

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

JUDGE EUGENE A. LUCCI

CITY OF MENTOR)	
)	
Plaintiff)	
)	
vs.)	CASE NO. 00CV001662
)	
CSX TRANSPORTATION, INC.)	
)	
Defendant)	
-----)	
CITY OF MENTOR)	
)	
Plaintiff)	
)	
vs.)	CASE NO. 00CV001663
)	
NORFOLK SOUTHERN RAILWAY CO.)	
)	
Defendant)	

ORDER SETTING HEARING ON MEASURE OF DAMAGES

Prior to the commencement of the bench trial in this consolidated petition for grade crossing filed by the City of Mentor against CSX Transportation Inc. and Norfolk Southern Railway Company, the parties informed the court that they had reached a stipulation. The stipulation was that this court would first hear the issue of the petition for the grade crossing and that, if the court granted the petition, the court would then schedule and hear the issues on the measure of damages for the appropriation. The parties did not object – in their pleadings or in their conversations with the court – to the court’s jurisdiction to decide the appropriation issues. Under Ohio law, the appropriation issues in a railroad grade-crossing case are categorically different from typical eminent domain issues that are usually litigated in probate court and that provide for the right to a jury trial.¹

¹ *Board of Park Commissioners of Lake Metroparks v. Norfolk and Western Railway Co.* (Lake 1999), 131 Ohio App. 3d 412, 722 N.E.2d 611 (Appropriation issues involving a railroad grade crossing are governed by R.C. §4957.30 and §4957.31, and not by the more general statute giving a Board of Park Commissioners the authority to appropriate property). See, *Cleveland & P.R. Co. v. Martins Ferry* (1915), 92 Ohio St. 157, 110 N.E.642, in which the Supreme Court stated, “no power to appropriate is

The parties stipulated to this bifurcated structure for the hearing because, if the court denied the petition for the grade crossing, the parties did not want to get sidetracked by having to engage one additional expert each (above the 25 experts who testified at the first hearing) and conduct discovery on the wholly-separate issue of the amount of damages for the appropriation. (See paragraphs {6} and {699} of the court’s order, filed on May 28, 2003). It is well-established in Ohio that when a trial court rules on the liability issues in a bifurcated case, the ruling on liability is not a final and appealable order.²

The court entered its order granting the petition for grade crossing on May 28, 2003. In its final paragraph, the court stated that it would set the hearing on the measure of damages for the appropriation after consulting with counsel for the parties and arranging a mutually convenient date, allowing for their preparation.

On June 3, 2003, the court held a telephone conference with all counsel for the parties to set that hearing date. The court set the hearing date for October 1, 2003, and if needed, October 2, 2003. For the first time, the defendant railroads mentioned a jury trial, possibly going to probate court, the court of appeals needing to review the May 28, 2003 decision, and this court’s alleged lack of jurisdiction to decide anything further on this case. The defendant railroads informed the court that they wanted to file an immediate appeal of the court’s order granting the grade crossing petition. The court informed counsel that its order was not a final appealable order because: (1) the parties stipulated to a bifurcated hearing and the second part of that bifurcated hearing had not yet occurred, (2) not all issues pending before this court had been decided, and (3) multiple appeals were extremely wasteful of judicial resources. The court is aware that this case is a special proceeding under R.C. §2505.02, and that the court’s May 28, 2003 order determined substantial rights of the parties. These circumstances make the court’s May 28, 2003 order “final,” but – in the absence of the language specified in Rule 54(B) – they do not make the order “appealable.” One of the main purposes for

conferred unless such appropriation will not unnecessarily interfere with the use of the property to be crossed, and the appropriation proceeding cannot go forward until that question shall have been determined[.]”

² *American Living Centers v. Bon-Ing, Inc.*, No. 93AP-1045 (10th Dist. Ct. App., Franklin, 5-5-1994), 1994 WL 171177; *Rack v. Randolph*, No. C-830947 (1st Dist. Ct. App., Hamilton, 5-29-1985); *Schoenfeld v. Knickerbocker*, No. E-82-47 (6th Dist. Ct. App., Erie, 4-1-1983), 1983 WL 13798.

