

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

DOCKET NO. FD 35477

ALLIED INDUSTRIAL DEVELOPMENT CORPORATION-
PETITION FOR DECLARATORY ORDER

ENTERED
Office of Proceedings
March 28, 2014
Part of
Public Record

MOTION SEEKING EXPEDITED RESOLUTION OF PROCEEDING.

Comes now Allied Industrial Development Corporation (“AID”), Petitioner, and files this motion seeking an expedited resolution of the instant proceeding based on evidence recently presented to the Board in a closely related proceeding that applies with equal force to the issues involved in this matter. In its decision dated December 20, 2013 in FD 35316, *Allied Erecting and Dismantling, Inc. and Allied Industrial Development Corporation—Petition for Declaratory Order—Rail Easements in Mahoning County, Ohio* (hereinafter the “December Decision”, the Board declared that “if Ohio Central never obtained the regulatory authority to operate over the tracks, then none of Allied’s state law claims against Ohio Central could be federally preempted.”¹

It is respectfully submitted that consideration of the recent evidence presented to the Board by the AID and Allied Erecting and Dismantling, Inc. (collective referred to as “Allied”) in support of their Petition to Reopen, filed February 20, 2014, compels the conclusion that none of the Ohio Central

¹ December Decision at 10. As the Board explained in n.2 of that decision, the “Ohio Central Railroad System” is a trade name used for limited purposes by 11 commonly controlled railroads. The instant proceeding directly involves only two (2) of those railroads, Mahoning Valley Railway Company (“MVRV”) and Ohio & Pennsylvania Railroad Company (“OHPA”).

railroads, in particular MVRV, hold any operating authority issued by the former Interstate Commerce Commission (“ICC”) or the Board to perform service as an authorized railroad common carrier over the private tracks that are owned by Allied. Any claim to the contrary is based on fundamental misconceptions regarding the railroad operations conducted by MVRV pursuant to authority granted by the ICC in early 1982.

Based on Allied’s evidence presented in FD 35316, which will be repeated hereinafter, the Board should find that MVRV’s operations over Allied tracks are and always have been unregulated. Therefore, the Board should forthwith advise the state court that referred the instant matter to the Board over three years ago that none of Allied’s state law claims are preempted due to the fact that all operations conducted by MVRV over the private tracks that Allied acquired from LTV Steel Company, Inc. (“LTV”) were unregulated operations for which no operating authority was needed or ever obtained.

Consistent with its precedents, the Board should also advise the state court 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. Therefore, the Board is not in a position to determine whether MVRV sold Lot 62188 to Gearmar Properties LLC in 2007.

The Board Should Take Judicial Notice Of The Evidence Pertaining To MVRV's 1981 Application Tendered By Allied In FD 35316.

As the Board is aware, Allied filed a Petition with the Board to Reopen and Supplement the Record in Docket No. FD 35316 on February 20, 2014. That Petition was prompted by the Board's interpretation of the scope of the Certificate of Public Convenience and Necessity that the ICC granted MVRV on January 13, 1982. In their joint Petition, Allied introduced evidence, which is incorporated herein by reference, regarding the actual scope of the application MVRV filed with the ICC in 1981, which the ICC granted in January 1982.

As Allied demonstrated, prior to its incorporation in March 1981 until it was granted railroad common carrier authority, the in-plant railroad of Jones & Laughlin Steel Corporation ("J&L Steel") provided unregulated switching services at J&L's Campbell Works utilizing J&L Steel's network of tracks. It was only in February 1982 that the newly incorporated MVRV began providing service as a railroad common carrier in what then remained of J&L Steel's Campbell Works.

By way of background, J&L Steel acquired the Campbell Works from Youngstown Sheet & Tube ("YS&T") shortly after YS&T shut down the Campbell Works on September 19, 1977, a day that is known in Youngstown as "Black Monday". Thereafter, concerted efforts were made to save some parts of the Campbell Works facility by opening it to smaller companies that were not

related to J&L Steel.² In order for MVRV to provide switching services for other than J&L Steel, it was necessary for MVRV to acquire a common carrier operating authority from the ICC so that it could directly offer for-hire switching services to the new tenants and several other companies located in Struthers, Ohio on the south side of the Mahoning River.

