

# Record No. 5954

---

---

## PETITION FOR WRIT OF MANDAMUS

---

---

In the  
Supreme Court of Appeals of Virginia  
at Richmond

---

ROBERT Y. BUTTON,  
ATTORNEY GENERAL OF VIRGINIA  
v. (Peninsula Ports Authority  
of Virginia)  
SIDNEY C. DAY, JR.,  
COMPTROLLER OF VIRGINIA

---

---

### RULE 5:12—BRIEFS

§5. NUMBER OF COPIES. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. SIZE AND TYPE. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

IN THE  
**Supreme Court of Appeals of Virginia**

AT RICHMOND

---

**Record No. 5954**

---

**VIRGINIA:**

In the Supreme Court of Appeals held at the Masonic Building in the City of Staunton on Wednesday the 9th day of September, 1964.

**ROBERT Y. BUTTON, ATTORNEY GENERAL OF VIRGINIA,**  
Petitioner,

*against*      Record No. 5954 (Peninsula Ports Authority  
of Virginia)

**SIDNEY C. DAY, JR., COMPTROLLER OF VIRGINIA,**  
Respondent.

---

Upon a Petition for Writ of Mandamus

---

This day came Robert Y. Button, Attorney General of Virginia, and presented to the court a petition praying that a writ of mandamus do forthwith issue requiring and compelling Sidney C. Day, Jr., Comptroller of Virginia, respondent, to issue warrants upon the Treasurer of Virginia for payments of such amounts as may be authorized by vouchers of the Peninsula Ports Authority of Virginia pursuant to the powers granted thereto, as more fully set out in the said petition. Petitioner further prays that the said Sidney C. Day, Jr., Comptroller of Virginia, be made a party defendant to

this petition and be required to answer the same, and for other relief.

Whereupon came the respondent, by counsel, and filed a demurrer and answer to the aforesaid petition.

Upon mature consideration whereof Howard W. Dobbins, Esquire, is hereby appointed as counsel to represent the said respondent, and it is ordered that the cause be docketed and the record printed.

On motion of the parties agreed, it is further ordered that 25 printed copies of the petitioner's brief be filed with the clerk on or before August 28, 1964; that 25 printed copies of the respondent's brief be filed with the clerk on or before September 28, 1964; and that 25 printed copies of the petitioner's reply brief, if any, be filed with the clerk on or before October 3, 1964; and the cause is hereby placed upon the privileged docket of the October, 1964, session of this court.

## RECORD

### NOTICE OF APPLICATION FOR WRIT OF MANDAMUS

To the Honorable Sidney C. Day, Jr., Comptroller of Virginia:

Please take notice that on the 20 day of June, 1964, at 2 P. M., the undersigned will make application to The Supreme Court of Appeals of Virginia at the Supreme Court of Appeals Building, in the City of Richmond, Virginia, for a writ of mandamus, a copy of the petition for said writ being attached hereto.

ROBERT Y. BUTTON  
Attorney General of Virginia.

Service of the foregoing notice of application for a writ of mandamus with attached copy of the petition for said writ is accepted this 30 day of June, 1964.

SIDNEY C. DAY, JR.  
Comptroller.

### PETITION FOR WRIT OF MANDAMUS.

Your petitioner, Robert Y. Button, Attorney General of Virginia, by this petition for a writ of mandamus, respectfully represents unto the Court as follows:

#### I.

Under Chapter 46 of the Acts of Assembly of Virginia, 1952, as amended (the "Enabling Act"), including particularly the amendments thereto by Chapter 39 of the Acts of Assembly of Virginia, 1964, the Peninsula Ports Authority of Virginia (the "Authority"), a body politic and corporate and a political subdivision of the Commonwealth of Virginia, has been created with the powers and duties therein defined, including the powers:

(a) to acquire, lease, construct, maintain and operate port facilities, as such term is defined in the Enabling Act, including landings, wharves, docks and piers and the approaches to and appurtenances thereof, tracks, spurs, crossings, switchings, terminals, warehouses and terminal facilities of every kind and description necessary or useful in the transportation and storage of goods, wares and merchandise;

(b) to issue its revenue bonds for the purpose of paying all or any part of the cost of port facilities; and

(c) to sell or otherwise dispose of, or grant concessions or rights in, all or any part of the port facilities and to lease to a lessee or lessees all or any of such facilities for such period, in such manner and upon such terms and conditions as the Authority shall determine to be in the public interest.

## II.

At its 1958 Session, the General Assembly of Virginia adopted House Joint Resolution No. 70, which recognizes the high degree of importance of further port development to the economic and industrial development of the Commonwealth and the necessity for providing new and improved port facilities through public means in order to compete successfully with publicly-supported ports in other states. H.J.R. No. 70 provides as follows:

“WHEREAS, the increasing pressure of competition from ports with publicly-supported terminals and facilities has made it impossible for private industry to provide the necessary new and improved facilities which Virginia’s ports must have if they are to obtain the oceanborne general cargo commerce, potential to them, maintain their present volume of trade or to properly serve Virginia agriculture and industry; and

“WHEREAS, the Virginia State Ports Authority, in the discharge of its responsibilities for developing and promoting Virginia’s ports and their commerce, has recommended a program for general cargo facilities acquisition and construction at Hampton Roads based upon financial investment by the State and private industry which, through force of circumstances, could not be presented to the Governor and the General Assembly for consideration until after the State’s budget requirements for other purposes had been largely determined, resulting in the General Assembly being

unable to appropriate the money requested to inaugurate the program in the 1958-1960 biennium; now, therefore, be it

“RESOLVED by the House of Delegates, the Senate concurring, That by reason of the high degree of importance of further port development to the economy of the Commonwealth, the General Assembly of Virginia directs the Virginia State Ports Authority to proceed to obtain facts and information regarding the cost of acquisition and construction of such port terminals and facilities for presentation to the Governor and the General Assembly at the regular session of 1960.”

### III.

The Enabling Act provides that the improvement and development of modern and efficient port facilities for the purpose of increasing trade and commerce beneficial to the economy, prosperity and welfare of the State conform to the overall State policy of promoting the development and operation of adequate, modern and efficient seaports and harbors through such aids and other encouragement as may be authorized by the General Assembly.

### IV.

In order to facilitate the provision of port facilities at Newport News, Virginia, the General Assembly at its 1964 regular session amended the Enabling Act in order to vest additional powers for financing and providing port facilities at Newport News and, further, included in the appropriation act for biennium 1965-1966, Item 190 providing as follows:

#### “Item 190

“For one-half the annual cost for acquisition, development, construction and operation of port facilities at Newport News, a sum sufficient, not to exceed in any one year the amount appropriated annually herein for port facilities at Norfolk.

“It is provided, further, that in the event the Board of Commissioners of the Virginia State Ports Authority is unable to acquire, develop or operate port facilities at Newport News, as proposed pursuant to H.J.R. No. 70, of the 1958 General Assembly, the funds hereby appropriated for such acquisition, development and operation of port facilities at



Newport News shall be available, subject to the approval of the Governor, in like manner and to the same extent, to the Peninsula Ports Authority of Virginia, a political subdivision of the Commonwealth having jurisdiction and authority to acquire, own, construct, and operate or lease port facilities."

The amount appropriated annually in such appropriation act for port facilities at Norfolk is \$757,500.

Under the appropriation act for the biennium 1962-1964 adopted by the General Assembly at its 1962 Session, the development of port facilities was recognized by the inclusion in such appropriation act of Item 172 reading as follows:

"Item 172

"For acquisition, development, construction and operation of port facilities, a sum sufficient not to exceed \$100,000.

"It is provided, further, that in the event the Board of Commissioners of the Virginia State Ports Authority is unable to acquire, develop or operate port facilities at any port, as proposed pursuant to H.J.R. No. 70, of the 1958 General Assembly, the funds hereby appropriated for such acquisition, development and operation of port facilities at any port shall be available, subject to the approval of the Governor, in like manner and to the same extent, to any other political subdivision of the Commonwealth having jurisdiction and authority to acquire, own, construct, and operate or lease port facilities."

V.

The Virginia State Ports Authority by a resolution adopted on June 8, 1964 (Exhibit A attached hereto and made a part hereof), pursuant to said 1962 and 1964 appropriation acts, has determined that it is unable to acquire, develop or operate port facilities at Newport News and has recommended to the Governor of the Commonwealth of Virginia that he approve making available to the Peninsula Ports Authority of Virginia the sum of \$5,000 appropriated for the fiscal year ending June 30, 1964 for the acquisition, development, construction and operation of port facilities at Newport News and a sum sufficient, not to exceed \$757,500 for each of the fiscal years ending June 30, 1965 and June 30, 1966 for one-half the annual cost of acquisition, development, construction and operation of port facilities at Newport News pursuant to the 1964 Appropriation Act.

## VI.

The Governor of the Commonwealth of Virginia by a letter dated June 19, 1964 (Exhibit B attached hereto and made a part hereof) pursuant to said 1962 and 1964 appropriation acts has approved the making available to the Peninsula Ports Authority of Virginia of said funds, as recommended by the Board of Commissioners of Virginia State Ports Authority, appropriated for the acquisition, development, construction and operation of port facilities at Newport News.

## VII.

In the exercise of its powers and for the purpose of acquiring, developing, constructing and operating port facilities at Newport News the Authority has entered into a contract (Exhibit C hereto attached and made a part hereof) with a firm of consulting engineers named Sverdrup & Parcel, for the performance of engineering services in connection with the construction of certain port facilities at Newport News, and the Authority under the terms of said contract is presently obligated to pay to Sverdrup & Parcel forthwith the sum of \$1,000 as a retainer.

## VIII.

The Authority, The Chesapeake and Ohio Railway Company (herein called the "Railway") and the City of Newport News, Virginia (herein called the "City" and sometimes referred to as the "Consolidated City of Newport News") have entered into a tripartite agreement called a "Memorandum of Agreement" (Exhibit D attached hereto and made a part hereof), dated as of June 10, 1964, pursuant to which the Authority, the Railway and the City have agreed, *inter alia*, as follows:

(a) the Railway, shall convey to the Authority certain existing port facilities at Newport News and the Authority shall pay to the Railway the sum of \$7,581,500 therefor from proceeds of revenue bonds proposed to be issued and sold by the Authority;

(b) the Authority shall construct, with proceeds derived from the issuance and sale of said revenue bonds, certain port facilities, including a general cargo pier, at Newport News;

(c) the Railway shall lease from the Authority and the



Authority shall lease to the Railway said port facilities to be acquired from the Railway and to be constructed by the Authority;

(d) said agreement of lease shall provide that the Railway shall pay to the Authority for the port facilities thus leased annual rental during the initial thirty year term in an amount equal to fifty per centum (50%) of the total amount the Authority requires to provide for the payment of principal of and interest on, and for the amortization of and reserves for, the revenue bonds of the Authority issued to pay the cost of said port facilities, but not in any event to exceed a total annual payment by the Railway to the Authority of Seven Hundred Fifty-seven Thousand Five Hundred Dollars (\$757,500) (called the "basic rent") and an additional amount (called the "additional rent") sufficient to pay in full the fees and other costs payable to the trustee, banking institutions and accountants for services under the trust agreement securing the Authority's revenue bonds, the costs incurred in the purchase or redemption of revenue bonds, if any, reports provided for in the agreement of lease or in the trust agreement securing such revenue bonds and the net loss, if any, suffered in the investment of funds under said trust agreement, and, in addition, the Railway shall also pay all costs of operation, repair, and maintenance of the Port Facilities;

