

JACKSON CITY COUNCIL
Regular Session
September 8, 2008
7:00 p.m.

Call to Order..... President Speakman
Pledge of Allegiance..... Mr. Evans
Opening Prayer..... Mr. Wiggins

Roll Call

Approval of Minutes

August 25, 2008

VISITORS

COMMITTEE REPORTS:

- Utility
- Budget & Finance
- Police, Fire & Traffic
- Service
- Railroad
- Building/Recreation
- City Auditor
- Law Director
- Mayor
- Service/Safety Director
- Redistricting Committee

ORDINANCES AND RESOLUTIONS

CORRESPONDENCE

OLD BUSINESS

NEW BUSINESS

ADJOURN

JACKSON CITY COUNCIL

Minutes from
August 25, 2008
7:00 p.m.
Regular Session

Jackson City Council met in regular session on Monday, August 25, 2008 at 7:00 p.m. at the Jackson City Council chambers. President Ron Speakman called the meeting to order. The Pledge of Allegiance was given, led by Mr. Wiggins. The Prayer was given, led by Mr. Wiggins.

A roll call was taken as follows:

- Mr. Evans – present
- Mr. Adams – present
- Mr. Eric Brown – present
- Mr. Smith – present
- Mr. Cary Brown – present
- Mr. Elliott - present
- Mr. Wiggins – present

Mr. Adams made a motion to approve the minutes of August 11, 2008 regular session seconded by Mr. Elliott. In a voice vote, all Council agreed.

VISITORS

Marvin Ross came before council to discuss utilities and ordinances. He started by saying that Marva Colby told them last year that fund balances would be in the red. We lost Meridian, how are we going to recover those funds. Is there a plan in place for future business? They filed bankruptcy and we turned their electric back on, our residents do not get this benefit. Mr. Eric Brown, Mr. Cary Brown and Mr. Heath were here! We have three garbage trucks, we only use two. Water rates are going to go up now and again in 2009. What about our residents on fixed incomes? Is the Apple Festival going to receive a rate increase? What is the city doing in regards to pigeon droppings, this looks bad. He passed pictures of intersection with problems. The mowing laws are not being enforced. The Dave Evans property is not being mowed, none last year. McCarty's on Dickason Street, I was told I was not a resident of the city it was not my concern. We have a mosquito problem, Jackson Tire are storing used tires improperly. Concerned with old cars, there has been one on Grandview for 10 months. The two hour parking is not being enforced. He also feels that Parkview is not a good deal for the seniors, the building needs air conditioning, heating, asbestos removal, this is a real problem. Council members should check their areas and note complaints and problems. 288 Main Street, there are junk and weeks, pigeon problem; they were suppose to fix and place on tax bill. Mr. Sheward needs to do his job. Mr. Cary Brown stated you do not live in the city. Mr. Ross stated no, but I pay utilities and own property within the city. Mr. Cary Brown stated you could have addressed the Mayor, and agreed with some of what Mr. Ross had to say. Mr. Ross stated you were here. Mr. Cary Brown stated you are going to blame me for Meridian. Mr. Ross stated you three are responsible for spending; citizens are tired of your mistakes. Mr. Cary Brown said you should move back to the city and run for Council. Mr. Ross said he would stay where he is at. Mr. Humphreys stated we need to look after our seniors. Mr. Smith stated that Mr. Ross should go view the current senior facility, and noted that he does travel his ward. The service director goes with Council's wishes; he does an admirable job, and feels the mowing has been enforced. The city does not want to mow, people should adhere to the ordinances, and this is a wasted cost to the city. \$150.00 does not cover the cost and with the high foreclosure rate, this creates another problem. Mr. Ross asked how many times he travels his ward. Mr. Smith noted three to four times a week. Mr. Eric Brown reminded Mr. Ross that the previous council worked hard to get you utilities, we went to the commissioners for you and you did not even live in the city. Mr. Ross stated that when Mr. Speakman annexed he put all but four lots in the city. Mr. Humphreys noted that a requisition had been signed in regards to pigeons. Mr. Cary Brown stated that Jackson Tire has broken no laws. Mr. Ross said the EPA would disagree. Mr. Cary Brown said are you trying to put them out of business. Mayor Heath stated we are trying to address some of these problems.

Mr. Smith made a motion to corrected the minutes on page three, to change the paragraph stating spoke to the engineers, noting this is common knowledge, seconded by Mr. Eric Brown.

COMMITTEE REPORTS

UTILITY

Mr. Eric Brown reported that a meeting had been held at 6:00 tonight, the committee was taking a first look at the water rate study, they have ask Mr. Sheward to invite Jones & Henry to visit Council. If there are any questions please forward to Mr. Sheward and he will then forward to Jones & Henry. The ordinance for the garbage rates should only be a first reading.

BUDGET & FINANCE – No report

Mr. Adams stated a meeting will be held on September 3, 2008 at 6:00 p.m. to discuss the 2009 budget.

POLICE, FIRE & TRAFFIC – No Report

Mr. Evans stated he canceled his meeting for tonight and will be rescheduling. Mr. Sheward suggested a method needs to be created on contacting members and the media to make them aware. Mr. Speakman recommended the Council clerk notify members and notify all parties, media and Lyn.

SERVICE - No Report

RAILROAD - No report

BUILDING/RECREATION - No report

CITY AUDITOR

Mr. Humphreys announced an Investment Board meeting will be held on August 28, 2008 at 9:00 a.m. in the Mayor's office.

LAW DIRECTOR

Mr. Detty reported that last Friday was answer day to file a response, there is a copy on top to dismiss the amended complaint. Also there are signed releases from the Police chief and assistant police chief. Ordinance No. 79-08 should be 78-08, there are two more ordinances relating to the garbage and Horizon antennas. Mr. Smith asked if the Horizon ordinance should go before the committee first. Mr. Speakman suggested that it go before the committee after the first reading. Mr. Detty stated that Tom Woltz should also attend. Mr. Sheward stated he knows a lot, they are the same as that are there, and they will be painted red, this is a way for the city to maintain the inactive tower. Mr. Evans asked about the deleted records. Mr. Detty stated he is working with Mr. Woltz, some progress has been made.

MAYOR

Mayor Heath reported that last Friday they met with AMP Ohio, Greg Slone, outlined the situation, this is a set back for the community. We have asked for \$2 million no interest loan over a 30 month period, this would cover 50% of lost interest. Mr. Slone was very sympathetic, he will speak to others. We will return to talk before the meeting with the board. We should know more by the end of the week. There have been questions about the utility office role, this was noticed by there office after the first month, emails were sent to the prior administration, they thought this was due to the new contract. Mr. Smith asked when. Mayor Heath stated October 17, 2007, not really sure how much communication there was, this was about the same time Mr. Humphreys noticed it on the annual reports. Mayor Heath stated that the recreation department will be having basketball, it will be Monday through Thursday at the field house, and this is for Jackson City School residents. YMCA will also be having there program, would like more competitive league, trying to coordinate programs. We did lose \$10,000 from the schools, we still maintain \$8,000-\$10,000, with none for Catch program, and next year the recreation director and pool manager will be one. He discussed a map that he passed to Council members for proposed use of the Main Street property for ball fields. We could use for baseball and soccer.