As the “Return to Questionnaire” submitted by MVRV in 1981 reflects, no mention was made of Republic Steel Corporation, which at the time was an active competitor of J&L Steel. Furthermore, MVRV was unable to reach Republic Steel’s facilities that were located south of the Mahoning River in Youngstown, Ohio, much less conduct switching operations over the private tracks owned and by Republic Steel within those facilities. Indeed, MVRV would have had to operate across Conrail’s tracks to reach the extensive system of private tracks over which Republic Steel conducted its unregulated in-plant railroad operations. Given the foregoing, the only rational conclusion to be drawn is that the ICC in 1982 did **not** authorize MVRV to provide service within the facilities of Republic Steel over the private tracks that were built and maintained by Republic Steel and operated by it to serve only its own needs,

² In order to help explain what was happening at the Campbell Works at that time, the Board’s attention is invited to the following link: http://www.allthingsyoungstown.net/articles/in_youngstown_we_made_steel/article.htm. It should be noted that the article errs when it states that a former LE&E line at the far left of one of the photographs is the property of an Ohio Central subsidiary. The track that is referenced is actually owned by Allied. Also, the new building that is the subject of the final photo belongs to Allied and is part of Allied’s ongoing efforts to revitalize Youngstown following the demise of the steel industry.

moving its own goods. There is no suggestion that its in-plant operator ever hold out services to other shippers.

As Allied has also shown, at some point in time following the 1984 merger of J&L Steel and Republic Steel that created LTV Steel, MVRV took over the in-plant operations in the former Republic Steel facility in Youngstown. It was only in September 1990 that Conrail provided an access route between LTV's Campbell Works and its Welded Tubular facility, which was located within Republic Steel's former facilities. However, MVRV never sought or acquired an additional certificate of public convenience and necessity pursuant to 49 U.S.C. § 10901 to provide railroad common carrier service to any industry located in Youngstown on the south side of the river.

Despite the foregoing, Respondents have advanced the baseless claim that MVRV's 1981 application somehow authorized MVRV to provide service within Republic Steel's facilities. In the Reply Respondents filed in response to Allied's Petition for Declaratory Order in the instant proceeding, the wholly unsubstantiated and false statement is made 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 MVRV since 1981. See Mahoning Valley Railway Co. – Operation of a Line of Railroad in Mahoning County, OR, (sic) ICC Finance Docket No. 29658(Sub-1), 46 Federal Register 4007 (August 6, 1981).

It is untrue that MVRV used any of the tracks located in Lot 62188 in 1981. In order for that to have happened, MVRV would have had to have been

owned by Republic Steel in 1981. It was not. Instead, it was incorporated in that year by J&L Steel, which was then a competitive, unrelated steel company.

By way of background, Lot 62188 is located to the west of the Center Street Bridge in Youngstown, just south of the Mahoning River. That lot was part of Republic Steel's former facility. As such that lot was not included in the geographic scope of the certificate of public convenience and necessity the ICC granted to MVRV in 1982. Hence, the rail facilities located within that lot could not have been used by MVRV since 1981.

To support their baseless claims, Respondents rely on an affidavit of David Collins. In his affidavit, Mr. Collins candidly admits that his personal knowledge can be dated only back to January 2009. Furthermore, although he states that he discussed the matter with former employees of Summit View and the railroads, those unidentified employees have not been shown to have any personal knowledge that would predate Summit View's acquisition of MVRV in 2001.

In stark contrast, Allied has presented the Verified Statement of William C. Spiker, who testified from his personal knowledge regarding the in-plant railroad operations of MVRV's predecessor, as well as MVRV's common carrier operations following the grant of ICC authority in January 1982. Furthermore, because he remained with the MVRV until it was sold to Summit View in 2001, he has first-hand knowledge of the unregulated, in-plant services that MVRV

performed for LTV after LTV was formed following the merger of J&LS and Republic Steel.

The unreliable hearsay testimony of Mr. Collins must be disregarded. Simply stated, Mr. Spiker's testimony plainly shows that MVRV's unregulated operations within Lots 62188 and 62189, which were conveyed to MVRV by LTV in 2001 as part of the sale of MVRV's stock to Summit View, had nothing to do with MVRV's ICC certificate. That being the case, there is no avoiding the impact of the Board's comments at page 10 of its *December Decision* in FD 35316 that "if Ohio Central never obtained the regulatory authority needed to operate over the tracks, then none of Allied's state law claims against Ohio Central could be federally preempted."

Allied Does Not Contest MVRV's Easement To Access Its Locomotive Shop That Is Located On Lot 62189, Which Is Owned By MVRV.

Allied also wishes to make it crystal clear that it does not contest MVRV's ownership of Lot 62189 (described as Youngstown City Lot No. 2 in the Quitclaim Deed, dated February 28, 2001, that memorialized the conveyance of the lot by LTV to MVRV). That conveyance occurred in conjunction with the sale of MVRV's stock to Summit View. Because MVRV's ownership of Lot 62189 is uncontested, Allied agrees that MVRV has at the very least an implied easement by necessity to reach its land-locked locomotive repair shop that is located on Lot 62189 by operating over Allied's tracks (Main 2 and Main 3) that are located to the east of Lot 62189 and extend to the east to the point where they connect with NSR's Haselton Yard tracks. That easement, however, does

not authorize MVRV to interfere in any respect with Allied's operations over its private tracks or with its ongoing reclamation efforts.

