

EXPEDITED CONSIDERATION REQUESTED



BEFORE THE
SURFACE TRANSPORTATION BOARD

FD-35037

PETITION OF MARK LANGE
FOR EXPEDITED DECLARATORY ORDER

FILED

MAY

2007

Filed By

Attorney Brian D Hamill
Dempsey, Williamson, Kelly & Hertel, LLP
P O Box 886
Oshkosh WI 54903-0886
(920)235-7300

ENTERED
Office of Proceedings

MAY 21 2007

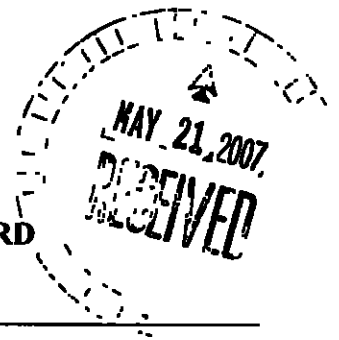
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MAY 21 2007

SURFACE
TRANSPORTATION BOARD

**EXPEDITED CONSIDERATION REQUESTED
BEFORE THE SURFACE TRANSPORTATION BOARD**



**PETITION OF MARK LANGE
FOR EXPEDITED DECLARATORY ORDER**

1 Petitioner, Mark Lange ("Lange"), an adult resident of the State of Wisconsin, respectfully petitions the Surface Transportation Board ("Board"), pursuant to the Board's authority under 5 U S C §554(e) and 49 U S C §721(b)(4), to enter a declaratory order to terminate a controversy, and/or to remove uncertainty, as to the preemptive reach of the Interstate Commerce Act, specifically declaring that

- (1) the Interstate Commerce Act ("ICA") does not have jurisdiction over the controversy in question,
- (2) the nature of the controversy is a dispute of land that would not be an economic regulation of any aspects of railroad transportation and would not preempt the jurisdiction of the state courts
- (3) the remedies provided in 49 U S C §§10101-11908 with respect to regulation of rail transportation are not applicable to the situation that follows and state and local legal remedies are more applicable,
- (4) what would constitute a situation that is in the proper jurisdiction of the Board is to be determined exclusively by the Board,

I. THE FACTS

2 Petitioner is the owner of property located in the City of Neenah, Wisconsin

Plaintiff has become aware that portions of the property are covered by a fence that was placed there by Canadian roughly seven years ago. Petitioner has noticed that there is some equipment on the property and has repeatedly contacted Canadian and requested that they remove the fence and any property belonging to them and that they are trespassing and encroaching upon such property.

Canadian has repeatedly refused them on their property and has made claims that it is the true owner without presenting any documents to that effect. The property is approximately 13' wide at the northerly end and 14' wide at the southerly end, approximately 192 feet long, which is approximately 2,592 square feet.

After repeated discussions with Canadian, petitioner decided to file suit in this matter and did so in the civil court of Winnebago County, Wisconsin on November 22nd, 2005. See attached Exhibit "A". Canadian alleges defenses that this is the type of action that is covered under the Interstate Commerce Act and filed a motion specifically based on the same. The court heard the matters but the court required, as to the position of the Surface Transportation Board as to this claim, and now awaits that response.

2. REQUEST FOR ORDER

3 Petitioner respectfully requests the Board institute a declaratory order proceeding, then render a decision addressing the reach of the ICA. The declaratory order would terminate the controversy between petitioner and Canadian National with respect to the jurisdiction in this case and allow the case to proceed in the state court of Wisconsin.

3. REQUEST FOR EXPEDITED CONSIDERATION

4 Petitioner is concerned that Canadian National is continually attempting to modify

and further incorporate the area that is being complained of here to increase its conversion and building on the property. If delayed it is concerned that Canadian will add more structures, fences or buildings to the property.

5 The issue is currently waiting in the state Circuit Court for Winnebago County, Wisconsin for a decision by the Board, and as soon as a decision is made the state case might go forward.

II. ARGUMENT

A. The Court Has Subject Matter Jurisdiction in this Matter and is Not Preempted by the ICA

The Interstate Commerce Act (ICA) provides a preemption provision by which the STB was granted exclusive jurisdiction over rail transportation. The provision provides

(b) The jurisdiction of the Board over

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers, and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State Law.

49 U.S.C. § 10501(b). This statute is consistent with Congress' intent to reduce the regulation on railroads and remove state regulation of their railroad operations. See, CSX Transp., Inc. v. Georgia Public Service Comm., 944 F. Supp. 1573 (N.D. Ga. 1996).

The scope of the preemption is first examined by the text of the language, but two presumptions are considered during the analysis (1) States' historic police powers are not preempted unless there is a clear statement to the contrary and (2) the preemption is determined by Congress's purpose in enacting the statute Medtronic, Inc v Lohr, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996). When viewed with the presumptions, the nature of the preemption should not extend to the action at hand. The Congressional focus for passing the ICA was to "remov[e] *direct* economic regulation by the States." Florida East Coast Ry. Co. v. City of West Palm Beach, 266 F.3d 1324, 1337 (11th Cir. 2001). The act was not meant to preempt state or local regulation with only an incidental effect on rail transportation. Id. 266 F.3d at 1331. See also Borough of Riverdale, SIB Finance Docket No. 33466, at *5, (Surface Transp. Bd. Sept. 9, 1999), 1999 WL 715272 ("[S]tate and local regulation is permissible where it does not interfere with interstate operations.") Therefore, the act should not be extended beyond the intent of Congress to include a regulation with only a remote effect upon the operations of a railroad switch.

In examining the proximity of the operation of the switch with the local regulation of this property, it is important to note the switch itself is not located on the property, nor would the relief granted prevent the defendant from operating the switch. In the affidavit of Gregory Guthrie, provided by the defendant, the railroad used the property for access to lead tracks for maintenance of those tracks and associated hydraulic switches, snow removal, and walkway (Guthrie Affidavit). A fence was also constructed on the property (Guthrie Affidavit). See attached Exhibit "B". These activities are remote to the operation of the switch and would not result in the regulating or stopping of railroad activity.