SAFETY/SERVICE DIRECTOR

Mr. Sheward stated that we had mowed 20 lots in August, we have missed some but we do respond to calls from citizens. We are trying to work the St. Rt. 93 project into a grant, we will ask for approval at the next meeting. Fuel adjustments on the electric continue to increase, we should look at the base rate. These number are from 1992, cost have more than doubled. He reported that with the help of Lyn, could possibly receive a \$40,000 grant for dumpster/truck, we have a significant number of injuries. We would need a \$10,000 match and they want to see safety program together within 6 months, this is doable and we are pursuing. Mr. Eric Brown will this grant help reduce the Workers Comp. rate. Mr. Sheward was not sure, but with the new truck/dumpsters we will have fewer injuries. Two technicians from BWC followed our trucks last week, they had suggestions. The required enclosures cause a lot of injuries; they recommend doing away with or making larger with no other items in the area. Would like to bring one of the trucks here to use for a day. Enclosed find the police breakdown for the month. Mr. Eric Brown reported that Pike Sanitation has been doing business within the city and does not have paid for franchise fee. Mr. Evans stated that several years ago the city subcontracted the mowing, could bid on square footage and add 5% for administrative fee. Mr. Sheward stated that this money would not be collected immediately but we would have to pay immediately. Mr. Evans stated we are mowing too much land; we need to be more aggressive. Mr. Smith asked about the creek cleaning. Mr. Sheward stated this has been discussed; part will be done in house. We are really busy with the sewer lining project and have lost our summer help.

REDISTRICTING COMMITTEE

Mr. Evans reported that Mr. Woltz is tied up until September.

ORDINANCES AND RESOLUTIONS

ORDINANCE NO. 66-08

AN ORDINANCE AUTHORIZING WAGE RATES FOR THE POSITION OF CHIEF OF POLICE AND ASSISTANT CHIEF OF POLICE, AND DECLARING AN EMERGENCY.

Third Reading

Mr. Eric Brown made a motion to remove from the table, seconded by Mr. Elliott. In a voice vote, all Council agreed.

In a roll call vote to adopt the ordinance, Council voted as follows:

Mr. Evans – yes
Mr. Adams – yes
Mr. Eric Brown – yes
Mr. Smith – yes
Mr. Cary Brown – yes
Mr. Elliott – yes
Mr. Wiggins – yes

ORDINANCE NO. 66-08 DULY ADOPTED

ORDINANCE NO. 69-08

AN ORDINANCE APPROVING ADDITIONAL APPROPRIATIONS IN THE RAILROAD FUND, AND DECLARING AN EMERGENCY.

Third Reading

In a roll call vote to adopt the ordinance, Council voted as follows:

Mr. Evans – yes
Mr. Adams – yes
Mr. Eric Brown – yes

Mr. Smith – yes
Mr. Cary Brown – yes
Mr. Elliott – yes
Mr. Wiggins – yes

ORDINANCE NO. 69-08 DULY ADOPTED

ORDINANCE NO. 77-08

AN ORDINANCE APPROVING ADDITIONAL APPROPRIATIONS IN THE POOL NATURE
WORKS GRANT FUND, AND DECLARING AN EMERGENCY.

First Reading

Mr. Eric Brown made a motion to adopt the ordinance, seconded by Mr. Adams. In a voice vote, all
Council agreed.

Mr. Evans made a motion to suspend the rules, seconded by Mr. Smith. In a roll call vote, Council voted as
follows:

Mr. Evans – yes
Mr. Adams – yes
Mr. Eric Brown – yes
Mr. Smith – yes
Mr. Cary Brown – yes
Mr. Elliott – yes
Mr. Wiggins – yes

In a roll call vote to adopt the ordinance, Council voted as follows:

Mr. Evans – yes
Mr. Adams – yes
Mr. Eric Brown – yes
Mr. Smith – yes
Mr. Cary Brown – yes
Mr. Elliott – yes
Mr. Wiggins – yes

ORDINANCE NO. 77-08 DULY ADOPTED

ORDINANCE NO. 78-08

AN ORDINANCE REPEALING ORDINANCE NO. 19-01, SECTION FOUR, AND DECLARING AN
EMERGENCY.

First Reading

Mr. Eric Brown made a motion to adopt the ordinance, seconded by Mr. Adams. In a voice vote, all
Council agreed.

Mr. Adams made a motion to suspend the rules, seconded by Mr. Eric Brown. In a roll call vote, Council
voted as follows:

Mr. Evans – yes
Mr. Adams – yes
Mr. Eric Brown – yes
Mr. Smith – yes
Mr. Cary Brown – yes
Mr. Elliott – yes
Mr. Wiggins – yes

In a roll call vote to adopt the ordinance, Council voted as follows:

Mr. Evans – yes
Mr. Adams – yes
Mr. Eric Brown – yes
Mr. Smith – yes
Mr. Cary Brown – yes
Mr. Elliott – yes
Mr. Wiggins – yes

ORDINANCE NO. 78-08 DULY ADOPTED

ORDINANCE NO. 79-08

AN ORDINANCE AMENDING JACKSON CODIFIED ORDINANCE SECTION 945-03, COLLECTION RATES FOR RESIDENCES, ORDINANCE AMENDING JACKSON CODIFIED ORDINANCE SECTION 945-.031, SENIOR CITIZEN DISCOUNT RATE FOR GARBAGE COLLECTION, AND AMENDING JACKSON CODIFIED ORDINANCE SECTION 945.04, COLLECTION RATES FOR BUSINESSES.

First Reading

Mr. Eric Brown made a motion to adopt the ordinance, seconded by Mr. Adams. In a voice vote, all Council agreed.

Mr. Humphreys asked about the removal of the senior citizen discount. Mr. Adams stated he would like this to be a first reading. Mr. Eric Brown stated the original ordinance presented increases the senior citizens by \$2.00, asking for a first reading and amend at the next meeting. Mayor Heath stated the senior rate was set by a separate ordinance. Mr. Detty stated the cost is now \$7.50; it is drafted to “all residents”. Mr. Speakman stated the senior rate is for those 62 and older. Mr. Eric Brown stated someone needed to talk to Karen and address at the next meeting. Mr. Smith stated he had a major concern, not the end of this, newer equipment, new trucks, containers. He hopes we are looking long range, and asked if recycling is contributing to this. Mr. Eric Brown stated there are no new people on the payroll; the committee looked at \$250,000 with a five year payback. There will be a shortfall next year, looking at a new front load unit and with attrition this could become a one man operation. Mr. Evans stated he missed the meeting, ask about the per bag issue and the container cost. Mr. Eric Brown stated this idea sounds great, but what about people who set out trash without a sticker. Mr. Evans stated he understands the concerns, but other cities have done this and it works. President Speakman stated the members had two weeks to review and this constituted a first reading.

ORDINANCE NO. 80-08

AN ORDINANCE AUTHORIZING THE CITY TO ENTER INTO A SITE LEASE AGREEMENT BETWEEN THE CITY OF JACKSON, OHIO, AND HORIZON PERSONAL COMMUNICATIONS, INC. (“HORIZON PCS”), FOR A LEASE TO INSTALL ANTEENAS FOR WIRELESS COMMUNICATION ON A PORTION OF THE CITY’S APPLE WATER TOWER, AND DECLARING AN EMERGENCY.

First Reading

Mr. Eric Brown made a motion to adopt the ordinance, seconded by Mr. Adams. In a voice vote, all Council agreed.

President Speakman referred this ordinance to the building committee for review.

RESOLUTION NO. 20-08

A RESOLUTION AUTHORIZING A THEN AND NOW CERTIFICATE, AND DECLARING AN EMERGENCY.

Third Reading

Resolution dies, due to lack of motion to remove from the table.

Mr. Speakman noted that we are almost nine months into the year, the committees are functioning well and Council is doing a super job.

CORRESPONDENCE

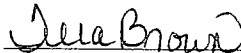
Received a request for liquor license (see attached). Mr. Evans made a motion to take no action, seconded by MR. Eric Brown.

OLD BUSINESS - None

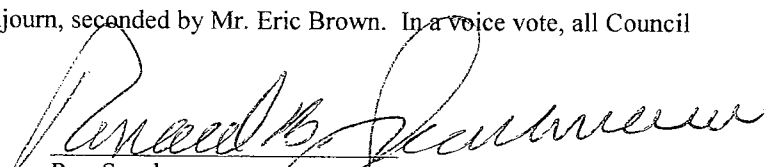
NEW BUSINESS - None

ADJOURN

Mr. Smith made a motion to adjourn, seconded by Mr. Eric Brown. In a voice vote, all Council agreed. Council adjourned at 8:38 p.m.



