

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO, ex rel.)	CASE NO. 2009-0026
GERALD O.E. NICKOLI, et al.,)	
)	Original Action in Mandamus
Relators,)	
)	
v.)	
)	
ERIE METROPARKS, et al.,)	
)	
Respondents.)	

**RESPONDENTS' MOTION FOR LEAVE TO FILE A
SUPPLEMENT TO THEIR PRESENTATION OF EVIDENCE**

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FILED
 JUN 17 2009
 CLERK OF COURT
 SUPREME COURT OF OHIO

**RESPONDENTS' MOTION FOR LEAVE TO FILE A
SUPPLEMENT TO THEIR PRESENTATION OF EVIDENCE**

Pursuant to S.Ct. Prac. R. XIV, Section 4, Respondents respectfully move this Court for Leave to file a Supplement to their Presentation of Evidence to include the attached Affidavit (“Dice Affidavit”) of Stephen Dice as Respondents’ Exhibit F and the attached Affidavit (“Young Affidavit”) of Don John Young as Respondents’ Exhibit G.¹ Both of these Affidavits are required because Relators’ Merit Brief raised issues that were not apparent from their Complaint and which therefore were possibly not adequately addressed in Respondents’ Presentation of Evidence.

This case involves the Huron River Greenway (the “Greenway”), a biking/hiking trail operated by Respondents. The date Respondents began to exercise possession and control over the real estate on which the Greenway is located is important to several issues in this case. In paragraph 5 of the Complaint, Relators alleged that Respondents have been in possession and control of the real estate on which the Greenway is located “since 1999.” However, Relators’ Merit Brief indicates Relators may now dispute this date. The sole purpose of the Dice Affidavit is to establish the year the Greenway was opened to the public.

The alleged rights of Relators in the real estate on which the Greenway is located is a major issue in this case. In their Complaint, Relators alleged such rights derived from deeds going back to the Milan Canal Company. Complaint, ¶¶12, 17, 23, 22. In Relators’ Merit Brief, Relators now argue another alleged source of such rights: abandonment of a railroad right-of-way. The sole purpose of the Young Affidavit is to present several documents that are germane to Relators’ abandonment argument.

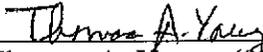
¹ Attached hereto is the original of Exhibit F and a true and genuine copy of Exhibit G. Counsel of Record for Respondents anticipates that he will have the original of Exhibit G in his possession later this week, at which time he will immediately file it with this Court.

Relators will not be prejudiced by granting the leave sought by this Motion, as Relators are entitled to file a Reply Brief herein by June 24, 2009, and in that Reply Brief Relators can dispute or discuss the matters contained in the Dice Affidavit and the Young Affidavit.

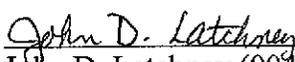
Additionally, on or about May 28, 2009, Relators filed a Motion for Leave to File a Supplement to their Presentation of Evidence, and Respondents have not opposed that Motion.

For the reasons stated herein, Respondents respectfully request that this Court grant this Motion and issue an order that the Dice Affidavit and the Young Affidavit are part of Respondents Presentation of Evidence.

Respectfully submitted,



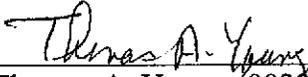
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 (by Thomas A. Young)
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Attorneys for Respondents

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 17th day of June, 2009, he served a copy of the foregoing "Respondents' Motion For Leave To File A Supplement To Their Presentation Of Evidence" on Bruce L. Ingram, Esq., VORYS, SATER, SEYMOUR & PEASE, 52 East Gay Street, Columbus, Ohio 43216-1008, counsel of record for Relators, by causing said copy be hand-delivered to his office.