To the best knowledge of the Petitioner, the railroad owns the property on the other side of

the railroad tracks. If these activities were vital to the operation of the switch, it may be possible to engage in such behavior on the other side of the tracks without any interference to interstate rail activity, much less a removal of the tracks. Courts recognized "local regulations may bring hardship or inconvenience to a railroad without causing the sort of economic impact that would trigger preemption." Native Village of Eklutna v. Alaska R.R. Corp., 87 P.3d 41, 57 (Alaska 2004). The Court's decision may cause some hindrance to the railroad in its switch operations, but such a decision would not rise to the level of being more than an incidental impact on its operations. The defendants have asserted that this is only "hampering" the operations, and do not assert they will be stopped. It should be noted that the cases cited by the defendants involve government entities attempting to remove or regulate railroad tracks, which is not occurring here.

The construction of the fence, while purported to be within the operation of the switch, is far too remote from the actual operations to be considered as such. The scope of operations of the railroad should not be inappropriately extended to include all activity within an area simply by virtue of being located near the switch. This activity, much like that addressed above, is incidental to the operation of the switch and does not lead to preemption under the ICA.

The argument that the relief sought equates to a regulation on the grounds it seeks to control the rail operations fails. When passing the ICA, it was noted in a House Report that "state criminal and antitrust law would not be preempted as applied to the railroads, 'because they do not generally collide with the scheme of economic regulation of rail transportation.'" Id. 87 P.3d at 56 (quoting H.R. Rep. 104-422, at 167 (1995), reprinted in 1995 U.S.C.A.N. 850, 852). Simply by virtue of the possibility a regulation may affect the operating procedure of a railroad should not be grounds for preemption since this exceeds the legislative intent.

The railroad asserts the removal of the items from this property would result in a regulation of the railroad, however, fails to point out the specific reasons why such assertion is true. The issue of whether the relief sought would affect the operations of the switch is a question of fact which requires analysis and a determination. It would be improper to take the assertion of the railroad that the relief would equate to a regulation of any sort. Therefore, it is appropriate to allow for a fact-based determination of whether this action will affect the interstate commerce of the railroad to the extent of causing preemption by the ICA.

III. CONCLUSION

Based on the foregoing, it is clear that these issues should not be preempted by the ICA and is rightfully within the subject matter jurisdiction of the Wisconsin state courts. The ICA does not have jurisdiction, the nature of the controversy would not be an economic regulation of the railroad carrier, and local remedies are therefore more applicable.

Dated this 15th day of May, 2007

Respectfully submitted,

DEMPSEY, WILLIAMSON, KELLY & HERTEL, LLP
Attorneys for Mark Lange, Petitioner

By



Brian D. Hamill

MARK R. LANGE
1108 Hewitt Street
Neenah, WI 54956,

Plaintiff,

v

CANADIAN NATIONAL RAILROAD, INC.
455 North City Front Plaza Drive
Chicago, IL 60611-5504

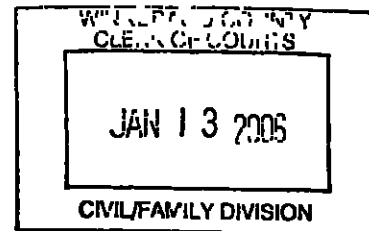
and

WISCONSIN CENTRAL LIMITED
17641 S. Ashland
Homewood, IL 60430,

Defendants.

Classification No. 30405

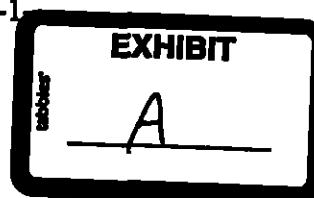
Case No. 05 CV 1365



AMENDED COMPLAINT

NOW COMES the Plaintiff, by his attorneys, Dempsey, Williamson, Young, Kelly & Hertel, LLP, by Brian D. Hamill, and alleges as follows:

1. Plaintiff, Mark R. Lange, is a resident of Winnebago County, Wisconsin, with an address of 1108 Hewitt Street, Neenah, WI 54956.
2. Defendant, Canadian National Railroad, Inc. ("Canadian"), is a foreign corporation, with an address of 455 North City Front Plaza Drive, Chicago, IL 60611-5504
3. Defendant, Wisconsin Central Limited ("Central"), is an Illinois corporation, with an address of 17641 S. Ashland, Homewood, IL 60430.



4. Plaintiff is the owner of property located at 235 Tyler Street, in the City of Neenah, Neenah, WI.

General Allegations

5. Plaintiff purchased property at 235 Tyler Street in the City of Neenah, Wisconsin on August 10th, 2005.

6. Plaintiff is aware that a portion of the property is encumbered by a fence that was not part of his property. In inquiring about the fence, plaintiff has learned it was erected by Canadian approximately seven years ago at the request of a neighbor to the property, James Condon.

7. Plaintiff has also noticed that there was some equipment on the property that is owned by Canadian as well, apparently used for "switching" trains.

8. Plaintiff has repeatedly contacted Canadian requesting that they remove the fence and any other equipment or property belonging to them in that they are trespassing and encroaching upon his property.

9. Canadian has repeatedly refused to remove this property, and claimed that it is in fact the true owner of the property. Canadian has not produced any documents to show any ownership rights in the property even after repeated requests

10. Plaintiff has offered proof of ownership to Canadian pursuant to the attached letter and survey map and deed showing the ownership of the property. (See Exhibit A) After receiving such information, Canadian has still refused to remove its property from the premises.

11. The survey of the property attached depicts the encroachment which is approximately 13 feet wide at the northerly end, approximately 14 feet wide at the southerly end

and approximately 192 feet long, consisting of approximately 2,592 square feet.

12. Canadian has informed plaintiff that Central is in fact the owner of at least the land that is part of this property. In reviewing the survey maps it appears as though Central may be the owner and with respect to the real estate they would be the encroaching party.

13. It is upon information and belief that Central owns the real property and Canadian owns the property that is on the lot.

14. In discussions with counsel for Canadian, he had stated repeatedly that Canadian had owned the lot.

15. However, after the Complaint was filed, plaintiff was informed that Central has some ownership interest as well.

16. Because of this conflict, both parties have some part in the trespass and/or encroachment.

CLAIM 1: ENCROACHMENT

17. Plaintiff realleges paragraphs 1-16 of the Complaint as if repeated herein verbatim.

18. Defendants have constructed a fence and maintains other equipment and property on land owned by Plaintiff at 235 Tyler Street, Neenah, WI. Defendants have encroached and trespassed on the property without the consent of the Plaintiff.

19. Plaintiff has determined by a competent survey that the property is in fact his. (See Exhibit A) Plaintiff has incurred survey costs, attorney's fees and other costs in association with obtaining such survey and subsequent negotiations with Canadian to remove their fence and equipment from the property, to no avail.