In addition, the June 25, 1992 Easement Agreement between LTV and Allied provided LTV with the following easement:

To operate, use, maintain, repair, restore, replace and abandon (at LTV's sole cost and expense) the railroad tracks and related equipment located on the property that the Mahoning Valley Railway Company leases from LTV located along the north property line of Parcel "A" [which was sold to Allied in 1992], along the south shore of the Mahoning River, that extend from the west property line of Parcel "A", easterly to Conrail's Hazelton Yards. These tracks are known as the No. 2 and No. 3 Mains.

That Easement Agreement was assigned to MVRV by LTV in 2001. As part of the Assignment and Assumption Agreement, MVRV agreed to assume and perform all of the "conditions, covenants and obligations of the Real Property Agreements", which specifically included the June 25, 1992 Agreement between LTV and Allied. Hence, there is no avoiding the conclusion that MVRV has the sole responsibility for maintaining the No. 2 and No. 3 Mains. If those tracks are currently inoperable for any reason, the fault lies with MVRV for its failure to maintain them. Allied is under no obligation to assume responsibility for their maintenance.

MVRV may not be heard to complain that it cannot operate over Main Tracks 2 and 3. If it cannot do so, it is solely MVRV's fault that it has failed to maintain those tracks to a rigid Class 1 FRA standard as required by the 2001 Transportation Service Agreement that LTV negotiated with MVRV prior to the

sale to Summit View. Because that Agreement formally shifted responsibility for maintenance of those tracks to MVRV from LTV, which had sole responsibility for the maintenance of them under the June 25, 1992 Easement Agreement between LTV and Allied, MVRV is also in continuing violation of the Easement Agreement that LTV negotiated with Allied when it sold the tract of land to Allied in 1999 containing 38.457 acres that is located to the east of Lot 62189.³

Following Its Sale Of Lot 62188 To Gearmar, MVRV Has No Easement To Operate Over Allied's Tracks That Are Located On That Lot Other Than Those Tracks, If Any, That Are Required To Access MVRV's Locomotive Shop From The No. 2 And No. 3 Main Tracks.

A different conclusion must be reached regarding the other railroad easement in the 1992 Easement Agreement between LTV and Allied. When it sold Lot 62188 (described as Youngstown City Lot No. 1 in the February 28, 2001 Quitclaim Deed that memorialized the conveyance of the lot by LTV to MNRY) to Gearmar in 2007, MVRV did not reserve any easements that would allow it to continue to operate over any of the tracks described in the 1992 Easement Agreement. Therefore, as a matter of law it relinquished any right to operate over those tracks pursuant to the terms of the Easement Agreement. In the absence of any operating authority from the ICC and/or the Board, Allied cannot be compelled to allow MVRV to operate over its tracks numbered 220, 239, 240 and No. 4 Main.

³ For the Board's convenience, detailed photo maps of the involved tracts of real property that are at issue herein are attached.

Allied notes that MVRV has voiced multiple complaints to the Board that Allied's temporary removal of 75 feet of track 239, which is located on lot 62188 west of the Center Street Bridge, in order to perform storm sewer repairs has interfered with its operations over the LTV easement tracks. That contention is a further red herring.

In the first place, the 1992 LTV Easement applies only to tracks that are located on Allied's property that is located on the east side of the Center Street Bridge. As explicitly stated therein, the LTV Easement extends in an easterly direction from the *west* property line of the parcel of land that Allied acquired from LTV in 1992. Therefore, any tracks to the west of that property line would not be encompassed within the 1992 LTV Easement Agreement with Allied.

In particular, it does not apply to any of the tracks that are physically located on Lots 62188 and 62320, which are located to the west of the Center Street Bridge. Because MVRV, which formerly owned Lot 62188, failed to require any easements when it sold that lot to Gearmar in 2007, that lot was free and clear of any easements related to tracks when Gearmar sold it to Allied in 2009. As a result, Lot 62188 is no longer the dominant estate as its right to an easement to operate over Allied's property that is located to the east of the Center Street Bridge was voluntarily extinguished by the sale to Gearmar that did not retain a railroad easement. In any event, the contested issue of ownership of lot 62188 is an issue that is beyond the expertise of the Board to resolve, which is why Allied three (3) years ago requested the Board to reject the state court's referral of the issues involved in the instant proceeding.