(e) said agreement of lease shall further provide for an initial term of thirty (30) years which, at the option of the Railway, shall be subject to renewal for two (2) additional successive thirty (30) year terms, subject to an adjustment of rent therefor as shall be provided under the agreement of lease;

(f) the Authority shall urgently request the General Assembly of Virginia to appropriate to the Authority an amount, not exceeding \$757,500 in any fiscal year, equal to fifty per centum (50%) of the total amount required to provide for the payment of principal of and interest on, and for amortization of and reserves for, the revenue bonds of the Authority issued to pay the cost of said port facilities;

(g) in order to facilitate the issuance and marketing of the revenue bonds of the Authority and for and in consideration of the Authority's agreement to convey to the City, when said revenue bonds have been fully paid or sufficient funds have been deposited for the full payment of such bonds, title to said port facilities, the City agrees to pay to the Authority an amount equal to the Bond Requirement Deficiency as de-

fined in and pursuant to Section 11. of the Enabling Act which reads as follows:

“§ 11. The improvement and development of Port Facilities for the purpose of increasing trade and commerce beneficial to the economy, prosperity and welfare of the State conform to the overall State policy of promoting the development and operation of adequate, modern and efficient sea-ports and harbors through such aids and other encouragement as may be authorized by the General Assembly. To promote and encourage the acquisition, construction, operation and maintenance of Port Facilities and to enable the Authority to sell its bonds for paying the cost of such Port Facilities, the Authority is authorized to pledge for the payment of such bonds, in addition to other revenues, moneys from time to time (i) appropriated to or for the use of the Authority by the General Assembly and available for such purpose and (ii) paid to the Authority by the City of Newport News or the City of Hampton or both cities as provided in this section. Notwithstanding any charter or statutory provision to the contrary, the cities of Newport News and Hampton are, or either of them is, authorized to pay to the Authority for each fiscal year during which any of such bonds are outstanding an amount not exceeding the Bond Requirement Deficiency, as hereinafter defined, incurred in such fiscal year and the City of Newport News and the City of Hampton, or either of them, and the Authority are empowered to enter into any contract or contracts, for such period of years as they determine to be necessary, providing for such payments and further providing that in consideration of the assumption by the City of Newport News or the City of Hampton or both cities, as the case may be, of such contingent liability to make such payments the Authority may convey to the respective city or cities, when all bonds of the Authority payable from any revenues of such Port Facilities, including interest thereon, shall have been paid or sufficient funds for such payment shall have been deposited in trust therefor, title to such Port Facilities of the Authority, subject to any leasehold interests, licenses, liens or other lawful encumbrances thereon. The term “Bond Requirement Deficiency” as used in this act means for any fiscal year an amount equal to one-half of the total amount required for such fiscal year to provide for payment of principal of and interest on, and for amortization and reserves for, the bonds of the Authority that are issued under this act to pay the cost of such Port Facilities, less the amount of any funds appropriated by the General Assembly

to or for the use of the Authority for such fiscal year and available for such purpose.

“Any liability to make any payment assumed by the City of Newport News or the City of Hampton under any such contract or contracts, being contingent upon the existence of a Bond Requirement Deficiency caused by inadequate appropriations to or for the use of the Authority by the General Assembly, shall not constitute or create an obligation or an indebtedness within the meaning of any constitutional, statutory or charter limitations upon obligations or debts of such city, and the execution of any such contract or contracts by the City of Newport News or the City of Hampton shall not be deemed to create any obligation or debt contrary to any such limitations.”

(h) in conformity with Section 11 of the Enabling Act, above quoted, and for and in consideration of the City's agreement to pay to the Authority an amount equal to the Bond Requirement Deficiency, the Authority shall convey to the City, when said revenue bonds of the Authority, including interest thereon, shall have been paid or sufficient funds for such payment shall have been deposited in trust therefor, title to the port facilities, subject to any leasehold interests, licenses, liens or other lawful encumbrances thereon; and

(i) the Memorandum of Agreement is an interim, temporary agreement which shall be superseded and supplemented, as soon as practicable but in any event on or prior to the date the revenue bonds are delivered and paid for, by the following definitive contracts:

(1) an agreement of lease by and among the Authority, the City and the Railway providing for the leasing of said port facilities and the payment of rent therefor by the Railway;

(2) a contract by and between the Authority and the Railway providing for the conveyance of the Port Facility Property (as defined in such Memorandum of Agreement) to the Authority and the construction of the New Port Facilities (as defined in such Memorandum of Agreement) by the Authority;

(3) a contract by and between the Authority and the City for the City's payment to the Authority of an amount equal to the Bond Requirement Deficiency and the Authority's conveyance to the City of title to said port facilities; and

(4) a trust agreement by and between the Authority and a trustee providing for the issuance and securing of the Au-

thority's revenue bonds to pay the cost of acquiring such Port Facility Property and constructing such New Port Facilities.

The operations of the Railway under the lease will probably result in the incurring of operating losses which the Railway is required to absorb and the Authority and the City are relieved of the obligations of making up any deficiency in earnings and are not obligated to pay or bear any losses incurred in the operation of said port facilities by the Railway.

## IX.

The principal of and the interest on the revenue bonds of the Authority shall be payable solely from the rentals derived by the Authority from the lease of said port facilities, moneys that are made available therefor through appropriations of the General Assembly of the Commonwealth and through payments, if any, of an amount equal to the Bond Requirement Deficiency by the City. Section 11 of the Enabling Act, above quoted, specifically provides that any liability to make any payment assumed by the City under any contract with the Authority, being contingent upon the existence of a Bond Requirement Deficiency caused by inadequate appropriations to and for the use of the Authority by the General Assembly, shall not constitute or create an obligation or an indebtedness within the meaning of any constitutional, statutory or charter limitations upon obligations or debts of the City, and the execution of any such contract or contracts by the City shall not be deemed to create any obligation or debt contrary to any such limitations.

## X.

The Commissioners of the Authority at a meeting duly held on June 29, 1964 adopted a resolution approving and authorizing the execution of the Memorandum of Agreement; the council of the City at a meeting duly convened and held on June 7th, 1964 adopted a resolution approving and authorizing the execution of the Memorandum of Agreement; and the Railway has approved and authorized the execution of such Memorandum of Agreement. The Authority, the City and the Railway, pursuant to such approvals and authorizations, have duly executed the Memorandum of Agreement and such Agreement is now in full force and effect.

## XI.

In order to meet its obligation to said Consulting Engineers, Sverdrup & Parcel, pursuant to said Contract attached hereto as Exhibit C, the Authority has presented to the respondent herein, the Honorable Sidney C. Day, Jr., Comptroller of Virginia (the "Comptroller"), its voucher for the payment of the \$1,000 retainer to Sverdrup & Parcel out of the \$5,000, made available to the Authority, out of said appropriation for the fiscal year ending June 30, 1964. A copy of said voucher, marked "Exhibit E", is hereto attached and made a part hereof.

## XII.

The Comptroller has declined to issue a warrant authorizing said payment of \$1,000. By letter dated June 29, 1964, the Comptroller notified your petitioner that he entertained doubts respecting the validity of said Memorandum of Agreement and stated that (a) the obligation of the City to pay to the Authority an amount equal to the Bond Requirement Deficiency creates an obligation or debt in contravention of constitutional, statutory and charter limitations of the City, including particularly Section 127 of the Virginia Constitution, and such Memorandum of Agreement to the extent that it attempts to impose said obligation upon the City is unlawful and void; (b) the provisions of Section 11 of the Enabling Act authorizing the City and the Authority to enter into any contract for the City's payment of an amount equal to the Bond Requirement Deficiency is in conflict with the Constitution of Virginia, particularly Section 127 thereof; and (c) the provisions in the Memorandum of Agreement relating to the Agreement of Lease between the Authority, the City and the Railway are invalid, being in violation of Section 185 of the Virginia Constitution, in that the credit of the State and of the City is directly or indirectly granted to or in aid of the Railway.

The Comptroller contends that the City under the Memorandum of Agreement has incurred an obligation to pay in each fiscal year an amount up to \$757,500 for at least thirty years, being the period that the revenue bonds are expected to be outstanding, and such obligation constitutes an indebtedness of the City within the purview of constitutional debt limit provisions. The total indebtedness thus assumed by the City under the Memorandum of Agreement is in excess of

\$22,725,000, which amount, including the existing indebtedness of the City, exceeds 18% of the assessed value of the real estate in the City subject to taxation, as shown by the last preceding assessment for taxes, such 18% limitation being applicable to the City. The City has not authorized such indebtedness by an ordinance enacted in accordance with Section 123 of the Constitution of Virginia and approved by the affirmative vote of the majority of the qualified voters of the City voting upon the question of incurring such obligation for a supply of water or other specific undertaking from which the City may derive a revenue. The Comptroller further contends that the provisions in the Memorandum of Agreement relating to the agreement of lease between the Authority, the City and the Railway are invalid and in violation of Section 185 of the Virginia Constitution. Section 185 provides that neither the credit of the State, nor of any county, city or town, shall be, directly or indirectly, under any device or pretense whatsoever, granted to or in aid of any person, association or corporation. The Memorandum of Agreement provides for the payment of rent by the Railway to the Authority for the lease of the port facilities which is expected to amount to only 50% of the total amount required to liquidate the revenue bonds to be issued by the Authority for financing the port facilities. In addition, it is provided in the Memorandum of Agreement that upon liquidation of such bonds or termination of the initial 30 year term, the Railway has the option of extending the term of the lease for one additional term or two additional terms of 30 years each during which the rent payable by the Railway shall be adjusted as mutually agreed upon by the parties. These rental provisions of the Memorandum of Agreement, to be incorporated in the agreement of lease, coupled with the aforementioned obligation of the City of Newport News to pay the Bond Requirement Deficiency, constitute devices for extending the credit of the Commonwealth and of the City to the Railway contrary to such constitutional inhibition in that the rent payable by the Railway and the rest that may be provided for future terms do not represent fair rental predicated upon the cost or value of the port facilities leased. The Comptroller further notified your petitioner that he did not feel that it would be proper or safe, and that he would, therefore, refuse, to issue any warrants in payment of obligations incurred by the Authority payable out of monies appropriated for the fiscal year ending June 30, 1964, until there has been a final adjudication by the Supreme Court of Appeals of Virginia determining

any and all the questions raised by the Comptroller or by this petition pertaining thereto. A copy of the Comptroller's letter, designated "Exhibit F" is hereto attached and made a part hereof.

### XIII.

The specific questions raised by the Comptroller in said letter are as follows:

1. Are the provisions of Section 11 of the Enabling Act authorizing such contract between the City and the Authority respecting the Bond Requirement Deficiency in conflict with the Constitution of Virginia, particularly the debt-incurring limitations of Section 127 of the Constitution?

2. Is the Memorandum of Agreement invalid by reason of the fact that the City thereunder has assumed an indebtedness in contravention of applicable constitutional, statutory and charter limitations, particularly said Section 127 of the Constitution?

3. Is the Memorandum of Agreement invalid by reason of the fact that the City thereunder has assumed an indebtedness which, with the City's other indebtedness, exceeds constitutional and charter debt limitations governing the City?

4. Are the provisions in the Memorandum of Agreement for the execution of an agreement of lease invalid and in violation of Section 185 of the Constitution of Virginia?