20. Plaintiff has no adequate remedy at law in that the fence and equipment that is encroaching upon the Plaintiff's land would have to be moved, requiring a mandatory injunction.

21. Plaintiff demands immediate possession of his property and the removal of all property owned by Defendants. If this does not occur, Plaintiff will continue to suffer irreparable loss, injury and damages.

CLAIM 2: INTENTIONAL TRESPASS

22. Plaintiff realleges paragraphs 1-21 of the Complaint as if repeated herein verbatim.

23. Defendants are trespassing on Plaintiff's property by refusing to remove its fence and equipment.

24. Defendants have, pursuant to the trespass and without good faith, wrongfully caused the trespass on Plaintiff's property and has acted maliciously and oppressively toward the Plaintiff in that at all times during this trespass Defendants had knowledge of the location and boundary line of the property and either intentionally or with reckless disregard to the rights of the Plaintiff, committed such trespass.

25. Defendants have trespassed without consent of the Plaintiff, and caused loss, injury and damages

CLAIM 3: NUISANCE

26. Plaintiff realleges paragraphs 1-25 of the Complaint as if repeated herein verbatim

27. Defendants, based on the actions described above, have caused a nuisance to the Plaintiff under Wis. Stat. §844.10 in that it constitutes an obstruction of use of the Plaintiff's

property so as to interfere with the comfortable and quiet enjoyment of life and property, without the Plaintiff's consent.

28. The encroachment is a nuisance under Wis Stat. §844.10 in that it has injured the Plaintiff by obstructing the Plaintiff's loss of use of the property and caused the Plaintiff financial damages as described throughout this Complaint.

29. Plaintiff has notified Canadian of the encroachment and trespass and the fact that the encroachment is interfering with Plaintiff's use and enjoyment of his property, and Canadian has refused, and continues to refuse, to remove its property from the area and abate the trespass and encroachment, and has claimed to own the property.

30. Based on the above, Defendants' actions constitute a nuisance and Plaintiff is entitled to an injunction to compel Canadian to abate the nuisance

CLAIM 4: NEGLIGENCE

31. Plaintiff realleges paragraphs 1-30 of the Complaint as if repeated herein verbatim.

32. In causing the fence and equipment to encroach on Plaintiff's property, as described in this Complaint, Defendants acted negligently and carelessly and with complete disregard to the Plaintiff's property rights, and without regard to the boundary of the property.

33. As a proximate result of Defendants' negligence and the resulting trespass and encroachment, Plaintiff has suffered damages from the loss of use of the Plaintiff's property which has been encroached upon

CLAIM 5: INTERFERENCE WITH REAL PROPERTY

34. Plaintiff realleges paragraphs 1-33 of the Complaint as if repeated herein

verbatim.

35. The encroachment mentioned in this Complaint by Defendants has interfered with the Plaintiffs' property under Wisconsin Statutes Section 844.01 in that it constitutes an obstruction to the free use of the Plaintiff's property so as to interfere with the comfortable and quiet enjoyment of the property without the Plaintiff's consent

36. The encroachment is an interference with the Plaintiff's property under Wisconsin Statutes Section 844.01 in that it has injured Plaintiff by obstructing Plaintiff's free use of Plaintiff's property, and has caused Plaintiff financial damages as described in this Complaint.

37. Plaintiff has notified Defendants of the encroachment and the fact the encroachment is interfering with Plaintiff's use and enjoyment of his land and Defendants have refused, and continue to refuse, to remove the property from the Plaintiff's land.

38. Defendants' encroachment on Plaintiff's land constitutes an interference with Plaintiff's property under Wisconsin Statutes Section 844.01 and Plaintiff is therefore entitled to an injunction to compel Defendants to abate the interference.

CLAIM 6: POSSESSION

39 Plaintiff realleges paragraphs 1-38 of the Complaint as if repeated herein verbatim.

40 Plaintiff owns an interest in the property in question and demands immediate possession of that property and the ejectment of Defendants from said property.

41 Plaintiff is entitled to possession and demands damages based on Defendants' wrongful possession of the property and the Plaintiff's inability to use and enjoy the land and demands possession under Wisconsin Statutes Section 843.01

**CLAIM 7: UNJUST ENRICHMENT, QUANTUM MERUIT
AND RETROACTIVE RENT**

42 Plaintiff realleges paragraphs 1-41 of the Complaint as if repeated herein verbatim.

43. Based on the foregoing, Defendant have been and will continue to be unjustly enriched by its continued use of and possession of the premises.

44. Because of this unjust enrichment, plaintiff has also been harmed financially.

45. Based on Defendants' use of the property for approximately seven years, plaintiff is due and owing rent on this property on a quantum meruit basis.

46. In equity, the property that is being used by Defendants would have been rented by plaintiff to Canadian at that time in the amount of 10¢ per square foot per month.

47. This rental amount would equal \$259.20 per month for a total of \$3,110.40 per year.

48. Based on Defendants' use of the property for the last seven years, it would owe approximately \$21,772.80 in total rent to the plaintiff. The plaintiff steps in the shoes of his predecessor, and has acquired this property with the rent due and owing.

49 As an alternative claim, plaintiff requests payment of the rent, and an end to the lease in equity.

WHEREFORE, Plaintiff requests judgment as follows:

1. For immediate possession of the encroached upon property, plus money damages including costs and attorney's fees to be determined by the trier of fact,

2. In the alternative, approximately \$21,772.80 in total rent to the plaintiff for the

last seven years.

3 In the alternative, for damages in the amount of \$20,000.00 for the land, costs and attorney's fees;

4 For Punitive Damages based on Wis. Stat. §895.85 based on Defendants' wilful and malicious acts in refusing to remove from the property with intentional disregard for the rights of the Plaintiff;

5. Unless this Court, by a mandatory injunction, orders and directs Defendants to remove the property or compensate the Plaintiff, he will continue to suffer irreparable loss, injury and damages; and

6. Such other and further relief as the court may deem just and proper.

PLAINTIFF REQUESTS A JURY OF 12.

Dated this 5 day of December, 2005.