Following Its Sale Of Lot 62320 To Gearmar, OHPA Has No Easement To Operate Over Allied's Tracks That Are Located On That Lot.

As Respondents have conceded, “[t]here is no dispute that Gearmar purchased Lot 62320 from Ohio & Pennsylvania Railroad, and then sold it Allied.” Respondent’s Reply at 3, n.3. No claim is made that OHPA has any right to operate over the tracks that were or are located on that Lot, none of which had ever been part of the national transportation system. Also left unsaid is that when Maverick C&P, Inc. conveyed the property to OHPA, which included the private industrial tracks located thereon that were among the remnants of Republic Steel’s in-plant track system, OHPA did not seek authority from the Board to acquire the tracks. Hence, OHPA was never authorized by the Board to provide common carrier service over the tracks located on Lot 62320 or on any other property that is owned by Allied. Of course, to the extent that Allied may decide to utilize the remaining tracks located on Lot 62320 or on any other parcel of its properties to conduct its own, private rail operations over what remains of Republic Steel’s network of private tracks, it would not require Board authority.

The Board Should Expeditiously Issue Its Decision Finding That Allied’s State Law Claims Are Not Preempted.

Because the determination of who owns good title are issues of State law that are outside the expertise of the Board, the Board should issue its decision on an expedited basis finding that Allied’s state law claims are not federally preempted. The Board should also direct the court to resolve whether Allied is the owner of Lot 62188. Because more than three years have passed since AID

filed its Petition for Declaratory Order requesting such a directive to the state court, there is no good reason to further delay the resolution of the underlying ownership issue. Therefore, Allied urges the Board, based on the evidence that is now of record regarding the scope of the ICC's grant of authority to MVRV, to find that MVRV never obtained the regulatory authority to operate over Allied's private tracks that would cause Allied's state law claims to be federally preempted.

Respectfully submitted,

/s/ Richard H. Streeter

Richard H. Streeter, Esq.
Law Office of Richard H. Streeter
5255 Partridge Lane, N.W.
Washington, D.C. 20016
202-363-2011 Fax: 202-363-4899
rhstreeter@gmail.com

Christopher R. Opalinski, Esq.
T. Timothy Grieco, Esq.
Jacob C. McCrea, Esq.
Eckert Seamans Cherin & Mellott, LLC
44th Floor, 600 Grant Street
Pittsburgh, PA 15219
412-566-6000 Fax 412-566-6099
Counsel for Allied Erecting and
Dismantling Co., Inc. and Allied Industrial
Development Corporation

Dated: March 28, 2014

Certificate of Service

I hereby certify that on March 28, 2014, a copy of the foregoing Motion was served upon the following persons by Email:

Eric M. Hocky

ehocky@thorpreed.com

C. Scott Lanz

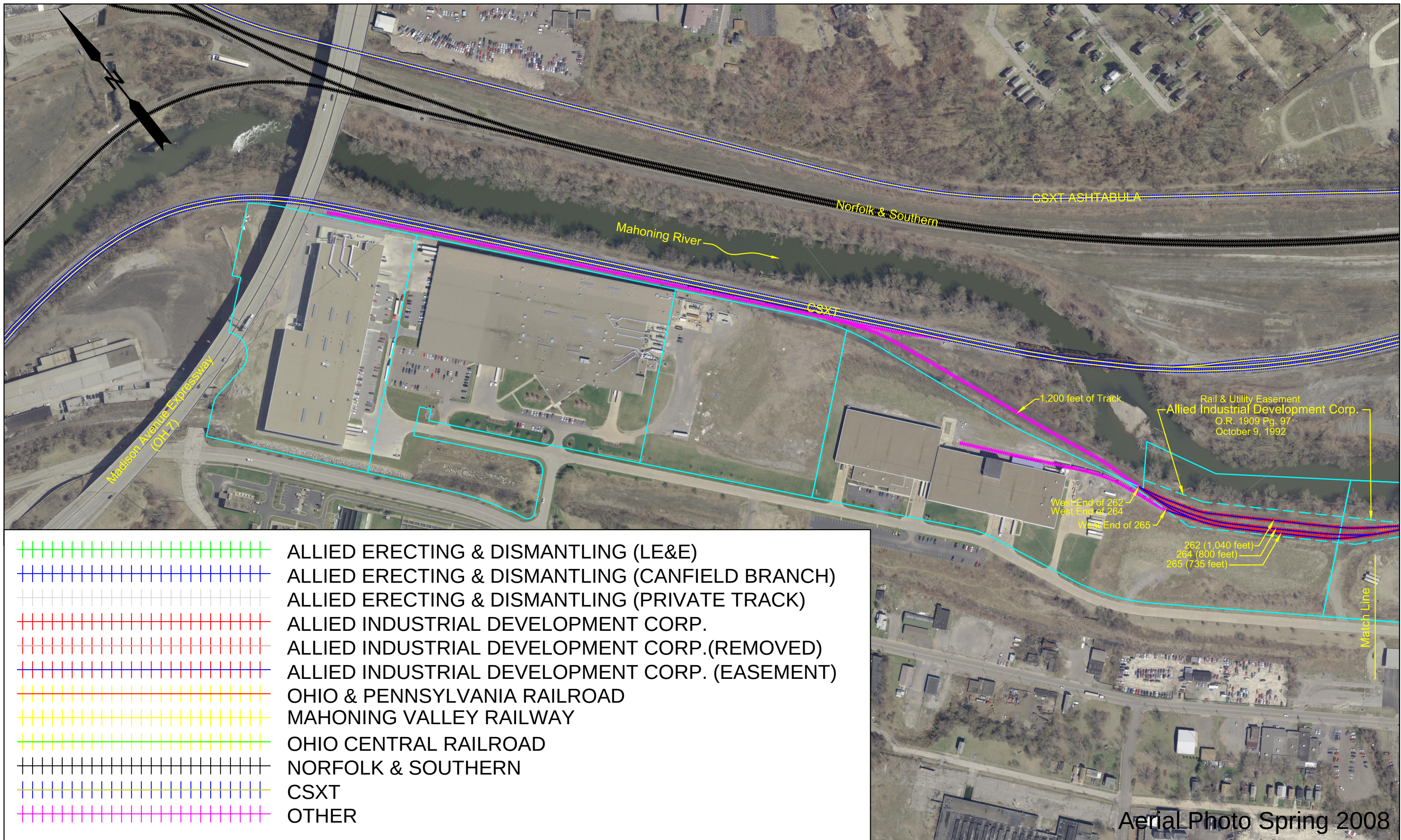
slanz@mnblawyers.com

Thomas J. Lipka

