

# VERMONT TRANSPORTATION BOARD MEETING AUGUST 23, 2012

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## **Board Members Present:**

Maurice Germain, Chairman; term expires 2/28/2014  
Timothy Hayward, term expires 2/28/2013  
Nick Marro, term expires 2/28/2013  
Robin Stern, term expires 2/28/2015  
Wesley Hrydziusko, term expires 2/28/2015

## **Board Members Absent:**

Arthur Sanborn, term expires 2/28/2015  
Charles Bucknam Jr., term expires 2/28/2013

## **Others Present:**

John Zicconi, Executive Secretary  
Marc Cote, President Blow & Cote, Inc.  
Lonny Wade, Catamount Safety  
Kevin Oddy, VTrans Legal Program Administrator  
Greg Wilcox, VTrans Resident Engineer  
Barbara Donovan, VTrans Public Transit Administrator  
Toni Clithero, Vermont Assistant Attorney General (via telephone)

## **Call to Order:**

The Chairman, Maurice Germain, called the Thursday, August 23, 2012 meeting to order at 9:30 a.m., which was held in the Vermont Agency of Transportation fifth floor Boardroom at 1 National Life Drive Montpelier, VT.

## **1. NEW BUSINESS**

### ***1.1 Approve the Minutes of July 19, 2012***

**On a motion by Mr. Marro seconded by Mr. Hayward, the Board unanimously voted to approve the minutes of the July 19, 2012 meeting as submitted with a minor amendment to correct a typo.**

### ***1.2 Executive Secretary's Update***

Mr. Zicconi informed the Board that earlier in the week Arthur Sanborn's wife, Patricia, notified the Transportation Board office that Mr. Sanborn, due to his failing health, is resigning from the Board. Mr. Zicconi said he is preparing a letter to the Governor informing him of the resignation, and asking him to appoint a new member. Chairman Germain will sign the letter.

Mr. Zicconi reminded the Board that as part of its regular meeting on September 20, 2012 members will receive training regarding property condemnation, compensation and appraisals. The training is mandated by statute, and all Board members must attend.

### ***1.3 TB-397 Hubbardton Stone Valley Byway Application.***

Mr. Hrydziusko recommended that the Board approve the Town of Hubbardton's application to join the Stone Valley Byway. On August 13, 2012, Mr. Hrydziusko acted as hearing officer at a public hearing held at the Hubbardton Town Offices regarding Hubbardton's request. Following the hearing, Mr. Hrydziusko filed a written report with the Board recommending approval. A total of 19 people, including the Hubbardton Town Clerk and

all five members of the Hubbardton Select Board, attended the public hearing, which was held at the request of the Vermont Byway Council.

**On a motion by Mr. Marro seconded by Mr. Hayward, the Board unanimously voted to approve Hubbardton's application.**

Mr. Zicconi was instructed to inform the Byway Council via letter of the Board's decision.

#### ***1.4 TB-389 Blow & Cote Hearing***

Chairman Germain called the hearing to order at 10:08 a.m.

TB-389 involves a dispute over who is responsible to pay a \$1,700 fine attached to a VOSHA citation. VTrans contests that the contractor, Blow & Cote, must pay the fine; while the contractor contests VTrans bears responsibility. VTrans paid the fine, but did so by withholding money from its final payment to the contractor.

VTrans in 2009 contracted with Blow & Cote to conduct a bridge rehabilitation project – Fairfax BHF 023-1(5) – that would rehab Bridge #10 on Route 104 in Fairfax over Mill Brook. The rehabilitation work included replacement of the bridge's superstructure, along with related substructure repair and roadway approach work.

The VOSHA citation and the \$1,700 fine relates to the VTrans field office that was associated with the bridge work. VOSHA cited VTrans for the trailer having energized electrical outlets and fluorescent light fixtures that were not covered. Because the field office was a trailer that was supplied by Blow & Cote per contract (Sections 107 and 631 of the 2006 Vermont Standard Specifications for Construction), the Agency believes Blow & Cote "owns" the fine. Blow & Cote disagrees.

In attendance representing Blow & Cote were Blow & Cote President Marc Cote and Lonny Wade of Catamount Safety. In attendance representing VTrans were Legal Program Administrator Kevin Oddy, Resident Engineer Greg Wilcox and Assistant Attorney General Toni Clithero. Ms. Clithero attended via telephone, and called in approximately eight minutes into the hearing.

Mr. Oddy testified that the case came down to whether the work contract entered into between Blow & Cote and the State of Vermont is "qualified or absolute," and whether Blow and Cote had an "absolute" responsibility to comply with all laws, regulations and rules – including VOSHA requirements. And should any violations of these laws, regulations and rules arise, is the contract language "absolute" and require Blow and Cote to indemnify the state?