DEMPSEY, WILLIAMSON, YOUNG, KELLY & HERTEL, LLP
Attorneys for Plaintiff

By


Brian D. Hamill

Member No. 1030537

FIRM ADDRESS:

US Bank Plaza
One Pearl Avenue, P. O. Box 886
Oshkosh, WI 54903-0886
(920) 235-7300

**NOTICE REQUIRED BY THE FAIR DEBT
COLLECTION PRACTICES ACT (the Act),
15 U.S.C. § 1692 as Amended**

1. Dempsey, Williamson, Young, Kelly & Hertel, LLP is the creditor's law firm and is attempting to collect a debt for the creditor, Society Insurance. Any information the debtor provides to Dempsey, Williamson, Young, Kelly & Hertel, LLP will be used for that purpose.
2. The amount of the debt is set forth in the Complaint attached hereto.
3. The creditor as named in the attached complaint is the creditor to whom the debt is owed.
4. The debt described herein will be assumed to be valid by Dempsey, Williamson, Young, Kelly & Hertel, LLP, unless the debtor, within (30) days after the receipt of this Notice, disputes in writing, the validity of the debt or some portion thereof.
5. If the debtor notifies Dempsey, Williamson, Young, Kelly & Hertel, LLP in writing within thirty (30) days of the receipt of this Notice that the debt or any portion thereof is disputed, Dempsey, Williamson, Young, Kelly & Hertel, LLP will obtain a verification of the debt and a copy of the verification will be mailed to the debtor by Dempsey, Williamson, Young, Kelly & Hertel, LLP.
6. If the creditor named in the attached document is not the original creditor, and if the debtor makes a written request to Dempsey, Williamson, Young, Kelly & Hertel, LLP within thirty (30) days from the receipt of this Notice, the name and address of the original creditor will be mailed to the debtor by Dempsey, Williamson, Young, Kelly & Hertel, LLP.
7. Written requests should be addressed to Dempsey, Williamson, Young, Kelly & Hertel, LLP, P.O. Box 886, Oshkosh, WI 54903-0886

JAMES J. WILLIAMSON
TIMOTHY M. DEMPSEY
TIMOTHY R. YOUNG
JOHN M. KELLY
CHARLES J. HERTEL

**DEMPSEY, WILLIAMSON, YOUNG,
KELLY & HERTEL, LLP**
A WISCONSIN LIMITED LIABILITY PARTNERSHIP
ATTORNEYS AT LAW SINCE 1849

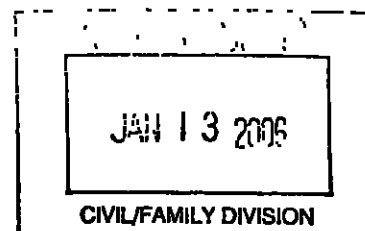
U.S. BANK PLAZA
P.O. BOX 886
OSHKOSH, WISCONSIN 54903-0886

OSHKOSH 920/235-7300 RIPON 920/748-5415
FAX 920-235-2011
www.dempseylaw.com

ASSOCIATES
PETER J. CULP
BRIAN D. HAMILL
ELIZABETH A. HARTMAN
JULIE M. MASLOWSKI
DANIEL J. POSANSKI

November 9, 2005

Attorney Michael J. Barron, Jr.
Fletcher & Sippel LLC
Suite 920
29 N. Wacker Drive
Chicago, IL 60606-2875



Re: 235 Tyler Street, Neenah, WI a/k/a
Lots 16, 9, 11, 12 and part of Lots 1 and 13, Block 3,
Sherry's Second Addition to Sherry Town, City of
Neenah, Winnebago County, Wisconsin.

Dear Attorney Barron:

Pursuant to our numerous discussions with respect to the above outlined property, we once again demand that your client remove all property from the above location. The attached map and deed confirms the ownership in this land by my client. You have previously stated there was a deed that showed otherwise, but based on our last conversation that does not exist.

At this point, we will be filing suit within one week of this letter unless your client completely removes all of its property and foregoes any claim that it has for this land. If not, the suit will also include an action for punitive damages under the Wisconsin Statutes based on your wilful and intentional actions harming the impending rights of my client, Mark Lange.

If you have any questions, please feel free to give me a call. Thank you for your immediate attention to this matter.

Very truly yours,

DEMPSEY, WILLIAMSON, YOUNG, KELLY & HERTEL, LLP


Brian D. Hamill

BDH:kn
Enclosures
cc: Mark R. Lange

EXHIBIT

A

GABE BOUCK, 1849-1904 ■ JOHN F. KLUWIN,
EDWARD J. DEMPSEY, 1906-1956 ■ RAY C. DEMPSEY,
NICHOLAS J. MEEHAN, 1956-1995

1885-1942 ■ WILLIAM C. BOUCK, 1893-1955 ■
DEMPSEY, 1936-1972 ■ JOHN E. DEMPSEY, 1935-1995
MAGNUSEN, 1946-1998

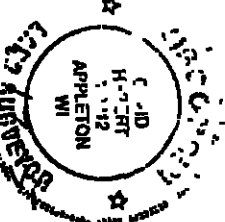
Wisconsin Central LTD Railroad

N01°07'28"W 192.00'

