

COURT OF COMMON PLEAS

BUTLER COUNTY, OHIO

TRUSTEES OF THE CINCINNATI
SOUTHERN RAILWAY

Plaintiff

vs.

THE CITY OF CINCINNATI, et al.

Defendants

Case No. CV-77-050373

MEMORANDUM OF PLAINTIFF ON THE HISTORY
OF THE CINCINNATI SOUTHERN RAILWAY

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INTRODUCTION

The purpose of this memorandum is to recite the history of the Cincinnati Southern Railway based upon careful examination of great volumes of materials from the files of the Trustees of the Cincinnati Southern Railway. There should be no controversy about the contents of this memorandum and it is intended to be a basic reference throughout the litigation.

In order to avoid the expense of proving what the Trustees believe to be historical fact, this memorandum is being submitted to the Defendants in the form of a request for admissions under Rule 36 of the Ohio Rules of Civil Procedure. In the event that there are any portions of the history which either Defendant disputes and it becomes necessary to prove those disputed elements of the history, this will shift the expense from the Trustees to the Defendant who

chooses to challenge what the Trustees believe to be an accurate history of the railroad.

I. ECONOMIC NEED

The Queen City, Gateway to the West, was indeed an accurate description for Cincinnati in the early and mid 1800's. By mid-century, Cincinnati was the largest city west of the Alleghenies and the fourth largest city in the country.¹ It grew from a population of 9,642 in 1820 to 161,044 in 1860.² The thriving metropolis had an extensive commercial interest in slaughtering, meat packing, and steamboat construction. Her strategic location and the reliance on river-oriented steamboat transportation gave Cincinnati strong early ties to western and southern markets.³

The advent of steam locomotion⁴ and rail transportation and the somewhat later beginnings of the Civil War conspired to strip her of her status as the population center and marketplace of the West.⁵ The following population table for the four largest cities of what was then the West shows Cincinnati's predominance early in the century, and the reversal that took place in the midst of the Civil War.

	<u>1820</u>	<u>1830</u>	<u>1840</u>	<u>1850</u>	<u>1860</u>	<u>1870</u>
CINCINNATI	9,642	24,831	46,338	115,345	161,044	216,239
CHICAGO	---	70	4,470	29,463	112,172	298,977
ST. LOUIS	---	5,862	16,469	77,860	160,773	310,864
LOUISVILLE	4,012	10,341	21,210	43,194	68,033	100,753 ⁶

Steamboat transportation rapidly lost favor to rail transportation. In 1848, there had been 319 steamboats from New Orleans to Cincinnati, and by 1870 only seventy-six.⁷ In the twenty years from 1855 to 1875, Cincinnati's own choice of method of transportation shifted drastically from river to rail. The value of goods transported into and out of Cincinnati by rail grew phenomenally, while river-transported goods stagnated and then dropped.

	<u>1855</u>	<u>1865</u>	<u>1875</u>
RIVER	\$20,700,000	\$ 77,400,000	\$ 43,800,000
RAIL	18,000,000	116,200,000	157,500,000 ⁸

With the reliance on river transportation and the flow of the rivers themselves giving Cincinnati its early ties with the South,

"The 'Queen City of the West,' as she chose to call herself, was, in fact, a southern city in most respects. Although situated on the north bank of the Ohio River, she was very intimately connected with the South. Her trade was almost wholly down the Ohio with that section, with which she strove to keep on good terms both politically and commercially."⁹

While the Civil War brought some new war-related industry and commerce, in all other respects, "one of the first effects of the war was to completely stagnate the city commercially and industrially. Her southern markets slipped almost overnight."¹⁰

By the end of the war, rail domination of transportation was determined, and the ready availability of the water transportation was insufficient to return Cincinnati's antebellum ties to southern markets. Without adequate rail ties to the South, Cincinnati was

put in an extremely poor financial position. In modern terms, she suffered from a severe balance of trade deficit, as the table below shows.

<u>Year</u>	<u>Imports</u>	<u>Exports</u>
1865	\$307,000,000	\$193,000,000
1866	362,000,000	201,000,000
1867	335,000,000	192,000,000
1868	280,000,000	144,000,000
1869	283,000,000	163,000,000
1870	312,000,000	193,000,000 ¹¹

Just as for many years there had been pressure in Cincinnati for a southern railway connection, the same economic forces were at work in the South to establish a northern connection.

"When Eli Whitney invented the cotton gin he made possible the future development of the South along its peculiar lines. Within a few decades, the people had turned their interest and energy almost wholly to the raising of cotton, largely neglecting the necessary food products. A great agricultural region was here producing much less food than it consumed.

"Just the opposite conditions prevailed in the Ohio Valley and to the north and west. Around 1825 this region was growing corn for sale at twelve cents a bushel and wheat selling for relatively little more. The elements were present in this situation for the growth of traffic lines. The South soon saw the possibilities. She could now devote her energies solely to cotton culture and continue as long as she could maintain her commercial connections with the Northwest."¹²

Railroads worked to the disadvantage of the South as well as of Cincinnati. For the most part the lines ran east and west, thus

establishing corridors of trade between the Northwest and East, rather than from the Northwest to the South.¹³ It was the strong desire to overcome this problem that led to the keen interest throughout the South in the success of what became Cincinnati's attempt to construct the Cincinnati Southern Railway. That Knoxville, Nashville, and Chattanooga all sent representatives to Cincinnati within a week after the passage of the Ohio enabling act to urge that their cities be selected as the line's southern terminus was ample evidence of this concern.¹⁴

Interest in a rail connection was equally intense in the area between the North and the South, Kentucky. As Louisville became a rail center ahead of Cincinnati, with connections to Nashville and other southern destinations, the transportation needs of eastern Kentucky were ignored. Because of the circuitous and lengthy routes to market, most farm stock raisers of eastern Kentucky lost numerous head of cattle and hogs before the animals could ever reach the market.

The stock produced in eastern Kentucky was needed in the South. When the outcome of the Kentucky enabling legislation was in doubt, H. N. Snyder, of Tennessee, spoke "in behalf of the people of Tennessee, of Alabama and of Georgia,"¹⁵ in support of the bill before the Kentucky General Assembly. He pointed out that "the people of the cotton states are also nonproducers of stock. They are compelled to go beyond their borders to procure a supply."¹⁶

Commercially, where there were large coal fields in eastern Kentucky, they were little used because of the inadequate transportation facilities. Most Kentuckians were thus forced to pay for more expensive coal to transport it through Louisville.¹⁷

As Snyder argued in his speech to the Kentucky legislators:

"And who can impugn their judgment or their loyalty to their State when they only seek to make accessible and productive the coal, the iron, and other natural resources of their own State, and not be forever dependent upon the products and the wealth of another, and forever adding that strength and prosperity to others which can be so easily made their own. Kentucky, with coal fields more extensive than those from which England is supplied, still brings this article from beyond her borders. Kentucky, with iron deposits more rich than those which enable England to send her manufactured articles over the world, still depends upon others for four fifths of the iron products which she uses."¹⁸

II. FIRST ATTEMPTS

The economic interrelationship between Cincinnati and the South had for years made it desirable to establish a rail connection between the two. Numerous attempts, none successful, were made to establish such a tie.

As early as 1835, five years after the feasibility of steam locomotion had been demonstrated, a public meeting was held within Cincinnati for the purpose of considering the subject of railway transportation between Cincinnati and the cities of the South Atlantic. In 1836, Cincinnati sent a delegation to the Great

Southwestern Railroad Convention conceived by John C. Calhoun. That convention was held in furtherance of the construction of the Cincinnati, Louisville and Charleston Railway, approved early that same year by the Kentucky legislature. While the project showed promise, it was assigned to an early grave by the financial crash of 1837.¹⁹ Over the next fifteen years, several unsuccessful attempts were made to encourage railroad companies organized to provide direct access to the South.

In 1859, there was an attempt made to raise from private entrepreneurs a \$1,000,000 cash bonus that would be awarded to the Cincinnati, Lexington and East Tennessee Railroad in exchange for its establishing a connection through to Knoxville, Tennessee. Before anything concrete could be done in this direction, the Civil War intervened and this project too was abandoned.

The Civil War itself came close to giving Cincinnati its southern railway connection. Serious consideration was given to the establishment of a military railroad to the South, President Lincoln urging its construction. Under the direction of General Burnside, surveys were actually made and there was even some preparation of grades. Other war-related events overshadowed the importance of the military route, and this project too was abandoned.²¹

In 1866, a final private attempt to construct the southern connection was made. This too proved unsuccessful before any work was actually undertaken.²²

III. CONSTITUTIONAL DIFFICULTIES

In the years prior to mid-century, it was standard practice for governmental bodies to issue bonds and turn over capital to private corporations in exchange for private corporations undertaking large public works projects.²³ This method of financing was used to build canals, railroads, turnpike roads, and many other internal improvements. The Little Miami Railroad, the Cincinnati area's first railroad, and the Cincinnati, Hamilton and Dayton Railway were both built in part using this method of municipal assistance to private corporations.²⁴

Not only in Ohio, but throughout what was then the West, there was a great rush toward development of these types of projects. Unfortunately, there also was a great abuse of power of cities, towns, and even townships to become stockholders in private corporations.²⁵ These abuses lead to a number of fiscal disasters. As a result, financial ruin stared the citizens of many municipalities in the face.

It was to prevent cities and other local governments from subscribing to such wild schemes that a specific clause was inserted in the Ohio Constitution in 1851.²⁶ This clause read:

"The general assembly shall never authorize any county, city, town or township, by vote of its citizens, or otherwise, to become an owner in any joint stock company, corporation, or association whatever; or to raise money for, or loan its credit to, or in aid of any such company, corporation or association."²⁷

It was generally felt that this constitutional provision severely hampered Cincinnati's ability to effect the construction of a southern railway.²⁸ Some consideration and effort was put forth in the direction of attempting to remove the objectionable provision of the Constitution. In fact, in 1869 an amendment making it possible for cities to subscribe to railroads was introduced in the Ohio legislature, where there was so little support for it, it failed. Many Cincinnatians felt that even if the amendment had been endorsed by the legislature, the process that would be required for voter approval would take too long to be useful.²⁹

There was a second problem with the Constitution of 1851 that the promoters of the southern railway had to face. Up until this time, the state legislature had retained control of local government and the legislature itself was required to approve every charter and every amendment to that charter. As Ohio grew, more and more localities sought incorporation and more and more of the legislature's time was taken up with special acts referring to individual localities. This was described as:

"One of the serious problems which faced the delegates at the convention was that of freeing the legislature of the state of the onerous task of enacting special laws. Part of this problem was that of the incorporation of cities and towns and the continual amendment of these charters to meet the needs of an expanding urban situation."³⁰

Article XIII of the Constitution of 1851, entitled "Corporations," attempts to deal with this problem in two provisions.

Section 1 of Article XIII, styled "Corporate Powers," states, "The general assembly shall pass no special act conferring corporate powers."³¹ Section 6 of the same Article, entitled "Organization of Cities," states:

"The general assembly shall provide for the organization of cities, and incorporated villages, by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power."³²

Additionally, Article II, Section 26, provides that:

"All laws, of a general nature, shall have a uniform operation throughout the state; nor, shall any act, except as relates to public schools, be passed, to take effect upon the approval of any other authority than the general assembly, except, as otherwise provided in this constitution."³³

The problem for the backers of the southern railway connection posed by the constitutional prohibitions against special acts was that they could not simply go to the legislature seeking a special grant of power to the City of Cincinnati to construct the rail line. An act authorizing specifically the City of Cincinnati to build a railroad would be in clear violation of the Constitution.