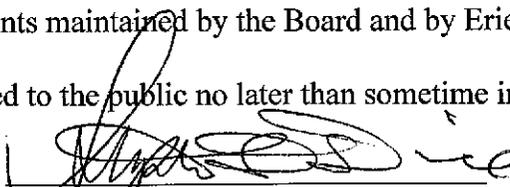
Thomas A. Young (0028070)
Counsel of Record for Respondents

AFFIDAVIT OF STEPHEN DICE

STATE OF OHIO
COUNTY OF ERIE

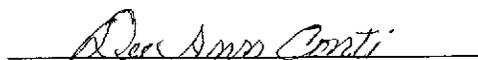
Stephen Dice, being first duly sworn, states as follows:

1. I have personal knowledge of each and every fact stated herein.
2. I am the Executive Director of Erie MetroParks.
3. The Huron River Greenway (the "Greenway") is a 66-foot wide linear hiking/bicycle trail operated by Erie MetroParks in Erie County, Ohio.
4. I am the custodian of documents maintained by the Board and by Erie MetroParks which disclose that the Greenway was opened to the public no later than sometime in 2003.



Stephen Dice
Executive Director
Erie MetroParks

Signed and sworn to before me, a notary public in and for the State of Ohio, by Stephen Dice, Executive Director/Secretary for Erie MetroParks, on the 16th day of May, 2009.



Notary Public

Dee Ann Conti
Notary Public, State of Ohio
My commission expires February 25, 2012

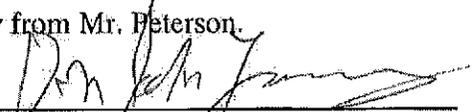
AFFIDAVIT OF DON JOHN YOUNG

STATE OF OHIO)
) SS :
COUNTY OF ERIE)

Don John Young, being first duly sworn, states as follows:

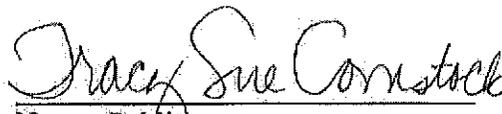
1. I have personal knowledge of each and every fact stated herein.
2. I am an attorney at law, duly licensed to practice in the State of Ohio. My Ohio Supreme Court Attorney Registration Number is 0071839.
3. I represent the Board of Park Commissioners of Erie MetroParks (“Erie MetroParks”) in a number of matters.
4. I am familiar with the facts involved in the lawsuit docketed as *State of Ohio ex rel. Gerald O.E. Nickoli, et al. v. Erie MetroParks, et al.*, Ohio Supreme Court Case No. 2009-0026. Although I am not counsel of record for Erie MetroParks in *Nickoli*, I am advising them with respect to that lawsuit, and I am familiar with the facts of that lawsuit.
5. *Nickoli* involves the Huron River Greenway, which is a public biking/hiking trail operated by Erie MetroParks on a former railroad corridor (the “Railroad Corridor”).
6. Attached hereto as Young Affidavit Ex. 1 are two notices published in the Federal Register (“FR”), one at 55 FR 4026, the other at 55 FR 22864. To the best of my knowledge, the rail line described in the notice published at 55 FR 4026 as “Huron Jct. (MP H-0.0) to Shinrock, OH (MP H-10.6)” is a reference to a rail line which includes the Railroad Corridor.

7. Attached hereto as Young Affidavit Ex. 2 is a copy of a letter dated September 14, 1992 from Roger A. Peterson, General Attorney for Norfolk Southern Corporation, to William Sippel. I obtained this letter directly from Mr. Peterson.



Don John Young

Signed and sworn to before me, a Notary Public in and for the State of Ohio, by Don John Young on the 17th day of June, 2009.



Notary Public

Tracy Sue Comstock, Notary Public
State of Ohio
My Commission Expires 12/25/12



5 of 5 DOCUMENTS

INTERSTATE COMMERCE COMMISSION

[Finance Docket No. 31591]

55 FR 4026

February 6, 1990

Exemption; Wheeling Acquisition Corp. -- Acquisition and Operation Exemption -- Lines of Norfolk & Western Railway Co.

