

**IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO**

J. MOYER

Plaintiff,

v.

**PAUL V. MUETHING, President of the Board of Trustees of the Cincinnati
Southern Railway**

-and-

THE BOARD OF TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY,

Defendants.

MOTION FOR PRELIMINARY INJUNCTION

Plaintiff, J. Moyer respectfully moves this Court for Preliminary Injunction to enjoin the sale of the property and infrastructure known as the *Cincinnati Southern Railway*, under the terms of the Sales Agreement resolved to by the Cincinnati Southern Railway Board in Resolution 1-2023.

Upon information and belief, the Plaintiff argues that the Sales Agreement, its statutory basis, and actions of the CSR Board leading up to the vote, are riddled with legal and procedural deficiencies which did not result in an orderly, lawful or informed democratic process. The outcome of which is that the Railway is being sold for a fraction of its true value.

The execution of the Sales Agreement under these circumstances would be an act of grave economic injustice against the people of Cincinnati. The Petitioner prays for relief in the public interest.

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MEMORANDUM OF SUPPORT FOR PRELIMINARY INJUNCTION

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Introduction and Background

The Cincinnati Southern Railway is an extraordinary piece of Americana.¹

The construction of an interstate railway by a municipality has no known American or global precedence. It was an act by the 4th largest city in America at the time and an indication of its financial and political power.

The history covers different reasons for this unusual situation, as almost all railroads in North America were built with private capital. A key reason related to this Motion and the value of this Railway today is that for its length, 337 miles, it is uniquely complex, featuring 27 tunnels and 105 bridges, a number unmatched except for some transcontinental railroads. The history shows multiple attempts for decades to build a railroad, but there was no private investor large enough to make a bond issue for a railroad this size and complexity. (Even Cincinnati struggled with the bond payments until the railroad began operation.)

To build the railway, the Ohio legislature in 1869 passed the *Ferguson Railway Act* to create the unique corporate body building and owning the railway, the Cincinnati Southern Railway board.

City residents voted in a ballot issue later in 1869 to authorize construction.

That public vote, as well as others through the years, are core characteristics of the Ferguson Act, in that the act solidified the idea of a collectively owned and managed railway. The informed consent of the people of Cincinnati through ballot is not incidental, it is a core part of the legal structure of the Railway.

With construction completed in 1881, and after a couple of short term leasing agreements, the CSR Board entered into a lease agreement with the Cincinnati, New Orleans and Texas Pacific Railway Company, (CNOTP) now a subsidiary of Norfolk Southern. This agreement, consisting of the original 1881 lease and amendments over the past 143 years, is the lease operating today and leads directly to the present Sales Agreement. An amendment in 1987 predetermined the process of negotiation and other characteristics of today's Sales Agreement.

The last major renegotiation of the lease occurred in 1927. The lease's term is 99 years and its last day is December 31, 2026.

The significance of lease end December 2026 cannot be overstated. The first CNOTP lease was 20 years (1881-1901), extended 60 years in 1901, and then extended

¹For purposes of brevity this Memorandum does not attempt a complete history, just an overview with immediate relevance to the Motion. The court may find helpful a Memorandum from a 1977 court case for a general history of the Railway: Exhibit Z, History of CSR Case No CV-77-050873, July 29, 1977

again 99 years in 1927. That means that 2027 is the first time in 146 years that the City of Cincinnati will have the opportunity to not lease the Railway, but instead operate it directly as a municipally owned and operated revenue-generating enterprise.

The Sales Agreement, subject of this motion, negotiated in 2022 between the CSR Board and Norfolk Southern, contains preconditions to its execution, including amendment by the state legislature of the Ferguson Act and a vote of the people of Cincinnati. Amendment to the Ferguson Act occurred with House Bill 23, an omnibus transportation budget bill, in March 2023.

CSR Board Resolution 1-2023, adopted by the Board on June 27, 2023 is the legal act which authorizes the President of the Board, Paul V. Muething to execute the sale. (Exhibit A)

In regards to the Board's fiduciary duty and the valuation of the Railway, the Board refers to the consultation work of The Brattle Group, BMO Capital Markets Group and Bob Dovenberg in Resolutions 1-2022 and 1-2023.

The Cincinnati media report that the expected closing of the transaction is March 15, 2023.