"Because of the prohibition against special legislation contained in Article XIII, section 1 of the Constitution it was impossible to enact laws for each city by name. The subterfuge of dividing the cities into classes was resorted to instead. By 1880, when the Commissioners to revise and consolidate the statutes reported to the general assembly and later adopted the results of their labors as the revised statutes of Ohio, the classification of municipal corporations was as follows:³⁴

"Municipal corporations are divided into cities, villages and hamlets; cities are divided into two classes, first and second; cities of the first class are divided into three grades, first, second, and third;

cities of the second class are divided into four grades, first, second, third, and fourth; cities of the second class which hereafter become cities of the first class shall constitute the fourth grade of the later class; in villages which hereafter become cities shall belong to the fourth grade of the second class.'"35

The effect of this procedure was that the five largest cities of the state, Cincinnati, Cleveland, Toledo, Columbus, and Dayton, were each in a class by themselves.³⁶ The legislation authorizing the construction of the Cincinnati Southern Railway was a somewhat earlier forerunner of such detailed special legislation by classification.

IV. THE FERGUSON ACT

When it appeared that all other methods of obtaining a southern railway connection for Cincinnati were doomed to failure, Mr. E. A. Ferguson came forward with what is variously described as an "astounding proposition,"³⁷ "a municipal enterprise embracing elements of the greatest importance in American technological as well as urban history,"³⁸ "an unprecedented move in American municipal activities,"³⁹ and "the remarkable proposition."⁴⁰ Ferguson, a former Cincinnati City Solicitor and State Senator,⁴¹ proposed that the City of Cincinnati itself should build and own a southern railway. Ferguson believed that while the state Constitution prohibited a local government from owning stock in a private corporation that was attempting to build a rail line, that provision did not prevent

the City from constructing and owning the railway entirely on its own.

Ferguson's own words, detailing the germination of this idea, are recorded and preserved in a number of forms. On each occasion reciting the beginnings of this concept, Ferguson tells of a meeting in New York City involving several Cincinnati merchants and himself. He recounts that the meeting got around to a discussion of Cincinnati's need for a southern railroad.

"The remark was made that, under the Constitution of the State of Ohio, the City of Cincinnati could do nothing, that we were bound hand and foot and entirely powerless. I said: 'Gentlemen, this is a mistake. The city of Cincinnati has as much power to do for her public interest as she ever had. The only difference is she cannot go into partnership with anybody to pursue her objects. You know she owns the water works, which formerly belonged to a private company; you know she paid \$3 million to buy the gas works, which belonged to a private company; and yet, although she can own the gas works and the water works and operate them, she cannot own a dollar in stock in any private company. That is all there is of it. The constitutional provision is against the city going into partnership, against her becoming a stockholder, but as to whether she may find it necessary to do for our public weal, she has as much power under the present democratic constitution - for it was so called - as she ever had.' I went on to say that when I got home I believed I would draw up a little bill to show the gentlemen what could be done."⁴²

The November 25, 1868 edition of the Cincinnati Daily Enquirer indicates that Ferguson did just that. The newspaper contains an editorial endorsing in detail the bill that was, according to the article, "designed to secure the completion of the long-proposed railroad connection between this city and the South."⁴³

In early 1869, the Ferguson bill was introduced into the Ohio General Assembly. Accompanying the bill was a memorial presented by a committee from the City Council, the Chamber of Commerce, and the Board of Trade, asking that the bill be passed.⁴⁴ On April 28, 1869, the Senate passed the Ferguson Bill, and on May 4, 1869 the bill was enacted into law.⁴⁵

Formally titled "An Act Relating to Cities of the First Class Having a Population Exceeding 150,000 Inhabitants," the Ferguson Act is relatively short, containing only eleven sections. The act permits cities with a population exceeding 150,000 inhabitants (at the time of the adoption of this act, Cincinnati was the only city in the state to fall into this classification), to borrow monies and issue bonds (up to \$10,000,000) in order to construct a line of railway. The act provided that before this can be done the City Council of the city must pass a resolution declaring such a railway to be "essential to the interests of such city," and that one of the termini of the line must be the city establishing the railroad. The railway specified in the resolution must be approved at an election of the qualified electors of the city, before any funds can be borrowed or bonds issued for the railroad.

Section 2 of the act authorizes the "Superior Court of said city, or, if there be no Superior Court, then in the Court of Common Pleas of the county in which the city is situate," to appoint five trustees for the railroad.

Section 3 authorizes the trustees and their successors to ~~control the funds obtained through borrowing and bonds, to use such~~ funds to construct a railroad, and grants the trustees the power to make contracts and to acquire and hold real and personal property "either in this state or in any other state into which said line of railway may extend."

Section 4 of the act details the organization of the board of trustees and the selection of the board president.

Section 5 grants the trustees the power to take security from their officers, agents or contractors and specifies that the trustees shall be responsible "only for their own acts."

Section 6 authorizes the city solicitor to bring action in the appointing court, for the removal of a trustee who has "failed in the faithful performance of his trust." The section also authorizes a bondholder or a taxpayer of the municipality to file such an action on his own behalf in cases where the solicitor fails to do so and provides for compensation for the legal fees incurred in bringing such an action.

Section 7 authorizes the use of appropriation to obtain land necessary to a construction of a line of rail, provided it is done in accordance with the existing law of compensation.

Section 8 authorizes the trustees to acquire existing rail lines which can be incorporated into the right-of-way desired between the two selected termini for the railway.

Section 9 provides for the lease of the right-of-way as portions of it are constructed and for leasing the entire line upon completion of construction.

Section 10 authorizes the City Council to provide funds to the railroad trustees for the expense of the election required under the law. Section 7 states, "This act shall take effect upon its passage."⁴⁶

On June 4, 1869, Cincinnati City Council, following the requirements of the enabling legislation, and reciting the powers conferred in the legislation, adopted a resolution declaring it "essential to the interests of the said city of Cincinnati that a line of railway, to be named the Cincinnati Southern Railway, should be provided between said city of Cincinnati and the city of Chattanooga."⁴⁷

On June 26, 1869, the election mandated in the act was held.

15,435 votes were cast "for providing said line of railway" and but 1,500 against.⁴⁸

On June 30, 1869, the Superior Court of Cincinnati appointed the first board of Trustees. The Court named Edward A. Ferguson, Richard M. Bishop, Miles Greenwood, William Hooper, and Philip Heidelbach.⁴⁹ The board subsequently selected Mr. Miles Greenwood as the first president.

Some controversy surrounded the appointment of the first Trustees because none of those appointed had any practical experience in railroad construction.

"The theory of selection, insofar as theory operated, was that the variety of duties devolving upon the trust, - including the passage of complex legislation and the

negotiation of large bond issues, - made it impossible to appoint a body composed exclusively of skilled engineers; that, on the other hand, the influence of but a single person of this kind upon unskilled associates would be predominant and ultimate to an undesirable degree. Accordingly, men of sterling integrity and large public spirit, enjoying unlimited public confidence, rather than experts in railroad construction, were selected for the execution of the work."⁵⁰

V. TENNESSEE ENABLING LEGISLATION

For the reasons previously discussed, Tennessee was known to be strongly in support of establishing a railway with Cincinnati.⁵¹ Evidence of the Tennessee support was manifested by the fact that three Tennessee cities, Nashville, Knoxville, and Chattanooga, all had sent delegations to Cincinnati, lobbying for their cities to be selected as the southern terminus for the Cincinnati Southern Railway.⁵² With the expectation of strong support within the Tennessee legislature, and because Tennessee's legislature met prior to Kentucky's, Ferguson and the other Trustees submitted enabling legislation along with a resolution urging its passage first in Tennessee.⁵³

Surprisingly, the legislation initially encountered rough going in Tennessee. This was evidently because jealous representatives of those cities that were not selected as the southern terminus decided to take revenge on Chattanooga. The bill was initially referred to the House Judiciary Committee. The Chairman

of the Judiciary Committee, a resident of Knoxville, had been a strong supporter of the Cincinnati Southern Railway before

Chattanooga was selected as the southern terminus. His allegiance now switched, and he obtained an unfavorable committee report on the bill.⁵⁴

The argument used was that such a grant of power to the City of Cincinnati was unwarranted by the state Constitution, and that the rights of the State of Tennessee were not properly safeguarded in this measure.⁵⁵

Representatives of the City of Louisville, as they were to do in the Kentucky legislature, vehemently opposed the grant of power to the City of Cincinnati before the Tennessee legislature.⁵⁶

A committee of Trustees of the Cincinnati Southern Railway remained in Nashville throughout the consideration of the measure. Eventually, their explanations of the bill's provisions and the outlining of local advantages resulted in the measure's being approved by the Tennessee legislature.⁵⁷ It was enacted into law January 20, 1870.⁵⁸

The act authorized the board of Trustees to enter, survey, and acquire by gift, purchase, or condemnation, land or portions of constructed railways, in such amount as might be necessary for the construction and maintenance of the railway. Counties and towns along the route were empowered, upon a majority vote of the qualified electors, to donate land or monies in aid of the construction of the railway, to an amount not exceeding five percent of the taxable property. The Trustees of the railroad were required to

locate the road within two years after the passage of the act and to complete it within five. The governor of the state might extend this later period to ten years. The maximum transportation charges were fixed at \$.35 per hundred pounds and \$.10 per cubic foot for freight, and \$.5 per mile for passengers. Discrimination was forbidden against the citizens of Tennessee, and the legislature reserved the right to enforce these provisions by all necessary legislation. Bondholders were secured by a statutory mortgage on the road and its income, and failure to comply with any terms of the grant involved its forfeiture. The act also stated, "that the rights, privileges, and immunities granted by this act, shall continue for and during the period of 99 years, and no longer."⁵⁹ Further, the act established the gauge of the railway to be five feet and required that the Cincinnati Southern Railway Trustees establish an office in the city of Chattanooga and maintain an agent upon whom process could be served against the Trustees within Tennessee.

The act pays curious and unique attention to the Trustees of the Cincinnati Southern Railway, and incorporates by direct reference the Ohio enabling legislation under which the Trustees were appointed. Three times in the first three paragraphs of the Tennessee act, direct reference is made to the five Trustees, and they are recited by name.

"Whereas, it is represented to this general assembly that Miles Greenwood, Richard M. Bishop, William Hooper, Philip Heidelbach and Edward A. Ferguson, of the city of

Cincinnati, in the state of Ohio, were appointed, under and by virtue of an act of the general assembly of the state of Ohio, passed on the fourth day of May in the year 1869,"⁶⁰

begins the act. It is as if the legislature desired to make it absolutely clear to whom it was granting the power authorized in the act. To this end, the act specifically defines the Trustees as "the trustees for the time being, appointed under the act of the General Assembly of the State of Ohio, and so include said board of trustees and their successors."⁶¹

Following the passage of the act, the City of Chattanooga, in accordance with the power authorized under the act, appropriated \$100,000 to assist in paying for portions of the Cincinnati Southern Railway within Chattanooga.⁶²

The railroad Trustees formally accepted the Tennessee enabling act via a resolution adopted at their meeting on November 1, 1870. The resolved clause of the resolution reads:

"Resolved: By the Board of Trustees of the Cincinnati Southern Railway that the said Act of the General Assembly of the State of Tennessee, with all the restrictions and provisions thereof be and the same is hereby accepted, and that the Trustees, now present, sign a copy of the foregoing preamble and resolution, as a written acceptance thereof to be attested by the Secretary of the Board who shall file the Same with the Secretary of State of the State of Tennessee, as the acceptance of the Trustees of said Act."⁶³

The memorial seeking adoption of the legislation, the legislation, and then the very formal acceptance provide a basis for considering the relationship of the Trustees to the State of Tennessee a contractual one.