### XIV.

Said letter from the Comptroller to your petitioner constitutes sufficient ground for this Court to exercise jurisdiction in this case, and to consider and determine all questions raised in said letter or in this petition, or in the respondent's answer, such jurisdiction being expressly conferred in Section 8-714 of the Code of Virginia

### XV.

Your petitioner believes, and so avers, that Section 11 of the Enabling Act is not in violation of any of the provisions of the Constitution of Virginia, that the Memorandum of Agreement is in all respects valid and constitutional, and that the questions of the Comptroller set forth in paragraph XIV of this petition should be answered in the negative.



WHEREFORE, your petitioner files this petition and prays that this Honorable Court will consider and determine all questions raised herein and will adjudge that the Enabling Act is a valid enactment of the General Assembly of Virginia and is not in violation of any of the provisions of the Constitution of Virginia and that the Memorandum of Agreement is in all respects valid and constitutional, and that each of the questions enumerated in paragraph XIV of this petition should be answered in the negative; and your petitioner further prays that the said Honorable Sidney C. Day, Jr., Comptroller of Virginia, be made a party defendant to this petition and be required to answer the same; and that a writ of mandamus be issued by this Honorable Court directed to the said defendant, Honorable Sidney C. Day, Jr., Comptroller of Virginia, requiring him to issue warrants upon the State Treasurer for payment of such amount as may be authorized by the voucher of the Authority, pursuant to the powers granted it.

ROBERT Y. BUTTON  
Attorney General.

This is to certify that on June 30, 1964, I personally served a copy of the foregoing petition for writ of mandamus, with attached exhibits, upon the Honorable Sidney C. Day, Jr., Comptroller of Virginia, at his office in Richmond, Virginia, together with notice that the petition would be filed in the Clerk's Office of The Supreme Court of Appeals of Virginia, at 2 P. M. on June 30, 1964.

KENNETH C. PATTY  
Assistant Attorney General.

#### AFFIDAVIT OF PETITIONER.

State of Virginia,  
City of Richmond, to-wit:

This day personally appeared before me, a Notary Public in and for the City aforesaid in the State of Virginia, Kenneth C. Patty, who stated upon oath that he is Assistant Attorney General of Virginia and that the matters and things stated in the petition for writ of mandamus in the above styled matter are true to the best of his knowledge, information and belief.

Given under my hand this 30 day of June, 1964.  
My commission expires on the 8th day of May, 1966.

MABEL G. HURT  
Notary Public.

ROBERT Y. BUTTON,  
Attorney General.  
KENNETH C. PATTY,  
First Assistant Attorney General  
Library-Supreme Court Building  
Richmond, Virginia.

E. SCLATER MONTAGUE  
Citizens National Bank Building  
Hampton, Virginia.

F. O. BLECHMAN  
Wilbern Building  
Newport News, Virginia.

Attorneys for Petitioner.

## **APPENDIX**

## EXHIBIT A.

## VIRGINIA STATE PORTS AUTHORITY

Maritime Tower  
Norfolk, Virginia 23510  
Cable Address Vastports

D. H. CLARK  
Executive Director

June 8, 1964

## RESOLUTION

DETERMINING THAT THE VIRGINIA STATE PORTS AUTHORITY IS UNABLE TO ACQUIRE, DEVELOP OR OPERATE PORT FACILITIES AT NEWPORT NEWS AS PROPOSED PURSUANT TO H. J. R. NO. 70 OF THE 1958 GENERAL ASSEMBLY

WHEREAS, under the provisions of Chapter 640 of the Acts of the General Assembly of Virginia, 1962 (herein the "1962 Appropriation Act") an appropriation of a sum sufficient, not to exceed \$100,000, for acquisition, development, construction and operation of port facilities for the fiscal year ending June 30, 1964 has been made to the Board of Commissioners of the Virginia State Ports Authority, subject to the provision "that in the event the Board of Commissioners of the Virginia State Ports Authority is unable to acquire, develop or operate port facilities at any port, as proposed pursuant to H.J.R. No. 70, of the 1958 General Assembly, the funds hereby appropriated for such acquisition, development and operation of port facilities at any port shall be available, subject to the approval of the Governor, in like manner and to the same extent, to any other political subdivision of the Commonwealth having jurisdiction and authority to acquire, own, construct, and operate or lease port facilities"; and

WHEREAS, pursuant to An Act to appropriate the Public Revenue for the Two Years Ending Respectively on the Thirtieth Day of June, 1965 and the Thirtieth Day of June, 1966 (H35), approved April 3, 1964, (herein the "1964 Appropriation Act") there has been appropriated to the Board of Commissioners of the Virginia State Ports Authority "a sum sufficient, not to exceed in any one year the amount appropriated annually herein for port facilities at Norfolk", for one-half the annual cost for acquisition, development, construction and operation of port facilities at Newport

News, and it is further provided in such act that in the event the Board of Commissioners of the Virginia State Ports Authority "is unable to acquire, develop or operate port facilities at Newport News, as proposed pursuant to H.J.R. No. 70 of the 1958 General Assembly, the funds hereby appropriated for such acquisition, development and operation of port facilities at Newport News shall be available, subject to the approval of the Governor, in like manner and to the same extent, to the Peninsula Ports Authority of Virginia \* \* \*"; and

WHEREAS, pursuant to the provisions of the 1964 Appropriation Act there has been appropriated for port facilities at Norfolk the sum of \$757,500 for each of the fiscal years ending June 30, 1965 and June 30, 1966, respectively; and

WHEREAS, under Chapter 46 of the Acts of the General Assembly of 1952, approved February 15, 1952, as amended, including particularly the amendments thereto by Chapter 39 of the Acts of the General Assembly of Virginia, 1964, (herein the "Enabling Act") the Peninsula Ports Authority of Virginia has been established as a body politic and corporate and a political subdivision of the Commonwealth and has been authorized, among other things, to foster and stimulate the commerce of the Port of Newport News and the shipment of freight through such port and to acquire, lease, construct, maintain, operate and finance, through the issuance of bonds and otherwise, port facilities; and

WHEREAS, under the provisions of the Enabling Act, the City of Newport News is authorized to pay to the Peninsula Ports Authority of Virginia for each fiscal year during which any bonds of such Authority are outstanding an amount not exceeding the Bond Requirement Deficiency, as defined in the Enabling Act, incurred in such fiscal year by the Peninsula Ports Authority of Virginia, and the City of Newport News and the Peninsula Ports Authority of Virginia are empowered to enter into any contract or contracts for such period of years as they determine to be necessary providing for such payment and further providing that in consideration of the assumption by the City of Newport News of such contingent liability to make such payments, the Peninsula Ports Authority of Virginia may convey to the City of Newport News, under certain conditions, the port facilities financed through the issuance of such bonds; and

WHEREAS, the Virginia State Ports Authority has studied and considered the feasibility of its financing through the issuance of its revenue bonds, the acquisition and construction of necessary port facilities in the City of Newport News and has conferred with officials of the Chesapeake and Ohio Railway Company, interested city officials, investment bankers and others in an effort to develop and formulate a feasible plan for undertaking and financing the acquisition and construction of such port facilities by the Virginia State Ports Authority; and

WHEREAS, the Virginia State Ports Authority has ascertained that the rent that may be derived by leasing the port facilities to be acquired and constructed in the City of Newport News to the Chesapeake and Ohio Railway Company will be sufficient to meet only part of the principal of and interest on the revenue bonds that have to be issued to finance the acquisition and construction of such port facilities; and

WHEREAS, it has been further ascertained by the Virginia State Ports Authority that the revenues and moneys that will be available to pay the revenue bonds required to be issued to pay the cost of the port facilities at Newport News will not be sufficient to enable the Virginia State Ports Authority to market its revenue bonds for the acquisition and construction of such port facilities; and

WHEREAS, the Peninsula Ports Authority of Virginia and the City of Newport News propose to enter into a contract or contracts pursuant to the Enabling Act obligating the City of Newport News to pay to the Peninsula Ports Authority of Virginia the Bond Requirement Deficiency, as defined in the Enabling Act, in order to facilitate the acquisition, construction and financing of port facilities in the City of Newport News by the Peninsula Ports Authority of Virginia; and

WHEREAS, it appears that the Peninsula Ports Authority of Virginia with the additional security thus provided through such contract or contracts with the City of Newport News may be able to issue and sell its revenue bonds to pay the cost of acquiring and constructing port facilities at Newport News;

NOW, THEREFORE, BE IT RESOLVED by the Board of Commissioners of the Virginia State Ports Authority, as follows:

Section 1. In conformity with the provisions of the 1962 Appropriation Act and the 1964 Appropriation Act, it is hereby determined and affirmed that the Board of Commissioners of the Virginia State Ports Authority is unable to acquire, develop or operate port facilities at Newport News, as proposed pursuant to H.J.R. No. 70 of the 1958 General Assembly, and that said Board of Commissioners hereby recommends that the Governor of the Commonwealth of Virginia approve the making available to the Peninsula Ports Authority of Virginia the sum of \$5,000 for the acquisition, development, construction and operation of port facilities at Newport News appropriated for the fiscal year ending June 30, 1964 pursuant to the 1962 Appropriation Act and a sum sufficient, not to exceed \$757,500 for each of the fiscal years ending June 30, 1965 and June 30, 1966, for one-half the annual cost of acquisition, development, construction and operation of port facilities at Newport News pursuant to the 1964 Appropriation Act.

Section 2. The Secretary is directed to send certified copies of this Resolution to the Governor and the Comptroller of the Commonwealth, the Peninsula Ports Authority of Virginia and the City of Newport News.

The foregoing resolution was approved and adopted by the Board of Commissioners of the Virginia State Ports Authority assembled in Special Meeting at the Chamberlin Hotel, at Old Point Comfort, Virginia, Monday, June 8, 1964.

BOARD OF COMMISSIONERS  
VIRGINIA STATE PORTS  
AUTHORITY

HARRY REYNER,  
Acting Chairman.

(Seal)

ATTEST:

JOHN F. MEREDITH,  
Secretary.

June 8, 1964



## Supreme Court of Appeals of Virginia

## EXHIBIT "B"

## COMMONWEALTH OF VIRGINIA

Governor's Office  
Richmond

June 19, 1964

BOARD OF COMMISSIONERS, VIRGINIA STATE  
PORTS AUTHORITY:

Pursuant to your Resolution under date of June 8, 1964, authorization is hereby granted for the payment of \$5,000 to the Peninsula Ports Authority of Virginia from Item 172 of the 1962 Appropriation Act under the provisions of H.J.R. No. 70, 1958 General Assembly.

/s/ A. S. HARRISON, JR.  
Governor/s/ L. M. KUHN  
Director of the Budget

cc: Honorable Robert Y. Button—With copy of Resolution  
Attorney General of Virginia  
Honorable Sidney C. Day, Jr.  
State Comptroller  
Admiral D. H. Clark, Executive Director  
Virginia State Ports Authority

\* \* \* \* \*

## EXHIBIT C

## SVERDRUP &amp; PARCEL

Consulting Engineers  
915 Olive Street  
St. Louis, Mo. 63101

June 3, 1964

Peninsula Ports Authority of Virginia  
P. O. Box 338  
Newport News, Virginia 23607

Attention: Mr. J. Frank Alspaugh  
Executive Director

Gentlemen:

By letter of May 15, 1964, you advised us that the Peninsula

Ports Authority of Virginia, at its regular meeting on May 15, 1964, had selected our firm as consulting engineers in connection with the proposed Modern General Cargo Pier at Newport News, Virginia.

Accordingly, L. J. Sverdrup, John I. Parcel, E. R. Grant, B. R. Smith and D. C. Wolfe, a partnership doing business as Sverdrup & Parcel, Consulting Engineers, whose address is 915 Olive Street, St. Louis, Missouri 63101, do hereby agree to perform the engineering services on your behalf in connection with this project, as shown on the attached Scope of Work.

