

CITY OF KENT
DEPARTMENT OF PUBLIC SERVICE
DIVISION OF ENGINEERING

MEMO

TO: Dave Ruller
FROM: Jim Bowling
DATE: July 30, 2008
RE: Fairchild Avenue Bridge – A.B.C. RR Agreement

We have received proposed railroad agreements from ODOT for construction of the Fairchild Avenue Bridge Project. Attached is the proposed railroad agreement with A.B.C. RR. This agreement is for the proposed Fairchild Avenue at grade crossing of the A.B.C. RR. The agreement was drafted by ODOT and sent to us for review and approval. Generally, the agreements provide access for us onto RR properties and specify responsibilities for construction, RR flagging, right-of-way acquisition, maintenance and ownership of the structures to be built. Additional items such as payment, insurance and non-discrimination are also included. The agreements are based on requirements in the Revised Code of Ohio and are standard to any federally funded project involving a railroad.

This agreement includes the recommended resolution from the negotiations with A.B.C. on the proposed retaining walls along the railroad required to raise the existing tracks to correct sight distance and vertical clearance deficiencies of the existing bridge/RR crossing. The resolution of the negotiations on the proposed retaining walls is generally listed as:

- The City will own, inspect, maintain, repair and renew the walls as required
- The RR will permit access to the City to inspect, maintain and repair the walls at no cost to the City
- The RR will arrange and pay for all costs required to repair/replace the wall damaged/destroyed by negligence of the RR.

Jim Silver and I have both reviewed the agreements and provided our comments to ODOT. A copy of the e-mail transmitting these comments is included. I have spoken with ODOT on our comments and they are addressing the comments. We are requesting approval to execute the agreements contingent on satisfactory resolution of the comments provided.

C: Linda Copley
Jim Silver
Rhonda Boyd
File

IN THE MATTER OF THE CLOSING OF THE CRAIN AVENUE GRADE CROSSING, AND CONSTRUCTION OF A NEW FAIRCHILD AVENUE GRADE CROSSING OVER THE TRACK OF THE AKRON BARBERTON CLUSTER RAILWAY CO. IN THE CITY OF KENT, PORTAGE COUNTY, OHIO.

DRAFT 6/10/08

**AGREEMENT NO.: 21563
ODOT PID NO.: 18466**

AGREEMENT

THIS AGREEMENT, made this _____ day of _____, 2008 between the State of Ohio, acting by and through the Director of Transportation of the **State of Ohio**, as First Party, hereinafter referred to as the STATE; the **City of Kent**, as Second Party, hereinafter referred to as the CITY and the **Akron Barberton Cluster Railway Co.**, as the Third Party, hereinafter referred to as the COMPANY.

WITNESSETH:

WHEREAS, The STATE and the CITY propose to close the Crain Avenue vehicular grade crossing (AARDOT #262565N) over the tracks of the COMPANY at milepost 191.16 in the City of Kent, Portage County, Ohio, and

WHEREAS, as part of the construction of a new Fairchild Avenue grade separation structure over CSX and the Cuyahoga River, the STATE and the CITY propose to construct a new grade crossing to carry Fairchild Avenue over the tracks of the COMPANY at milepost 191.20. Said structure and the necessary approaches thereto are hereinafter referred to as the PROJECT; and

WHEREAS, no existing COMPANY grade crossing will be eliminated as a result of the proposed construction; and

WHEREAS, under such conditions, Chapter 5523 of the Revised Code of Ohio and other grade crossing elimination laws of the State of Ohio do not apply to the PROJECT herein considered; and

WHEREAS, the Director of Transportation of the State of Ohio is empowered generally by Chapter 5501 of the Revised Code of Ohio to carry forward highway improvements of the type herein contemplated; and

WHEREAS, the Federal-Aid Highway Act of 1956, as amended, and Section 5531.03 of the Revised Code of Ohio have become effective, providing funds for the construction costs of projects such as is contemplated herein; and

WHEREAS, it is desired by the parties hereto to carry out and accomplish the installation of a new roadway over the tracks of the COMPANY at the point hereinbefore mentioned and to determine and agree upon the manner of doing said work and the portion of said work to be done by each of said parties respectively, and the proportion of costs and expenses to be paid by each of said parties, and the mode and time of payment therefore.

