

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel., MUNICIPAL  
CONSTRUCTION EQUIPMENT  
OPERATORS' LABOR COUNCIL, et al.,

Relators

vs.

CITY OF CLEVELAND, et al.

Respondents

CASE NO. 06-2056

ORIGINAL ACTION  
FOR A WRIT  
OF MANDAMUS

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REALTORS' MOTION FOR LEAVE  
TO SUPPLEMENT EVIDENCE

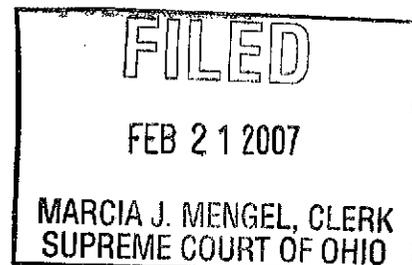
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COUNSEL FOR RESPONDENTS



## MOTION FOR LEAVE TO SUPPLEMENT EVIDENCE

Relators the Municipal Construction Equipment Operators' Labor Council and named individuals (hereafter collectively referred to as "CEO Union") move this Court pursuant to S. Ct. Prac. R. XIV, §4(A) to issue an order granting it leave to present additional, supplemental evidence in response to such evidence as may be submitted to this Court by the Respondents City of Cleveland, et al. (hereafter collectively referred to as "Cleveland") within the extended time for filing which was granted to Respondents. The primary reason for this motion is that a one-sided extension of time for the presentation of evidence was granted to Respondents Cleveland, which has created an imbalance between the parties.

The Entry of this Court setting a schedule for the submission of evidence required both parties to submit evidence simultaneously. The extension which was given only to the Respondents Cleveland created a situation in which Cleveland may tailor its submission in reaction to that of the CEO Union, while the CEO Union will not be afforded the opportunity to rebut new evidence promised (somewhat cryptically) by Cleveland. The Relator prays the court to allow it the opportunity to supplement its evidence, within the limited time of seven days after the filing of evidence by Cleveland, in order to rebut evidence produced by Cleveland.

## **MEMORANDUM IN SUPPORT**

Prior to the submission of evidence, and in attempted compliance with O. Sup. Ct. R. Prac. X, sec. 7, Relators attempted to achieve an agreement between the parties with respect to the submission of evidence. Attached hereto as Exhibit "A" is correspondence between counsel, pertaining to Relators' attempt to reach an agreement. During those discussions, Cleveland did not

ask for an extension of time, nor disclose that it intended to obtain new evidence from a third party. When Cleveland did not respond to the Relator's proposal for an agreed submission of evidence, the Relators submitted evidence on the deadline established by the Court. At the eleventh hour, Cleveland requested, by motion, an extension of time for its submission of evidence. Cleveland served the motion upon the CEO Union by U.S. Mail which would not arrive until the afternoon of the deadline date for evidence in this Court's Entry of January 24, 2007. As support, Cleveland asserted as "good cause" for the extension that it had not received anticipated evidence from an unnamed third party. Over opposition, Respondent Cleveland's motion for an extension was granted.

The dispute between the City and construction equipment operators and master mechanics working for the City of Cleveland, began in 2001 in the Cuyahoga County Common Pleas Court. Discovery was conducted in that case, and an evidentiary hearing before an administrative law judge for the state employment relations board (hereafter "SERB") was held pursuant to the direction of this Court in *State ex rel. Consolo v. Cleveland* (2004), 103 Ohio St. 3d 362. See SERB Opinion 2006-008. During contract negotiations, evidence was taken by a SERB-appointed fact-finder pursuant to R.C. §4117.14. See Exhibit K to Relators' Petition for a Writ of Mandamus, filed herein. It is a surprise that Cleveland now intends to obtain new evidence of which Relator the CEO Union is not aware.

Had Respondent requested a stipulation to an extension of time, Relator would have been afforded the opportunity to request disclosure of proposed new evidence, or, at minimum, to request a reciprocal extension. The opportunity for such give-and-take appears to be one purpose of Sup. Ct. R. Prac. XIV, Sec. 3(B)(2)(b), which requires that parties first attempt to obtain a stipulation to

an agreed extension of time. Respondent Cleveland chose not to “tip its hand” by requesting that Relator agree to an extension for the submission of evidence. Cleveland apparently sought to obtain a tactical advantage by filing its new evidence only after Relator CEO Union’s opportunity to submit evidence has been closed.