ARGUMENT

PART A: Defective legislative process: Ohio Constitution Article II Section 15, "Single Subject Rule" and legislative framework for Sale

Section summary: Amending the Ferguson Act through an omnibus bill violated Ohio Constitution Article II Section 15. The combining of changes to the Ferguson Act with other unrelated matters impaired public understanding and participation to a valuable and complicated piece of interstate infrastructure. The people of Cincinnati and Ohio were denied the opportunity to participate and understand that discussion.

Ohio Constitution Article II section 15 says..."No bill shall contain more than one subject, which shall be clearly expressed in its title."

“The purpose of this rule is to 'check on the power of the legislative branch and is designed to prevent logrolling and riders and promote an orderly and informed legislative process.’”²

The legislative act amending the Ferguson Railway Act to make this Sale possible occurred with House Bill 23 of the 135th General Assembly.

In regards to the Ferguson Act, the bill³:

- *Permits a railway board of trustees created under the Ferguson Act of 1869 to sell a railroad or portion of a railroad upon approval by the electorate, including when and in what amount the proceeds are to be periodically disbursed to the city.

- * Provides that a board may submit a question of sale to the voters in a primary or general election in 2023 or 2024, and may submit the question only one time, until otherwise authorized by the General Assembly.

- * Permits a board to establish a trust fund to invest the proceeds of the sale of the railway.

- * Clarifies that all net earnings and income under a lease of a municipally owned railway must be paid into the city's treasury to the credit of the sinking fund or bond retirement fund.

- * Requires the city to spend the proceeds from the trust fund only on the rehabilitation, modernization, or replacement of existing infrastructure improvements, and prohibits the city from using the proceeds to pay for construction of new infrastructure improvements.

- * Prohibits the city from using the proceeds of the trust fund to pay debt service, unlike other revenues from a municipally owned railway.

In addition to the above, House Bill 23 (Exhibit D) is the \$13.5 billion state fiscal year 2024-2025 transportation budget (bill title: “Enact FY 2024-2025 transportation budget.”)

The same bill also:

- *Requires a county or township to allow aggregate mineral surface mining activities in any zoning district (i.e., residential, commercial, industrial) as either a permitted use or conditional use when those activities are to be added to an

² Exhibit B, Member's Brief, “One Subject Rule” Ohio Legislative Service Commission, March 2022

³ Exhibit C, HB 23, Final Analysis document, Ohio Legislative Services Commission

existing mineral mining operation as authorized by a permit issued by the Department of Natural Resources.

- *Requires the ODOT Director and every county to issue an annual permit for both vehicles that haul farm machinery, when the farm machinery otherwise qualifies for the ODOT “Farm Equipment Permit” or a similar county permit for farm machinery and equipment; and vehicles that haul agricultural produce or agricultural production materials that otherwise could be hauled by farm machinery under the ODOT “Farm Equipment Permit” or a similar county permit for farm machinery and equipment.

- *Restricts the authority of a county or township to operate a traffic law photo-monitoring device (“traffic camera”) for civil enforcement of red light or speeding offenses.

- *Requires ODOT to ensure that limited access exit and entrance ramps to interstate highways exist at least every 4.5 miles in adjacent municipal corporations, provided that each municipal corporation has a population above 35,000; the municipal corporations are located in different counties; and at least one of the municipal corporations is in a county with a population above one million.

- *Authorizes a vehicle powered primarily by electric battery power to exceed the statutory gross vehicle weight and axle load limits by up to 2,000 pounds.

- *Requires ODOT to contract with a third party to conduct a wrong-way driving study in order to determine the reasons for incorrect driving patterns and other factors that lead to wrong-way driving.

- *Changes Pay ranges for Highway Patrol officers and other employees

- *Requires the purchaser of a financed motor vehicle to affirmatively choose between receiving a physical certificate of title or having the title remain electronic upon completion of all payments financing the motor vehicle.

- * Requires the Director of Public Safety to enter into an agreement with the U.S. Department of Homeland Security in order to obtain approval to issue enhanced driver’s licenses, enhanced commercial driver’s licenses (CDL), and enhanced identification (ID) cards and requires the Registrar of Motor Vehicles to adopt rules governing the issuance and security of enhanced driver’s licenses, CDLs, and ID cards, all of which facilitate land and sea border crossings between the U.S. and Canada, Mexico, and the Caribbean.