Tera Brown
Clerk
Date 9-9-08



Ron Speakman
Council President
Date 9-9-08

Criminal

Minor Misdemeanor Charge	Totals	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Cat Violation	0												
Disorderly By Insult/Taunt	8				2	3	1	2					
Disorderly By Intoxication	154	5	12	30	20	26	30	31					
Disorderly By Fighting	52	15	7	4	7	7	6	6					
Disorderly By Hindering	0												
Disorderly By Unreas. Noise	7	1	1	1	2			2					
Dog Violation	5	1	2	1				1					
Loitering	0												
Loud Stereo	0												
Open Container/Cons. In M.V.	1			1									
Open Container in public	3			1			1	1					
Possession Of Marijuana	16	2		6	3	2		3					
Skateboarding on Street						1							

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

US RAIL CORPORATION)	Case No. 2:08-cv-00764
)	
Plaintiff,)	Judge Holschuh
)	
vs.)	Magistrate Judge Kemp
)	
CIT GROUP, INC., ET AL.)	
)	
Defendants.)	
)	
)	

**MOTION OF DEFENDANT CITY OF JACKSON, OHIO
TO DISMISS THIRD AMENDED COMPLAINT**

Defendant City of Jackson, Ohio ("Jackson") moves this Court pursuant to Fed.R.Civ.P. 12(b)(1) for an Order dismissing Plaintiff's Third Amended Complaint ("Complaint") in its entirety for lack of subject matter jurisdiction on the grounds that the claims asserted against Defendants CIT Group, Inc. ("CIT") and Jackson do not arise under a federal statute regulating commerce pursuant to 28 U.S.C. § 1337. Alternatively, Jackson moves this Court for an Order dismissing Plaintiff's claims against it because, assuming arguendo this Court has original jurisdiction over Plaintiff's claim against CIT, there is no supplemental jurisdiction over Plaintiff's state law claims against Jackson pursuant to 28 U.S.C. § 1367(a) as such claims do not form part of the same case or controversy as the claims being asserted against CIT.

A memorandum in support of Jackson's motion is attached.

Respectfully submitted,

/s/ Stephen C. Fitch

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Attorneys for Defendant

CITY OF JACKSON, OHIO

MEMORANDUM IN SUPPORT

I. Introduction.

The Third Amended Complaint ("Complaint") filed by US Rail in this action alleges that in 2004 Jackson entered into a Short Line Lease Agreement ("Agreement") with the Great Miami & Scioto Railway Co. ("Great Miami") for the operation of a rail line owned by Jackson.¹ Complaint at ¶ 6. A copy of the Agreement between Jackson and Great Miami is attached to the Complaint.² The Complaint further alleges that Great Miami's rights under the Agreement subsequently inured to US Rail. Complaint at ¶ 7. The Complaint further alleges that on July 31, 2006, a rail car allegedly owned and/or leased by CIT derailed near Jackson, Ohio causing property damage to the rail line leased to US Rail under the Agreement. Complaint at ¶¶ 17-24.

As a result of the train derailment, US Rail filed its initial Complaint against CIT in the U.S. District Court for the Northern District of Ohio. US Rail subsequently filed Second and Third Amended Complaints adding Jackson as a party. On July 21, 2008, the Northern District entered an order transferring this action to this Court. (Docket No. 22).

In its Third Amended Complaint, US Rail asserts the following causes of action: (1) negligence against CIT; (2) declaratory judgment under Ohio Revised Code § 2721.03 against Jackson; and (3) breach of contract against Jackson. In its first claim, US Rail alleges that CIT had a duty to maintain the rail car at issue and that its failure to properly maintain the rail car resulted in the derailment and property damage. For its second claim, US Rail seeks a declaratory judgment under R.C. § 2721.03 that US Rail has satisfied its maintenance requirements under the Agreement entered into between Jackson and Great Miami and allegedly

¹ As set forth below, for purposes of this motion, the allegations on the Complaint are accepted as true.

² Because the copy of the Agreement attached to the Complaint is partially illegible, Jackson has attached a legible copy to this motion.

subsequently acquired by US Rail. In its third claim, US Rail alleges that Jackson breached the Agreement by failing to use its best efforts to develop funds to repair the railway.

II. Standard for Dismissal Under Federal Civil Rule 12(b)(1).

“In considering whether to dismiss a Complaint under Fed.R.Civ.P. 12(b)(1) due to the lack of subject matter jurisdiction, the plaintiff bears the burden of proving the existence of subject matter jurisdiction.” *Farmer v. Bur. of Alcohol, Tobacco, Firearms & Explosives* (S.D. Ohio 2006), 456 F.Supp.2d 893, 898; see also *United Govt. Sec. Officers of Am. v. Akal Sec., Inc.* (S.D. Ohio 2006), 475 F.Supp.2d 732, 736. A Rule 12(b)(1) motion to dismiss can be based on a “facial” attack or a “factual” attack upon the complaint. *Id.* If the motion to dismiss attacks the assertion of subject matter jurisdiction raised on the face of the complaint, the Court accepts the complaint’s allegations as true and construes them in the light most favorable to the non-moving party. *Id.* If, however, the motion attacks the factual basis for subject matter jurisdiction, the Court is empowered to weigh the evidence and no presumptions apply as to the truthfulness of the plaintiff’s allegations. *Id.* (internal quotations omitted.)

In the matter *sub judice*, Jackson makes a facial attack upon US Rail’s assertion of subject matter jurisdiction.

III. Argument.

A. The Court Does Not Have Subject Matter Jurisdiction Over This Lawsuit Under 28 U.S.C. § 1337(a) Because Plaintiff’s Claims Do Not Arise Under Federal Law.

US Rail bears the burden of establishing the existence of subject matter jurisdiction. In its Complaint, US Rail alleges that federal jurisdiction exists under 28 U.S.C. § 1337(a). Section 1337(a) provides, in relevant part, as follows:

- (a) The district courts shall have original jurisdiction of any civil action or proceeding **arising under** any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: *Provided, however,* That the district courts shall have original jurisdiction of an action brought under section 11706 or 14706 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds \$10,000, exclusive of interest and costs.

(Italics in original and emphasis added). “Arising under” for purposes of Section 1337(a) is interpreted similarly to the analogous “arising under” language in 28 U.S.C. § 1331. *Ford Motor Co. v. Transp. Indem. Co.* (C.A.6, 1986), 795 F.2d 538, 543; *Eickhof Constr. Co. v. Great N. Ry Co.* (D.C. Minn. 1968), 291 F.Supp. 44, 46 (holding that “[i]t is generally assumed that the phrase ‘arising under’ in § 1337 is to be given the same breadth and limit as the synonymous phrase of § 1331 governing general federal question jurisdiction”).

In determining whether an action “arises under” federal law, a court must look initially to the plaintiff’s complaint. *Zimmerman v. Conrail* (D.C.N.Y. 1982), 550 F.Supp. 84, 85, citing *Gully v. First Natl. Bank* (1936), 299 U.S. 109, 57 S.Ct. 96; see also *Eickhof* at 47 (holding that “[i]t is singularly pertinent to the case at hand to know that the basis for jurisdiction must appear from the well pleaded facts of the complaint standing alone and unaided by anticipated defenses, the answer, or the petition for removal”). “If plaintiff chooses to rely on state law as the basis for its claim, then the case cannot be said to arise under federal law even if plaintiff could have relied on federal law instead. *Id.*, citing *Great N. Ry v. Alexander* (1918), 246 U.S. 282, 38 S.Ct. 237, 239; see also *Russo v. Kirby* (C.A.2, 1971), 453 F.2d 548, 551 (holding that “[j]urisdiction under § 1337 does not attach on the bare assertion that a right under an act regulating commerce is infringed * * * [f]acts must be alleged to show that federal law in the particular case *creates a duty or remedy*”) (emphasis added).