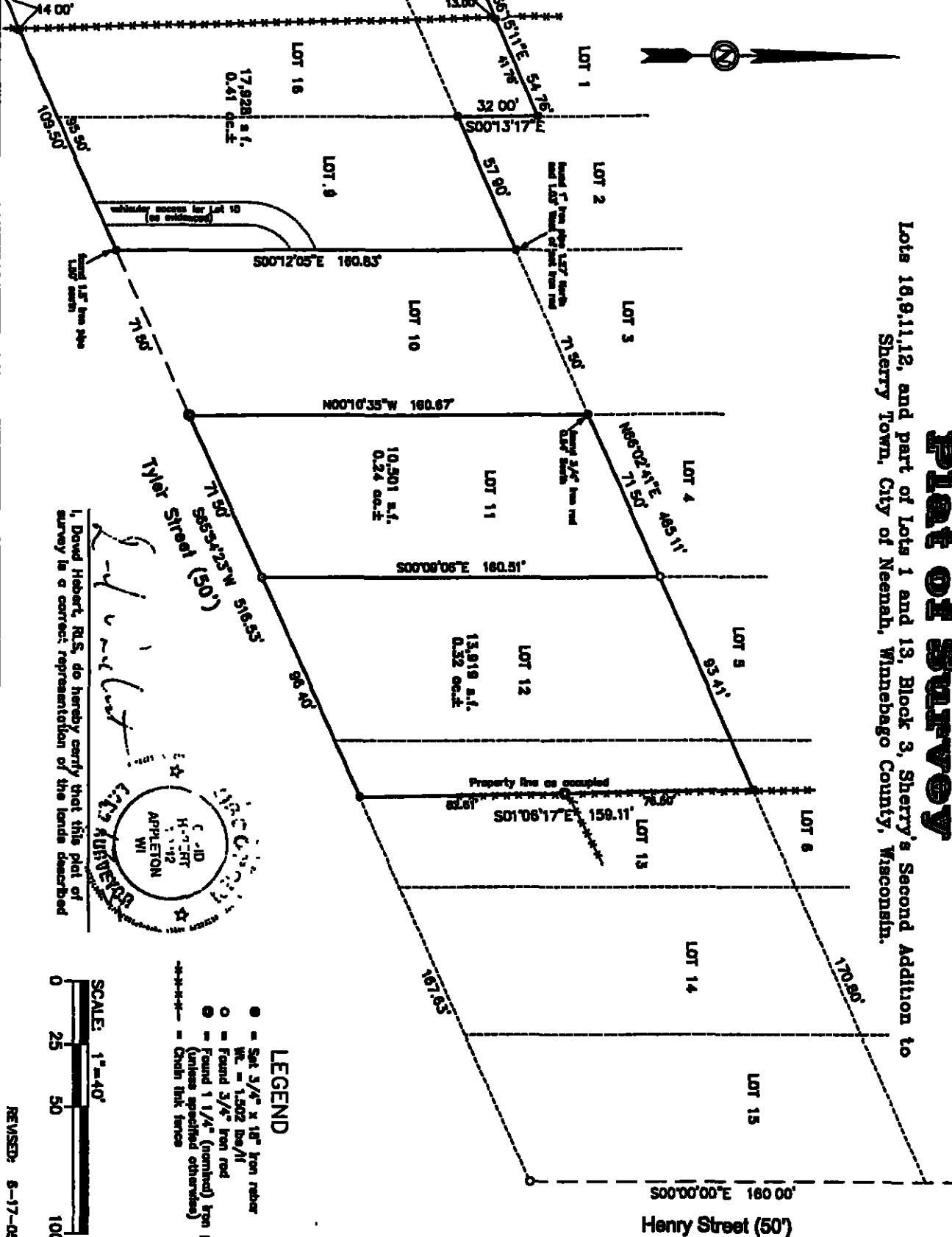


Plat of Survey
Lots 16, 8, 11, 12, and part of Lots 1 and 13, Block 3, Sherry's Second Addition to
Sherry Town, City of Neenah, Winnebago County, Wisconsin.

I, David Hebert, RLS, do hereby certify that this plat of survey is a correct representation of the lands described



- LEGEND
- = Set 3/4" x 18" iron rebar
 - = Found 3/4" iron rod
 - = Found 1 1/4" (narrowed) iron pipe
 - = Chain link fence



REVISION: 8-17-05



Hebert Associates, Inc.

Land Surveying • Soil Testing • Engineering Systems

1110 W Wisconsin Ave
Appleton, WI 54914

920-734-8373
Fax: 920-734-3968

A survey for

Mark Lange
1108 Hewit St.
Neenah, WI 54956

DATE: 06-08-05
DRAWN BY: TJS
SCALE: 1"=40'
SHEET # 1 OF 1
DRAWING NUMBER:
05047B01

State Bar of Wisconsin Form 3-2003
QUIT CLAIM DEED

Document Number

Document Name

1366818

REGISTER'S OFFICE
WINNEBAGO COUNTY, WI
RECORDED ON

08/15/2005 09:16AM

JULIE PAGEL
REGISTER OF DEEDS

RECORDING FEE 13.00
TRANSFER FEE 171.00
OF PAGES 2

THIS DEED, made between **NAPUCK INVESTMENTS, LLC, A WISCONSIN LIMITED LIABILITY CORPORATION**

("Grantor," whether one or more), and **MARK R. LANGE AND SUSAN S. LANGE, HUSBAND AND WIFE AS SURVIVORSHIP MARITAL PROPERTY**

("Grantee," whether one or more).

Grantor quit claims to Grantee the following described real estate, together with the rents, profits, fixtures and other appurtenant interests, in **WINNEBAGO County, State of Wisconsin ("Property")** (if more space is needed, please attach addendum):

SEE ATTACHED

Recording Area

Name and Return Address **FA-1182721**
JEROME H. BLOCK
ATTORNEY AT LAW
512 W. COLLEGE AVE.
APPLETON, WI 54911

802-0033, 802-0030 AND 802-0029

Parcel Identification Number (PIN)

This is not homestead property.

(X) (is not)

Dated

7/28/05

NAPUCK INVESTMENTS, LLC

(SEAL) x

*** DANIEL NAPUCK, MEMBER**

(SEAL)

(SEAL) x

*** BEVERLY NAPUCK, MEMBER**

(SEAL)

AUTHENTICATION

Signature(s) **DANIEL NAPUCK AND BEVERLY NAPUCK**

authenticated on

7/28/05

*** JEROME H. BLOCK**

TITLE: MEMBER STATE BAR OF WISCONSIN

(If not, _____
authorized by Wis. Stat. § 706.06)

ACKNOWLEDGMENT

STATE OF _____)
_____) ss.
_____ COUNTY)

Personally came before me on _____,
the above-named _____

to me known to be the person(s) who executed the foregoing
instrument and acknowledged the same.

THIS INSTRUMENT DRAFTED BY:

JEROME H. BLOCK
ATTORNEY AT LAW

Notary Public, State of _____

My commission (is permanent) (expires: _____)

(Signatures may be authenticated or acknowledged. Both are not necessary.)

NOTE: THIS IS A STANDARD FORM. ANY MODIFICATION TO THIS FORM SHOULD BE CLEARLY IDENTIFIED.

QUIT CLAIM DEED

*Type name of all signatures.

STATE BAR OF WISCONSIN

© State Bar of Wisconsin 2003

FORM NO. 3-2003

NOTARY PUBLIC Form 3-2003

**Exhibit A
Legal Description**

Order No.: 1132721

The land referred to is described as follows:

Parcel 1:

Lot Nine (9), Block Three (3) in SHERRY'S SECOND ADDITION TO SHERRYTOWN, in the Second Ward, City of Neenah, Winnebago County, Wisconsin.

Part of Tax Key No. 802-0033

Parcel 2:

Lot Sixteen (16) and the Southerly 32 feet of Lot One (1), Block Three (3), in SHERRY'S SECOND ADDITION TO SHERRYTOWN, in the Second Ward, City of Neenah, Winnebago County, Wisconsin.