Of the full 125 pages of the bill, changes to the Ferguson Railway Act, occupy just four pages (16 through 20.)

The wide range of issues combined into HB 23 came from very different spheres of public administration and several belong in their own subjects.

The Ferguson Act features a complicated and unique legal structure for the purpose of building, owning and managing the Railway which HB 23 completely rebuilds in order to effect the sale and administer the proceeds.

The Ferguson Act was not and could not have been created as part of omnibus legislation. It, and the Railway it refers to, is its own single subject which could not be destroyed in an omnibus bill.

A single subject bill to do so would reasonably have a summary which begins with “An Amendment to the Ferguson Railway Act...”

House Bill 23 of the 135th General Assembly was introduced in the legislature February 15, 2023, active in the legislature through the end of March 2023 and signed by the Governor on March 31, 2023. That gave Ohio citizens and state legislators a mere 45 days to process its wide-ranging contents.

Article II, Section 1c of the Ohio Constitution provides that normal legislation must take 90 days to come into effect, so March 31 was the last day that the critical state transportation budget (ending June 30) could be enacted without requiring a 2/3rds vote of the legislature to provide continued funding through emergency legislation. Due to this quality, the transportation budget bill is one of two “must pass” state budget bills.

To accept that the changes to the Ferguson Act are so minor and related to the state transportation bill that it could be combined with that bill and changes to the issuance of farm equipment permits, is to imply that all the legislative business of Ohio could be done in just a few bills. That is not the intention of the Single Subject Rule. The purpose of this requirement is to ensure that major changes to law are given ample public discussion through a transparent and orderly legislative process. The changes to law allowing the execution of the Sales Agreement this motion intends to enjoin were major changes to a longstanding Ohio act, but were combined into a “must pass” two year transportation budget, featuring a wide range of subjects and which was introduced in the legislature and enacted in just 45 days. This action denied the people of Cincinnati and Ohio the opportunity to review the proposed law and its consequences in an orderly legislative process.

Unlike almost all other elections which elect public officials for limited terms (who can be removed for extraordinary misconduct) or settle questions of law (which can always be changed later) the election for Issue 22 is an irreversible sale.

The people of Cincinnati are entitled to a high level of informed, orderly, democratic discourse as part of the legal process to determine an irreversible sale of extraordinarily valuable property. This was denied to them by the legislature thanks to

the method it chose to amend the Ferguson Railway Act. The Petitioner would respectfully argue that that legal deficiency, namely its non-compliance with Ohio Constitution Article II Section 15, is enough to void this Sale.

PART B: Non-performance of fiduciary duty by Cincinnati Southern Railway Board

Section summary: The Petitioner argues that the Cincinnati Southern Railway Board did not perform its fiduciary duty by misrepresenting, hiding and refusing to assess the full monetary and connective value of the Railway

“The Trustees of the Southern Railway are not public officers, in such sense, as that the function of appointing them can not be considered the exercise of judicial power.

On the contrary, they are strictly trustees according to the meaning of that term in a Court of Chancery, of a charitable trust, jurisdiction to administer which belongs appropriately to that Court.”⁴

The Railway is a toll road. It is its own revenue generating enterprise.

It is one-half of the shortest rail route between Chicago and Atlanta.

Railroads are considered as one of the most profitable industries in America.⁵

The CSR Board is entrusted with the unique task of being trustees of a charitable trust for a business enterprise whose owners are the people of Cincinnati.

Because the Railway has been locked into a lease for the last 96 years, the Board has had few opportunities to practice its fiduciary duty in regards to the operation of that business enterprise.

This Board has been presented with the responsibility of fiduciary duty for the end of the lease and negotiations for a sale offer.

The Board’s argument to voters in advocacy for the Sale can be summarized in two lines from the Board President in January 2023:

“In 2024, based on the current lease which runs through 2026, the annual lease payment will be \$25.5 million.

⁴ Exhibit E, CINCINNATI SOUTHERN RAILROAD, Arguments in the Supreme Court The Cincinnati Daily Enquirer, Oct 27, 1871

⁵ Statista, ["Most profitable industries in the United States as of January 2023"](#),

In 2024, earnings from a \$1.6 billion trust fund are projected to be \$57.1 million after reserving approximately \$30 million to grow the trust fund as a hedge against inflation.”⁶

The core argument to voters was that \$57.1 million is more than \$25.5 million and to vote Yes to 22 because of that.