On December 15, 1870, the Tennessee legislature passed an act extending for three years the time granted for the commencement of the construction of railroads previously authorized by the state of Tennessee legislature.⁶⁴ On February 21, 1885, the Tennessee legislature enacted a law permitting each railroad within the state to adopt the gauge or gauges their respective authorities may choose, and permitted those authorities to alter the gauges at their pleasure.⁶⁵ (On May 30, 1886, the gauge of the Cincinnati Southern Railway was changed to 4' 8-1/2".)

Finally, on April 2, 1929, a Tennessee law went into effect making the franchise and powers granted under the 1870 act perpetual.⁶⁶

VI. KENTUCKY ENABLING LEGISLATION

On January 7, 1870,⁶⁷ while action was still pending in the Tennessee legislature, a similar bill was introduced in the General Assembly of Kentucky and referred to the Joint Committee on Railroads.⁶⁸ Due to the strong sectional rivalry between Louisville and Cincinnati, stiff opposition was expected in the Kentucky legislature.⁶⁹ That expectation was fully met.

Mr. Ferguson himself, the author of the bill that was introduced, attended the session, as did Mr. R. M. Bishop, another Trustee. The Trustees had authorized the sum of \$20,000 to be used

in the Kentucky lobbying effort.⁷⁰ Part of that money was used to employ the Hon. John C. Breckenridge as a lobbyist for the railroad.⁷¹ Serious consideration of the legislation began on January 25, 1870, when Mr. Breckenridge testified before the Joint Committee on Railroads of the General Assembly of Kentucky.⁷² The following night, Mr. Isaac Caldwell, of Louisville, testified in opposition to the legislation.⁷³

Objection to the Cincinnati Southern Railway came particularly from Louisville representatives, who argued that the bill was unconstitutional in that it was an evasion of the Ohio constitutional prohibition against a city's subscribing to private corporate efforts to construct railroads, and they questioned the propriety of granting the powers called for under this legislation to a foreign city.⁷⁴ As one observer noted, in The Cincinnati Commercial, July 1, 1869,

"The rival routes, private and public interests, the jealousies of state pride, state rights, party politics (whether used rightly or wrongfully, I do not say), would all conspire to prevent the granting of an independent charter."

In spite of the efforts of Breckenridge and the Trustees, the bill was defeated in both the Kentucky Senate and House in March of 1870.⁷⁵

A second attempt to secure the Kentucky enabling legislation began with the reintroduction of Ferguson's bill on January 4, 1871. This time around, supporters of the measure won a close victory in

the Kentucky House but were again defeated in the Kentucky Senate.⁷⁶

With each defeat, the resolve of the residents of central and eastern Kentucky grew. These were the people who would be most benefited by the rail line, and strongly supported its passage. Colorful language of the Cynthiana Democrat, quoted in the Cincinnati Commercial of February 18, 1970, seems to sum up the reaction of central and eastern Kentucky.

"The country traversed is willing and more than willing, but here comes in the mean envy of a second rate city that happens to be on our side of the river, to oppose it, like a dog in the manger So far as this part of the state is concerned, Louisville might be removed from the map tomorrow without the disturbance of trade to the amount of a dollar, and without ... the loss of much good will Cincinnati is worth six of her in importance, in enterprise, in liberality, and in everything that goes to make up a city worth trading with and to be proud of. Cincinnati has as many Kentuckians, and friends of Kentuckians, among her people as has Louisville, the little snob."

Snyder, arguing before the Kentucky General Assembly, had demonstrated the economic interests at stake:

"It is estimated, that in a single county of Kentucky there is lost, annually, on the wheat and pork crop alone, more than fifty thousand dollars, in consequence of the want of the market which this railroad enterprise would give. This state of things is true of many counties in your State, and of many counties in the State of Tennessee. Besides enriching the people annually, in this manner, it is regarded as a low estimate that this railway would add, directly and indirectly, more than thirty millions of dollars to the taxable property of your state."⁷⁷

In response to the situation, meetings were held throughout central and eastern Kentucky to urge and organize for the passage

of the railroad enabling statute.⁷⁸ A third attempt was made in 1872, and at the urging of the residents of central and eastern Kentucky was treated as a "Kentucky fight."⁷⁹ The Cincinnati Trustees did not make their presence felt in Frankfort on this occasion, but allowed the citizens of Kentucky to carry the effort themselves. The strategy succeeded, and the bill was enacted on February 13, 1872.⁸⁰

In most respects, the Kentucky act⁸¹ was identical to that of Tennessee. However, the continued hostility of some sections of Kentucky made itself felt in the final version of the bill as adopted. Three very negative provisions were contained in the legislation. First, the Trustees were charged with paying an exorbitant head tax of \$.50 per person on every passenger crossing through the Commonwealth of Kentucky, and \$.25 for each passenger traveling 100 miles within the state of Kentucky. Second, the Kentucky legislature attempted to dictate a portion of the route by specifying that the line must connect Cincinnati and Chattanooga by way of Sparta, Tennessee and Nicholasville, Kentucky. Third, the Kentucky act required that each line surveyed must be reported to the citizens of Cincinnati, who would be permitted to vote for the route they preferred, and the Trustees would be bound by that decision.⁸² These provisions were repealed by early 1873.⁸³

It is interesting to note the treatment given under the Kentucky act to the concept of trustees. It is in all respects similar to the way the Tennessee legislature handled it. The word

trustees has the same definition in the Kentucky statute as in the Tennessee statute, and three times in the first two paragraphs of the act, the five trustees are individually named and included.

Snyder's appeal for the legislation had forcefully demonstrated to the Kentucky legislators the inflexibility of the procedures the board of Trustees would follow and be governed by. They were told that the board would not, in fact could not, be changed.

"The trustees who are asking the passage of this railway bill are not seeking to serve personal ends, nor to pursue an obstinate course. They have certain authority delegated to them to act in a certain way. This delegated authority cannot be varied, and there is no opportunity to change it. All these trustees ask, is, that you grant them the privilege of expending the fund created, and of carrying forward the great enterprise proposed, in accordance with the authority delegated to them; being unable to proceed in a different manner than is therein provided."⁸⁴

It is also interesting to look at the memorial of the board of Trustees to the General Assembly of Kentucky urging the adoption of the Ferguson bill. The document, signed by all five of the railroad Trustees, states in part,

"Inasmuch as the powers vested in your memorialists cannot be exercised, nor the proposed line of railway constructed within Kentucky, without the consent of the General Assembly thereof, they respectfully ask your honorable bodies to pass an act enabling them to carry into effect the purpose for which they were appointed upon such conditions and with such guards as in the opinion of your honorable bodies will be consistent with the honor of the commonwealth and promote the interests of its people, and thus contribute to the formation of a highway which will unite two large portions of our common country - now separated by a mountain barrier - in free, social, and commercial intercourse."⁸⁵ (Emphasis added.)

The Trustees recognized the grant of power to them was to be subject to conditions laid out by the Kentucky legislature. Included in these conditions, by way of incorporation by reference, is the Ohio act of May 4, 1869.

The railroad Trustees acted to accept the Kentucky enabling legislation by resolution at their meeting of March 12, 1873. The effective clause of the resolution was similar to the one approved to accept the Tennessee legislation two and a half years earlier.

"Resolved - By the Board of Trustees of the Cincinnati Southern Railway, that the Said Acts of the General Assembly of the Commonwealth of Kentucky, as amended, with all the restrictions and provisions thereof, be and the Same are hereby accepted, and that the Trustees now present, sign a copy of the foregoing preamble and resolution, as a written acceptance thereof, to be attested by the Secretary of the Board, who shall file the Same with the Secretary of State, of the State of Kentucky as the acceptance of the Trustees of Said Act.⁸⁶

The board went on to specifically "deputize" Mr. Gunn, their chief engineer, to "carry the acceptance of the Trustees of the Kentucky Acts, to Frankfort, and to take receipt of same from the Secretary of State."⁸⁷

As with the Tennessee legislation, the provisions of the act and acceptance and the formalities attended to take on all the trappings of a contract. Both parties are benefitted, Kentucky economically, and the Trustees by the powers granted them (consideration). The legislation serves as an offer and the Trustees' action of March 12, 1873 as an acceptance.

In addition to the acts repealing the noxious provisions of the enabling legislation, Kentucky has adopted several measures

supplementing the original bill. On May 15, 1886, Kentucky authorized the gauge of the railroad to be changed,⁸⁸ and on March 20, 1930 the grant of power to the Trustees was effectively made perpetual.⁸⁹

VII. GEORGIA LEGISLATION

By 1879, the railroad right-of-way was located from Cincinnati to Boyce's Station, about five miles north of Chattanooga. It was at this point that the Cincinnati Southern Railway met the Western & Atlantic Railroad. It was found convenient by the Cincinnati Southern Railway Co. (the lessee) to establish a temporary lease arrangement with the Western & Atlantic Railroad Co. for the use of their rails from Boyce's Station into Chattanooga.⁹⁰

The Trustees of the Cincinnati Southern Railway determined that a more permanent arrangement was necessary, and at the Trustees' meeting of June 28, 1879, they instructed "the attorney and agent for Tennessee to procure a right-of-way from Boyce's Station to McCallie Street in Chattanooga."⁹¹ The Western & Atlantic Railroad Co. was owned by the state of Georgia, just as the Cincinnati Southern was owned by the City of Cincinnati.

Acting under his instructions, the attorney and agent for Tennessee reported to the board of Trustees at their September 13, 1879 meeting that "the state legislature of Georgia would doubtless

grant trustees the right to build embankments on the right-of-way of the Western & Atlantic Railroad between Boyce's Station and Chattanooga."⁹² At still a later meeting, on October 4, 1879, the attorney and agent for Tennessee reported that "the Georgia legislature would, in his opinion, pass within a few days and that the governor will promptly sign, the bill granting the trustees the right to build a railway between Chattanooga and Boyce's Station, on the right-of-way of the Western & Atlantic Railroad."⁹³

On October 8, 1879, the Georgia legislature approved "an act granting right-of-way to the Cincinnati Southern Railway, where its route adjoins that of the Western & Atlantic Railroad."⁹⁴ The preamble of the statute stated:

"That whereas the City of Cincinnati has nearly completed the Cincinnati Southern Railway, a trunk line which will be of great benefit to the state of Georgia, forming a most important feeder, practically, an extension of the Western & Atlantic Railroad, which is the property of the state, in giving to our commerce the advantage of a direct and admirable connection with the railway system of the North and West."⁹⁵

The act went on to recite the advantages that would accrue to both the State of Georgia and both railroads because of the construction of two sets of tracks on the same right-of-way. Its operative language was:

"There is hereby granted to the trustees of the Cincinnati Southern Railway, for the use of said railroad, the use of that portion of the right-of-way of the Western & Atlantic Railroad between Boyce's Station, Tennessee, and the Chattanooga, Tennessee terminus."⁹⁶ (Emphasis added.)

Operating under this grant, the Trustees proceeded to construct a line of railroad to its Chattanooga terminus. On October 11, 1881, the work on this section of the railroad was completed and that completed the construction of the entire line from Cincinnati⁹⁷ to Chattanooga.

This arrangement, providing for the use of the right-of-way, worked conveniently for some time.

