

FOR YOUR INFORMATION

Date: June 8, 2023

To: Mayor and Members of City Council

Copies: Sheryl M.M. Long, City Manager;
Melissa Autry, Clerk of Council

From: Emily Smart Woerner, City Solicitor *EESW*

Subject: Petition to Remove Trustees of Board of Cincinnati Southern Railway

The purpose of this memorandum is to inform you of my decision to decline to petition Council to remove the trustees of the Board of Trustees of the Cincinnati Southern Railway (CSR Board). Because CMC 205-3 also provides that a taxpayer¹ may nonetheless petition the Council to remove the Trustees, I am also providing you with my rationale, including correspondence from outside counsel, for that decision.

After a thorough review of the facts and any applicable law, it is my opinion that there is no basis to remove the trustees. Not only have the trustees faithfully performed their duties, the thousands of pages of publicly available documents demonstrate the trustees negotiated this transaction at arms-length and with care and diligence. They engaged multiple experts to provide financial and legal advice and are not financially interested in the transaction in any way. Applicable law further supports the conclusion that the trustees' decision to accept a final amount that was .03% less than what was previously discussed was consistent with the faithful execution of their duties and limitations on their expenditures. Finally, the fact that the voters of Cincinnati will ultimately decide the wisdom of this transaction informs my decision-making.

Background

As you know, the CSR Board worked over the past few years to negotiate terms for the extension of the long-term lease between the CSR Board and the Cincinnati, New Orleans and Texas Pacific Railway Company, a subsidiary of Norfolk Southern (NS).

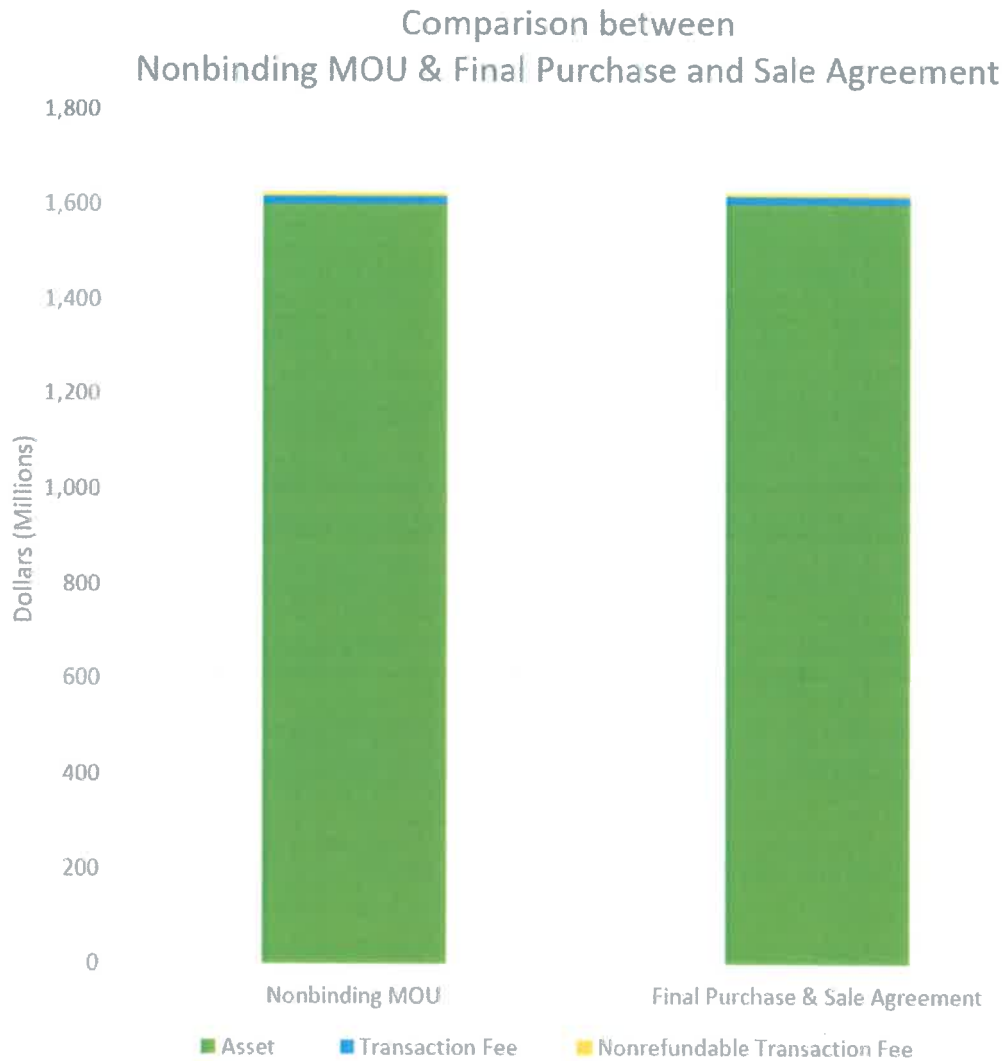
¹ On May 23, 2023, Thomas Brinkman submitted a petition to the Clerk of Council requesting that you remove the Trustees. Although the timing was premature, we are not requiring Mr. Brinkman to resubmit the petition. Rather, the Mayor will place the petition on the June 14, 2023 Council Calendar for your consideration.