The rest of this Motion will show why this was a false and misleading narrative.

B1: Fiduciary Duty and Board statements regarding Railway financial performance

In regards to public discussion in the Cincinnati media about how the Board valued the Railway:

“One way to estimate value is to calculate how much it would cost Norfolk Southern to move rail traffic using a different route, known as the "next best alternative." This was hard to calculate because Norfolk Southern refused to give the consultants all the necessary financial information.

"They claimed that they didn't keep financial information on a segment basis just for this segment from Cincinnati to Chattanooga," said CSR Board President Paul Muething.”⁷

Such estimates are knowable, in fact the Board was provided one by its own consulting firm in September 2020:

“BMO’s estimates for CSR is that it contributes nearly \$800 million in operating revenue and >\$250 million in operating income for NS”⁸

The report adds on the same page that NS could conceivably agree to 25% of that number which is \$73 million but doesn’t explain why 25% is the negotiation limit.

Page 14 of that report notes that the lease payments have, to a substantial amount, not kept up with the economic performance of the Lessee since at least 1992.

⁶Exhibit F, A Remarkable and Historic Opportunity, Paul Muething, President, Cincinnati Southern Railway Board of Trustees (January 26, 2023) Cincinnati Business Courier

⁷ Exhibit G “34 questions (and counting) about the Cincinnati Southern Railway sale, answered” WVXU
<https://www.wvxu.org/local-news/2023-10-02/cincinnati-southern-railroad-sale-ballot> (question 16)

⁸ Exhibit H, "Project Copper, Trustee Meeting Presentation" September 14, 2020, BMO Capital Markets, page 9

The Petitioner would go further and say that the history of lease payments show that underpayment began in 1901 and its best performing years were the first 20 from 1881 to 1901.⁹

In the statement of January 2023 and subsequent advocacy thereafter for the Sale, the Board positioned the status quo of the soon to end current lease, which it knows to be paying 1/10th of the Railway's purported income, and has known has been underpaying for decades, as the only alternative to selling.

The Petitioner would argue that the Board has issued no communication leading up to the day of election for Issue 22, in which they communicated a reasonable and adequate representation of the Railway's financial performance. Doing so was their fiduciary duty. But more than that, the WVXU article indicates the Board was fabricating a narrative in advocacy of the Sale which purposefully hid the financial performance of the Railway.

B2: Fiduciary Duty and Board's advocacy for limitations of sale proceeds

In explaining the Board's preferred vision for the sale proceeds, the Board President said in January 2023¹⁰:

"We've asked the Ohio Legislature to amend the founding legislation to:

- Enable CSR to create the "trust fund" in which we must place the railway sale proceeds. Currently, sale proceeds can only be used to retire City bonded debt.
- Ensure that trust fund earnings could only be used to "rehabilitate, modernize, or replace existing infrastructure" and could never be used for the construction of new infrastructure improvements."

There is no reasonable rationale for why Trustees of a charitable trust of a municipality would advocate for arbitrary limitations on the use of that trust, such as not being able to spend even \$1 on new infrastructure, for perpetuity of the trust.

⁹ Exhibit Z contains a history of lease payments.

¹⁰ Exhibit F, "A Remarkable and Historic Opportunity," Paul Muething, President, Cincinnati Southern Railway Board of Trustees (January 26, 2023) Cincinnati Business Courier

The fiduciary duty of the Board is to advocate for a trust fund which has the flexibility to adapt to the needs Cincinnati would face in the future. The Board's advocacy for arbitrary limitations in the use of that trust fund is a disorder.¹¹

B3: Fiduciary duty and Board's estimated cost to build replica

There is no one value of this Railway.

Instead, there are a variety of different situations and operating scenarios each of which is a puzzle piece for a greater puzzle which is the value of the Railway.

One of those pieces is the previously mentioned estimate that the Lessee receives \$800 million in revenue and over \$250 million in income from their operation of the Railway.

Another would be how much it would cost to build a parallel replica of the Railway.