In order to equalize the advantages of the parties, Relators now move this Court to grant them 7 days leave to supplement their evidence, in response to such evidence as may be submitted by Cleveland.

Respectfully submitted,



**STEWART D. ROLL (Reg. #0038004)**  
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*Representing Individual Relators and  
the Municipal Construction Equipment  
Operators' Labor Council*

**OF COUNSEL:**

**PERSKY, SHAPIRO &  
ARNOFF CO., L.P.A.**

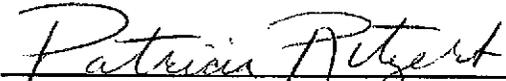
**CERTIFICATE OF SERVICE**

A copy of the foregoing "Relators' Motion for Leave to Supplement Evidence" has been sent to the following via regular U.S. mail, on this 20<sup>th</sup> day of February, 2007.

Lindsey Williams, Assistant Attorney General  
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Theodora M. Monegan, Esq.  
William Sweeney, Esq.  
City of Cleveland, Department of Law  
601 Lakeside Avenue, Room 106  
Cleveland, OH 44114-1077

Respectfully submitted,



**STEWART D. ROLL (Reg. #0038004)**  
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**OF COUNSEL:**

**PERSKY, SHAPIRO &  
ARNOFF CO., L.P.A.**



\* \* \* TRANSMISSION RESULT REPORT ( FEB. 8.2007 4:32PM ) \* \* \*

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DATE	TIME	ADDRESS	MODE	TIME	PAGE RESULT	PERS. NAME	FILE
FEB. 8.	4:29PM	2166642663	TES	2'37"	P. 4 OK		015

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M : MEMORY  
S : STANDARD

C : CONFIDENTIAL  
L : SEND LATER  
D : DETAIL

\$ : TRANSFER  
T : FORWARDING  
T : FINE

P : POLLING  
E : ECM  
> : REDUCTION

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PATRICIA M. RITZERT, ESQ.

February 8, 2007

**VIA FACSIMILE (216) 664-2663**

Theodora M. Monegan, Esq.  
City of Cleveland, Department of Law  
601 Lakeside Avenue, Room 106  
Cleveland, OH 44114-1077

**Re: *State of Ohio ex rel. Municipal Construction Equipment Operators'  
Labor Council, et al. v. City of Cleveland, et al.*  
Supreme Court of Ohio Case No. 06-2056**

Dear Theodora:

Sent herewith is the Cleveland Ordinance No. 1682-79, which I asked you to agree is authentic. I will contact you tomorrow morning regarding this and the questions of whether Cleveland is able to state the hourly wages paid to Construction Equipment Operators Group A, Group B, and Master Mechanic, whether a copy of the Cleveland City Charter is available to use as evidence, and whether you agree to the joint submission of testimony given in February, 2006 before Administrative Law Judge Beth Jewell for the State Employment Relations Board.

We also discussed the agreed submission of the Collective Bargaining Agreement of February 14, 2005 as related to your asserted defenses of accord and satisfaction, release and waiver. Please confirm.

Very truly yours,



Patricia M. Ritzert

PMR/smj  
Enclosures

tract, or by separate contract for each or any combination of said items as the Board of Control shall determine. Alternate bids for a period less than a year may be taken if deemed desirable by the Commissioner of Purchases and Supplies until provision is made for the requirements for the entire year.

**Section 2.** The cost of said contract shall be charged against the proper appropriation account and the Director of Finance shall certify thereon the amount of the initial purchase thereunder, which purchase, together with all subsequent purchases, shall be made on order of the Commissioner of Purchases and Supplies pursuant to a requisition against such contract duly certified by the Director of Finance.

**Section 3.** That this ordinance is hereby declared to be an emergency measure and, provided it receives the affirmative vote of two-thirds of all the members elected to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise it shall take effect and be in force from and after the earliest period allowed by law.

Passed September 24, 1979.  
Effective September 25, 1979.

**Ord. No. 1676-79.**

**By Councilmen Burten, Gets, Russo and Forbes (by departmental request).**

An emergency ordinance to amend Section 1 and the title of Ordinance No. 2851-78, passed January 8, 1979, relating to the issuance of a permit for the construction of a spur track easement across East 48th Place.