TEXT: Exemption; Wheeling Acquisition Corporation (WAC), a non-carrier, has filed a notice of exemption to: (1) Acquire (by purchase and sublease) and operate approximately 576 miles of rail line owned by Norfolk & Western Railway Company; and (2) acquire and operate approximately 264 miles of incidental trackage rights over lines owned or leased by N&W. The properties include the following lines and trackage rights in Ohio, Pennsylvania, West Virginia, and Maryland:

Lines Owned by N&W (454.3 route miles): Yeomans (MP T-54.7) to Terminal Jct., OH (MP T-214.0); Cleveland Belt Line Jct. (MP CZ-2.1) to Harmon, OH (MP CZ-73.6); Carey (MP AY-53.0) to Mogadore, OH (MP AY-169.3); Huron Jct. (MP H-0.0) to Shinrock, OH (MP H-10.6); Orrville Jct. (MP MB-0.0) to Orrville, OH (MP MB-1.4); Dalton (MP MB-7.0) to Run Jct., OH (MP MB-22.1); Adena (MP A-0.0) to Saginaw Mine, OH (MP A-14.8); AC&NA Jct. (MP AC-0.0) to Georgetown, OH (MP AC-10.9); Warrenton (MP SB-0.0) to Steubenville, OH (MP SB-13.2); Falls Jct. (MP CF-0.0) to Solon, OH (MP CF-1.9); Canton Yard (MP CC-0.0) to Carrollton, OH (MP CC-27.7); Minerva Jct. (MP MM-0.0) to Minerva, OH (MP MM-3.0); Waco (MP BL-0.0) to Nimishillen Creek, OH (MP BL-3.7); Brittain, OH (MP BS-0.9) to MP BS-2.0; The Mogadore Lead (1.3 miles); and the former CSXT track at Medina, OH (2.5 miles).

Lines Subleased From N&W (121.5 route Miles): Pierce (MP PC-0.0) to Clairton, PA (MP PC-5.7); Longview (MP LM-0.0) to Mifflin, PA (MP LM-3.5); West Belt Jct. (MP WE-0.0) to West End, PA (MP WE-2.3); and Connellsville, PA (MP C-1.2) to Pittsburgh Jct., OH (MP C-111.2).

Trackage Rights Over N&W (35.7 route miles): Yeomans (MP T-54.7) to Chatfield, OH (MP S-73.6); Yeomans (MP T-54.7) to Parkertown, OH (MP S-102.0); Yeomans (MP T-54.7) to Flat Rock, OH (MP S-93.4); Cleveland Belt Line Jct. (MP CB-0.0) to Knob, OH (MP CB-5.4); and MP CZ-1.7 to MP CZ-2.1 at Cleveland, OH.

Assignment of N&W Trackage Rights Over Other Carriers (228.4 route miles): over Consolidated Rail corporation from Wellington to Cleveland, OH (32.1 miles); and over CSX Transportation, Inc., from Connellsville, PA to Hagerstown, MD (176.2 miles); and from Connellsville to Westmoreland, PA (20.1 miles).

The transaction is proposed to be consummated as soon as practicable after the notice becomes effective. WAC will also issue securities in connection with the acquisitions covered by this notice. Because WAC will be a Class II carrier, this securities issuance is exempt under 49 CFR 1175.1

Comments must be filed with the Commission and served on Robert H. Wheeler, Oppenheimer Wolff & Donnelly, Two Illinois Center, suite 2400, 233 North Michigan Avenue, Chicago, IL 60601.

55 FR 4026

WAC must preserve intact all sites and structures 50 years old or older until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470. n1

n 1 WAC certifies that it has identified to the appropriate State Historic Preservation Officers all sites and structures 50 years old or older that will be subject to the transaction.

This notice is filed under 40 CFR 1150.31 and 1150.35. If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

Decided: January 30, 1990.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

Kathleen M. King,

Acting Secretary.

[FR Doc. 90-2572 Filed 2-5-90; 8:45 am]

BILLING CODE 7035-01-M



4 of 5 DOCUMENTS

INTERSTATE COMMERCE COMMISSION

[Finance Docket No. 31675]

55 FR 22864

June 4, 1990

Wertheim Schroder & Co. Inc.; Continuance in Control Exemption, Wheeling & Lake Erie Railway Co.