tlipka@mnblawyers.com

/s/ Richard H. Streeter

Richard H. Streeter



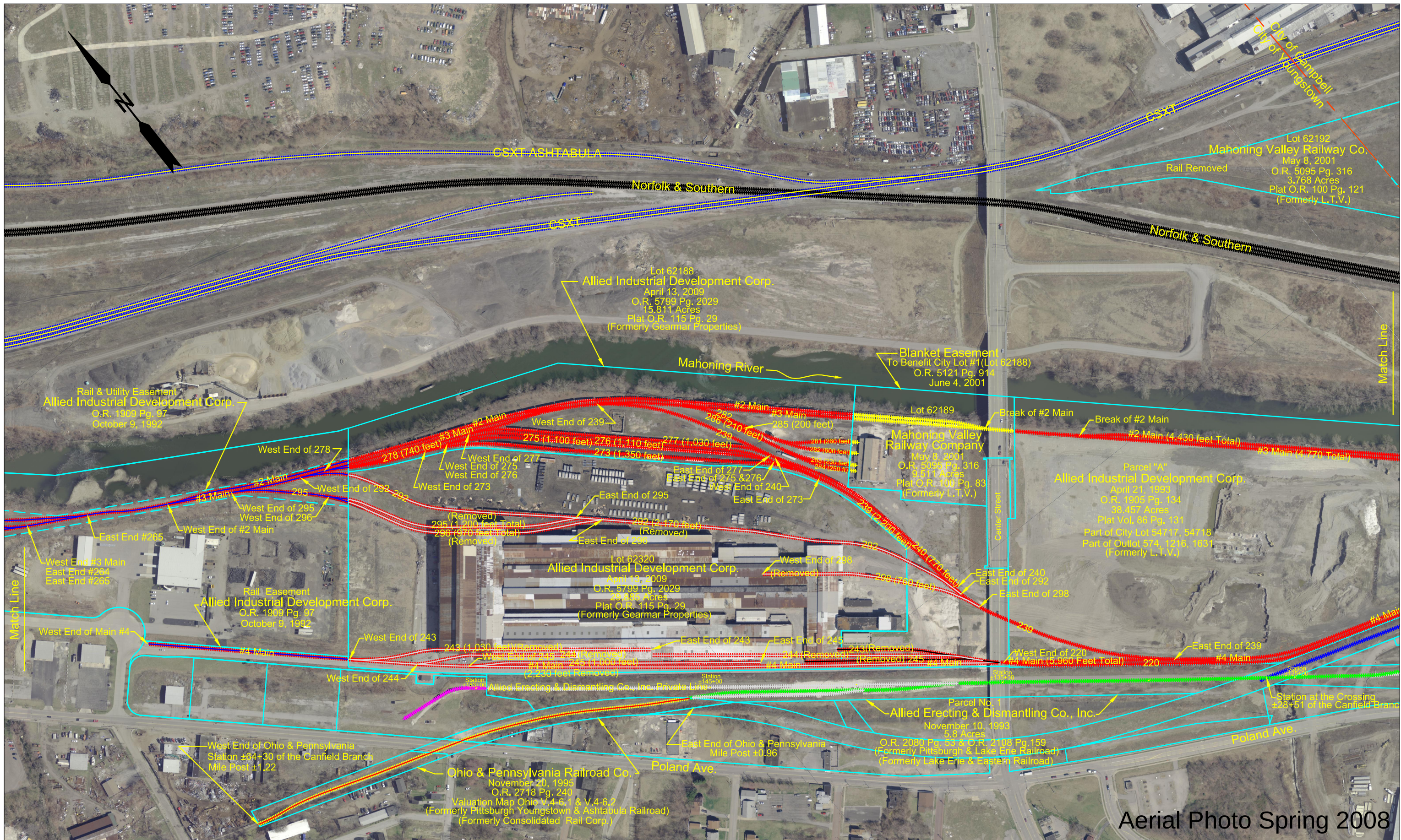
0 300 600 900



Scale 1"=300'