By the early 1900's, however, Georgia apparently became dissatisfied with the arrangement. On August 21, 1916, the Georgia state legislature approved an act attempting to repeal the grant of 1879.⁹⁸ The railroad trustees quickly prepared and served on the Western & Atlantic Railroad Commission, the State of Georgia, and the Governor of Georgia, a "declaration of title," refusing to recognize the attempted repeal.⁹⁹ As the Trustees were preparing to go into a Tennessee state court to uphold their right to continue the use of the right-of-way, Georgia brought an original action in the United States Supreme Court.¹⁰⁰

State of Georgia v. Trustees of Cincinnati Southern Railway, et al., 39 Sup.Ct. 14 (1918), was argued on November 7, 1918. The Cincinnati Enquirer reported that:

"The case was submitted to the Supreme Court on Thursday and its decision is awaited with interest. The hearing excited much comment, in that it was an action by a state, the owner of a railroad - the only state in the union that is such - against the only municipality in the world which owns a railroad, a unique situation."¹⁰¹

A special committee of the Trustees that was comprised of W. T. Porter, John W. Peck, and Henry T. Hunt, prepared a brief for the

Trustees, in cooperation with the Cincinnati, New Orleans & Texas Pacific R. Co. Their brief argued that the 1879 legislation was a permanent, irrevocable grant for the use of a portion of the right-of-way.¹⁰²

It should be noted in passing that the brief of the defendants outlined for the Court a history of the Cincinnati Southern Railway, and contained the following observations on the nature of the Trustees:

"The Board of Trustees of the Cincinnati Southern Railway is an agency of the State of Ohio and not of the City of Cincinnati, although its creation is 'for the attainment of Cincinnati's object and interest as decided upon by itself, in providing this railway.' (Thoms v. Greenwood, 7 Am. Law Record, following p. 768.) All the powers of the board of trustees were conferred upon it by the State of Ohio, and the State required them to be appointed and qualified by and before a court of that State. The object in having a board of trustees and in having it appointed by the court was to secure 'permanence of the agency and to avoid changeability such as the mutations of elections and opposing and conflicting opinions would bring about, to the inevitable injury and possibly total failure of the enterprise.' The Board of Trustees, while holding the legal title to the property, are nevertheless to employ it primarily for their beneficiary, the City of Cincinnati, and secondly for the holders of the bonds which they have negotiated, and for the lessees of the railway when it shall have been put under lease. These interests have the right to have this board of trustees permanently maintained in order to preserve the interests which the board has in charge."¹⁰³ (Emphasis added.)

The brief points out that there was a mutuality of the benefit accruing to both parties, and that there was strong consideration for the grant by the State of Georgia.¹⁰⁴

The opinion, delivered by Mr. Justice Holmes, observed that

"The Ohio statute under which the Cincinnati Southern Railway was constructed by the City of Cincinnati provided for a board of trustees to be appointed and kept filled by the superior court of the city, to have control of the funds raised by the city, and to acquire and hold all the necessary real and personal property and franchises either in Ohio or in any other state into which the line of railroad should extend."¹⁰⁵

Therefore, Holmes found that the railroad trustees were the proper party to receive the grant.

From the language of the grant of 1879, the Court concluded that it was a perpetual grant and one that could not now be revoked by the State of Georgia. Further, the Court found that this was a "conveyance in aid of a public purpose from which great benefits are expected, and therefore not a gratuitous grant that would be prohibited under the Constitution of Georgia."¹⁰⁶

VIII. THE TRUSTEES, THE INITIAL VIEW

A fair amount of attention has been paid to the concept of the Cincinnati Southern Railway board of Trustees in the literature detailing the beginnings and history of the railroad. Ohio's new House Bill 69 attempting to change the appointment of railroad Trustees is not the first attack to have been made on the board of Trustees.

On June 30, 1869, Judge Storer, speaking for the Superior Court of Cincinnati, announced the five Trustees:

"We have endeavored to select men who, from their position in the community and from their known integrity, energy and capacity for business, may be safely confided in and who will perform the obligations of their important office intelligently and uprightly, and for the benefit of the city and not for themselves."¹⁰⁷

John Breckenridge, testifying before the Joint Committee on Railroads of the General Assembly of Kentucky, described the appointment of the first Trustees as follows:

"After that vote was taken, in pursuance of the act, the case was certified to the judge of the Superior Court of Cincinnati, Judge Storer, or rather the three judges presided over by Judge Storer - perhaps one of the most eminent jurists and judges in the West - and the gentlemen named were appointed. The names of the gentlemen appointed as Trustees by the Superior Court of Cincinnati are Richard M. Bishop, Miles Greenwood, Edward A. Ferguson, William Hooper, and Philip Heidelberg."¹⁰⁸

As previously noted, the Ohio legislation specified that the Trustees for the railway would be appointed by either the Superior Court, or, in the event that there was no Superior Court, then by the Common Pleas Court of the county in which the city authorizing the railroad to be constructed was situated.¹⁰⁹ The Ohio legislation also specified that the Trustees could only be removed for cause, thus in effect granting a lifetime tenure to the Trustees.¹¹⁰

This arrangement was not merely happenstance, but rather was designed to create an independent board of Trustees, insulated at least somewhat from political pressures. Perhaps the best source of information as to what was intended and why is the author of the bill itself, Edward A. Ferguson.

On April 18, 1877, Mr. Ferguson spoke to a meeting of Cincinnati merchants, manufacturers, and capitalists, called together to organize a common carrier company for the operation of the railroad. Ferguson described at some length the beginnings of the Cincinnati Southern Railway, and paid particular attention to
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 the makeup of the Trustees.

"What was this Ferguson Act? It was a very simple thing. It was that the City of Cincinnati should raise the necessary capital to build the road herself. How was it to be done; what was the plan? When you start out to borrow money you must have credit, you must have faith. If you had gone into the markets and asked money with a Board of Trustees subject to elections, subject to the changes which come over every community engaged in a great undertaking like this, we should have failed. The organization of the Croton Board of Waterworks was changed three or four times, although the Board was appointed by the Governor. DeWitt Clinton was at one time thrown out of the Canal Board, but the people took him up and put him back. A delegation was elected from the City of New York to the General Assembly to repeal Clinton's Law, and filled up the 'damned dry ditch,' as they called it. I knew the history of the public occurrences and saw the necessity for a trust fund, the Trustees to be appointed by the Court and to continue in office as long as they faithfully discharged their duties, and until they finished the road. This the Bill provided, and it also provided that if any citizen and taxpayer had anything to say against any Trustee, he might go to the City Solicitor and make his complaint, and go to the Court and have him removed, if his complaint was well grounded and the Solicitor failed to make it. It was a constant Board. It was appointed once for all time to do the work."112

On November 27, 1878, Mr. Ferguson was called to testify before the Commission on the Affairs of the Trustees of the Cincinnati Southern Railway, the Management of Their Trust, and the Disbursement of the Monies Entrusted to Their Care. As a part

of that testimony, the following exchange on the nature of the Trustees took place.

"Q. It has become a public question whether the Trustees appointed by the Court, under the so-called 'Ferguson Bill' hold office by vested tenure, that can not be changed except by death, resignation, legal process, or concurrent legislation in Ohio, Kentucky, and Tennessee. Have you any opinion upon that? If so, state it, if you feel free to do so. A. That is undoubtedly the case. It was intended that the Trustees should hold an office that could not be changed except by death, resignation, etc. It was, undoubtedly, the understanding of the purchasers of the ten million bonds. It would be a breach, not only of contract, but of faith, to attempt any other change than that which was contemplated by the original Act. I might add that, in addition to this concurrence of the Legislatures, it would be necessary to have the concurrence of the City of Cincinnati, and each individual bond-holder of the ten million of bonds. As long as the city owns the Southern Railway some amount - say half a million of dollars - of the first issue of bonds should be kept outstanding, because under them, or with them outstanding, the trust powers continue, and they become a safe-guard to any hostile legislation against the road."¹¹³ (Emphasis added.)

Ferguson clearly believed that the method of appointing Trustees and their tenure of office was important in securing bond purchases. In testimony before the Commission, he stated:

"What the City said when she went into the markets to invite capitalists to take the ten millions of bonds, was about this: We desire to make a loan of ten millions. We have provided a Board of Trustees, appointed by a court, irremovable except for cause, and their successors to be appointed in the same way. The money that you lend will be placed in the hands of these Trustees, to be expended by them for this purpose, and until you are repaid you will hold the road and its net income, and also have the pledge of faith of the City, and a tax to be annually levied, sufficient with this net income, to pay the interest and provide a sinking fund for the ultimate payment of your money. Without these provisions - (the project being novel,) the idea of the City building and owning a road, being new - I do not believe the bonds could have been sold."¹¹⁴ (Emphasis added.)

In his speech on April 18, 1877, Ferguson stated much the same thing:

"The Act said to the capitalists: 'When you loan your money to the City of Cincinnati for the building of this road, it is to be devoted to that one object, and cannot be diverted. It is a trust fund to build the Southern Railroad, and not connected with the general municipal fund.' In other words, Cincinnati went to the capitalists of the world and said: 'We have constituted a Board of Trustees. Primarily, they are your Trustees, because you will lend them your money to build the road; they are immovable except for proper cause, and for the money you lend them they will pay you not to exceed 7.3 per cent, interest.' Primarily this road belongs to the trust fund and to the bondholders, and the solemn Acts of the State of Ohio, of Kentucky and of Tennessee created a bond between bondholder and yourselves which has been sanctioned by the judicial determination of the courts of all three states, and it will be sustained by the Supreme Court of the United States if ever subject to the investigation of that tribunal. This fund is secured, and so are you secured. This is the way the problem has thus far been solved."¹¹⁵

It was into the control of the men appointed in this manner, that was placed "the greatest trust ever before committed to any board in the state of Ohio, involving the disbursement of many millions of public money!"¹¹⁶

IX. BUILDING THE ROAD

Before actual construction of the railroad could begin, a route had to be surveyed and selected. The Board of Trustees of the Cincinnati Southern Railway appointed Mr. W. A. Gunn as their chief engineer in charge of surveys. Several years earlier, it had been Gunn who did the surveying of the route considered by General

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Burnside as a military route during the Civil War. Gunn surveyed several alternate routes and presented his findings in March of 1873 to the board of Trustees.