Pending further study by our firm and determination of fees to be paid, which shall be generally in accord with the established practice for such work, and the preparation of formal agreement covering the work to be performed, the total fee, the terms of payment and the execution of such contract, as a partial payment for our consulting engineering services performed, Sverdrup & Parcel does hereby agree to accept, and the Peninsula Ports Authority of Virginia does hereby agree to pay, as soon as funds for such purposes become available, the sum of One Thousand Dollars (\$1,000.00) as an interim retainer fee.

Our statement for the interim retainer is attached.

We are enclosing two (2) copies of this letter agreement, on which the Peninsula Ports Authority of Virginia may indicate its acceptance by having an authorized person sign and return one (1) copy to us.

Yours very truly,

SVERDRUP & PARCEL  
By: B. R. SMITH  
Partner

Accepted this 10th day of June, 1964:

PENINSULA PORTS AUTHORITY  
OF VIRGINIA  
By: J. FRANK ALSPAUGH  
Executive Director

ENGINEERING CONTRACT — PENINSULA PORTS  
AUTHORITY OF VIRGINIA C&O RAILROAD GEN-  
ERAL CARGO PIER, NEWPORT NEWS, VIRGINIA

## SCOPE OF WORK

## PHASE I. PRELIMINARY

1. Review C&O Railroad general layout to ascertain whether type of pier and facilities will serve the present and future interest of the Peninsula Area for handling cargo by truck as well as by rail.

2. Review C&O Railroad design criteria to ascertain whether criteria provides for piers and facilities which are of modern economic design and desired capacity.

3. Assist bond counsel in preparation of engineering portion of bond prospectus.

4. When requested, provide a representative, or representatives, to attend meetings pertaining to the project, and to aid, advise and assist the Authority in arranging for necessary project financing.

5. Provide information to and assist the Authority in securing necessary approval for construction of the project from the Department of the Army, Commonwealth of Virginia, and other Government agencies.

## PHASE II. ENGINEERING REVIEW

1. Review C&O construction plans and specifications for compliance with design criteria and also review cost estimates and construction contracts.

2. Assist the Authority in securing bids for construction work, analyze bids and make recommendations in reference thereto.

## PHASE III. CONSTRUCTION

1. Provide a full-time representative at the site of work to represent Authority for the purpose of observing construction progress and such part time services of engineering specialists (when required) as will approximate full-time service of another representative. The supervision and inspection of construction detail will be performed by others.

2. Review proposed change orders and amendments to construction contracts.

3. Review progress and final estimates which are the basis of payment by Authority to construction contractors and their supporting data without the responsibility of verifying quantities which will be the responsibility of the C&O Railway.

4. Certify to Authority when in Engineer's opinion project is complete and review final construction report.

5. In connection with the performance of the foregoing services, make such current reports, recommendations and comments to the Authority as are appropriate and as will keep the Authority fully informed during the progress of the project.

SVERDRUP & PARCEL  
Consulting Engineers  
915 Olive Street  
St. Louis, Mo. 63101

Client's Order No.

Peninsula Ports Authority of Virginia  
P. O. Box 338  
Newport News, Virginia 23607

Invoice Date June 3, 1964  
Invoice No. 1  
Our Job No. P-2244-A

Interim retainer fee pending execution of formal agreement for consulting engineering services for proposed Modern General Cargo Pier Project, Newport News, Virginia.

Amount due this invoice \$1,000.00

#### EXHIBIT D

#### MEMORANDUM OF AGREEMENT

Agreement by and among the Peninsula Ports Authority of Virginia, The Chesapeake and Ohio Railway Company and the City of Newport News, Virginia,  
Dated as of June 10, 1964.

#### WITNESSETH:

WHEREAS, under Chapter 46 of the Acts of Assembly of Virginia, 1952, as amended, including particularly the amendments thereto by Chapter 39 of the Acts of Assembly of Virginia, 1964 (the "Enabling Act") the Peninsula Ports Authority of Virginia (the "Authority"), a body politic and corporate and a political subdivision of the Commonwealth of Virginia, has been created with the powers and duties therein defined; and

WHEREAS, the Authority is authorized and empowered under the Enabling Act, *inter alia*, to acquire, lease, construct, maintain and operate port facilities, as such term is defined in the Enabling Act, including landings, wharves, docks and piers and the approaches to and appurtenances thereof, tracks, spurs, crossings, switchings, terminals, warehouses and terminal facilities of every kind and description necessary or useful in the transportation and storage of goods, wares and merchandise; and

WHEREAS, the Authority is also authorized and empowered under the Enabling Act to issue its revenue bonds for the purpose of paying all or any part of the cost of port facilities, to sell or otherwise dispose of, or grant concessions or rights in, all or any part of the port facilities and to lease to a lessee or lessees all or any of such facilities for such period, in such manner and upon such terms and conditions as the Authority shall determine to be in the public interest; and

WHEREAS, the General Assembly at its 1958 Session adopted House Joint Resolution No. 70 recognizing the high degree of importance of further port development to the economic and industrial development of the Commonwealth and the necessity for providing new and improved port facilities through public means in order to compete successfully with publicly-supported ports in other states; and

WHEREAS, the Enabling Act provides that the improvement and development of modern and efficient port facilities for the purpose of increasing trade and commerce beneficial to the economy, prosperity and welfare of the State conform to the overall State policy of promoting the development and operation of adequate, modern and efficient seaports and harbors through such aids and other encouragement as may be authorized by the General Assembly; and

WHEREAS, in order to effectuate the purposes of the Enabling Act the Authority deems it desirable and in the public interest (i) to acquire from The Chesapeake and Ohio Railway Company (the "Railway"), the Port Facility Property, as hereinafter defined and provided, which the Railway is willing to agree to convey and cause to be conveyed to the Authority, and (ii) to construct modern and efficient terminal facilities, comparable to those existing at other ports, for the loading, unloading, interchange, servicing and storage of

general cargo (herein called the "New Port Facilities"), as hereinafter defined and provided; and

WHEREAS, the Railway is willing to agree to convey the Port Facility Property to the Authority subject to the Authority's agreement to pay to the Railway the sum of \$7,581,500 representing fifty-five per centum (55%) of the value of the Port Facility Property of \$13,784,543 as appraised by The Lloyd-Thomas Co., the Railway thereby donating and contributing to the Authority, exclusively for a public purpose, the difference in amount between such value of the Port Facility Property and said \$7,581,500 in recognition of urgent public needs and the best interests of the Commonwealth of Virginia and the City; and

WHEREAS, under the provisions of Chapter 640 of the Acts of Assembly of Virginia, 1962 (herein the "1962 Appropriation Act") an appropriation of a sum sufficient, not to exceed \$100,000, for acquisition, development, construction and operation of port facilities for the fiscal year ending June 30, 1964 has been made to the Board of Commissioners of the Virginia State Ports Authority, subject to the provision that in the event such Board of Commissioners is unable to acquire, develop, or operate port facilities at any port, as proposed pursuant to H.J.R. No. 70, of the 1958 General Assembly, the funds thereby appropriated shall be available subject to the approval of the Governor, in like manner and to the same extent, to any other political subdivision of the Commonwealth having jurisdiction and authority to acquire, own, construct, and operate or lease port facilities; and

WHEREAS, under the provisions of the 1964 appropriation act of the General Assembly of Virginia, approved April 3, 1964 (herein the "1964 Appropriation Act") there has been appropriated to the Board of Commissioners of the Virginia State Ports Authority a sum sufficient, not to exceed in any one year the amount appropriated annually under such act for port facilities at Norfolk (being \$757,500 annually), for one-half the annual cost for acquisition, development, construction and operation of port facilities at Newport News, and it is further provided in such act that in the event such Board is unable to acquire, develop or operate port facilities at Newport News, as proposed pursuant to H.J.R. No. 70 of the 1958 General Assembly, the funds thereby appropriated shall be available, subject to the approval of the Governor, in like manner and to the same extent, to the Peninsula Ports Authority of Virginia; and

WHEREAS, the Board of Commissioners of the Virginia State Ports Authority, pursuant to said appropriation acts, by resolution duly adopted, has determined that such Board is unable to acquire, develop or operate port facilities at Newport News, as proposed pursuant to H.J.R. No. 70 of the 1958 General Assembly; and

WHEREAS, the Governor of the Commonwealth, in view of such determination of the Board of Commissioners of the Virginia State Ports Authority and fully appreciating the need for the port facilities at Newport News and recognizing their importance to the commercial and industrial life of the State, has, pursuant to such appropriation acts, approved the making available to the Authority of such appropriated funds; and

WHEREAS, the Authority has determined that the public interest will be best served and that the purposes of the Enabling Act can more advantageously be attained by leasing to the Railway the Port Facility Property and the New Port Facilities (collectively called the "Port Facilities") and the Railway is willing to lease and to operate the Port Facilities upon terms and conditions herein generally specified and more specifically set forth in an agreement of lease (the "lease") to be hereinafter executed by and among the Authority, the City (hereinafter mentioned) and the Railway; and

WHEREAS, the Authority deems it necessary to borrow money for the acquisition of the Port Facility Property and the construction of the New Port Facilities and to that end, in the exercise of its powers, the Authority proposes to issue its revenue bonds (the "revenue bonds") to be secured under a trust agreement (the "trust agreement") to be executed by the Authority and a bank or trust company as trustee (the "trustee") as hereinafter provided; and

WHEREAS, the moneys to be pledged under the trust agreement for the payment of the principal of and the interest on the revenue bonds are expected to be derived from the rent to be paid to the Authority by the Railway under the lease and from appropriations by the General Assembly of Virginia; and

WHEREAS, the Authority has ascertained and determined that it will be unable to issue and market its revenue bonds



for such purpose without additional security for such bonds consisting of a pledge of moneys from time to time to be paid to the Authority by said City; and

WHEREAS, Section 11 of the Enabling Act authorizes said City, notwithstanding any charter or statutory provisions to the contrary, to pay to the Authority for each fiscal year during which any of the Authority's revenue bonds are outstanding an amount not exceeding the Bond Requirement Deficiency incurred in such fiscal year, the Bond Requirement Deficiency, as defined in such section, being for any fiscal year an amount equal to one-half of the total amount required for such fiscal year to provide for payment of the principal of and interest on, and for amortization of and reserves for, the revenue bonds of the Authority that are issued under the Enabling Act to pay the cost of the Port Facilities, less the amount of any funds appropriated by the General Assembly to or for the use of the Authority for such fiscal year and available for such purpose; and

WHEREAS, the City of Newport News, Virginia (the "City", sometimes referred to as the "Consolidated City of Newport News") pursuant to such statutory authority, is willing to agree to pay to the Authority an amount equal to the Bond Requirement Deficiency in consideration of the Authority's agreement to convey to the City title to the Port Facilities when the revenue bonds issued by the Authority in connection with the Port Facilities, including interest, have been paid or sufficient funds for such payment shall have been deposited in trust therefor; and

WHEREAS, the Authority and the City have determined that the execution of this Memorandum of Agreement will be in all respects for the benefit of the inhabitants of the Commonwealth of Virginia and to the advantage of the City, for the increase of their commerce and for the promotion of their safety, health, welfare, convenience and prosperity; and

WHEREAS, it is the purpose and intention of the parties that this Memorandum of Agreement, although binding upon the parties, shall constitute a preliminary, interim instrument to be later superseded and supplemented by more definitive and formal contracts, mutually satisfactory to the parties hereto, to be entered into in the light of future developments in relation to the Port Facilities, including the authorization and marketing of the revenue bonds by the Authority, the

provisions of the resolution authorizing the issuance of such bonds and the trust agreement securing the same and other facts and circumstances which will have a bearing upon the contractual relationships of the parties hereto.