Whereas, this ordinance constitutes an emergency measure providing for the usual daily operation of a municipal department; now, therefore,

Be it ordained by the Council of the City of Cleveland:

**Section 1.** That Section 1 of Ordinance No. 2851-78, passed January 8, 1979, be and the same is hereby amended to read as follows:

**Section 1.** That the Director of Public Service be and he hereby is authorized to issue a permit, revocable at the will of Council, to Harry Rock and Company, its successors and assigns for the construction, maintenance and use of a spur track easement at the following described location:

Situated in the City of Cleveland, County of Cuyahoga and State of Ohio; and known as being part of East 48th Place and being a strip of land 30 feet in width extending 15 feet northeasterly and 15 feet southwesterly from the following described centerline:

Beginning on the westerly line of East 48th Place at its intersection with the southerly line of Woodland Avenue, S.E.; thence southerly along said westerly line of East 48th Place 592 feet to the principal place of beginning of said centerline; thence southeasterly in a direct line about 56 feet to a point on the easterly line of East 48th Place distant 631 feet southerly from the southerly line of Woodland Avenue, S.E.

Further, that the title of said ordinance be amended to read as follows:

An emergency ordinance authorizing the Director of Public Service to issue a permit to Harry Rock and Company for the construction of a spur track easement across East 48th Place.

**Section 2.** That existing Section 1 of Ordinance No. 2851-78, passed January 8, 1979, be and the same is hereby repealed.

**Section 3.** That this ordinance is hereby declared to be an emergency measure and, provided it receives the affirmative vote of two-thirds of all the members elected to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise it shall take effect and be in force from and after the earliest period allowed by law.

Passed September 24, 1979.  
Effective September 25, 1979.

**Ord. No. 1682-79.  
By Councilman Forbes (by departmental request).**

	Effective Date	Minimum	Maximum
1. Asbestos Worker	5-1-79	\$ 5.00	\$16.07
2. Asphalt Construction Foreman	5-1-79	5.00	14.35
3. Asphalt Raker	5-1-79	5.00	13.32
4. Asphalt Tamper	5-1-79	5.00	13.32
5. Boiler Maker	6-1-79	5.00	16.06
5a. Boiler Maker—Certified High Pressure Welder	6-1-79	5.00	16.06
6. Bricklayer	5-1-79	5.00	16.25
7. Bricklayer Helper	5-1-79	5.00	13.97
8. Carpenter	5-1-79	5.00	16.31
9. Carpenter Foreman	5-1-79	5.00	17.06
10. No Provision			
11. Cement Finisher	5-1-79	5.00	15.89
12. Construction Equipment Operator—Group 1	5-1-79	5.00	15.88
13. Construction Equipment Operator—Group 2	5-1-79	5.00	15.73
14. Construction Equipment Operator—Group 3	5-1-79	5.00	15.38
15. Construction Equipment Operator—Group 4	5-1-79	5.00	14.60
16. Construction Equipment Operator—Oiler	5-1-79	5.00	12.10
17. Crane Operator—Electric	5-1-79	5.00	16.63
18. Curb Cutter	5-1-79	5.00	13.85
19. No Provision			
20. Curb Setter	5-1-79	5.00	13.85
21. Electrical Worker	5-1-79	5.00	16.63
22. Electrical Worker Foreman	5-1-79	5.00	17.53
23. Glazier		5.00	14.89
	8-29-79	5.00	16.14
24. Ironworker	5-1-79	5.00	16.28
25. Ironworker Foreman	5-1-79	5.00	17.03
26. Jackhammer Operator	5-1-79	5.00	13.32
27. Master Mechanic	5-1-79	5.00	16.38
28. Overhead Floodlight Maintenance Man	5-1-79	5.00	16.63
29. Painter	5-1-79	5.00	14.83
	11-1-79	5.00	15.18
30. Painter Foreman	5-1-79	5.00	15.13
	11-1-79	5.00	15.48
31. Paint Spray Operator	5-1-79	5.00	15.23
	11-1-79	5.00	15.58
32. Paver	5-1-79	5.00	13.85
33. Paving Foreman	5-1-79	5.00	14.35
34. Pipefitter	5-1-79	5.00	16.37
35. Pipefitter—Certified High Pressure Welder	5-1-79	5.00	16.37
	5-1-79	5.00	16.87
36. Pipefitter Foreman	5-1-79	5.00	16.37
37. Pipefitter Welder	5-1-79	5.00	16.37
38. Plasterer	5-1-79	5.00	16.24
39. Plumber	5-1-79	5.00	16.23
40. Plumber Foreman	5-1-79	5.00	16.98
41. Pounder	5-1-79	5.00	13.20
42. Roofer	5-1-79	5.00	16.11
43. No Provision			