Mr. Oddy said on September 15, 2009, Blow & Cote entered into a contract with the State to rehabilitate Bridge #10 in Fairfax, and that the contract incorporated the 2006 Vermont Standard Specifications for Construction that were approved and adopted by the Vermont Agency of Transportation. As part of that contract (Section 631) Blow and Cote agreed to furnish, erect, equip and maintain a field office to be used by VTrans' engineering staff. Blow & Cote, under Section 105.06 of the contract, is also responsible for supplying a safety officer who is well versed in OSHA and VOSHA regulations, and who is capable of implementing a plan to conform to those regulations, Mr. Oddy said.

Mr. Oddy said that Section 107.01 of the contract calls for Blow & Cote to indemnify the Agency of Transportation, and says that the contractor "shall" comply with all state and federal laws, ordinances and regulations in any manner affecting the conduct of the work, as well as the actions or operations of those engaged in the work. Further, the contract calls for Blow & Cote to defend and indemnify the state, and all its officers and employees, against any claim or liability arising or based on such laws, Mr. Oddy said.

On September 16, 2010, VOSHA issued three citations. Mr. Oddy said that one citation did not include a fine, while Blow & Cote paid the fine associated with a citation that involved a propane tank that served the field office and was not securely fastened to a firm foundation. However, Blow & Cote contests that it is responsible for the

VOSHA violation and \$1,700 fine that was issued because the field office trailer exposed workers to energized electrical outlet boxes and light fixtures that did not contain covers, Mr. Oddy said.

Marc Coty testified that the worker who was exposed to the hazards in the trailer was not a Blow & Cote employee, but instead was an employee of the State of Vermont, and that the State has an obligation to ensure that its employees work in a safe environment. Mr. Cote also said that the State has safety inspectors that inspect projects. The field office trailer, by contract, was for the exclusive use of VTrans staff. A VTrans engineer inspected the trailer, which belongs to Blow & Cote, prior to its delivery and reported nothing was missing or faulty, and found the trailer acceptable, Mr. Cote said.

Mr. Cote further testified that his company's contract with VTrans called for all equipment in the trailer to be in good working order, and provided his company 48 hours to repair damaged or inoperative equipment. VTrans gave Blow & Cote no notice that any equipment in the trailer was in need of repair or became inoperative, Mr. Cote said. VOSHA did not assess any citations or fines against Blow & Cote. Instead, it cited VTrans for allowing its employee to work in an unsafe environment, Mr. Cote said.

Mr. Cote said that the engineer that worked in the trailer was a VTrans employee, and VOSHA oversees the relationship between employer and employee. Therefore, the VOSHA violation belongs to VTrans exclusively, Mr. Cote said, and Blow & Cote cannot be held responsible for the job safety of a VTrans' employees.

Mr. Cote said that the 2006 Vermont Standard Specifications for Construction define a damage claim as a claim by an individual or entity for damage to property or for personal injury, and that a VOSHA violation does not fall under this definition. As a result, the job safety provided by VTrans to one of its employees cannot be indemnified by Blow and Cote.

The field office is, in essence, is a rental unit provided by Blow and Cote for VTrans exclusive use, Mr. Cote said. Section 107 of the contract does not apply to VOSHA violations because this section is written to apply to third-party damages as it would pertain to things like vehicles or property belonging to the public. Section 107, Mr. Cote said, does not apply to State workers doing their daily business as employees of VTrans. Section 107 cannot be construed to include VOSHA violations because the contractor cannot be party to employee/employer relationships between a state employee and VTrans, Mr. Cote said.

VTrans Resident Engineer Greg Wilcox acknowledged that he accepted the trailer in the spring of 2010, but said he only inspected the trailer for cleanliness and general acceptability, and not if the trailer would pass safety inspections related to electricity as the trailer was not electrically energized at the time of his inspection. Mr. Oddy said this general-condition signoff is all that is required of the VTrans engineer by contract, and that Blow & Cote is responsible for safety and maintenance of the field office.

Lonny Wade disagreed. Mr. Wade said he has been a safety and health professional for 20 years, and that it was VTrans' responsibility to do a daily hazard assessment of the field trailer. Mr. Wilcox, who occupied the trailer, is an employee of the State, not Blow & Cote, and that it was Mr. Wilcox's employer's responsibility to do a hazard assessment as it relates to VOSHA rules and regulations, Mr. Wade said.

Mr. Wilcox said he did not recall whether Blow & Cote delivered the trailer, which was located at the Fairfax Town Garage about three miles from the bridge construction site, without the electrical outlet and light covers. However, he said it was the contractor's responsibility to both deliver and "set up" the trailer. Mr. Wilcox said he first occupied the trailer around the end of April of 2010, and the first VOSHA inspection took place about six weeks later in June.