"On April 30, 1873, the route was definitely located on the military survey, - from the Kentucky-Tennessee state line eight miles north to a point in central Kentucky about one mile west of South Danville, - and provisionally continued down Emory River to White's Junction, along Walden's Ridge to Boyce, from where Chattanooga, five miles distant, could be reached over the tracks of the Western and Atlantic Railroad."118

Just as work on the road was about to begin, the financial crash of September, 1873 occurred. Hollander, in his oft-quoted study on the Cincinnati Southern Railway, described the economic situation thusly:

"The financial crash of September, 1873, and the prostration which succeeded it, made practically impossible the completion and disposition of so immense a work by a single contract. Large numbers of railroad capitalists were ruined, and confidence in railroad construction so shaken, as to necessitate the abandonment in turn of the 'completing and leasing' project, and return to the original plan of detailed construction as the only possible method of procedure. In the general despondency which followed the crisis, the proposition of so continuing met with little favor. The trustees were publicly advised to abandon the entire work, and strong private influences were brought to bear upon the author of the plan to induce him to drop it."119

The Trustees, however, were determined to push forward. It was decided to begin with the construction of what would be the longest tunnel on the line, a three fourths of a mile long passageway that was to be bored through King's Mountain. So determined were the Trustees that even though no public funds were available

for the purchase of the entrances of the tunnel, four of the trustees secured \$5,000 on their personal credit, and on December 12, 1873, the first contract for excavation was awarded.¹²⁰

For awhile, construction moved rapidly along. During February, March and April of 1874, thirty contracts were awarded for the grading, tunneling and bridging of some 150 sections.¹²¹

It rapidly became apparent that the original \$10 million bond issue would be insufficient to fund complete construction of the railroad. It was necessary for the Trustees to secure another \$6 million authorization from the legislature of the state of Ohio and still later to go back for a \$2 million additional bond issue from the General Assembly. While the additional financing was not always easy to come by,¹²² it did enable construction on the railroad to proceed and on December 10, 1879, just north of Robbins, Tennessee, workmen spiked the last rail in place near the center of tunnel No. 15.¹²³

Cincinnati Southern has twenty-seven tunnels and 105 bridges including large spans over the Ohio, Kentucky, Cumberland, New and Tennessee Rivers.¹²⁴ The High Bridge over the Kentucky River was the first cantilever bridge on the American continent.¹²⁵ The Ohio River Bridge at Cincinnati, with its 515-foot channel span, was the longest truss span in the world.¹²⁶ The spring of 1880 saw great rejoicing in Cincinnati over the completion of the road. Trainloads of southern dignitaries were brought to Cincinnati, including the mayors of Chattanooga, Atlanta, and Montgomery, and the governor

of Tennessee. The hoopla culminated in a "grand banquet" on March 18, 1880. It was described as follows:

"The largest banquet ever spread in the United States, up to that date, was given by the citizens of Cincinnati at the Music Hall in commemoration of that event. Not less than 1676 southern men, the leading merchants, manufacturers, politicians, governors and other invited guests sat down to this magnificent feast. The balconies were occupied by the ladies and their escorts."¹²⁷

The menu for the banquet is preserved in the records of the Cincinnati Historical Society, as is a large poster print depicting the event. One source describes the meal as follows:

"Forty banquet tables groaned with food. Silverware, china and crystal gleamed along a quarter mile of table tops. Hundreds of waiters circulated among the guests serving green turtle soup, roast sirloin, wild mallard duck, haunches of venison and a variety of other game. There were salads, jellies, sweets, and cake - and a hundred gallons of ice cream."¹²⁸

Construction of the line really did not stop with its opening. Over the years there have been numerous improvements and additions to the line. When the road was initially built it had a five-foot track gauge, that was a gauge used throughout the South. Eventually, however, it became necessary to standardize the gauge. And after securing the necessary legislative authorization from the states of Kentucky¹²⁹ and Tennessee,¹³⁰ the Trustees determined to go forward with the gauge change. On Sunday, May 30, 1886, all trains were taken off the line and the entire 338-mile route was re-gauged to four feet, eight and one half inches, in one day. At the same time mechanical crews changed the wheel sets on the rolling stock. Thirteen hours after the work began, having

incurred expenses of \$54,403.99,¹³¹ the railroad was again ready for operation, now at a gauge that was standard throughout the South and North.

From time to time, other improvements and modifications have been necessary. Terminal facilities have been built and rebuilt.¹³² The Cincinnati Southern Railway Trustees even had a role to play in the construction of the Cincinnati Union Terminal.¹³³

In the early 1920's, funded by a total bond authorization of \$3.5 million, the Ohio River bridge was rebuilt so that there was both a double track system going across the river and a walkway from Cincinnati to Ludlow, Kentucky.¹³⁴ On January 20, 1920, while the road was under the control of the U. S. government, as were all railroads during World War I, a new bridge was opened over the Tennessee River, after the old bridge had been condemned.¹³⁵ In 1911 the High Bridge over the Kentucky River was rebuilt by the lessee company. The new structure was built thirty-one feet above the level of the old and constructed in such a way that traffic was not stopped for a single day. Spanning 1,230 feet, the top rail of the High Bridge is more than 308 feet above the low water mark of the Kentucky River.¹³⁶

Over the years, the Cincinnati, New Orleans & Texas Pacific Co., lessee of the railroad, has double-tracked a substantial portion of the road. Additionally, they have constructed hundreds of miles of sidings, switches, and spur tracks.¹³⁷

What were undoubtedly the most extensive improvements of the line were undertaken at a much later date. In order to compete with other railroads, it became necessary for the line to be extensively improved. Funded by a bond authorization of some \$35 million,¹³⁸ the CNO&TP and its parent company, the Southern Railroad Company, undertook what was described as "one of the most ambitious railroad construction projects in this country in half a century."¹³⁹

Popularly called the rat hole division because of its numerous narrow tunnels,¹⁴⁰ the Cincinnati Southern Railway could not accommodate the huge freight cars and high wide loads then being carried on more modern lines.¹⁴¹

Construction upon the six improvement projects funded under the \$35 million bond issue commenced in November of 1961. The work enlarged or totally by-passed all of the tunnels remaining on the line. Additionally, it straightened bad curves and reduced the grade in difficult sections. The Southern Railway System is convinced that today it has a line with "elbow room for the future," and "room for the biggest cars and loads Southern can foresee."¹⁴²

X. THE RAILWAY UNDER LEASE

Section 9 of the 1869 Ohio enabling legislation authorized the Trustees of the Cincinnati Southern Railway to provide that as portions of the railway were completed they could be leased to an

operating railroad company or companies.¹⁴³ There was a good deal of concern over how leasing of the railway or portions of it would be accomplished, and as a result there was a whole series of separate legislative acts enacted before any lease was ever entered into. On April 18, 1873, the General Assembly passed an act¹⁴⁴ confirming the right of the Trustees to lease the railroad and specifying some of the procedural safeguards that must be followed in entering into such a lease. On February 24, 1876, the General Assembly enacted a further law¹⁴⁵ dealing with the lease of the railroad by the Trustees. That act required that "before leasing said road the trustees shall advertise for six months in the leading newspapers of the United States for proposals for leasing said road." And finally, on April 24, 1877, an act¹⁴⁶ was adopted repealing procedures for lease specified in the 1876 act and laying out new procedures for such a lease. This act included the requirement that the Trustees shall "advertise once a week for eight weeks, in at least two newspapers published in the general circulation in each of the cities of Boston, New York, Philadelphia, Baltimore and Cincinnati."

On July 3, 1877, when the first portion of the railroad had been completed, from Ludlow to Somerset, Kentucky, the Trustees granted a determinable license to the Cincinnati Southern Railway Co.¹⁴⁷ On December 8, 1877, that license was extended as far as the Ohio River Bridge.¹⁴⁸ Rufus King was the original president of the Cincinnati Southern Railway Co., owned by a group of Cincinnati

investors.¹⁴⁹ They organized under the terms of the Common Carriers Act, drafted by Ferguson, and adopted by the legislature on April 12, 1877.¹⁵⁰ The investors apparently believed that they would be able to lease the entire railroad when it was completed. However, the Trustees of the railroad refused to go along with that, and as a result there was a great deal of dissatisfaction among both the Trustees and the Cincinnati Southern Railway Co.¹⁵¹ King resigned as president and was replaced by Mr. W. H. Clement.¹⁵² Although there was an effort to resolve dissatisfaction on both sides, it did not succeed, and on September 9, 1878, the Trustees notified the Cincinnati Southern Railway Co. of their intentions to terminate the license.¹⁵³

On May 21, 1879, a new license to operate the completed portion of the railroad was granted to the Cincinnati Railroad Co.¹⁵⁴ That license was to remain in effect for a little over two years.

Action had continued in the state legislature even during the operation of portions of the road under a determinable license. On April 18, 1878, the legislature enacted a law¹⁵⁵ specifying that any lease of the railroad must be approved by the Trustees of the Sinking Fund, the Sinking Fund being an agency created to oversee the repayment of the entire bonded debt of the City of Cincinnati. Three years later, on March 18, 1881, still another law¹⁵⁶ was enacted authorizing the Trustees of the Cincinnati Southern Railway to lease or sell the railroad. The law required that the term of the lease be not less than twenty-five years.

With the passage of the first passenger train over the full 336 miles of the track from Chattanooga to Cincinnati, on March 8, 1880,¹⁵⁷ the Trustees of the Cincinnati Southern Railway were ready to provide for a longer lease of the line. Operating under the act of 1881, the Trustees sought bids for the lease, and on September 3, 1871, opened ten bids for lease.¹⁵⁸ An examination of the bids determined that Fred Wolffe & Associates had presented the best bid, and the Trustees determined to come to terms with Wolffe's group.¹⁵⁹ Wolffe represented the British (Erlanger) interests that also controlled the Alabama and Great Southern Railway.¹⁶⁰ On September 7, 1881, Wolffe's group incorporated as the Cincinnati, New Orleans & Texas Pacific Railway, and notified the Trustees that the rights won in the bid had been assigned to the CNO&TP. On October 11, the Board of Trustees of the Cincinnati Southern Railway signed a twenty-five year lease with the CNO&TP.¹⁶¹

The lease had the following general terms:

"The line from Cincinnati to Chattanooga at the following variable rental:

"First period, five years until 1886 \$ 800,000 per annum.

"Second period, five years until 1891 900,000 per annum.

"Third period, five years until 1896 1,000,000 per annum.

"Fourth period, five years until 1901 1,090,000 per annum.

"Fifth period, five years until 1906 1,250,000 per annum.

"The lessee covenanted, among other things, to pay the taxes on the property; to purchase the rolling stock, etc., acquired by the Trustees; to defend suits against the Trustees on claims arising out of the operation of the

property; to pay a sufficient sum to keep up the organization of the Trustees; to maintain its principal office at Cincinnati; to assume certain contracts of the lessors; to develop the traffic of the line, and not to discriminate against the city of Cincinnati."162

The owners of the Alabama & Great Southern Railway Co. owned rail lines connecting Chattanooga with New Orleans. Thus, with the CNO&TP controlling the Cincinnati Southern Railway, they had a direct route from Cincinnati to New Orleans which became popularly called the "Queen and Crescent route."¹⁶³

In 1890, the East Tennessee, Virginia & Georgia and R. & D. Companies acquired control of the Alabama & Great Southern Railway Co. Along with that, they acquired the control of the Cincinnati, New Orleans & Texas Pacific line.¹⁶⁴ By 1892, the East Tennessee, Virginia & Georgia Railroad was in the hands of a receiver. Shortly thereafter, partly as a result of the receivership of the East Tennessee line and partly as a result of a fraudulent over-issue of stock by an officer of the CNO&TP, the CNO&TP found itself under a receiver. The former president of the CNO&TP, Samuel M. Ferguson, served as receiver under the federal District Court, from March 18, 1893 until October of 1899.¹⁶⁵

While the road was still under the receiver, a furious battle for control of the CNO&TP took place. This battle was finally settled just short of a court-ordered sale. Settlement involved the creation of a new corporation, the Southwestern Construction Co., that was to be jointly owned in equal interests by the Cincinnati,

Hamilton and Dayton Railroad (CH&D), and the Southern Railway System.¹⁶⁶

1896 saw an attempt by representatives of the Southwestern Construction Co. to purchase outright from the City of Cincinnati the Cincinnati Southern Railway. The attempt to purchase failed by a mere 338 votes when it was put to a vote of the citizens of the City of Cincinnati.¹⁶⁷

Once the attempt to purchase failed, there began discussion of an extension of the existing lease. On March 8, 1889, the Ohio General Assembly had passed a law¹⁶⁸ to permit the extension of the lease of the railroad. However, the lessee company declined to consider an extension of the lease upon the terms of the act. No action was ever taken under this act.¹⁶⁹ Instead, on April 2, 1898, another act¹⁷⁰ authorizing the extension of the lease was passed and its companion legislation permitting an extension of the time for payment of the outstanding bonds was passed two days later.