NOW, THEREFORE, in consideration of the covenants and promises made, and other good and valuable consideration paid, by each of the parties hereto to the other, the receipt of which is hereby severally acknowledged, the Peninsula Ports Authority of Virginia, The Chesapeake and Ohio Railway Company and the City of Newport News, for themselves, their successors and assigns, hereby covenant and agree as follows:

## ARTICLE I.

### RAILWAY'S CONVEYANCE OF PORT FACILITY PROPERTY.

Section 1.01. The Railway hereby agrees to convey, or cause to be conveyed, to the Authority certain cargo terminal facilities and other property in the City consisting of merchandise piers 2 to 8, inclusive, warehouses, track facilities, approximately 91 acres of land and other incidental property, all as more specifically shown in the attachment hereto entitled "Description of Port Facility Property", attached to and made a part of this Agreement, including such rights of ingress and egress and such reciprocal rights and easements as may be incorporated in the formal contract to be hereafter executed by and between the Railway and the Authority and in the deed of conveyance of the Railway which is to be executed and delivered to the Authority on the date of settlement, as hereinafter defined (all of said property being herein referred to as the "Port Facility Property").

Section 1.02. The Authority agrees to accept such conveyance of the Port Facility Property and to pay to the Railway therefor, but solely from the proceeds to be derived from the sale of its revenue bonds, the sum of \$7,581,500 less the total amount of the proceeds of insurance, if any, recovered by the Railway from and after the date of this Agreement as a result of any damage, destruction or other casualty to the Port Facility Property, or any part thereof, not expended in repairing the damages thereof or in improving the Port Facility Property (being the "purchase price"). The Railway agrees that upon receipt of the purchase price therefor as herein provided it shall convey to the Authority good and

merchantable title to the Port Facility Property. The Railway further agrees that it will deliver to the Authority the Port Facility Property in as good condition as it is in at the date of this Agreement, ordinary wear and tear excepted, and agrees that from and after the date of this Agreement until the time of settlement, as hereinafter defined, the Railway at its own cost and expense will keep the Port Facility Property insured against loss, damage or destruction by fire and all other risks and perils embraced within "extended coverage" provisions, such insurance to be in an amount not less than the amount of the purchase price aforesated.

Section 1.03. The Authority agrees to acquire the Port Facility Property from the Railway and to pay the purchase price therefor, subject, however, to the authorization, issuance, sale and delivery of its revenue bonds to finance the cost of the Port Facility Property and the New Port Facilities, as defined in this Agreement.

Section 1.04. In the event the Railway is unable to complete the conveyance of the Port Facility Property for any reason, including any dispute respecting the validity of title thereto, or in the event such conveyance cannot be consummated because any covenant, easement, reservation, restriction or condition existing against the Port Facility Property may impair, impede or obstruct the purposes for which the Port Facility Property is to be acquired by the Authority, or in the event the agreement for the conveyance of the Port Facility Property when incorporated in a more formal contract, as herein provided, is not approved by the Board of Directors of the Railway and authorized to be executed in behalf of the Railway by such Board of Directors, or is not approved by the Commission of the Authority and authorized to be executed in behalf of the Authority by said Commission, or is not approved by the council of the City, or in the event the mortgage trustees of the Railway refuse to grant releases necessary to enable the Railway to enter into such contract, or in the event an agreement of lease satisfactory to the Railway, the Authority and the City is not executed, in any such event this Agreement, at the option of the Railway, the Authority or the City may be cancelled and terminated and none of the parties hereto shall be obligated to the other parties by reason of such termination.

Section 1.05. If prior to the time of settlement any part or parts of the Port Facility Property shall be taken or damaged in the exercise of the power of *eminent domain*, this Agreement shall not be thereby affected, altered or impaired (except that the Description of the Port Facility Property shall

be appropriately revised) unless the use of the Port Facility Property as herein contemplated shall, in the determination of any of the parties, be thereby materially adversely affected, in which case this Agreement may, at the option of such party, be cancelled and terminated upon giving to the other parties written notice of such cancellation and termination within thirty (30) days after such taking or damage occurs. If this Agreement is not so cancelled and terminated, the entire net proceeds of any award made in condemnation proceedings shall be paid to the Authority.

Section 1.06. From and after the execution of this Agreement the Authority shall have the privilege and right, which may be exercised through its employees, officers, representatives or consultants, to enter upon the Port Facility Property at any reasonable time or times prior to the time of settlement hereunder for the purpose of making surveys, tests, plans, borings, studies and investigations thereof incident to the construction of the New Port Facilities as hereinafter defined, subject, however, to the Authority's giving to the Railway, if practicable, prior notice of any such entry. Such activities shall be so conducted as not to interfere unduly with the normal use and operation of the Port Facility Property.

## ARTICLE II.

### CONSTRUCTION OF NEW PORT FACILITIES.

Section 2.01. The Authority agrees that as soon as practicable after the issuance and sale of its revenue bonds and acquisition of title to the Port Facility Property, it shall provide and construct or cause to be provided and constructed with all reasonable dispatch, in and upon the Port Facility Property, port facilities (herein sometimes called "New Port Facilities") consisting generally of a new merchandise pier at the general location of present pier 4 in accordance with plans and specifications to be prepared and to be mutually acceptable to the Railway, the Authority and the City. The total cost of acquisition of the Port Facility Property and construction of the New Port Facilities, including, among other costs, the cost of plans, specifications, engineering and legal fees, financing expenses and reserves for contingencies is presently estimated to be (upon the basis of merely preliminary estimates) approximately \$26,000,000.

Section 2.02. The Railway, the Authority and the City agree that such cost of the Port Facilities will be paid by the Authority with the proceeds of its revenue bonds secured under a trust agreement drafted in form and substance to facilitate the marketing of such revenue bonds at reasonable rates of interest. It is further agreed that the plans and specifications for the New Port Facilities shall be prepared and the construction of the New Port Facilities shall be under the supervision of a qualified engineering firm selected by the Authority which shall be satisfactory to the Railway; provided, however, that at the request of the Authority the Railway may furnish, without charge therefor or upon reimbursement of the cost thereof, as agreed upon between the Railway and the Authority, such engineering services in connection with the design or construction of the New Port Facilities as the Railway and the Authority deem appropriate.

Section 2.03. When and if the Authority, the Railway and the City determine that the revenue bonds can be sold and issued upon fair and reasonable terms, the Authority shall sell and issue its revenue bonds in an amount sufficient to pay the cost of acquiring and constructing the Port Facilities and all other costs and expenses incident thereto. If the Authority, the Railway or the City determines that the Authority cannot sell and issue the amount of revenue bonds required therefor upon fair and reasonable terms at or before the time of settlement hereunder, this Agreement shall be terminated and the Authority, the Railway and the City shall be relieved of all duties and obligations hereunder. The Authority shall exert reasonable efforts to effect such sale of the revenue bonds.

Section 2.04. Each of the parties hereto covenants and agrees that it will exercise with reasonable diligence, consistent with the objectives of this Agreement, all rights and powers vested hereunder to approve any action or document and to make any determination.

### ARTICLE III.

#### LEASE OF PORT FACILITIES.

Section 3.01. The Authority, the City and the Railway agree that at the time of the sale and issuance by the Authority of its revenue bonds and the delivery by the Railway to the Authority of the deeds to the Port Facility Property and payment by the Authority to the Railway of the purchase

price for the Port Facility Property, the Authority, the City and the Railway will duly execute and deliver an agreement of lease pursuant to which the Railway shall lease from the Authority and the Authority shall lease to the Railway all of the Port Facilities for an initial term of thirty (30) years, subject to such extension of the term as herein provided. Such agreement of lease shall provide, among other things, (i) for the operation of the Port Facilities by the Railway as public facilities serving the general public, trucks and other common carriers upon a fair and reasonable basis and (ii) for the payment by the Railway to the Authority of rent during the initial term in an amount equal to fifty per centum (50%) of the total amount required to provide for the payment of principal of and interest on, and for amortization of and reserves for, the revenue bonds of the Authority issued to pay the cost of the Port Facilities, but not in any event to exceed a total annual payment by the Railway of Seven Hundred Fifty-seven Thousand Five Hundred Dollars (\$757,500) (herein called the "basic rent") and additional rent (herein called the "additional rent") sufficient in amount to pay in full the fees and other costs payable to the trustee, banking institutions and accountants for services under the trust agreement securing such revenue bonds, the costs incurred in the purchase or redemption of revenue bonds, if any, reports provided for in the agreement of lease or in the trust agreement and the net loss, if any, suffered in the investment of funds under said trust agreement. The basic rent required to be paid hereunder shall be due and payable by the Railway in semi-annual installments. The Railway shall also agree under such agreement of lease to pay all costs of operation, repair and maintenance of the Port Facilities.

Section 3.02. The initial term of the lease shall, at the option of the Railway, be subject to renewal for two (2) additional successive thirty (30) year terms, subject to payment of such rent as shall be required under the lease. Any conveyance of title to the Port Facilities by the Authority to the City shall be subject to such lease and such option to extend the initial term; provided, however, that all rent payable by the Railway under the lease that accrues from and after such conveyance to the City shall be paid to the City by the Railway and the City shall thereafter be the lessor under the lease.

Section 3.03. When the revenue bonds, including all prin-

principal and interest thereon, have been fully paid or sufficient funds have been deposited to pay the principal of and interest on such bonds in full, following the termination of the initial term of the lease, the rent payable by the Railway upon any renewal of the lease term shall be a reasonable rent, as agreed upon in the lease by and among the Railway, the Authority and the City. The basis for determining such rent upon any renewal of the initial term, shall be subject to the approval of the City and shall be stated in the formal contract between the Authority and the Railway superseding this Agreement.

Section 3.04. It is expected that the Commonwealth of Virginia shall biennially appropriate sufficient funds which, with the basic rent payable by the Railway, will be sufficient to enable the Authority to pay its revenue bonds, including interest. In order to facilitate the issuance and marketing of the revenue bonds of the Authority and for and in consideration of the Authority's agreement to convey to the City (when the revenue bonds of the Authority issued to pay the cost of the Port Facilities have been fully paid, both as to principal and interest, or sufficient funds have been deposited for the full payment of such bonds) title to the Port Facilities, subject to any leasehold interests, licenses, liens or other lawful encumbrances, including the lease to and the exercise by the Railway of its option to extend the term of the lease, and further in consideration of the advantages and benefits that will accrue to the City and its inhabitants from the construction and operation of modern and efficient port facilities in the City, the City hereby agrees to pay an amount equal to the Bond Requirement Deficiency to the Authority (or to the trustee under the trust agreement, as required by the Authority) promptly and sufficiently in advance of the time that the funds may be required to permit the timely payment of the Authority's revenue bonds and to meet its other obligations pursuant to the trust agreement securing such bonds. The obligation of the City hereunder to pay the amount equal to the Bond Requirement Deficiency as herein provided shall be a continuing obligation until the Authority's bonds, with interest, have been paid in full or sufficient funds for such payment have been placed on deposit therefor, and the City hereby waives all notices of default, demands of payment, notices of non-payment and all other notices in connection therewith and such obligation of the City hereunder shall be and continue effective notwithstanding any legal disability



of the Commonwealth to make such appropriations or any other factor preventing such appropriations. It is intended that this obligation of the City is to cover and include any and all refundings, renewals or extensions of such revenue bonds, howsoever represented, which refundings, renewals or extensions may not be effected without notice to or assent by the City. The City hereby agrees that its obligation hereunder may be enforced by the Authority or by the holder or holders of the Authority's revenue bonds or the trustee under any trust agreement securing such revenue bonds. The total liability of the City hereunder shall not in any event exceed the total amount of the basic rent payable by the Railway to the Authority under the agreement of lease. The City's liability hereunder shall not be reduced or impaired by reason of the Authority's failure to take any action with respect to the appropriation by the Commonwealth of moneys for the Commonwealth share.