Ms. Stern asked how VOSHA came to inspect the trailer. Mr. Wilcox said that he was "having problems" with safety on the bridge construction project, and that he asked VOSHA to visit the site. The VOSHA officer visited the project more than once, and when the VOSHA officer arrived for one of his inspections he met Mr. Wilcox at the field office trailer, and the VOSHA officer began his inspection with the trailer, Mr. Wilcox said.

Mr. Hayward asked if anyone knew whether the violations existed when the trailer was delivered to VTrans. Mr. Cote said that his “guess” is that the outlet and light covers were not in place when the trailer was delivered. Mr. Wade said this was a moot point, however, as it is the employer’s responsibility to conduct ongoing hazard assessments. But in this case, the State had an employee working in the trailer for nearly two months and the hazard was not identified and reported to Blow & Cote, so the company did not know that it needed to conduct repairs, Mr. Wade said.

Mr. Oddy said that if Mr. Cote is correct and that the trailer was delivered to VTrans without cover plates, then Blow & Cote is remiss because Section 631.01 of the 2006 Standard Specifications for Construction calls for the Contractor to furnish, erect, equip and maintain the field office. So if cover plates were missing from the time the trailer was delivered, Blow and Cote had an “absolute” responsibility to correct the violations at the time it first set the trailer up, Mr. Oddy said.

Ms. Stern asked if there were conflicting contract obligations. Ms. Stern said she was struggling with the idea that by contract, Blow & Cote had an absolute responsibility to indemnify the State against violations, but the contract also contains a 48-hour provision to cure upon notice if any problems arise. Ms. Stern said that under due-process concepts, you generally have to get notice before you have an obligation to fix something, because you cannot fix something you do not know about.

Mr. Oddy said notice would be required if, for example, the engineer realized there were light bulbs burned out. Because the engineer realized he could not see he would notice the contractor that the light bulbs needed to be replaced. But the engineer is neither a safety inspector nor a safety officer, Mr. Oddy said, so the contract call for Blow & Cote to provide a safety officer that is on site all the time to inspect and ensure that all operations under the contract are performed safely and according to all VOSHA regulations.

Ms. Stern pointed out that the 2006 Standard Specifications for Construction also calls for the Agency of Transportation to engage a safety officer whose duties include safety inspections. Mr. Oddy said that is correct, but that the VTrans Safety Officer provides safety inspection of the “construction project.”

Mr. Wade asked why that State person did not identify the problem in the field office trailer.

Ms. Clithero said who should have noticed that the trailer contained violations, or who should have reported the violations to whom, is irrelevant because the VOSHA citation has already occurred. The question before the Board, Ms. Clithero said, is not who should have noticed the violation before VOSHA acted, but under the contract did the Director of Program Development reasonably concluded that the indemnity clause contained in Section 107.01 of the 2006 Standard Specifications for Construction is broad enough to include the VOSHA citation and fine?

Mr. Hrydziusko asked if Blow & Cote had a safety officer on site during all work periods. Mr. Cote and Mr. Wade said yes. Blow & Cote’s field superintendent was trained as a Safety officer, as is Mr. Wade, who also spent time at the construction site and did “multiple” site inspections. Mr. Hrydziusko asked Mr. Wade if he noticed the safety issues in the field office trailer. Mr. Wade said he inspected only the “job site,” and that he focused on construction activities and not the job trailer that the State’s engineer had accepted.

Mr. Marro asked if the field office trailer was part of the construction activities. Mr. Wade answered no. He said it was located three miles away from the bridge construction site. A job trailer that is used by someone other than construction worker and located three miles away from construction activities was not Blow & Cote’s responsibility, Mr. Wade said.

Ms. Stern asked if the State had a parallel safety officer that essentially did the same job as the Contractor’s Safety officer. Mr. Wade answered yes. Mr. Oddy said Mr. Wade is incorrect.

Mr. Oddy said that the State employs an on-site resident engineer whose duties are clearly spelled out in the contract. And while the State also engages a safety officer who conducts inspections at “periodic levels, Mr. Oddy said this hearing is not about what the State’s employees are charged to do. This case is not about whether a VOSHA citation and fine should have been issued. Citations and a fine were issued. The question before the Board is who “owns” the violations and fine. This case is about whether the indemnification language in the contract is “absolute,” Mr. Oddy said.

Ms. Stern asked if there was any part of the contract that was not placed in the record that referenced indemnification obligations. Ms. Stern said often contracts will call for indemnification unless gross negligence on behalf of a party is the reason for a problem. Ms. Stern asked if the Board has all it needs to make a decision regarding indemnification obligations.