Under these provisions a modified and extended lease was entered into on June 7, 1902, following approval of the extension by the voters of the City of Cincinnati.¹⁷¹ The action extended the lease for a period of sixty years from the date of the expiration of the original lease, until October 12, 1966.

The lease extension described the rental terms in the following way:

"During the first period of twenty years of the said extended term hereby granted the annual rental of \$1,050,000; during the second period of twenty years of

said extended term hereby granted the annual rental of \$1,100,000; during the third period of twenty years of the said extended term hereby granted annual rental of \$1,200,000."172

The lease agreement was executed by the five Trustees of the Cincinnati Southern Railway, Charles P. Taft, president and on behalf of the Trustees of the Sinking Fund of the City of Cincinnati, and Samuel Spencer, president and on behalf of the Cincinnati, New Orleans & Texas Pacific Railway Co.¹⁷³

There were further adjustments to the lease in 1912, 1915, 1921, and 1923, each for the purpose of adjusting the rental to take account of additional obligations incurred for improvement on the railroad.¹⁷⁴

On August 1, 1928, the second modification and extension agreement became effective. This agreement provided for a ninety-nine year lease extending from January 1, 1928 to December 31, 2026. The second modification and extension was necessary because the lessee desired to obtain an assurance of longer tenure in exchange for its expenditure of \$13,200,000 to double track a distance of some seventy-seven miles of the railroad.¹⁷⁵

The lease also provided for more favorable rental terms to the City than were called for under the existing lease:

"For the period January 1, 1928 to December 31, 1946, a fixed annual rental of \$1,250,000 plus the expense of the trustees' organization, (\$12,000); interest and sinking fund payments on the City bonds heretofore established for terminal improvements and betterments, as provided in the then lease and as agreed to from time to time, and a contingent rental equivalent to two per cent of the net profits derived by the Lessee from the operation of the leased property during such period;

"The annual rental for the period January 1, 1947 to December 31, 1966 is fixed at \$1,350,000, plus the expense of the trustees' organization, plus the interest and sinking fund payment on the City bonds, as long as any such bonds remain outstanding, that is until 1965, and a contingent annual rental at the rate of three per cent of net profits;

"For the 20-year period from January 1, 1967 to December 31, 1986, a fixed annual rental of \$1,450,000 plus the expense of trustees' organization, plus a contingent annual rental at a rate of four per cent;

"For the period from January 1, 1987 to December 31, 2006, a fixed annual rental of \$1,600,000 plus the expense of trustees' organization and a contingent annual rental with the rate increased to five per cent;

"For the period January 1, 2007 to December 31, 2026, a fixed annual rental of \$1,700,000 plus the expense of the trustee's organization and a contingent annual rental at the rate of six per cent."176

The lease served well for a time, but by 1960 it had become apparent that new radical improvements were necessary if the Cincinnati Southern Railway was to continue to be a major income-producing asset of both the City of Cincinnati and the Southern Railway System. The twisting, turning tracks and the narrow tunnels had been fine for an earlier day, but they did not meet the needs of modern rail transportation. Under the existing restrictions, it was impossible for the Cincinnati Southern to transport either tri-level automobile carriers, flatcars carrying truck trailers, or cars carrying automobile frames in a vertical position. CNO&TP management was of the opinion that:

"These categories of railroad business are so important to the Cincinnati Southern and the CNO&TP that the improvements to the railroad to accommodate this type of business are essential to the continued existence of

the Cincinnati Southern Railway as a profitable railroad property. The CNO&TP management is also of the opinion that the only reasonable method of financing these improvements is through the issuance of bonds by the City of Cincinnati, the principal of and interest on which would be paid by the CNO&TP by increasing the present lease rentals."¹⁷⁷

CNO&TP was urging a bond issue of \$35 million to finance the necessary improvements in the loan. The City of Cincinnati, hesitant about the necessity and size of the bond issue, authorized the Wall Street consulting engineering firm of Coverdale & Colpitts to undertake a study to determine the need for these improvements and the likely cost. That study concluded that the improvements were necessary and that \$35 million was not an unreasonable cost.¹⁷⁸ Council was convinced, and on November 15, 1961, they agreed to issue the bonds.¹⁷⁹

The Trustees of the Cincinnati Southern Railway entered into a supplemental agreement with the Cincinnati, New Orleans & Texas Pacific Railway Co. on November 16, 1961. The supplemental agreement required the CNO&TP to "pay the interest on and principal of the bonds and notes in anticipation thereof, issued by the City of Cincinnati for improvements as the same become due and payable."¹⁸⁰ The supplemental agreement also required the CNO&TP to pay to the City of Cincinnati an additional contingent rental each year that was to be based upon the income of the railroad.

In the end, the improvements cost only \$29.5 million, but they took eighteen months to construct. The improvements included the replacement of the old King's Mountain tunnel with a deep cut some

5,700 feet long with walls in some places as high as a fourteen-story building. The curves were eliminated, tunnels by-passed, and the road over the New River was relocated onto one of the highest railroad bridges in America, 307-1/2 feet from the average stream bed to the top of the rail.¹⁸¹

The road continues today to be operated under the lease of 1881 and the modifications and extensions of it. The next likely modification of the lease may involve the development of some thirteen acres owned by the Cincinnati Southern Railway Trustees immediately to the west of the Charles P. Taft Riverfront Stadium in Cincinnati. Over the last several years, there has been a series of informal discussions between representatives of the Southern Railway Company, the Trustees and the City of Cincinnati in regard to the possibility of Southern's entering into a separate long-term ground rental agreement for that property, in order to develop it commercially. Possible developments include a hotel and restaurant complex that would be tied into the recreational tourist use of the existing riverfront development.¹⁸²

XI. BOND FINANCING OF THE RAILROAD

E. A. Ferguson, the father of the Cincinnati Southern Railway, not only conceived a method of circumventing the Ohio constitutional prohibition against municipal subscription to private

corporations, but also settled upon a method of municipal financing for the construction of the railway - municipal bonds. The bonds would commit the full faith and credit of the City of Cincinnati to guaranteeing their repayment.

The 1869 legislation authorizing the construction of railroads by cities with a population of more than 150,000 authorized the expenditure of \$10 million worth of bonds in the pursuit of such construction.¹⁸³ Ferguson, author of the legislation, disclaims responsibility for the amount of the bond authorization contained in the act.

"Of course when the bill was presented a blank was left as to the amount to be appropriated. The blank was filled with ten millions, not upon the idea that ten millions would build the road, but that it was all that should then be provided, for two reasons: First, it was not good policy to so fix the sum that the people of Kentucky and Tennessee, who would be largely benefited, would feel that they should not contribute; for the Bill, as drawn and passed, had a provision for donations. Secondly, it would not do to appal the public with the amount of money that would probably be necessary to carry out so large a work as this must necessarily be. These were considerations which influenced the friends of the enterprise in filling the blank with \$10,000,000. I myself had not given thought at that time as to how much would be required. I subsequently thought it would probably take about fifteen millions of dollars."¹⁸⁴

R. M. Bishop, another of the original Trustees, had a different view:

"Years later, Governor R. M. Bishop, who was in Columbus at this time, testified before the investigating commission that he and Mr. Ferguson had a talk with Mr. Biggs, member of the senate from Hamilton County, and in charge of the bill, during which the question came up as to the amount of bonds which should be authorized. 'We will commence with ten millions,' said Mr. Ferguson; and that was the amount named in the bill."¹⁸⁵

There is no evidence that Ferguson or any of the other original Trustees believed that \$10 million would construct the entire 338-mile road from Cincinnati to Chattanooga. Evidently, however, some citizens of Cincinnati, and the Cincinnati Enquirer, believed that \$10 million would more than cover the cost of the road. Boyden, writing in his book, The Beginnings of the Cincinnati Southern Railway, states:

"About the only note of warning was sounded by 'E. K. W.' in one of the papers. He said 'No reliable estimate' of the cost of the road had been made, and added, 'It will be too late to draw back from this business after we have once put it into the enormous sum of ten million.'"

"The Enquirer referring to this suggestion, said a few days later:

"'The idea of spending ten millions of dollars even for the long desired Southern Railroad will not, we believe, and certainly should not, be entertained for a moment. There is no doubt that a small fraction of the sum named in the Ferguson bill will be sufficient for the purpose.'"186

In any event there was great community support for the \$10 million issue authorized in the Ferguson Act. As the act required, the question of permitting the \$10 million worth of bonds to be sold was put to a vote of the people. Historians unanimously report a festive air surrounding the election held on June 26 of 1869.

"The day was made a holiday. Nine bands of music paraded the street. The fire bells rang at six in the morning, at noon, at three in the afternoon. Various wards organized. A full vote was urged."187

The support the railroad and the bond issue that would build it received among the electors of Cincinnati would make any politician

envious. 15,423 electors voted in favor of the railroad, and a mere
¹⁸⁸
 1,500 opposed it.

The authorization of the bonds was only the first step. Next, they had to be sold.

Before the attempt could be made to sell the bonds, the Trustees had to direct their attention to securing the necessary legislation in Tennessee and Kentucky. Additionally, authorization had to be secured from Congress for a bridge over the Ohio River, and extensive surveying for a route for the railway had to be completed. As a result, four years elapsed from the time of the passage of the Ferguson Act until the first spade of earth was turned in actual construction. The delay was costly.

"The results of this unexpected delay in commencing operations were most unfortunate. The negotiation of the construction bonds was delayed from a period favorable to financial operations to one highly unfavorable."¹⁸⁹

Nevertheless, the Trustees made an attempt:

"In the early summer of 1872, [the trustees] offered for sale the first lot of Southern Railway bonds. The issue amounted to only \$150,000. They bore seven percent interest and were taken by one of the Cincinnati banks."¹⁹⁰

Mr. Hooper, another of the original Trustees, spent a half a year, late fall of 1872 until May of 1873, in Europe. While there, he made efforts to dispose of some of the bonds among the capitalists of Europe. Records reveal extensive correspondence between Hooper and the Trustees remaining in Cincinnati. The results were
¹⁹¹
 nil. Hooper was unable to sell any bonds.

Efforts next focused on disposing of bonds in the American market, particularly among New York capitalists. The panic of 1873, combined with the unpopular restriction requiring the sale of the bonds at par value, and continuing expressions of doubt as to the validity of the Ferguson Act, despite the decision of Ohio courts, continued to prevent the sale of the bonds. Not until May of 1874 were another \$1 million worth of bonds marketed in New York by the American Exchange National Bank of New York.¹⁹² Finally, in May of 1875, the American Exchange Bank purchased the remainder of the \$10 million issue.¹⁹³

It readily became apparent that the \$10 million issue was insufficient to construct the entire line. In 1876, the Trustees returned to the legislature in order to obtain further bonding authorizations.¹⁹⁴ The Cincinnati newspapers hotly disputed the wisdom of any further funding. The Cincinnati Enquirer did something of a flip-flop in its positions of seven years earlier. "We have started to build the road, and have expended ten million dollars. We must finish the job."¹⁹⁵ The Cincinnati Commercial, while criticizing some of the policies of the Trustees, sided with the Enquirer. "Of course the people will vote the six millions."¹⁹⁶

The Times disagreed. It expressed fear that the City of Cincinnati would run up "a debt of twenty, or more probably twenty-five, millions."¹⁹⁷ The Volksblatt was more vociferous:

"Following a will of the wisp, we have plunged deeper into the wilderness, and are now forced to hear, instead of the hoped for advantages and profitable outcome, a

melancholy announcement that further sacrifices, a further expenditure of money, a heavier load of interest, and higher taxes have become necessary."¹⁹⁸

Proponents of the road had hoped to avoid a popular vote on the issuance of further bonds. Strong pressure, however, resulted in an amendment to the bill to "provide for the submission of the question of allowing issue of the additional bonds to a vote of the people."¹⁹⁹ The controversy, however, did little more than reduce the margin of approval for the bonds.