NOW THEREFORE, for and in consideration of the mutual covenants hereinafter stipulated to be kept and performed, it is agreed between the parties as follows:

SECTION 1

The plans of the STATE for the said improvement are identified by title as follows:

"State of Ohio, Department of Transportation, POR-Crain Avenue (Crain Avenue Bridge Relocation), City of Kent, Portage County".

Before this agreement shall be in force and effect, the foregoing plans shall meet the approval of the parties hereto, and upon such approval shall become a part of this agreement by reference.

SECTION 2

The work to be done under this agreement and shown on the plans described under SECTION 1 of this agreement consists of the construction of an adjacent grade separation structure, and a new grade crossing over the tracks of the COMPANY and the necessary approaches thereto.

Part of said work for the aforementioned project will consist of installation of retaining walls; removal of existing tracks; re-grading of existing grade and sub-base; reinstallation of track, switches and ballast, including surfacing and lining; and installation of new grade crossing protection equipment and surface.

The construction of the highway and any necessary earth work to effect the clearances shown above, the grading, draining and paving of the highway, the removal and reinstallation of railroad track and base, the sodding, seeding and planting of slopes, the construction of highway guard rails, the settlement of claims for property purchased, appropriated or damaged by such construction, and the maintenance of railroad traffic and rearrangement and restoration of railroad facilities made necessary by the work herein contemplated, shall be considered as necessary items to be included as part of this improvement.

SECTION 3

Responsibility for the several necessary items of work shall be as follows:

- a. The following items shall be let in contract by the STATE after competitive bidding as provided by law, at PROJECT expense, subject to the provisions of this agreement:
 1. Construction of a new Fairchild Avenue grade separation structure over the CSX tracks and Cuyahoga River adjacent to a new grade crossing of the COMPANY's tracks, including necessary approaches on either side of the new grade crossing.
 2. Removal of existing railroad tracks and switches, ballast, base and sub-base material; regrading and installation of new fill, sub-base, base, drainage, sub-ballast, ballast, track and switches; surfacing and lining of track surfaces; and installation of a new grade crossing surface and protective devices at the new Fairchild Avenue crossing.
 3. Removal of the existing Crain Avenue grade crossing protection devices and surface.

4. Grading, draining and paving the adjacent roadway surfaces, including constructing any necessary side drives and approaches.
 5. Installation of new retaining walls north and south of existing ABC tracks, including adjacent concrete platforms and handrails.
 6. Sodding, seeding and planting of slopes and installation of necessary highway guardrails.
- b. The following items shall be done or caused to be done by the COMPANY with its own forces, at PROJECT expense, subject to the provisions of this agreement.
1. Provision of switch tenders, flagmen, watchmen and other protective services and devices to promote safety and insure continuity of train operations as may be necessary in connection with the work performed by the COMPANY's forces.
 2. Arrange or by agreement with others provide for the reconstruction, repair and renewal of the existing below-grade grain hopper at the 'Star of the West' grain facility to ensure unimpeded operation during and after construction is completed.
 3. Changes in communication and signal lines, interlocking and signal apparatus

SECTION 4

Any work not specifically provided for in SECTION 3 shall be done by one of the parties hereto as may be mutually agreed upon from time to time during progress of the work, as provided for by the rules and regulations of the Federal Highway Administration as then in effect.

SECTION 5

All work to be done by the COMPANY under the provisions of this agreement shall be done in accordance with the plans described in SECTION 1, together with such other plans and specifications, detailed and supplementary thereto, as may be mutually agreed upon and as may be necessary to carry out the work fully in accordance with the intent of this agreement and in accordance with good engineering practice. All work to be done by the STATE shall be done in accordance with said plans and under the standard and supplemental specifications of the Department of Transportation in force on the date of the award of the contract, together with such special provisions as may be agreed upon by the parties hereto.

The STATE will require its contractor to use Railroad protective personnel to protect railroad traffic made necessary or occasioned by his operations, as set forth in special provisions to be approved by the parties hereto, which are more specifically set forth in the "Special Clauses in the Proposal" and which are included in this agreement by reference.