Ms. Clithero said the Board had everything and that as far as she knew Section 107.01 was the only area of the the State’s contract with Blow & Cote that deals with indemnification. Ms. Clithero further said that she would do additional research following the Board’s hearing to ensure that there was no other indemnification language, and would let the Board know via email if she discovered anything.

**On a motion by Mr. Hayward seconded by Mr. Marro, the Board at 11:07 a.m. unanimously voted to close the hearing.**

**On a motion by Mr. Marro seconded by Mr. Hayward, the Board at 11:07 a.m. unanimously voted to enter executive session, pursuant to Title 1 § 313, to deliberate.**

Mr. Zicconi was invited into the executive session.

At 11:33 a.m. the Board exited executive session.

**On a motion by Mr. Hayward seconded by Mr. Hrydziusko, the Board at 11:34 a.m. unanimously voted to affirm the VTrans Director of Program Development’s ruling that Blow & Cote is responsible to pay the VOSHA fine in TB-389.**

The Board then instructed Mr. Zicconi to prepare the final documents for the signature of the Chairman.

## **2. OLD BUSINESS**

### ***2.1 Review Status and Plan Assignments for Pending Cases***

The Board reviewed the pending case spreadsheet. Ms. Stern pointed out that TB-383 was scheduled to be ready for hearing at the Board’s next meeting on September 20, which is also the date the Board is scheduled for training regarding the State’s new condemnation law.

Mr. Zicconi said that he recently spoke to the attorneys involved in the case, and that they were behind schedule. As a result, he did not expect them to be ready for hearing in September. He told the Board he would work with the attorneys in the coming weeks to adjust the schedule and set a new hearing date.

### ***2.2 Fall Public Hearings***

Mr. Zicconi informed the Board that he consulted with both VTrans and the transportation planners associated with Vermont’s Regional Planning Commissions regarding topics for this year’s fall hearings, and the following six topics have been suggested.

- State Transportation Revenues

- Bike and Pedestrian Issues
- Railroad and Inter-City Bus Services
- Climate Change – Resilience & Adaptation
- VTrans Accelerated Bridge Program
- Roadway Safety

With the Board's approval, Mr. Zicconi said he would prepare a three-to-five minute presentation on each topic that he would present to the audience at each hearing to provide background and set the stage for discussion. Aside from these topics, the hearings will also provide time for participants to bring up any transportation-related topic they wish. The Board agreed this was a good approach.

Mr. Zicconi informed the Board that the RPCs had suggested six locations for the hearings: Brattleboro, Middlebury, Montpelier, Rutland, White River Junction and Winooski.

Mr. Hayward pointed out that Rutland and Middlebury are fairly close together, and suggested that the Board consider eliminating one and adding a location within the northeast. Mr. Marro agreed, and suggested that the Board consider holding a hearing in St. Johnsbury, Lydon or Newport. Ms. Stern suggested swapping the Middlebury hearing location for one of the northeast locations. The Board agreed.

Mr. Zicconi said he would contact the Northeastern Vermont Development Association, which serves as the northeast's regional planning commission, to solicit a recommendation on where in the northeast to hold the public hearing and would communicate the suggestion to Board members via email.

Ms. Stern asked Mr. Zicconi if he was looking for volunteers to act as hearing officers at these locations. Mr. Zicconi said he did not need Board members to volunteer today, but that Board members should begin looking at their calendars, understand what dates in late October and all of November work for them, and then let him know. Mr. Zicconi said he would then put a schedule together based on Board member availability.

Mr. Hrydziusko asked if Mr. Zicconi was looking for two volunteers per location. Mr. Germain said that two would be ideal.

### ***2.3 TB-390 Morristown Compensation Hearings***

In light of Mr. Sandborn's resignation, the Board now has two hearing officers (Mr. Bucknam and Mr. Hayward) scheduled to preside over the Morristown Compensation hearing scheduled for September 6, 2012. Mr. Sandborn acted as chairman of the three-member panel in previous hearings. Mr. Germain asked Mr. Hayward to assume the role of chairman at the upcoming meeting. Mr. Hayward accepted. No additional Board member was assigned to the panel.

## **3. OTHER BUSINESS**

### ***3.1 Round Table***

Nothing was discussed.

## **4. ADJOURN**

**On a motion by Mr. Hayward seconded by Ms. Stern, the Board unanimously voted to adjourn at 11:38 a.m.**

Respectfully submitted,

John Zicconi  
Executive Secretary

**Next Board Meeting:  
September 20, 2012 -- 9:30 a.m.  
AOT 3<sup>rd</sup> Floor Conference Room**