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January 28, 2000

Via Facsimile to 1-614-752-8349

Robert E. Marvin  
Chief, Railroad Division  
Public Utilities Commission of Ohio  
Columbus, Ohio 43215-3793

Re: Case No. A-2687-98-122

Dear Mr. Marvin:

I thank your office for sending me up the file to date. However, I find the documentation is deficient as to the actual cost of materials for the fence installed at the subject property. All that has been provided as to cost of materials is a July 7, 1999 handwritten letter from one Mary L. Pethtel that gives "the estimated cost for fence repairs." The first item, which is also the largest item, is rounded to the sum of "\$1,000" for "barbed wire + electric wire". The PUCO file sent to me has no receipts and no invoices for actual amounts spent on these two sections of fence. Mr. Coates report makes no reference to having obtained receipts and invoices.

Please treat this letter as Plaintiff Ohi-Rail Corporation's Request for Production of Documents for all receipts and invoices that have been submitted as to the actual cost of the materials used in the fence installed at the subject property. Please submit copies of this information by February 7, 2000. If you do not have this documentation, please advise that PUCO will issue a subpoena duces tecum commanding Ms. Pethtel to appear at the Commission hearing with all receipts and invoices that have been submitted as to the actual cost of the materials used in the fence installed at the subject property. If PUCO will not be issuing that subpoena duces tecum, please so advise so that I can have a subpoena duces tecum served upon him.

I thank you for your efficient service to this duty.

Very Truly Yours,

Brendan Delay

BD/maca

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May 5, 2000

Florence Hvizdak  
1528 Township Road 1267  
Amsterdam, Ohio 43903

Re: Case No. A-2687-98-122

Dear Mrs. Hvizdak:

Please find enclosed an attorney Trust Account Check #1149 in the amount of \$1,316, which represents payment by Plaintiff Ohi-Rail Corporation for all actual costs of the materials used in the fence installed at your subject property on both sides of a railroad right-of-way.

This payment extinguishes the above-captioned Complaint pressed by yourself as property owner, and by Mr. Troy Pethel and Mrs. Mary Pethel as occupants of the land.

Very Truly Yours,

Brendan Delay

BD/maca

Enclosure

(5) Any other relevant factors.

(C) The commission may order an action or remedy under division (A) of this section only if comparable fencing exists along or within the abutting landowner's property boundaries perpendicular or parallel to the railroad's property line.

(D) If an owner of land abutting a scenic railway requests the company or person having control or management of the railway to construct and maintain in good repair such a fence along the abutting line of land of the railway, the company or person having control or management of the railway shall do so, and the cost of constructing and maintaining the fence shall be equally shared between the railway and owner of land.

(E) As used in this section, "scenic railway" means a railroad operated not for profit and exclusively as a tourist or historical attraction.

(1998 S 197, eff. 3-9-99; 1977 H 458, eff. 11-3-77; 1953 H 1; GC 8913)

#### 4959.04 Temporary crossings

In the case of a railroad in process of construction or a proposed railroad which passes through enclosed land, the company or person having control of the railroad during its construction shall provide suitable crossings for the owner or occupant of each farm, make and keep in repair fences along the line of the railroad through the enclosed fields, and protect crops growing thereon. When the company or person agrees with the owner of the lands through which a railroad passes that the owner is to build and keep in repair any portion of the fencing, and if such fencing is destroyed or damaged by fire from passing trains or by the elements, the company or person owning or operating the railroad shall rebuild or repair such fence if the property holder demands it. If the company fails to construct a fence after having received written notice to do so from the owner or occupant of lands through which the railroad passes, after thirty days from the time of serving the notice upon the agent of such company nearest such lands, the owner or occupant may proceed to construct it, and the company shall be liable to the person for the cost thereof.