The COMPANY agrees to furnish the STATE's contractor at PROJECT expense, and the STATE shall require its contractor to use, such switch tenders, flag men, telegraph operators, pilots, watchmen or other protective services and devices, other than engineering personnel, as in the opinion of the COMPANY are required to promote the safety and insure continuity of railroad traffic during the contractor's operations.

The COMPANY agrees to bill the STATE as a part of its regular force account work the actual cost for such protective services and devices, including the actual rate of pay, plus the amount paid for overtime, insurance, railroad retirement, vacation allowance, holidays, health and welfare, transportation, deadhead and turn around time, accounting and billing.

The STATE agrees to reimburse the COMPANY for said protective services and devices as a part of its regular force account work as set forth in this agreement.

SECTION 6

The STATE shall have general charge of the engineering work on the PROJECT, but the COMPANY shall provide such engineering services as the STATE may require. Nothing herein shall deny the COMPANY the right to place inspectors on work being done on its property or facilities. Preliminary engineering costs incurred by the COMPANY subsequent to November 30, 2004 charged may be charged against the PROJECT.

Construction engineering and inspection costs incurred by the COMPANY subsequent to the award of a construction contract by the STATE may be charged against the PROJECT.

SECTION 7

The STATE shall require its contractor at all times to use all reasonable care and diligence and to cooperate with the officials of the COMPANY in order to avoid accidents, damage or unnecessary delay to or interference with trains upon the tracks of the COMPANY.

Any of the COMPANY's equipment, such as work trains, locomotive cranes, cars or other rolling stock used on the work by the STATE's contractor in carrying out his contract shall not be chargeable to the parties hereto, but the STATE shall require the contractor to bear the cost of the rental of such equipment as part of the contract price for the work.

If at any time the STATE's contractor requires a temporary crossing over the COMPANY's tracks, the STATE shall require said contractor to arrange with the COMPANY for such crossing.

SECTION 8

It is understood that the construction costs of the PROJECT herein contemplated are to be financed from funds provided by the CITY and the STATE and expended in accordance with Federal regulations, that all plans, specifications, estimates of costs, awards of contracts, acceptance of work and procedure in general will at all times conform to all Federal laws, rules, regulations, orders and approvals applying to a Federal-Aid Project, and the STATE shall reimburse the COMPANY for construction costs and for preliminary and construction engineering costs in accordance with Federal-Aid Policy Guide 140(I) of the Federal Highway Administration or any subsequent amendments thereto, in such amounts and forms as are proper and eligible for payment from Federal-Aid highway funds. The COMPANY shall render its billings to the STATE in accordance with said rules and regulations, and further agrees to provide and furnish such itemized records of and substantiating data for such costs as may be necessary.

In the event that delays or difficulties arise in securing necessary approvals or in securing necessary rights of way or settling damages or damage claims which, in the opinion of the STATE, render it impracticable to utilize funds from the current appropriation for the construction of the PROJECT, the STATE may serve formal notice of cancellation upon the COMPANY and this agreement shall, with the exception of the obligations set forth in the following sentence, become null and void.

The STATE shall reimburse the COMPANY for all costs and expenses incurred by it at the request of the STATE, on account of the PROJECT prior to such cancellation, and shall restore the COMPANY's property to the condition existing prior to the initiation of the PROJECT construction.

SECTION 9

The COMPANY may bill the STATE monthly or periodically for its force account when costs exceed \$1,000. Progressive invoices may be submitted for work done during the previous month or period showing the portion of estimated cost completed. A final bill covering actual cost of work and showing all details shall be submitted to the STATE within ninety (90) days after completion of said work.

The STATE shall pay all bills that have been approved within sixty (60) days after receipt thereof. The STATE may hold a retainer on all bills not to exceed eight percent (8%) until final payment. Final payment for all amounts due the COMPANY shall be paid by the STATE within sixty (60) days after the final audit has been made and approved.

SECTION 10

The CITY shall acquire or settle all property, property rights and all damages to property affected by the PROJECT. The cost of said property, property rights and damages to property shall be included as a part of the PROJECT expense.

