTV R/W - Shop	
292	2,200			I/S - LTV R/W	X
295		1,050		O/S - Part LTV & R/W?	
296		800		I/S - Part LTV & R/W?	

# Mahoning Valley Railway

## LTV's Welded Tube Track

TRACK NUMBER	TRACK LENGTH			REMARKS	SEE NOTE 2
	NVRWY LEASED TRACK	LTV TRACK OWNED	TENANT TRACK		
298		900		I/S - LTV R/W	
TOTAL FEET	47,106	3,750	0		50,856

Note 1: I/S = In Service  
 O/S = Out of Service  
 R/W = Right of Way

Note 2: Indicates Track to be Maintained to Strict Class I FRA Track Standards

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**Mahoning Valley Railway**  
LTV's Seamless Tube Track

TRACK NUMBER	TRACK LENGTH			REMARKS SEE NOTE 1	SEE NOTE 2
	NEARBY LEASED TRACK	LTV TRACK OWNED	TENANT TRACK		
1 - Main	6,358			6,358	O/S
2 - Main	5,628			5,628	O/S - West End
4 - Buster	1,120			1,120	I/S - Part under Ground
4 - Main East		1,690	525	2,215	I/S - Easement on Casey R/W
4 - Main/118			946	946	O/S - Easement on Casey R/W
5 - Main	11,452			11,452	O/S - LTV R/W
1 - New Yard	2,150			2,150	O/S - Vegetation
2 - New Yard	1,539			1,539	O/S - Vegetation
3 - New Yard	1,493			1,493	O/S - Vegetation
4 - New Yard	1,629			1,629	O/S - Vegetation
4 - Gorilla Park	1,822			1,822	O/S - Vegetation
10 - West Yard	2,067			2,067	O/S - Vegetation
11 - West Yard	1,915			1,915	O/S - Vegetation
12 - West Yard	1,829			1,829	O/S - Vegetation
13 - West Yard	1,680			1,680	O/S - Vegetation
14 - West Yard	1,534			1,534	O/S - Vegetation
15 - West Yard	1,433			1,433	O/S - Vegetation
16 - West Yard	1,257			1,257	O/S - Vegetation
17 - West Yard	1,757			1,757	O/S - Vegetation
19 - West Yard	1,351			1,351	O/S - Vegetation
55		136		136	Stub to Seamless Sludge - In Ground
59	2,878			2,878	I/S - Repairs Needed for 1 Panel
66		836		836	In Ground - Into LTV Upset
67		549		549	In Ground - Into LTV Upset
82			901	901	Easement on Casey R/W (Quality Bar)
83			913	913	O/S - Easement on Casey R/W
84			1,651	1,651	O/S - Easement on Casey R/W
87			845	845	I/S - Easement on Casey R/W

4 OF 5

Mahoning Valley Railway  
LTV's Seamless Tube Track

TRACK NUMBER	TRACK LENGTH			REMARKS SEE NOTE 1	SEE NOTE 2
	MAINTENANCE TRACK	LEASED TRACK	TOTAL		
88					
105	426		562	I/S - Easement on Casey R/W	
108	428			I/S - LTV R/W (Sand Tower)	
109	345			I/S - Car Shop - LTV R/W	
115		300		I/S - Car Shop - LTV R/W	
117			90	I/S - Easement on LTV/Munroe R/W	
118			960	I/S - Easement on Casey R/W	
120	1,795		1,138	I/S - Easement on Casey R/W (Penn Ohio)	
121		1,455	292	O/S - Easement on Casey R/W	
126			700	I/S - Lead to 118 - Easement on Casey R/W	X
127			473	O/S - Switch Only - Easement on Casey R/W	
128			573	O/S - Switch Only - Easement on Casey R/W	
131			450	O/S - Switch Only - Easement on Casey R/W	
164		673		O/S - Lead to 83/84 - Easement on Casey R/W	
165		97		I/S - LTV R/W - Rounds Unloading	
166		464		I/S - LTV R/W - Switch Only	
169		586		I/S - LTV R/W - Rounds Unloading	
171	1,860			I/S - LTV R/W	X
172		865		I/S - LTV R/W	
172 1/2	675			I/S - LTV R/W	X
174		839		I/S - LTV R/W	
175				I/S - LTV R/W - Shipping	
176	2,269			I/S - LTV R/W - Running Track	X
179		450		I/S - LTV R/W - Shipping	
180		726		I/S - LTV R/W - Shipping	
181		453		I/S - LTV R/W - Shipping	X
182		323		I/S - LTV R/W - Shipping	
183		433		I/S - LTV R/W	
		493		I/S - LTV R/W	

1/19/01

MV Tracks

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Mahoning Valley Railway  
LTV's Seamless Tube Track

TRACK NUMBER	TRACK LENGTH			REMARKS SEE NOTE 1	SEE NOTE 2
	NEARBY EAST TRACK	LTV TRACK OWNED	TOTAL		
184		298	298	I/S - LTV R/W - Roll Shop	
215	858		858	I/S - Easement to CASTLO	X
218 - Short Line	3,361		3,361	I/S - Easement to CASTLO	X
225	1,492		1,492	I/S - Easement to CASTLO	X
CR Lead	288		288	I/S - LTV R/W	X
Ladder	1,239		1,239	O/S - LTV R/W - Vegetation	
Leg	957		957	O/S - LTV R/W - Vegetation	
Gorilla Park East Lead	177		177	I/S - LTV R/W	X
Gorilla Park West Lead	674		674	I/S - LTV R/W	X
New Yard Tail Track	520		520	O/S - Stub - Part in Ground - LTV R/W	
Westbound Main		2,145	2,145	In Ground - Casey R/W	
Eastbound Main		1,556	1,556	In Ground - Casey R/W	
X-over (1x2M)	140		140	I/S - LTV R/R	X
X-over (1x2M)	125		125	I/S - LTV R/R	X
S - Main Runaround	1,300		1,300	O/S - Easement on LTV/Casey R/W	
<b>TOTAL FEET</b>	<b>69,821</b>	<b>12,116</b>	<b>14,270</b>		