Civil Rule 54(B) is to give the trial court control over when an appeal may be taken.³ One of the primary factors that a trial court should consider in determining whether an order should be made final and appealable is the prevention of piecemeal appeals that waste judicial resources and disrupt an orderly disposition of the case.⁴

In Ohio, the legislature requires the trial court to expedite the resolution of railroad grade-crossing cases. Ohio Revised Code §4957.31 requires that these proceedings be advanced by the trial court over other civil causes. During the June 3, 2003 telephone conference, the court informed counsel that the court deems it a tremendous waste of judicial and litigant resources for there to be two appeals, one addressing the at-grade crossing decision and then a later appeal on the issue of damages. The court's file consists of two boxes of pleadings, motions and other filings in the Clerk of Courts' office, and the exhibits, which are being retained by the judge, consisting of more than 10,000 pages in six boxes. The transcript of the grade crossing trial is expected to take six or seven months to prepare and is estimated to be at least 3,000 pages. With the press of other transcripts on appeal, which are already in the queue for the court reporter to prepare, the trial transcript on the portion of this case dealing with the at-grade crossing will not be completed for several months after the completion of the scheduled appropriations hearing. Since any appeal of this court's order granting the petition for at-grade crossing could not be heard by the court of appeals until many months after the hearing and the order on the measure of damages for the appropriation is entered, the court deems it wasteful to delay that hearing and then make it the subject of a separate appeal some time in the undetermined future.

During the June 3, 2003 telephone conference, the court ordered the defendant railroads, if they objected to the court's setting a date for the second of the bifurcated hearing on October 1, 2003, to file a motion for reconsideration of the setting of the date, so that the conference and all of the legal and factual arguments are made a matter of record in the case.

The court is aware that – notwithstanding the consolidation of these cases – on June 4, 2003, Defendant Norfolk Southern Railway Co. filed a notice of appeal in Case No. 00CV001663. As of the date of this order, Defendant CSX Transportation, Inc. has not filed a notice of appeal in Case No.

³ *Reagan v. Ranger Transp., Inc.* (Portage 1995), 104 Ohio App. 3d 15, 660 N.E.2d 1234.

⁴ *BancOhio Nat'l Bank v. Rubicon Cadillac, Inc.* (1984), 11 Ohio St. 3d 32, 34, 462 N.E.2d 1379.

00CV001662. Absent Rule 54(B) certification, consolidated cases are not individually appealable.⁵ In addition, the appeal by Defendant Norfolk Southern Railway Co. attempts to address the court's decision on the bifurcated issue of the need for the grade crossing; it does not address any of the issues regarding the appropriation. For these reasons, the filing of the notice of appeal does not divest this court of jurisdiction to schedule, hear, and decide the appropriation issues.

Accordingly, because these cases have been consolidated, and because the issues have been bifurcated, and because the parties stipulated that this court would decide the measure of damages for the city's appropriation of railroad property if the grade crossing was granted, and because the court and all parties relied upon that stipulation, and because the appropriations decision will be rendered months in advance of the completion of the transcript on the grade-crossing portion of the case, and because any appeal on the grade-crossing issue would not deprive this court of jurisdiction to handle the appropriation issue (for which the parties must still prepare), this court's order granting the grade crossing petition on May 28, 2003, is not a final appealable order, and the parties should wait for the decision on the appropriations issue before filing any appeal. The court hereby sets the hearing on the measure of damages for the appropriation on October 1, 2003, and, if needed, on October 2, 2003.

IT IS SO ORDERED.

EUGENE A. LUCCI, JUDGE

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⁵ *Whitaker v. Kear* (Ross 1996), 113 Ohio App. 3d 611, 681 N.E.2d 973; followed in *Graphic Enterprises, Inc. v. Keybank National Association*, No. 2001-P-0129 (11th Dist. Ct. App., Portage, 9-27-2002), 2002 WL 31166944.

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