An action will arise under a statute regulating commerce, therefore, if a federal right created by the statute is essential to the cause of action. *Ford Motor Co.* at 544. Stated otherwise, “[t]o give rise to Federal jurisdiction under § 1337 * * * the basis of the action must concern the validity, construction or enforcement of a statute regulating commerce.” *Eickhof* at 46, citing *Adams v. Internatl. Brotherhood of Boilermakers* (C.A.10, 1959) 262 F.2d 835, 839. The mere fact that a federal law regulating commerce may be tangentially related to a cause of action is insufficient to satisfy 28 U.S.C. § 1337(a). *Zimmerman* at 85-86.

With respect to the validity of US Rail’s assertion of subject matter jurisdiction in the Complaint, the issue is whether a federal right created by 49 U.S.C. § 10101, et seq. is essential to the causes of action against CIT and Jackson. Other than making a blanket assertion in the Complaint that its action against CIT and Jackson arises under the “interstate commerce act,” 49 U.S.C. § 10101, et seq. (now the Interstate Commerce Commission Termination Act or “ICCTA”), US Rail altogether fails to identify any rights, duties and/or remedies created by this statute which give rise to its causes of action. Indeed, the Complaint fails to cite to any particular section of 49 U.S.C. § 10101, et seq. in support of Plaintiff’s assertion that its claims arise under federal law. The following analysis demonstrates that US Rail’s claims against CIT and Jackson do not arise under the ICCTA and, therefore, that this Court does not have subject matter jurisdiction over this lawsuit under 28 U.S.C. § 1337(a).

“The [ICCTA] was enacted to deregulate the railroad industry by significantly reducing state and local regulatory authority over railroads and granting the United States Surface Transportation Board (“STB”) exclusive jurisdiction over most railroad matters.” *In re Metropolitan Transp. Auth.* (N.Y.A.D. 2006), 32 A.D. 943, 823 N.Y.S.2d 88; see also *Rushing v. Kansas City S. Ry Co.* (S.D. Miss. 2001), 194 F.Supp.2d 493, 499 (stating that “the goal of

Congress in enacting the ICCTA, was to foster competition while deregulating the railroad industry”). In furtherance of its intended purpose of reducing state and local regulation of railroads, the jurisdiction section of the ICCTA grants the STB exclusive jurisdiction over nearly all matters of rail regulation. *Maynard v. CSX Transp., Inc.* (E.D. Ky. 2004), 360 F.Supp.2d 836, 839. Specifically, 49 U.S.C. § 10501(b) provides that the jurisdiction of the STB over:

(1) transportation by rail carriers, and the remedies provided in this part 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, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

See 49 U.S.C. § 10501(b).

In addition to this STB exclusive jurisdiction provision, it has been held by some courts that Section 11704 of ICCTA also provides a private cause of action in federal district court for damages resulting from direct statutory violations of the ICCTA by “rail carriers.” See, e.g., *Pejepscot Indust. Park, Inc. v. Maine Cent. R.R. Co.* (C.A.1, 2000), 215 F.3d 195 (claim that unlawful refusal to provide rail service violates 49 U.S.C. § 1101(a) of ICCTA); *Rymes Heating Oils, Inc. v. Springfield Terminal R. Co.* (C.A.1, 2004), 358 F.3d 82. Other courts, however, have refused to recognize such private causes of action. See *DeBruce Grain, Inc. v. Union Pac. RR.* (W.D. Mo. 1997), 983 F.Supp. 1280 (holding district courts have no jurisdiction over § 1101(a) damages claims brought pursuant to § 11704(b); *Flynn v. Burlington N. Santa Fe Corp.* (E.D. Wash. 2000), 98 F.Supp.2d 1186 (same).

Sections 11704(b) and (c)(1) of the ICCTA provide, in relevant part, as follows:

- (b) A **rail carrier** providing transportation subject to the jurisdiction of the Board under this part is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this part. * * *
- (c)(1) A person may file a complaint with the Board under section 11701(b) of this title or bring a civil action under subsection (b) of this section to enforce liability against a **rail carrier** providing transportation subject to the jurisdiction of the Board under this part.

49 U.S.C. § 11704 (Emphasis added.) Clearly, these provisions contemplate civil actions against “rail carriers” for statutory violations of the ICCTA. Stated otherwise, it is clear from Section 11704 that in order to be liable for statutory violations of the ICCTA falling under the jurisdiction of the STB or potentially a court, one must be a “rail carrier providing transportation subject to the jurisdiction of the Board.” With respect to the claims set forth in US Rail’s Complaint, therefore, subject matter jurisdiction turns on whether CIT and/or Jackson are “rail carriers” as defined under the statute.

Under Section 10102(5) of ICCTA, a “rail carrier” is defined as “a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation.” 49 U.S.C. § 10102(5). In construing this definition, courts first determine whether a party is a “common carrier” as that term is used in the statute. See, e.g., *New York Susquehanna and W. Ry Corp. v. Jackson* (C.A.3, 2007), 500 F.3d 238, 250 (holding that “only common carriers fit the [ICCTA’s] definition of ‘rail carrier’”). The term “common carrier” is not defined in the ICCTA. *Id.* Accordingly, courts rely on the general definition of the term “common carrier” which is “[a] carrier that is required by law to transport passengers or freight, without refusal, if the approved fare or charge is paid”. *Id.*, citing BLACK’S LAW DICTIONARY 205 (7th ed. 1999).

According to US Rail's Complaint, "[CIT] owns numerous rail cars that sometimes utilize the railway leased to US Rail by [Jackson]" and "[CIT's] rail cars are used to transport goods in the national railway system to and from customers located along US Rail's railway located in Jackson, Ohio." Complaint at ¶¶ 8-9. Nowhere is it alleged that CIT is a "rail carrier" or a "common carrier" under the ICCTA. Similarly, there are no allegations in the Complaint that Jackson is a "rail carrier" or a "common carrier" providing railroad transportation for compensation under the ICCTA. Where, as here, it is clear from the face of the Complaint that neither CIT nor Jackson are "rail carriers" under the ICCTA, it cannot reasonably be argued that US Rail's claims against the Defendants arise under this federal statute. Consequently, this Court does not have subject matter jurisdiction under 28 U.S.C. § 1337(a), and this case should be dismissed in its entirety.

B. Alternatively, Even If The Court Has Jurisdiction Over US Rail's Negligence Claim Against CIT, The Court Does Not Have Supplemental Jurisdiction Over The State Law Claims Against Jackson Under 28 U.S.C. § 1367(a).

It is beyond dispute that US Rail's claims against Jackson for a declaratory judgment under R.C. 2721.03 and for common law breach of contract are state law claims. Assuming arguendo this Court has original jurisdiction over US Rail's negligence claim against CIT under 28 U.S.C. § 1337(a) as alleged in the Complaint, the Court does not have supplemental jurisdiction over the state law claims against Jackson because those claims do not arise out of a common nucleus of operative facts.

Supplemental jurisdiction is governed by 28 U.S.C. § 1367(a) which provides, in relevant part, as follows:

- (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original

jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

28 U.S.C.A. § 1367(a). “Supplemental jurisdiction serves to moderate between the restrictions imposed by the doctrine of limited jurisdiction and the more expansive principle that combining federal and state law claims can serve notions of judicial economy and fairness.” *Harris v. City of Circleville* (S.D. Ohio 2005), 2005 WL 1793841 at *2. Section 1367(b) imposes limitations on the exercise of supplemental jurisdiction when the District Court’s original jurisdiction is based upon diversity of citizenship. Section 1367(b) is inapplicable here because there is no complete diversity of citizenship between the parties.