Railroads along the Mahoning River 1 of 5

Feb. 14, 2014



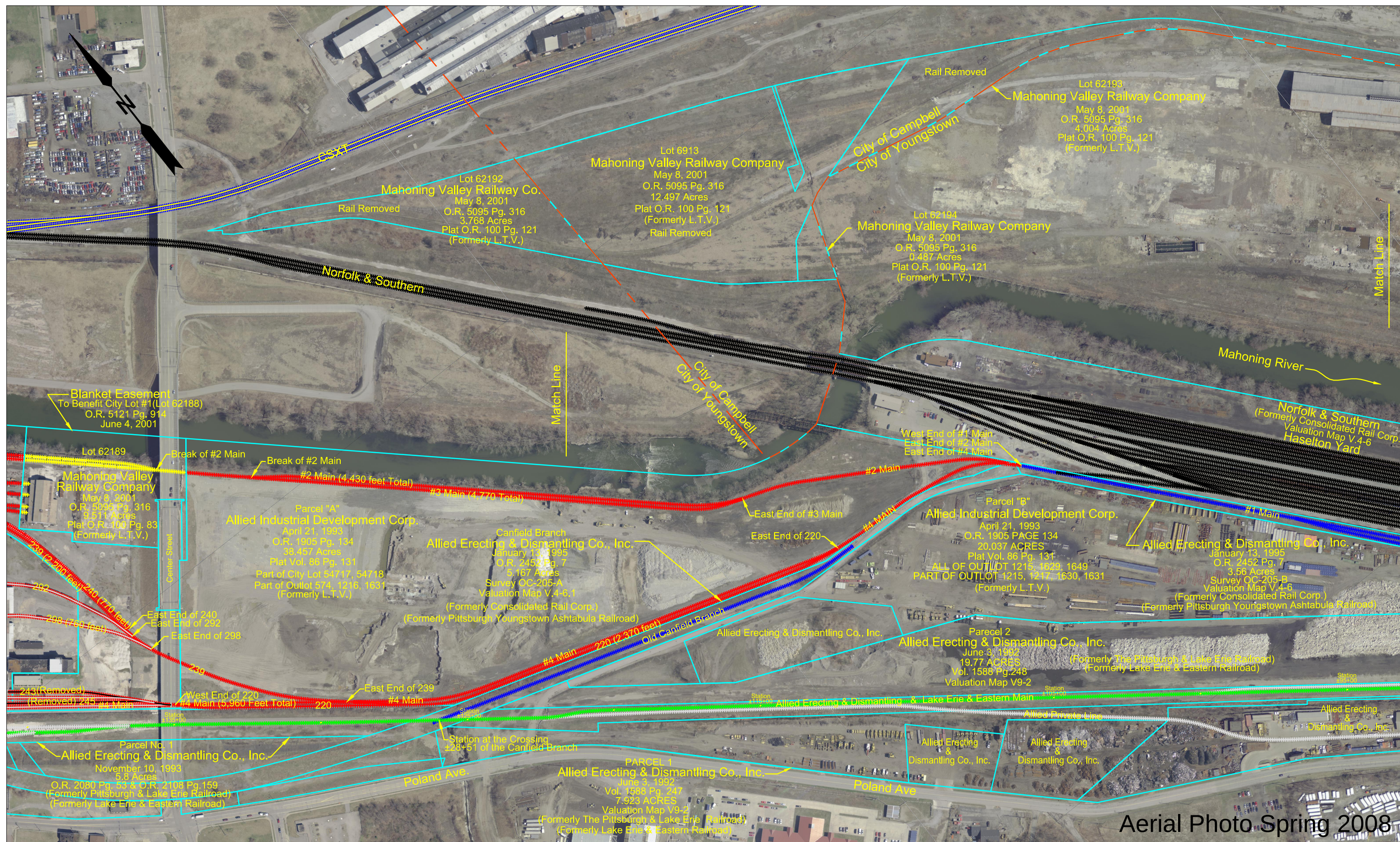
0 300 600 900



Scale 1"=300'

Railroads along the Mahoning River 2 of 5

Feb. 14, 2014



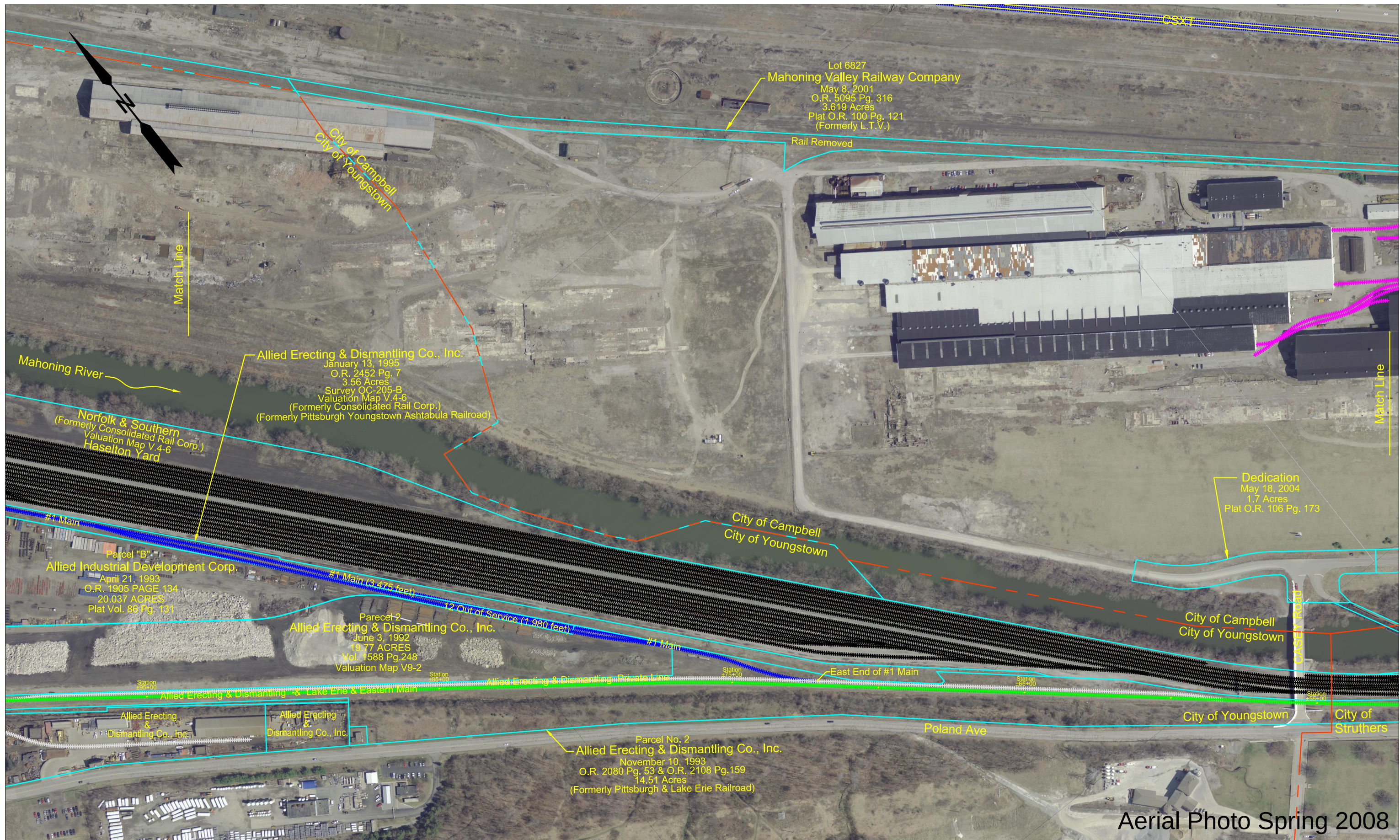
Aerial Photo Spring 2008



Scale 1"=300'