The COMPANY, insofar as it has the legal right so to do, shall permit the STATE, CITY and/or its contractor a right-of-entry to enter upon lands owned or operated by the COMPANY to construct and occupy said highway facilities across its property with sufficient width to permit construction and maintenance of the PROJECT. Should permanent easements of COMPANY property be needed for the project, the CITY and COMPANY shall enter into good faith negotiations for a price to be consistent with the property interest determined by the Director of Transportation to be needed for the proposed improvement.

However, the price to be paid by the CITY to the COMPANY for said conveyances (representing the fair market value thereof plus damages, if any, to the residue) shall be as mutually agreed upon within nine (9) months from the date of occupancy by the CITY, and if agreement as to price is reached, an additional period of ninety (90) days shall be allowed for settlement, it being agreed however, that if no agreement as to price is reached within the aforesaid nine (9) month period, the CITY will within ninety (90) days thereafter institute an eminent domain proceeding authorized by law for the determination of the value of same. The provisions of this agreement shall survive the institution of such eminent domain proceeding.

The CITY shall furnish the plans and descriptions for any such conveyance. It is understood however, that the foregoing right of entry is a permissive use only, and this Section is not intended to convey or obligate the COMPANY to convey any interest in its land.

In case any action involving said improvement is brought by or against any party hereto, said party shall promptly notify the other parties of the pendency of such action.

SECTION 11

Each party hereto waives, but only against the others, any and all damages or right to claim damages to any of its property growing out of or in any way connected with the improvement herein contemplated, except as otherwise provided for in this agreement.

The STATE shall require of its contractor a bond, conditioned according to Section 5525.16 of the Revised Code of Ohio, in favor of the STATE and the CITY, and shall further require its contractor to take out before work is commenced, and keep in effect until work is completed and accepted, a policy of Railroad Protective Liability Insurance from an insurance company authorized to do business in the State of Ohio, to protect the COMPANY against loss or damage to property and injury to or death of persons, and against all claims, demands, expenses, suits or judgments arising because of, or resulting from the operations of the contractor, his subcontractor, agents or employees, such policy of insurance to provide for a single limit in the amount of \$6,000,000.00 per occurrence and subject to that limit, an aggregate in the amount of \$10,000,000.00 for each annual period for all damages arising out of bodily injuries to or death of one or more persons and out of injury to or destruction of property including such property in the care, custody and control of the COMPANY.

The above insurance provisions are more specifically set forth in the "Special Clauses in the Proposal" which are included in this agreement by reference.

SECTION 12

The work provided for in this agreement shall be commenced by the parties hereto within thirty (30) days from the latter of the following: (1) the date on which this agreement becomes effective, (2) the date on which the COMPANY has been notified by the STATE to proceed or (3) the date on which all funds necessary therefore on the part of the STATE have been properly certified and made available; and it shall be completed within a reasonable time thereafter. Buying and assembling of materials shall be construed as compliance with the foregoing thirty (30) day provision.

All obligations of the STATE provided for in this agreement which require the expenditure of funds by the STATE shall terminate at the end of the present biennium, being June 30, 2009. If construction covered under said agreement is not complete by June 30, 2009, it is the expressed intention of the parties to renew said obligations for one successive biennium period; with the renewal period beginning July 1, 2009 and ending no later than June 30, 2011; until such time as construction covered under said agreement is complete. Said renewal is conditioned upon the STATE determining future appropriations will permit the STATE to renew said obligations.

All financial obligations of the STATE as provided for in this agreement are subject to the provisions of Section 126.07 of the Ohio Revised Code.

SECTION 13

Upon completion of the PROJECT herein contemplated the CITY shall at its own cost and expense, inspect, maintain, repair and renew, or by agreement with others provide for the maintenance, repair and renewal of the new adjacent roadway structure and surfaces, approach grades, newly-constructed retaining walls, concrete platforms and safety railings along the ABC tracks, and all other highway facilities constructed or changed under the terms of this agreement. The COMPANY will permit access onto its property to perform said maintenance at no cost to the CITY, and shall at its own cost and expense, maintain, repair and renew all of its facilities constructed or changed under the terms of this agreement.