“Supplemental jurisdiction * * * allows a plaintiff to include claims over which a federal court would not normally have jurisdiction provided that that plaintiff’s complaint properly invokes the district court’s jurisdiction and that the other claims: ‘are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.’” *Voyticky v. Village of Timberlake, Ohio* (C.A.6, 2005), 412 F.3d 669, 675. The United States Supreme Court has held that a federal court may exercise jurisdiction over a state law claim only if the federal and state claims derive from a “common nucleus of operative facts.” *Harris* at *2, citing *United Mine Workers v. Gibbs* (1966), 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218. Moreover, “the federal claims must have substance sufficient to confer subject matter jurisdiction on the court” and the plaintiff’s claims must be “such that he would ordinarily be expected to try them all in one judicial proceeding.” *Id.* “The decision to exercise supplemental jurisdiction is discretionary and includes considerations of such factors as judicial economy, convenience, and fairness to the litigants.” *Id.*, citing *Kauffman v. Allied Signal, Inc. Autolite Div.* (C.A. 6, 1992), 970 F.2d 178, 187.

To the extent it is determined that US Rail's negligence claim against CIT arises under federal law, the negligence claim against CIT and the state law claims for declaratory judgment and breach of contract against Jackson do not derive from a common nucleus of operative facts. With respect to US Rail's negligence claim against CIT, the operative facts will encompass whether CIT had a duty to maintain the rail car at issue, whether CIT breached that duty, whether CIT's breach caused the rail car derailment, and whether US Rail suffered damages as a result of the rail car derailment and, if so, to what extent.

There are no similarities between the facts US Rail will be required to establish to sustain its negligence claim against CIT and the operative facts at issue relative to US Rail's state law declaratory judgment and breach of contract claims against Jackson. Indeed, none of the aforementioned operative facts relative to US Rail's negligence claim against CIT will be at issue in determining whether US Rail "has satisfied all maintenance requirements under the [Agreement]" (Complaint at ¶ 28) or whether Jackson somehow has failed to fulfill its alleged obligation under the Agreement to "use its best efforts in the development of grants and loan requests as needed." (Agreement at Item 7). The facts underlying the claims being asserted against CIT focus on the conduct of CIT as it relates to the derailment. The facts underlying the claims against Jackson focus on the actions or inactions of US Rail and Jackson as it relates to their obligations under the Agreement. There is no "common nucleus of operative facts" which compels or supports the exercise of supplemental jurisdiction by the Court over US Rail's state law claims against Jackson.

Given the lack of similarities between the operative facts related to US Rail's negligence claim against CIT and its state law claims against Jackson, it cannot reasonably be argued that US Rail would ordinarily be expected to try all of its claims in one judicial proceeding. *Harris* at

*2. Moreover, to require Jackson to litigate US Rail's factually unrelated state law claims in this Court rather than in the appropriate state court in Jackson County, Ohio would be both logistically and financially unfair and inconvenient to Jackson and would not serve the interest of judicial economy.

IV. Conclusion.

It is clear from the face of US Rail's Complaint that neither CIT nor Jackson is a "rail carrier" subject to liability in a civil action for violations of the ICCTA. Therefore, US Rail's claims against CIT and Jackson for negligence, declaratory judgment, and breach of contract cannot arise under the ICCTA and, accordingly, this Court lacks subject matter jurisdiction over this matter under 28 U.S.C. § 1337(a). As a result, this lawsuit should be dismissed in its entirety. In the alternative, if the Court determines that it has original jurisdiction over US Rail's negligence claim against CIT, supplemental jurisdiction under 28 U.S.C. § 1367(a) over the state law claims against Jackson do not lie because the claims against CIT and Jackson do not derive from a common nucleus of operative facts. Therefore, US Rail's state law claims against Jackson should be dismissed.

Respectfully submitted,

/s/ Stephen C. Fitch

Stephen C. Fitch (0022322) (Trial Attorney)

Clint B. Charnes (0082913)

Chester, Willcox & Saxbe LLP

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Columbus, Ohio 43215-4213

Telephone: (614) 221-4000

Facsimile: (614) 221-4012

E-Mail: sfitch@cwslaw.com

ccharnes@cwslaw.com

Attorneys for Defendant

CITY OF JACKSON, OHIO

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Motion of Defendant City of Jackson, Ohio to Dismiss Third Amended Complaint* has been served by the Court's CM/ECF system this 22nd day of August, 2008 upon:

Anthony J. Calamunci, Esq.
Amy L. Butler, Esq.
Roetzel & Andress, LPA
One SeaGate, Suite 1700
Toledo, Ohio 43604
Attorneys for Plaintiff

Donald E. Theis, Esq.
Baran, Piper, Tarkowsky, Fitzgerald
& Theis Co., L.P.A.
1620 Fifth Third Center
608 Madison Avenue
Toledo, Ohio 43604
*Attorney for Defendant
CIT Group, Inc.*

/s/ Stephen C. Fitch
Stephen C. Fitch

SHORT LINE LEASE AGREEMENT

This Short Line Lease Agreement ("Agreement") is made between the City of Jackson, Ohio (the "City"), an Ohio Municipal Corporation, and The Great Miami & Scioto Railway Company (the "Railroad"), an Ohio corporation, in Jackson County, Ohio, on the date indicated below, in light of the following circumstances:

- A. The City owns rail properties acquired from the Baltimore and Ohio Railroad Company and Chesapeake and Ohio Railway Company (BO/CO) (now known as CSX) as follows:
- (i) From Mile Post 32.75 near Firebrick, Ohio to Mile Post 4.64 near Wellston, Ohio;
 - (ii) Thence from Mile Post 4.64 near Wellston, Ohio to Mile Post 0.00 at Hamden, Ohio;
 - (iii) Thence from Mile Post 127.8 near Hamden, Ohio to Mile Post 112.3 at West Junction, Ohio;
 - (iv) Thence from Mile Post 95.5 at West Junction, Ohio to Mile Post 91.6 at RA Junction near Vauces Yard on the north-south main line of the Baltimore and Ohio and Chesapeake and Ohio railroads;
 - (v) Thence from Mile Post 127.71 near Hamden, Vinton County, Ohio on the CSX Main Line, to Mile Post 136.71 near Red Diamond, Vinton County, Ohio.

The property described above shall hereinafter be called "the Short Line".

- B. The City desires to lease and assign to the Railroad all its rights and interests to operate on the CSX line from RA Junction to Vauces Yard as said rights and interests are set forth in a trackage rights agreement between the City and CSX.
- C. The City desires to enter into a contractual arrangement with the Railroad to operate its Short Line Railroad.

Therefore, in consideration of their mutual promises and other valuable consideration, the parties agree as follows:

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1. DEFINITIONS:

- a. "Short Line Properties" shall mean all rail properties on the Short Line acquired by the City, including but not limited to, land, track and structures, BUT EXCLUDING the assets described in Exhibit A attached hereto.
- b. "Freight Service" shall mean all aspects of a rail freight business on the Short Line, including but not limited to handling all rail freight traffic using the Short Line Properties, whether originating or terminating on these Properties, interchanging traffic with other rail carriers, advertising for customers, scheduling traffic, billing, collecting accounts receivable, performing customer service, and the like.
- c. "Closing Date" shall be the date this contract is signed by both contracting parties: "City and Railroad".

2. LEASE OF PROPERTIES:

The City hereby leases the Short Line Properties to the Railroad, and the Railroad hereby leases the Short Line Properties from the City, for the term of this Agreement, subject to the provisions set forth in this Agreement. During the term of this Agreement, the Railroad shall have the sole and exclusive right to operate a Freight Service using the Short Line Properties.

The City hereby leases and assigns to the Railroad all the City's rights and interests to operate on the CSX line from RA Junction to Vauces Yard as such rights and interests are set forth in a trackage rights agreement between the City and CSX.