The Buyer and current Lessee, Norfolk Southern, claims that it would cost them between \$1.3 and \$2 billion dollars to build a parallel replica of this Railway.

This was presented in a consultant's document to the Board as the only estimate for how much it would cost to build this Railway, and therefore a key figure for understanding its value.¹²

No bank would issue a mortgage for a house in which the only known cost to construct that house was one provided by either the Buyer or the Seller. Likewise, it is ridiculous for the Board to accept the Buyer's claim for how much it would cost to build the Railway as a reliable and independent calculation for valuation.

\$1.3 to \$2 billion is a modest sum to build an interstate railroad, especially one with purported yearly revenue and income of \$800 million and \$250 million respectively. If it were that inexpensive to build, today or in historically equivalent terms, private capital would have built it and there would be at least one more parallel railroad.

The reason it is not \$1.3 to \$2 billion is because of its 132 bridges and tunnels. Its complexity meant it was not affordable to private capital.

¹¹ Proceeds from the Railway operations have been used for new infrastructure and to pay debts related to new infrastructure in Cincinnati from its very beginning. The highways of Cincinnati were built partly on Railway earnings.

¹²Exhibit I, The Brattle Group, "PRELIMINARY Valuation Estimate for the Cincinnati Southern Railway," December 22, 2021, (pages 4-5) and Exhibit J "UPDATED PRELIMINARY Valuation Estimate for the Cincinnati Southern Railway", February 18, 2022, (pages 13-14)

The City of Cincinnati issued \$18 million in bonds in the 1870s, and a construction cost inflation calculator estimates that that is the modern-day equivalent of \$7.8 billion.¹³

The Petitioner would argue that the true cost to build a modern parallel replica would be \$6–10 billion, without interest payments, and that the Board, as part of its fiduciary duty, has never answered this question on its own.

B4: Fiduciary duty and value of Railway through direct operation by City

The owner of a railroad has a rich selection of different business opportunities.

As Lessee, Norfolk Southern uses this Railway for freight service with a goal of profit maximizing for shareholders. In this capacity the Railway is purported to render \$800 million in revenue and over \$250 million in income.

By not continuing the lease the City has a the opportunity beginning in 2027 to operate the Railway as it sees fit. That could mean merely operating it as a toll road.

It could also mean operating its own rail cars. The City can send a railcar without toll between Cincinnati and Chattanooga. (In fact, the city can do that now in accordance with the 1881 lease agreement which does not allow discrimination against City operated railcars.)

The City could operate the Railway balancing different goals such as passenger service to connect Cincinnati, potential profit from freight services, the costs of tolls and reciprocal track access from other railroads, profit that can be delivered to the City Treasurer, job creation for Cincinnati, etc. Different balancing of these goals are different operating scenarios.

There are also the potential opportunities which would come with upgrading the infrastructure and adding more track. That would allow for more toll paying freight traffic as well as high speed passenger service to the South.

There is no place in America who can set up a passenger train service faster, cheaper and more profitably than Cincinnati—it owns an interstate railroad. The Board could have always been running service to at least Lexington and Chattanooga. It is a shockingly low-hanging fruit which would contribute enormously to the economic and cultural development of the tri-state.

The direct operation of the Railway by the City introduces a combination of possibilities which are either lucrative on their own and/or would bring value through enhanced connectivity to Cincinnati.

¹³\$18 million in 1875 dollars, the midpoint of construction of the Railway. <https://www.measuringworth.com/dollarvaluetoday/?amount=18000000&from=1875#>

The City might not be able to replicate the purported \$800 million revenue and \$250 million income operating only freight cars like Norfolk Southern. But the Petitioner argues that there is at least that much value to the City in some other type of passenger and freight/intermodal business.

None of these operating scenarios were examined by the Board. The only mention of this comes from the Minutes of the Board, June 27, 2023:

“Mr. Dovenberg [Consultant for the CSR Board] summarized the analysis BMO Capital Markets Corp (“BMO”) performed related to the proposed purchase price of \$1,600,000,000 (“the Base Purchase Price”). As context for the financial analysis and advice to the Board from BMO, Mr. Dovenberg noted that, unlike other railroad sale transactions, the Board does not own an operating company and does not have, for example, customers, freight revenue, rail cars, or other assets like an operating rail company would. Rather the Board only owns the railway itself.”¹⁴

It is the fiduciary duty of the Board of a charitable trust which owns a railroad to know what are the value-generating opportunities of that infrastructure. With the lease ending 2027, it is this Board who had the fiduciary duty to assess the opportunities. The fact that a directly-run operating company hasn’t been done in its history does not absolve the Board of its fiduciary duty.