(1998 S 197, eff. 3-9-99; 1953 H 1, eff. 10-1-53; GC 8915)

#### 4959.05 Landowner may construct fence—Repealed

(1998 S 197, eff. 3-9-99; 1953 H 1, eff. 10-1-53; GC 8916)

#### 4959.06 Owner may repair fence—Repealed

(1998 S 197, eff. 3-9-99; 1977 H 458, eff. 11-3-77; 1953 H 1; GC 8917)

#### 4959.07 Exception

Sections 4959.02 to 4959.04 of the Revised Code, relating to fences, do not apply to any case in which compensation for building a fence has been or may be taken into consideration and estimated as a part of the consideration to be paid for the right-of-way, so far as the fence has been or may be settled or paid for. Those sections do not affect, in any manner, any contract or agreement between a railroad company, or person having the control and management of a railroad, and the proprietors or occupants of lands adjoining for the construction or maintenance of fences and cattle guards.

(1998 S 197, eff. 3-9-99; 1953 H 1, eff. 10-1-53; GC 8918)

#### 4959.10 Forfeitures for not complying with chapter

A company or person having the control and management of a railroad, who fails to comply with any provision of this chapter, shall forfeit and pay, for each day the company or person so fails, a sum not exceeding fifty dollars per day, to be recovered in a civil action in the name of the state for the use of the county in which suit is brought.

(1998 S 197, eff. 3-9-99; 1953 H 1, eff. 10-1-53; GC 8920)

#### Section

4961.03	Highway and aerial transportation
4961.10	Appropriation of land to make cha
4961.15	Company may acquire lands
4961.33	Dissenting stockholder may sell sto
4961.34	Court may appoint arbitrators
4961.35	Notice of application
4961.37	Lessor and lessee jointly liable
4961.39	Lease of right of way to be recorde

#### 4961.03 Highway and aerial transportation

##### Library

OJur 3d: 14, Carriers § 53; 79, Railroads § 23, 30

#### 4961.10 Appropriation of land to make cha

##### Notes of Decis

##### 1. In general

This section, requiring the probate court to find that the property and rights of owners along the proposed change will not be unreasonably affected is satisfied by a journal entry finding the allegations of the petition to be

#### 4961.15 Company may acquire lands

##### Notes of Decis

##### 1. In general

The law of reverter of private land upon an abandonment of a public roadway is not applicable to a railroad's private property that is used for railway purposes for a

#### 4961.33 Dissenting stockholder may sell s

##### Librar

OJur 3d: 5A, Alternative Dispute Resolution § 241; 79 Railroads § 31, 141, 163

#### 4961.34 Court may appoint arbitrators

##### Librar

OJur 3d: 5A, Alternative Dispute Resolution § 241; 79 Railroads § 141, 163

#### 4961.35 Notice of application

##### Librar

OJur 3d: 5A, Alternative Dispute Resolution § 241; 79 Railroads § 141, 163

#### 4961.37 Lessor and lessee jointly liable

##### Librar

OJur 3d: 14, Carriers § 255; 39, Employment Relations § 219; 49, Fires § 26; 79, Railroads § 13, 154

v Consolidated Rail Corp., 120 App(3d) 378, 697 N.E.(2d) 1109 (Union 1997).

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#### and Opinions

road Safety Act of 1970, 45 USC 421 to 447, but claims based on absence of adequate warning devices at the railroad crossing are not preempted. *CSX Transp., Inc. v. Easterwood* (U.S.Ga. 1993) 113 S.Ct. 1732, 507 U.S. 678, 123 L.Ed.2d 387.

ferences

#### a right of way at highway intersection

#### and Opinions

A motorist's claim that obstructive vegetation prevented her from seeing the oncoming train until it was too late to avoid a collision is a fact issue to be determined where defendant railroad presents no evidence that it discharged its duty of care and maintained a clear, unobstructed crossing contrary to plaintiff's evidence that includes (1) PUCO reports of obstructive vegetation at the crossing, (2) deposition testimony of the railroad roadmaster responsible for maintaining the crossing that no action was taken upon the reports, and (3) photos of the foliage bordering the crossing. *Elwell v CSX Transportation, Inc.*, No. 96CA006455, 1996 WL 640033 (9th Dist Ct App. Lorain, 11-6-96).