3. TERM OF AGREEMENT:

The term of this Agreement shall begin on April 30, 2004 at 11:59 p.m., and shall expire at 11:59 p.m. on April 30, 2014. This Agreement shall be for a term of 10 years. At the end of the 10 year term, and each successive 10 year term, this Agreement shall automatically renew itself for an additional 10 year period unless sooner terminated pursuant to paragraph 4 below.

4. TERMINATION OF AGREEMENT:

- a. Termination Without Cause. The Railroad may at anytime terminate this Agreement without cause by delivering a written notice to terminate to the City at its Notice Address, at least twelve months before the effective date of termination.
- b. Termination With Cause. The City may terminate this Agreement forthwith by delivering a written notice of immediate termination of this Agreement to the Railroad at its Notice Address, upon the occurrence of either of the following events:

- i. The Railroad fails to make a Rental Payment due under this Agreement within thirty days after the due date, provided that the City delivers to the Railroad written notice of failure within twenty-one (21) days after that due date; or
- ii. The Railroad fails to cure any breach of its obligations under this Agreement within sixty (60) days after the City delivers to the Railroad written notice of Breach.

5. RENTAL PAYMENTS:

- a. Rental Payments. The Railroad shall pay Rental Payments to the City on the fifteenth day of each month throughout the Term of this Agreement. The Rental Payments shall be in the amount of 11% of freight revenue from the preceding month. All Rental Payments received by the City shall be placed into a fund that shall be used for Railroad purposes only. The moneys placed in the fund may be used for economic rail development, repayment of rehabilitation loans, major repairs, and railroad track maintenance. The City shall administer the fund with consultation and assistance from the Railroad.
- b. AluChem Fund. In addition to the above mentioned Rental Payment, the Railroad shall pay the City the sum of Fifty-nine and 21/100 Dollars (\$59.21) per car on all Railroad traffic which goes in and out of the AluChem facility located near Jackson, Ohio. These payments shall be due on the fifteenth day of the month for revenue rail traffic in or out of the AluChem Facility for the preceding month. This per car payment shall increase at a rate of Four Percent (4%) per year beginning January 1, 2005. All moneys received shall be placed in a fund to be called the AluChem Fund. The AluChem Fund shall be used for track maintenance or repair of track used by AluChem rail traffic. This shall include rail track from the AluChem Facility to Jackson, Jackson to Hamden, the Hamden Yard and Wye, and Hamden to RA Junction in Richmond Dale, Ohio. For purposes of the AluChem Fund only, track maintenance shall be limited to track, track-related material, and contractor services. Upon request from the Railroad, the City shall disburse funds from the AluChem Fund as payment directly to the supplier of such goods or services for such purposes. Both the Railroad and the City acknowledge that neither party fully adhered to the AluChem fee provision in their previous Short Line Lease Agreement and both parties agree to forebear the enforcement of and to hold each other harmless for any breach of the AluChem provision in their previous agreement.
- c. Dispute Resolution: The parties agree that any controversy or claim arising out of or relating to the administration of the Rental Payments or the AluChem Fund as provided in subsections (a) and (b) above shall be settled by arbitration in accordance with the then-governing rules of the American Arbitration Association and judgment upon the award rendered by the arbitrators will be final, binding, and unappealable, and entered in any court having jurisdiction. If the parties so agree, such arbitration may be conducted privately and not by or through the American Arbitration

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Association but still in accordance with the then-governing rules of the American Arbitration Association. Such arbitration will be conducted no earlier than thirty (30) days following the delivery of written notice of demand of arbitration of any party. The parties shall agree on the arbitrator within ten (10) days following receipt of the written demand for arbitration. If the parties are unable to agree within said ten (10)-day period, then such arbitration will be held before three (3) arbitrators. Each party will designate one arbitrator, and those two arbitrators will designate a third, but if they cannot agree, then the Court of Common Pleas of Ross County, Ohio shall designate the third arbitrator. The arbitrators are not empowered to award damages or to determine or decide any issue or matter other than those hereinabove expressly set forth. The expense of arbitration proceedings conducted hereunder will be shared equally by the parties involved. All arbitration proceedings hereunder will be conducted in Chillicothe, Ross County, Ohio. The statute of limitations of the State of Ohio applicable to the commencement of a lawsuit will apply to the commencement of arbitration hereunder.

6. FREIGHT SERVICE:

The Railroad shall at its expense throughout the Term of this Agreement operate a Freight Service. The Railroad shall at its expense provide rolling stock and engines and labor sufficient to accommodate local rail shippers' regular and reasonably anticipated and verified long-term needs for rail freight, on an ongoing basis. The Railroad shall provide rail freight service to Chillicothe no fewer than two times each week. The Railroad's delay in performing Freight Service shall be excused in the event of an Act of God or other cause entirely beyond the control of the Railroad, but only the extent that such event directly causes the delay. In such event, the Railroad shall promptly take action to minimize its delay in performance.

7. MAINTENANCE:

It is recognized that the Railroad does not produce sufficient funds to meet all possible long term track and track structure repairs, rehabilitation, or replacement. The Railroad shall use its best efforts to maintain the track to the standards set forth below. Funds provided by the Railroad, Rental Payments received by the City, and moneys in the AluChem Fund may be augmented by grants and loans from third parties. The City agrees to use its best efforts in the development of grants and loan requests as needed.

The track from Hamden and points west shall be maintained at FRA Class 2 track standards. The track from Hamden and points east from Hamden, and from Hamden and points south of Hamden, including the Hamden Yard and Wye, shall be maintained at FRA Class 1 standards. The Railroad shall pay the cost of inspections performed at least annually to establish the state of maintenance of these properties.

The Railroad shall only be responsible for the maintenance of track that is "in service". "In Service" shall mean all track over which the Railroad normally operates trains. The Railroad shall notify the City, in writing, of all track that is "in service". The Railroad shall promptly notify the City, in writing, whenever the status of any section of track changes status ("in service" or "out of service"). Such notice shall include the date of change, the exact location of the change, and the reason for the change.

8. TAXES:

The Railroad shall pay all property taxes on the Short Line Properties attributable pro-rated to the Term of this Agreement. The Railroad shall also pay all personal property tax, excise tax, taxes on earnings and the like imposed upon the Railroad or upon the Freight Service. The City shall exercise its best efforts to obtain whatever other tax relief which may be available.

9. INSPECTION OF FINANCIAL RECORDS:

The City shall have the right upon reasonable notice to inspect the Railroad's financial records in order to determine whether taxes, maintenance obligations, and other expenses are being paid timely.

10. FREIGHT SERVICE REPORTS:

The Railroad shall at least once each three months report to the City a summary of its Freight Service operations, including numbers of carloads shipped.

11. MODIFICATIONS AND IMPROVEMENTS:

The Railroad may make modifications and improvements upon the Short Line Properties only after advance written consent from the City, but this written consent shall not be unreasonably withheld. If the Railroad replaces old or defective rails or ties, it may retain the replaced items for their salvage value. In the event new construction is required (as for example a new industrial spur), then the Railroad shall consult the City in advance concerning the design of construction.

12. INSURANCE:

The Railroad shall at its own expense obtain and maintain a policy of comprehensive liability insurance with coverage limits in the amount of \$2,000,000.00 in the aggregate and per occurrence both for bodily injury and for property damage. This policy of insurance shall name the City as additional insured. The policy may not contain provisions for deductibles greater than the amount of \$25,000.00. The Railroad shall deliver to the City at its Notice Address at least annually a certificate showing this insurance coverage.

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13. FENCING:

The City may levy fees for access to Railroad Properties for private railroad crossings or other reasons. The fees collected by the City shall be used by the City for fencing installation and maintenance of fencing along the railroad right-of-way.