B5: Fiduciary duty and Board engagement with voters/owners: access to Railway, information about Railway

AS the Cincinnati Southern Railway travels south of Lexington through the Kentucky River Palisades, a traveler encounters the High Bridge, 275 feet high and 1,125 feet long, at one time the highest railroad bridge in the world. The bridge is the centerpiece of a state park which a Kentucky tourism website says is “known as the jewel of the Kentucky River Parks.”¹⁵

The bridge, notable enough to have its own Wikipedia entry¹⁶, is owned by the people of Cincinnati. But the people of Cincinnati wouldn’t know that because the CSR Board website doesn’t mention this extraordinary landmark.

¹⁴ Exhibit K, Minutes of the CSR Board, June 27, 2023, Cincinnati Southern Railway Board

¹⁵ <https://www.kentuckytourism.com/explore/high-bridge-park-and-historic-bridge-4427>

¹⁶ https://en.wikipedia.org/wiki/High_Bridge_of_Kentucky

Indeed, there is very little about the Railway that can be learned from the Board website. The Railway features over 132 active and retired bridges and tunnels, as many as 80 abandoned passenger stations, numerous branch lines, sidings, rail yards, and the Petitioner would argue that there's no more than three pictures of any of it on the core website. The website does not offer a high-resolution map of the property, an inventory of property, or an annual accounting and report of the property.¹⁷

In spite of the Railway's purported \$2.2 million in revenue per day, the Board website would lead a voter to conclude that the Railway is little more than a historic oddity with no relevance to the present.

It is the Board's fiduciary duty, generally, but particularly in the context of a proposed sale, to tell and show its owners what exactly it is they own.

When the people of Cincinnati chose to build the Railway, they had an intimate relationship with travel by rail and the business of railroads, as the Railway predates highways by at least 70 years. The legitimacy of the democratic decisions voters made about the Railway was built around a population who knew railroads well.

Today, Cincinnati has almost non-existent passenger rail service. This Railway has not had passenger service since 1972. It has been over 50 years since anyone from Cincinnati has travelled on the Cincinnati Southern Railway.

The failure of the Board to offer regular passenger service after 1972 on its own Railway is a curious historical question. But more than that, the Board has never even offered even a periodic scenic train service so that Cincinnatians could inspect their Railway.

Running a scenic train service on a railroad you own is trivial. There are several scenic train offerings in the tri-state by organizations with far smaller budgets than that of the Board's, such as the Cincinnati Dinner Train. It is little more than renting a bus and putting it on a highway. In this case, a highway in which all other traffic yields to you.

The Petitioner would argue that the Board not operating a scenic train on the Railway, allowing the people of Cincinnati to see their Railway in person, is an injustice

¹⁷ As a result of public records request, the Board did publish two real estate appraisal reports which do have pictures from a helicopter of the property. (NS Appraisal Reports - Cincinnati to Danville and Danville to Chattanooga.) These reports are not intended to inform Cincinnatians about their Railway but are found at <https://cincinnatisouthernrailway.org/csr-sale/>

which is shocking to the conscience in the context of the Board asking voters to sell it.¹⁸

No one from Cincinnati has seen the Railway. The Buyer, however, knows it intimately.¹⁹

Unlike the people of 19th century Cincinnati, who had intimate knowledge of railroads and endorsed the unique proposition to build one, the people of Cincinnati today generally have little to no experience with interstate railroads and were afforded no opportunity to understand their unique value and business case. Because of the 99 year lease the Railway had not been in the public's consciousness for decades.

The responsibility of engaging with the people of Cincinnati about their Railway fell to the Board. This is its fiduciary duty. This Board has expressly avoided it.