#### 2 4957

#### Crossings

road tracks  
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e

#### ilroad tracks

#### and Opinions

Union R. Co. (Ohio Com.Pl. 1932) 30 Ohio N.P.(N.S.) 129, affirmed 13 Ohio Law Abs. 606.

#### id supports

#### and Opinions

unnecessary interference with access or delay in completing the construction or any claim of negligence or malice or any facts which might bring the improvement within the term "nuisance," is held to be demurrable. *Dowling v. Dayton Union R. Co.* (Ohio Com.Pl. 1932) 30 Ohio N.P.(N.S.) 129, affirmed 13 Ohio Law Abs. 606.

#### 4957.25 Street railway company to share expense

#### Notes of Decisions and Opinions

##### 1. Constitutional issues

GC 8892, 8893 and 8894 (RC 4957.25 and 4957.26), giving a city power to require a street railway to bear a fair share of the city's part of the cost of separating grades where the street railway must go with the street, over or under, is constitutional when construed to mean that if the city and the street railway can not agree on

that amount the ordinance fixing the amount is not a judgment but merely like a creditor making out his bill for suit and leaving to court and jury to determine what is a fair amount. *Northern Ohio Traction & Light Co. v. City of Akron* (Ohio Cir. 1912) 26 Ohio C.D. 644, 23 Ohio C.C.(N.S.) 497, affirmed 91 Ohio St. 382, 110 N.E. 1064, 12 Ohio Law Rep. 293.

### CHAPTER 4959

#### Right of Way Drainage and Fences

##### Section

4959.01	Waterways must be provided
4959.02	Fences: scenic railway's obligations
4959.04	Temporary crossings
4959.05	Landowner may construct fence—Repealed
4959.06	Owner may repair fence—Repealed
4959.07	Exception
4959.10	Forfeitures for not complying with chapter

#### 4959.01 Waterways must be provided

#### Notes of Decisions and Opinions

##### 3. Remedies

In a homeowner's claim for damages due to flooding from a drainage ditch that runs along railroad tracks, summary judgment is granted to the defendant where there is no evidence that the railroad made an unreasonable use of its land in terms of surface water which

accumulated along its tracks or that it acted unreasonably in taking measures to remove weeds and other debris along the tracks. *Schlack v CSX Transportation, Inc.*, No. CA95-09-692, 1996 WL 42333 (12th Dist Ct App. Warren, 2-5-96).

#### 4959.02 Fences: scenic railway's obligations

(A) A company or person having control or management of any railroad except a scenic railway shall construct and maintain in good repair, or otherwise provide for, on each side of the railroad, along the line of the lands of the company owning or operating it, a fence sufficient to turn stock. If, pursuant to section 4907.08 of the Revised Code, the public utilities commission determines that the company or person having control or management of the railroad is in violation of this section, the commission may order the company or person to do any of the following:

- (1) Construct, replace, or repair the fence;
- (2) Provide the landowner with the required materials to construct, replace, or repair the fence;
- (3) Pay the cost of the materials required to construct, replace, or repair the fence.

When the commission directs the company or person having control or management of the railroad to provide the landowner with the required materials under division (A)(2) of this section or to pay the cost of the required materials under division (A)(3) of this section, the landowner is responsible for the labor necessary to construct, replace, or repair the fence. Any fence constructed, replaced, or repaired under this section shall be the same as or comparable to existing fence on the property.

(B) In determining what remedy to order under division (A) of this section, the commission shall consider all of the following:

- (1) The volume of train traffic;
- (2) Train types and speed;
- (3) The cost of fence repair or replacement;
- (4) The accessibility to the railroad right-of-way through the property;