"This was the result: for the six millions 21,433; against, 9,323; total vote 33,756.

"As compared with the vote of June 26, 1869, the total vote went up from 16,935, being an increase of 13,811. The vote for the road had increased from 15,435, being an increase of 5,998; the vote against the road had increased from 1,500, being an increase of 7,823. The vote total was approximately a full one. A month later, at a regular April election, the total vote was 35,353."²⁰⁰

Popular belief was that this funding would provide for the completion of the road. For a moment it looked like it would. The sale of the bonds went quickly. Bonds worth \$3,200,000 were sold requiring payment in gold at a six percent interest. The other \$29,800,000 bore a 7.3 percent interest.²⁰¹ Unfortunately, expenditure of the money proceeded at as rapid a pace as the sale of the bonds.

By 1878, the Trustees were before the legislature again. They only wanted \$2 million this time, and they were sure it would complete the road. But like the boy who cried wolf, it was tough to convince the legislature, and even harder to convince the people of Cincinnati.

The Volksblatt argued that: "The cup is full. The people of Cincinnati will not put up with any further extortion of this sort."²⁰² The Enquirer, inspired by its opposition, answered:

"The old party of soreheads and chronic growlers are working against the two million bill. They want all steps in line of progress defeated.... The Southern Railroad is a necessity to the city, and all men who have the welfare of Cincinnati at heart will vote to give the two million asked for."²⁰³

On April 18, the legislature did enact a law authorizing an additional \$2 million worth of bonds, providing that it would be approved by the voters of Cincinnati.²⁰⁴ That election was held on May 3, and resulted in the first and only rejection of the Cincinnati Southern Railway by the voters of Cincinnati. Only 11,179 supported the \$2 million issue, while 11,349 opposed it.²⁰⁵

Only twelve days later, on May 15, the Trustees of the Railway succeeded in securing a second \$2 million loan authorization from the General Assembly.²⁰⁶ Under the act:

"The Trustees were directed, upon the passage of the measure, to invite proposals for the completion of the railway and to conditionally accept the lowest and best bid, provided that it did not in the aggregate exceed the amount of bonds authorized by the act. After the bid so accepted had been duly announced, the issue of the bonds should be submitted to the vote of qualified electors of Cincinnati."²⁰⁷

On August 14, the election mandated under the act was held. Returning to their old habits, the voters once again supported the Southern Railway. A total of 16,244 voted in favor of the bond issue, and 10,424 opposed it.²⁰⁸

One million dollars worth of the issue was quickly sold at seven percent interest, and the remaining \$1 million went at six percent in just a short while later.²⁰⁹

These three bond issues: \$10 million, \$6 million, and \$2 million, totalling \$18 million, completed the necessary funding for the construction of the main line. These issues, as well as those which followed, were not revenue bonds but general obligation bonds against which taxes were pledged.

"They [the bonds] were the obligations of the city, the interest and sinking fund being secured by a levy on the grand duplicate of the city. The original issue was also secured by a mortgage of the net income of the railway.²¹⁰

Almost \$15 million worth of the railway construction bonds were subsequently either refunded at a 3.5 or four percent interest rate or exchanged for bonds bearing the reduced interest. These later issues extended the payable date on some railway construction bonds to as late as 1960.²¹¹

By 1880, the Trustees were back before the General Assembly. On April 9 of that year, the state legislature authorized \$300,000 worth of bonds to be used for the purchase of terminal facilities.²¹² Issued in seven installments over a six-year period, \$16,000 worth of the bonds bore four percent interest, while \$284,000 worth were issued at 4.1 percent interest.²¹³

On April 23, 1898, the Ohio legislature passed an act authorizing the extension of the existing lease between the Trustees and the CNO&TP. That same act also authorized the issuance of \$2,500,000

worth of bonds for the construction of terminal facilities and permanent betterments.²¹⁴ The bonds were to be issued \$500,000 at a time, once a year. The lessee was required to agree to pay an additional rent equal to the annual interest on the bonds at one percent per annum for a sinking fund for the final redemption of the bonds.

"The lessee so agreed and the bonds were issued at 3.5% and with the proceeds the Northwestern Terminals at Western Avenue and Bank Street, and the Central Terminals on Front Street from Vine to Plum, occupying six blocks of land, were provided and the viaduct to connect the later with the main line at Eighth Street and McLean Avenue constructed."²¹⁵

The \$2,500,000 thus provided proved insufficient to construct the necessary terminals. Thus, on May 17, 1911, it was necessary for the General Assembly of Ohio to pass yet another act, this time authorizing \$500,000 worth of bonds for the construction of terminal facilities.²¹⁶ These bonds, sold over a period of six years, brought varying rates of interest. The first \$200,000 worth of the bonds bore four percent interest, \$100,000 went at 4.25 percent interest, \$100,000 at 4.5 percent, and the last \$100,000 at five percent interest.²¹⁷

It was now almost forty years since the Cincinnati Southern Railway Ohio River bridge opened for business. To meet the increasing demands railroad traffic was placing on the bridge, the CNO&TP determined that it would be necessary to rebuild the Ohio River bridge.²¹⁸ In order to do that, additional bonding became necessary. On April 6, 1915, the Ohio legislature authorized \$2,500,000

worth of bonds to be used in the reconstruction of the bridge.²¹⁹
 The first \$250,000 worth of the issue carried 4.25 percent interest,
 and the remaining \$2,250,000 went at five percent interest.²²⁰ As
 in the past, initial estimates were inaccurate. Before the
 rebuilding of the Ohio River bridge could be completed, it was
 necessary to return to the legislature again. On January 15, 1920,
 the legislature authorized yet an additional \$1,000,000 to complete
 the reconstruction of the Ohio River bridge.²²¹ These bonds sold
 at a five percent interest rate.²²²

On April 11, 1923, the General Assembly of Ohio authorized yet
 another \$2,000,000 worth of bonds to be used for the construction
 and completion of terminal facilities and permanent betterments for
 the line of railway of the Cincinnati Southern Railway.²²³ Under
 this authorization, \$400,000 worth of bonds were issued at 4.5
 percent interest.²²⁴

Thus it was that in the first forty-five years of the life of
 the Cincinnati Southern Railway, \$23,200,000 worth of bonds for the
 railroad and facilities adjacent to it were authorized by the state
 legislature, and issued by the board of Trustees of the Cincinnati
 Southern Railway through the offices of the City of Cincinnati.

Other modernization and improvements in the road were neces-
 sary, but they were accomplished by the lessee without additional
 bonding. The massive reconstruction of the early 1960's was a
 different story.

In early 1961, the CNO&TP approached the Trustees of the Cincinnati Southern Railway regarding a major reconstruction of the road that was necessary. There were alternative methods of funding the necessary construction. The cost estimate of the project, \$35 million, was far in excess of the initial cost of the construction of the road itself.

"There are two methods by which the city of Cincinnati could finance the proposed improvements to the Cincinnati Southern Railway without affecting its overall bond-issuing authority. The first method would be through the issuance of non-debt revenue bonds under Section 3 of Article XVIII of the Constitution. The second method would be the issuance of general obligation revenue bonds which would be outside debt limitations to the extent the principal thereof and the interest thereon is paid by the CNO&TP. The advantage of the first type of bond is that it would be a limited obligation for which the full faith and credit, including the taxing power, of the city would not be pledged. The advantage of the second type of bond is that, since the taxing power of the city is pledged, the bonds could be sold at the lowest possible interest rate."²²⁵

Ultimately, the City settled on general obligation bonds to fund the modernization of the railroad. On November 30, 1962, \$12,250,000 worth of bonds were sold bearing three percent interest.²²⁶ On November 1, 1963, \$17,250,000 worth of bonds were sold bearing 3.25 percent interest.²²⁷ The final cost of the project was significantly less than \$35,000,000. Of the \$29,500,000 worth of bonds issued, \$1,168,142.91 proved to be in excess of the amount needed for construction. That money has been kept in a Cincinnati Southern Railway reserve account, gaining interest, and will be used "strictly for redemption purposes to call Cincinnati

Southern Railway improvement bonds after the first call of November 1, 1977." ²²⁸ Under the modification of the lease entered into in 1961, the CNO&TP assumed the responsibility for redeeming and paying the interest on the bonds. ²²⁹ This was in addition to their base rent and contingent rental payments.

XII. INCOME FROM THE ROAD

While it was not always easy, Cincinnati did always manage to raise whatever money was necessary to construct the Cincinnati Southern Railroad.

"Although there were times when Cincinnati had to turn out its street lamps on moonlit nights in order to meet interest payments, a reward was forthcoming, not only in traffic supremacy, but also in returns on the actual investment." ²³⁰

A total of \$32,700,000 worth of bonds has been sold since the beginning of construction of the road. (This figure excludes interest that has been paid on those bonds.) In exchange for that dollar commitment, Cincinnati's businesses have benefitted from the necessary rail connection to the South, and the City's coffers have received a handsome return on their investment. The City has received more than \$127,000,000 ²³¹ worth of direct income through either rent or contingent rent from the CNO&TP, and the two earlier operators of the railroad. This figure excludes more than \$54 million paid by the CNO&TP to redeem and pay the interest on the Southern Railway improvement bonds and the terminal and permanent

232
betterment bonds. This represents a total income in excess of \$182 million.

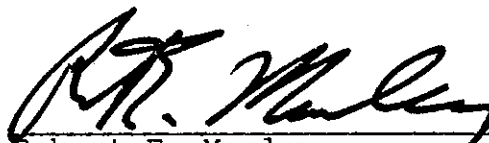
Income of the Cincinnati Southern Railway, over and above the cost of redeeming and servicing bonds, is so great that the City has been able to use it for other necessary public works projects. Income from the Cincinnati Southern is now tied to redeeming and servicing the bonds that have constructed Cincinnati's expressway system. Since 1953, more than \$29 million worth of income from the Cincinnati Southern Railway has gone into the construction of Cincinnati's expressway system. Only three times, in 1962, 1963 and 1964, was the income from the railroad insufficient to meet the needs of the expressway bonds.²³³ In those years, the \$3,725,500 short-fall in meeting the needs of the expressway bonds had to be made up, ultimately, by increasing the levy on the property owners of Cincinnati.

In the single year of 1976, the Cincinnati Southern Railway produced an income to the City of Cincinnati of \$4,073,385.34²³⁴ On an initial investment of \$18,000,000, this represents a rate of return of more than twenty-two percent. Even considering the total investment in terminals, bridges, and improvements of \$54,700,000, more than half of which is the 1960's line improvement, really CNO&TP's expense, the rate of return is still a healthy 7.4 percent.

The Cincinnati Southern Railway has proven to be the City's greatest money maker. Its return on investment, dollar for dollar, is unmatched.