Section 3.05. The General Assembly of Virginia has made an appropriation under the 1962 Appropriation Act for the fiscal year ending June 30, 1964, of an amount sufficient, not exceeding \$100,000, for the acquisition, development, construction and operation of port facilities at any port, as proposed pursuant to H.J.R. No. 70 of the 1958 General Assembly, and has made an appropriation under the 1964 Appropriation Act for each of the fiscal years ending June 30, 1965 and June 30, 1966 sufficient for one-half the annual cost for acquisition, development, construction and operation of port facilities at Newport News but not to exceed in any one year the amount appropriated annually for port facilities at Norfolk, i.e., \$757,500. The Authority agrees that it will urgently request the General Assembly at each of its regular sessions during the time that its bonds remain outstanding to make an appropriation of an amount in each year sufficient for one-half of such annual cost of the Port Facilities, not exceeding \$757,500. The Authority further agrees that any such appropriation received from the Commonwealth or any payment hereunder made by the City shall be promptly deposited with the trustee under the trust agreement securing its revenue bonds to the credit of the sinking fund created for the payment and security of its revenue bonds.

#### ARTICLE IV.

#### SPECIAL CONDITIONS AND PROVISIONS.

Section 4.01. It is the intention of the parties hereto that this Agreement shall be superseded and supplemented as

soon as practicable but in any event on or prior to the date of settlement, by definitive contracts, in conformity with this Agreement, as follows:

(a) an agreement of lease (the "lease") by and among the Authority, the City and the Railway providing for the leasing of the Port Facilities and the payment of rent therefor by the Railway;

(b) a contract by and between the Authority and the Railway providing for the conveyance of the Port Facility Property to the Authority and the construction of the New Port Facilities by the Authority;

(c) a contract by and between the Authority and the City for the City's payment to the Authority of an amount equal to the Bond Requirement Deficiency and the Authority's conveyance to the City of title to the Port Facilities; and

(d) a trust agreement by and between the Authority and the trustee providing for the issuance and security of the Authority's revenue bonds.

Section 4.02. Anything contained in this Agreement to the contrary notwithstanding, it is the intention of the parties hereto that the Railway's conveyance to the Authority of title to the Port Facility Property, the payment of the purchase price thereof by the Authority to the Railway, the signing of the agreement of lease and the delivery of and payment for the revenue bonds by the Authority are to be simultaneous transactions, as near as may be, consummated at such time (in this Agreement called the "time of settlement") as shall be mutually satisfactory to the Authority, the Railway and the City. It is hereby agreed that the parties hereto shall proceed to consummate said transactions as soon as practicable.

Section 4.03. None of the foregoing transactions mentioned in the preceding Section shall be consummated until all of the following conditions have been satisfied:

(a) all questions respecting the validity or legality of all transactions provided for in this Memorandum of Agreement or respecting the power or authority of the parties to engage in such transactions under the Constitution and laws of Virginia shall be resolved by the Supreme Court of Appeals of Virginia to the satisfaction of the Authority, the Railway and the City;

(b) assurances satisfactory to the Authority, the Railway

and the City are received that the Authority is able to sell its revenue bonds upon terms satisfactory to such parties;

(c) final plans and specifications for the construction of the New Port Facilities, the lease, the trust agreement and other definitive contracts required under this Agreement are completed and are approved by the Authority, the Railway and the City; and

(d) the Authority has received bids from qualified and responsible contractors for the construction, in accordance with said plans and specifications, of at least ninety per centum (90%) in value of the New Port Facilities, and upon the basis thereof and the cost of acquiring the Port Facility Property and all other estimated costs and expenses involved it is determined by the Railway, the Authority and the City that the amount of basic rent will not exceed in any year a total of \$757,500, unless this condition be waived in writing by the Authority, the Railway and the City.

Section 4.04. No assignment of this Agreement or any right accruing thereunder shall be effective without the concurrence in writing of all three parties to this Agreement.

Section 4.05. Unless sooner terminated as herein provided, this Agreement shall be terminated on October 1, 1965 or within one year following the final decree of the Supreme Court of Appeals of Virginia in any litigation involving the transactions provided for in this Agreement, whichever is later.

IN WITNESS WHEREOF, the Peninsula Ports Authority of Virginia has caused this Memorandum of Agreement to be signed in its name and behalf by W. T. Watkins, Vice Chairman, and its corporate seal to be hereto affixed and attested by Irvin Reid, its Secretary, thereunto duly authorized, and The Chesapeake and Ohio Railway Company has caused this Memorandum of Agreement to be executed in its name and behalf by Gregory S. DeVine, its President, and its corporate seal to be hereto affixed and attested by R. D. Griebeling, its assistant secretary, thereunto duly authorized, and the City of Newport News has caused this Memorandum of Agreement to be signed in its name and behalf by J. C. Biggins, its City Manager, and its corporate seal to be hereto affixed and at-

Robert Y. Button, Attorney General, etc., v.  
Sidney C. Day, Jr., Comptroller, etc.

39

tested by C. L. Williams, its Clerk, hereunto duly authorized  
as of the day and year first above written.

PENINSULA PORTS AUTHORITY  
OF VIRGINIA

By W. T. WATKINS  
Title Vice Chairman.

(Seal)

Attest:

IRVIN REID  
Secretary.

THE CHESAPEAKE AND OHIO  
RAILWAY COMPANY  
By GREGORY S. DeVINE  
Title President.

(Seal)

Attest:

R. D. GRIEBLING  
Title Assistant Secretary.

CITY OF NEWPORT NEWS  
By J. C. BIGGINS  
City Manager.

(Seal)

Attest:

C. L. WILLIAMS, Clerk.

**DESCRIPTION OF PORT FACILITY PROPERTY**



Commonwealth of Virginia,  
City of Newport News, to-wit:

Be it remembered that on the 29th day of June, 1964, before me, the subscriber, a notary public within and for said City and State, personally came W. T. Watkins and Irvin Reid, who are the Vice Chairman and the Secretary, respectively, of the Peninsula Ports Authority of Virginia, and acknowledged that the name of said Authority was subscribed to the foregoing Memorandum of Agreement in execution thereof by said Vice Chairman in his official capacity as such officer, that the seal impressed thereon is the seal of said Authority and is attested by said Secretary, that said name was subscribed and said seal impressed and attested by the direction and authority of the Peninsula Ports Authority of Virginia and that the foregoing Memorandum of Agreement is the free act and deed of said Authority, for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my official seal on the day and year aforesaid.

MARGUERITE W. BRIDGES

(Seal)

Notary Public.

My commission expires January 16, 1966.

State of Ohio,  
County of Cuyahoga, ss:

Before me, the undersigned, a Notary Public in and for said County and State, on this 19th day of June, 1964, personally appeared Gregory S. DeVine and R. D. Griebing to me known to be the identical persons who subscribed the name of The Chesapeake and Ohio Railway Company to the foregoing instrument as the President and Assistant Secretary, respectively, of said Railway Company and acknowledged to me that they executed the same as their free and voluntary acts and deeds and as the free and voluntary act and deed of such Railway Company, for the uses and purposes therein set forth.

Given under my hand and seal of office the day and year last above written.

(Seal) GARTH E. GRIFFITH  
Notary Public.

GARTH E. GRIFFITH, Attorney  
Notary Public—State of Ohio

My Commissson has no expiration date.

Section 147.03 R. C.

My commission expires

Commonwealth of Virginia,  
City of Newport News, to-wit:

Be it remembered that on the 23 day of June, 1964 before me, the subscriber, a notary public within and for said City and State, personally came J. C. Biggins and C. L. Williams who are the City Manager and the Clerk, respectively, of the City of Newport News, Virginia, and acknowledged that the name of said City was subscribed to the foregoing Memorandum of Agreement in execution thereof by said City Manager in his official capacity as such officer, that the seal impressed thereon is the seal of said City and is attested by said Clerk, that said name was subscribed and said seal impressed and attested by the direction and authority of the Council of the City of Newport News, Virginia, and that the foregoing Memorandum of Agreement is the free act and deed of said City, for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my official seal on the day and year aforesaid.

LOUISE M. SCHMID  
Notary Public.

(Seal)

My commission expires August 8, 1966.



# INVOICE

EXHIBIT B

ORIGINAL

(Name and address of State Agency receiving goods or service)

Purchase Order No. \_\_\_\_\_

Requisition No. \_\_\_\_\_

Date of invoice June 3, 1964

How Shipped \_\_\_\_\_

Terms and discount Net

**SOLD TO**

Peninsula Ports Authority of Virginia  
P. O. Box 338  
Newport News, Virginia

(Name and address of Vendor)

**BY**

Sverdrup & Parcel  
Consulting Engineers  
915 Olive Street  
St. Louis, Missouri

## NOTICE TO VENDOR

All invoices against agencies of the Commonwealth of Virginia must be prepared on this form and four copies sent directly to the agency to which merchandise was shipped or for which service was rendered. Invoices must be complete in detail. Render a separate invoice for each purchase order promptly upon completion of shipment, or performance of service. Retain last copy for your records. If charges for freight or express are added to invoice, original bill of lading or receipt must be attached.

DATE OF SHIPMENT OR SERVICE	DESCRIPTION OF ARTICLES OR SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT	LEAVE BLANK
	For engineering services in connection with development of port facilities at Newport News, Virginia				1,000 00	

**VENDORS SHOULD NOT WRITE BELOW THIS LINE**

**VENDOR'S TOTAL**

1,000 00

Purchase Order: Complete ☒ Incomplete ☐

Voucher No. 1 Month June

Appropriation-Activity-Object (Allotment) (F.O.) Amount

467-10-2620-10-4

### DEDUCTIONS

Discounts.....%

Other (Specify):

Amount certified for payment

### TO THE COMPTROLLER:

It is hereby certified that the goods or services specified above have been received, or performed, payment therefor has not been previously authorized and that this expenditure is a proper charge to the appropriation indicated. This account is approved for payment.

Signature of approving officer /s/ J. Frank Alspaugh

(Use ink or indelible)

Title Executive Director

Audited: Receiving stamp. — Dept. of Accts.

Entered on Comptroller's register of warrants

Charged:

Tabulated:

EXHIBIT F.

COMMONWEALTH OF VIRGINIA

Office of the Comptroller  
P. O. Box 6-N  
Richmond 15, Va.

June 29, 1964.

Honorable Robert Y. Button  
Attorney General of Virginia  
Supreme Court Building  
Richmond, Virginia

Dear Mr. Button:

Item 172 of the Appropriation Act of 1962-64 provides for an appropriation to the Board of Commissioners of Virginia State Ports Authority of \$100,000 for the second year of the biennium (beginning on the 1st day of July, 1963) for the acquisition, development, construction and operation of port facilities. Pursuant to the provisions of such Appropriation Act, \$5,000 of such appropriation, with the approval of the Governor, has been made available to the Peninsula Ports Authority of Virginia (hereinafter referred to as the "Authority"), a political subdivision of the Commonwealth having jurisdiction and authority to acquire, own, construct and operate or lease port facilities. In order to pay some of the costs incident to the acquisition, development and construction of port facilities at Newport News, the Authority has presented its voucher for the payment of \$1,000 of said \$5,000 portion of such appropriation, but I have declined to issue a warrant authorizing said payment. The relevant facts, together with my reasons for declining said payment, are hereinbelow set out.