The details of those negotiations are found in thousands of pages of publicly available documents and presentations to Council. They are also outlined in the enclosed letter and opinion from outside counsel, so I will not repeat them fully here.

Most relevant to the petition for removal of the trustees are the following facts:

- NS first proposed buying the railway for \$865 million.
- The trustees negotiated a sale of the railway for \$1.6 billion, an amount that remained consistent between an initial Nonbinding Memorandum of Understanding with NS and the final approved Purchase and Sale Agreement.
- ***In addition*** to the \$1.6 billion for the railway, the trustees negotiated for NS to pay the CSR Board's transaction costs:
 - A Transaction Fee of \$20 million will be due to the CSR Board at the transaction closing (which only occurs if the voters approve the sale). This amount remained unchanged between the Non-binding MOU and the Purchase and Sale Agreement.
 - A nonrefundable Accelerated Transaction Fee ("Nonrefundable Transaction Fee") due after execution of the Purchase and Sale Agreement. This amount was \$5 million in the Nonbinding MOU and later \$4.5 million in the Purchase and Sale Agreement.
- The CSR Board informed NS after the Nonbinding MOU - but before executing the Purchase and Sale Agreement - that the Cincinnati Charter prohibits the CSR Board (or any other constituent part of the City) from expending funds for or against ballot issues.
- After learning this, NS lowered its offer for the Nonrefundable Transaction Fee by \$500,000, and the CSR Board ultimately accepted that term, which lowered the overall sale amount by 0.03%.

The following chart places this change in context of the entire transaction:



Analysis

CMC 205-3 provides that trustees can be removed from their office if they fail in “the faithful performance of his or her trust.” The attached opinion from Taft Stettinius & Hollister (Taft) provides a detailed legal analysis of the meaning of “faithful performance” their trust, which can be read to mean “duty.” Although there is no court case directly interpreting this municipal code provision, Taft’s analysis provides several persuasive analogies from other well-established sources of law. These include surety liability for public officials, trustee liability, liability for directors of nonprofit corporations, and general standards for removal of public officials.

The consistent principle that emerges from these sources of law is that the trustees should not be removed from their roles if they acted in good faith and consistent with their reasoned judgment about what is in the best interests of the CSR and, as a result, the City. Differences in opinion about non-material terms of the negotiation are not a basis for removal. This is especially true here considering this transaction will ultimately be presented to a vote of the Cincinnati electorate for approval.

Here, the trustees accurately informed NS that they could not expend funds for or against the ballot issue. They provided this transparency in an effort to *comply with* the law, not violate it. NS, the party on the other side of an arms-length negotiation, offered the Trustees less money for the Nonrefundable Transaction Fee after learning about this limitation. The decision then for the trustees was to either accept that term or not. They decided to accept that term – an entirely appropriate decision given that the total value of the transaction was decreasing by 0.03%. There is simply no grounds on which to conclude that the trustees should be removed from their positions. In my opinion, this is not a close call. This opinion is shared and explained in detail in the Taft memorandum and in the letter from Squire Patton Boggs, both of which are enclosed.

Conclusion

After reviewing the letter and opinion from outside counsel and considering the thousands of pages of publicly available records documenting the negotiations leading up to the proposed sale of the Cincinnati Southern Railway, I have determined that I will not apply to Council to remove the trustees. However, a taxpayer has petitioned Council and, therefore, Council must hear the matter and make a decision by a majority vote. I have provided my rationale, the petitioner's submissions, and the legal analysis of two outside law firms to aid that decision. I have also enclosed my correspondence to counsel for the taxpayer.

If you have any questions, please do not hesitate to contact me.