Part of Tax Key No. 802-0033

Parcel 3:

Lot Twelve (12), of Block Three (3), in SHERRY'S SECOND ADDITION TO SHERRYTOWN, in the Second Ward, City of Neenah, Winnebago County, Wisconsin, excepting therefrom the Northerly 10 feet thereof

The West 1/3 of Lot Thirteen (13), of Block Three (3), in SHERRY'S SECOND ADDITION TO SHERRYTOWN, in the Second Ward, City of Neenah, Winnebago County, Wisconsin, excepting therefrom the Northerly 10 feet thereof.

Tax Key No. 802-0030

Parcel 4:

Lot Eleven (11), of Block Three (3) in SHERRY'S SECOND ADDITION TO SHERRYTOWN, in the Second Ward, City of Neenah, Winnebago County, Wisconsin.

Tax Key No. 802-0029

MARK R. LANGE
1108 Hewitt Street
Neenah, WI 54956,

Plaintiff,

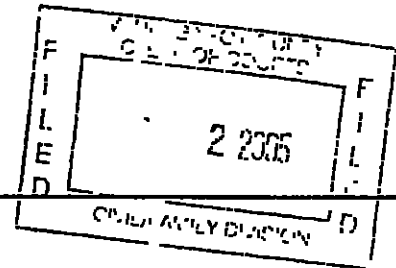
Classification No.

Case No. 0501-066-252

v.

CANADIAN NATIONAL RAILROAD, INC.
455 North City Front Plaza Drive
Chicago, IL 60611-5504

Defendant.



COMPLAINT

NOW COMES the Plaintiff, by his attorneys, Dempsey, Williamson, Young, Kelly & Hertel, LLP, by Brian D. Hamill, and alleges as follows:

1. Plaintiff, Mark R. Lange, is a resident of Winnebago County, Wisconsin, with an address of 1108 Hewitt Street, Neenah, WI 54956.
2. Defendant, Canadian National Railroad, Inc. ("Canadian"), is a foreign corporation, with an address of 455 North City Front Plaza Drive, Chicago, IL 60611-5504.
3. Plaintiff is the owner of property located at 235 Tyler Street, in the City of Neenah, Neenah, WI.

General Allegations

4. Plaintiff purchased property at 235 Tyler Street in the City of Neenah, Wisconsin on August 10th, 2005.

5. Plaintiff is aware that a portion of the property is encumbered by a fence that was not part of his property. In inquiring about the fence, plaintiff has learned it was erected by Canadian approximately seven years ago at the request of a neighbor to the property, James Condon.

6. Plaintiff also noticed that there was some equipment on the property that is owned by Canadian as well, apparently used for "switching" trains.

7. Plaintiff has repeatedly contacted Canadian requesting that they remove the fence and any other equipment or property belonging to them in that they are trespassing and encroaching upon his property.

8. Canadian has repeatedly refused to remove this property, and claimed that it is in fact the true owner of the property. Canadian has not produced any documents to show any ownership rights in the property even after repeated requests.

9. Plaintiff has offered proof of ownership to Canadian pursuant to the attached letter and survey map and deed showing the ownership of the property. (See Exhibit A). After receiving such information, Canadian has still refused to remove its property from the premises.

10. The survey of the property attached depicts the encroachment which is approximately 13 feet wide at the northerly end, approximately 14 feet wide at the southerly end and approximately 192 feet long, consisting of approximately 2,592 square feet.

CLAIM 1: ENCROACHMENT

11. Plaintiff realleges paragraphs 1-10 of the Complaint as if repeated herein verbatim

12. Canadian has constructed a fence and maintains other equipment and property on

land owned by Plaintiff at 235 Tyler Street, Neenah, WI Canadian has encroached and trespassed on the property without the consent of the Plaintiff.

13 Plaintiff has determined by a competent survey that the property is in fact his (See Exhibit A) Plaintiff has incurred survey costs, attorney's fees and other costs in association with obtaining such survey and subsequent negotiations with Canadian to remove their fence and equipment from the property, to no avail.

14. Plaintiff has no adequate remedy at law in that the fence and equipment that is encroaching upon the Plaintiff's land would have to be moved, requiring a mandatory injunction.

15. Plaintiff demands immediate possession of his property and the removal of all property owned by Canadian. If this does not occur, Plaintiff will continue to suffer irreparable loss, injury and damages.

CLAIM 2: INTENTIONAL TRESPASS

16. Plaintiff realleges paragraphs 1-15 of the Complaint as if repeated herein verbatim.

17. Canadian is trespassing on Plaintiff's property by refusing to remove its fence and equipment.

18. Canadian has, pursuant to the trespass and without good faith, wrongfully caused the trespass on Plaintiff's property and has acted maliciously and oppressively toward the Plaintiff in that at all times during this trespass Canadian had knowledge of the location and boundary line of the property and either intentionally or with reckless disregard to the rights of the Plaintiff, committed such trespass.

19. Canadian has trespassed without consent of the Plaintiff, and caused loss, injury

and damages

CLAIM 3: NUISANCE

20. Plaintiff realleges paragraphs 1-19 of the Complaint as if repeated herein verbatim.

21. Canadian, based on the actions described above, has caused a nuisance to the Plaintiff under Wis. Stat. §844.10 in that it constitutes an obstruction of use of the Plaintiff's property so as to interfere with the comfortable and quiet enjoyment of life and property, without the Plaintiff's consent.

22. The encroachment is a nuisance under Wis. Stat. §844.10 in that it has injured the Plaintiff by obstructing the Plaintiff's loss of use of the property and caused the Plaintiff financial damages as described throughout this Complaint.

23. Plaintiff has notified Canadian of the encroachment and trespass and the fact that the encroachment is interfering with Plaintiff's use and enjoyment of his property, and Canadian has refused, and continues to refuse, to remove its property from the area and abate the trespass and encroachment.

24. Based on the above, Canadian's actions constitute a nuisance and Plaintiff is entitled to an injunction to compel Canadian to abate the nuisance.

CLAIM 4: NEGLIGENCE

25. Plaintiff realleges paragraphs 1-24 of the Complaint as if repeated herein verbatim.

26. In causing the fence and equipment to encroach on Plaintiff's property, as described in this Complaint, Canadian acted negligently and carelessly and with complete

disregard to the Plaintiff's property rights, and without regard to the boundary of the property

27. As a proximate result of Canadian's negligence and the resulting trespass and encroachment, Plaintiff has suffered damages from the loss of use of the Plaintiff's property which has been encroached upon.