B6: Fiduciary duty and valuation of Railway in the context of Buyer's business

A key citation for fiduciary duty by the Board involves the so-called "Next Best Alternative model" discussed in the Board's minutes and calculated in two reports by Brattle:²⁰

"...Mr. Dovenberg reviewed with the Board BMO's methodology and analysis of the Base Purchase Price reflected in the 2023 Agreement. Mr. Dovenberg explained that the Next Best Alternative model BMO created provides a calculation of what it would cost Norfolk Southern to re-route traffic away from the CSR and that the lowest such amount is the maximum Norfolk Southern would logically be willing to pay for the CSR."²¹

In effect, what the Board and its consultants did was to value the Railway only in the context of its business case to the Buyer, Norfolk Southern.

¹⁸ The absurdity of the people of Cincinnati not seeing their own Railway is compounded by the fact that it is almost certainly one of the most beautiful rail journeys in the eastern United States. The case for leveraging the Railway by the City for tourism is fascinating.

¹⁹ The Board's minutes say that the Board President has done some type of inspection.

²⁰ Exhibit I, The Brattle Group, "PRELIMINARY Valuation Estimate for the Cincinnati Southern Railway," December 22, 2021 and Exhibit J "UPDATED PRELIMINARY Valuation Estimate for the Cincinnati Southern Railway", February 18, 2022

²¹ Exhibit K, Minutes of the CSR Board, June 27, 2023, Cincinnati Southern Railway board

Combining that answer with the answer to the question “how much does Norfolk Southern claim it would cost to replicate the Railway” the Board’s sole effort of fiduciary duty extended to the retaining of consultants to answer the question “what would Norfolk Southern pay for it?”

Missing from that is what the value is to the people of Cincinnati.

With the narrowness of the foregoing valuation, and its circular logic that the value of the Railway is what the Buyer is willing to pay for it, thereby justifying the sale, it becomes inescapable that the only fiduciary duty this Board performed was that of Norfolk Southern’s.

B7: Fiduciary Duty and litigation related to Board compliance with Ohio open meeting and public records laws

The Cincinnati media²² have reported on litigation involving the Board and its lack of compliance with Ohio open meeting and public records laws in the context of negotiations regarding this Sale.

The historical record and settlement of that litigation would suggest a failure of the Board to comply with those laws.

Ohio law on open meetings and public records is to provide for orderly and accountable operation by public sector institutions. It is the fiduciary duty of the Board to operate in the framework of those laws. That duty was not performed in relation to negotiations for this Sale.

In regards to the Petitioner and Conclusion

I come to this Court as a taxpaying resident of Ohio with family home in Medina County. I am an artist, writer and public advocate currently based in Berlin, Germany. I became aware of the Railway and its proposed Sale while engaging with the legislature on other legislation contained in the transportation budget bill.

After the enactment of HB 23, I had the time to process what it means for Cincinnati to own a railroad. In consequence of my understanding of the discourse in Cincinnati, I started a self-funded ballot issue PAC with the Hamilton County Board of Elections (“Protect the Queen City Railway and make Cincinnati a passenger rail hub, vote no on 22”) in a late attempt to broaden the conversation in Cincinnati. (<https://www.queencityrailway.com/>)

²² Exhibit L: “Secrecy and shenanigans’: Cincinnati rail board settles secret meetings lawsuit”, September 11, 2023, cincinnati.com

It is of enormous economic importance to the people of Cincinnati that Cincinnati operate the railway directly and use it to its highest potential or sell it for a cost much closer to its true value.

That true value, factoring in the cost of construction, the purported revenue and income of the Railway, its potential for connecting Cincinnati through passenger service, over a time period relevant to a municipality, is \$6 to \$10 billion. The Railway is worth at least its construction costs.

The Railway is a long-lost treasure refound: a gift from a very wealthy city of the past to the people of Cincinnati today.

That gift, and its true value, has been hidden from the people of Cincinnati by the Board in charge of it.

The execution of the Sale under these circumstances would be national tragedy.


Miscellaneous

Waiver of bond

In light of the court's discretion to waive the bond requirement of Ohio Civ. R. 65(c), Petitioner respectfully requests that this Court exercise that discretion here as the relief sought does not result in financial loss to the City.

Notes about Railway inspection

At roughly 10,000 acres, the Railway is 1/5 the size of Cincinnati itself. At 80 mph (the Railway's current passenger speed limit) it will take a full day to inspect the Railway (which ends in Georgia) and return to Cincinnati.


2/3/21

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Fax: 513 327 5764

Certified mail service provided by Clerk's office through written request