14. INDEMNIFICATION:

The Railroad shall indemnify the City and hold it harmless from liability for any losses not fully insured against by the Railroad's policies of insurance, arising from injury (including death) to persons or damage to property, including the Short Line Properties, which shall arise out of or be in any way connected with any act or omission of the Railroad or its agents, employees or contractors.

15. NOTICE OF ADDRESS:

The City's Notice Address shall be as follows: Office of the Mayor, 145 Broadway Street, Jackson, Ohio 45640-1656, or such other address as to which the City notifies the Railroad. The Railroad's Notice Address shall be as follows: The Great Miami & Scioto Railway Company, P. O. Box 1060, Hamilton, Ohio 45012-1060, or such other address as to which the Railroad notifies the City.

16. REMEDIES FOR DEFAULT:

In the event of a breach of this Agreement, in addition to the right of termination provided above, each party shall have whatever remedies are available against the other at law or equity.

17. ASSIGNMENT:

Neither party may assign its rights in this Agreement without the consent of the other party.

18. GENERAL PROVISIONS:

- a. Authority. Each party warrants to the other that it is fully authorized by its governing body to enter into this Agreement.
- b. Successor's Obligations: Successors and assigns of each party shall be bound by this Agreement to the same extent as are the parties themselves.
- c. Ohio Law: This Agreement shall be interpreted and enforced according to the law of the State of Ohio.

To execute this Agreement, the parties sign below as indicated this 11 day of May, 2004.

THE CITY OF JACKSON, OHIO

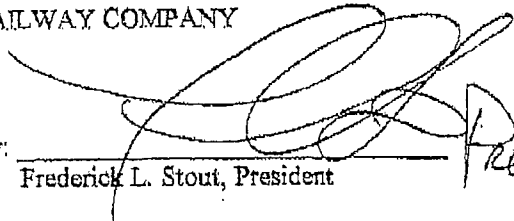
Lynedell E. Spatman
Witness

By:  MAYOR
Shane A. Goodman, Mayor

Jessica Veach
Witness

THE GREAT MIAMI & SCIOTO
RAILWAY COMPANY

Lynedell E. Spatman
Witness

By:  President
Frederick L. Stout, President

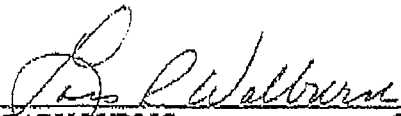
Jessica Veach
Witness

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STATE OF OHIO
COUNTY OF JACKSON SS:

Sworn to and subscribed before me this 11 day of May, 2004, by Shane A. Goodman, Mayor of the CITY OF JACKSON, OHIO, who acknowledged the signing thereof to be his voluntary act and deed.

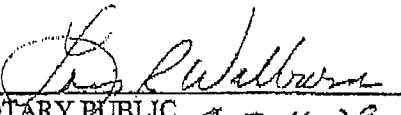
IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my notarial seal on the day and year last above written.


NOTARY PUBLIC CE 11-29-2005

STATE OF OHIO
COUNTY OF Jackson SS:

Sworn to and subscribed before me this 11 day of May, 2004, by Frederick L. Stout, President, THE GREAT MIAMI & SCIOTO RAILWAY COMPANY, who acknowledged the signing thereof to be his voluntary act and deed.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my notarial seal on the day and year last above written.


NOTARY PUBLIC CE 11-29-2005

SHORT LINE LEASE AGREEMENT

EXHIBIT A

Excluded Areas

1. Pride Park Depot and Pride Park Development Area in Wellston.
2. Any other real property encumbered or to be encumbered by the Wellston Participation Agreement between the City of Jackson, Ohio and the City of Wellston, Ohio.
3. Meadow Run Coal Loading Facility and Area, including two loading sites.
4. Any other real property encumbered or to be encumbered by a Lease Agreement between the City of Jackson, Ohio and Sands Hill Coal Co., Inc.
5. Old C & O Depot Building and surrounding dock area in Jackson, now used by the City of Jackson for storage of electrical equipment.
6. Areas now leased to non-railroad entities for non-railroad purposes.
7. Present and future rights-of-way for utility lines and streets, provided that use of the railroad is not affected thereby.

The parties intend by these exclusions to preserve for the Railroad all through trackage from Firebrick to Hamden; thence to West Junction and RA Junction, plus all spurs which now serve customers or which may be used to serve customers in the future, plus the area below Water Street in Jackson which may be converted into a trainyard.

RELEASE

For value received, Carl Eisnaugle, the undersigned, for himself and his heirs, personal representatives, successors, and assigns, releases the City of Jackson, Ohio, its employees and representatives, from any and all claims and rights of action of any kind which the undersigned now has or may accrue, arising out of the issue as to a lack of pay raise since 2003, and any claims of discrimination, retaliation, or any other claims of any kind, related to the lack of any increase in pay. The undersigned, Carl Eisnaugle, for himself and his heirs, personal representatives, successors, and assigns, releases the City of Jackson, Ohio, its employees and representatives, for any damages, claims, and other losses incurred as a result of the issue of a lack of pay raise since 2003.

Date: Aug 22, 2005

Carl Eisnaugle
CARL EISNAUGLE

In The Presence Of:

Judy L. Brown
Judy L. Brown

RELEASE

For value received, Maria Uribe, the undersigned, for herself and her heirs, personal representatives, successors, and assigns, releases the City of Jackson, Ohio, its employees and representatives, from any and all claims and rights of action of any kind which the undersigned now has or may accrue, arising out of the issue as to a lack of pay raise since 2003, and any claims of discrimination, retaliation, or any other claims of any kind, related to the lack of any increase in pay, including, but not limited to, any and all claims which she set forth in an action captioned Maria Uribe v City of Jackson, Case No. 2:06-cv-974, In the United States District Court for the Southern District of Ohio, Eastern Division. The undersigned, Maria Uribe, for herself and her heirs, personal representatives, successors, and assigns, releases the City of Jackson, Ohio, its employees and representatives, for any damages, claims, and other losses incurred as a result of the issue of a lack of pay raise since 2003. The undersigned, Maria Uribe, for the value received, further agrees to dismiss and not refile the action captioned Maria Uribe v City of Jackson, Case No. 2:06-cv-974, In the United States District Court for the Southern District of Ohio, Eastern Division, which is currently dismissed subject to refiling.

Date: 8-21-08

Maria Uribe
MARIA URIBE

In The Presence Of:

Judy L. Brown
J. M. & D. J.

NOTICE TO LEGISLATIVE
AUTHORITY

OHIO DIVISION OF LIQUOR CONTROL
6606 TUSSING ROAD
P.O. BOX 4005
REYNOLDSBURG, OHIO 43068-9005

TO

15255180090 PERMIT NUMBER		NEW TYPE	CLARKS PUMP N SHOP INC DBA JACKSON BP 10 90 TWIN OAKS DR JACKSON OH 45640	
08 11 2008 ISSUE DATE				
C1 PERMIT CLASSES				
40 TAX DISTRICT	022 B	Y38894 RECEIPT NO.		

FROM 08/13/2008

PERMIT NUMBER		TYPE	
ISSUE DATE			
FILING DATE			
PERMIT CLASSES			
TAX DISTRICT		RECEIPT NO.	



MAILED 08/13/2008

RESPONSES MUST BE POSTMARKED NO LATER THAN. 09/15/2008

IMPORTANT NOTICE

PLEASE COMPLETE AND RETURN THIS FORM TO THE DIVISION OF LIQUOR CONTROL
WHETHER OR NOT THERE IS A REQUEST FOR A HEARING.

REFER TO THIS NUMBER IN ALL INQUIRIES **B NEW 1525518-0090**

(TRANSACTION & NUMBER)

(MUST MARK ONE OF THE FOLLOWING)

WE REQUEST A HEARING ON THE ADVISABILITY OF ISSUING THE PERMIT AND REQUEST THAT
THE HEARING BE HELD IN OUR COUNTY SEAT. IN COLUMBUS.