An emergency ordinance to amend Section 33 of Ordinance No. 1266-A-79, passed June 11, 1978, relating to hourly rates for craft employees.

Whereas, this ordinance constitutes an emergency measure providing for the usual daily operation of a municipal department; now, therefore,

Be it ordained by the Council of the City of Cleveland:

**Section 1.** That Section 33 of Ordinance No. 1266-A-79, passed June 11, 1978, be and the same is hereby amended to read as follows:

**Section 33. Hourly Rates—Crafts.** Compensation for all persons employed by the hour in any of the following classifications shall be fixed by the appointing authority within the limits established in the following schedule for each classification:

	Effective Date	Minimum	Maximum
44. Sheet Metal Worker	5-1-79	5.00	16.22
45. Sign Painter	5-1-79	5.00	13.96
46. Sign Painter Foreman	5-1-79	5.00	14.96
47. Superintendent of Construction Equipment and Asphalt Plant		5.00	16.44

**Section 2.** That existing Section 33 of Ordinance No. 1266-A-79, passed June 11, 1979, be and the same is hereby repealed.

**Section 3.** That this ordinance is hereby declared to be an emergency measure and, provided it receives the affirmative vote of two-thirds of all the members elected to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise, it shall take effect and be in force from and after the earliest period allowed by law.

Passed September 24, 1979.  
Effective September 25, 1979.

**Ord. No. 1684-79.**  
**By Councilmen Trenton and Forbes (by departmental request).**

**An emergency ordinance authorizing the Director of Port Control to enter into a Lease By Way of Concession with Midway Airlines for office and related space at Burke Lakefront Airport.**

Whereas, Midway Airlines requires the use of certain office and related operations space in the West Concourse at Burke Lakefront Airport in connection with its air carrier operations; and

Whereas, the City of Cleveland desires to lease such space to Midway for such purpose in furtherance of the public purpose of providing facilities in aid of air commerce; and

Whereas, this ordinance constitutes an emergency measure providing for the usual daily operation of a municipal department; now, therefore,

Be it ordained by the Council of the City of Cleveland:

**Section 1.** That any provision of the Codified Ordinances of Cleveland, Ohio, 1976 to the contrary notwithstanding, the Director of Port Control be and said Director hereby is authorized to enter into a Lease By Way of Concession with Midway Airlines for the use and occupancy of approximately 1560 square feet of office and baggage space and approximately 250 square feet of ticket counter, baggage handling and security screening area space, all in the West Concourse at Burke Lakefront Airport in connection with its air carrier operations; at a rental rate of \$8.00 per square foot per year for a one (1) year term commencing upon execution.

**Section 2.** That the Lease authorized hereby shall authorize the use of public air operations areas at the Airport in common with other users; at the then prevailing landing, parking and other fees and rates, shall be prepared by the Director of Law and shall contain such additional conditions and provisions as he deems necessary to protect and benefit the public interest.

**Section 3.** That this ordinance is hereby declared to be an emergency measure and, provided it receives the affirmative vote of two-thirds of all the members elected to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise, it shall take effect and be in force

from and after the earliest period allowed by law.

Passed September 24, 1979.  
Effective September 25, 1979.

**Ord. No. 1688-79.**  
**By Councilmen Trenton and Forbes (by departmental request).**

**An emergency ordinance authorizing and directing the rental by requirement contract of snow removal equipment, with operators, for the Division of Airports, Department of Port Control.**

Whereas, this ordinance constitutes an emergency measure providing for the usual daily operation of a municipal department; now, therefore,

Be it ordained by the Council of the City of Cleveland:

**Section 1.** That the Director of Port Control be and hereby is authorized and directed to make a written requirement contract in accordance with the Charter and the Codified Ordinances of Cleveland, Ohio 1976, for the requirements for the necessary items of rental of snow removal equipment, with operators, for the period November 15, 1979, through March 31, 1980, in the approximate amount as procured during the preceding such period, to be procured by the Commissioner of Purchases and Supplies upon a unit basis for the Division of Airports, Department of Port Control.