The COMPANY will not be vested with any rights of ownership or have a duty to maintain the roadway structure or the new retaining wall south of the COMPANY's tracks, and will not, if the structure ceases to be a part of the highway system, have a duty to remove the facility from the COMPANY right of way.

Upon completion of the PROJECT, the COMPANY will at its own cost and expense, maintain, repair and renew the grade crossing protection equipment, including lights, gates, electrical systems and incoming power feeds, crossing surface; and all track, switches, ballast, sub-ballast and below-grade drainage within the COMPANY's Right-of-Way that was changed or affected by the PROJECT.

The COMPANY further agrees that should any portion of the newly-constructed retaining walls, including concrete platforms and safety railings adjacent to and along the ABC tracks, are damaged or destroyed by negligence of the COMPANY, the COMPANY agrees to arrange and pay for all necessary repair costs.

The COMPANY will arrange or by agreement with others provide for the maintenance, repair and renewal of the existing below-grade grain hopper at the 'Star of the West' grain facility to ensure unimpeded operation after construction is completed. The CITY will not be vested in any rights or responsibilities for the referenced grain hopper.

SECTION 14

This agreement shall be for the benefit of the parties hereto only and no person, firm or corporation shall acquire any rights whatsoever by virtue of this agreement, except the STATE and COMPANY and the successors and assigns of the COMPANY.

SECTION 15

The Federal Highway Administration's Federal-Aid Policy Guide 646(B) classifies this PROJECT in Classification No. 2 resulting in no ascertainable benefits to the COMPANY. The Parties signatory to this agreement accept this classification as applicable in this instance. The COMPANY's contribution shall be zero dollars.

SECTION 16

The COMPANY agrees to adhere to the requirements of Ohio Ethics law as provided by Section 102.04 of the Ohio Revised Code. O.R.C. Section 102.04(A) prohibits a state official or employee from receiving compensation, other than from his own agency, for personal services rendered in a case, proceeding application, or other matter before any state agency. O.R.C. Section 102.04(B) prohibits state officials and employees from selling goods or services to state agencies, except by competitive bidding.

It is understood by the parties that non-elected state officials and employees may qualify for an exemption under Section 102.04(D), if (1) the agency with which the official or employee seeks to do business is an agency other than the one with which he serves; and, (2) prior to rendering personal services or selling or agreeing to sell goods or services, the official or employee files an O.R.C. Section 102.04(D) statement with the Ohio Ethics Commission, the agency with which he serves, and the agency with which he seeks to do business. The statement must include a declaration that the non-elected state official or employee disqualifies himself for a period of two years from any participation in his official capacity as a board or commission member in any matter involving any official or employee of the agency with which he seeks to do business.

It is expressly understood and agreed to by the parties that a failure by the COMPANY to file a declaration statement as required under O.R.C. Section 102.04(D), may be considered by the STATE, a breach of material condition of this agreement and the STATE may, if it so elects, void this agreement.

SECTION 17

In carrying out this contract, the COMPANY shall not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, disability, age, or Vietnam-era veteran status. The COMPANY will ensure that applicants are hired and that employees are treated during employment without regard to their race, religion, color, sex, national origin, disability, age, or Vietnam-era veteran status.

Such action shall include, but not be limited to, the following: Employment, Upgrading, Demotion, or Transfer; Recruitment or Recruitment Advertising; Layoff or Termination; Rates of Pay or other forms of Compensation; and Selection for Training including Apprenticeship.

SECTION 18

COMPANY agrees to comply with all applicable state and federal laws regarding drug-free workplace. COMPANY shall make a good faith effort to ensure that all COMPANY employees, while working on state property, will not purchase, transfer, use or possess illegal drugs or alcohol or abuse prescription drugs in any way.

IN WITNESS WHEREOF, the parties hereunto have caused this agreement to be duly executed in duplicate as of the day and year first above written.

THE STATE OF OHIO

By _____
James G. Beasley, P.E., P.S.
Director of Transportation

THE CITY OF KENT

By _____
Print Name _____
Title _____

By _____
Print Name _____
Title _____

By _____
Print Name _____
Title _____

THE AKRON BARBERTON CLUSTER RAILWAY CO.

By _____
Print Name _____
Title _____