Railroads along the Mahoning River 3 of 5

Feb. 14, 2014



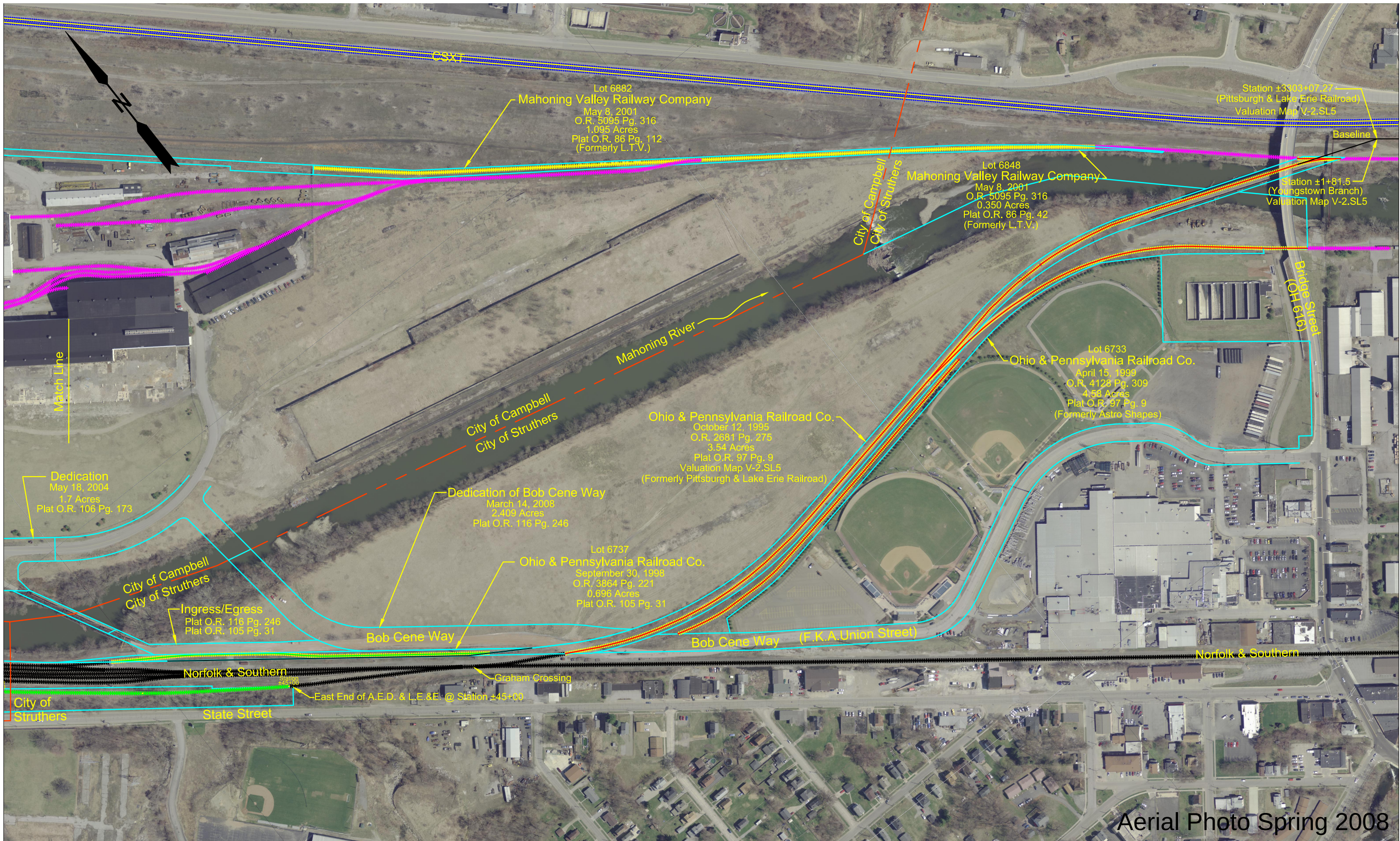
0 300 600 900



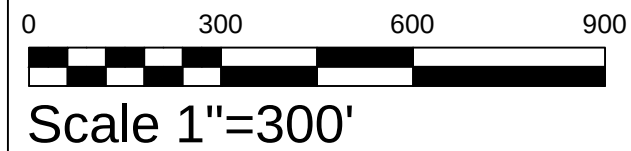
Scale 1"=300'

Railroads along the Mahoning River 4 of 5

Feb. 14, 2014



Aerial Photo Spring 2008



Railroads along the Mahoning River 5 of 5

Feb. 14, 2014