CLAIM 5: INTERFERENCE WITH REAL PROPERTY

28. Plaintiff realleges paragraphs 1-27 of the Complaint as if repeated herein verbatim

29. The encroachment mentioned in this Complaint by Canadian has interfered with the Plaintiffs' property under Wisconsin Statutes Section 844.01 in that it constitutes an obstruction to the free use of the Plaintiff's property so as to interfere with the comfortable and quiet enjoyment of the property without the Plaintiff's consent.

30. The encroachment is an interference with the Plaintiff's property under Wisconsin Statutes Section 844.01 in that it has injured Plaintiff by obstructing Plaintiff's free use of Plaintiff's property, and has caused Plaintiff financial damages as described in this Complaint.

31. Plaintiff has notified Canadian of the encroachment and the fact the encroachment is interfering with Plaintiff's use and enjoyment of his land and Canadian has refused, and continues to refuse, to remove the property from the Plaintiff's land.

32. Canadian's encroachment on Plaintiff's land constitutes an interference with Plaintiff's property under Wisconsin Statutes Section 844.01 and Plaintiff is therefore entitled to an injunction to compel Canadian to abate the interference.

CLAIM 6: POSSESSION

33. Plaintiff realleges paragraphs 1-32 of the Complaint as if repeated herein

verbatim.

34. Plaintiff owns an interest in the property in question and demands immediate possession of that property and the ejectment of Canadian from said property.

35. Plaintiff is entitled to possession and demands damages based on Canadian's wrongful possession of the property and the Plaintiff's inability to use and enjoy the land and demands possession under Wisconsin Statutes Section 843.01

**CLAIM 7: UNJUST ENRICHMENT, QUANTUM MERUIT
AND RETROACTIVE RENT**

36. Plaintiff realleges paragraphs 1-35 of the Complaint as if repeated herein
verbatim

37. Based on the foregoing, the Canadian has been and will continue to be unjustly enriched by its continued use of and possession of the premises

38. Because of this unjust enrichment, plaintiff has also been harmed financially.

39. Based on Canadian's use of the property for approximately seven years, plaintiff is due and owing rent on this property on a quantum meruit basis

40. In equity, the property that is being used by Canadian would have been rented by plaintiff to Canadian at that time in the amount of 10¢ per square foot per month.

41. This rental amount would equal \$259.20 per month for a total of \$3,110.40 per year

42. Based on Canadian's use of the property for the last seven years, it would owe approximately \$21,772.80 in total rent to the plaintiff. The plaintiff steps in the shoes of his predecessor, and takes this property with the back rent due and owing.

43. As an alternative claim, plaintiff requests payment of the rent, and an end to the lease in equity.

WHEREFORE, Plaintiff requests judgment as follows:

1. For immediate possession of the encroached upon property, plus money damages including costs and attorney's fees to be determined by the trier of fact;
2. In the alternative, approximately \$21,772.80 in total rent to the plaintiff for the last seven years.
3. In the alternative, for damages in the amount of \$20,000 00 for the land, costs and attorney's fees;
4. For Punitive Damages based on Wis. Stat. §895.85 based on Canadian's wilful and malicious acts in refusing to remove from the property with intentional disregard for the rights of the Plaintiff;
5. Unless this Court, by a mandatory injunction, orders and directs the Canadian to remove the property or compensate the Plaintiff, he will continue to suffer irreparable loss, injury and damages; and
6. Such other and further relief as the court may deem just and proper.

PLAINTIFF REQUESTS A JURY OF 12.

Dated this 22nd day of November, 2005.

DEMPSEY, WILLIAMSON, YOUNG, KELLY & HERTEL, LLP
Attorneys for Plaintiff

By 
Brian D. Hamill
Member No. 1030537

FIRM ADDRESS:

US Bank Plaza

One Pearl Avenue, P. O. Box 886

Oshkosh, WI 54903-0886

(920) 235-7300

JAMES J. WILLIAMSON
TIMOTHY M. DEMPSEY
TIMOTHY R. YOUNG
JOHN M. KELLY
CHARLES J. HERTEL

**DEMPSEY, WILLIAMSON, YOUNG,
KELLY & HERTEL, LLP**
A WISCONSIN LIMITED LIABILITY PARTNERSHIP
ATTORNEYS AT LAW SINCE 1849

U.S. BANK PLAZA
P.O. BOX 886
OSHKOSH, WISCONSIN 54903-0886

OSHKOSH 920/235-7300 RIPON 920/748-5415
FAX 920-235-2011
www.dempseylaw.com

ASSOCIATES
PETER J. CULP
BRIAN D. HAMILL
ELIZABETH A. HARTMAN
JULIE M. MASLOWSKI
DANIEL J. POSANSKI

November 9, 2005

Attorney Michael J. Barron, Jr.
Fletcher & Sippel LLC
Suite 920
29 N. Wacker Drive
Chicago, IL 60606-2875

Re: 235 Tyler Street, Neenah, WI a/k/a
Lots 16, 9, 11, 12 and part of Lots 1 and 13, Block 3,
Sherry's Second Addition to Sherry Town, City of
Neenah, Winnebago County, Wisconsin.

Dear Attorney Barron:

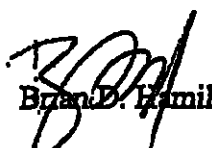
Pursuant to our numerous discussions with respect to the above outlined property, we once again demand that your client remove all property from the above location. The attached map and deed confirms the ownership in this land by my client. You have previously stated there was a deed that showed otherwise, but based on our last conversation that does not exist.

At this point, we will be filing suit within one week of this letter unless your client completely removes all of its property and foregoes any claim that it has for this land. If not, the suit will also include an action for punitive damages under the Wisconsin Statutes based on your wilful and intentional actions harming the impending rights of my client, Mark Lange.

If you have any questions, please feel free to give me a call. Thank you for your immediate attention to this matter.