The Authority has entered into a tripartite agreement (hereinafter referred to as the "Memorandum of Agreement") with The Chesapeake and Ohio Railway Company (hereinafter referred to as the "Railway") and the City of Newport News, Virginia (herein called the "City") bearing date of June 10, 1964, providing for: (a) the purchase from the Railway of certain port facility property situated in the City of Newport News, Virginia; (b) the construction thereon of certain port terminal facilities and improvements; (c) the financing of such acquisition and construction through

the sale and issuance of the Authority's revenue bonds; (d) the lease of the aforesaid property, including the facilities and improvements to be constructed thereon, to the Railway for a term of thirty years at an annual rental, not exceeding \$757,500, in an amount equal to 50% of the total amount the Authority requires to provide for the payment of principal of and interest on, and for the amortization of and reserves for, said revenue bonds, during the term of said lease plus additional rent and payment of all operation, repair and maintenance expenses as prescribed in the Port Facility Contract; and (e) the City's agreement to pay to the Authority, during the period such revenue bonds are outstanding, an amount equal to the Bond Requirement Deficiency as defined in and pursuant to Section 11 of Chapter 46 of the Acts of Assembly of Virginia, 1952, as amended (herein called the "Enabling Act"), including particularly the amendments thereto by Chapter 39 of the Acts of Assembly of Virginia, 1964. The Memorandum of Agreement provides that the lease shall vest in the Railway the option to renew the term of the lease for 2 additional successive 30 year terms (following the initial term), subject to an adjustment of the rent, and, further, that the Memorandum of Agreement is an interim, temporary agreement which shall be superseded and supplemented by certain definitive contracts, including a definitive agreement of lease by and among the three parties. In anticipation of the foregoing the Authority entered into an agreement with Sverdrup & Parcel, Consulting Engineers, bearing date of June —, 1964, providing for the performance of certain engineering work in connection with the construction of the proposed facilities and improvements and the payment by the Authority to Sverdrup & Parcel of a retainer of \$1,000. Said voucher is for the payment of said retainer.

Attached hereto are copies of the following instruments:

- (1) Memorandum of Agreement.
- (2) The aforesaid voucher in the amount of \$1,000.
- (3) The agreement with Sverdrup & Parcel.

I have declined to issue a warrant authorizing the payment of said voucher because I entertain doubts as to the validity of the Memorandum of Agreement for the following reasons:

(a) I believe that the obligation assumed by the City under the Memorandum of Agreement to pay an amount equal to the Bond Requirement Deficiency creates an obligation or debt in contravention of constitutional, statutory and charter

limitations imposed upon the City, including particularly Section 127 of the Virginia Constitution, and the Memorandum of Agreement to the extent that it attempts to impose said obligation upon the City is unlawful and void;

(b) the provisions of Section 11 of the Enabling Act pursuant to which the City has assumed such obligation is in conflict with the Constitution of Virginia, particularly Section 127 thereof; and

(c) the *provisions* in the Memorandum of Agreement relating to the proposed lease by and among the Authority, the City and the Railway are invalid, being in violation of Section 185 of the Virginia Constitution in that the credit of the State and of the City is directly or indirectly granted to or in aid of the Railway.

In my opinion the City under the Memorandum of Agreement has incurred an obligation to pay in each fiscal year an amount up to \$757,500 for at least 30 years, the period said revenue bonds will be outstanding, and such obligation constitutes an indebtedness of the City within constitutional debt limit provisions. The total indebtedness thus assumed by the City is in excess of \$22,725,000, which amount, including the existing indebtedness of the City, exceeds 18% of the assessed value of the real estate of the City subject to taxation, as shown by the last preceding assessment for taxes, such 18% limitation being applicable to the City. Nor has the City authorized such indebtedness by an ordinance enacted in accordance with Section 123 of the Constitution of Virginia and approved by the affirmative vote of a majority of the qualified voters of the City voting upon the question of incurring such obligation for a supply of water or other specific undertaking from which the City may derive a revenue.

I believe that the provisions in the Memorandum of Agreement respecting the proposed lease agreement by and among the Authority, the City and the Railway are invalid as being in violation of Section 185 of the Constitution of Virginia. The rent to be paid by the Railway during the initial term amounts to 50% of the amount required to liquidate the proposed revenue bonds, and during any successive term or terms the rent is to be adjusted as mutually agreed by the parties. These rental provisions, coupled with the City's obligation to pay an amount equal to the Bond Requirement Deficiency, constitute devices for extending the credit of the Commonwealth and the City to the Railway, contrary to Section 185 of the Constitution, in that the rent payable by the

Railway for the initial term and the rent, which undoubtedly is expected to be reduced below that payable for the initial term, payable for any successive term or terms do not represent fair rental predicated upon the cost or value of the port facilities leased to the Railway by the Authority.

The foregoing considerations impel me to raise these specific questions:

1. Are the provisions of Section 11 of the Enabling Act authorizing such contract between the City and the Authority respecting the Bond Requirement Deficiency in conflict with the Constitution of Virginia, particularly the debt-incurring limitations of Section 127 of the Constitution?

2. Is the Memorandum of Agreement invalid by reason of the fact that the City thereunder has assumed an indebtedness in contravention of applicable constitutional, statutory and charter limitations, particularly said Section 127 of the Constitution?

3. Is the Memorandum of Agreement invalid by reason of the fact that the City thereunder has assumed an indebtedness which, with the City's other indebtedness, exceeds constitutional and charter debt limitations governing the City?

4. Are the provisions in the Memorandum of Agreement for the execution of an agreement of lease invalid and in violation of Section 185 of the Constitution of Virginia?

In view of the foregoing questions, I do not feel that it would be proper or safe to approve the payment of said voucher out of the \$5,000 made available to the Authority from moneys appropriated under Item 172 of the Appropriation Act of 1962-64 until there has been a final adjudication by the Supreme Court of Appeals of Virginia determining all the questions raised herein and that may be raised in a petition filed by the Attorney General pertaining thereto; and, accordingly, I hereby notify you that I shall not issue any warrant in payment of such obligation incurred by the Authority and payable out of said \$5,000 made available from moneys appropriated under said Item 172 until such adjudication has been made.

Yours very truly,

s/ SIDNEY C. DAY, JR.  
Comptroller.

\* \* \* \* \*

Robert Y. Button, Attorney General of Virginia, (Peninsula  
Ports Authority of Virginia), Petitioner,

*against*

Sidney C. Day, Jr., Comptroller of Virginia, Respondent.

## DEMURRER AND ANSWER OF RESPONDENT.

### Respondent's Demurrer

The respondent, Sidney C. Day, Jr., Comptroller of Virginia, says that the petition of the Attorney General of Virginia in this matter is not sufficient in law to obtain the relief prayed for and states for grounds of his demurrer that it appears fully and clearly from the petition, the exhibits filed therewith and made a part thereof, and the Acts and Joint Resolution of the General Assembly referred to in said petition, that Chapter 46 of the Acts of Assembly of Virginia, 1952 and the amendments thereto contained in Chapter 39 of the Acts of the Assembly of Virginia of 1964, and more particularly Section 11 of said Chapter 39 of the 1964 Acts of the Assembly of Virginia (the Enabling Act), as construed and interpreted by the Virginia State Ports Authority in its resolution adopted on June 8, 1964, and as construed and interpreted by the Peninsula Ports Authority of Virginia, the Chesapeake & Ohio Railway Company and the City of Newport News, Virginia, the Memorandum of Agreement between said Peninsula Ports Authority of Virginia, the Chesapeake & Ohio Railway Company and the City of Newport News and the undertakings provided therein, including the proposed lease with the Chesapeake & Ohio Railway Company, the agreement with Sverdrup and Parcel, Consulting Engineers, and all other agreements, acts and action of any officer or agent of the Commonwealth of Virginia, the City of Newport News, Virginia, the Virginia State Ports Authority and the Peninsula Ports Authority of Virginia, and all resolutions or ordinances of the Board of Commissioners of either of said authorities or of the governing body of the City of Newport News in furtherance of the purposes expressed by and set forth in said Acts of the Assembly, are in violation of Sections 127, 185 and 188 of the Constitution of Virginia, and of Article 2, Chapter 5, Title 15.1 of the Code of Virginia, 1950, as amended. and Chapters 2 and 7 of the charter of the City of Newport News, Virginia.

## Respondent's Answer

Notwithstanding his demurrer to the petition hereinabove set forth and without waiving the benefit of the same, the said respondent, Sidney C. Day, Jr., Comptroller of Virginia, for answer to the petition for writ of mandamus sets forth the following:

1. The respondent admits that the Peninsula Ports Authority of Virginia is a body politic and corporate and a political subdivision of the Commonwealth of Virginia pursuant to Chapter 46 of Acts of Assembly of Virginia of 1952, as amended (the "Enabling Act"), including the amendments thereto by Chapter 39 of the Acts of Assembly of Virginia, 1964 and has been granted the powers set out in paragraph I (a), (b) and (c) of the petition.

2. The respondent admits that the General Assembly of Virginia adopted at its 1958 session House Joint Resolution No. 70, as set forth in paragraph II of the petition.

3. The respondent admits that Section 11 of the Enabling Act as amended contains the provisions set forth in paragraph III of the petition.

4. The respondent admits that the General Assembly at its 1964 regular session amended the Enabling Act and further admits that Item 190 in the Appropriation Act for biennium 1965-1966 appropriated funds to the use of the Virginia State Ports Authority for acquisition, development, construction and operation of port facilities in Newport News, and that said item further provided that in the event the Board of Commissioners of Virginia States Port Authority was unable to acquire, develop or operate port facilities at Newport News, such funds so appropriated shall be available as set forth in paragraph IV of the petition to the Peninsula Ports Authority of Virginia; respondent likewise admits that Item 172 of the Appropriation Act for the biennium 1962-1964 provided for the appropriation of funds and the availability of the same to any other political subdivision to the extent and in the manner and under the conditions set forth in said paragraph IV of the petition.

5. The respondent is advised that the amount appropriated annually in the Appropriation Act of 1965-1966 for port facilities at Newport News is \$757,500; the respondent is advised that the facts set forth in paragraph V of the petition are true relating to the Resolution adopted on June 8, 1964 by the Virginia State Ports Authority and therefore does not deny them, but respondent states that such Resolution is without lawful force or effect in that appropriations in both

Item 190 in the Appropriation Act for the biennium 1965-1966 and in Item 172 in the Appropriation Act for the biennium 1962-1964 specifically provide that such appropriations are for "acquisition, development, construction and operation of port facilities", and said Virginia State Ports Authority acted unlawfully in requesting the Governor to make funds appropriated for such purposes available for the payment, or partial payment, of the principal of and interest on revenue bonds proposed to be issued by the Peninsula Ports Authority of Virginia, which are to be issued under the terms and conditions contrary to the provisions of Sections 127, 185 and 188 of the Constitution of Virginia, Article 2, Chapter 5, Title 15.1 of the Code of Virginia, 1950, and the charter of the City of Newport News.