Note 1: I/S = In Service

O/S = Out of Service

R/W = Right of Way

Note 2 Indicates Track to be Maintained to Strict Class I FRA  
Track Standards

**Schedule 4.03(a)**

**SERVICE SCHEDULE**

1. The LTV Copperweld facility in Youngstown, Ohio (the "Facility") is operated in eight (8) hour shifts (a "Shift"). As of October 2000, the Facility is being operated one Shift per day, Monday through Friday, fifty-two (52) weeks per year. Historically, there have been periods in which the Facility has been operated two (2) Shifts per day, and it is possible that the Facility could be run three (3) shifts per day. It is also possible that the Facility could be operated six (6) or seven (7) days per week. The Mahoning Valley Railroad (the "Railroad") has been operated to accommodate the schedule of the Facility, and the willingness of the Cuyahoga Valley Railway Company to sell the stock of the Railroad to Summit View, Inc. is based, in part, on the agreement of the Railroad, following the sale of the stock, to continue to tailor its service schedule to the needs of the Facility.
2. The Facility may be operated up to three (3) Shifts per day, up to seven (7) days per week, fifty-two (52) weeks per year. During each Shift, LTV may request service from Railroad by facsimile, email or telephone (a "Request"), which service may consist of Switching Service, Local Service, Intra-Plant Service and/or Ancillary Services. Within two (2) hours after receipt of a Request, Railroad shall provide the necessary crews, power and/or equipment, and commence providing the services requested. Railroad shall be deemed to have "commenced" providing service upon its arrival at the Set-Out/Delivery Tracks, Existing Interchanges or the Facility, as

applicable, with appropriate crew, power and/or equipment. Railroad shall dedicate the necessary crew, power and/or equipment to perform the services set forth in a Request until such services have been completed.

3. As of the date of the Transportation Services Agreement, the Facility is being operated one Shift per day, 7:00 a.m. to 3:00 p.m., Monday through Friday, fifty-two (52) weeks per year. If the schedule of operations at the Facility changes, Railroad shall adjust its service schedule to accommodate the schedule of operations at the Facility, within (i) thirty (30) days after receipt of written notice of the change in schedule if the change is anticipated to be long-term (*i.e.*, more than thirty (30) days), and (ii) five (5) days after receipt of written notice of the change in schedule if the change is anticipated to be short-term (*i.e.*, up to thirty (30) days).

4. Railroad shall use best efforts to provide service as soon as possible following a Request from LTV, and shall diligently complete all services following commencement of such services. For purposes of computing Railroad's on-time performance, the Railroad will be on-time only if both (i) Railroad commences the service within the time frames set forth in this Schedule 4.03(a), and (ii) the service is completed during the business day on which the service is commenced (unless the service in question, by its nature, could not be completed the same day, in which case it shall be completed as soon as practicable).

5. All capitalized terms in this Schedule shall have the meanings ascribed to them in the Transportation Services Agreement, unless such terms are defined herein.

**Schedule 5.01(c)**

**FEES FOR INTRA-PLANT SERVICE**

1. Re-railing of derailed cars or locomotives, and track maintenance and repair: \$30/hour/employee, adjusted annually pursuant to Section 5.02 of the Transportation Services Agreement ("TSA").
2. In-plant switching: the rate shown in the Tariff (as defined in Section 5.01 of the TSA), adjusted annually pursuant to Section 5.02 of the TSA.
3. Special equipment and materials used for intra-plant service will be billed on the invoice at cost plus additives not to exceed fifteen (15) percent.

**Schedule 5.01(d)**

**FEEES FOR ANCILLARY SERVICE**

The actual hourly rate paid by The Mahoning Valley Railway Company to the employees performing the services, multiplied by two and two-tenths (2.20)

Schedule 7.01

<u>NO.</u>	<u>CAR INITIAL</u>	<u>CAR NUMBER</u>
1	MV	900
2	MV	901
3	MV	903
4	MV	904
5	MV	905
6	MV	906
7	MV	907
8	MV	908
9	MV	909
10	MV	910
11	MV	911
12	MV	912
13	MV	913
14	MV	914
15	MV	915
16	MV	916
17	MV	917
18	MV	918
19	MV	919
20	MV	920
21	MV	921
22	MV	922
23	MV	923
24	MV	924
25	MV	925
26	MV	926
27	MV	927
28	MV	928

<u>NO.</u>	<u>CAR INITIAL</u>	<u>CAR NUMBER</u>
29	MV	929
30	MV	930
31	MV	931
32	MV	932
33	MV	933
34	MV	934
35	MV	935
36	MV	936
37	MV	937
38	MV	938
39	MV	940
40	MV	941
41	MV	942
42	MV	943
43	MV	944
44	MV	945
45	MV	946
46	MV	947
47	MV	948
48	MV	949
49	YS	317
50	YS	316
51	YS	3019
52	YS	227
53	YS	202
54	YS	217
55	YS	319