Very truly yours,

DEMPSEY, WILLIAMSON, YOUNG, KELLY & HERTEL, LLP


Brian D. Hamill

BDH:km
Enclosures
cc: Mark R. Lange

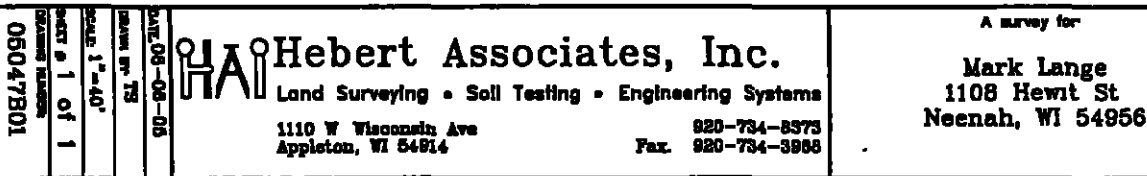
EXHIBIT

A

GABE BOUCK, 1849-1904 ■ JOHN F. KLUWIK
EDWARD J. DEMPSEY, 1906-1956 ■ RAY C. DEMPSEY
NICHOLAS J. MEYER

1885-1942 ■ WILLIAM C. BOUCK, 1895-1955 ■
DEMPSEY, 1936-1972 ■ JOHN E. DEMPSEY, 1935-1995
MAGNUSEN, 1946-1998

Lots 16, 9, 11, 12, and part of Lots 1 and 13, Block 3, Sherry's Second Addition to Sherry Town, City of Neebaw, Winnebago County, Wisconsin.



State Bar of Wisconsin Form 3-2003
QUIT CLAIM DEED

Document Number

Document Name

1366818

REGISTER'S OFFICE
WINNEBAGO COUNTY, WI
RECORDED ON

08/15/2005 09:16AM

JULIE PAGEL
REGISTER OF DEEDS

RECORDING FEE 13.00
TRANSFER FEE 171.00
OF PAGES 2

THIS DEED, made between NAPUCK INVESTMENTS, LLC, A WISCONSIN LIMITED LIABILITY CORPORATION

("Grantor," whether one or more), and MARK R. LANGE AND SUSAN S. LANGE, HUSBAND AND WIFE AS SURVIVORSHIP MARITAL PROPERTY

("Grantee," whether one or more).

Grantor quit claims to Grantee the following described real estate, together with the rents, profits, fixtures and other appurtenant interests, in WINNEBAGO County, State of Wisconsin ("Property") (if more space is needed, please attach addendum):

SEE ATTACHED

Recording Area

Name and Return Address PA-1132721
JEROME H. BLOCK
ATTORNEY AT LAW
512 W. COLLEGE AVE.
APPLETON, WI 54911

802-0033, 802-0030 AND 802-0029

Parcel Identification Number (PIN)

This is not homestead property.
(is) (is not)

Dated 7/28/05

NAPUCK INVESTMENTS, LLC

(SEAL) [Signature] (SEAL)

* DANIEL NAPUCK, MEMBER

(SEAL) [Signature] (SEAL)

* BEVERLY NAPUCK, MEMBER

AUTHENTICATION

Signature(s) DANIEL NAPUCK AND BEVERLY NAPUCK

authenticated on 7/28/05

* JEROME H. BLOCK

TITLE: MEMBER STATE BAR OF WISCONSIN

(If not, _____
authorized by Wis. Stat. § 706.06)

ACKNOWLEDGMENT

STATE OF _____)
) ss.
_____ COUNTY)

Personally came before me on _____,
the above-named _____

to me known to be the person(s) who executed the foregoing
instrument and acknowledged the same.

THIS INSTRUMENT DRAFTED BY:

JEROME H. BLOCK

ATTORNEY AT LAW

Notary Public, State of _____

My commission (is permanent) (expires: _____)

(Signatures may be authenticated or acknowledged. Both are not necessary.)

NOTE: THIS IS A STANDARD FORM. ANY MODIFICATION TO THIS FORM SHOULD BE CLEARLY IDENTIFIED.

QUIT CLAIM DEED

*Type name of new signatures

STATE BAR OF WISCONSIN

© State Bar of Wisconsin 2003

FORM NO. 3-2003

INFO: PRINT and Form - 8/15/05 - 11/15/05 - 11/15/05

**Exhibit A
Legal Description**

Order No.: 1132721

The land referred to is described as follows:

Parcel 1:

Lot Nine (9), Block Three (3) in SHERRY'S SECOND ADDITION TO SHERRYTOWN, in the Second Ward, City of Neenah, Winnebago County, Wisconsin.

Part of Tax Key No. 802-0033

Parcel 2:

Lot Sixteen (16) and the Southerly 32 feet of Lot One (1), Block Three (3), in SHERRY'S SECOND ADDITION TO SHERRYTOWN, in the Second Ward, City of Neenah, Winnebago County, Wisconsin.

Part of Tax Key No. 802-0033

Parcel 3:

Lot Twelve (12), of Block Three (3), in SHERRY'S SECOND ADDITION TO SHERRYTOWN, in the Second Ward, City of Neenah, Winnebago County, Wisconsin, excepting therefrom the Northerly 10 feet thereof

The West 1/3 of Lot Thirteen (13), of Block Three (3), in SHERRY'S SECOND ADDITION TO SHERRYTOWN, in the Second Ward, City of Neenah, Winnebago County, Wisconsin, excepting therefrom the Northerly 10 feet thereof.

Tax Key No. 802-0030

Parcel 4:

Lot Eleven (11), of Block Three (3) in SHERRY'S SECOND ADDITION TO SHERRYTOWN, in the Second Ward, City of Neenah, Winnebago County, Wisconsin.

Tax Key No. 802-0029

County of Cook)
)
State of Illinois)

**SUPPLEMENTARY AFFIDAVIT OF
GREGORY J. GUTHRIE**

I, Gregory J. Guthrie, being duly sworn, depose and state as follows:

1. I submit this affidavit to supplement the affidavit I swore to on March 6, 2006.
2. In my previous affidavit, I described how WCL uses the property at issue in the Lange Complaint (Winnebago County Circuit Court, Case No. 05 CV 1365).
3. If WCL no longer could use the property at issue in the Lange Complaint, it could not safely use the tracks that adjoin the property for switching
4. In addition, without use of the subject property, WCL could not access the tracks that adjoin the subject property in order to properly maintain the tracks and associated hydraulic switches, nor safely conduct snow removal along side the track in order to maintain safe walking surfaces for crews when they are switching.
5. If called before a Court to testify, I would testify as I have stated in this affidavit.

Further affiant Sayeth not.

Gregory J. Guthrie
Gregory J. Guthrie

Subscribed and sworn to
Before me this 10th day of
July, 2006

Kristine Bailey
Notary Public