TEXT: Wertheim Schroder & Co. Incorporated (Wertheim Schroder) has filed a notice of exemption to continue to control Wheeling & Lake Erie Railway Company (W&LE). n1 Wertheim Schroder controls Gateway Western Railway company (Gateway Western) through ownership of 100 percent of Gateway Western's preferred stock, which has voting rights until it is redeemed, and ownership of approximately 85 percent of Gateway Western's outstanding common stock, which has voting rights that vest only when all of the preferred stock is redeemed. On or about May 11, 1990, a limited partnership in which a subsidiary of Wertheim Schroder is a general partner was to acquire 100 percent of the preferred stock of The Wheeling Corporation (Wheeling), of which W&LE is a wholly owned subsidiary, which preferred stock has voting rights until it is redeemed. In addition, the same partnership will acquire approximately 80 percent of the common stock of Wheeling, which has voting rights that vest only when all of the preferred stock is redeemed.

n 1 W&LE was formerly named Wheeling Acquisition Corporation. Effective May 1, 1990, Wheeling Acquisition Corporation changed its name to Wheeling & Lake Erie Railway Company.

Immediately following Wertheim Schroder's acquisition of the W&LE preferred and common stock, W&LE will acquire, by purchase or sublease, certain lines of railroad from Norfolk & Western Railway Company. A notice of exemption covering this transaction was published February 6, 1990, in Finance Docket No. 31591, Wheeling Acquisition Corporation -- Acquisition and Operation Exemption -- Lines of Norfolk & Western Railway Company. After the transaction is consummated, Wertheim Schroder and the limited partnership in which its subsidiary is a general partner will each control a carrier, and thus Wertheim Schroder will control two carriers, Gateway Western and W&LE.

Wertheim Schroder indicates that: (1) The transaction involves lines that will not connect with each other or with any other railroad in their corporate family; (2) the continuance in control is not part of a series of anticipated transactions that would connect the railroads with each other or with any other railroad in their corporate family; and (3) the transaction does not involve a Class I carrier.

This transaction involves the continuance in control of a nonconnecting carrier and comes within the class exemption in *49 CFR 1180.2(d)(2)*.

As a condition to use of this exemption, any employees affected by the transaction will be protected by the conditions set forth in *New York Dock Ry. -- Control -- Brooklyn Eastern Dist., 360 I.C.C. 60 (1979)*.

55 FR 22864

Petitions to revoke the exemption under *49 U.S.C. 10505(d)* may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction. Pleadings must be filed with the Commission and served on: Thomas W. Rissman, McLachlan and Rissman, 6 W. Hubbard Street, Suite 500, Chicago, IL 60610.

Dated: May 29, 1990.

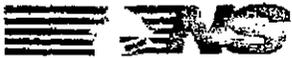
By the Commission, Jane F. Mackall, Director, Office of Proceedings.

Noreta R. McGee,

Secretary.

[FR Doc. 90-12870 Filed 6-1-90; 8:45 am]

BILLING CODE 7035-01-M



**NORFOLK
SOUTHERN**

Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, Virginia 23510-2191

Roger A. Petersen
General Attorney

Writer's Direct Dial Number

(804) 629-2844

September 14, 1992

William Sippel, Esq.
Oppenheimer, Wolff and Donnelly
233 North Michigan Avenue, Suite 2400
Chicago, IL 60601

Re: Interstate Commerce Commission Docket No. AB-290 (Sub
No. 53X) - Norfolk and Western Railway Company -
Abandonment Between Mittingers and Shinrock, in Huron
and Erie Counties, Ohio - Notice of Exemption

Dear Mr. Sippel:

Pursuant to our discussion, I enclose a copy of the
confirming notice served by the ICC on January 10, 1989, formally
notifying the public of NW's exempt abandonment of its line of
railroad between Mittingers and Shinrock, Ohio. All requirements
for the abandonment were met but the authority never was
exercised through the necessary tariff publications.

If you have any questions, please let me know.

Very truly yours,

Roger A. Petersen

RAP/sm

Enclosure

Young Affidavit Ex. 2