"Cincinnati's citizens may well be glad that voters in 1896 rejected the idea of selling the Cincinnati Southern. The railroad that resulted from the city's far-seeing enterprise almost a century ago has already returned its cost several times over in cash rentals. It is and will be the source of a large and steady income for the city."235

With proper management, dedicated to the preservation of the assets of the railway, the Cincinnati Southern Railway will continue to be a valuable Cincinnati property and a monument to the perseverance of the citizens of Cincinnati.



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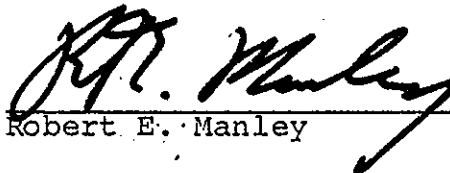
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum of Plaintiff on the History of the Cincinnati Southern Railway is being mailed to all parties entitled to service under Rule 5, Ohio Rules of Civil Procedure, on the 29th day of July, 1977.


Robert E. Manley

FOOTNOTES

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2. J. H. Hollander, The Cincinnati Southern Railway, A Study in Municipal Activity, Johns Hopkins University Studies in Historical and Political Science, Johns Hopkins U. Press (January-February, 1894) at 10.
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4. Charles G. Hall, Ed., The Cincinnati Southern Railway, A History, Cincinnati: McDonald Press (1902) at 25.
5. Coulter, supra note 1 at 18.
6. Hollander, supra note 2 at 6.
7. Joseph Nimmo, Jr., "First Annual Report on the Internal Commerce of the United States, 1878, 79," Cincinnati Daily Gazette (April 18, 1866).
8. Id.
9. Coulter, supra note 1 at 16.
10. Id. at 18.
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12. Id. at 1.
13. Hall, supra note 4 at 29.
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15. H. N. Snyder, "An Appeal from the South," Address to the General Assembly of Kentucky, Frankfort: The Kentucky Yeoman Office (1871) at 1.
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17. Hollander, supra note 2 at 29.

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51. See part I of this memorandum.
52. Coulter, supra note 1 at 36.
53. "Testimony of E. A. Ferguson," supra note 42 at 101-102.
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57. "Testimony of E. A. Ferguson," supra note 42 at 100.
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69. Coulter, supra note 1 at 41.
70. Biggs, supra note 14 at 93.
71. "Testimony of E. A. Ferguson," supra note 42 at 102.
72. "Address of the Hon. John C. Breckenridge," supra note 68 at 5.
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81. 1871-72 Kentucky Acts 23.

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112. Id. at 119.
113. "Testimony of E. A. Ferguson," supra note 42 at 104.
114. Id. at 101.
115. Boyden, supra note 42 at 117.
116. Report of the Investigating Commission, supra note 50 at 49.
117. Hall, supra note 4 at 50.
118. Hollander, supra note 2 at 36.
119. Id. at 36.
120. Id. at 37.
121. Id. at 40.
122. W. T. Porter, The Cincinnati Southern Railway, Items of Interest Concerning the Railway, Trustees of the Cincinnati Southern Railway (September, 1923) at 6-7. See also, Boyden, supra note 42. Boyden gives a detailed description of the difficulties encountered in attempting to secure additional funding.

123. "Program, Inspection Trip by Directors of Southern Railway System Companies and Central of Georgia Railway Company," §4 (October 15-17, 1963), unpaginated, at [13].
124. Hall, supra note 4 at 54.
125. "Program," supra note 123, §4 at [12].
126. Id., §4 at [12].
127. Ferguson, supra note 41 at 125.
128. "Program," supra note 123, §4 at [6].
129. 1885-86 Kentucky Acts.
130. 1885 Tennessee Public Acts 67.
131. Hall, supra note 4 at 55.
132. Porter, supra note 6 at 11-14.
133. The Board of Trustees of the Cincinnati Southern Railway was party to several agreements necessary to the construction of Union Terminal.
134. Porter, supra note 6 at 20-22. See also, W. T. Porter, Statement of Bond Issues for Account of the Cincinnati Southern Railway, Trustees of Cincinnati Southern Railway (May, 1926) at 14-17.
135. Porter, supra note 6 at 18.
136. Id. at 19.
137. Coverdale & Colpitts, Report on Proposed Improvements To Be Made by the Cincinnati, New Orleans & Texas Pacific Railway Company to the Property of the Cincinnati Southern Railway (September 1, 1961) at 6.
138. Cincinnati Ordinance No. 359-1962.
139. "Program," supra note 123, §4 at [16].
140. Mike Iczkowski, "As the Rabbit Chases the Beagle up the Rathole," Trains Magazine (April, 1976) at 22-30.
141. C. A. Harrell, City Manager's Report to City Council (June 14, 1961).

142. "Program," supra note 123, §4 at [22].
143. 66 Ohio Laws 80, §9.
144. 1873 Ohio Laws 139-40.
145. 1876 Ohio Laws 13-14.
146. 1877 Ohio Laws 115.
147. Porter, supra note 46 at xiii.
148. Id. at xiii.
149. Hall, supra note 4 at 56.
150. Id. at 56.
151. John M. Allen, Secretary of CNO&TP, A Brief History of the Cincinnati Southern Railway and the Cincinnati, New Orleans and Texas Pacific Railway Co., paper on file in the office of the Trustees of the Cincinnati Southern Railway (c. 1944) at 7.
152. Hall, supra note 4 at 57.
153. Id. at 57.
154. Porter, supra note 46 at xiii.
155. 1878 Ohio Laws 559.
156. 1881 Ohio Laws 58.
157. "Program," supra note 123, §4 at [6].
158. Hall, supra note 4 at 57.
159. Id. at 57-58.
160. "Program," supra note 123, §4 at [13].
161. Allen, supra note 151 at 8-9.
162. Harrison, supra note 97 at 975.
163. "Program," supra note 123, §4 at [14].
164. Harrison, supra note 97 at 977-78.

165. Hall, supra note 4 at 67-81.
166. Harrison, supra note 97 at 979-980.
167. Id. at 980-981.
168. 1889 Ohio Laws 67.
169. Porter, supra note 46 at 27; see footnote.
170. 1898 Ohio Laws 80.
171. Porter, supra note 46 at xx-xxii and 28-32. See also, Supplement to Legal History of the Lines of Railroad of Southern Railway Company, Washington, D.C. (September 1, 1921) at 24-25.
172. Contract of Modification and Extension of Lease, §6 (June 7, 1902), reprinted in Hall, supra note 4 at 199-208.
173. Id. at 208.
174. Coverdale & Colpitts, supra note 137 at 5.
175. Allen, supra note 151 at 20.
176. Coverdale & Colpitts, supra note 137 at 68.
177. Harrell, supra note 141.
178. Coverdale & Colpitts, supra note 137.
179. Cincinnati Ordinance No. 359-1961.
180. Copy of Supplemental Agreement on file in offices of the Trustees of the Cincinnati Southern Railway.
181. The New CNO&TP Opened Up ... Straightened Out ... With No Limits on Service," Ties, the Southern Railway System Magazine (August, 1963) at 5-16.
182. See Affidavit of Ambrose H. Lindhorst (June 23, 1977), filed with Plaintiff's memorandum in support of preliminary injunction.
183. 1869 Ohio Laws 80, §1, now General Code §15093.
184. "Testimony of E. A. Ferguson," supra note 42 at 100.

185. Boyden, supra note 42 at 8-9.
186. Id. at 9.
187. Hall, supra note 4 at 36.
188. Hollander, supra note 2 at 24.
189. Id. at 35.
190. Hall, supra note 4 at 37-38.
191. Boyden, supra note 42 at 26.
192. Hall, supra note 4 at 39.
193. Biggs, supra note 14 at 96.
194. 1876 Ohio Laws 13, now General Code §15107.
195. Editorial, Enquirer (January 6, 1876), in Boyden, supra note 42 at 45.
196. Editorial, Commercial (January 7, 1876), in Boyden, id. at 45.
197. Editorial, Times (January 15, 1876), in Boyden, id. at 46.
198. Editorial, Volksblatt (January 15, 1876), in Boyden, id. at 46.
199. Hall, supra note 4 at 40.
200. Boyden, supra note 42 at 57.
201. W. T. Porter, Statement of Bond Issues for Account of the Cincinnati Southern Railway, Trustees of the Cincinnati Southern Railway (May, 1926) at 9.
202. Editorial, Volksblatt (February 13, 1878), in Boyden, supra note 42 at 90.
203. Editorial, Enquirer (May 1, 1878), in Boyden, id. at 99.
204. 1878 Ohio Laws 115, now General Code §15110.
205. Hall, supra note 4 at 41-42.
206. 1878 Ohio Laws 559, now General Code §15119.

207. Hollander, supra note 2 at 47.
208. Hall, supra note 4 at 42.
209. Porter, supra note 201 at 9-10.
210. Id. at 3.
211. Id. at 10-12.
212. 1880 Ohio Laws 153, now General Code §15123.
213. Porter, supra note 201 at 13-14.
214. 1898 Ohio Laws 637, now General Code §15137.
215. Porter, supra note 122 at 11-12.
216. 1911 Ohio Laws 111, now General Code §15150-1.
217. Porter, supra note 201 at 15-17.
218. Porter, supra note 122 at 20-22.
219. 1915 Ohio Laws 140, now General Code §15150-6.
220. Porter, supra note 201 at 15-16.
221. 1920 Ohio Laws 80, now General Code §15150-14.
222. Porter, supra note 201 at 16-17.
223. 1923 Ohio Laws 158, now General Code §15150-17.
224. Porter, supra note 201 at 17.
225. Harrell, supra note 141.
226. Cincinnati Ordinance No. 359-1962 (September 26, 1962);
Cincinnati Ordinance No. 410-1962 (November 7, 1962).
227. Cincinnati Ordinance No. 286-1963 (September 5, 1963).
228. 1976 Annual Report, Bond Retirement Fund, Department of
Finance, City of Cincinnati, at 7.
229. Supplemental Agreement between Cincinnati Southern Railway
Trustees and the CNO&TP, signed November 16, 1961, recorded
Hamilton County Recorder's Deed Book 3184, page 527.

230. Biggs, supra note 14 at 101-02.
231. Figures computed from the examination of the annual reports of the Bond Retirement Fund of the City of Cincinnati and the annual reports of its predecessor, the Board of Trustees of the Sinking Fund, for the period of 1878 through 1976. (These materials are on file at Cincinnati City Hall in the Bond Retirement Office.)
232. Id.
233. Id., specifically reports from 1951 to 1976.
234. Id., 1976 Annual Report at 7, 11, 12.
235. Program, supra note 123, §4 at [13].

COURT OF COMMON PLEAS

BUTLER COUNTY, OHIO

TRUSTEES OF THE CINCINNATI
SOUTHERN RAILWAY

Plaintiff

vs.

THE CITY OF CINCINNATI, et al.

Defendants

Case No. CV77-050373

ERRATA OF PLAINTIFF'S
MEMORANDUM ON HISTORY
OF THE CINCINNATI
SOUTHERN RAILWAY

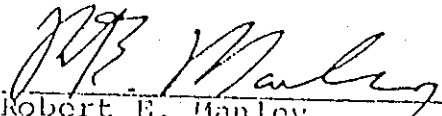
The following typographical errors are contained in the Plaintiff's Memorandum on the History of the Cincinnati Southern Railway, filed with Plaintiff's Second Request for Admissions:

Page 36, first line of last paragraph, "has" should read "had."

Page 50, third line of first paragraph, "338" should read "336."

Page 57, second line of second full paragraph, "\$23,200,000" should read "\$25,200,000."

Page 59, first line of last paragraph, "\$32,700,000" should read "\$54,700,000."


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