Bids shall be taken in such manner as to permit an award to be made for all items as a single contract, or by separate contract for each or any combination of said items as the Board of Control shall determine.

**Section 2.** That the costs of said contract shall be charged against the proper appropriation account and the Director of Finance shall certify thereon the amount of the initial purchase thereunder, which purchase, together with all subsequent purchases, shall be made on order of the Commissioner of Purchases and Supplies pursuant to a requisition against such contract duly certified by the Director of Finance.

**Section 3.** That this ordinance is hereby declared to be an emergency measure and, provided it receives the affirmative vote of two-thirds of all the members elected to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise it shall take effect and be in force from and after the earliest period allowed by law.

Passed September 24, 1979.  
Effective September 25, 1979.

**Ord. No. 1973-79.**  
**By Councilman Forbes (by departmental request).**

**An emergency ordinance to issue notes in the aggregate principal amount of One Million Five Hundred Thousand Dollars (\$1,500,000.00) in anticipation of the issuance of bonds for the purpose of providing funds for improving streets, roads, alleys and boulevards in the City of Cleveland by grading, draining, curbing, paving, resurfacing, exten-**

**ding and widening and otherwise improving the same.**

Whereas, pursuant to Ordinance Nos. 638-77 and 1073-78, passed by the Council of the City of Cleveland (the "Council") on April 25, 1977 and May 15, 1978, respectively, notes in the aggregate principal amount of One Million Five Hundred Thousand Dollars (\$1,500,000.00) were authorized for the purpose hereinafter stated and, under the authority of said ordinances, there is outstanding a note in the principal amount of One Million Five Hundred Thousand Dollars (\$1,500,000.00) which is dated October 6, 1978 and matures October 5, 1979; and

Whereas, this Council has determined that said outstanding note should be renewed by the issuance of new notes in anticipation of the issuance of bonds; and

Whereas, it has heretofore been duly certified to the Council that the estimated life of the property, asset or improvement proposed to be acquired or constructed from the proceeds of the bonds hereinafter referred to is at least five (5) years, and it has heretofore been further duly certified that the maximum maturity of said bonds is twenty (20) years, based upon the weighted average of the amounts allocated to the several classes of improvements as set forth in such certification, which allocation is hereby approved and confirmed, and that the maximum maturity of notes issued in anticipation thereof is eight (8) years from the date of the original notes issued for such purpose; provided, however, that if said notes are sold at private sale, then their maximum maturity may not exceed one (1) year; and

Whereas, this Ordinance constitutes an emergency measure providing for the immediate preservation of the public property, health and safety of the City of Cleveland (the "City") and its inhabitants in that a note in anticipation of the bonds hereinafter referred to is about to mature and must be renewed with the proceeds of the notes herein authorized; now, therefore,

Be it ordained by the Council of the City of Cleveland, State of Ohio:

**Section 1.** That it is deemed necessary to issue bonds (the "Bonds") of the City in the aggregate principal amount of One Million Five Hundred Thousand Dollars (\$1,500,000.00) for the purpose of providing funds for improving streets, roads, alleys and boulevards in the City by grading, draining, curbing, paving, resurfacing, extending and widening and otherwise improving the same and the payment of such expenses as are incurred in connection with the issuance and sale of the Bonds for such purpose.

**Section 2.** That the Bonds shall be issued pursuant to the provisions of the Constitution of the State of Ohio, the Uniform Bond Law, Chapter 133 of the Revised Code of the State of Ohio, the Charter of the City of Cleveland and Chapter 177 of the Codified Ordinances of Cleveland, Ohio, 1976, as amended, in the aggregate principal amount of One Million Five Hundred Thousand Dollars (\$1,500,000.00) for the purpose aforesaid. The Bonds shall be designated "Streets Improvement Bonds"; shall be of the denomination of Five Thousand Dollars (\$5,000.00) each or any multiple thereof; shall be dated approximately October 1, 1980; shall bear interest at the rate