6. The respondent is informed that the facts set out in paragraph VI of the petition are true concerning the approval of the Governor of the Commonwealth of Virginia of the Resolution of the Board of Commissioners of Virginia State Ports Authority, but respondent asserts that the Governor was improperly advised and that the said funds as provided in the Appropriation Act were appropriated by the respective General Assemblies of 1962 and 1964 for the acquisition, development, construction and operation of port facilities, and not for the payment of principal of, and interest on, revenue bonds to be issued by the Peninsula Ports Authority of Virginia in violation of the said provisions of the Constitution of Virginia, Code of Virginia, and charter of the City of Newport News, Virginia.

7. The respondent is advised that the facts contained in paragraph VII of the petition are true, but asserts that the obligation to said Consulting Engineers was entered into in pursuance of the Enabling Act, the Memorandum of Agreement, and other agreements, all of which are contrary to the provisions of Sections 127, 185 and 188 of the Constitution of Virginia, Article 2, Chapter 5, Title 15.1 of the Code of Virginia, 1950, as amended, and the charter of the City of Newport News.

8. The respondent admits that the Peninsula Ports Authority of Virginia, the Chesapeake & Ohio Railway Company and the City of Newport News have entered into a tripartite agreement called "Memorandum of Agreement" as set forth in paragraph VIII of the petition and admits that the said agreement, *inter alia* provides for the conveyances, construction, leasing and other things set forth in said paragraph VIII of the petition: the respondent has no knowledge whether or not the operations of the Railway under the



lease will result in the Railway incurring operating losses required to be absorbed by it but because respondent is advised and believes that the allegations with respect thereto are true, he does not deny them, but the respondent asserts nevertheless that said Memorandum of Agreement, the conveyances, leases and agreements and other things provided therein, violate Sections 127, 185 and 188 of the Constitution of Virginia, Article 2, Chapter 5, Title 15.1 of the Code of Virginia, 1950, as amended, and the charter of the City of Newport News, and are therefore unlawful.

9. The respondent admits that the Memorandum of Agreement provides that the principal of, and interest on, the revenue bonds of the Authority shall be paid solely from the sources set forth in paragraph IX, and admits that Section 11 of the Enabling Act provides that any liability to make any payment assumed by the City of Newport News shall not constitute or create an obligation or indebtedness within the meaning of any constitutional, statutory or charter limitations upon obligations or debts of the city and that the execution of any contract or contracts by the city shall not be deemed to create any obligation or debt contrary to such limitations; but notwithstanding respondent asserts that the Memorandum of Agreement and any agreement supplemental thereto as well as Section 11 of the Enabling Act particularly insofar as the same authorizes the payment of the bond requirement deficiency by the City are invalid and contrary to the above-mentioned sections, articles and chapters of the Constitution of Virginia, the Code of Virginia, 1950, and the charter of the City of Newport News.

10. The respondent is advised that the facts contained in paragraph X of the petition are true and therefore does not deny them, but states that they are nevertheless irrelevant and immaterial because the said Memorandum of Agreement and any action authorizing the execution of the same violate the above-mentioned sections, articles and chapters of the Constitution of Virginia, the Code of Virginia, 1950, and the charter of the City of Newport News, and are therefore invalid.

11. The respondent admits the allegations of paragraph XI of the petition.

12. The respondent admits that he has declined to issue a warrant authorizing the payment of the sum of \$1,000 to Sverdrup & Parcel, and admits that by his letter of June 29, 1964 he notified the Attorney General of Virginia of his doubts respecting the validity of the said Memorandum of Agreement as set forth in paragraph XII of the petition, and

Exhibit F attached thereto; the respondent further states that he is advised, verily believes and therefore avers that:

(a) The total indebtedness, by which the City of Newport News is by the Memorandum of Agreement obligated to pay, is in excess of \$22,725,000, which amount excluding existing indebtedness of the said City (except indebtedness specifically excluded in any such determination by Section 127 of the Constitution of Virginia) exceeds 18% of the assessed value of the real estate in the said City subject to taxation as shown by the last preceding assessment for taxes by said City;

(b) The charter of the said City of Newport News does not authorize a larger percentage of indebtedness by said City than authorized by said Section 127 of the Constitution of Virginia;

(c) The City of Newport News has not authorized the obligations contemplated by the Memorandum of Agreement by ordinance enacted pursuant to Section 123 of the Constitution of Virginia, and approved by the affirmative vote of a majority of the voters voting on the question of incurring such obligation for a supply of water or other specific undertaking from which the City may derive a revenue;

(d) The rental of the port facilities to be paid by the Chesapeake & Ohio Railway Company for the initial term of the lease contemplated by the Memorandum of Agreement and the rental payable by said Railway for any successive term or terms (as subsequently agreed upon) do not represent fair rental predicated upon the necessity or value of the port facilities which are to be leased to the Railway thereunder.

13. The respondent does not dispute the jurisdiction of this Court in this matter conferred by Section 8-714 of the Code of Virginia, 1950, as specified in paragraph XIV of the petition.

14. The respondent denies the allegations of paragraph XV of the petition.

And now having fully answered the petition for writ of mandamus, this respondent prays that the Court deny the prayer of the petitioner and it adjudge and decree that Section 11 of the Enabling Act (Chapter 46 of the Acts of Assembly of Virginia 1952, as amended by Chapter 39 of the Acts of Assembly of Virginia of 1962) is not a valid enactment of the General Assembly of Virginia; and that it further adjudge and decree that all transactions and acts contemplated and all contracts, trust agreements, leases, convey-

ances and other undertakings made or proposed to be made pursuant to said Section 11 of the Enabling Act, as amended and as set forth in the petition for writ of mandamus are in violation of Sections 127, 185 and 188 of the Constitution of Virginia, and of Article 2, Chapter 5, Title 15.1 of the Code of Virginia, 1950, as amended, and Chapters 2 and 7 of the charter of the City of Newport News, Virginia; that it further adjudge and decree that the questions set forth in paragraph XIII of the petition for writ of mandamus be answered in the affirmative; that it adjudge and decree that the funds appropriated under Item 190 of the Appropriation Act for the biennium 1965-1966 and by Item 172 of the Appropriation Act for the biennium 1962-1964 are not lawfully available for the payment of principal of, and interest on, the revenue bonds by the Peninsula Ports Authority of Virginia as contemplated by the various contracts and transactions described in the petition for mandamus; that the writ of mandamus be refused; and that the respondent be hence dismissed with his reasonable costs by him in this behalf expended.

SIDNEY C. DAY, JR.  
 Comptroller of Virginia  
 By HOWARD W. DOBBINS  
 900 Travelers Building  
 Richmond 2, Virginia  
 Counsel.

State of Virginia,  
 City of Richmond, to-wit:

Sidney C. Day, Jr., the respondent named in the foregoing demurrer and answer to the petition for writ of mandamus, being duly sworn, says that the matters and things set forth and alleged in his said pleading are true, except those which are stated to be on information, which he verily believes to be true.

SIDNEY C. DAY, JR.  
 Respondent.

Subscribed and sworn to before me, a Notary Public, in and for the City and State aforesaid, in my City aforesaid, this 20th day of July, 1964.

My commission expires on the 13 day of Jan., 1968.

C. P. . . . ., JR.  
 Notary Public.

CERTIFICATE OF SERVICE.

The undersigned, Howard W. Dobbins, attorney of record for Sidney C. Day, Jr., respondent herein, hereby certifies that a true copy of the foregoing demurrer and answer was delivered to the petitioner, Robert Y. Button, Attorney General of Virginia, at his office at Richmond, Virginia, and to Kenneth C. Patty, First Assistant to the Attorney General, at his office in Richmond, Virginia, and that copies thereof were also mailed, postage prepaid, to E. Selater Montague, Esq., of counsel for the petitioner, Citizens National Bank Building, Hampton, Virginia, and to F. O. Blechman, Esq., of counsel for the petitioner, Wilbern Building, Newport News, Virginia, on July 21, 1964, prior to the filing of the same in the Clerk's Office of the Supreme Court of Appeals of Virginia.

HOWARD W. DOBBINS

IN THE SUPREME COURT OF APPEALS OF VIRGINIA  
At Richmond

Record No. 5954

Robert Y. Button, Attorney General of Virginia, (Peninsula  
Ports Authority of Virginia), Petitioner,

*against*

Sidney C. Day, Jr., Comptroller of Virginia, Respondent.

STIPULATION.

It is hereby stipulated that:

1. The record herein shall consist of the following, which shall be printed:
  - a. Petition for Writ of Mandamus filed June 30, 1964;
  - b. Notice of Application for Writ of Mandamus served June 30, 1964;
  - c. Exhibits A, B, C, D, E and F, inclusive, attached to and made a part of said Petition for Writ of Mandamus;
  - d. Respondent's Demurrer and Answer to Petition for Writ of Mandamus;
  - e. This Stipulation; and

f. Order filing this Stipulation.

2. a. Respondent's Answer shall be filed not later than July 21, 1964;

b. Petitioner's Opening Brief shall be filed not later than August 28, 1964;

c. Respondents Brief shall be filed not later than September 28, 1964; and

d. Petitioners Reply Brief, if any, shall be filed not later than October 3, 1964.

3. The parties shall jointly request that the cause be placed on the privileged docket of the October 1964 session of the Court.

4. If it is held by the Court that by entering into the Memorandum of Agreement, the City of Newport News would incur an indebtedness or obligation to which the limitations of the City's charter and Section 127 of the Constitution of Virginia apply, as alleged by the Respondent, then it is stipulated that, upon the basis of the assessed valuation of real estate in the City subject to taxation, the total of the limited indebtedness of the City, including existing indebtedness plus \$22,725,000 (the aggregate amount which might become due and payable over a thirty year period by the City by virtue of the Memorandum of Agreement), would exceed the debt limitations.

If, however, it is held by the Court that the indebtedness incurred by the City under said Memorandum of Agreement is limited to the maximum payable in any one year, \$757,500, then it is stipulated that said limitations would not be exceeded.

5. It is further stipulated that the charter of the said City of Newport News does not authorize a larger percentage of indebtedness by said City than authorized by said Section 127 of the Constitution of Virginia; and

6. It is further stipulated that the City of Newport News has not authorized the obligations contemplated by the Memorandum of Agreement by ordinance enacted pursuant to Section 123 of the Constitution of Virginia and approved by the affirmative vote of a majority of the voters voting on the question of incurring such obligation for a supply of water or other specific undertaking from which the City may derive a revenue.

IN WITNESS WHEREOF, the parties have signed and  
filed this Stipulation at Richmond, Virginia, on August 7,  
1964.

ROBERT Y. BUTTON, ATTOR-  
NEY GENERAL OF VIRGINIA,  
Petitioner.

By: F. O. BLECHMAN  
Of Counsel for Petitioner.

SIDNEY C. DAY, JR.,  
COMPTROLLER OF VIRGINIA,  
Respondent

By: HOWARD W. DOBBINS  
Of Counsel for Respondent.

A Copy—Teste:

H. G. TURNER, Clerk.

## INDEX TO RECORD

	Page
Order .....	1
Record .....	3
Notice of Application for Writ of Mandamus .....	3
Petition for Writ of Mandamus .....	3
Appendix .....	17
Exhibit A—Resolution .....	18
Exhibit B—Authorization .....	22
Exhibit C—Letter dated June 3, 1964, from Sverdrup & Parcel .....	22
Exhibit D—Memorandum of Agreement .....	25
Exhibit E—Invoice .....	44
Exhibit F—Letter dated June 29, 1964, from Sidney C. Day, Jr., Comptroller .....	45
Demurrer and Answer of Respondent .....	49
Stipulation . . . . .	55