WE DO NOT REQUEST A HEARING.

DID YOU MARK A BOX? IF NOT, THIS WILL BE CONSIDERED A LATE RESPONSE.

PLEASE SIGN BELOW AND MARK THE APPROPRIATE BOX INDICATING YOUR TITLE:

Uma Braun

(Signature)

(Title)- Clerk of County Commissioner

Clerk of City Council

Township Fiscal Officer

8-26-08

(Date)

CLERK OF JACKSON MUNICIPAL COUNCIL
145 BROADWAY ST
JACKSON OHIO 45640-1656

FOR OFFICE USE ONLY
 NEW TRANSFER
 PERMIT # 1525518-0090

OHIO DEPARTMENT OF COMMERCE
 DIVISION OF LIQUOR CONTROL
 6606 Tussing Road, P.O. Box 4005, Reynoldsburg, Ohio 43068-9005
 Telephone: (614) 644-2431 http://www.liquorcontrol.ohio.gov

OFFICER/ SHAREHOLDERS DISCLOSURE FORM

SECTION A. (This form must accompany all applications of a corporate business entity)

2008 JUL 25 AM 10:35

Name of Corporation <u>Clarks Pump N Stop Inc.</u>	DBA Name <u>Jackson B.P. #10</u>
Permit Premises Address <u>40 Twin Oaks Drive</u>	City, State <u>Jackson OH</u> Zip Code <u>45640</u>
Township, if in Unincorporated Area	Tax Identification No (TIN) <u>61-0978158</u>

SECTION B.

1. Is stock publicly traded? YES NO
 If "YES", indicate exchange _____ & Do NOT complete SECTION D

2. Does any stockholder own 5% or more shares? If YES, complete SECTION D. YES NO

3. Total Number of shares issued 1104

Please be advised that any social security numbers provided to the Division of Liquor Control in this application may be released to the Ohio Department of Public Safety, the Ohio Department of Taxation, the Ohio Attorney General, or to any other state or local law enforcement agency if the agency requests the social security number to conduct an investigation, implement enforcement action, or collect taxes.

SECTION C. List the top five (5) officers of the captioned corporation If an office is NOT held please indicate by writing NONE.

THE INDIVIDUALS LISTED BELOW MUST HAVE A BACKGROUND CHECK PERFORMED BY BC&I AND SUBMIT A PERSONAL HISTORY BACKGROUND FORM. PLEASE READ "BACKGROUND CHECK INFORMATION" DLC4181

NAME OF OFFICER	SOCIAL SECURITY NUMBER	DATE OF BIRTH
1) CEO		
2) President <u>Brent E Clark</u>		<u>10-21-68</u>
3) Vice-President <u>Rodney D. Clark</u>		<u>9-19-66</u>
4) Secretary <u>John F. Clark</u>		<u>8-4-64</u>
5) Treasurer		

SECTION D. Stockholders holding 5% or more outstanding shares Note: If you answered Question 1 YES, do not complete this section

THE INDIVIDUALS LISTED BELOW MUST HAVE A BACKGROUND CHECK PERFORMED BY BC&I AND SUBMIT A PERSONAL HISTORY BACKGROUND FORM. PLEASE READ "BACKGROUND CHECK INFORMATION" DLC4181. If none, please indicate by writing "NONE".

Stockholder's Name	Social Security No (if Individual)	NUMBER OF SHARES HELD (NOT PERCENTAGE)
1) <u>Brent E. Clark</u>		<u>368</u>
Residence Address <u>1516 Bath Avenue</u>	Tax Identification No (if applicable)	
City and State <u>Ashland Kentucky</u>	Zip Code <u>41101</u>	
Telephone No <u>606-325-2631</u>	Date of Birth <u>10-21-68</u>	
2) <u>Rodney D. Clark</u>		<u>368</u>
Residence Address <u>4620 Roberts Drive</u>	Tax Identification No (if applicable)	
City and State <u>Ashland Kentucky</u>	Zip Code <u>41102</u>	
Telephone No <u>606-928-2686</u>	Date of Birth <u>9-19-66</u>	

(PLEASE SEE REVERSE SIDE SHOULD YOU NEED ADDITIONAL SPACE TO LIST STOCKHOLDERS)

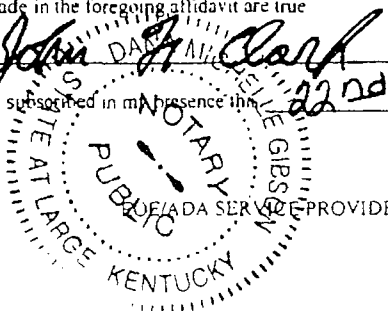
STATE OF KY BOYD COUNTYss

I, John F. Clark being first duly sworn, according to law, deposes and says that he/she is (Title) Secretary of the Clarks Pump N Stop Inc. a corporation duly authorized by law to do business in the State of Ohio, and that the

statements made in the foregoing affidavit are true

(Signature) John F. Clark (Print Name and Corporate Title) John F. Clark Secretary

Sworn to and subscribed in my presence this 22nd day of July 2008



Dana Michelle Gibson 4-19-2010
 (Notary Public) (Notary Expiration)

2008 JUL 25 AM 10:35

List Stockholders holding 5% or more outstanding shares. If none, please indicate by writing "NONE".

THE INDIVIDUALS LISTED BELOW MUST HAVE A BACKGROUND CHECK PERFORMED BY BCI&I AND SUBMIT A PERSONAL HISTORY BACKGROUND FORM. PLEASE READ "BACKGROUND CHECK INFORMATION" DLC4191.



3) Stockholder's Name	<i>John F. Clark</i>	Social Security No. (if Individual)	NUMBER OF SHARES HELD (NOT PERCENTAGE) <i>368</i>
Residence Address	<i>6328 Cannonsburg Rd</i>	Tax Identification No. (if applicable)	
City and State	<i>Catlettsburg Kentucky</i>	Zip Code <i>41129</i>	
Telephone No	<i>606-739-4601</i>	Date of Birth <i>8-4-64</i>	
4) Stockholder's Name		Social Security No. (if Individual)	NUMBER OF SHARES HELD (NOT PERCENTAGE)
Residence Address		Tax Identification No. (if applicable)	
City and State		Zip Code	
Telephone No		Date of Birth	
5) Stockholder's Name		Social Security No. (if Individual)	NUMBER OF SHARES HELD (NOT PERCENTAGE)
Residence Address		Tax Identification No. (if applicable)	
City and State		Zip Code	
Telephone No		Date of Birth	
6) Stockholder's Name		Social Security No. (if Individual)	NUMBER OF SHARES HELD (NOT PERCENTAGE)
Residence Address		Tax Identification No. (if applicable)	
City and State		Zip Code	
Telephone No		Date of Birth	
7) Stockholder's Name		Social Security No. (if Individual)	NUMBER OF SHARES HELD (NOT PERCENTAGE)
Residence Address		Tax Identification No. (if applicable)	
City and State		Zip Code	
Telephone No		Date of Birth	
8) Stockholder's Name		Social Security No. (if Individual)	NUMBER OF SHARES HELD (NOT PERCENTAGE)
Residence Address		Tax Identification No. (if applicable)	
City and State		Zip Code	
Telephone No		Date of Birth	
9) Stockholder's Name		Social Security No. (if Individual)	NUMBER OF SHARES HELD (NOT PERCENTAGE)
Residence Address		Tax Identification No. (if applicable)	
City and State		Zip Code	
Telephone No		Date of Birth	
10) Stockholder's Name		Social Security No. (if Individual)	NUMBER OF SHARES HELD (NOT PERCENTAGE)
Residence Address		Tax Identification No. (if applicable)	
City and State		Zip Code	
Telephone No		Date of Birth	